No. 20A-_____

IN THE SUPREME COURT OF THE UNITED STATES

T.J. WATSON, WARDEN, ET AL., APPLICANTS

v.

WESLEY IRA PURKEY

(CAPITAL CASE)

APPLICATION TO VACATE STAY OF EXECUTION ISSUED BY
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PARTIES TO THE PROCEEDING

Applicants (respondents-appellees below) are T.J. Watson, in his official capacity as Warden of United States Penitentiary - Terre Haute, and the United States of America.

Respondent (petitioner-appellant below) is Wesley Ira Purkey.

RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. Purkey, No. 01-cr-308 (Jan. 26, 2004)

Purkey v. United States, No. 06-cv-8001 (Sept. 29, 2009)

United States District Court (S.D. Ind.):

Purkey v. United States, No. 19-cv-414 (Nov. 20, 2019)

United States Court of Appeals (8th Cir.):

United States v. Purkey, No. 04-1337 (Nov. 7, 2005)

Purkey v. United States, No. 10-3462 (Sept. 6, 2013)

United States Court of Appeals (7th Cir.):

Purkey v. Hanlon, No. 19-3047 (Nov. 7, 2019)

Purkey v. United States, No. 19-3318 (July 2, 2020)

Supreme Court of the United States:

Purkey v. United States, No. 05-11528 (Oct. 16, 2006)

Purkey v. United States, No. 13-9783 (Oct. 14, 2014)

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The United States Court of Appeals for the Seventh Circuit stayed respondent's scheduled execution, which is set for July 15, 2020 at 4:00 p.m. Eastern Standard Time. Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants T.J. Watson and the United States of America, respectfully applies for an order vacating that stay.

Respondent is a federal death-row inmate convicted in 2003 following his confession to the gruesome rape and murder of a 16-year-old girl. Respondent's direct appeal ended in 2006, and postconviction proceedings challenging his conviction and sentence under 28 U.S.C. 2255 ended in 2014. In July 2019, following the completion of a lengthy process of revising the federal execution protocol, the government set a date for respondent's execution.

The following month, respondent filed an application for a writ of habeas corpus under 28 U.S.C. 2241 challenging his conviction and sentence. As relevant here, respondent asserted three claims concerning allegedly ineffective assistance of counsel during his trial 16 years earlier. Respondent's current counsel had been aware of the factual basis for at least some of those claims since 2017 or earlier, but respondent did not seek relief on them until his execution date had been set.

The district court denied respondent's habeas application, finding it barred by 28 U.S.C. 2255(e), which generally prohibits federal prisoners from using habeas applications under Section 2241 to circumvent the strict limits on timeliness and successive claims that Congress has established for federal postconviction proceedings under 28 U.S.C. 2255. On July 2, 2020, the court of appeals affirmed that decision, rejecting respondent's claim that federal prisoners can circumvent the limits on successive and untimely motions under Section 2255, see 18 U.S.C. 2255(f), (h), merely by alleging they received ineffective assistance of counsel in earlier postconviction proceedings. Indeed, the court recognized that respondent's argument is impossible to reconcile with the text of Section 2255(e), and lacks any limiting principle.

But notwithstanding its determination that respondent cannot proceed on his habeas petition, the court of appeals granted respondent relief anyway. It ordered that his execution be stayed

pending further order of that court or issuance of the court's mandate -- which would not occur until more than a month after the scheduled execution date. In doing so, the court acknowledged that one of the "requirements for a stay" identified by this Court in Nken v. Holder, 556 U.S. 418 (2009), is that "'the stay applicant has made a strong showing that he is likely to succeed on the merits.'" App., infra, 26a (citation omitted). But the court of appeals did not find that respondent had made such a showing. To the contrary, the court had just held that respondent cannot succeed in this case because his claims are statutorily barred, with no suggestion that it thought either the en banc court of appeals or this Court might reverse that decision. Instead, the court simply distinguished this case from Nken on the ground that this one involves the death penalty.

Less than 36 hours after entry of the court of appeals' decision on July 2, 2020, the government filed a motion asking the panel or the en banc Seventh Circuit to vacate the stay or, at a minimum, to require expedition of any petition for en banc review that respondent might choose to file. The court of appeals set a July 10, 2020 deadline for respondent to oppose the government's motion. As of this filing, the court of appeals has not ruled on that motion. Accordingly, in light of the impending July 15, 2020 execution date, the government respectfully moves this Court to set aside the Seventh Circuit's stay and allow the execution to

proceed. This Court has in the past summarily vacated stays of execution when a lower court "enjoined [the] execution without finding that [the prisoner] has a significant possibility of success on the merits." Dunn v. McNabb, 138 S. Ct. 369, 369 (2017). Such intervention is, if anything, especially warranted here, where the court of appeals correctly recognized that respondent cannot succeed on his claims, and gave no indication that it believes either the en banc court of appeals or this Court will grant discretionary review to reverse the denial of respondent's habeas application -- and yet ordered a stay nonetheless. A last-minute stay in these circumstances is directly contrary to the strict limitations that Congress imposed on collateral review of federal criminal convictions, and this Court should not allow it to remain in place.

STATEMENT

1. On the morning of January 22, 1998, respondent, who had recently been released from prison, encountered 16-year-old high school student Jennifer Long on a sidewalk in Kansas City, Missouri. See Purkey v. United States, 729 F.3d 860, 866 (8th Cir. 2013) (Purkey V), cert. denied, 574 U.S. 933 (2014). Respondent engaged Long in conversation and invited her to "party" with him. Ibid. According to respondent, Long then voluntarily entered respondent's pickup truck. After stopping at a liquor store to buy orange juice and gin, respondent told Long that he needed to

go to his home, which was across state lines in Lansing, Kansas. Long then asked to be let out of the truck. Ibid. Respondent indicated his refusal by grabbing a boning knife from the glove box and placing it under his thigh. Ibid.

After respondent drove Long to Lansing, respondent took Long into his basement, forced her at knifepoint to strip, and raped her. Purkey V, 729 F.3d at 866-867. After the rape, Long attempted to escape the house. Id. at 867. They struggled briefly, and then respondent stabbed Long repeatedly in the chest, neck, and face, eventually breaking the knife blade inside her body. Purkey V, 729 F.3d at 867.

After the murder, respondent stored Long's body in a toolbox; stopped at a bar to drink for several hours; and then went to Sears to purchase an electric chainsaw. Purkey V, 729 F.3d at 867. He then spent several days dismembering Long's body with the chainsaw before dividing Long's body parts into bags and burning the remains. Ibid. He dumped the charred remnants into a septic pond, where they were eventually recovered by investigators. Ibid.

Authorities learned that respondent had murdered Long when respondent was arrested nine months later for the unrelated murder of 80-year-old Mary Ruth Bales. Purkey V, 729 F.3d at 867. Respondent had visited Bales's home on a service call for a plumbing company. Ibid. He told Bales that he was willing to return later to complete the job for a lower price if Bales paid

him $70 up front. Ibid. Bales agreed, and she paid him the money. Respondent used the money to hire a prostitute and purchase cocaine. Ibid. After using the cocaine, he returned to Bales's home with the prostitute. Ibid. While the prostitute waited in respondent's car, respondent entered Bales's home and bludgeoned Bales to death in her bedroom with a claw hammer. Ibid. He returned to the house the following day with cans of gasoline to burn the house down. Ibid. A neighbor saw respondent in the yard and called police, leading to respondent's arrest. Ibid.

While awaiting trial for the murder of Bales, respondent contacted federal authorities concerning the Long murder. Purkey V, 729 F.3d at 868. Respondent -- who eventually received a sentence of life imprisonment in state prison in the Bales case -- gave a full confession to the earlier murder because he hoped that his confession would enable him to serve his life sentence in what he believed would be the more comfortable conditions of a federal prison. Ibid.

2. Following a jury trial in the United States District Court for the Western District of Missouri, respondent was convicted of interstate kidnapping for the purpose of forcible rape, resulting in death, in violation of 18 U.S.C. 1201(a), 1201(g), and 3559(d) (1994 & Supp. IV 1998). See App., infra, 4a-5a. The jury recommended that respondent be sentenced to death, and the district court imposed that sentence. Id. at 5a-6a. The

Eighth Circuit affirmed respondent's conviction and sentence, United States v. Purkey, 428 F.3d 738 (8th Cir. 2005), and this Court denied a writ of certiorari, Purkey v. United States, 549 U.S. 975 (2006).

In 2007, on the final day of the applicable one-year statute of limitations, Purkey filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. 2255. See 28 U.S.C. 2255(f). The motion raised, inter alia, a claim that his trial counsel was ineffective in 17 different respects. App., infra, 6a. The district court denied the motion. Purkey v. United States, No. 06-cv-8001, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009). The Eighth Circuit affirmed, Purkey V, supra, and this Court again denied a writ of certiorari, Purkey v. United States, 574 U.S. 933 (2014).

3. On July 25, 2019, the federal government announced the completion of an "extensive study" that it had undertaken to consider possible revisions to the Federal Bureau of Prisons' lethal injection protocol to account for the scarcity of drugs required by the prior three-drug procedure. In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 110 (D.C. Cir. 2020) (per curiam) (Execution Protocol Cases), cert. denied, Bourgeois v. Barr, No. 19-1348 (June 29, 2020). Following a deliberate investigation that had commenced when the prior drug became unavailable in 2011, the government published a revised addendum to its protocol, in which it adopted a single-drug

procedure (also used by many States) that would allow the federal government to resume executions. Ibid.

Alongside its adoption of this revised lethal injection protocol, the government also set execution dates for five federal inmates who had previously received capital sentences, including respondent. Execution Protocol Cases, 955 F.3d at 111. Initially, respondent's execution was scheduled for December 13, 2019. After respondent and several of the other capital prisoners filed a challenge to the federal execution protocol, however, the United States District Court of the District of Columbia entered a preliminary injunction in November 2019 barring the government from carrying out the executions as scheduled. Ibid.

On April 7, 2020, the United States Court of Appeals for the District of Columbia Circuit vacated the preliminary injunction in that case. Execution Protocol Cases, 955 F.3d at 108. The federal government subsequently set July 15, 2020 as the new date for respondent's execution.

4. At the same time that respondent was seeking to enjoin his scheduled execution through his challenge to the federal lethal injection protocol, he also initiated several other suits seeking to preclude his execution on other grounds. This application concerns one of those suits, a challenge to respondent's conviction and sentence that respondent filed in August 2019 -- nearly 13 years after the conclusion of his direct appeal, and nearly six

years after the conclusion of his Section 2255 proceedings. See D. Ct. Doc. 1 (Aug. 27, 2019). The challenge asserts, as relevant here, three claims of allegedly ineffective assistance of counsel stemming from his 2003 trial. Respondent has not asserted that those claims could satisfy the statutory requirements for a second or successive motion for collateral relief under Section 2255, see 28 U.S.C. 2255(h), and has not disputed that they would have been untimely by nearly 12 years under the statute of limitations applicable to Section 2255 motions, see 28 U.S.C. 2255(f). Instead, respondent sought to raise them by filing an application for a writ of habeas corpus under 28 U.S.C. 2241.[1]

The district court denied respondent's application, on the ground that 28 U.S.C. 2255(e) bars respondent from challenging his conviction or sentence by filing a habeas application under Section 2241. App., infra, 28a-56a. Section 2255(e) provides as follows:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief,

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[1] In addition to this suit and his challenge to the federal lethal injection protocol (which remains pending), respondent also filed two other suits seeking to bar his execution. In one, he contends that he is presently incompetent to be executed. See Purkey v. Barr, No. 19-cv-3570 (D.D.C. filed Nov. 26, 2019). In the other, he alleges that the government selected him for execution in retaliation for his acting as a jailhouse lawyer. Purkey v. Barr, No. 19-cv-517 (S.D. Ind. filed Oct. 28, 2019). As of this filing, respondent has motions to preliminarily enjoin his execution pending in both cases.

> by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. 2255(e). The district court explained that because the "court which sentenced" respondent had already denied his motion for relief under Section 2255, respondent could pursue his habeas application under Section 2241 only if he could satisfy the so-called "saving clause" by showing that Section 2255's "remedy" was "inadequate or ineffective to test the legality of his detention." Ibid.; App., infra, 35a-36a. The district court found no such "inadequa[cy] or ineffective[ness]" here, because respondent could have asserted his present claims in his original Section 2255 proceedings -- he just failed to do so. App., infra, 51a.

5. On July 2, 2020, the court of appeals affirmed the district court's decision, agreeing with the district court that Section 2255(e) barred respondent's application for a writ of habeas corpus. App., infra, 1a-27a. But the court of appeals nevertheless entered a stay of execution pending further order of the court of appeals or issuance of the court of appeals' mandate. Id. at 26a-27a.

On the merits, the court of appeals explained that under its precedents, in order to show that a Section 2255 motion is "'inadequate or ineffective'" to present a federal prisoner's claim, the prisoner must make "a compelling showing that, as a practical matter, it would be impossible to use section 2255 to

cure a fundamental problem." Id. at 19a-20a (citation omitted). It found that respondent could not make that showing, because "[a]t the time [respondent] filed his motion under section 2255, nothing formally prevented him from raising each of the three errors he now seeks to raise in his petition under 2241." Id. at 20a.

The court of appeals rejected respondent's contention that alleged deficiencies by his postconviction counsel in his proceedings under Section 2255 rendered that Section's "remedy by motion ineffective or inadequate to test the legality of his detention." App., infra, 18a. The court observed that under Coleman v. Thompson, 501 U.S. 722 (1991), "there is no right to counsel in collateral proceedings, and thus no right to effective assistance of counsel" in such proceedings. App., infra, 18a (emphasis added). The court further observed that to allow federal prisoners to circumvent Section 2255's second-or-successive and timeliness limits whenever they alleged they received ineffective assistance of counsel during their earlier Section 2255 proceedings would give rise to "a never-ending series of reviews and re-reviews," with each denial of relief followed by a new suit alleging that the last set of lawyers had neglected to identify additional meritorious claims. Id. at 21a.

The court of appeals acknowledged that the ineffectiveness of post-conviction counsel can sometimes serve as a basis for "overcom[ing] a procedural bar" established as a "matter of federal

common law" for state prisoners who seek federal habeas relief. App., infra, 25a (discussing Trevino v. Thaler, 569 U.S. 413 (2013); and Martinez v. Ryan, 566 U.S. 1 (2012)). But the court found no basis for extending that approach to the circumstances here, because "the availability of further relief for someone in [respondent's] position is not a simple matter of federal common law. It is governed by statutes" -- and, specifically, the limitations in Section 2255(e). Ibid. While "nothing prevents Congress from changing the rules," id. at 22a, a court lacks the power to do so. The court therefore "conclude[d] that [respondent] is not entitled to raise his new arguments in a petition for a writ of habeas corpus." Id. at 25a.

Notwithstanding that conclusion, however, the court of appeals granted respondent's application for a stay of execution. App., infra, 26a-27a. In doing so, it acknowledged that this Court's decision in Nken v. Holder, 556 U.S. 418 (2009), held that one of the "requirements for a stay" is that "'the stay applicant has made a strong showing that he is likely to succeed on the merits.'" App., infra, 26a (quoting Nken, 556 U.S. at 434). But the court of appeals -- having just determined that respondent "is not entitled to raise his new arguments in a petition for a writ of habeas corpus," id. at 25a -- made no finding that respondent has any substantial likelihood of persuading the en banc court of appeals or this Court to reverse the panel's decision. See id. at

26a-27a. Instead, the court of appeals viewed Nken as distinguishable from this case on the theory that "although the Nken Court held that something more than a 'better than negligible' chance of success is necessary, it also stressed that the injury the applicant faced [there] was not 'categorically irreparable,'" while here respondent "faces categorically irreparable injury -- death." Id. at 26a (quoting Nken, 556 U.S. at 434-435).

The court of appeals stated that although it had affirmed the dismissal of respondent's claims "because of our understanding of the safety valve language" in Section 2255(e), "[i]f our reading of the safety valve is too restrictive, there would be significant issues to litigate" with respect to two of the ineffectiveness claims. App., infra, 27a. Deeming those underlying claims potentially "worthy of further exploration," the court ordered "[a] brief stay to permit the orderly conclusion of the proceedings in this court." Ibid. It concluded that such a stay "will not substantially harm the government, which has waited at least seven years to move forward on [respondent's] case," and that "the public interest" would not be served by proceeding more expeditiously in respondent's case than it would in "any [other] case." Id. at 26a-27a.

6. At approximately 2 a.m. Central Standard Time on the morning of Saturday, July 4, 2020 -- less than 36 hours after the court of appeals entered its decision -- the government filed a

motion asking the panel or en banc Seventh Circuit to vacate the stay of execution or, alternatively, enter an expedited schedule for any petition for rehearing respondent might choose to file that would allow the court to rule on that petition by 1 p.m. Central Standard Time on Friday, July 10, 2020. Gov't C.A. Pet. 1-3. The government explained that a decision within that time was necessary to ensure that this Court had sufficient time to consider any further motion for emergency relief in advance of the scheduled July 15, 2020 execution date. Id. at 16. The court of appeals instead gave respondent until 12 p.m. Central Standard Time on July 10, 2020 to respond to the government's July 4 motion. C.A. Doc. 40, at 2 (July 6, 2020). As of this filing, the court of appeals has not yet ruled on the government's motion.

ARGUMENT

This Court regularly exercises its authority under the All Writs Act, 28 U.S.C. 1651, to vacate stays of execution improperly entered by the lower courts. See, e.g., Dunn v. Price, 139 S. Ct. 1312 (2019); Dunn v. Ray, 139 S. Ct. 661 (2019); Mays v. Zagorski, 139 S. Ct. 360 (2018); Dunn v. McNabb, 138 S. Ct. 369 (2017); Dunn v. Melson, 137 S. Ct. 2237 (2017); Lombardi v. Smulls, 571 U.S. 1187 (2014); Roper v. Nicklasson, 571 U.S. 1107 (2013). And the Court has recognized that summary vacatur is especially appropriate where a lower court enters a last-minute stay of

execution "without finding that [the prisoner] has a significant possibility of success on the merits." McNabb, 138 S. Ct. at 369.

The court of appeals abused its authority in precisely that fashion here. Over the first 25 pages of its opinion, it correctly determined that respondent is barred from obtaining habeas corpus relief on his claims. But in the final page-and-a-half, it ordered that his execution nevertheless be stayed, on the remote chance that the en banc court of appeals or this Court might decide that the panel's "reading of the safety valve is too restrictive." App., infra, 26a. The panel gave no indication that it thought such a result was at all likely -- and, indeed, yesterday another Seventh Circuit panel applying the decision below to a separate but "indistinguishable" Section 2241 case found the prisoner's efforts to bypass Section 2255's limitations "frivolous" and denied his motion for a stay. Lee v. Watson, No. 19-3318, 2020 WL 3888196, at *2-*3 (7th Cir. July 10, 2020). Yet despite respondent's failure to establish that he has a significant possibility of success, the court of appeals entered a stay in this case anyway based on its erroneous view that a stay would not substantially harm the government and that the public interest would not be served by expediting resolution of this case.

In these extraordinary circumstances, this Court's intervention is warranted. The court of appeals' order conflicts with this Court's precedents requiring that a stay be supported by

a strong showing of a substantial likelihood of success, and it represents the very sort of last-minute delay that the limitations in Section 2255 were adopted to prevent. "Both the [government] and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)). The Court should not allow that interest to be frustrated here on the basis of an application that the court of appeals itself correctly recognized cannot ultimately succeed.

I. THE COURT OF APPEALS FAILED TO ADHERE TO THE REQUIREMENTS THIS COURT HAS SET OUT FOR STAYS AND OTHER SUCH INTERIM RELIEF

This Court has held that one of the "critical" considerations a lower court must consider when ordering a stay or granting preliminary injunctive relief is "'whether the stay applicant has made a strong showing that he is likely to succeed on the merits.'" Nken v. Holder, 556 U.S. 418, 434 (2009) (citation omitted); see Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (holding that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits"). "It is not enough that the chance of success on the merits be 'better than negligible.'" Nken, 556 U.S. at 434 (citation omitted).

Because the court of appeals itself had already held that respondent cannot succeed in this case, applying the stay factors set forth in Nken would have required it to find a substantial likelihood that either the en banc court of appeals or this Court

would grant respondent extraordinary discretionary review and reverse the panel decision. The court of appeals made no such finding. See App., infra, 26a-27a. Instead, it appears to have taken the view that the "requirements" described in Nken are inapplicable to capital cases, distinguishing Nken on the ground that the harm at issue there was "not 'categorically irreparable'" in the same sense that an execution would be. App., infra, 26a (quoting Nken, 556 U.S. at 435).

That view is plainly incorrect. Nken contains no such carve-out, and this Court has held, squarely and repeatedly, that "like other stay applicants, inmates seeking [a stay of execution] must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." Hill, 547 U.S. at 584 (emphasis added); see, e.g., Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (finding it "well established" that in order to grant a "[s]tay[] of execution * * * pending the filing and consideration of a petition for a writ of certiorari * * * 'there must be a significant possibility of reversal'") (citation omitted).

Accordingly, when this Court has previously considered stays of "execution [entered] without finding that [the prisoner] has a significant possibility of success on the merits," it has summarily vacated them. McNabb, 138 S. Ct. at 369. That course is appropriate here as well. Given the "important interest in the

timely enforcement of a sentence," no justification exists for further delaying respondent's scheduled execution based on claims that the court of appeals itself recognized to be unavailing. Hill, 547 U.S. at 584.

II. RESPONDENT COULD NOT ESTABLISH ENTITLEMENT TO A STAY UNDER A PROPER APPLICATION OF THE STAY FACTORS

Although the court of appeals' own failure to make the required finding of a substantial likelihood of success is sufficient grounds to vacate the stay, see McNabb, 138 S. Ct. at 369, vacatur is particularly appropriate because respondent is not entitled to a stay under any proper application of the stay factors. As the court of appeals correctly recognized in affirming the district court's decision, respondent cannot establish a likelihood of success on the merits. Equitable considerations likewise weigh against entry of a stay in this case, because the facts that form the basis for his current claims have been available since respondent's trial in 2003 and have been known in significant part to respondent's current counsel since at least May 2017, and yet respondent waited to assert those claims until more than a month after his execution date was set in July 2019. Finally, as noted above, the public interest in the enforcement of criminal judgments weighs against entry of a stay as well.

A. Respondent Cannot Establish A Likelihood Of Success On The Merits

As the court of appeals recognized in affirming the district court's decision here, Section 2255(e) bars respondent's attempt to use an application for a writ of habeas corpus to assert claims of ineffective assistance of counsel during his trial more than 16 years ago. See App., infra, 13a-25a. Respondent has not identified, and counsel for the government is not aware of, any decision of any court allowing a federal prisoner to pursue habeas relief under comparable circumstances. And no substantial likelihood exists that the en banc Seventh Circuit or this Court will do so in this case.

Congress enacted Section 2255 in 1948 in order to make federal postconviction challenges more efficient by requiring federal prisoners to bring such challenges in the district of their conviction rather than the district in which they happened to be confined. See United States v. Hayman, 342 U.S. 205, 210-219 (1952) (discussing the legislative impetus for enactment of Section 2255). A half-century later, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1220, Congress sought to further streamline such federal postconviction challenges by imposing a one-year statute of limitations (generally running from the date that a prisoner's conviction becomes final) and barring second or successive challenges outside of certain narrowly drawn scenarios

inapplicable here. See 28 U.S.C. 2255 (Supp. II 1996). In order to ensure that federal prisoners do not circumvent the Section 2255 framework specifically enacted for federal postconviction challenges by instead seeking relief under the general federal habeas statute, 28 U.S.C. 2241, Congress has also provided since 1948 that a federal prisoner who could seek -- or has sought -- relief by motion under Section 2255 may not instead pursue an application for a writ of habeas corpus under Section 2241. See 28 U.S.C. 2255(e).

Section 2255(e) allows a federal prisoner to pursue relief under Section 2241 only in a circumstance where he can show "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality" of his conviction or sentence. 28 U.S.C. 2255(e). As the court of appeals recognized, however, the saving clause of Section 2255(e) is "narrow," and respondent's claims do not come within it. App., infra, 13a.[2] "It is not enough that proper use of [a Section 2255 motion] results in denial of relief," id. at 20a, for then a prisoner could always resort to Section 2241 whenever the deliberate limitations in Section 2255 block the

[2] The government has argued that the court of appeals' prior decisions take an overly expansive view of Section 2255(e)'s saving clause, in at least certain respects. See Pet. at 14-25, United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420). And in this case, even the court of appeals' view does not allow for resort to Section 2241 -- as the court itself recognized. Nor has respondent identified any other circuit whose precedent would.

prisoner's claim. Instead, at the very least, a prisoner must make "a compelling showing that, as a practical matter, it would be impossible to use section 2255 to cure a fundamental problem." Ibid. No such showing can be made with respect to the ineffective assistance claims that respondent seeks to assert here, because respondent would have been free to bring those claims in his motion under Section 2255 -- he just failed to do so (asserting instead 17 other ineffective assistance claims). See id. at 20a-21a.

Respondent nevertheless contends that Section 2255 was "inadequate or ineffective" for him because his counsel in the Section 2255 proceedings initiated in 2007 (who was different from his trial and direct appeal counsel) failed to identify and assert his present claims. See App., infra, 20a-21a. But as the court of appeals put it, "how far are we supposed to take that?" Id. at 21a. Allowing federal prisoners to escape Section 2255(e)'s limitations on second or successive claims merely by alleging that their earlier postconviction counsel had been ineffective for failing to raise the claims they now wished to bring would generate "a never-ending series of reviews and re-reviews" -- exactly what the limits in Section 2255 are intended to prevent. Ibid.

In the courts below, respondent sought to overcome this difficulty by observing that in Martinez v. Ryan, 566 U.S. 1 (2012) and Trevino v. Thaler, 569 U.S. 413 (2013), this Court held that otherwise-applicable procedural default rules can sometimes be

overcome where state prisoners did not receive the effective assistance of counsel in their state post-conviction proceedings, even though prisoners have no constitutional right to counsel in such proceedings, see, e.g., Coleman v. Thompson, 501 U.S. 722, 752 (1991). As the court of appeals recognized, however, Martinez and Trevino are fundamentally different from this case because they established exceptions to judicially created rules of "federal common law," whereas the bar applicable here "is governed by statutes" -- namely, Section 2255(e)'s general preclusion of challenges to federal convictions and sentences through a Section 2241 habeas application. App., infra, 25a. While "judge-made * * * doctrines, even if flatly stated at first, remain amenable to judge-made exceptions," "a statutory * * * provision stands on a different footing." Ross v. Blake, 136 S. Ct. 1850, 1857 (2016) (refusing to create judicial exceptions to the mandatory exhaustion requirement of the Prison Litigation Reform Act of 1995). "There, Congress sets the rules -- and courts have a role in creating exceptions only if Congress wants them to." Ibid.

Nothing suggests Congress wanted courts to allow extra-textual exceptions to Section 2255(e) for defendants who claim not to have received the effective assistance of counsel in earlier postconviction proceedings. And respondent has not identified any court that has ever held otherwise. It is thus exceedingly unlikely that either the en banc Seventh Circuit or this Court

would hold that respondent's application for habeas relief should proceed. See Lee, 2020 WL 3888196, at *2 (describing such a position as "frivolous"). Accordingly, respondent cannot establish the substantial likelihood of success necessary to support issuance of a stay. See Hill, 547 U.S. at 584.

B. Equitable Considerations Weigh Against Entry Of A Last-Minute Stay

Equitable considerations also weigh strongly against entry of a stay in this case. This Court has held that "[a] court considering a stay must * * * apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" Hill, 547 U.S. at 584 (quoting Nelson v. Campbell, 541 U.S. 637, 650 (2004)). That equitable presumption should be particularly strong in a case, like this one, where the prisoner is seeking to circumvent statutory limitations enacted to streamline postconviction challenges and thereby prevent delays in the execution of capital judgments occasioned by last-minute litigation. See pp. 19-23, supra.

The court of appeals addressed this factor only indirectly, observing that after the government issued a notice on July 25, 2019 setting respondent's execution date, respondent "los[t] no time * * * fil[ing] a detailed petition under" Section 2241. App., infra, 9a. But if the court meant to suggest that this fact

should weigh in respondent's favor, it was mistaken. All of the ineffective-assistance claims at issue here stem from respondent's original 2003 trial. Indeed, the factual basis underlying one of the alleged errors was, as the court of appeals itself put it, "apparent to everyone from the minute the jury returned its verdict." App., infra, 23a. The factual basis for another one of the claims -- concerning trial counsel's failure to object to the seating of one of the jurors -- is set out in a sworn affidavit signed in May 2017, more than two years before respondent filed his habeas application. D. Ct. Doc. 23-36, at 1170-1172 (Sept. 12, 2019).

Even where a federal prisoner identifies new evidence that persuasively establishes his factual innocence of the charged offense -- one of the narrow circumstances in which Section 2255 would indeed permit a successive collateral attack, see 28 U.S.C. 2255(h)(1) -- Congress has required that he assert any "claim or claims" based on that evidence within 1 year of "the date on which the facts * * * could have been discovered through the exercise of due diligence," 28 U.S.C. 2255(f)(4). Here, however, respondent did not act with any such expedition or diligence. Instead he filed his more-than-200-page habeas application and nearly 3000-page appendix -- asserting claims based on information his counsel had obtained years earlier -- only after an execution date had been set. See D. Ct. Docs. 1, 23.

Had respondent filed his application when he first had notice of the factual basis for those claims, the application would have run its course by now. Having instead filed only after the scheduling of his execution, respondent has no equitable right to demand that his execution be further delayed. See Hill, 547 U.S. at 584.

C. The Public Interest Weighs Against A Stay

Finally, in considering the public interest, see Nken, 556 U.S. at 434, this Court has repeatedly emphasized in the context of state executions that "'[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a sentence.'" Bucklew, 139 S. Ct. at 1133 (quoting Hill, 547 U.S. at 584); see, e.g., Nelson, 541 U.S. at 650 (describing "the State's significant interest in enforcing its criminal judgments"); Gomez v. District Court, 503 U.S. 653, 654 (1992) (per curiam) (noting that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment").

The court of appeals' entry of a stay frustrates that interest. In doing so, it contravenes not only general equitable principles, but also the policies Congress has embedded in the very statutes at issue here. As discussed above, see pp. 19-24, supra, Congress refined Section 2255 specifically to prevent untimely, successive claims that collaterally attack final federal

sentences. That interest is just as strong in this case as in others. Although the government did not schedule respondent's execution until last year due to the careful but time-consuming process that the government undertook in revising the federal lethal injection protocol, see pp. 7-8, supra, treating that process as though it somehow undercut the public interest in carrying out respondent's sentence would improperly penalize the government -- and the public itself -- for acting conscientiously.

And insofar as the court of appeals placed a thumb on the scales in favor of delaying the implementation of capital sentences, see App., infra, 26a, that approach is incompatible with the importance this Court has placed on "the timely enforcement of a sentence." Bucklew, 139 S. Ct. at 1133 (citation omitted); see Barr v. Roane, 140 S. Ct. 353, 353 (2019) (expecting court of appeals to act with "appropriate dispatch" in resolving capital case). If a court is unwilling to allow an execution to go forward even after it has determined that a prisoner's claim cannot succeed, the public will never obtain the "assurance of real finality" that this Court's cases -- and Section 2255 itself -- promote. Calderon v. Thompson, 523 U.S. 538, 556 (1998).

CONCLUSION

This Court should vacate the court of appeals' stay of execution in order to allow respondent's execution to proceed as scheduled on July 15, 2020.

Respectfully submitted.

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