Nos. 18-6525/18A465
CAPITAL CASE
Execution Scheduled: November 1, 2018, at 7:00 CST

IN THE
SUPREME COURT OF THE UNITED STATES

EDMUND ZAGORSKI,
Petitioner,

V.

TONY MAYS, WARDEN,
Respondent

ON APPLICATION FOR STAY OF EXECUTION AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION AND RESPONSE TO MOTION FOR STAY

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Under *Edwards v. Carpenter*, 529 U.S. 446 (2000), may a federal habeas corpus petitioner invoke the rule of *Martinez v. Ryan*, 566 U.S. 1 (2012), to show that the ineffectiveness of post-conviction counsel provides "cause" for the procedural default of an ineffective-assistance-of-trial-counsel argument argued as "cause" for the procedural default of a substantive constitutional claim?

2. May a federal habeas corpus petitioner use Fed. R. Civ. P. 60(b) to overcome the procedural default of a substantive constitutional claim by arguing that s/he has "cause" under *Martinez* for the default of an ineffective-assistance-of-trial-counsel argument argued as "cause" for the default of that constitutional claim?

3. Is Edmund Zagorski entitled to relief from judgment under Fed. R. Civ. P. 60(b)(6) in this capital case, and/or did the district court abuse its discretion in denying relief, especially where Mr. Zagorski has a meritorious claim for relief under *Lockett v. Ohio*, 438 U.S. 586 (1978)?

4. Should the Court grant the petitioner the equitable relief of a stay of execution to review the denial of post-judgment relief under Fed. R. Civ. P. 60(b)(6) when the petitioner has been dilatory in pursuing equitable relief and can show no likelihood of success on his quest to extend *Martinez* virtually beyond recognition?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

The petitioner, Edmund Zagorski, was convicted by a Tennessee jury in 1984 of the first-degree murders of John Dale Dotson and Jimmy Porter. The jury sentenced the petitioner to death for each of the murders, and the Tennessee Supreme Court affirmed. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986).[1] The petitioner sought post-conviction relief, which was denied in state court. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999).

The petitioner filed a habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Tennessee, which dismissed the petition by judgment entered in March 2006. The Sixth Circuit affirmed, and this Court denied certiorari. *Zagorski v. Bell*, 326 Fed. Appx. 336 (6th Cir. Apr. 15, 2009), *cert. denied*, 559 U.S. 1068 (2010), *reh. denied*, 561 U.S. 1019 (2010).

Eleven months after this Court's opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), the petitioner moved the district court for relief from its judgment under Fed. R. Civ. P. 60(b)(6), arguing that *Martinez* provided grounds to reconsider the district court's disposition of certain claims, including a claim that the trial court had responded to a juror question during sentencing deliberations in a way that violated the Eighth Amendment and *Lockett v. Ohio*, 438 U.S. 586 (1978). Within months of filing the motion, petitioner then insisted that the district court stay the proceeding pending decisions in other cases in which *Martinez* had been raised, and the district court granted his request in 2013. Those other cases— *McGuire v. Warden*, 738 F.3d 741 (6th Cir. 2013), and *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014)—were decided several months

[1]The facts of Zagorski's crimes are set out in the opinion of the Tennessee Supreme Court. *Id*. at 809-12.

later, but petitioner took no further action in his own case, instead allowing it to sit dormant for more than four years.

On March 15, 2018, the Tennessee Supreme Court set the petitioner's execution date for October 11, 2018. Three months later, on June 11, 2018, the petitioner moved to resume proceedings on his Rule 60(b) motion. *See Zagorski v. Mays*, No. 3:99-1193 (M.D. Tenn.) (Motion, Doc. No. 233). On September 12, 2018, the district court denied the petitioner's Rule 60(b) motion but granted a certificate of appealability. Pet. Appx. 18a-37a.

Despite his imminent execution date, the petitioner delayed the ministerial task of filing a notice of appeal until October 5, 2018. On October 10, 2018, a divided panel of the Sixth Circuit granted a stay of execution pending disposition of the petitioner's appeal from the denial of his Rule 60(b) motion. This Court vacated that order the next day. *Mays v. Zagorski*, ___ S. Ct. ___, 2018 WL 4934191 (Oct. 11, 2018).

On October 11, 2018, the Governor of Tennessee issued a short reprieve from execution.[2] Upon dissolution of the reprieve, the Tennessee Supreme Court set the petitioner's execution for November 1, 2018.

In light of the reprieve, the Sixth Circuit expedited the petitioner's appeal in this case, and in an opinion filed October 29, 2018, affirmed the judgment of the district court. Pet. Apx. 3a-17a. The Sixth Circuit correctly observed that the change in decisional law resulting from *Martinez* is insufficient by itself to show extraordinary circumstances for relief under Fed. R. Civ. P. 60(b)(6) from a defaulted claim of ineffective assistance of trial counsel. Pet. Apx. 6a. As to petitioner's proposed expansion of *Martinez* under *Edwards v. Carpenter*, 529 U.S. 446 (2000), to

[2]The executive reprieve was issued in response to a federal district court order—entered on the morning of the petitioner's scheduled execution—directing the State of Tennessee to honor the petitioner's last-minute decision to choose electrocution as his method of execution. *Zagorski v. Haslam, et al*., No. 3:18-cv-10135 (M.D. Tenn.) (Order, Oct. 11, 2018).

defaulted jury-instruction and other non-ineffectiveness claims, the court rejected his argument. The court reasoned that adopting the petitioner's argument would "detonate" the procedural default bar in *Coleman v. Thompson*, 501 U.S. 722 (1991). Pet. Apx. 6a-7a. The court further observed that, by making this argument, the petitioner had actually raised entirely new ineffective-assistance claims based on counsel's alleged failure to litigate the underlying non-ineffectiveness claims, which are not reviewable under Rule 60(b) but instead amount to a second or successive habeas petition under 28 U.S.C. § 2244(b)(2)(A). Pet. Apx. 7a-8a.

Finally, considering other equitable factors, the Sixth Circuit noted that impending capital punishment does not necessarily mandate relief under Rule 60(b), especially when the merits of the claims at issue do not support extraordinary relief. Pet. Apx. 8a. After considering the merits of the petitioner's claims, the Sixth Circuit agreed with the district court that the petitioner could show no prejudice from counsel's alleged deficient performance regarding the investigation of other suspects, "given the overwhelming evidence against Zagorski." Pet. Apx. 9a. Further, on the jury-instruction claim and the petitioner's challenge to an isolated comment by the trial court in response to a juror question during the sentencing phase of trial, the petitioner showed no constitutional deprivation. All of the petitioner's mitigating evidence was presented during the guilt phase at trial, and the trial court instructed the jury that it could consider this evidence. Pet. Apx. 10a. On the plea-negotiation claim, nothing prohibited the State from seeking the death penalty at trial once the parties failed to reach an agreement to resolve the case. Pet. Apx. 10a-11a.

On October 30, 2018, the petitioner filed a petition for rehearing en banc and motion for a stay of execution in the Sixth Circuit, both of which were denied. Pet. Apx. 1a-2a. Petitioner now seeks certiorari review and a stay of execution pending review of his jury-instruction claim.

ARGUMENT

I. The Petition for Writ of Certiorari Should Be Denied Because the District Court Did Not Abuse Its Discretion In Refusing to Extend The *Martinez* Exception Beyond Its Narrow Bounds.

The petitioner argues that, in light of *Martinez*, the district court should have granted relief under Fed. R. Civ. P. 60(b)(6). But the Sixth Circuit correctly held that the district court did not abuse its discretion when rejecting the post-judgment motion and finding no extraordinary circumstances to support relief. The change in decisional law resulting from *Martinez* alone does not justify relief, and other equitable considerations weigh heavily against him. The district court appropriately declined to extend *Martinez* beyond its unambiguous terms. Furthermore, the petitioner was not diligent in pursuing his request for relief. Additional review of the petitioner's post-judgment motion is most certainly not warranted.

Among the numerous claims rejected by the lower courts in the petitioner's initial federal habeas proceedings was the sole claim on which he now seeks review—that the trial court, after having fully instructed the jury as to mitigating evidence, responded to a juror question about mitigation in a manner that allegedly violated *Lockett* and improperly limited the jury's consideration of the circumstances surrounding the two murders. Since this issue was never raised in the state courts, the claim was found to have been procedurally defaulted and was thus dismissed. Seeking to rely on this Court's narrow inroad into the procedural-default doctrine in *Martinez*, the petitioner applied for equitable relief under Rule 60(b)(6). Recognizing that his claim did not neatly fit into *Martinez*, the petitioner argued that the district court should construe *Martinez* together with *Edwards v. Carpenter*, 529 U.S. 446 (2000), to permit post-conviction counsel's failure to raise a never-before-presented ineffective-trial-counsel claim to serve as cause for petitioner's procedural default of his jury-instruction claim.

But petitioner's proposal would extend *Martinez* so far beyond its terms that it would eliminate procedural default altogether, and it flies in the face of the principles of comity. As Justice O'Connor made clear in the opening of *Coleman*, "[t]his is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claim of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). *Martinez* established only a narrow exception to the rule in *Coleman*. Petitioner would have this Court eliminate that rule altogether.

"Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (citing *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978)). The district court's decision on a Rule 60(b) motion is reviewed for an abuse of discretion. *Buck v. Davis*, 137 S. Ct. 759, 777 (2017). To secure relief under Rule 60(b)(6), a movant must show extraordinary circumstances for reopening the case. *Gonzalez*, 545 U.S. at 535; *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 863-64 (1988); *Ackermann v. United States*, 340 U.S. 193, 199-202 (1950).

Further review of the judgment is unnecessary for at least four reasons. *First*, the Sixth Circuit gave proper deference to the district court's conclusion that *Martinez* was insufficient to warrant post-judgment relief on the petitioner's claims. This change in the decisional law alone cannot serve as an extraordinary circumstance for Rule 60(b)(6) relief. *Agostini v. Felton*, 521 U.S. 203, 239 (1997). As this Court clarified in *Gonzalez*, "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005). "It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Id*.

Here, nothing more than *Martinez* could arguably support post-judgment relief. As the district court correctly noted, all of the petitioner's proffered equitable considerations were either "based on *Martinez*" or were not new developments. Pet. Appx. 36a-37a. With nothing more than a mere change in the decisional law, the Sixth Circuit correctly affirmed the district court's denial of post-judgment relief.

Second, the jury-instruction claim now raised is not a claim of ineffective assistance of trial counsel and thus does not fall within the ambit of *Martinez*. The Sixth Circuit appropriately rejected the petitioner's proposed, unsupported expansion of *Martinez* to any and all procedurally defaulted claims. Doing so would run directly contrary to the Court's decisions in this area.

In *Martinez*, the Court carved out a "narrow exception" to the procedural default bar in *Coleman*: "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*." *Martinez*, 566 U.S. at 9 (emphasis added). In *Davila v. Davis*, 137 S. Ct. 2058 (2017), this Court declined to extend this "narrow exception" to claims of ineffective assistance of appellate counsel because "[o]n its face, *Martinez* provides no support for extending its narrow exception to new categories of procedurally defaulted claims." 137 S. Ct. at 2065. "Applying *Martinez*'s highly circumscribed, equitable exception to new categories of procedurally defaulted claims would . . . do precisely what th[e] Court disclaimed in *Martinez*: Replace the rule of *Coleman* with the exception of *Martinez*." *Id*. at 2066.

The petitioner's proposal for expanding *Martinez* beyond claims of ineffective assistance of trial counsel by relying on *Edwards*—which no court has accepted—runs directly contrary to the Court's own holding in *Martinez*. The lower courts appropriately rejected the petitioner's argument. Certainly, in the context of a post-judgment Rule 60(b)(6) motion, whose resolution is

reviewable only for an abuse of discretion, a district court cannot be faulted for electing not to apply *Martinez* in a manner directly contrary to *Martinez* and never before followed by any court.

Third, the Sixth Circuit appropriately recognized that, by advocating for this expansion of *Martinez*, the petitioner raised an entirely new claim of ineffective assistance of trial counsel. Under *Gonzalez*, the petitioner's new claim is not even cognizable under Rule 60(b). The petitioner may not pursue it in the district court unless authorization were warranted and granted under 28 U.S.C. § 2244(b)(2). "Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Gonzalez*, 545 U.S. at 531 (citing 28 U.S.C. § 2244(b)(2)). No such showing has been made here.

Fourth, as the district court found, the petitioner was dilatory in pursuing Rule 60(b)(6) relief. A motion for relief from the judgment must be raised "within a reasonable time." Fed. R. Civ. P. 60(c)(1). "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 this case, evidences a lack of diligence on his part in pursuing the relief he seeks." Pet. Apx. 21a-22a. In *Gonzalez*, the Court found a lack of diligence because the petitioner waited over eight months after an intervening decision before filing a Rule 60(b) motion. *Gonzalez*, 545 U.S. at 536-38. This case presents even more delay than shown in *Gonzalez*. The petitioner's own persistent lack of diligence further undermines his argument that the district court abused its discretion by denying post-judgment relief under Rule 60(b)(6).

II. A Stay of Execution Is Not Warranted Because the Petitioner Was Dilatory in Pursuing Rule 60(b) Relief, He Has No Likelihood of Success in this Appeal, and the State's Interests in Executing Its Judgments Is Strong.

"[A] stay of execution is an equitable remedy," and "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. U.S. Dist. Court of Northern Dist. of California*, 503 U.S. 653, 654 (1992). "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004).

The district court specifically found that the petitioner was dilatory in prosecuting the Rule 60(b)(6) motion. This continued on appeal when the petitioner delayed filing his notice of appeal for weeks, waiting until just six days before his scheduled execution date. Indeed, this Court vacated a stay of execution entered following the petitioner's own avoidable, dilatory conduct. The petitioner's consistent delay in litigating this matter has now culminated in the petitioner filing a cert petition and a stay application less than 30 hours before his rescheduled execution. This factor clearly weighs against granting a stay.

Furthermore, a prisoner seeking a stay pending collateral litigation must demonstrate a significant possibility of success on the merits of that collateral litigation. *Id.*; *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). This must be a "strong showing" when a prisoner appeals from the denial of relief, as done here. *Hilton v. Braunskill*, 481 U.S. 779, 776 (1987). The petitioner bears the burden of proving that he is entitled to the equitable remedy of a stay of execution. *Hill*, 547 U.S. at 584.

Petitioner plainly cannot make that strong showing here. As already explained, the Court should not grant certiorari in this case. There is no reason for further review on the petitioner's baseless Rule 60(b) motion asserting review under *Martinez* for a claim that is not ineffective assistance of trial counsel. His novel argument has been accepted by no court, and it merits no further regard.

Also weighing against a stay is "the State's strong interest in proceeding with its judgment" which the Court must take into consideration. *Gomez*, 503 U.S. at 654. The petitioner has long since completed state and federal review of his convictions and sentence. The State's interests in finality are now "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998).

Petitioner's case has been thoroughly litigated over a span of more than three decades. He committed double murder more than thirty-five years ago. *Zagorski*, 701 S.W.2d at 810 (crimes occurred April 23, 1983). His conviction became final more than thirty years ago. *Zagorski v. Tennessee*, 478 U.S. 1010 (1986) (cert. denied on June 30, 1986). The judgment in petitioner's federal habeas proceedings became final over eight years ago. *Zagorski v. Bell*, 559 U.S. 1068 (2010) (petition for writ of certiorari denied April 19, 2010). The State's significant interests in enforcing its criminal judgments and the victims' compelling interest in finality weigh heavily against granting a stay of execution. *Calderon*, 523 U.S. at 556.

CONCLUSION

The petition for a writ of certiorari and the application for stay should be denied.

Respectfully submitted,

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