

CAPITAL CASE

No. 18-6525

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent's Brief in Opposition confirms that this Court should grant certiorari and reverse the judgment of the Sixth Circuit, especially in light of Chief Judge Cole's dissent which recognizes that "Zagorski is correct" that he is entitled to relief under *Edwards v. Carpenter*, 529 U.S. 446 (2000), Justice Breyer's concurrence in *Edwards, Martinez v. Ryan*, 566 U.S. 1 (2012), and *Lockett v. Ohio*, 438 U.S. 586 (1978), as explicated by Justice Sotomayor in *Hodge v. Kentucky*, 568 U.S. 1056 (2012). This Court should grant certiorari and reverse:

1. In his Brief in Opposition, Respondent simply states that *Martinez* does not apply, without coming to grips with the very point made by Mr. Zagorski in his petition for writ of certiorari: This Court has before it, and must address, the vital question arising from the two lines of authority from this Court, one of which would entitle Mr. Zagorski to relief, the other which would not.

2. Only this Court can decide whether *Edwards* and *Martinez* apply to enable Mr. Zagorski to secure relief (as Chief Judge Cole has recognized) or whether *Coleman* applies, precluding relief. Where Chief Judge Cole agrees that "Zagorski is correct" that *Edwards* and *Martinez* by their terms apply and entitle him to relief (Pet.App. 13a), it is critical for this Court to decide the issue in this capital case – especially where the panel majority has recognized that this Court alone is a position to resolve the tension in these two lines of authority. *See* Pet. App. 7a.

3. Because Respondent does not contest that there is a doctrinal conflict between *Edwards & Martinez* on the one hand and *Coleman* on the other, Respondent confirms that Mr. Zagorski is indeed correct that this Court should grant certiorari.

This is especially true where Respondent does not contest (for he cannot) that this is an issue of vital importance to the administration of justice throughout the nation.

4. Respondent's claim that this Court should not grant certiorari because *Martinez* alone is not an extraordinary circumstance under Rule 60(b) also misses the mark. Mr. Zagorski has relied on all the equities in his case, as is required by Rule 60(b)(6), *See Buck v. Davis*, 580 U.S. ___ (2017), and Chief Judge Cole has recognized that when all the equities are considered (including his death sentence, the merits of his *Martinez* argument, and *Martinez*, not to mention the state's offer of life before trial), Mr. Zagorski is entitled to relief from judgment. *Zagorski*, slip op. at 15 (Cole, J., dissenting); Pet. App. 17a. Respondent's narrow focus on *Martinez* alone is off base, as was the District Court's analysis which focused on *Martinez* alone – which proves the District Court's abuse of discretion in denying relief from judgment, and Mr. Zagorski's entitlement to relief here.

5. Respondent further erroneously asserts that Mr. Zagorski's "ineffective assistance as cause" argument is, as the panel majority claimed, a claim for habeas corpus relief. Mr. Zagorski has already debunked that contention by citing this Court to the specific language of *Gonzalez v. Crosby*, 545 U.S. 524, 530 & 532 n.4 (2005), which holds that a habeas claim is a claim attacking the judgment of the state court. Here, Mr. Zagorski's ineffective-assistance-of-trial-counsel argument is a "cause" argument alone, with his habeas challenge to the state court judgment being his *Lockett* (and/or *United States v. Jackson*) claims. Having ignored the clear teachings of *Gonzalez*, Respondent (like the panel majority) has made a most serious error. That

said, Respondent does not contest (for he cannot) that the panel decision conflicts directly with *Gonzalez* and, as a published opinion, is an outlier and in conflict with decisions of the other circuits, such that certiorari should be granted, as counseled by Rule 10(a) of this Court.

6. Respondent's additional claim that Mr. Zagorski somehow should have been denied relief from judgment for filing his motion within a year of *Martinez* also fails, especially where (a) the District Court never found lack of diligence in the filing of the motion (*See* R. 244, pp. 4-5, PageID #985-986); and (b) neither did the Sixth Circuit. Where the lower courts found no lack of diligence, neither can this Court. And Respondent misreads *Gonzalez*. This Court found *Gonzalez* lacked diligence because he could have raised the issue in light of favorable precedent, but abandoned his claim. *Gonzalez*, 545 U.S. 537. Mr. Zagorski did no such thing. He filed within a "reasonable time" which is all that Fed.R.Civ.P. 60(c) requires, and indeed the Sixth Circuit has held that any filing within a year of *Martinez* is timely. *Wright v. Warden*, 793 F.3d 670 (6th Cir. 2015). Where Mr. Zagorski complied with the rules set forth by Rule 60(c) and enforced in the Sixth Circuit, this Court is not at liberty to conclude that he somehow was not diligent in filing his motion for relief.

7. At the end of the day, Respondent has no significant response to Mr. Zagorski's request for certiorari where this Court needs to resolve the vital doctrinal conflict between *Edwards/Martinez* and *Coleman*, where the panel has patently ignored *Gonzalez*, and failed to apply *Lockett* (and Justice Sotomayor's reasoning in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)). As Chief Judge Cole recognizes, when the

law is properly applied, Mr. Zagorski is indeed entitled to the relief he seeks. His case is indeed, therefore, an appropriate vehicle for addressing the questions presented.

8. The Chief Judge of the United States Court of Appeals has concluded that Mr. Zagorski has properly invoked his rights under this Court's precedent, and when that law is applied here, Mr. Zagorski is entitled to relief from judgment, and he is entitled to be spared from execution.

9. This Court should thus grant certiorari, and as Mr. Zagorski has requested, order expedited proceedings so that he may secure the relief to which is justly entitled.

CONCLUSION

This Court should grant the petition for writ of certiorari, reverse the judgment below and/or remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply to brief in opposition was served via first-class mail and email upon John Bledsoe, Esq., and Michael Stahl, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 1st day of November, 2018.

/s/ Paul R. Bottei