CAPITAL CASE
EXECUTION SCHEDULED – JULY 15, 2020

No. 20A4

IN THE

Supreme Court of the United States

T.J. WATSON, WARDEN OF USP TERRE HAUTE,
UNITED STATES OF AMERICA,

Applicants,

v.

WESLEY IRA PURKEY,

Respondent.

OPPOSITION TO APPLICATION TO VACATE STAY OF EXECUTION

Wesley Purkey is scheduled to be executed on July 15, 2020. On July 2, 2020, a unanimous panel of the Seventh Circuit (Wood, Brennan, St. Eve, JJ.) issued a temporary stay of that execution, "to permit the orderly conclusion of the proceedings in th[at] court." App. 26a.[1] As the court "emphasized," Mr. Purkey has raised "at least two" claims of ineffective assistance of trial counsel that "are worthy of further exploration," but have never been considered by any court. *Id.* The court further concluded that absent a stay, Mr. Purkey stands to suffer "categorically irreparable injury—death," that a "brief stay to permit the orderly conclusion of the proceedings in th[at] court will not substantially

[1] The Appendix appended to Government's Application To Vacate Stay Of Execution Issued By The United States Court of Appeals for the Seventh Circuit will be cited herein as "App." The Application itself will be cited as "Mot."

harm the government, which has waited at least seven years to move forward on Purkey's case," and that "the public interest is surely served by treating this case with the same time for consideration and deliberation that [the court] would give any case." App. 26a-27a. The court also recognized that its reading of the relevant statute might be "too restrictive," and so allowed for the possibility that the full Seventh Circuit might reverse the panel's holding. App. 26a. Accordingly, the court entered a brief stay, that "will expire upon the issuance of [the Seventh Circuit's] mandate or as specified in any subsequent order that is issued." App. 27a.

At approximately 2 a.m. on July 4, 2020, the Government—apparently dissatisfied with the Seventh Circuit's considered judgment that a brief stay of execution serves the interests of justice—filed an "emergency" petition requesting that the Seventh Circuit summarily vacate the decision a unanimous panel issued merely two days earlier. The so-called "emergency" purportedly justifying this extraordinary request is the Government's professed need to execute Mr. Purkey on July 15 and not a day later—despite having previously waited *over seven years* to schedule an execution date in Mr. Purkey's case, and despite the fact that proceedings before the Seventh Circuit remained ongoing.

Rather than wait for the Seventh Circuit to rule on its petition, the Government now comes to this Court requesting vacatur of the stay, in a desperate attempt to short-circuit the appellate process and execute Mr. Purkey before his claims have been duly considered. The Government's extraordinary motion comes nowhere close to satisfying the high bar for justifying vacatur of a temporary, discretionary stay. The Government's request should be denied.

BACKGROUND

Mr. Purkey was convicted and sentenced to death in federal court in Missouri in 2003 and 2004. He was tried before a jury that included a juror presumed biased as a matter of law because she had been the victim of a similar crime at the same age, and bore the same name, as the victim in Mr. Purkey's case. Although that juror (Juror 13) disclosed this information on her juror questionnaire, Mr. Purkey's trial counsel failed to object to her being seated or even to question her about her potential bias. Then during the penalty phase, trial counsel presented a meager mitigation case, the result of a halfhearted investigation that failed to collect information about generations of important family history and extensive physical and sexual abuse that Mr. Purkey suffered while at home, school, and church at the hands of his parish priest.

In October 2007, Mr. Purkey brought a challenge to his conviction and sentence under 28 U.S.C. § 2255. There, his counsel raised none of these issues. In short, Mr. Purkey's § 2255 counsel provided ineffective assistance.

Because of the ineffective assistance of his trial and § 2255 counsel, the first time Mr. Purkey brought his claims of ineffective assistance of trial counsel to the attention of any court was in August 2019, when he petitioned for habeas corpus under 28 U.S.C. § 2241 in the Southern District of Indiana, where he is confined. The petition challenged Mr. Purkey's conviction and sentence on several grounds, including that he had received ineffective assistance of trial counsel because trial counsel failed to strike an impliedly biased juror and failed to present critical mitigation evidence.

The district court denied the petition in November 2019, concluding that it was barred by § 2255(h), which generally prohibits the filing of "second or successive" federal

habeas petitions. *See* App. 52a, 54a. The court further held that the Savings Clause codified in § 2255(e) was not available to Mr. Purkey. Even if Mr. Purkey's initial § 2255 counsel was constitutionally ineffective, the court reasoned, that would not render the initial § 2255 proceedings "inadequate or ineffective" to test the legality of Mr. Purkey's detention within the meaning of the Clause. *See* App. 50a-54a. In reaching that conclusion, the district court distinguished *Martinez* v. *Ryan*, 566 U.S. 1 (2012), and *Trevino* v. *Thaler*, 569 U.S. 413 (2013), where the Court held that procedural default does not bar federal habeas review of a state prisoner's substantial claims of ineffective assistance of trial counsel when that default was the result of ineffective assistance of initial-review collateral counsel. Those decisions, the district court said, did not "involve the Savings Clause" and therefore were "not controlling." App. 48a.

Meanwhile, in July 2019—a decade and a half after Mr. Purkey's conviction and sentence—the Government for the first time set a date for his execution (for December 2019) under a newly announced federal lethal-injection protocol.[2] In November 2019, the U.S. District Court for the District of Columbia preliminarily enjoined his execution (and three others) under the new protocol. *See* Mem. Op., *Roane* v. *Barr*, No. 19-mc-145 (D.D.C. Nov. 20, 2019), Dkt. #50. The Government appealed and, on April 7, 2020, a divided panel of the U.S. Court of Appeals for the D.C. Circuit vacated the injunction. *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois* v. *Barr*, No. 19-1348, 2020 WL 3492763 (U.S. June 29,

[2] Press Release No. 19-807, *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse* (July 25, 2019), https://bit.ly/2Z8y8Qg.

2020). The D.C. Circuit's mandate issued on Friday, June 12, and on Monday, June 15—the day before the Seventh Circuit argument in Mr. Purkey's § 2241 appeal—the Government scheduled Mr. Purkey's execution for four weeks later, on July 15, 2020.

On July 2, 2020, the Seventh Circuit affirmed the district court's dismissal of Mr. Purkey's § 2241 petition. The court recognized that a federal prisoner who receives ineffective assistance of § 2255 counsel is functionally in the same position as the state prisoners in *Martinez* and *Trevino*. But unlike for those state prisoners, the court stated that "the availability of further relief … is not a simple matter of federal common law," but is instead "governed by statutes." App. 25a. To benefit from the Savings Clause, the court wrote, "there must be a compelling showing that, as a practical matter, it would be *impossible* to use section 2255 to cure a fundamental problem." App. 20a (emphasis added). Mr. Purkey could not make that showing, the court concluded, because at the time he filed his § 2255 petition "nothing *formally* prevented him from raising each of the … errors he now seeks to raise in his petition under [§] 2241." *Id.* (emphasis added).

Although the court held against Mr. Purkey on the availability of the Savings Clause, it granted Mr. Purkey's request for a stay of execution "to permit the orderly conclusion of the proceedings" in the Seventh Circuit. App. 26a-27a. The court noted that the underlying claims of ineffective assistance of trial counsel raised by Mr. Purkey's petition were "serious"—specifically, those concerning Juror 13 and the inadequate mitigation case—and that it was "troubling" that no court had ever considered those claims. App. 20a, 22a, 25a. The court emphasized, moreover, that it had "rejected" Mr. Purkey's ineffective assistance claims "not on the merits, but because of [its] understanding of the safety valve language" of § 2255(e). App. 26a. And the court

recognized that if its "reading of the safety valve [was] too restrictive, there would be significant issues to litigate." *Id.* For that reason—and in recognition that Mr. Purkey satisfied the relevant four-factor test—the court issued a brief stay of execution that would expire upon the issuance of its mandate or until a time set forth in a subsequent order. App. 26a-27a.

Less than 36 hours after the court issued its decision, at approximately 2 a.m. on July 4, the Government filed a petition for rehearing en banc seeking to immediately vacate the stay. On July 6, the Seventh Circuit issued an order directing Mr. Purkey to respond to the Government's petition by 12 p.m. on July 10, which Mr. Purkey did. Rather than wait for the Seventh Circuit to decide its petition, however, the Government—in another attempt to short-circuit the normal appellate process—filed another emergency motion with this Court on Saturday, July 11, now asking this Court to vacate the stay even while the full Seventh Circuit considers whether to grant the same relief, so that it can proceed with its chosen July 15 execution date.

ARGUMENT

The standard of review on an application to vacate a stay of execution is highly deferential. A stay of execution is an equitable remedy that lies within a court's discretion. *See Kemp* v. *Smith*, 463 U.S. 1321 (1983) (Powell, J., in chambers). Where, as here, the court of appeals has granted a stay of execution, "this Court generally places considerable weight on the decision reached by the courts of appeals." *Barefoot* v. *Estelle*, 463 U.S. 880, 896 (1983). "Only when the lower courts have clearly abused their discretion in granting a stay should [this Court] take the extraordinary step of overturning such a decision." *Dugger* v. *Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist,

C.J., dissenting); *see also Doe* v. *Gonzales*, 546 U.S. 1301, 1307, 1309 (2005) (Ginsburg, J., in chambers) (denying application to vacate stay entered by court of appeals "[a]lthough there is a question as to the likelihood of … success on the merits" because "the applicants have not shown cause so extraordinary as to justify this Court's intervention in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding" (internal quotation marks omitted)).

In considering whether to grant a stay of Mr. Purkey's execution, the Seventh Circuit considered: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." App. 26a (quoting *Nken* v. *Holder*, 556 U.S. 418, 434 (2009)). The court did not abuse its discretion in holding that these factors weighed in favor of a temporary stay.

I. THE SEVENTH CIRCUIT CORRECTLY CONCLUDED THAT MR. PURKEY'S SHOWING ON THE MERITS JUSTIFIES A BRIEF STAY

The Seventh Circuit panel correctly concluded that Mr. Purkey has raised at least two "significant issues" regarding the effectiveness of his trial counsel that he has not yet had an opportunity to litigate. App. 26a. This showing justifies the brief stay entered by the Seventh Circuit.

First, the court correctly found that trial counsel was ineffective in failing to object, or even to question, Juror 13. *See* App. 20a. Due to trial counsel's ineffectiveness on this score, a juror with the same name as the victim in Mr. Purkey's case who herself had been the victim of an attempted rape at the same age as the victim in Mr. Purkey's

case was seated on the jury that voted to convict Mr. Purkey and to send him to death. That juror was presumptively biased. *See Fuller* v. *Bowersox*, 202 F.3d 1053, 1056 (8th Cir. 2000); *Hunley* v. *Godinez*, 975 F.2d 316, 319 (7th Cir. 1992) (per curiam). And "[t]he presence of a biased jury constitutes a fundamental, structural defect that affects the entire conduct of the trial." *United States* v. *Dale*, 614 F.3d 942, 960 (8th Cir. 2010); *see also Johnson* v. *Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992).

Second, the court agreed with Mr. Purkey that trial counsel "fail[ed] … to conduct a proper mitigation analysis." App. 26a. Trial counsel failed entirely to investigate the three years that Mr. Purkey was sexually abused by his parish priest, from age 11 to 13; the physical abuse, degradation, and humiliation that Mr. Purkey suffered at school; and Mr. Purkey's family history of, and genetic vulnerability to, neurodegenerative disease, PTSD, substance abuse, and addiction. That trial counsel presented other mitigating evidence does not end the inquiry, because "counsel's effort to present *some* mitigation evidence" does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears* v. *Upton*, 561 U.S. 945, 955 (2010) (per curiam).

That prejudice inquiry is worthy of particularly careful examination in Mr. Purkey's case, given that the Seventh Circuit observed that it was "disturbed that the jury left blank the spaces on the verdict form for its consideration of Purkey's many trial arguments in mitigation, and that trial counsel did not insist that the case be returned to the jury for completion of those blanks when he had the chance." App. 22a-23a. Because of these problems, the court noted, "it is hard to know whether" the jury actually fulfilled its obligation of "balanc[ing] aggravating and mitigating factors." App. 23a. Indeed, had

the jury "focus[ed] on mitigation, … it may have found some points in Purkey's favor"—"even based on only the trial evidence." *Id.* These concerns are all the more alarming given the wealth of evidence that trial counsel failed to investigate and resultingly never shared with the jury.

In affirming the denial of Mr. Purkey's § 2241 petition, the court made clear that it was not rejecting either of these two claims on the merits. App. 27a. To the contrary, the court appears to have agreed with Mr. Purkey's contention that these claims have at least "some merit," as that phrase is used in *Martinez*. For that reason, the court did not dispute that if he were a state prisoner proceeding under § 2254, Mr. Purkey likely would be permitted to assert these ineffective assistance of trial counsel claims. *See* App. 25a. The court ultimately concluded, however, that § 2255(e)'s Savings Clause demanded that federal prisoners be treated differently and did not permit Mr. Purkey to file a second habeas petition under § 2241 even if his post-conviction counsel had been ineffective. App. 26a.

Moreover, the Seventh Circuit recognized that § 2255(e) question was a difficult one that tested both Supreme Court and Seventh Circuit precedent in new ways, even suggesting that its reading of § 2255(e) might be "too restrictive." App. 26a. Mr. Purkey submits that the Seventh Circuit's reading of § 2255(e) was too restrictive—because it both contravenes this Court's decisions in *Martinez* v. *Ryan*, 566 U.S. 1 (2012), and *Trevino* v. *Thaler*, 569 U.S. 413 (2013), and is inconsistent with the Seventh Circuit's own precedent in *Ramirez* v. *United States*, 799 F.3d 845 (7th Cir. 2015). For that reason, contrary to the Government's assertions (Mot. 3-4, 12, 16-17), the full Seventh Circuit or

this Court *is* likely to reverse the panel decision, meaning that Mr. Purkey is likely to succeed on the merits of his appeal.

In *Coleman* v. *Thompson*, 501 U.S. 722 (1991), this Court held that an attorney's negligence does not constitute cause to excuse procedural default in state post-conviction proceedings. In *Martinez*, however, this Court recognized an equitable exception to that holding: The Court held that where, by virtue of the structure of a State's procedural framework, "claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at 17. The Court recognized that because many state-court systems "move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims" and that a defendant's constitutional right to counsel—a "bedrock principle in our justice system"—will be difficult, if not impossible, to vindicate "[w]ithout the help of an adequate attorney." *Id.* at 11-13. But the Court limited its holding to state jurisdictions where ineffective assistance claims are *required* to be raised during initial collateral proceedings rather than on direct appeal.

The following year, the Court granted certiorari in *Trevino* to clarify whether *Martinez*'s holding applied equally in jurisdictions where ineffective assistance of trial counsel claims were not prohibited outright during direct appeal proceedings, but where the state-court procedures made it "'virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim' on direct review."

Trevino, 569 U.S. at 423 (citations and brackets omitted). The Court held that it did. *See id.* at 428-429 (clarifying that *Martinez* also applies where the State's "procedural framework … makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise" a substantial claim of ineffective assistance of trial counsel on direct appeal). As in *Martinez*, in *Trevino* the Court focused on the centrality of the effective assistance of trial counsel to our criminal justice system and, correspondingly, the importance of permitting prisoners a meaningful opportunity to develop and present substantial claims of ineffective assistance of trial counsel. *See id.* at 422-423; *see also Davila* v. *Davis*, 137 S. Ct. 2058, 2066 (2017) ("[T]he Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel.").

A federal prisoner with substantial claims of ineffective assistance of trial counsel, who lacked effective assistance of initial-review collateral counsel, is in the exact same position as the state prisoners were in *Martinez* and *Trevino*. In the normal course, a federal prisoner first files a direct appeal, but the required timing for direct appeals under the federal rules precludes bringing an adequately developed claim of ineffective assistance of trial counsel. A § 2255 petition thus provides a federal prisoner's first real opportunity to raise claims of ineffective assistance of trial counsel. *See Massaro* v. *United States*, 538 U.S. 500, 508 (2003). Where that § 2255 proceeding is "undertaken … with ineffective counsel," however, it likely is not "sufficient to ensure that proper consideration was given to a substantial claim" of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 14. That is because, as recognized in *Martinez*, ineffective assistance of trial counsel claims are difficult if not impossible to mount "[w]ithout the

help of an adequate attorney," because "[c]laims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." *Id.* at 11-13. Congress recognized as much in ensuring that capital defendants (unlike most federal prisoners) have the right to counsel not only through trial and direct appeal, but also in post-conviction proceedings. 18 U.S.C. § 3599; *see Martel* v. *Clair*, 565 U.S. 648, 658-660 (2012). Yet, under the constraints of § 2255(h), that one initial proceeding is the only chance a federally death-sentenced prisoner will get to present substantial claims of ineffective assistance of trial counsel. The principles this Court articulated in *Martinez* and *Trevino* instruct that such prisoners be given the opportunity to raise such claims in a second petition pursuant to §§ 2241 and 2255(e).

In this regard, a § 2255 proceeding in which a federal capital prisoner receives ineffective assistance of counsel is structurally "inadequate or ineffective" to test the legality of his conviction and sentence.[3] Under those circumstances, because § 2255 counsel was ineffective, the prisoner is denied "an *opportunity* to bring his argument," and thus the "'*remedy* by motion'" under § 2255 is "'inadequate or ineffective'" to test the legality of his detention. *Prost* v. *Anderson*, 636 F.3d 578, 584-585 (10th Cir. 2011) (Gorsuch, J.). This is not to say that because the prisoner was denied *relief*, § 2255 is

[3] The Government asserts that Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) forecloses Mr. Purkey's claim. *See* Mot. 19-21. To the contrary, in enacting AEDPA, Congress restricted the availability of "second or successive" habeas petitions under § 2255 to situations where the movant can point to either "newly discovered evidence" that would undermine his conviction, or a new, retroactive "rule of constitutional law … that was previously unavailable." 28 U.S.C. § 2255(h). But, in doing so, Congress did not alter the Savings Clause of § 2255(e)—an implicit acknowledgment that § 2241 would be available in some cases other than the two narrow circumstances identified in § 2255(h). AEDPA thus cuts in Mr. Purkey's favor.

inadequate or ineffective. Rather, it is the denial even of an *opportunity* to present substantial claims of ineffective assistance of trial counsel that renders the *remedy* inadequate or ineffective to test the legality of the conviction and sentence. *See id.* Indeed, under those circumstances (as here), *no* court will ever review the prisoner's substantial claims of ineffective assistance of trial counsel before he is put to death. For that reason, the Seventh Circuit's conclusion that to benefit from the Savings Clause in § 2255(e), "there must be a compelling showing that, as a practical matter, it would be *impossible* to use section 2255 to cure a fundamental problem"—and that ineffective assistance of § 2255 counsel does not create such an impossibility—is incorrect. App. 20a (emphasis added). Under those circumstances, raising substantial claims of ineffective assistance of trial counsel is—for all practical purposes—impossible. Accordingly, the principles this Court articulated in *Martinez* and *Trevino* require that such prisoners be given the opportunity to raise such claims in a petition under § 2241.

For much the same reasons, the panel's decision conflicts with the Seventh Circuit's own precedent. In *Ramirez*, the Seventh Circuit held that a federal prisoner who receives ineffective assistance of initial-review collateral counsel may use Federal Rule of Civil Procedure 60(b) to reopen his § 2255 proceedings to press substantial claims of ineffective assistance of trial counsel. The court explained:

> Because the federal courts have no established procedure … to develop ineffective assistance claims for direct appeal, the situation of a federal petitioner is the same as the one the Court described in *Trevino*: as a practical matter, the first opportunity to present a claim of ineffective assistance of trial or direct appellate counsel is almost always on collateral review, in a motion under section 2255.

799 F.3d 853. The court found there was "no reason to distinguish between actions at the state level that result in procedural default and the consequent loss of a chance for federal review, and actions at the federal level that similarly lead to a procedural default that forfeits appellate review" and thus the holdings of *Martinez* and *Trevino* "'apply to all collateral litigation under 28 U.S.C. § 2254 or § 2255.'" *Id.* at 852, 854.

Ramirez stands in direct conflict with the panel's decision here. *Ramirez* recognized, in no uncertain terms, that the principles underlying *Martinez* and *Trevino* apply to federal prisoners. Applying those principles, it unavoidably follows that where a federal prisoner is denied meaningful review of his substantial claims of ineffective assistance of trial counsel because of ineffective assistance of collateral counsel, he was denied an *opportunity* to bring those claims and § 2255 is "inadequate or ineffective" to test the legality of his conviction and sentence. This intra-circuit conflict makes it particularly likely that the Seventh Circuit will reverse the panel's decision here.[4]

All told, then, the Seventh Circuit here concluded that Mr. Purkey's underlying claims had merit but were jurisdictionally unavailable due to a close question of first impression involving the interaction between multiple statutory provisions and lines of

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[4] The Government argues that it is "exceedingly unlikely that … the en banc Seventh Circuit … would hold that [Mr. Purkey's] application for habeas relief should proceed" because another panel of the Seventh Circuit denied another federal capital prisoner's request for a stay of execution. Mot. 15, 22-23 (citing *Lee* v. *Watson*, No. 19-3318, 2020 WL 3888196, at *2-*3 (7th Cir. July 10, 2020)). However, the *Lee* panel was bound by the panel's decision in this case and thus was not free to hold otherwise absent a contrary ruling from the Seventh Circuit en banc, as the Government appears to concede. *See* Mot. 15 (noting that "another Seventh Circuit panel [was] *applying the decision below* to a separate but '*indistinguishable*' Section 2241 case" (emphases added)). The *Lee* decision simply has no bearing on whether the full Seventh Circuit is likely to reverse the panel's decision here.

judicial precedent. Under those circumstances, it was well within the Seventh Circuit's discretion to enter a temporary stay of execution to permit Mr. Purkey to seek further review in that court. In any event, the en banc Seventh Circuit or this Court is likely to reverse the panel's decision that § 2241 is unavailable to Mr. Purkey, which is sufficient to establish a likelihood of success on the merits.

II. THE SEVENTH CIRCUIT CORRECTLY CONCLUDED THAT MR. PURKEY WILL SUFFER IRREPARABLE HARM ABSENT A STAY

As the Seventh Circuit correctly found, irreparable harm is indisputably present when a stay of execution is sought. *See* App. 26a (absent a stay, "Purkey faces categorically irreparable injury—death"). That conclusion is consistent with this Court's precedent, which instructs that "death is different"—"execution is the most irremediable and unfathomable of penalties." *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.); *see also Wainwright* v. *Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.").

The fact that, absent a stay, Mr. Purkey will be executed without any court ever having heard his substantial claims of ineffective assistance of trial counsel only supports the finding of irreparable harm. *See* App. 20a, 22a, 25a (characterizing Mr. Purkey's underlying claims of ineffective assistance of trial counsel as "serious" and noting that it found "troubling" that no court had ever considered those claims).

III. THE SEVENTH CIRCUIT CORRECTLY CONCLUDED THAT THE EQUITABLE FACTORS FAVOR A STAY

As the Seventh Circuit correctly found, contrary to the irreparable harm Mr. Purkey would suffer absent a stay, a stay would "not substantially harm the government, which has waited at least seven years to move forward on Purkey's case." App. 26a-27a. The Government in fact did not proceed with *any* federal executions during that time period while they revised their lethal-injection protocol, including six years when they were purportedly engaged in the "final phases of finalizing th[at] protocol." Status Report, *Roane* v. *Gonzales*, No. 05-cv-02337 (D.D.C. July 3, 2013), Dkt. #323. "[T]hat the government has not—until now—sought to" schedule Mr. Purkey's execution "undermines any urgency surrounding" its need to do so, and supports the notion that it will not be harmed if the execution is stayed for a brief period of time to permit the appellate process to play out. *Osorio-Martinez* v. *Attorney General of United States*, 893 F.3d 153, 179 (3d Cir. 2018).

Yet, despite its lengthy, self-imposed delay, the Government is now in a rush. In July 2019, it announced a new execution protocol—after, again, having no protocol in place for years—and simultaneously set Mr. Purkey's execution for December 2019. Before that execution could take place, a D.C. district court enjoined Mr. Purkey's execution—an injunction that was in effect until June 12. Then on the first business day after that injunction was lifted (June 15), the Government *immediately* moved to set a new execution date merely one month out—even though oral argument was scheduled in this case for one day later, on June 16, making it impossible for the appellate process to proceed before the Seventh Circuit in the ordinary course. Then, when the Seventh

Circuit granted a brief stay of Mr. Purkey's execution, the Government filed a motion within 36 hours, on a federal holiday, seeking to summarily vacate that stay so that it could execute Mr. Purkey before his claims were finally adjudicated. And before the Seventh Circuit had the opportunity to rule on that motion, the Government—again, in an effort to circumvent the normal appellate process—now seeks emergency relief from this Court. This conduct does not serve the public interest and is not justified by the Government's "significant interest in enforcing its criminal judgment." *Nelson* v. *Campbell*, 541 U.S. 637, 649-650 (2004). Rather, to borrow the Seventh Circuit's words, "the public interest is surely served by treating this case with the same time for consideration and deliberation that [the Court] would give any case." App. 27a. And the fact that "the death penalty is involved is no reason to take short-cuts—indeed, it is a reason not to do so." *Id.*

Nonetheless, the Government asks to bypass any further judicial process because Mr. Purkey "did not act with … expedition or diligence" in filing his claims and instead engaged in "last-minute litigation." Mot. 23-24. As the panel found, that is not the case. *See* App. 9a (noting that Mr. Purkey "[l]os[t] no time" in filing his § 2241 petition). The execution date was set in July 2019, Mr. Purkey filed the § 2241 petition in August 2019, and the district court reached its decision in November 2019. The petition relies on evidence obtained through the very month of filing (August 2019). *See* Dist. Ct. App. 78-88 (Dkt. #23-5 at PageID# 3518-3528). The Government focuses—as it did before the Seventh Circuit—on an affidavit from May 2017 focusing on the Juror 13 issue. *See* Mot. 24. But the § 2241 petition contained seven other claims that Mr. Purkey pursued up until filing. The Government's unsupported statements to the contrary—that Mr. Purkey was

aware of the factual bases for his claims for years and nonetheless failed to act (*see* Mot. 24-25)—ignore the record and the motion papers before the panel.

The accusation that Mr. Purkey hurried to complete his § 2241 petition once his execution date was scheduled (Mot. 24) misses the point. Mr. Purkey and his § 2241 counsel pursued his claims while no execution was scheduled, but then hurried to complete the 221-page petition and 2,500-page appendix *by necessity* when the Government sprung a surprise new execution protocol and set an execution date for a few months later. Mr. Purkey and his counsel therefore have not "delayed unnecessarily"; they have diligently advanced his § 2241 claims, which could not "have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson*, 541 U.S. at 650. Nor did Mr. Purkey delay in seeking a stay from the Seventh Circuit—he sought a stay just two days after the new execution date was announced and four weeks before the scheduled execution.

As the Seventh Circuit panel recognized in granting the stay, this case presents substantial issues that merit the full Seventh Circuit's considered review. Whether and by what procedural mechanism federal capital prisoners who are in the analogous position of the state prisoners in *Martinez* and *Trevino—i.e.*, whose substantial claims of ineffective assistance of trial counsel were defaulted by ineffective § 2255 counsel—may press such claims in petitions brought pursuant to § 2241, is an important question on which the Seventh Circuit's views have not fully crystalized. Although the panel held against Mr. Purkey on the merits of that question, it recognized that its "understanding of the safety valve" may be "too restrictive," and if so "there would be significant issues to litigate." App. 26a.

Thoughtful resolution of the issue to be presented by Mr. Purkey's appeal is of increased importance now that the Government has—for the first time in nearly two decades—begun scheduling executions. There are nearly 60 prisoners on federal death row, some of whom may face the possibility of execution despite their having substantial claims of ineffective assistance of trial counsel that have never been reviewed by any court. As a result, the question of the availability of § 2241 will recur. The question takes on heightened importance in the Seventh Circuit. Because nearly all federal death row prisoners are incarcerated at U.S.P. Terre Haute and § 2241 petitions must be filed in the district where the prisoner is incarcerated, nearly all claims of this type must be brought in the Southern District of Indiana (where Terre Haute sits). That is all the more reason to permit the Seventh Circuit to consider these weighty issues in the ordinary course. This Court should not intervene to upset the Seventh Circuit's considered judgment that a brief stay is warranted.

CONCLUSION

The Government's request to vacate the stay entered by the Seventh Circuit should be denied.

Respectfully submitted.

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July 2020

CAPITAL CASE
EXECUTION SCHEDULED – JULY 15, 2020

CERTIFICATE OF SERVICE

I, Alan E. Schoenfeld, a member of the bar of this Court, hereby certify that on this 12th day of July, 2020, I caused all parties requiring service in this matter to be served with the accompanying Opposition to the Application to Vacate Stay of Execution by email to the address below:

JEFFREY B. WALL
ACTING SOLICITOR GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov

I further certify that paper copies will be submitted to the Court and served on all parties requiring service by overnight courier on July 13, 2020, per discussion with the Clerk's Office.

/s/ Alan E. Schoenfeld
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