No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL LEWIS LEE,
PETITIONER,

v.

T.J. WATSON, WARDEN, AND UNITED STATES OF AMERICA,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

LEE IS SCHEDULED TO BE EXECUTED TODAY, JULY 13, 2020 AT 4:00 P.M. EASTERN TIME

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CAPITAL CASE

QUESTIONS PRESENTED:

1. The savings clause of 28 U.S.C. § 2255(e) provides a residual habeas forum for federal inmates in cases in which a § 2255 motion is "inadequate or ineffective to test the legality of . . . [their] detention." Did the court of appeals below err in holding that this "savings clause" is unavailable where the circuit having § 2255 venue imposes a categorical structural bar on federal inmates seeking redress for a meritorious Sixth Amendment violation?

2. Whether a defendant advancing a *Brady* claim due to the prosecution's long concealment of evidence deemed material must also demonstrate that he or she could not have uncovered some part of the suppressed evidence through the exercise of due diligence?

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PETITION FOR WRIT OF CERTIORARI

DANIEL LEE, a death-sentenced federal prisoner, petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in his case.

OPINIONS BELOW

The court of appeals' opinion, *Lee v. T.J. Watson, Warden, et al.,* __ F.3d ___, 2020 WL 3888196 (7th Cir. 2020), is at Appendix ("A") at A1. The district court's order is at A9.

JURISDICTION

The Court of Appeals entered judgment on July 10, 2020. *See* A1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, 28 U.S.C. § 2255, 28 U.S.C. § 2241, the Fifth Amendment, and the Sixth Amendment are reproduced at A121-A126.

STATEMENT OF THE CASE

> *The sentencing disparity between Kehoe and Lee, along with serious questions about the evidence presented to the jury both at trial and sentencing and the government's course of conduct during Lee's post-conviction proceedings, underscores how denying relief to Lee—who faces execution to carry out a sentence of death—risks severe injustice. At a minimum, the unjust and arbitrary result in the case of United States v. Daniel Lewis Lee threatens to undermine the public's confidence in the judicial process on which we all rely.*

Lee v. United States, No. 20-2351 (8th Cir. July 12, 2020) (Kelly, J., dissenting).

Daniel Lee was sentenced to die for two reasons alone: first, because a psychological test proved he was a "psychopath" who would be a danger in the future; and second, because his jury heard he was guilty of a prior murder but had "gotten away with it." Both of these claims were false. Had trial counsel accurately challenged the test's use in his case the jury would not have heard the spurious evidence; had the prosecution not withheld the truth about the prior murder no death sentence would have ensued. So clear is that result that three federal judges found based on these two different grounds that Danny Lee's death sentence likely violates the Constitution and should be invalidated. Unfortunately, two of those jurists believed that the structure of the § 2255 statute prevented them from granting the necessary relief. The third found § 2241 nevertheless unavailable to Lee. This petition arises from that third finding.

Section 2255 of Title 28 of the U.S. Code provides for collateral review of federal convictions and sentences. 28 U.S.C. §2255(a). Ordinarily, a federal prisoner subject to Section 2255 may initiate such collateral review proceedings only once. There are limited exceptions. If the § 2255 remedy has proved "inadequate or ineffective to test the legality of his detention," §2255(e), the prisoner may seek review pursuant to 28 U.S.C. § 2241.

Lee requires resort to the savings clause due to the Eighth Circuit's peculiar administration of the § 2255 remedy. Its categorical rules created a structural block to meaningful merits consideration of his two challenges to the constitutionality of his death sentence. Thus denied access to the single collateral process available to

him, Lee sought review under § 2241 in the Southern District of Indiana where he is incarcerated. He brought both challenges to that court: that trial counsel was ineffective in failing to keep the spurious test from the jury, and that the Government had suppressed evidence and then lied to the jury about Lee's purported guilt in a prior homicide. The Seventh Circuit's mishandling of his § 2241 claims gives rise to this petition.

Critically, the Seventh Circuit failed to appreciate the crucial distinction between the posture of Lee's claim and that of the defendant in *Purkey v. United States*, No. 19-3318, 2020 WL 3603779 (7th Cir. July 2, 2020). Purkey had argued that ineffective performance by federal habeas counsel in presenting issues that § 2255 jurisprudence would have fully and fairly resolved on the merits was alone sufficient to make the § 2255 remedy "inadequate and ineffective." Not so Daniel Lee. His allegation is that, during the initial §2255, Eighth Circuit rules of general application shunted his claims into a procedural dead end which completely foreclosed their consideration on the merits.

1. Section 2255 counsel knew that Lee's trial lawyers had failed him on the psychopathy test evidence. They were aware that the trial court had deemed it "very questionable" whether Lee's jury would have returned a death sentence without it, and they knew that a strong challenge was available and being employed effectively in 1999 at the time of Lee's trial. Collateral counsel therefore raised an ineffective assistance claim as to that failure, charging that the trial lawyers should

have challenged the use of the Hare Psychopathy Checklist Revised ("PCL-R") to prove "future dangerousness" to the jury.

What they did not do was follow the rules that would have allowed the post-conviction court to consider the claim. They did not submit with their § 2255 motion the supporting evidence to establish the claim in accordance with Eighth Circuit law. Instead, they waited until after the § 2255 motion was denied to belatedly attach the proof in a motion filed pursuant to Fed. R. Civ. P. 59(e).

The district court openly expressed frustration at collateral counsel's ignorance of their obligations. It admonished counsel repeatedly for "fail[ing] to adequately present facts sufficient to support [the] ineffective assistance of counsel claims." *See* A75. It recited the many chances it had given them to establish the Sixth Amendment claim. *See* A75 ("The Court was purposefully lenient in permitting the parties to expand the record as they wished before taking up the merits of [the] motion," even permitting habeas counsel to conduct "any and all" requested discovery); *id*. (counsel failed to act when the court gave them "one final opportunity" to submit "additional legal authority" or "argument in support of the grounds for relief" then pending); A76 (habeas counsel were "on notice of the law and pleading requirements for § 2255 motions," and the court "specifically advised that it would determine based on the submissions whether an evidentiary hearing was required."); *id*. ("Finally, before ruling, the Court provided Petitioner with yet another opportunity to submit anything he wished in support of his Petition."); *see also* A77 (counsel "offers no explanation" as to why the documentation was not

submitted until the Rule 59 (e) motion). Rarely has a court commented so directly on the failures of collateral counsel.

At this stage, due to counsel's error, the district court could do nothing but ignore the supporting facts and rule against Lee. Which it did. The order denying the Rule 59(e) motion stated plainly that "the Court is foreclosed by existing legal principles from considering the information now, absent permission and direction from the Eighth Circuit to do so." A77. The Eighth Circuit did not revisit those rules but denied a COA on the claim. Lee consequently missed post-conviction review of his trial counsel's performance on an issue that the district court had already deemed prejudicial. *See* A62 (doubting that the jury would have sentenced Lee to die absent the PCL-R evidence).

Shortly after Lee's § 2255 proceedings were completed, this Court made a narrow but significant change in the law regarding the failures of post-conviction counsel. In *Trevino v. Thaler*, 569 U.S. 413 (2013), and *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court held that a habeas petitioner must receive "a meaningful opportunity to present a claim of ineffective assistance of trial counsel" in an initial-review collateral proceeding. *Trevino*, 569 at 428. The Court reasoned that because the right to effective trial counsel is fundamental, the initial-review collateral proceeding must allow for "meaningful review of a claim of ineffective assistance of trial counsel." *Trevino*, 569 U.S. at 425. If that "initial review" proceeding is itself "undertaken with ineffective counsel," the right to effective trial counsel will not be vindicated. *Martinez*, 566 U.S. at 14.

Lee immediately sought to implement the *Trevino* holding in his in own case. He filed a motion to re-open the judgment pursuant to Fed. R. Civ. P. 60(b) so that the district court[1] might apply the new *Martinez/Trevino* rule to the signal failure of his initial review collateral counsel on the PCL-R claim. Failing to gain review, he appealed to the Eighth Circuit.

a. Lee argued there that like the state petitioners in *Martinez* and *Trevino*, he had been harmed by the failure of counsel to follow procedural rules in his initial-review collateral proceeding. For a federal prisoner, § 2255 is the first (and only) avenue for mounting a challenge to his conviction or sentence based on evidence outside the trial record, and thus his first opportunity to allege violations of his rights based on the conduct of his counsel or the prosecution. *See Massaro v. United States*, 538 U.S. 500, 504-507 (2003) (allegations of ineffective assistance of trial counsel best raised in § 2255 motion); *Trevino*, 569 U.S. at 428 (citing *Massaro* for proposition that initial consideration of ineffectiveness claims should occur in collateral review). If § 2255 counsel is ineffective in presenting a Sixth Amendment claim of error, counsel's errors "could . . . deprive a defendant of any review of that claim at all." *Trevino*, 569 U.S. at 423.

But the Eighth Circuit slammed the door—on Lee and on any federal prisoner in his position. The court held that in no federal case could the movant have the opportunity to show that collateral counsel failed him, even when it was

[1] As the Hon. G. Thomas Eisele, Lee's trial and post-conviction judge, had taken senior status, the Hon. J. Leon Holmes was now presiding.

his only chance at raising a substantial, meritorious claim that his Sixth Amendment rights were violated by poor representation at trial. The Circuit reasoned that any attempt to rely on Rule 60(b) to raise that point would fail the *Gonzalez* test on successor petitions. *United States v. Lee,* 792 F.3d 1021, 1024 (8th Cir. 2015) (citing *Gonzalez v. Crosby*, 545 U.S. 524 (2005)).[2] It rejected Lee's contention that his § 2255 lawyer's failure to follow a governing procedural rule constituted a defect in the integrity of his proceedings pursuant to *Trevino*. Instead, the Eighth Circuit concluded that although collateral counsel's omission in litigating a Sixth Amendment claim in *state* post-conviction can constitute a defect in the integrity of that proceeding for purposes of *Gonzalez*, the same may never be said of an identical omission by habeas counsel in a § 2255 proceeding. *Lee,* 792 F.3d at 1024.

On rehearing, the dissent observed that this categorical rule would forever preclude federal prisoners from accessing the post-conviction remedy:

> If *Martinez* and *Trevino* have an animating principle, it is that a prisoner must have at least one opportunity to present a claim that trial counsel was ineffective—and to present it with the assistance of effective counsel . . . . In this case, if one grants that Lee's § 2255 counsel was ineffective in failing to attach the evidence in support of his ineffectiveness claim to his petition, Lee will have completed his journey through the court system without ever having had a chance to present a colorable ineffective assistance of trial counsel claim to a court with the aid of an effective lawyer—which seems to be exactly the problem that *Martinez* and *Trevino* sought to remedy.

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[2] *See Gonzalez,* 545 U.S. at 532 (distinguishing between "proper" Rule 60(b) motions, which raise a defect in the integrity of the post-conviction proceedings, and those that seek adjudication of a claim on the merits, which are considered successive).

United States v. Lee, 811 F.3d 272, 273 (8th Cir. 2015) (Kelly, J., dissenting from denial of rehearing); A84. Lee never obtained full merits review in § 2255 of the prejudicial error his trial counsel committed.

b. Because the Eighth Circuit had shut the door on the ability of § 2255 to ever provide a remedy, Lee turned to the savings clause. He filed a petition for relief pursuant to § 2241 in the Southern District of Indiana.[3] He set out there how the construction given § 2255 by the Eighth Circuit's categorical rule—interpreting *Martinez* and *Trevino* as applying only to state prisoners with state-imposed procedural obstacles—rendered the remedy inadequate to afford review of his claim given the circumstances of his case.

Yet the Seventh Circuit did not decide the issue before it.[4] Instead, it held that Lee's case was identical to that of another federal prisoner:

> This case is indistinguishable from *Purkey*. Lee raised a claim of ineffective assistance of trial counsel in his § 2255 motion and now seeks to use § 2241 as a vehicle to raise a new argument about trial counsel's ineffectiveness. Under *Purkey* the Savings Clause does not

[3] Lee is incarcerated at USP Terre Haute in Terre Haute, Indiana, where nearly all federal death row prisoners are housed. Petitions seeking § 2241 jurisdiction must be filed in the district of incarceration. § 2241(d).

[4] The district court granted Lee a stay of execution in December 2019 based on the second claim to § 2241 jurisdiction as discussed below. It did not address the ineffective assistance of trial counsel issue. Twenty-four hours later, the Seventh Circuit vacated the stay, also without addressing that issue. After this Court declined to stay the effect of a preliminary injunction granted Lee and three others on a lethal injection challenge, the execution was postponed. The district court denied § 2241 jurisdiction on both the ineffectiveness and the *Brady* and *Napue* claims on March 20, 2020, *see* A9, and a motion to alter or amend that judgment on June 26, 2020. *See* A17. The Seventh Circuit affirmed on July 10, 2020, writing for the first time on Lee's ability to litigate an IAC claim on the PCL-R pursuant to the savings clause. *See* A1.

> apply; there was nothing structurally inadequate about § 2255 as a vehicle for this argument. Like Wesley Purkey, Lee invokes the *Martinez*/*Trevino* doctrine as interpreted in *Ramirez*. We rejected this argument in *Purkey* and that decision controls here.

Lee v. Watson, No. 20-2128, 2020 WL 3888196, at *3 (7th Cir. Jul. 10, 2020). The circuit so held even though it had just recited what Purkey had attempted: raising wholly new claims in the § 2255 process and relying on a blanket invocation of *Trevino* to excuse the omissions. *Id*. ("Purkey… maintained that 'section 2255 is structurally inadequate to test the legality of a conviction and sentence any time a defendant receives ineffective assistance of counsel in his one permitted motion.'") (quoting *Purkey v. United States*, No. 19-3318, 2020 WL 3603779, *7 (7th Cir. July 2, 2020)).

Purkey could have raised any of those claims in § 2255 where they would have been reviewed and addressed on the merits. Had he availed himself of it, the statute could have provided an adequate and effective forum for resolving Purkey's claims. Not so Lee's. He *raised* in his § 2255 motion that trial counsel were ineffective in their handling of the PCL-R evidence. But his lawyers missed a critical procedural step:

> In the context of his ineffective assistance of counsel claims, Petitioner was obliged to state the facts showing both that his counsel's performance was deficient and explaining how such deficiencies prejudiced his defense. Petitioner failed to adequately present facts sufficient to support his ineffective assistance of counsel claims.

A75. Then addressing the ineffectiveness claim—clearly before him—dealing with the poor PCL-R challenge, the post-conviction court wrote:

> Petitioner offers no explanation for why such affidavits or other supporting

> information were not provided to the Court before it ruled on his original motion for § 2255 relief. Had they been, the Court might have determined that an evidentiary hearing was required. However, the Court is foreclosed by existing legal principles from considering the information now, absent permission and direction from the Eighth Circuit to do so.

A77. Unlike Purkey, Lee sought to use the § 2255 remedy for his claim. Unlike Purkey, his lawyer violated a procedural rule that kept the court from reviewing the evidence that supported his claim. Unlike Purkey, Lee filed a Rule 60(b) motion raising the narrowly-tailored remedy that *Martinez* and *Trevino* afford in initial-review collateral proceedings. Lee's assertion is that the Eighth Circuit's blanket rule against applying that remedy to any federal prisoners rendered the § 2255 proceeding of which the 60(b) was a part wholly ineffective for him. The Seventh Circuit, invoking its opinion in *Purkey*, addressed none of it.

2. The second pillar of the government's case for death was Lee's purported responsibility for a prior murder. The Government told the jurors that as a juvenile, Lee had murdered a man named Joseph Wavra at a party in Oklahoma, but that the benevolent prosecutors there had let him plead to robbery. As proof, the Arkansas federal prosecutors introduced a certified copy of Lee's final plea; a certified copy of the murder conviction of his cousin for the same offense; and testimony from Oklahoma agents involved in investigating that case. A118.

The Government warned the jury:

> [Lee] got a gift in that case from the prosecutors in Oklahoma. They gave him a plea bargain. And this allowed him to get off with just a robbery.

A38. It said there was no question Lee was guilty of a prior murder, A94 ("legally

and morally the blood of Joey Wavra's hands is on Daniel Lee"); A37 ("[Daniel Lee] has an earlier murder under his belt . . . has a prior victim's blood on his hands"), and that the prosecutors had made a big mistake. A119-A120 ("Usually you commit a murder, and you get sent away for a very long time. … Daniel Lee got a do over.").

The presentation's purpose was not a subtle one: the federal prosecutors would not make that same mistake, and neither should the jurors. The Government also used this evidence to show that even though codefendant Chevie Kehoe had been proved far more culpable in the capital offense, Lee was the one deserving of death.[5] It called the Wavra murder "the drastic distinction" between Lee and Kehoe, A37. The difference between the two was Lee's "dangerousness" because there was "no prior Joey Wavra as to Chevie. There is as to Lee." Tr. 7969-70.

The problem is, there wasn't. Years after Lee's § 2255 proceedings, it came to light that the Oklahoma state prosecutors had not been offering grace or charity. Instead, the judge—who saw all the evidence that the prosecutors, with the help of the Oklahoma agents, showed the Arkansas jury, and more—deemed it insufficient

[5] This was no small issue. The Government had spent the entire trial showing how Kehoe was the far more culpable actor. It was Kehoe's purported plan to start a white separatist organization; he had the prior aggravated history that included the attempted murder of two policemen; and it was the prosecution's evidence that he alone wanted to and did kill the child victim. A71. (They described Lee as Kehoe's "faithful dog." *United States v. Lee*, No. 4:97-cr-243, 2008 WL 4079315, at *32 (E.D. Ark. Aug. 28, 2008).) When the jury was deliberating Kehoe's fate, the U.S. Attorney's office for the Eastern District of Arkansas polled the prosecutorial team, the case agents, and the victims and asked if they would support a life sentence for Lee if that's what the jury gave Kehoe. They all agreed. A63. The decision required the approval of Main Justice, however, and the Department would not agree. A63-A64. Hearing the "future danger" case against Lee, the jury gave him death.

to establish even probable cause. According to a scanned copy of a billing record that surfaced at the Oklahoma courthouse, the judge apparently had taken the unusual step, after a preliminary hearing for Danny Lee, of recommending dismissal of the charge because it was "not established by the evidence." *See* A117. The prosecution obliged, and the 17-year-old Lee pled guilty to stealing Joey Wavra's keys without his consent.

a. Once aware of this evidence, Lee filed a second motion pursuant to § 2255 alleging violations of his rights guaranteed him under *Brady v. Maryland,* 373 U.S. 83 (1963), and *Napue v. Illinois,* 360 U.S. 264 (1959). The District Court for the Eastern District of Arkansas found the withholding of this evidence prejudicial to Lee at sentencing:

> [A]ssuming that the Oklahoma state court held at a preliminary hearing that the evidence was insufficient to establish probable cause that Lee was guilty of murdering Joey Wavra, that evidence is material. In light of the government's reliance on the Wavra murder during sentencing, it is reasonably likely that, if it had been disclosed at trial that the Oklahoma court found the evidence insufficient to establish that Lee was guilty of murder, the outcome at sentencing would have been different.

A100 (footnote omitted). The court went on to hold, however, that Lee would have to file a motion for authorization at the Court of Appeals to have his claim adjudicated. A102. The court so held despite the fact that the facts surrounding what happened

in Oklahoma were, and remain, in the province of the Government and the Oklahoma case agents with whom it prepared Daniel Lee's capital penalty phase.[6]

b. At the same time he sought to establish access to the savings clause for the violation of his right to effective counsel, Lee also raised the *Brady* and *Napue* claims. He argued that § 2255 had proved ineffective to address a situation in which the Government hides relevant material evidence until the § 2255 proceedings have been completed, at which point it points a finger at the defense and says "too late." Here the Department of Justice also maintained that the billing record found well after § 2255 proceedings had concluded would have been available to Lee in 1999 at trial or in 2006 during collateral review, and that therefore he could not prevail under *Brady*. Yet the Government acknowledged in its pleadings that the Oklahoma proceedings may have occurred exactly as Lee had suggested, with the prosecution being forced to drop an inflated charge. *See* A34 (noting Government's concession regarding what occurred in Oklahoma).

The District Court for the Southern District of Indiana (Hanlon, J., presiding) was persuaded both that a *Brady* violation had likely occurred and that the full facts were not yet known. In ordering a stay of the execution at that time, the court found that fact development was essential to determining exactly what had

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[6] Lee argued at the Eighth Circuit that because this was a *Brady* claim, and because the Government was in possession of the facts while he was not, and its failure to turn over the proof of what happened had already been found material, he should not have had to meet the successor requirements of § 2255 for a court to review his claim. The Eighth Circuit denied a certificate of appealability over dissent on this question. *See* A107.

happened in Oklahoma. A39-A41.[7] Finally, the court found under these circumstances that, where the prosecution did not disclose evidence in its possession turning its penalty phase presentation on its head, there was a "significant possibility" that Lee had satisfied the requirements of the savings clause. Due to the Government's actions, Lee had neither a "'reasonable opportunity . . . to obtain a reliable judicial determination" of the legality of his sentence nor even one "unobstructed procedural shot at getting his sentence vacated." A33.

The Seventh Circuit vacated the stay. Its denial of Lee's access to the savings clause was predicated on the view that *Brady* allegations are "regularly made and resolved under §2255," not reckoning with the inability of that proceeding to resolve a violation that the Government had continued to conceal. *See* A49. It then jettisoned any determination that the proceeding itself could have been inadequate by finding—without any evidentiary support in the record whatsoever—that the evidence was not newly discovered because it was a "a statement made on the record by a judge decades ago" that was "available from that state court" and "was made in Lee's presence." A49-A50. There is in fact no evidence that the judge's statement was made in open court; at Lee's preliminary hearing; or with him present, or that the digitized fee notes were available in some other form during the § 2255 proceeding. The district court sought evidence; the Seventh Circuit answered the questions without it.

[7] The Indiana court understood that the fee application was not the *Brady* evidence itself, but rather demonstrated that the facts, peculiarly within the Government's possession, were not at all as it had presented them. A38-A39.

After Lee's execution date was postponed in December, the district court issued an opinion on March 20, 2020, relying on the circuit's ruling vacating the stay, and denying § 2241 jurisdiction on both the ineffectiveness claim and the *Brady* and *Napue* issues. *See* A9. Lee appealed the ruling. The Seventh Circuit affirmed on July 10, reiterating, again without facts, that the newly discovered evidence could have been found had counsel acted with reasonable diligence. *See* A5.

3. The case for future danger dominated Lee's penalty phase. *See* A54-A63. Two evidentiary strands joined to form that case: a psychological test that proved Lee's future danger and a prior murder committee as a teen. Neither was real. The Government's own expert has disavowed any reliance on the PCL-R to prove danger in prison. The Government has abandoned use of the test and no one now stands behind it. Lee is the only person still on federal death row whose death sentence rests on that false claim.

Lee was never guilty of a prior murder. The State of Oklahoma levied a charge it could not prove and were told to drop it. But no one told Lee's capital jurors. Instead, the state agents from Oklahoma and the federal prosecutors in Arkansas assured them of Lee's "legal guilt" of the crime. And the Government persuaded the jury that one "gift" to a killer was enough.

This is the sentence the Department of Justice stands behind. But the courts have not defended it. Judge G. Thomas Eisele of the Eastern District of Arkansas found it "questionable" that the jury could have returned a death sentence without the PCL-R. *See* A62. Judge A. Leon Holmes of the same court deemed the *Brady*

evidence about the purported prior conviction material. *See* A100. Judge James Patrick Hanlon of the Southern District of Indiana concurred. *See* A37. All three found that absent one *or* the other of these two spurious claims, Daniel Lee would not have been sentenced to death. There can be no question that Lee was prejudiced by the failure of his trial counsel to challenge the test's probity and of the failure of the Government to reveal the truth about its case.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE LOWER COURTS NEEDED GUIDANCE AS TO THE SCOPE OF 28 U.S.C. § 2241.

When § 2255 was enacted in 1948 it was intended primarily to minimize practical difficulties created because of the requirement that a writ be filed in the district of incarceration. *United States v. Hayman,* 342 U.S. 205, 219 (1952). From its inception the so-called "savings clause" (now found in § 2255(e)) has been part of the statute, yet the legislative history of that clause is scant and this Court has never defined its scope. In *Hayman*, one of a handful of Supreme Court cases discussing § 2255, this Court noted merely that "[i]n a case where Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing." *Id.* at 223 (footnote omitted).

Absent this Court's guidance, the circuit courts of appeals have attempted to formulate rules governing the savings clause. But the results have been inconsistent, difficult to apply, and prone to creating disparate results in

sentencing. These haphazard results often arise based solely on the happenstance of a prisoner's place of confinement. Similarly-situated federal prisoners may either be denied or permitted access to § 2241 only because of the location of the federal penitentiary where they are housed.

While the circuits have generally agreed that the touchstone of § 2241 is whether a § 2255 movant has had the opportunity to litigate his claim, there is little agreement on the how to make that determination. The Fourth, Fifth, and Sixth Circuits have grafted the successive application standard of the AEDPA onto § 2255(e) and require proof of actual innocence of the charged offense. *See e.g., Wooten v. Cauley*, 677 F.3d 303, 307–08 (6th Cir. 2012); *Reyes–Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000). The Second Circuit entertains § 2241 petitions where a "petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions." *Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997). The Third Circuit focuses on whether applying limitations would cause a "complete miscarriage of justice." *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997). And in the Eighth and Ninth Circuits, a prisoner must not have had an unobstructed procedural shot at presenting that claim, defined to include changes in law. *See Harrison v. Ollison*, 519 F.3d 952, 959–60 (9th Cir. 2008); *Abdullah v. Hedrick,* 392 F.3d 957, 963 (8th Cir. 2004).

This legal patchwork spawns arbitrary consequences. Lee, for example, could well have been allowed to proceed in § 2241 had he been confined in New York,

Pennsylvania, or Arizona. But not in Indiana. And given that three federal judges have already found that his death sentence violates the Constitution, this disparity could mean the difference between habeas relief or being executed. This result is also especially troubling because the administration of the federal death penalty strives to be a uniform punishment, not subject to the peculiarities or quirks of the circuit of conviction. The vagaries in the application of § 2241 among the circuits should be addressed by this Court; Lee should not be deprived of a remedy for the constitutional violations in his case because of the arbitrary location of federal death row in a prison in Indiana.

There is no dispute that § 2241 is not regularly and consistently applied in federal cases. Indeed, all the litigants in this case believe this Court's guidance about § 2241 is desperately needed. The very attorney appearing for the Government in this case below petitioned for certiorari review not two years ago telling this Court "a widespread circuit conflict" regarding the savings clause exists in the courts of appeals, which "will continue to produce[] divergent outcomes for litigants in different jurisdictions on an issue of great significance." U.S. Petition for Certiorari 12-13, *United States v. Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420), 2018 WL 4846931 (Oct. 3, 2018) ("Wheeler Pet."). As the Government further noted, "[o]nly this Court's intervention can provide the necessary clarity" and "ensure nationwide uniformity." *Id.* at 13, 26. And "timely resolution" of the question presented is therefore imperative "now." *Id.* at 29. Lee agrees.

The Government's briefing and argument in *Lee* and *Purkey* in the Seventh Circuit also serve to highlight the need for this Court's review. In Lee's case, despite prevailing in the district court, the Government disavowed the circuit law governing § 2241 and expressly argued that a circuit conflict exists between the Seventh, Tenth and Eleventh Circuits. Seventh Circuit Govt Brief at n.3 ("The Government believes this Court's cases applying the saving clause—including *Davenport*, *Garza*, and *Webster*—are incorrectly decided.").

The Government's argument in Lee's case below is also inconsistent with its own position during the *Purkey* oral argument presented only one week ago. There the government recognized Rule 60(b) as an integral part of initial § 2255 proceedings that must be available to correct an improper foreclosure of review such as occurred in Lee's case. In fact, the Government faulted Purkey for proceeding directly to § 2241 and explained that 60(b) is the proper avenue for relief:

> THE COURT: So death is the response? So you put somebody to death because they had a bad lawyer who didn't raise a meritorious claim? That is pretty harsh it seems to me.
>
> GOVERNMENT: Well, I do think there are other equitable remedies and I think if you are really talking about there being some procedural bar, *something about counsel performance created a procedural bar to hearing the claim*, then I think 60(b) is the avenue.

Oral Arg. Available at http://media.ca7.uscourts.gov/sound/external/mn.19-3318.19-3318_06_16_2020.mp3 (last visited July 6, 2020) (emphasis added).

Lee had done exactly what the Government demanded of Purkey. Yet when in his case Rule 60(b) was deemed a categorically unavailable avenue for federal prisoners to remedy the ineffectiveness of their habeas counsel, the Government

argued below that it was not an available equitable remedy in § 2255. This Court should grant certiorari review to provide much needed guidance to the lower courts about the scope of § 2241 review.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE SEVENTH CIRCUIT'S HOLDING ALLOWING LEE'S EXECUTION DESPITE A CLEARLY UNCONSTITUTIONAL DEATH SENTENCE AND THE ABSENCE OF ANY MECHANISM TO REVIEW THE LEGAL ERROR.

Denying federal prisoners the right to pursue unquestionably meritorious challenges to their detention directly undermines the fairness and integrity of the judicial system. *See, e.g., Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) ("[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?") (citation omitted).

Doing so by impeding access to corrective measures in initial § 2255 proceedings threatens the core of habeas review. Lack of meaningful review of this sort is a hollow promise. *See Boumediene v Bush,* 553 U.S. 723, 785 (2008) ("Habeas corpus is a collateral process that exists, in Justice Holmes' words, to 'cut through all forms and go to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.'") (quoting *Frank v. Mangum,* 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) (alterations omitted)).

This is especially true where, as here, the right at issue is that of the effective assistance of counsel at trial, "a bedrock principle in our justice system." *Martinez,* 566 U.S. at 12. Section 2255 proceedings are the initial (and only) post-conviction review for federal death row inmates and thus, like state habeas, they are "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 11. A defendant's "inability to present a claim of trial error is of particular concern," *id.* at 12, because it could deprive him of any review of his claim that he was denied the core constitutional right from which all other guarantees of a fair trial emanate. Thus, it is of extraordinary public importance that the initial-review collateral proceeding "afford[ ] meaningful review of a claim of ineffective assistance of trial counsel." *Trevino v. Thaler*, 569 U.S. 413, 425 (2013).

By denying Lee access to § 2241 in this case the Seventh Circuit failed to recognize how his § 2255 proceedings deprived him of the ability to challenge the legality of his detention. Citing to the *Purkey* decision and asserting that it was indistinguishable from Lee's case, A7-A8, the lower court ignored the fact that his § 2241 argument addressed the failure, not of counsel, but of the structure of the § 2255 proceeding itself. Habeas counsel's failure was, of course, a part of this story, but unlike *Purkey*, it was not the *basis* for proceeding in § 2241. Had § 2255 been fully operational in his case, Lee would have had an avenue for redress of deficiencies in his habeas. But it was not. The Eighth Circuit did not reject his Rule 60(b) based on review of his facts; instead it deprived him of a corrective process in § 2255 by the blanket application of a categorical structural block.

In this way, the Seventh Circuit's interpretation of the savings clause violates the fundamental purposes of habeas corpus. As the Government itself previously informed this Court, § 2255(e)

> readily encompasses more than a mere procedural opportunity to raise a claim. The habeas savings clause applies when Section 2255 is 'inadequate or ineffective to test the legality of [the prisoner's] detention, and those words embrace '[t]he essential function of habeas corpus,' which 'is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'… A defendant whose claim is foreclosed by controlling circuit law cannot readily 'test' his claim" because "[t]he district and circuit courts are bound by the precedent, and only rare and discretionary action by the en banc court or the Supreme Court can alter the law."

U.S. Reh'g Supp. Br. 11, *United States v. Surratt*, No. 14- 6851 at 29-30 (4th Cir. Feb. 2, 2016) (citations omitted).

Despite multiple federal judges noting his entitlement to relief, actual merits review has eluded Lee because of a structural barrier in his § 2255 proceedings. Unless this Court intervenes, he will be executed notwithstanding the repeatedly recognized unconstitutionality of his death sentence.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER THE SEVENTH CIRCUIT WAS CORRECT TO APPLY A "DUE DILIGENCE" TEST TO LEE'S *BRADY* CLAIM, A QUESTION WHICH HAS DIVIDED THE CIRCUITS.

The Seventh Circuit held that Lee's due process claims were foreclosed because information was available in a "publicly available court record" and "thus was available with reasonable diligence." A8. But the mere fact that a fee application—a document not ordinarily presumed to be part of the record of a criminal conviction and sentence—existed in a state courthouse did not establish prior counsel's lack of diligence. *See Williams v. Taylor*, 529 U.S. 420, 443 (2000).

And, more importantly, although requiring a "due diligence" test for a *Brady* claim stands in contravention to this Court's precedent, there is a deep circuit split on this issue. The Court should grant review to resolve that conflict and make clear that such a requirement is "not tenable" as a matter of due process. *Banks v. Dretke*, 540 U.S. 668, 695 (2004).

A. A defendant may rely on the Government's assurance that exculpatory material has been disclosed.

In *Banks*, this Court flatly rejected the notion that the "prosecutor may hide, defendant must seek." 540 U.S. at 695. Instead, the defense is entitled to presume that "public officials have properly discharged their official duties" when the Government "represents that all such material has been disclosed." *Id*. at 695-6.

Lee requested *Brady* material prior to trial and renewed that request in his initial § 2255 proceeding. Accordingly, he was entitled to rely on the Government's representations that it had complied with its constitutional obligation. *See Strickler v. Greene*, 527 U.S. 263, 284 (1999) (trial and post-conviction counsel may rely on representations of compliance made at trial); *Banks*, 540 U.S. at 693–94 (post-conviction litigant "cannot be faulted" for relying on representations that all *Brady* disclosures were made). Despite these assurances from the Government, however, the Seventh Circuit laid the blame at Lee's feet and rejected his claim based on a lack of due diligence. This ruling reflects the marked split among the circuit courts of appeals.

B. The courts of appeals are divided on whether *Brady* claims may be rejected for failure to exercise due diligence.

There has been a long-standing and widely acknowledged Circuit split on this issue, even after *Banks*: "The Supreme Court has not explicitly addressed and state and federal courts are split on this 'due diligence' question." *Biles v. United States*, 101 A.3d 1012, 1023 n.10 (D.C. 2014).

1. Seven circuits follow Banks *in rejecting a due diligence rule for* Brady *violations.*

Following *Banks*, the Sixth Circuit overruled its former endorsement of the due diligence rule, and interpreted *Banks* as a "rebuke[] … for relying on such a due diligence requirement to undermine the *Brady* rule." *United States v. Tavera*, 719 F.3d 705, 711 (6th Cir. 2013). It added that *Banks* "should have ended [the lower courts'] practice" of diluting the *Brady* rule by "favoring the prosecution with a broad defendant-due-diligence rule." *Id*. at 712.

The Second, Third, Eighth, Ninth, Tenth, and D.C. Circuits concur. *See Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 12-22 (2d Cir. 2015) ("an affirmative 'due diligence' requirement" "plainly violated clearly established federal law under *Brady* and its progeny."); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 290 (3d Cir. 2016) (*en banc*) ("defense counsel is entitled to presume that prosecutors have discharged their official duties" and that "the duty to disclose under *Brady* is absolute—it does not depend on defense counsel's actions."); *Jimerson v. Payne*, 957 F.3d 916, 927 (8th Cir. 2020) ("Due diligence does not require defense counsel to … discover potentially favorable evidence … particularly when defense counsel

specifically requested disclosure of the evidence now at issue."); *Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014) (defendant entitled to "rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce," whether or not defense "counsel could have found the information himself."); *United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) ("whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information"); *United States v. Nelson*, 979 F. Supp. 2d 123, 133 (D.D.C. 2013) ("*Brady* does not excuse the government's disclosure obligation where reasonable investigation and due diligence by the defense could also lead to discovering exculpatory evidence.")

2. Five courts of appeals recognize a due diligence exception to Brady*'s disclosure obligations.*

In contrast, the First, Fourth, Fifth, Seventh, and Eleventh Circuits will not recognize a *Brady* violation when the defendant could have discovered the withheld information through the exercise of due diligence, even after this Court's decision in *Banks*. *See United States v. Cruz-Feliciano*, 786 F.3d 78, 87 (1st Cir. 2015) ("evidence is not suppressed … if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of [it]."); *United States v. Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (defendant must demonstrate evidence did not "lie[] in a source where a reasonable defendant would have looked"); *United States v. Bernard*, 762 F.3d 467, 480 (5th Cir. 2014) (*Brady* claim must fail "if the suppressed evidence was discoverable through reasonable due diligence."); *Petty v. City of Chicago*, 754 F.3d 416, 423 (7th Cir. 2014) (no *Brady* violation unless "the

evidence was not otherwise available to a defendant through the exercise of reasonable diligence"); *LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005) (no *Brady* violation unless "the defendant did not possess the evidence and could not have obtained it with reasonable diligence").

C. The due diligence question is a recurring and significant one that warrants the Court's attention.

This conflict is acute, and it is notable for its persistence and importance. *Brady* violations inflict untold damage on the integrity of the criminal justice system. The premise of our system is that "the prosecutor as the representative … of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley,* 514 U.S. 419, 439 (1995) (citations omitted). *Brady* violations erode the public's trust in the rule of law. And Lee's case is a prime example of how burden-shifting of this sort can result in the upholding of an unconstitutional death sentence. This Court should grant review.

CONCLUSION

This Court should review the Seventh Circuit's judgment affirming the denial of Lee's § 2241 petition, grant certiorari and summarily reverse the decision below, or grant such other relief as justice requires.

Respectfully submitted,

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