

**CAPITAL CASE**

No. 18A465

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IN THE  
SUPREME COURT OF THE UNITED STATES

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EDMUND ZAGORSKI,

Petitioner

vs.

TONY MAYS, Warden,

Respondent

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**PETITIONER'S REPLY ON  
APPLICATION FOR STAY OF EXECUTION**

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To the Honorable Sonia Sotomayor: Edmund Zagorski replies that this Court should indeed grant him a stay of execution, expedite proceedings in this matter, and grant him relief:

1. 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). Those equities weigh strongly in Mr. Zagorski's favor, and Mr. Zagorski is entitled to a stay of execution.

2. As Mr. Zagorski has shown in his application and petition for writ of certiorari, with his life at stake, he has made the required showing entitling him to relief on his *Lockett* claim under *Edwards v. Carpenter*, 529 U.S. 446 (2000), Justice Breyer’s *Edwards* concurrence in *Edwards, Martinez v. Ryan*, 566 U.S. 1 (2012), and *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting).

3. As Chief Judge Cole has noted: “Zagorski is correct” that *Edwards* and *Martinez* apply, Mr. Zagorski has made the two-tiered cause showing required by those cases, and his *Lockett* claim has merit. Pet. App. 13a-16a. Respondent merely states that *Martinez* ought not apply via *Edwards* (Brief in Opposition & Response, p. 11), but Respondent has not come to grips with the true meaning of *Edwards* and *Martinez*, as Chief Judge Cole has, and as Mr. Zagorski has. This case fits precisely within the terms and rationales of both *Edwards* and *Martinez*, and Justice Breyer’s concurring opinion in *Edwards*.

4. Moreover, the District Court abused its discretion in denying relief from judgment, especially where it denied relief based on its misapprehension of the law and the merit of Mr. Zagorski’s claims: “[T]he 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.” Pet. App. 17a (Cole, C.J., dissenting).

5. Yet again, Respondent contends that the District Court did not abuse its discretion by concluding that *Martinez* alone does not provide grounds for a Rule 60(b)(6) motion. Brief In Opposition & Response, p. 10. But as Mr. Zagorski has made

clear throughout these proceedings, he is relying on *all the equities in his case*, of which *Martinez* is just one equity – which is why Respondent’s argument fails, and Chief Judge Cole’s assessment of all the equities, which warrant relief, is indeed correct (and supports the granting of a stay). It is not true (as Respondent contends) that nothing more than *Martinez* could support Rule 60(b) relief. Chief Judge Cole proves that assertion false.

6. While Chief Judge Cole’s analysis proves the merit of Mr. Zagorski’s position and entitlement to a stay of execution, the panel majority’s opinion is riddled with legal errors (including quite obvious error): While the majority failed to apply *Edwards* and *Martinez*, the majority then flouted the clear holding of *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) to erroneously claim that Mr. Zagorski’s cause argument was a challenge to the state court judgment of conviction. Respondent relies on that argument here (Brief In Opposition & Response, p. 12), but again, that is clearly wrong.

7. *Gonzalez* holds that a petitioner may use Rule 60(b)(6) to overcome a procedural default (545 U.S. at 532 n.4), and such a cause argument is *not* a habeas claim for relief subject to §2244, which *Gonzalez* clearly defines as a “federal basis for relief from a state’s court’s judgment of conviction.” *Gonzalez*, 545 U.S. at 530. Mr. Zagorski’s cause argument is “ineffective assistance of counsel,” while his “federal basis for relief from” the state court judgment is his *Lockett* claim. Again, Respondent’s argument fails, as the panel majority has clearly ignored the teaching of *Gonzalez*.

8. Moreover, the panel majority also failed to recognize that the *Lockett* error here is essentially identical to the error identified by Justice Sotomayor in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting).

9. Yet based upon these numerous legal errors that infected its ultimate conclusion, the panel majority has denied relief, and it has done so erroneously.

10. The panel majority is wrong. Chief Judge Cole and “Zagorski [are] correct.” Pet. App. 13a.

11. Especially where the petition for writ of certiorari raises the vital question whether *Edwards* and *Martinez* apply under the circumstances, where the panel majority refused to apply *Gonzalez* by its very terms, and where Mr. Zagorski’s petition presents a robust vehicle for the resolution of the issues presented, this Court should grant a stay of execution – exactly as it did when it granted stays of execution in Rule 60(b) proceedings in *Buck v. Thaler*, 564 U.S. 1063 (2011) and *Tharpe v. Sellers*, 582 U.S. \_\_\_ (Sept. 26, 2017).

12.. As a final note, Respondent’s challenge to the timing of Mr. Zagorski’s motion for relief from judgment also fails. Even the Sixth Circuit never found that Mr. Zagorski was dilatory in seeking relief, where he sought relief within a year of *Martinez*, where he sought to have his motion decided early this summer (R. 233), and where he sought, and was granted, expedited proceedings in the Sixth Circuit.

13. One need look no farther than this Court’s actions in *Buck v. Thaler*, 564 U.S. 1063 (2011) to see that Mr. Zagorski’s request for relief has been anything but dilatory.

14. In *Buck*, this Court granted a stay of execution on September 15, 2011 to allow review of a Rule 60(b)(6) motion that was filed just days before on September 7, 2011 (*Buck v. Thaler*, S.D.Tex. No. 4:04-cv-3965, R. 27) and where a notice of appeal was also filed days before Buck's September, 15, 2011 execution date, based on information that was made public on *June 9, 2000* – eleven years earlier.

15. If anyone was dilatory, it was Mr. Buck, and this Court should have allowed him to be executed, if that's what justice required.

16. This Court, however, properly granted him a stay of execution, precisely because his Rule 60(b)(6) motion and underlying claim had potential merit and his life was on the line. Those are the two most important stay factors here as well, and as in *Buck*, they warrant a stay of execution here.

17. To reiterate: The court of appeals majority opinion is fraught with error. The majority refused to properly apply *Edwards v. Carpenter*, 529 U.S. 446 (2000) and *Martinez v. Ryan*, 566 U.S. 1 (2012) which entitle Mr. Zagorski to relief. The majority flouted *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) to falsely assert that Mr. Zagorski's cause argument was a challenge to the state court judgment. It is not. The majority failed to apply *Lockett*, as interpreted and explained by Justice Sotomayor in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting). When all the equities are considered, Mr. Zagorski is entitled to relief from judgment, and ultimately to habeas corpus relief. *See Zagorski*, slip op. at 15 (Cole, C.J., dissenting); Pet App. 17a.

18. Given these serious flaws in the panel opinion, there is (contrary to Respondent's contention) a strong likelihood this Court will grant certiorari and reverse, and Mr. Zagorski will be entitled to relief from judgment (*See Buck v. Davis*, 580 U.S. \_\_\_ (2017)) and federal habeas corpus relief.

19. And where the prosecution offered Ed Zagorski a life sentence before trial, it is hard for Respondent to claim that Ed Zagorski must be executed now (Brief in Opposition & Reply, p. 14), especially in light of the serious errors made by the court of appeals that this Court should properly review, and reverse.

20. Consequently, this Court should grant a stay of execution so that Mr. Zagorski may secure the relief to which he is justly entitled.

#### 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 reply on the application for stay of execution was served via first-class mail and email upon Michael Stahl, Esq. and John Bledsoe, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 1<sup>st</sup> day of November, 2018.

*/s/ Paul R. Bottei*