

CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDMUND ZAGORSKI,

Petitioner

vs.

TONY MAYS, Warden,
Respondent

APPLICATION FOR STAY OF EXECUTION
Execution Scheduled For 7:00 p.m. Central Time, November 1, 2018

To The Honorable Sonia Sotomayor, Circuit Justice for the United States Court of Appeals for the Sixth Circuit: Petitioner Edmund Zagorski respectfully moves your Honor and this Court for a stay of execution of a scheduled November 1, 2018 execution date. Your Honor and this Court should grant a stay of execution for the following reasons:

1. “Before issuing a stay, it is ultimately necessary . . . to balance the equities – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.” *Trump v. Int’l Refugee Assistance Project*, 582 U.S. ___, ___ (2017)(*per curiam*)(slip op. at 10).

2. The two most critical factors that Your Honor and this Court must consider in deciding whether to grant a stay are whether the applicant has made a strong showing that s/he is likely to succeed on the merits, and whether s/he will be irreparably injured absent a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Such equities also include the public interest and any harm to an opposing party.

3. First, there is no question that Mr. Zagorski will be irreparably harmed if he is executed. Thus, that first of the two most critical factors supporting a stay heavily favors Mr. Zagorski.

4. Second, as Mr. Zagorski has shown in his contemporaneously-filed petition for writ of certiorari, he has indeed made a strong showing that he is likely to succeed on the merits of his claims in this Court.

5. As Mr. Zagorski has shown in his petition for writ of certiorari, he has satisfied all the prerequisites for relief on the merits of his *Lockett* claim, as shown by *Edwards v. Carpenter*, 529 U.S. 446 (2000), and Justice Breyer's *Edwards* concurrence.

6. Mr. Zagorski has established: (a) the merit of his *Lockett* claim, *See Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting); (b) the merit of his showing that he has "cause" for the default of that claim given the ineffectiveness of trial counsel (denominated case C by Justice Breyer in his concurring opinion in *Edwards*, 529 U.S. at 458); and (c) cause for the default of that "ineffectiveness of trial counsel as cause" argument (denominated as case C* by Justice Breyer in *Edwards*)

given the clear ineffectiveness of post-conviction counsel, as permitted by *Martinez v. Ryan*, 566 U.S. 1 (2012).

6. The court of appeals has made many serious errors in denying relief.

7. First, the court of appeals majority has erroneously refused to apply *Edwards* and *Martinez* to enable Mr. Zagorski to have his *Lockett* claim heard on the merits. Chief Judge Cole has explained this error, where Mr. Zagorski's claim fits squarely within both the scope and rationales of *Edwards* and *Martinez*. See *Zagorski v. Mays*, No. 18-6052 (6th Cir. Oct. 29, 2018)(Cole, C.J., dissenting), slip op. at 11 (“Zagorski is correct” that he establishes his entitlement to review and relief on his *Lockett* claim under *Edwards* and *Martinez*).

8. Second, the court of appeals majority has manifestly erred in denying relief by claiming that Mr. Zagorski's “ineffectiveness as cause” argument is a constitutional claim subject to 28 U.S.C. §2244. This Court's opinion in *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) unequivocally rejected that contention: A “claim as used in §2244(b) is an asserted federal basis for relief from a state court's judgment of conviction.” Rather, Mr. Zagorski's “federal basis for relief from the state court judgment” is his *Lockett* claim – not his “ineffectiveness as cause” argument.

9. Third, the court of appeals has maintained that Mr. Zagorski's *Lockett* claim is not meritorious, but it is, as clearly proven by Your Honor's opinion in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting). It is especially meritorious where the prosecution itself thought that the circumstances of the offense

merited a life sentence before trial. A reasonable, properly instructed juror could have concluded the same.

10. The court of appeals has thus denied relief and affirmed the denial of relief from judgment predicated on numerous errors of law, such that reversal by this Court of these errors would ultimately entitle Mr. Zagorski to merits review of his *Lockett* claim, and to relief. This is confirmed by Chief Judge Cole's conclusion – free from the legal errors of the majority – that Mr. Zagorski is indeed entitled to relief from judgment under Rule 60(b)(6) given the equities of this case. *Zagorski v. Mays*, slip op. at 15 (Cole, C.J., dissenting); Pet. App. 17a.

11. The petition for writ of certiorari itself demonstrates that certiorari is warranted and a reasonable probability that this Court will grant certiorari and reverse: The petition establishes a doctrinal conflict between *Edwards* and *Martinez* on the one hand and *Coleman v. Thompson*, 501 U.S. 722 (1991) on the other that needs to be addressed by this Court and that entitles Mr. Zagorski to relief; it shows a nationwide need to have that conflict addressed by this Court (which even the panel indicated); it notes that the published panel opinion is an outlier in clear conflict with *Gonzalez* and decisions of the other circuits; and the petition presents a powerful and appropriate vehicle for addressing the questions presented, where reversal by this Court will ultimately entitle Ed Zagorski to relief from judgment (as Chief Judge Cole has concluded) and to habeas corpus relief, including on his *Lockett* claim.

12. Thus, Mr. Zagorski shows not only irreparable harm but also a strong likelihood of success on the merits in this Court and a strong likelihood of this Court granting certiorari and reversing the judgment below.

13. When these two most important factors are coupled with the public's significant interest in not executing Mr. Zagorski in violation of the Constitution, and where the state itself never demanded death before trial when it offered a life sentence, the state's interest in executing Mr. Zagorski now is muted, and a stay is warranted.

14. In the balance of all the equities, a stay of execution is warranted, as is the grant of certiorari, and expedited proceedings in this Court, after which Mr. Zagorski may secure relief in this Court.

15. Especially where this Court can craft whatever equitable relief is appropriate when issuing a stay (*Trump, supra*, slip op. at 9), this Court should grant a stay of execution, order expedited proceedings, and then expeditiously rule in Mr. Zagorski's favor.

16. No one has an interest in executing Mr. Zagorski in violation of his rights and the Constitution, and thus, a stay of execution is warranted.

17. In fact, this Court itself has similarly granted stays of execution in capital habeas proceedings in which a petitioner has sought relief in this Court after being denied relief in the lower courts under Fed.R.Civ.P. 60(b)(6).

18. Thus, for example, in *Buck v. Thaler*, 564 U.S. 1063 (2011), this Court granted a capital habeas petitioner a stay of execution pending disposition of his

petition for writ of certiorari, where Buck sought relief from the lower courts' denial of relief from judgment under Fed.R.Civ.P. 60(b)(6) – and did so after first seeking relief from judgment just days before his scheduled execution date, based on information that was available for years.

19. Yet again, in *Tharpe v. Sellers*, 582 U.S. ____ (Sept. 26, 2017), this Court granted a stay of execution pending disposition of a petition for writ of certiorari seeking review of a capital petitioner's denial of relief under Fed.R.Civ.P. 60(b).

20. As in *Buck* and *Tharpe*, this Court should grant a stay of execution where Mr. Zagorski has shown serious reversible errors below that require this Court's intervention, where Mr. Zagorski ultimately establishes his entitlement to relief from judgment and relief under *Lockett*, and where he faces irreparable harm.

CONCLUSION

Your Honor and this Court should grant a stay of execution, grant certiorari and order expedited proceedings, and ultimately grant Mr. Zagorski relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing application for stay of execution was served via first-class mail and email upon John Bledsoe, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 31st day of October, 2018.

/s/ Paul R. Bottei