CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDMUND ZAGORSKI,

Petitioner

vs.

TONY MAYS, Warden,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Deborah L. Williams
Federal Public Defender

* Paul R. Bottei
Assistant Federal Public Defender

Office of the Federal Public Defender
Southern District of Ohio
10 West Broad Street, Suite 1020
Columbus, Ohio 43215
(614) 469-2999

* Counsel Of Record

CONTENTS

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0242p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI,

Petitioner-Appellant,

v.

TONY MAYS, Warden,

Respondent-Appellee.

No. 18-6052

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:99-cv-01193—Aleta Arthur Trauger, District Judge.

Decided and Filed: October 30, 2018

Before: COLE, Chief Judge; COOK and GRIFFIN, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING AND REHEARING EN BANC AND ON MOTION FOR STAY OF EXECUTION: Paul R. Bottei, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Chief Judge Cole would adhere to his original dissent.

The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied

Further, the motion for stay of execution is also denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0241p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI,

Petitioner-Appellant,

v.

TONY MAYS, Warden,

Respondent-Appellee.

No. 18-6052

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:99-cv-01193—Aleta Arthur Trauger, District Judge.

Decided and Filed: October 29, 2018

Before: COLE, Chief Judge; COOK and GRIFFIN, Circuit Judges.

COUNSEL

ON BRIEF: Paul R. Bottei, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. John H. Bledsoe, OFFICE OF THE ATTORNEY GENERAL OF TENNESSEE, Nashville, Tennessee, for Appellee.

COOK, J., delivered the opinion of the court in which GRIFFIN, J., joined. COLE, C.J. (pp. 10–15), delivered a separate dissenting opinion.

OPINION

COOK, Circuit Judge. Edmund Zagorski, a Tennessee capital prisoner, appeals from the district court's denial of relief from judgment under Federal Rule of Civil Procedure 60(b), asserting that his impending execution, an intervening Supreme Court decision, and the merits of

three procedurally defaulted constitutional claims mandate equitable relief. Giving due deference to the district court's discretion in balancing the equities, we AFFIRM.

I.

Like most capital cases, this case presents a tangled procedural history. In 1984, a Tennessee jury convicted Edmund Zagorski of two first-degree murders and sentenced him to death. The Tennessee Supreme Court affirmed both the convictions and sentence on direct appeal. *State v. Zagorski*, 701 S.W.2d 808, 810 (Tenn. 1985).

After state courts denied all post-conviction relief, Zagorski petitioned a federal court for a writ of habeas corpus. Among numerous other claims, Zagorski alleged that his trial counsel was ineffective for failing to investigate an alternative suspect, that the trial court erred by improperly instructing the jury on the meaning of mitigating circumstances, and that the jury could not constitutionally impose the death penalty because prosecutors originally offered a plea deal for two life sentences. Finding all three arguments procedurally defaulted, the district court denied habeas relief, we affirmed, and the Supreme Court denied certiorari. *See Zagorski v. Bell*, 326 F. App'x 336 (6th Cir. 2009), *cert. denied*, 559 U.S. 1068 (2010).

In 2012, the Supreme Court decided *Martinez v. Ryan*, permitting ineffective assistance of counsel at initial-review collateral proceedings to establish cause for a prisoner's procedural default of an ineffective assistance claim at trial. 566 U.S. 1, 9 (2012); *see also Trevino v. Thaler*, 569 U.S. 413, 417 (2013). Zagorski returned to district court and moved for post-judgment relief under Federal Rule of Civil Procedure 60(b)(6). He alleged that a combination of *Martinez* and *Edwards v. Carpenter*, 529 U.S. 446 (2000), excused his procedural defaults, permitting him to litigate the merits of his underlying substantive claims. The district court denied all relief, but nonetheless granted a certificate of appealability. Certificate in hand, Zagorski appealed.

This court scheduled briefing, but with the date of his execution looming, Zagorski moved for a stay to permit full consideration of the merits of his Rule 60(b)(6) appeal. His concurrent requests for the stay in district and appellate court yielded contrary results: the district court denied Zagorski's motion, and a divided panel of this court granted it. Ultimately, the

Supreme Court vacated our stay. *Mays v. Zagorski*, No. 18A385, 2018 WL 4934191 (U.S. Oct. 11, 2018). A timely-issued reprieve from execution, however, provides this court the opportunity to take up the merits.

II.

The "catchall" provision in Rule 60(b)(6) vests courts with a deep reservoir of equitable power to vacate judgments "to achieve substantial justice" in the most "unusual and extreme situations." *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007). And with great power comes great responsibility; in deciding these motions, a district court must "intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in the light of all the facts." *McGuire v. Warden*, 738 F.3d 741, 750 (6th Cir. 2013) (citation omitted). Out of deference to this highly fact-bound process, this court asks not whether we think that Zagorski presented extraordinary circumstances warranting relief, but rather whether the district court abused its discretion in deciding that he did not. *See Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014).

III.

Zagorski submits that the district court incorrectly denied his Rule 60(b)(6) motion because it failed to consider the merits of three claims originally raised in his habeas petition: (1) his trial counsel ineffectively failed to fully investigate other suspects; (2) the trial court incorrectly instructed the jury on the meaning of mitigating circumstances in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978); and (3) his capital sentence violated *United States v. Jackson*, 390 U.S. 570 (1968), because the prosecution originally offered two life sentences in exchange for pleas of guilty to each murder before trial. Although the district court found all three claims procedurally defaulted on habeas review, Zagorski now argues that a combination of *Martinez* and *Edwards* overcomes all defaults. He also maintains that because this capital case involves "significant and substantial" constitutional claims that a court has never reviewed, the balance of the equities demands Rule 60(b)(6) relief. As did the district court, we evaluate each argument in turn.

A. Claims Raised on Habeas Review

Although the district court denied habeas relief on Zagorski's ineffective assistance of trial counsel claim, he contends that *Martinez* resuscitates it. In *Martinez*, the Supreme Court delineated a very narrow exception to the *Coleman* rule prohibiting a habeas petitioner from demonstrating cause for a procedural default by claiming ineffective assistance of trial counsel during state post-conviction proceedings. *Martinez*, 566 U.S. at 8; *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). But *Martinez* did not change a criminal defendant's constitutional rights; it merely adjusted the equitable rules as to when he might avail himself of federal statutory relief. *Wright v. Warden*, 793 F.3d 670, 672 (6th Cir. 2015). And like most of our sister circuits, we have determined that changes in decisional law alone do not establish grounds for Rule 60(b)(6) relief. *Abdur'Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015); *see also Miller v. Mays*, 879 F.3d 691, 698–99 (6th Cir. 2018). A petitioner must present something more than just the availability of statutory relief from which he was previously barred. Recognizing this, the district court rightly discounted this factor.

The district court also denied relief for Zagorski's procedurally defaulted *Lockett* and *Jackson* claims. In his Rule 60(b) motion, Zagorski took a new tack, arguing ineffective assistance because his trial counsel failed to object to both the jury instructions and the imposition of death. But these brand new ineffective assistance of counsel claims—presented for the very first time in this motion—are themselves procedurally defaulted. *See Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013). To excuse this default, Zagorski points to *Edwards*, which "require[s] a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim." 529 U.S. at 451. Thus, Zagorski argues, *Edwards* supports his contention that, under *Martinez*, the ineffective assistance of post-conviction counsel establishes the cause and prejudice to excuse the newly raised and procedurally defaulted ineffective assistance of trial counsel claims, which in turn overcomes the procedural bar to the original *Lockett* and *Jackson* claims that Zagorski raised in his habeas petition.

As the district court recognized, permitting a two-layer showing of cause to excuse the default of a substantive constitutional claim would detonate *Coleman*'s procedural default bar.

501 U.S. at 732. *Coleman* ensures state courts the first opportunity to correct any constitutional violations stemming from their own mistakes. *See id.* at 730–32. Zagorski's reading flouts the very principle of federalism that the Supreme Court took pains to protect, and would permit habeas petitioners to resurrect procedurally defaulted claims in a motion for Rule 60(b)(6) relief by newly invoking the phrase: "post-conviction counsel ineffectively failed to raise an ineffective assistance of trial counsel claim." We cannot read *Martinez* as the exception that swallows this rule. "If *Coleman*'s revetment is to be torn down, it is not for us to do it. Rather, we must follow the case which directly controls" and leave the Supreme Court to overrule its own decisions. *Hunton v. Sinclair*, 732 F.3d 1124, 1127 (9th Cir. 2013) (quotation omitted).

But even if we credited this expansive reading of *Martinez* and *Edwards*, we cannot address a habeas claim disguised as a motion for Rule 60(b) relief. The Supreme Court instructs us to construe a Rule 60(b) motion as a successive habeas petition if it "seeks to add a new ground for relief." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005); *see also Moreland v. Robinson*, 813 F.3d 315, 322–23 (6th Cir. 2016) ("A movant is not making a habeas claim when he seeks only to lift the procedural bars that prevented adjudication of certain claims on the merits. But he *is* making a habeas claim when he seeks to add a new ground for relief or seeks to present 'new evidence in support of a claim already litigated.'" (quoting *Gonzalez*, 545 U.S. at 531)). By now asserting ineffective assistance of trial counsel claims in an attempt to revive his *Lockett* and *Jackson* claims, Zagorski presents new constitutional bases for habeas relief.[1] Thus, he needed this court's authorization to pursue those claims. *Moreland*, 813 F.3d at 322 (citing 28 U.S.C. § 2244(b)(3)).

Although we need not address the merits, *see Sheppard v. Robinson*, 807 F.3d 815, 820 (6th Cir. 2015), we note that to prevail under 28 U.S.C. § 2244(b)(2)(A), Zagorski must show that each new ineffective assistance of trial counsel claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously

[1]The dissent suggests that Zagorski's newly-raised ineffective assistance of counsel argument presents a procedural hurdle and not a substantive claim. This cannot be true. Zagorski's theory of *Martinez* and *Edwards* permits us to reach the underlying *Lockett* and *Jackson* claims only through an ineffective assistance of trial counsel claim. This ineffective assistance of trial counsel claim raises substantive concerns about Zagorki's Sixth Amendment right to counsel. Thus, though the dissent correctly states that Zagorski seeks "to lift the procedural bars that prevented consideration of his *Lockett* claim," he attempts to do so with a substantive claim. Dissent at 13.

unavailable[.]" Because he relies on *Martinez*—an equitable rather than constitutional rule—he cannot. *See Moreland*, 813 F.3d at 326.

B. Other Equitable Factors

In addition to his *Martinez* arguments, Zagorski argues that his capital sentence and the merits of his constitutional claims present extraordinary circumstances warranting Rule 60(b)(6) relief, and that the district court abused its discretion when it concluded otherwise. We disagree.

"[E]ven in cases involving the death penalty, we must afford 'profound respect' to the finality interests stemming from our prior decision denying *habeas* relief." *Miller*, 879 F.3d at 700–01 (quoting *Sheppard*, 807 F.3d at 821). This does not mean that we ignore the "irreversible finality of [an impending] execution," or that we do not take seriously the Supreme Court's instruction that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Thompson v. Bell*, 580 F.3d 423, 444 (6th Cir. 2009) (quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963)). But as the district court recognized, impending capital punishment does not mandate Rule 60(b) relief, especially when the merits of Zagorski's defaulted claims do not support such an extraordinary remedy. *See Miller*, 879 F.3d at 701; *see also Gonzalez*, 545 U.S. at 535–36 (noting that habeas cases rarely present the appropriate circumstances for exercising a court's equitable authority under Rule 60(b)(6)).

Like the panel in *Miller*, we do not necessarily agree that our cases require us to consider the merits of Zagorski's underlying constitutional claims when evaluating whether the district court abused its discretion in balancing the equities and denying Rule 60(b)(6) relief. *See Miller*, 879 F.3d at 702–03. Neither a Third Circuit case, *Cox v. Horn*, 757 F.3d 113, 124–25 (3d Cir. 2014),[2] nor an entirely distinguishable Supreme Court case involving the denial of a certificate of

[2]The dissent relies on *Cox* to support adopting a "flexible, multifactor approach" that more seriously weighs changes in decisional law when balancing the equities for Rule 60(b)(6) relief. Yet the Third Circuit's more flexible approach presents a minority position within the circuits. *See* 12 J. Moore, Moore's Federal Practice §§ 60.48[5][b]–[c] (3d Ed. 2018). Most circuits—including our own—require something much more "extraordinary" than the change in a law that an appellant originally decided not to appeal, but now seeks to benefit from. *See Ackermann v. United States*, 340 U.S. 193, 202 (1950) ("Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within . . . Rule 60(b)(6).") And notably, none of the cases that the dissent cites ultimately granted a habeas petitioner Rule 60(b)(6) relief.

appealability and a substantive question as to whether a petitioner had received ineffective assistance of counsel, *Buck v. Davis*, 137 S. Ct. 759, 775–80 (2017), persuades us otherwise. Permitting appellants to evade habeas jurisdictional bars by raising the merits of a procedurally defaulted claim in a Rule 60(b)(6) motion could "expose federal courts to an avalanche of frivolous postjudgment motions." *Gonzalez*, 545 U.S. at 534–35. But *Miller* acknowledged that our cases presented some uncertainty as to the proper course of action, *see Wright*, 793 F.3d at 673–74, and assumed it appropriate to consider the merits to decide "whether it changes the balance of equities with respect to [the appellant's] Rule 60(b)(6) motion." 879 F.3d at 702. We do the same.

To prevail on his underlying ineffective assistance of trial counsel claim, Zagorski must show that trial counsel's alleged failure to investigate other suspects for the murders constituted deficient performance that resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because "there can be no finding of ineffective assistance of counsel without prejudice," *Phillips v. Bradshaw*, 607 F.3d 199, 216 (6th Cir. 2010), we look first to whether Zagorski shows "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Zagorski cannot satisfy this burden. He provided several statements to the police "implicat[ing] himself in the killings" along with "other mercenaries," but declined to identify any other individuals he claimed were involved. *Zagorski*, 701 S.W.2d at 811–12. As the district court explained, given the overwhelming evidence against Zagorski, a more thorough investigation of another suspect would not have reasonably been likely to affect the outcome of the trial.

Next, Zagorski's *Lockett* claim requires us to examine "whether the [allegedly unconstitutional] instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Significantly, a juror in a capital case may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. As the district court

noted, no such violation occurred here. When asked by the jury to define what constitutes a mitigating circumstance, the trial court stated:

> Mitigating circumstances are within your province, if there are any. You have heard the evidence of the case, and no additional evidence was produced at the sentencing hearing, so **you may consider all of the evidence that was presented in the entire case**. The law sets out certain mitigation circumstances which have no particular applicability in this case, **but you're not limited to those, so you can consider any mitigating circumstances that in your judgment would comply with the instructions given**.

Citing a dissent from a denial of certiorari to the Supreme Court, *Hodge v. Kentucky*, 568 U.S. 1056 (2012) (Sotomayor, J., dissenting), Zagorski takes exception with the trial court's follow-up, when the jury foreman requested a definition of "mitigating":

> Mitigating would mean any circumstance which would have a tendency to lessen the aggravation, which would have any tendency to — (Pause) — give a reason for the act, I cannot think of a better definition right now, except that it's opposed to aggravating and would have a tendency to lessen or tend — not "to", necessarily, but tend to justify, and to take away any of the aggravation of the circumstance.

But here, all the mitigating evidence Zagorski marshalled during his habeas petition had already been presented to the jury during the guilt phase of trial. *See Zagorski*, 701 S.W.2d at 810–11. The court had already instructed the jury that it could consider that evidence; its later instruction changed nothing.

Finally, Zagorski's claim under *United States v. Jackson* also necessarily fails. Zagorski asserts that because prosecutors offered him two life sentences if he pleaded guilty to the murders, imposing the death penalty after trial unconstitutionally burdened his rights to assert his innocence and demand a jury trial. But *Jackson* invalidated a sentencing provision in the Federal Kidnapping Act because it permitted a court to impose the death penalty on only those defendants who insisted on invoking their constitutional rights to plead not guilty and present their case to a jury. 390 U.S. at 582–83. It did not hold that prosecutors may not offer lesser sentences in exchange for a guilty plea in capital cases. *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 747 (1970). To the contrary, many Supreme Court cases repudiate such a notion, *see United States v. Mezzanatto*, 513 U.S. 196, 210 (1995), and specifically reinforce the teaching

that "a State may encourage a guilty plea by offering substantial benefits in return for the plea." *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978). Although plea bargaining certainly discourages a defendant from exercising his Fifth and Sixth Amendment rights, "the imposition of these difficult choices [is] . . . an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973).

IV.

Because the district court did not abuse its discretion when it decided that none of Zagorski's proposed equitable considerations merit relief from judgment under Rule 60(b)(6), we AFFIRM.

DISSENT

COLE, Chief Judge, dissenting. Zagorski's motion for relief rests on Rule 60(b)(6), which permits relief "only in exceptional or extraordinary circumstances[.]" *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (citations omitted). In denying Zagorski's motion, the district court held that *Martinez v. Ryan*, 566 U.S. 1 (2012), "is not an extraordinary circumstance warranting Rule 60(b)(6) relief." This finding is unobjectionable and accords with our precedent. But the Rule 60(b)(6) inquiry does not end with the determination that *Martinez* alone is insufficient to warrant relief, because Zagorski does not request relief based on *Martinez* alone. The combination of a change in decisional law, a meritorious underlying constitutional claim, and the irreversible finality of capital punishment warrants relief. In failing to fully consider the combined weight of these factors, the district court abused its discretion.

I.

Zagorski presents two claims of ineffective assistance of trial counsel. First, he claims that, "in violation of the Eighth Amendment and *Lockett v. Ohio*, 438 U.S. 586 (1978), the trial court erroneously defined 'mitigating evidence,' thereby precluding full consideration of mitigating evidence of the circumstances of the offense," and "trial counsel was ineffective in failing to object" to this constitutional violation. Second, he claims that "trial counsel failed to effectively show Jimmy Blackwell's involvement in these murders (for purposes of showing reasonable doubt at the guilt phase or residual doubt at sentencing)." Appellant Br. 10.

Zagorski concedes both claims were procedurally defaulted. But "counsel's ineffectiveness in failing properly to preserve the claim for review in state court" can suffice as "'cause' to excuse a procedural default" of a substantive claim. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). And "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. Taken together, Zagorski argues these holdings instruct that ineffective assistance of post-conviction counsel "supplies the 'cause' for the otherwise defaulted

cause argument that trial counsel was ineffective for failing to object, under *Lockett*, to the trial judge's instructions." Appellant Br. at 8.

In my view, Zagorski is correct. As the district court observed, our cases counsel against reading *Martinez* any more broadly than the Court intended. *See Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013). But unlike the claims at issue in *Hodges*, Zagorski's claims fall squarely within the scope of the *Martinez* exception—to "establish cause for [his] procedural default of a claim of ineffective assistance at trial" (trial counsel's failure to object to the Eighth Amendment violation), Zagorski presented a claim of "[i]nadequate assistance of counsel at initial-review collateral proceedings" (post-conviction counsel's failure to spot trial counsel's error). *Martinez*, 566 U.S. at 9. This court has long held that failure to object to constitutional violations or other clear legal errors can constitute ineffective assistance within the meaning of *Strickland*. *See, e.g.*, *McPhearson v. United States*, 675 F.3d 553, 559 (6th Cir. 2012); *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999). That trial counsel's error caused a substantive constitutional violation should not prohibit a criminal defendant from arguing his counsel's error constitutes ineffective assistance for *Martinez* and *Edwards* purposes.

Zagorski's reading of *Martinez* and *Edwards* is fully consistent with the reasoning underlying both cases. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court established the general rule that an attorney's mistake in a collateral proceeding where the defendant had no right to counsel does not establish cause for procedural default. But in *Martinez*, the Court carved out a "narrow exception" to that rule: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9.

In describing why the *Martinez* exception to the general rule was necessary, the Supreme Court explicitly recognized the relationship between *Martinez* and *Edwards*:

> A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Effective trial counsel preserves claims to be considered on appeal, see, *e.g.*, Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

Martinez, 566 U.S. at 12. Part of the reason the Court justified the need for the *Martinez* exception was its concern that ineffective trial counsel may fail to preserve claims for habeas review—exactly what happened to Zagorski.

The majority argues that "permitting a two-layer showing of cause to excuse the default of a substantive constitutional claim would detonate *Coleman*'s procedural default bar." Zagorski's approach would require this court to undertake a two-layer cause analysis to excuse procedural default. But the Supreme Court in *Edwards* contemplated this result. Justice Scalia, writing for the majority in *Edwards*, found that a claim of "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim," and that while such a claim "generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default,'" the procedural default of "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim" may "*itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim." 529 U.S. at 451–53. Thus, a two-layer showing is also consistent with Supreme Court precedent.

Determining whether a defendant's two sets of ineffective counsel warrant excuse of two instances of procedural default is necessarily a thorny undertaking, and it would not warrant Rule 60(b)(6) relief every time a defendant invokes a simple "phrase," as the majority suggests. Rather, the defendant will still have to overcome the unenviable hurdle of meeting the *Strickland* deficiency and prejudice requirements *and* the *Martinez* substantiality requirement before his motion would be granted. As the Third Circuit has held, where a defendant facing the death penalty "has navigated each twist of the habeas labyrinth" and "overcome every hurdle," "we may review the merits." *Richardson v. Superintendent Coal Twp. SCI*, No. 15-4105, 2018 WL 4701949, at *12 (3d Cir. Oct. 2, 2018). The same should be true in the context of a Rule 60(b)(6) motion.

Nor does Supreme Court precedent require us to construe Zagorski's claims as a successive habeas petition rather than a Rule 60(b) motion. As the majority notes, "[a] movant is not making a habeas claim when he seeks only to lift the procedural bars that prevented adjudication of certain claims on the merits. But he *is* making a habeas claim when he seeks to

add a new ground for relief or seeks to present 'new evidence in support of a claim already litigated.'" *Moreland v. Robinson*, 813 F.3d 315, 322–23 (6th Cir. 2016). Zagorski's claims clearly amount to the former—he is seeking to lift the procedural bars that prevented consideration of his *Lockett* claim on the merits by challenging the doubly-ineffective assistance that led to the procedural default at issue.

Martinez excuses procedural default of a claim that trial counsel was ineffective where a petitioner can make two showings: first, that his post-conviction counsel provided ineffective assistance, and second, that the underlying claim of ineffective assistance of trial counsel is a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 566 U.S. at 14. To establish ineffective assistance, a petitioner must satisfy *Strickland v. Washington*'s requirements of deficiency and prejudice. 466 U.S. 668, 687 (1984).

Zagorski showed that his post-conviction counsel's assistance was ineffective. Specifically, Zagorski presented evidence that his post-conviction counsel never recognized that trial counsel should have objected to the jury instruction under *Lockett*, which amounts to deficient performance under the *Strickland* analysis. *See Sims v. Livesay*, 970 F.2d 1575, 1580–81 (6th Cir. 1992) ("We discern no strategy in [counsel's action], only negligence.").

Zagorski's claim that his trial counsel was ineffective meets *Martinez*'s threshold of substantiality. There is at least "some merit" to his claim that trial counsel's failure to recognize and object to an unconstitutional jury instruction constitutes deficient performance. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.").

Zagorski's prejudice claim also has at least "some merit." Failure to object to the mitigation instruction could have prejudiced him in two ways. First, the instruction prevented jurors from considering as mitigating evidence that the victims were "armed, heavily intoxicated, drug dealers." Appellant Br. at 19. The district court was correct to reject any "suggestion that 'a defendant is less culpable if he murders a vile person.'" But a juror could have drawn other inferences—for example, that the victims were dangerous, and even if that did not "tend to

justify" the crime as the district court instructed, it contributed to the circumstances of the crime. *See Lockett*, 438 U.S. 586, 604 (holding that jurors must be permitted to consider "any of the circumstances of the offense" as mitigating evidence). These interpretations highlight why the lack of "individualized consideration of mitigating factors" is unconstitutional in capital cases: preventing the jury "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605–06. If the jury received the correct mitigating instruction and made the individualized consideration the Eighth Amendment requires, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Zagorski's briefing also contains a second, sufficiently "substantial" theory that bolsters his contention that counsel's deficiency prejudiced him. Zagorski's second ineffective assistance claim is premised on his attorney's failure to present mitigating evidence of another suspect. "The Tennessee Supreme Court has stated that residual doubt is a nonstatutory mitigating circumstance[.] Such evidence 'may consist of proof . . . that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase.'" *Sutton v. Bell*, 683 F. Supp. 2d 640, 715 (E.D. Tenn. 2010). If not for ineffective counsel, the jury would have received (a) evidence of another suspect's plot to kill the victim and (b) a jury instruction on mitigation broad enough to encompass the new evidence of an alternative suspect. With these two material changes in Zagorski's proceedings, the probability that at least one juror would not have imposed the death sentence is even greater. I would find Zagorski presented a sufficiently substantial *Martinez* claim to excuse his procedural default.

II.

"In determining whether extraordinary circumstances are present, a court may consider a wide range of factors," including "'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (citations omitted). The district court's abuse of discretion lies in its failure to fully consider the remaining factors that Zagorski put forth in addition to *Martinez*.

The district court acknowledged and dismissed Zagorski's other proposed factors at the end of its opinion, noting there had been "no 'dramatic[] shift,' or any shift at all, in any of the petitioner's other factors." But no such shift is required. A death sentence is itself an equitable factor that moves the needle in favor of granting Zagorski's motion for relief under Rule 60(b)(6). We have repeatedly embraced the "Supreme Court's admonition that '[c]onventional notions of finality ... have no place where life or liberty is at stake and infringement of constitutional rights is alleged.'" *See, e.g.*, *Miller v. Mays*, 879 F.3d 691, 700–01 (6th Cir. 2018) (quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963)). In considering Rule 60(b)(6) motions in capital cases, we have held that "the finality of the judgment against [a defendant] must be *balanced against the more irreversible finality of his execution*," in addition to any constitutional concerns the defendant raises. *Wright v. Warden, Riverbend Maximum Sec. Inst.*, 793 F.3d 670, 673 (6th Cir. 2015) (emphasis added); *see also Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014) (finding courts must consider "whether the capital nature of [the] case or any other factor might counsel that *Martinez* be accorded heightened significance … or provide a reason … for granting 60(b)(6) relief."). This balancing did not take place. Neither a defendant's "interest in avoiding the death penalty" *by itself* nor a "change in decisional law" *by itself* would create exceptional circumstances. *Miller*, 879 F.3d at 701; *Wright*, 793 F.3d at 672. But the combined weight of the shift in decisional law, the death sentence, and the meritorious *Martinez* claim creates an extraordinary circumstance that warrants granting Zagorski's Rule 60(b)(6) motion.

I would reverse the district court's order and grant Zagorski's motion for relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EDMUND ZAGORSKI,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 3:99-cv-01193**
	)	
WARDEN TONY MAYS,	)	**JUDGE TRAUGER**
	)	
Respondent.	)	

MEMORANDUM

The petitioner, Edmund Zagorski, was convicted and sentenced to death in 1984 for the murders of Dale Dotson and Jimmy Porter. He has been denied relief in direct appeal, post-conviction, and federal habeas proceedings. *See Zagorski v. Bell*, 326 F. App'x 336 (6th Cir. 2009) (summarizing procedural history and affirming the denial of habeas relief). On February 25, 2013, the petitioner filed a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b), in which he asserted that the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), entitled him to consideration of the merits of three habeas claims that this court had previously rejected as procedurally defaulted. (Doc. No. 212.) The parties disputed whether *Martinez* and a subsequent case that expanded the jurisdictions in which it might apply, *Trevino v. Thaler*, 569 U.S. 413 (2013), applied in Tennessee, and, if so, whether they provided a basis for reconsidering judgment under Rule 60(b). (*See* Doc. No. 228.) Because those questions had divided the district courts within the Sixth Circuit and were then on appeal before the United States Court of Appeals for the Sixth Circuit, the court invited the parties to address whether the interests of fairness and judicial economy warranted staying the petitioner's motion until the Sixth Circuit ruled on them. (Doc. No. 228.) The petitioner favored a stay, while the respondent

opposed it. (Doc. Nos. 229–31.) On September 25, 2013, the court stayed this matter "pending clarification by the Sixth Circuit Court of Appeals on issues pertinent hereto." (Doc. No. 232.)

The petitioner moved to lift the stay and for relief on his Rule 60(b) motion on June 11, 2018, relying on his 2013 briefs. (Doc. No. 233.) On July 11, 2018, the court granted the motion in part by lifting the stay, but ordered both parties to submit amended briefs in light of the intervening developments in applicable caselaw and specifically ordered that the "briefs should address applicable precedent concerning whether *Martinez* is a proper basis for Rule 60 relief." (Doc. No. 235.) Both parties have now filed their briefs, and the petitioner's motion is ripe for review. (Doc. Nos. 241–43.)

I. STANDARD OF REVIEW

Rule 60 of the Federal Rules of Civil Procedure allows for revisions to a district court's judgment when necessary to correct a clerical mistake or for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;
(2) Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) The judgment is void;
(5) The judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) Any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The petitioner does not allege any mistake, excusable neglect, newly discovered evidence or other grounds for relief under Rule 60(b)(1)–(5). Instead, he relies on Rule 60(b)(6)'s "any other reason that justifies relief" as a basis for his motion. (Doc. No. 241 at 1.)

A movant seeking relief pursuant to this "catch-all" provision faces an exceedingly high burden:

> Even stricter standards are routinely applied to motions under subsection (6) of Rule 60(b) than to motions made under other provisions of the rule. Indeed, relief may be granted under Rule 60(b)(6) "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (citations omitted). "Courts . . . must apply subsection (b)(6) only as a means to achieve substantial justice when something more than one of the grounds contained in Rule 60(b)'s first five clauses is present." *Id.* (citations and internal quotation marks omitted). "The 'something more' . . . must include unusual and extreme situations where principles of equity mandate relief." *Id.* (emphasis in original).

Stokes v. Williams, 475 F.3d 732, 735 (6th Cir. 2007). Reopening a final judgment is not favored, and the extraordinary circumstances required by this rule "will rarely occur in the habeas context." *Gonzales v. Crosby*, 545 U.S. 524, 535 (2005). Factors to consider in the "case-by-case inquiry" required by Rule 60(b)(6) motions include the risk of injustice to the parties, the interest in the finality of judgments, and the risk of undermining public confidence in the judicial process. *Miller v. Mays*, 879 F.3d 691, 698 (6th Cir. 2018) (quoting *West v. Carpenter*, 790 F.3d 693, 697 (6th Cir. 2015), and *Buck v. Davis*, 137 S. Ct. 759, 778 (2017)).

The petitioner also relies on Rule 60(d)(1),[1] which preserves the court's authority to "entertain an independent action to relieve a party from a judgment, order, or proceeding." Rule 60(d)(1) only permits relief from judgment where necessary "to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47 (1998). The Sixth Circuit has held that this

[1] The petitioner's Amended Motion also cites 28 U.S.C. § 2243 and several provisions of the Constitution as bases for reopening his habeas case for reconsideration. (Doc. No. 241 at 1.) Section 2243 authorizes courts to grant a writ of habeas corpus, "unless it appears from the application that the applicant or person detained is not entitled thereto," and to "hear and determine the facts, and dispose of the matter as law and justice require." That is precisely what the court did in 2006 when it determined that the petitioner was not entitled to relief under the Antiterrorism and Effective Death Penalty Act of 1996. Neither Section 2243 nor the portions of the Constitution on which the petitioner relies provide any independent authority to reopen and revisit that determination. *Brewington v. Klopotoski*, No. CIV.A. 09-3133, 2012 WL 1071145, at *6 (E.D. Pa. Mar. 29, 2012).

is a "stringent and demanding standard," and a habeas petitioner seeking relief under this subsection must "make a strong showing of actual innocence." *Mitchell v. Reese*, 651 F.3d 593, 595–96 (6th Cir. 2011).

II. ANALYSIS

A. Petitioner's Diligence

The respondent asserts that the petitioner is not entitled to Rule 60 relief because he has not diligently pursued his asserted rights. (Doc. No. 242 at 9–10.) Rule 60(c) requires that 60(b) motions must be filed "within a reasonable time," and courts "evaluate reasonableness by considering a petitioner's diligence in seeking relief." *Miller*, 879 F.3d at 699.

In this case, the basis for the petitioner's 2013 Rule 60 motion was *Martinez*, which was decided on March 20, 2012. The petitioner filed his original motion on February 25, 2013, more than 11 months later. (Doc. No. 212.) The court stayed the case on September 25, 2013, pending determinations by the Sixth Circuit concerning the applicability of *Martinez* in Tennessee and whether *Martinez/Trevino* provided a basis for reconsideration of a judgment under Rule 60(b). (Doc. No. 228 at 1–2; Doc. No. 232.) The Sixth Circuit decided the latter issue in *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013), on December 30, 2013, and the former in *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), on March 19, 2014. The Tennessee Supreme Court set the petitioner's execution date of October 11, 2018, on March 15, 2018. Order, *Tennessee v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn. Mar. 15, 2018). The petitioner filed his motion to reopen almost 3 months later, on June 11, 2018, observing that the case had "lain dormant for some time," and pointing to the Sixth Circuit's decision in *Sutton* as the basis for reopening. (Doc. No. 233.)

The petitioner's delay of 11 months between the *Martinez* decision and his original

motion, combined with his delay of more than four years after *Sutton* was decided and almost three months after his execution date was set before moving to reopen his case, evidences a lack of diligence on his part in pursuing the relief he seeks. The court notes, however, that the Sixth Circuit has found that a 12-month delay in seeking relief after *Martinez* represented sufficient diligence, *Wright v. Warden, Riverbend Maximum Sec. Inst.*, 793 F.3d 670, 672 (6th Cir. 2015), and that the court's order staying this case did not direct the parties to move to reopen it within any particular time frame. (Doc. No. 232.) Accordingly, the court does not consider this factor to be determinative and applies negligible weight to it.

B. Impact of *Martinez*

1. *Martinez* is not an extraordinary circumstance warranting Rule 60(b)(6) relief.

Ordinarily, when a habeas petitioner has failed to fully exhaust a claim in state court and is unable to do so because of a statute of limitations or other state procedural rule, the claim is considered to be procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991). Except in cases where the petitioner can establish that he is actually innocent or that no reasonable juror would have found him eligible for the death penalty in light of new evidence, federal habeas review of the merits of defaulted claims is prohibited unless the petitioner demonstrates cause for, and prejudice from, his default. *Alley v. Bell*, 307 F.3d 380, 386 (6th Cir. 2002); *Calderon v. Thompson*, 523 U.S. 538, 559–60 (1988). This court previously determined that several of the petitioner's habeas claims were procedurally defaulted without adequate cause or prejudice and denied relief on that basis. (Doc. No. 183.) Those claims included the claims raised in the petitioner's pending motion: Claim 10(c), that trial counsel was ineffective for failing to investigate Buddy Corbitt as an alternative suspect (Doc. No. 241-1 at 17-18; Doc. No. 183 at 100–03); Claim 15, that the trial court did not properly instruct the jury about the meaning

of "mitigating circumstance" (Doc. No. 241-1 at 26; Doc. No. 183 at 114–15); and Claim 17, that the petitioner's death sentence was unconstitutional because he had been offered a pre-trial plea deal for two life sentences. (Doc. No. 241-1 at 38; Doc. No. 183 at 129–34.)

At the time the court denied relief on the habeas petition in 2006, it was clearly established that a habeas petitioner could not demonstrate cause for a procedural default by claiming that he had received ineffective assistance of counsel during state post-conviction proceedings. *Coleman*, 501 U.S. at 752–53; *Ritchie v. Eberhart*, 11 F.3d 587, 591–92 (6th Cir. 1993). Almost 6 years after this court's previous decision, however, the Supreme Court held in *Martinez* that, in certain circumstances, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. The following year, the Supreme Court held that *Martinez* applies not only in states that prohibit petitioners from raising ineffective-assistance claims on direct appeal, but also to those whose legal systems "make it virtually impossible" to do so. *Trevino*, 569 U.S. at 417. As mentioned above, the Sixth Circuit has held that this *Martinez/Trevino* exception applies in Tennessee. *Sutton*, 745 F.3d at 795–96. The petitioner asserts in his pending motion that "[i]n light of *Martinez* . . . [his] claims are not defaulted, and he is now entitled to have them heard on the merits." (Doc. No. 241 at 2.)

The fact that *Martinez/Trevino* applies in Tennessee, however, does not mean that it provides a basis for reconsidering the 2006 judgment in this case. The Sixth Circuit held in December 2013, shortly after this case was stayed, that "the change in the law resulting from the recent *Trevino* decision is flatly not a change in the constitutional rights of criminal defendants, but rather an adjustment of an equitable ruling by the Supreme Court as to when federal statutory relief is available." *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 751 (6th Cir.

2013). Accordingly, *Martinez/Trevino* did not sufficiently "change the balance" of factors as required to reopen a case pursuant to Rule 60(b). *Id.* The Sixth Circuit has consistently and repeatedly held the same since then:

> Based on *Martinez* and *Trevino*, [the petitioner] argues that he now can establish cause to excuse those defaults and receive a merits review of those claims. However, it "is well established that a change in decisional law is usually not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief." *McGuire*, 738 F.3d at 750 (citing *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007)). Moreover, neither *Martinez* nor *Trevino* sufficiently changes the balance of the factors for consideration under Rule 60(b)(6) to warrant relief. *McGuire*, 738 F.3d at 749–51.

Henness v. Bagley, 766 F.3d 550, 557 (6th Cir. 2014); *see also Miller v. Mays*, 879 F.3d 691, 698–99 (6th Cir. 2018) ("We have consistently held that *Martinez* and *Trevino*, as intervening decisions, do not alone 'sufficiently change[ ] the balance of the factors for consideration under Rule 60(b)(6) to warrant relief.'"); *Moore v. Mitchell*, 848 F.3d 774, 777 (6th Cir. 2017) ("[W]e have held that neither *Martinez* nor *Trevino*, without more, provides the kind of extraordinary circumstances that would justify the relief sought under Rule 60(b)."); *Wright v. Warden, Riverbend Maximum Sec. Inst.*, 793 F.3d 670, 672 (6th Cir. 2015) (citing *McGuire* and *Henness* and holding that *Martinez* and *Trevino* are not an extraordinary circumstance for the purposes of Rule 60(b)(6)); *Sheppard v. Robinson*, 807 F.3d 815, 820–21 (6th Cir. 2015) ("[O]ur court has already held that the Supreme Court's decision in *Martinez* and its follow-on decision in *Trevino* . . . are not "extraordinary" within the meaning of Rule 60(b)(6)."); *Abdur'Rahman v. Carpenter*, 805 F.3d 710, 716 (6th Cir. 2015) ("As a change in decisional law, *Martinez* does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief.").

The petitioner suggests that *Buck v. Davis*, 137 S. Ct. 759 (2017), supports the position that *Martinez* warrants relief under Rule 60. But the Supreme Court expressly declined to reach that question in *Buck*, because the state had waived the issue by failing to raise it in the lower

courts. *Id.* at 780. In this case, however, the respondent has argued consistently since its initial response in 2013 that *Martinez* is not an exceptional circumstance warranting relief under Rule 60. (Doc. Nos. 217, 230, 242.) The question of whether *Martinez* justifies Rule 60 relief is not waived in this case, as it was in *Buck*, and the answer to that question is no, as dictated by the Sixth Circuit precedent discussed above.

The petitioner's Rule 60(b)(6) motion, based on *Martinez*, must therefore be denied.

2. *Martinez* would not even apply to the petitioner's *Lockett* and *Jackson* claims.

Even if Rule 60(b)(6) authorized the court to reconsider its previous judgment in light of *Martinez*, that holding would not impact the court's previous ruling on Claims 15 or 17 of the amended petition. The petitioner asserted in those claims that the trial court did not properly instruct the jury about mitigation, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), and that his death sentence was unconstitutionally arbitrary pursuant to *United States v. Jackson*, 390 U.S. 570 (1968), in light of the state's earlier offer of a plea for life sentences. (Doc. No. 241-1 at 26, 38.) But the "narrow exception" announced by *Martinez* was that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of ***a claim of ineffective assistance at trial***." *Martinez*, 566 U.S. at 9 (emphasis added). Subsequent decisions have confirmed that *Martinez* does not apply to any claims other than claims of ineffective assistance at trial. *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017) (holding that *Martinez* does not apply to claims of ineffective assistance on appeal); *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) (explaining that "[w]e will assume that the Supreme Court meant exactly what it wrote," and rejecting argument that *Martinez* applied to claims other than claims for ineffective assistance at trial).

Despite these judicial admonishments about the narrowness of *Martinez*'s application, the

petitioner advocates a much broader approach:

> Ed Zagorski further maintains that *Martinez* is not limited to providing "cause" for independent claims of ineffective assistance of counsel raised as grounds for habeas relief. It also necessarily applies to valid assertions of ineffective assistance of counsel which provide "cause" for the failure to raise a substantive constitutional claim raised in a federal habeas petition.

(Doc. No. 241 at 10.) According to the petitioner, therefore, *Martinez* excuses the default of an implicit assertion that trial counsel was ineffective for failing to object to the violations alleged in Claims 15 and 17, which, in turn, excuses the default of Claims 15 and 17. (*Id.* at 10–13.)

The petitioner correctly states that the ineffectiveness of trial counsel can provide cause to overcome the default of an underlying claim, but only when a claim of that ineffectiveness itself has been exhausted. *Edwards v. Carpenter*, 529 U.S. 446 (2000). Applying *Martinez* to excuse such "ineffectiveness-as-cause claims" is a step that, according to the parties' briefs, no court has taken. The district court decision on which the petitioner relies, *Ellis v. Little*, No. 1:15-CV-00515-BLW, 2017 WL 386455 (D. Idaho Jan. 27, 2017), simply noted that the issue was "unclear" and that its resolution was not necessary in that case. *Id.* at *7 n.6. Even in his reply brief, which devotes three pages to this issue, the petitioner does not cite a single federal court opinion applying *Martinez* in this context. (Doc. No. 243 at 3–6.)

Several district courts have refused to expand *Martinez* as the petitioner suggests, including this one. *Duncan v. Carpenter*, No. 3:88-00992, 2015 WL 1003611, at *48 (M.D. Tenn. Mar. 4, 2015) (Nixon, J.) (rejecting the petitioner's assertion of a "two-layered showing of 'cause'" under *Martinez*); *see also Henderson v. Carpenter*, 21 F. Supp. 3d 927, 935 (W.D. Tenn. 2014) ("[T]his Court finds no reason to extend the limited holding in *Martinez* to claims other than ineffective assistance of trial counsel claims."); *Portee v. Stevenson*, No. 8:15-CV-487-PMD-JDA, 2016 WL 690871, at *3 (D.S.C. Feb. 22, 2016) (rejecting application of

Martinez when the alleged ineffectiveness was "one step removed": "instead of PCR counsel's error defaulting the underlying § 2254 ground, it defaulted a basis for excusing the default of that underlying ground"); *Northrup v. Blades*, No. 1:14-CV-00371-CWD, 2015 WL 5273261, at *7 n.5 (D. Idaho Sept. 9, 2015) (rejecting claim that "*Martinez* exception should be overlaid upon the *Edwards* exception," because "the *Martinez* Court emphasized the narrowness of the exception").

The United States District Court for the District of Arizona, in one of the first opinions to reject an argument to expand *Martinez* as the petitioner suggests, explained its reasoning as follows:

> Olmos attempts to derive support for the viability of this labyrinthine causal chain from *Martinez v. Ryan*, but that reliance is misplaced. The standard rule is that a petitioner has no constitutional right to counsel at collateral proceedings, and therefore cannot claim ineffective assistance at that stage. *See Coleman*, 501 U.S. at 753. The Supreme Court carved out a very narrow exception in *Martinez*: inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's default of a claim of ineffective assistance at trial. But that is not Olmos's argument. . . . Olmos's claim is not ineffective assistance as cause to excuse default of a claim of ineffective assistance—it is that ineffective assistance serves as cause to excuse default of a claim of ineffective assistance as cause to excuse default of a constitutional claim. Olmos therefore seeks to extend *Martinez* to situations where the ineffective assistance claim is merely the excuse for a procedural default—not the base claim itself.
>
> . . . Olmos has cited no case where the dizzying chain of excuses he proposes has found acceptance. The Court declines to do so here.

Olmos v. Ryan, No. CV-11-00344-PHX-GMS, 2013 WL 3199831, at *10 (D. Ariz. June 24, 2013) (internal citation omitted).

Likewise, this court again declines to adopt an application of *Martinez* that would effectively expand its application to every waived trial court error in every case. The petitioner's *Lockett* and *Jackson* claims are not ineffective-assistance-at-trial claims, and *Martinez* would not apply to them, even if it warranted reconsideration of the court's judgment under Rule 60.

3. Even applying *Martinez*, the petitioner would not be entitled to relief.

To overcome default under *Martinez*, a petitioner must show that post-conviction counsel was ineffective during the "initial-review collateral proceeding," *Martinez*, 566 U.S. at 16, and that the underlying ineffective-assistance-of-trial-counsel claim is a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 14. The plaintiff cannot satisfy those requirements for any of the three claims raised in his pending motion.

a. Claim 10(c)

The plaintiff's allegation in Claim 10(c), that trial counsel was ineffective for failing to investigate Buddy Corbitt as an alternative suspect, was related to Claim 9(b), in which he alleged that the prosecution had withheld material exculpatory evidence that Corbitt had a motive to kill one of the victims and had threatened to do so. (Doc. No. 241-1 at 14, 17–18.) The evidence in question was that, around a year before Porter and Dotson were murdered, Corbitt had paid $1,700 for Porter's murder to Joe Langford, who took the money and "laughed it off." (Doc. No. 183 at 97.) In its 2006 ruling, the court agreed that the prosecution had suppressed facially favorable evidence about Corbitt's potential involvement but found the evidence was not material, in light of the overwhelming evidence against the petitioner.[2] (Doc. No. 183 at 44.)

In connection with its ruling on Claim 9(b), the court addressed the petitioner's

[2] That evidence included: an arranged drug deal between the petitioner and the victims to take place on April 23, 1983; the victims' possession of a bag of cash on the afternoon of April 23, and their disappearance sometime after 4:30 that day; the petitioner's walking into the woods on April 23, after being overheard telling one of the victims that he would meet him at 6 p.m.; gunshots heard later that day from the area where the petitioner had walked into the woods; the discovery of the victims' bodies in a wooded area approximately two weeks later, with gunshot wounds in the chest and abdomen and their throats cut; the discovery near the bodies of the petitioner's knife scabbard, a case for the type of glasses he wore, and a .308 cartridge that ballistic tests showed had been fired from the petitioner's rifle; the petitioner's arrival in Ohio after the victims' disappearance, driving a victim's truck, and in possession of a victim's gun, both victims' coveralls, and large sums of cash. *State v. Zagorski*, 701 S.W.2d 808, at 810–11 (Tenn. 1985).

alternative argument that, if the court found no violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in the suppression of the documents, then trial counsel were ineffective for failing to discover and present the exculpatory evidence. (Doc. No. 183 at 98.) The court first found that any such claim was procedurally defaulted, because the evidence was in the prosecutor's file that had been turned over to post-conviction counsel, so there was no external cause for the default.[3] (*Id.* at 98–99.) But it went on to reject the petitioner's argument in an alternative analysis of its merits:

> Assuming for the sake of argument that defense counsels' representation was deficient for not being more aggressive in investigating and presenting exculpatory evidence, because Zagorski has failed to show that he is entitled to relief under *Brady*, he cannot establish that he was prejudiced by defense counsels' failure to research and present the evidence that forms the basis of Zagorski's *Brady* claim. In other words, Zagorski has not shown that, but for the evidence being unavailable, there exists a reasonable probability that the results of the trial would have been different. Because Zagorski has not satisfied both halves of the two-part *Strickland* [*v. Washington*, 466 U.S. 668, 693–94 (1984),] test . . . he has not shown that defense counsel provided ineffective assistance.

(Doc. No. 183 at 99.)

Accordingly, when the court reached the petitioner's related ineffective-assistance claim, Claim 10(c), it found that it was not only procedurally defaulted but also without merit for the reasons already explained in ruling on the other claim. (*Id.* at 101–02.) In effect, the court found that, because the Corbitt information that might have been discovered by a more thorough

[3] In fact, post-conviction counsel asserted in the Amended Petition for Post-Conviction Relief that "[c]ounsel failed to fully investigate and present all available evidence that would support Petitioner's claims of innocence regarding the First Degree Murder charges." (Doc. No. 9, Addendum 3, Post-Conviction technical record at 11.) That claim was not raised on post-conviction appeal. (*See* Doc. No. 183 at 98.) To the extent that the post-conviction claim encompassed the failure to discover and present the exculpatory Corbitt evidence, the fact that *Martinez* does not apply to claims that were raised in a post-conviction petition but defaulted on post-conviction appeal is yet another reason that Claim 10(c) does not merit relief under Rule 60. *See West v. Carpenter*, 790 F.3d 693, 698 (6th Cir. 2015) (explaining that *Martinez* does not apply in those circumstances because defaults on appeal cannot be attributed to ineffectiveness during the initial-review post-conviction proceeding).

investigation by counsel would not have been reasonably likely to affect the outcome of the case, the petitioner could not satisfy the prejudice prong required to prevail on a claim of ineffective assistance under *Strickland*. That alternative rejection of Claim 10(c) on the merits dictates that the claim is not sufficiently substantial to warrant further consideration under *Martinez*.[4]

b. Claim 15

The petitioner's claim regarding the trial court's instructions to the jury about mitigating factors is also not a substantial claim for *Martinez* purposes. The trial court instructed the jury that "mitigating circumstances may be established by any amount of proof and are not required to be proven beyond a reasonable doubt or even by a preponderance of the evidence." (Doc. No. 9, Addendum 1, Tr. 1127.) Just four minutes after beginning its deliberations, the jury returned to court, where the following exchange took place:

> THE FOREMAN: Your Honor, we were wondering if it would be possible that we get a good definition, explanation, of what would constitute a mitigating circumstance?
>
> THE COURT: Mitigating circumstances are within your province, if there are any. You have heard the evidence of the case, and no additional evidence was produced at the sentence hearing, so ***you may consider all of the evidence that was presented in the entire case***. The law sets out certain mitigating circumstances which have no particular applicability in this case, but you're not limited to those, so you can consider any mitigating circumstances that in your judgment would comply with the instructions given.
>
> THE FOREMAN: I think, what we're trying to get at is just what is the

[4] Even if the court were to reconsider the claim today, it remains convinced that, in light of the evidence against the petitioner, there is no reasonable probability that the Corbitt evidence would have changed the outcome of his trial. In addition to all of the circumstantial evidence clearly establishing the petitioner's involvement in the murders and robbery, the jury heard about the petitioner's multiple statements to law enforcement to the effect that several other individuals, whom he refused to identify, were involved. *State v. Zagorski*, 701 S.W.2d 808, 811 (Tenn. 1985). Even assuming the jurors would have connected a year-old plan to the murders, the Corbitt evidence might only have suggested the identity of one of those other individuals. There is no reasonable chance that it would have changed the balance of the evidence in the petitioner's favor.

> meaning of the word mitigating?
>
> THE COURT: Mitigating would mean any circumstance which would have a ***tendency to lessen the aggravation***, which would have any tendency to – (Pause) – ***give a reason for the act***. I cannot think of a better definition right now, except that it's opposed to aggravating and would have a tendency to lessen or tend – not "to," necessarily, but ***tend to justify, and to take away any of the aggravation of the circumstance***.

(Doc. No. 241-2 at 2–3) (emphasis added). The jury returned two hours later, and the foreman announced that they had unanimously found two aggravating circumstances: (1) the murders were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind (HAC aggravator); and (2) the murders were committed while the petitioner was engaged in robbing the victims. (Doc. No. 9, Addendum 1, Tr. 1133.) They also unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances they had found and, consequently, determined "that the punishment shall be death." (*Id.*)

The petitioner asserts that the judge's final statement had the effect of preventing the jurors from considering mitigation evidence that did not tend to justify the murders, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978.) *Lockett* provides that jurors must be allowed to consider as mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense." *Id.* at 604. Thus, it is true that a capital defendant is not required to establish that a fact bears some causal "nexus to the crime" in order for the jury to consider it as mitigation. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). But even if the trial court's off-the-cuff instruction ran afoul of that rule, for the petitioner to prevail on the basis of an erroneous jury instruction, he would have to establish that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp v. Naughten*, 414 U.S. 141,

147 (1973), or that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). A "substantial and injurious effect" exists when there is "grave doubt" about the effect of an error on the verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

As the trial court observed in the quotation above, the petitioner did not present any evidence during his sentencing hearing. In fact, he had "unequivocally informed counsel that if convicted, he preferred death instead of a possible sentence of life in prison. . . . [H]e prohibited his attorneys from having any contact with his family or delving into his past. He further instructed counsel that no mitigating evidence was to be presented at the sentencing phase of trial." *Zagorski v. State*, 983 S.W.2d 654, 656 (Tenn. 1998). The petitioner remained "adamant" in discussions with his attorneys throughout the trial that he did not want to present any mitigation. *Id.* At one point, the petitioner offered to confess to the murders if he could choose the time and method of his execution. (*See* Doc. No. 183 at 15.) When the jury returned from sentencing deliberations with a verdict of death, he thanked them. (Doc. No. 9, Addendum 1, Tr. 1133.)

Nevertheless, the petitioner now offers three facts known to the jury from the guilt phase of the trial that he asserts the jury might have considered mitigating, but for the court's faulty instruction: (1) the victims were involved in illegal drug dealing; (2) the victims were highly intoxicated at the time of their deaths; and (3) the victims were carrying a gun. (Doc. No. 241 at 6.) The petitioner does not explain how those facts are mitigating or cite any caselaw suggesting that they are. To the extent that they bore any causal relationship to the commission of the crime or had any tendency to make the murders less cruel or torturous, they fit squarely within the factors the court instructed the jurors they could consider as mitigation in the portions of its

instructions emphasized above. The faulty instruction, accordingly, did not preclude the jurors' consideration of those facts in the context of whether they played a role in the murders or weighed against the HAC aggravator.

The only other theory under which those three facts would arguably constitute mitigation amounts to the suggestion that "a defendant is less culpable if he murders a vile person," but the petitioner does not cite any authority for the proposition that a victim's "poor character" should be considered as mitigation. *See United States v. Snarr*, 704 F.3d 368, 400 (5th Cir. 2013) (holding that lower court properly excluded evidence of murder victim's "poor character" as "irrelevant or highly prejudicial"). To the contrary, at least one federal appellate court has held that evidence offered to support such a theory is not even admissible in a capital sentencing hearing. *Id.* Accordingly, the petitioner has not established that the error in the trial court's instructions prevented the jury from considering any proper mitigation factors or otherwise impacted the verdict. Because he cannot establish any prejudice arising from the alleged error, Claim 15 is not substantial and would fail on its merits even if the petitioner were entitled to reconsideration.

c. Claim 17

Finally, the petitioner's claim that it is unconstitutional to impose the death penalty on a defendant who previously rejected a plea deal for a life sentence has no merit. In *United States v. Jackson*, 390 U.S. 570 (1968), the case on which the petitioner bases his claim, the Supreme Court found that a federal statute that limited the potential imposition of a death sentence to only those defendants who went to trial unconstitutionally penalized defendants for exercising their right to plead not guilty and demand a jury trial. *Id.* at 582–83. The other case on which the petitioner relies, *Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y. Ct. App. 1998), also involved a statute

that barred the imposition of a death sentence on defendants who pleaded guilty. *Id.* at 620.

The petitioner does not allege that Tennessee's statutory capital sentencing scheme contains any provision like the ones found unconstitutional in *Jackson* or *Hynes*. Instead, he asserts that imposing a death sentence after trial—when he was offered a life sentence to plead guilty before trial—had the same effect of unconstitutionally burdening his right to plead not guilty and demand a jury trial. (Doc. No. 241 at 7.) But the Supreme Court has rejected the notion that trading lesser consequences for a defendant's guilty plea is unconstitutional:

> [I]n the "give-and-take" of plea bargaining, there is no [ ] element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.
>
> Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. . . . Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.
>
> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Bordenkircher v. Hayes, 434 U.S. 357, 363–64 (1978) (internal citations omitted). The Court reiterated that position when it held that a system that offered a defendant the possibility of avoiding a mandatory life sentence by entering a plea was not unconstitutional:

> The cases in this Court since *Jackson* have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant "the possibility or certainty . . . [not only of] a

> lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty . . .," but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury.
> . . .
> The States and the Federal Government are free to abolish guilty pleas and plea bargaining; but absent such action, as the Constitution has been construed in our cases, it is not forbidden to extend a proper degree of leniency in return for guilty pleas.

Corbitt v. New Jersey, 439 U.S. 212, 218–20, 223 (1978) (citation omitted). Thus, where the original charges are not unwarranted, an offer of leniency in exchange for a plea does not amount to "retaliation or vindictiveness" or constitute "punish[ment] for exercising a constitutional right" against those who go to trial. *Id.* at 223; *see also Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) ("Although every [plea bargain] has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas.")

Accordingly, a capital system that allows for plea bargaining and imposition of a death sentence after trial is not unconstitutional:

> [T]he Supreme Court in *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978), recently held that plea-bargaining, in which the prosecutor openly presents a defendant with the unpleasant alternatives of pleading guilty to a lesser charge and foregoing trial or pleading not guilty and facing a more serious charge on which he plainly is subject to prosecution, and for which he would receive upon conviction life imprisonment, does not violate the Due Process Clause of the Fourteenth Amendment. The fact that the prosecutor's plea-bargaining tool in *Bordenkircher* was life imprisonment and in this case it allegedly is the death penalty is a distinction without a difference. *Bordenkircher* controls the instant case. Finally, it is well settled that a plea bargain is not invalid per se because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty. *See, e.g., Brady v. United States*, 397 U.S. 742, 747 (1970). Thus, if Florida prosecutors actually are using the threat of the death penalty under Section 921.141 in their plea-bargaining to induce guilty pleas, the practice is permissible, and the petitioner's contention is without merit.

Spinkellink v. Wainwright, 578 F.2d 582, 608–09 (5th Cir. 1978) (affirming denial of habeas

relief to inmate under sentence of death) (some internal citations omitted); *see also North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970) (guilty plea to second degree murder in order to avoid possible death penalty after a trial on first-degree murder not compelled under Fifth Amendment); *Parker v. North Carolina*, 397 U.S. 790 (1970) (plea not compelled merely because induced by fear of possible death penalty); *Brady v. United States*, 397 U.S. 742 (1970) ("We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."); *Corcoran v. Buss*, 551 F.3d 703, 710–11 (7th Cir. 2008) (holding that prosecutor's "offer to forgo the death penalty in exchange for a bench trial" did not violate *Jackson*); *Cowans v. Bagley*, 624 F. Supp. 2d 709, 819 (S.D. Ohio 2008), aff'd, 639 F.3d 241 (6th Cir. 2011) (explaining that there is no constitutional prohibition against a system "where the defendant might plead guilty to avoid the *possibility* of a death sentence, inasmuch as there is no per se rule against encouraging guilty pleas").

The petitioner does not dispute that the crimes in this case were eligible for a death sentence under Tennessee's capital sentencing scheme. The State's offer of leniency in exchange for a guilty plea was not unconstitutional, nor did it render the petitioner's eventual sentence unconstitutional. The petitioner's *Jackson* claim thus lacks any merit even if his Rule 60 motion established a basis for its reconsideration.

C. Equitable Factors

Finally, the petitioner asserts that "the equities underlying this habeas proceeding have now dramatically shifted" and lists six "extraordinary circumstances" that warrant reopening his

case: (1) the petitioner's life is at stake; (2) there is no valid interest in "enforcing the non-existent procedural bars" the court previously applied; (3) the merits of the petitioner's claims might never be considered unless relief is granted; (4) the petitioner's *Lockett* claim is "clearly winning," and his other claims are "significant and substantial"; (5) *Martinez* dictates that the petitioner is equitably entitled to review of his claims because of his post-conviction counsel's errors; and (6) by offering him a life sentence before trial, the state recognized that a death sentence is "not a necessary sentence." (Doc. No. 241 at 20–21, 23.)

Factors 2 and 5 are both based on *Martinez*, which does not warrant Rule 60 relief for the reasons explained above. And there has been no "dramatic[] shift," or any shift at all, in any of the petitioner's other factors. His sentence, the plea offer, and the substance of his claims are all exactly the same as they were in 2006.

Moreover, the court's alternative analyses above demonstrate that the petitioner's claims are neither "winning" nor "substantial." The court also observes that none of the claims even arguably establishes that the petitioner is actually innocent of the crimes for which he was convicted. Accordingly, none of the petitioner's proposed equitable considerations—either individually or in combination—dictates granting the relief requested.

III. CONCLUSION

For the foregoing reasons, the petitioner has not established that he is entitled to relief. His motion will be denied.

An appropriate order shall enter.

ENTER this 12th day of September 2018.

Aleta A. Trauger
United States District Judge

Nos. 18-6052

Capital Case

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI,

Petitioner-Appellant,

vs.

TONY MAYS, Warden,

Respondent-Appellee

BRIEF OF THE APPELLANT EDMUND ZAGORSKI

Paul R. Bottei
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253. On September 12, 2018, the United States District Court granted a certificate of appealability.

REQUEST FOR ORAL ARGUMENT

Counsel for Mr. Zagorski is available for argument, should the Court desire such argument, and Mr. Zagorski would request argument.

ISSUES PRESENTED FOR REVIEW

1. Has Edmund Zagorski presented a meritorious, or at least debatable, constitutional claim that:

a. In violation of the Eighth Amendment, *Lockett v. Ohio*, 438 U.S. 586 (1978) and its progeny, the trial court unconstitutionally defined mitigating evidence as evidence that only "give[s] a reason for the act," "tend[s] to justify" the offense, or has "a tendency to lessen the aggravating" circumstances? YES: *Hodge v. Kentucky*, 568 U.S. 1056, 1060 (2012)(Sotomayor, J., dissenting)(*Lockett* violation where mitigating evidence was limited to evidence that "provides a reason" for, or 'explains" a capital offense).

b. In violation of the Sixth, Eighth, and Fourteenth Amendments, the death sentence is unconstitutional because, before trial, the prosecution offered Edmund Zagorski a life sentence in exchange for a guilty plea, which establishes that the death sentence here is an excessive, unfair, and arbitrary punishment? YES: *See United States v. Jackson*, 390 U.S. 570

(1968)(death sentence unconstitutional where not available through plea, but available before jury); *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988)(en banc)(death sentence arbitrary).

2. When denying Edmund Zagorski's motion for relief from judgment, did the District Court abuse its discretion by failing to weigh all the equities when it focused solely on the equity arising from the intervening decision in *Martinez v.* Ryan, 566 U.S. 1 (2012); and/or making its equitable assessment based on the erroneous conclusion that Zagorski's underlying claims lack merit or debatability, when that conclusion is erroneous in light of *Lockett*, Justice Sotomayor's opinion in *Hodge v. Kentucky*, and *United States v. Jackson*; and/or failing to fully take into account that this is a capital case in which the prosecution was content with a life sentence before trial? YES.

3. Where Edmund Zagorski's substantive constitutional claims were procedurally defaulted by counsel in state court and where trial counsel's ineffectiveness is now asserted as "cause" for those defaults, does *Martinez v. Ryan*, 566 U.S. 1 (2012) apply and provide "cause" for those defaults where post-conviction counsel ineffectively failed to assert

trial counsel's ineffectiveness for failing to raise his substantive constitutional claims? YES: *See Edwards v. Carpenter*, 529 U.S. 446 (2000)(while ineffectiveness of trial counsel asserted as cause for a procedural default generally must be raised in state court, a petitioner may have "cause" for not raising trial counsel's ineffectiveness in state court); *Id.* at 458 (Breyer, J., concurring)(if a petitioner can show cause for failing to raise a cause argument in state court, s/he is entitled to federal review of a substantive claim); *Martinez* (ineffectiveness of post-conviction counsel in failing to allege ineffectiveness of trial counsel provides cause for the default of a substantial ineffectiveness claim).

4. Should this Court reverse the District Court's denial of Mr. Zagorski's motion for relief from judgment or otherwise vacate the District Court's order and remand to the District Court for proper and full consideration of Edmund Zagorski's motion for relief from judgment, free from the taint of the District Court's earlier legally erroneous conclusions and/or its misapprehension of, and/or failure to fully evaluate, the equities? YES: *See Buck v. Davis*, 580 U.S. ___ (2017) (reversing denial of Rule 60(b)(6) motion in capital case); *Cox v. Horn*,

757 F.3d 113, 124 (3d Cir. 2014)(vacating District Court's denial of motion for relief from judgment in capital case and requiring proper full consideration of the motion); *Barnett v. Roper*, ___ F.3d ___, 2018 U.S.App.Lexis 26844 (8th Cir. Sept. 20, 2018)(in capital case, affirming grant of habeas relief following granting of motion for relief from judgment in light of *Martinez v. Ryan*, 566 U.S. 1 (2012)); *Bey v. Superintendent*, 856 F.3d 230 (3d Cir. 2017)(granting relief under *Martinez* where post-conviction counsel failed to assert trial counsel's ineffectiveness in failing to object to erroneous jury instruction).

STATEMENT OF FACTS

I.
Mr. Zagorski's Motion For Relief From Judgment Under Fed.R.Civ.P. 60(b)

On February 25, 2013, eleven months after the United States Court decided *Martinez v. Ryan*, Edmund Zagorski filed a motion for relief from judgment under Fed.R.Civ.P. 60(b)(6), asserting that there were extraordinary circumstances warranting the reopening of his habeas proceedings, to allow consideration of three previously procedurally defaulted claims. They include, for example: (1) Ed Zagorski will lose his

life absent equitable relief; (2) the federal court and the state have no valid interest in the federal courts enforcing non-existent procedural bar; (3) he has never received a merits ruling on his substantial federal claims (*Ruiz v. Quarterman*, 504 F.3d 523, 531-532 (5th Cir. 2007)(granting 60(b) relief in capital case); (4) he presents a winning *Lockett* claim and his other claims are significant and substantial; (5) *Martinez* weighs in his favor; (6) Even the state recognized before trial that a death sentence is not a necessary sentence, having offered Zagorski a life sentence in exchange for a guilty plea. *See* R. 212, pp. 17-23, PageID #507-513.

***Lockett* Claim**: Mr. Zagorski's first claim is that, in violation of the Eighth Amendment and *Lockett v. Ohio*, 438 U.S. 586 (1978), the trial court erroneously defined "mitigating evidence," thereby precluding full consideration of mitigating evidence of the circumstances of the offense – including that the victims were drug dealers, they were armed (*See* Trial Tr. 757-758: Jimmy Porter brought a .357 magnum to the drug deal), and highly intoxicated. *See* Trial Tr. 642-643 (Porter had a blood alcohol content of .10, and Dotson's blood alcohol content was .25). R. 212, pp. 3-4, PageID #493-494 (motion for relief from judgment).

Specifically, the trial judge's jury instruction limited mitigating evidence to evidence that had "any tendency to – ***give a reason for the act***. I cannot think of a better definition right now, except that it's opposed to aggravating and would have a tendency to lessen or tend – not 'to' necessarily, but ***tend to justify***, and to take away any of the aggravation of the circumstance." Trial Tr. 1131-1132 (emphasis supplied); R. 241-2, PageID #855-857. Mr. Zagorski maintained that the instruction unconstitutionally limited the consideration of mitigating evidence, as recognized by Justice Sotomayor in an opinion she issued in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting).

Mr. Zagorski maintained that, even though the claim was procedurally defaulted by counsel in state court, the combination of *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Edwards v. Carpenter*, 529 U.S. 446 (2000) now allowed him to overcome the default and secure relief on the merits. R. 212, pp. 8-10, PageID #848-850. As he explained, *Martinez* allows the ineffective assistance of post-conviction counsel in an initial review collateral proceeding to supply "cause" for the procedural default of a substantial, i.e., debatable, ineffective-assistance-of-trial counsel

argument. *Martinez*, 566 U.S. at 14. And *Edwards* recognizes that a petitioner may show cause for the failure, in state court, to raise a claim of ineffective-assistance-of-trial counsel argued in federal habeas proceedings as "cause" for the procedural default of a substantive claim, like the *Lockett* claim. *See Edwards*, *supra*; *Id.* at 458 (Breyer, J., concurring).

Thus, he argued, *Martinez* now supplies the "cause" for the otherwise defaulted cause argument that trial counsel was ineffective for failing to object, under *Lockett*, to the trial judge's instructions. Mr. Zagorski further established that he established "cause" under *Martinez*, with undisputed evidence that post-conviction counsel never recognized that trial counsel should have objected to the jury instruction under *Lockett* (R. 212-5, p. 1, PageID #591), with post-conviction counsel having thus rendered ineffective assistance, as required by *Martinez*. *See* R. 212, p. 16, PageID #506, *citing Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992) for the proposition that counsel's negligence, without any valid strategy, establishes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). And trial counsel likewise was

ineffective, having failed to object to a clearly invalid instruction. *Hinton v. Alabama*, 571 U.S. ___, ___, 134 S.Ct. 1081, 1089 (2014)(per curiam) (counsel's ignorance of law, and absence of tactical reason for action, constitutes ineffective assistance).

United States v. Jackson Claim: Mr. Zagorski further maintained that his death sentence violates due process and the right to be free from the arbitrary infliction of the death sentence, where the prosecution offered him a life sentence before trial, an undisputed fact in these proceedings. See R. 212-1, p. 1, PageID #515; R. 241-3, PageID #858 (affidavit of trial counsel Larry Wilks detailing prosecution's offer of life imprisonment before trial). Because life was the maximum sentence he faced with a plea, but death was the maximum sentence he faced for going to trial, Mr. Zagorski maintained that his death sentence violated the rule of *United States v. Jackson*, 390 U.S. 570 (1968) which so held, in the context of a case in which a criminal statute permitted life as a maximum sentence for a plea, but death for going to trial. As Mr. Zagorski explained, there is no difference between making life the maximum sentence via statute, or via a plea offer by the prosecution (as

occurred here), while death is available at trial.

As with his *Lockett* claim, while acknowledging that this claim was procedurally defaulted in state court, Mr. Zagorski also established that post-conviction counsel ineffectively failed to argue in state court that trial counsel was ineffective for failing to make the *United States v. Jackson* objection to the death sentence, as post-conviction counsel simply overlooked the issue and was therefore ineffective under *Martinez*. R. 212-5, p. 1, PageID #591; R. 241-7, PageID #944 (affidavit of post-conviction counsel). Again, therefore, under *Martinez* and *Edwards v. Carpenter*, he maintained that he overcomes the default of this claim.

Counsel Ineffectively Failed To Show Jimmy Blackwell's Involvement In The Offense: Finally, Mr. Zagorski alleged that trial counsel failed to effectively show Jimmy Blackwell's involvement in these murders (for purposes of showing reasonable doubt at the guilt phase or residual doubt at sentencing), where trial counsel failed to present evidence that Blackwell confessed to Roger Farley that he had killed the victims (R. 241-4, p. 4, PageID #862: testimony of Roger Farley),

Blackwell wrote a letter essentially admitting his involvement in the offense (R. 241-5, PageID #866), and Centerville, Tennessee, Police Chief Roger Livengood received a report of Blackwell's being seen leaving the woods where a similar homicide occurred. R. 241-4, p. 3, PageID #861. Where post-conviction counsel was unaware of these facts and failed to present them at trial (R. 241-4, pp. 5-7, PageID #863-865), Mr. Zagorski maintained that he satisfied the *Martinez* test for cause, was entitled to review of his claim on the merits, and to relief.

The District Court stayed proceedings. R. 232, PageID #769. In June, 2018, Mr. Zagorski asked the Court to rule on his motion (R. 233, PageID #770-771), but the Court asked the parties to file new submissions (R. 235, PageID #773-774), which Mr. Zagorski did. He filed a superseding and amended motion for relief from judgment with exhibits. R. 241 through 241-7, PageID #782-944.

II.
The District Court's Ruling

The District Court has now denied Mr. Zagorski's motion for relief from judgment. While acknowledging that any motion "under Rule 60(b)

must be made within a reasonable time" (See Fed.R.Civ.P. 60(c)), and noting that Zagorski filed his motion within 11 months of the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), the District Court gave negligible weight to Zagorski's diligence when considering his request for relief, even though this Court in *Wright v. Warden*, 793 F.3d 670, 672 (6th Cir. 2015) found that a capital petitioner acted diligently when he made his motion for relief from judgment 12 months after *Martinez*. R. 244, p. 5, PageID #986 (memorandum).

The District Court then proceeded to pen a section entitled "*Martinez* is not an extraordinary circumstance warranting Rule 60(b)(6) relief." R. 244, pp. 5-8, PageID #986-989. Citing this Court's decision in *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013) and several other Sixth Circuit cases, the District Court concluded that *Martinez* and/or *Trevino v. Thaler*, 569 U.S. 413 (2013) do not, by themselves, constitute an extraordinary circumstance warranting relief from judgment, where the Respondent had argued that "*Martinez* is not an exceptional circumstance warranting relief under Rule 60." R. 244, pp. 6-8, PageID #987-989. But this wholly missed Mr. Zagorski's contention that all the

equitable circumstances of his case must be considered when evaluating his entitlement to relief under Rule 60(b) – not just *Martinez*, which is but one circumstance in the assessment of equitable circumstances required by Rule 60(b).

As noted, Mr. Zagorski's *Lockett* and *United States v. Jackson* claims were procedurally defaulted by trial counsel. The District Court then proceeded to conclude that *Martinez* should not allow Mr. Zagorski to argue the ineffective assistance of trial counsel as "cause" for the procedural default, where such an ineffective-assistance-of-trial counsel argument was likewise defaulted by post-conviction counsel. R. 244, pp. 8-10, PageID #989-991. This, despite Mr. Zagorski's argument that *Edwards v. Carpenter*, 529 U.S. 446 (2000) allows a petitioner to establish "cause" for the failure to raise ineffective-assistance-of-trial counsel as "cause" for the procedural default of a substantive claim, and *Martinez* now allows the ineffectiveness of post-conviction counsel (which has been established) here to provide such cause.

The District Court afterwards maintained that Mr. Zagorski's *Lockett* and *Jackson* were not meritorious. R. 244, pp. 13-19, PageID

#994-1000. In doing so, the District Court maintained that not only did Mr. Zagorski have to show a violation of *Lockett*, he also had to show that the instructions given by the trial court violated due process (*Id.*, pp. 14-15, PageID #995-996, *citing Cupp v. Naughten*, 414 U.S. 441 (1973)), or otherwise had a substantial or injurious effect on the verdict. And the District Court did not actually address evidence not investigated by counsel showing Jimmy Blackwell's involvement, asserted as a claim of ineffective assistance of trial counsel. *See* R. 244, pp. 11-13, PageID #992-994.

Having previously concluded that Mr. Zagorski could not secure relief from judgment under *Martinez*, the District Court later stated that Mr. Zagorski was not entitled to relief from judgment based upon any of the equitable factors in this case, not only because of *Martinez*, but also because, *inter alia*, his claims were not meritorious. R. 244, p. 20, PageID #1001. The District Court granted a certificate of appealability. R. 245.

As Mr. Zagorski will show, *infra*, the District Court's evaluation of the equities was erroneous and an abuse of discretion where, *inter alia*, the Court wrongly believed that Mr. Zagorski's underlying claims lacked

merit (or were not even substantial), and had earlier concluded that *Martinez* alone did not provide grounds for relief from judgment.

ARGUMENT

I. This Court Should Reverse Or Vacate The District Court's Order Denying Relief From Judgment And Remand For Further Proceedings

The District Court has made significant errors in denying the motion for relief from judgment, not only having started its analysis by focusing exclusively on *Martinez* as a sole equitable factor in this case, but by erroneously concluding that in the equitable balance, Mr. Zagorski has presented no meritorious underlying claim.

That is not true, as (for example) his claim under *Lockett v. Ohio* is indeed meritorious, as proven by Justice Sotomayor's dissenting opinion in *Hodge v. Kentucky*, 568 U.S. 1056 (2012). And the District Court has also failed to properly acknowledge that, under *Edwards v. Carpenter*, 529 U.S. 446 (2000), a petitioner may establish "cause" for failing to raise trial counsel's ineffectiveness as "cause" for the default of a substantive constitutional claim, and *Martinez* supplies that very cause here. *See Id.* at 458 (Breyer, J., concurring)(if a petitioner can show cause for failing

to raise a cause argument in state court, s/he is entitled to federal review of a substantive claim).

Having made legal errors in weighing the equities, and having erroneously concluded that *Martinez* does not apply to defaulted "ineffectiveness-as-cause" arguments (as presented here), and having otherwise failed to find extraordinary circumstances, the District Court abused its discretion in denying relief from judgment. This Court should therefore reverse or vacate the District Court's order and remand for further proceedings. *Buck v. Davis*, 580 U.S. ___ (2017) (reversing denial of Rule 60(b)(6) motion in capital case); *Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014)(in capital case, vacating District Court's denial of motion for relief from judgment and requiring proper full consideration of the motion under proper legal standards). *See also Barnett v. Roper*, 2018 U.S.App. Lexis 26844 (8th Cir. Sept. 20, 2018)(in capital case, affirming grant of habeas relief following granting of motion for relief from judgment in light of *Martinez v. Ryan*, 566 U.S. 1 (2012)).

A. Edmund Zagorski Presents A Meritorious Claim Under *Lockett v. Ohio*, And A Debatable Claim Under *United States v. Jackson*

The first fundamental flaw in the District Court's denial of equitable relief is that the District Court erroneously believed that Mr. Zagorski's underlying *Lockett* claim lacks merit. It does not. As Mr. Zagorski has carefully explained, his claim is indeed meritorious under *Lockett*, based on the precise reasoning of Justice Sotomayor in *Hodge v. Kentucky*, 568 U.S. 1056, 1060 (2012)(Sotomayor, J., dissenting), which the District Court effectively ignored.

Indeed, as Justice Sotomayor recently explained, defining mitigation evidence as evidence that "provides a rationale" or "explains" one's conduct is a clear violation of the Eighth Amendment. As she has noted, limiting "mitigation" to evidence that "explains" or gives a reason for an offense is plainly unconstitutional: "We have made clear for over 30 years . . . that mitigation does not play such a limited role." *Hodge*, 568 U.S. at 1060 (Sotomayor, J., dissenting).

Rather, under the Eighth Amendment, "mitigating evidence" is much broader, including "any aspect of the defendant's character or

record and ***any of the circumstances of the offense*** that the defendant proffers as a basis for a sentence less than death" and any **"factors which may call for a less severe penalty**." *Lockett v. Ohio*, 438 U.S. at 604, 605 (emphasis supplied). Defining mitigation as embracing only a "rationale" – or to use the unconstitutional instruction provided here, a "*reason for the act*" – is, as Justice Sotomayor concludes, "plainly contrary" to *Lockett* and its progeny. *Hodge*, 568 U.S. at 1061. So were the instructions here that mitigation was evidence that "tend[ed] to justify" the offense or otherwise directly challenged the aggravating circumstances. Mitigation evidence is not so narrow.

Justice Sotomayor's opinion in *Hodge* makes perfectly clear not only that Mr. Zagorski's *Lockett* claim is meritorious and that the District Court erred in concluding otherwise, but also erred by superimposing an additional element (not demanded by the Eighth Amendment or *Lockett*) that the instruction further deprive Mr. Zagorski of due process under the Fourteenth Amendment. *See* R. 244, p. 14, PageID #995. The District Court was wrong: Once a *Lockett* violation is show, the error is complete,

and nothing more need be shown.[1]

And Mr. Zagorski's *United States v. Jackson* claim, while it is not as clear-cut in his favor as his *Lockett* claim, is at least substantial (i.e., debatable), which is all that is required for further proceedings under *Martinez*. *See Martinez*, 566 U.S. at 18-19. The District Court maintained that, notwithstanding the prosecution's offer of a life sentence before trial, *Jackson* ought not apply because *Jackson* involved a statute that permitted death at trial and only life without a trial, while in this case death was permitted at trial and life was permitted before

---

1 The District Court also indicated that the *Lockett* error should be overlooked, because Mr. Zagorski allegedly was adamant about not presenting mitigating evidence, but that statement is misleading. He did not want mitigating evidence about his personal or family life being presented to the jury, but he did allow trial counsel to argue for a life sentence, which trial counsel most certainly did.

Yet, mitigating evidence about the offense itself – i.e., evidence about the crime that made a sentence less than death appropriate – simply could not be considered by the jury, such as the victims being armed, heavily intoxicated, drug dealers. These types of mitigating facts about drug-related homicides routinely lead to life sentences. *See e.g.*, *State v. Moss*, 2016 Tenn.Crim.App.Lexis 709 (Sept. 21, 2016)(six drug-related homicides only merited life imprisonment without parole); *State v. King*, 2010 Tenn. Crim.App.Lexis 259 (Mar. 26, 2010)(defendant convicted of three drug-related homicides sentenced to life imprisonment without parole).

Given the nature of the circumstances surrounding the offense, the trial court's instructions did indeed have a substantial and injurious effect on the verdict, where this offense is simply not the "worst of the worst," as further proven by the prosecution's offer of a life sentence before trial, which *ipso facto* proves that a life sentence is enough punishment here.

trial by an offer of life, rather than by operation of statute. But there is no practical difference between the two situations: In both situations, a petitioner faces death only if s/he goes to trial, and does not get death if s/he pleads guilty and doesn't go to trial. There is no legal distinction between those situations. *See also Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y.Ct. App. 1998).[2]

B. The District Court Erroneously Focused Solely On Whether *Martinez* By Itself Is An Extraordinary Circumstance And/Or Relying On The Erroneous Conclusion That Zagorski's Underlying Claims Lack Merit; And/Or By Failing To Weigh The Compelling Equities That Ed Zagorski's Life Is At Stake, And The Prosecution Knew Before Trial That A Death Sentence Was Not Necessary In This Case

Because the District Court mistakenly believed that Mr. Zagorski has not presented any meritorious (or substantial) underlying constitutional claim, the District Court's weighing of the equities at the end of its opinion was fundamentally flawed, and its judgment should be

2 Similarly, where evidence of Jimmy Blackwell's involvement – including his confession to Roger Farley – establishes residual, if not reasonable, doubt about Mr. Zagorski's guilt, Mr. Zagorski again has a substantial claim, though the District Court failed to properly consider such evidence in its opinion. That was an abuse of discretion as well.

reversed, as it was predicated on a false premise. That alone provides sufficient grounds for reversal of the District Court.

Even more, any consideration of the equities at the end of the opinion does not salvage the District Court's decision from its reliance on its opening premise that led to that final erroneous conclusion – namely that *Martinez* itself does not constitute an extraordinary circumstance sufficient to reopen these proceedings.

As the Supreme Court explained in *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759 (2017), relief from judgment is available in cases involving extraordinary circumstances, and a district court must take into account a "wide range" of equitable factors, which may include the risk of injustice to the parties. *Id.*, 137 S.Ct. at 778.

But to properly review a Rule 60(b) motion, a district court must examine all the equitable factors in a case, or else it abuses its discretion when denying such a motion. In fact, in *Cox v. Horn*, *supra*, the Third Circuit made clear that it is erroneous and an abuse of discretion for a district court not to consider all the equities when evaluating a motion for relief from judgment. In *Cox*, the district court did precisely what the

District Court did here: It focused solely on the intervening decision of *Martinez* as not being a sufficient reason, of itself, to reopen the proceedings, to the exclusion of other equitable factors. *See Cox*, 757 F.3d at 121-124 (district court focused on whether *Martinez* is itself an extraordinary circumstance). As in *Cox*, this Court should reverse and/or vacate and remand, as the District Court's final decision here was tainted by its initial conclusion (R. 244, pp. 5-8, PageID #986-989) that it should not grant relief from judgment because *Martinez* alone did not allow such a result.

To be sure, at the end of its decision, the District Court did mention and arguably consider all the equities, but that decision cannot be divorced from the District Court's earlier conclusion – set forth in an entire section entitled "*Martinez* is not an exceptional circumstance warranting relief under Rule 60" -- that Mr. Zagorski simply cannot secure relief in light of *Martinez*. At a minimum, the District Court's decision denying relief based on *Martinez* but then considering equities (flawed as it was because of its failure to acknowledge the *Lockett* error) is internally inconsistent. All the more reason to reverse or vacate the

District Court order, so that the District Court can make its decision about whether to grant Rule 60(b) relief based in no part on the fundamentally flawed reasoning that *Martinez* is not enough to reopen the proceedings – when that undoubtedly influenced the District Court's ultimate conclusion here.

In addition, when one reviews the District Court's evaluation of the equities at the end of its opinion, the District Court only mentioned, but did not analyze or give proper weight to, the equitable factors that: (a) this is a capital case, where Mr. Zagorski's life is at stake, and (b) with its offer of life imprisonment before trial, even the prosecution agreed that life was more than enough punishment here. These factors weigh heavily in favor of reopening the judgment under Fed.R.Civ.P. 60(b)(6), yet the District Court failed to meaningfully analyze or weigh these factors. This provides additional reason for this Court to reverse or vacate the order and require a careful consideration of all the equities.[3]

---

3 And indeed, not surprisingly, both this Court and other courts have been more solicitous of granting Rule 60(b) relief in capital cases, given the stakes involved. *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759 (2017)(granting 60(b) relief in capital habeas proceeding); *Barnett v. Roper*, ___ F.3d ___, 2018 U.S.App.Lexis 26844 (8th Cir. Sept. 20, 2018)(affirming grant of habeas relief following reopening of capital habeas petition under *Martinez v. Ryan*); *Thompson v. Bell*, 580 F.3d 423, 442-445

And where the District Court essentially failed to consider Mr. Zagorski's argument that counsel ineffectively failed to investigate and prove Blackwell's involvement (*See* n. 2, *supra*), that, too, was an abuse of discretion.

In sum, therefore, the District Court denied relief from judgment by misapprehending the merit of Mr. Zagorski's *Lockett* claim, basing its denial of relief on the inadequate conclusion (as in *Cox*) that *Martinez* alone does not permit relief from judgment, and failing to properly weigh all the equities, including the compelling equitable factors that this is a capital case in which the prosecution offered a life sentence. This Court, therefore, should reverse the District Court's flawed order which denied relief from judgment and either order the grant of relief or remand for further proceedings.

(6th Cir. 2009); *In Re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004)(en banc)(granting 60(b) relief in Tennessee capital case), *vacated* 545 U.S. 1151 (2005).

C. The District Court Has Erroneously Failed To Acknowledge That *Martinez* Necessarily Applies Here, Given The Supreme Court's Decision In *Edwards v. Carpenter* And Justice Breyer's Concurrence In *Edwards*

At least with regard to his *Lockett* and *United States v. Jackson* claims, Mr. Zagorski's ultimate entitlement to relief hinges on whether the ineffective assistance of trial counsel – when argued as cause for the default of substantive constitutional claim, but not presented as a separate defaulted ineffectiveness-of-trial-counsel claim in federal habeas – is subject to the rule of *Martinez*. Contrary to the District Court's conclusion, *Martinez* does apply to such a situation, both as a matter of logic and fairness, given the Supreme Court's decision in *Edwards v. Carpenter*, 529 U.S. 446 (2000) and Justice Breyer's concurrence in *Edwards*.

The District Court has unfairly and erroneously avoided the holding of *Edwards v. Carpenter*, 529 U.S. 446 (2000) and Justice Breyer's explanation about establishing "cause" in his concurring opinion in *Edwards*. Indeed, *Edwards* specifically held that a petitioner may use the ineffectiveness of trial counsel as cause for a procedural default, so

long as allegations of trial counsel's ineffectiveness were properly exhausted by post-conviction counsel during state post-conviction proceedings. *Id.*

Yet the majority opinion in *Edwards* and Justice Breyer's concurrence in *Edwards* also make perfectly clear that when a petitioner wishes to use trial counsel's ineffectiveness in failing to raise a claim as "cause" for a default, if that ineffectiveness argument was itself defaulted because it was not properly presented to the post-conviction courts, the petitioner is still entitled to be heard on the merits of his or her claim in federal court if s/he can show "cause" for the failure to exhaust that ineffectiveness claim during post-conviction proceedings.

To quote Justice Scalia's majority opinion in *Edwards*: "To hold, as we do, that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that that procedural default may not *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim." *Id.* at 453. Exactly. That is precisely the case here, where *Martinez* excuses post-conviction counsel's failure to assert, as

Zagorski does now in federal court, that trial counsel was ineffective for failing to raise the *Lockett* and *United States v.* Jackson claims.

As Justice Breyer similarly explained, when "ineffectiveness of trial counsel" asserted as cause is otherwise defaulted, a petitioner may still show that s/he has cause for the default of an ineffectiveness of trial counsel claim. *Id.* at 458 (Breyer, J., concurring). That is precisely what Edmund Zagorski has done through the application of *Martinez* -- which by its terms supplies "cause" for any failure of post-conviction counsel (as here) to properly present an ineffectiveness claim or argument to the post-conviction court, to be used in federal court as cause for the default of a substantive constitutional claim.

In fact, Ed Zagorski's case presents the exact scenario contemplated by Justice Breyer in *Edwards*, in which a petitioner establishes "cause" for the default of an otherwise defaulted "cause" argument. Justice Breyer foresaw the practical impact that *Martinez* now has on establishing "cause" under *Edwards.* In his concurring opinion in *Edwards*, joined by Justice Stevens, he explained:

> Consider a prisoner who wants to assert a federal constitutional claim (call it FCC). Suppose the State asserts as a claimed "adequate and independent state ground" the prisoner's failure to raise the matter on his first state-court appeal. Suppose further that the prisoner replies by alleging that he had "cause" for not raising the matter on appeal (call it C). After *Carrier*, if that alleged "cause" (C) consists of the claim "my attorney was constitutionally ineffective," the prisoner must have exhausted C in the state courts first. And after today, if he did not follow state rules for presenting C to the state courts, he will have lost his basic claim, FCC, forever. . . . According to the opinion of the Court, he will not necessarily have lost FCC forever if he had "cause" for not having followed those state rules (i.e., the rules for determining the existence of "cause" for not having followed the state rules governing the basic claim, FCC) (call this "cause" C*). The prisoner could therefore still obtain relief if he could demonstrate the merits of C*, C, and FCC.

Edwards, 529 U.S. at 458 (Breyer, J., concurring). Justice Breyer is right, and this means that *Martinez* – which provides a standard for "cause" – applies here, now that Ed Zagorski is arguing cause of the default of his cause argument.

To reiterate: (a) *Edwards* allows the ineffectiveness of trial counsel to supply cause when the ineffectiveness of trial counsel is properly raised in post-conviction proceedings, and (b) *Martinez* allows the ineffectiveness of post-conviction counsel to supply cause when, during

post-conviction proceedings, the ineffectiveness of trial counsel (which a petitioner uses as cause) was not properly presented during post-conviction proceedings – which is exactly what occurred here.

The District Court didn't want to apply *Martinez* to Edmund Zagorski's "ineffective assistance as cause" arguments, but logically, the District Court cannot limit *Martinez* in this manner. The whole reason Mr. Zagorski's substantive *Lockett* and *United States v. Jackson* claims have never been heard by *any court* is that trial counsel failed to raise such claims, and post-conviction counsel failed to allege trial counsel's ineffectiveness. This is the precise rationale used by Justice Kennedy in his *Martinez* majority opinion as to why the ineffectiveness of post-conviction counsel must, when trial counsel was ineffective, provide cause for a procedural default. It therefore does apply here.[4]

It also makes no practical sense not to apply *Martinez* under these

[4] In *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), this Court identified the problem facing persons like Ed Zagorski as follows:

> Without *Martinez*'s exception, a defendant's claim that he was denied constitutionally adequate assistance at trial could get caught in an eddy at the confluence of federal deference, state procedural law, and inadequate post-conviction counsel, and thereby escape review entirely.

Id. at 791. In other words, *Martinez* ensures that Mr. Zagorski's ineffective-assistance-of-counsel argument will be reviewed by *some* court, as it must be now.

circumstances. A defaulted ineffectiveness-of-trial counsel claim alleging trial counsel's failure to do "X" is unquestionably subject to *Martinez*, and so must an identical "ineffectiveness-of-trial counsel as cause" argument alleging trial counsel failed to do "X." There is no meaningful distinction between counsel's failure to do "X" when alleged as a substantive defaulted ineffectiveness claim, or counsel's failure to do "X" when alleged as a defaulted assertion of cause. It's all the same.

Because the District Court failed to see this and failed to apply *Martinez*, the District Court should be reversed, and this Court should order it to review Mr. Zagorski's defaulted "ineffectiveness as cause" arguments under the rule of *Martinez* – especially where Mr. Zagorski has (at least) a meritorious claim under *Lockett* for which he will receive review and relief upon the application of *Martinez*, as provided for in *Edwards*.

D. This Court Should Reverse The Order Of The United States District Court And Remand For Further Proceedings, Untainted By Misapprehension Of The Law And With Full And Appropriate Consideration Of All The Equities In Ed Zagorski's Favor

At bottom, the District Court's denial of Rule 60(b)(6) relief is

plagued with numerous errors, constitutes an abuse of discretion, and must be reversed for many reasons:

(1) As in *Cox*, where the district court's ruling was reversed, the District Court's opinion here is tainted by its conclusion that *Martinez* alone does not provide extraordinary circumstances;

(2) The District Court misapprehended and erroneously weighed the equities by concluding that none of Mr. Zagorski's claims has merit, when certainly his *Lockett* claim is meritorious under Justice Sotomayor's reasoning in *Hodge*;

(3) The District Court wholly ignored Mr. Zagorski's evidence and argument that counsel ineffectively failed to present proof of Jimmy Blackwell's involvement in the offense;

(4) The District Court did not properly analyze or give weight to the equitable factors that Mr. Zagorski's life is at stake and the state offered him life imprisonment before trial, thus making the death sentence an unnecessary and arbitrary punishment; and

(5) The District Court erroneously failed to acknowledge that under *Edwards*, *Martinez* applies to Mr. Zagorski's defaulted

"ineffectiveness-as-cause" arguments which supplies cause here, and allows for merits review of Mr. Zagorski's substantive *Lockett* and *United States v. Jackson* claims.

CONCLUSION

This Court should reverse the denial of Rule 60(b) relief (*See Buck v. Davis, supra*), or as the Third Circuit did in *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), this Court should reverse and/or or vacate the District Court order denying Mr. Zagorski's motion for relief from judgment and remand for review of that motion under the proper legal standards and free from the errors which tainted the District Court's initial consideration of the Rule 60(b)(6) motion.

Respectfully submitted,

Paul R. Bottei
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: /s/ *Paul R. Bottei*

CERTIFICATION

I certify that this brief contains 5970 words as determined by the word processing program used to prepare this brief.

/s/ *Paul R. Bottei*

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this brief has been served via the electronic filing system to John Bledsoe and Michael Stahl, Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 on this 9th day of October, 2018.

/s/ *Paul R. Bottei*

ADDENDUM: DESIGNATION OF ELECTRONIC RECORD

Record No.	PageID #	Document
212	491-514	Motion For Relief From Judgment
212-1	515	Affidavit of Larry Wilks, Esq.
212-2	516	Affidavit of Janet Santana
212-3	517-518	Chart: Hickman County Murder Indictments (1976-1993)
212-4	519-590	Hickman County Murder Indictments
212-5	591	Affidavit of Samuel Felker, Esq.
232	769	Order Staying Proceedings
233	770-771	Motion To Lift Stay And For Ruling
235	773-774	Order Lifting Stay And For New Filings
241	782-810	Amended Motion For Relief From Judgment
241-1	811-855	Amended Habeas Corpus Petition
241-2	855-857	Jury Instruction On Mitigating Evidence
241-3	858	Affidavit of Larry Wilks, Esq.
241-4	859-865	Federal Hearing Transcript Excerpts
241-5	866	Handwritten Letter of Jimmy Blackwell
241-6	867-943	Affidavit of Janet Santana & Attachments
241-7	944	Affidavit of Samuel Felker, Esq.
244	982-1002	Memorandum Of The Court
245	1003-1004	Order Denying Relief, Granting Certificate of Appealability, And *In Forma Pauperis* Status On Appeal
247	1006-1007	Notice Of Appeal