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

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

CAPITAL CASE: QUESTIONS PRESENTED

In *Edwards v. Carpenter*, 529 U.S. 446 (2000) and Justice Breyer's concurring opinion in *Edwards* (*Id.* at 458), this Court and Justice Breyer recognized that when a federal habeas corpus petitioner argues the ineffective assistance of trial counsel as "cause" for the procedural default of a substantive constitutional claim, if that assertion of ineffective-assistance-of-trial-counsel is also procedurally defaulted, the habeas petitioner may still show "cause" for the default of that "cause" argument. In *Martinez v. Ryan*, 566 U.S. 1, 18-19 (2012), this Court held that the ineffective assistance of post-conviction counsel provides "cause" for the procedural default of a substantial claim of ineffective assistance of trial counsel.

In federal habeas corpus proceedings, Edmund Zagorski claimed that, in violation of the Eighth Amendment and *Lockett v. Ohio*, 438 U.S. 586 (1978), the trial judge erroneously defined "mitigating evidence" as evidence that "give[s] reason for the act" of killing, or "tend[s] to justify" an offense, or "take[s] away any of the aggravation of the circumstance." Such instruction, Mr. Zagorski has maintained, unconstitutionally limited jurors' consideration of mitigating circumstances of the offense itself, as confirmed by Justice Sotomayor's opinion dissenting from the denial of certiorari in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting).

Mr. Zagorski's *Lockett* claim was found procedurally defaulted in federal habeas corpus proceedings, as it was never raised by counsel in state court. And post-conviction counsel never alleged that trial counsel was ineffective for failing to raise the *Lockett* objection. After *Martinez*, however, Mr. Zagorski filed a motion for relief from judgment under Fed. R.Civ.P. 60(b)(6), asserting that under *Martinez*, the ineffectiveness of post-conviction counsel now supplies "cause" for any failure, in state court, to raise trial counsel's ineffectiveness in failing to make the *Lockett* objection, which in turn provides "cause" for the default of his *Lockett* claim – thereby allowing him to receive federal review and relief on his *Lockett* claim.

The United States District Court denied relief from judgment concluding that Mr. Zagorski ultimately cannot secure relief on his *Lockett* claim, because *Martinez* does not apply under the circumstances. A divided panel of the Sixth Circuit has affirmed. The majority has held that *Martinez* does not apply and that Mr. Zagorski cannot seek relief under Rule 60(b). Chief Judge Cole disagrees, having concluded that "Zagorski is correct" that under *Edwards* and *Martinez*, he can establish "cause;" his claim falls squarely within the *Martinez* exception; and this Court in *Edwards* contemplated such a two-layer cause analysis. Moreover, as Chief Judge Cole explains, in seeking to overcome a procedural default, Mr. Zagorski may indeed invoke Rule 60(b), *See e.g.*, *Gonzalez v. Crosby*, 545 U.S. 524, 532 n. 4 (2005), and the District Court abused its discretion in denying relief.

The questions presented are:

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? *See also Edwards*, 529 U.S. at 458 (Breyer, J., concurring)(outlining two-layer cause analysis applicable when a "cause" argument is itself defaulted)

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)? *See Zagorski v. Mays*, slip op. at 10-15 (Cole, C.J., dissenting)(concluding that Zagorski is entitled to relief from judgment); *Compare Buck v. Davis*, 580 U.S. ___ (2017)(lower courts abused discretion in denying Rule 60(b)(6) relief in capital case).

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JURISDICTION

This court has jurisdiction under 28 U.S.C. §1254. The United States Court of Appeals for the Sixth Circuit denied relief on October 29, 2018 and denied rehearing on October 30, 2018.

CONSTITUTIONAL & STATUTORY PROVISIONS & RULES INVOLVED

U.S. Const. Amend. VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fed.R.Civ.P. 60(b) provides, in pertinent part: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding 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."

STATEMENT OF THE CASE

1. In the Criminal Court of Robertson County, Tennessee, Edmund Zagorski was charged with two counts of first-degree murder involving the deaths of Jimmy Porter and John Dale Dotson.

2. Before trial, the prosecution offered Mr. Zagorski a sentence of two consecutive life sentences in exchange for a guilty plea, but Mr. Zagorski rejected that offer and proceeded to trial. *See* R. 241-3, p. 1, PageID #858 (affidavit of trial counsel).

3. Edmund Zagorski was convicted of both counts of first-degree murder, and the trial proceeded to a capital sentencing proceeding.

4. After the jury started its sentencing deliberations, they were confused about the meaning of "mitigating evidence," and thus asked the judge "if it would be possible that we get a good definition, explanation, of what would constitute a mitigating circumstance?" Trial Tr. 1131; R. 241-2, p. 2, PageID #856. Jurors wanted to know "just what is the meaning of the word mitigating?" *Id.*

5. The trial judge proceeded to bungle the answer, telling jurors that "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." R. 241-2, pp. 2-3, PageID #856-857 (emphasis supplied).

6. In federal habeas corpus proceedings, Edmund Zagorski claimed that, in violation of the Eighth Amendment, and *Lockett v. Ohio*, 438 U.S. 586 (1978), the trial court's definition of "mitigating evidence" unconstitutionally limited the full consideration of mitigating evidence, unconstitutionally precluding the jury from giving mitigating effect to the mitigating circumstances of the offense itself.

7. Such mitigating circumstances of the offense include the facts that the victims were drug dealers armed for a firefight (*See* Trial Tr. 757-758: Jimmy Porter brought a .357 magnum to the drug deal), and highly intoxicated. *See* Trial Tr. 642-643 (Porter's blood alcohol content was .10 and Dotson's was .25). R. 212, pp. 3-4, PageID #493-494.

8. During Mr. Zagorski's initial federal habeas corpus proceedings, the District Court found Mr. Zagorski's *Lockett* claim to be procedurally defaulted, because trial counsel had never objected to the trial court's instructions, nor did post-conviction counsel raise a *Lockett* claim or otherwise assert that trial counsel was ineffective for failing to raise the *Lockett* objection to the trial court's instructions.

9. It is undisputed, however, that post-conviction counsel simply failed to recognize and overlooked the *Lockett* claim and any associated assertion that trial counsel was ineffective for failing make the *Lockett* objection. R. 241-7, p. 1, ¶2, PageID #944 (affidavit of post-conviction counsel).

10. And there is no legitimate reason for trial counsel to have allowed the jury to be improperly instructed on such a critical matter at the capital sentencing proceeding. *See Hinton v. Alabama*, 571 U.S. ___ (2014)(per curiam).

11. After Mr. Zagorski's initial federal habeas proceedings concluded, this Court held in *Martinez v. Ryan*, 566 U.S. 1 (2012) that the ineffectiveness of post-conviction counsel in an initial-review collateral proceeding provides "cause" for the procedural default of a substantial ineffective-assistance-of-trial-counsel claim. *Id.* at 18-19.

12. In light of *Martinez*, and within 11 months of this Court's decision in *Martinez*, Mr. Zagorski filed a motion for relief from judgment under Fed.R.Civ.P. 60(b)(6), asserting, *inter alia*, that he had a meritorious *Lockett* claim in light of Justice Sotomayor's opinion in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting), which explained the unconstitutionality of nearly identical instructions which limited mitigating evidence to evidence that "provides a rationale" or "explains" an offense. *See* R. 212, p. 3, PageID #493.

13. As Justice Sotomayor explained in *Hodge*, "We have made clear for over 30 years . . . that mitigation does not play such a limited role," and thus such instructions are "plainly contrary" to *Lockett*. *Hodge*, 568 U.S. at 1060, 1061 (Sotomayor, J., dissenting).

14. Mr. Zagorski also asserted that under *Martinez*, he now overcame the procedural default of his *Lockett* claim because: (a) though his *Lockett* claim was procedurally defaulted, the ineffective assistance of trial counsel in failing to make

the *Lockett* objection supplied cause for that default; and (b) even though his "ineffective-assistance-of-trial-counsel as cause" argument was itself defaulted by post-conviction counsel in state court, he overcame the defaulted of his defaulted cause argument under *Martinez*, because post-conviction counsel ineffectively failed to raise an argument that trial counsel was ineffective for failing to make the *Lockett* objection. *See Id.*

15. As Mr. Zagorski explained in his motion, under *Edwards v. Carpenter*, 529 U.S. 446 (2000), while a federal habeas petitioner can argue ineffective-assistance-of-trial-counsel as cause for the procedural default of a substantive constitutional claim, if that "ineffective assistance as cause" argument is itself defaulted, a petitioner still is entitled to review of his or her claim if s/he can show "cause" for the default of his or her "cause" argument. R. 212, pp. 8-10, PageID #499-500.

16. Mr. Zagorski further asserted in his motion that, given the prosecution's offer a of a life sentence before trial, he had a valid claim under *United States v. Jackson*, 390 U.S. 570 (1968) that the prosecution had unconstitutionally burdened his right to seek a jury trial. That claim, too, was procedurally defaulted by trial counsel and found defaulted in federal habeas proceedings, but Mr. Zagorski alleged in his motion for relief from judgment that he now overcomes the default of that claim under *Edwards* and *Martinez*. R. 212, pp. 5, 8-10, PageID #495, 498-500.

17. He also asserted that trial counsel ineffectively failed to investigate Jimmy Blackwell's involvement in the offense, which would (at least) have led one

juror to vote for a sentence less than death. *Id.*, pp. 14-15, PageID # 504-505. That claim, too, was procedurally defaulted in state court, but Mr. Zagorski asserted that overcame that default under *Martinez*.

18. The District Court stayed proceedings on the motion (R. 232), and after Mr. Zagorski asked the Court to lift the stay and rule on his motion during the summer of 2018 (R. 233), the District Court requested that the parties refile their submissions, which Mr. Zagorski did, reasserting his entitlement to relief under *Lockett*, where the combination of *Edwards* and *Martinez* gave him cause to overcome the default of his "ineffective-assistance-of-trial-counsel as cause" argument. *See* R. 241 through 241-7, PageID #782-944.

19. The District Court denied the motion for relief from judgment. R. 244. In doing so, the District Court initially noted that Petitioner's diligence had negligible weight in the Court's analysis. *Id.*, pp. 4-5, PageID # 985-986. The District Court then penned an entire section concluding that *Martinez* **by itself** did not constitute an extraordinary circumstance warranting relief from judgment (*Id.*, pp. 508, PageID #986-989), though Mr. Zagorski had argued that all the equitable factors in his case (including the capital nature of his sentence, the prosecution's offer of life imprisonment before trial, the intervening decision in *Martinez* which overcame the default of his claims, and the substantive merit of his underlying claims) warranted relief from judgment.

20. Notwithstanding Mr. Zagorski's arguments that under *Edwards* and *Martinez*, he had made the two-layered cause showing necessary to overcome the

default of his *Lockett* and *United States v. Jackson* claims, the District Court refused to apply *Martinez* under the circumstances. R. 244, pp. 8-10, PageID #989-991. The District Court also asserted that none of Mr. Zagorski's underlying claims had merit. *Id.*, pp. 11-19, PageID #992-1000. The District Court did not ever really address the evidence of Jimmy Blackwell's involvement that trial counsel never investigated.

21. In rejecting Mr. Zagorski's *Lockett* claim, however, the District Court never mentioned Justice Sotomayor's opinion in *Hodge*. *Id.*, pp. 13-16, PageID #994-997.

22. The District Court concluded its opinion by holding that relief from judgment was not warranted under the circumstances. In doing so, however, the District Court relied heavily on its assertion that Mr. Zagorski's *Lockett* claim was meritless (which it is not), and his other underlying claims were meritless, and the court never actually considered the equitable impact of the factors that Mr. Zagorski's life is at stake and that the prosecution had offered him a life sentence before trial. *See* R. 244, pp. 19-20, 1000-1001.

23. On appeal, a divided Sixth Circuit has issued a published opinion affirming the District Court. The panel majority has concluded that despite *Edwards v. Carpenter*, Mr. Zagorski cannot invoke *Martinez* to overcome the procedural default of his "cause" argument that post-conviction counsel ineffectively failed to raise the *Lockett* objection at trial. *Zagorski v. Mays*, No. 18-6052 (6th Cir. Oct. 29, 2018), p. 4; App. 6a.

24. The panel majority feared that allowing the "two-layer showing of cause to excuse the default of a substantive constitutional claim would detonate *Coleman* [*v. Thompson*]'s [501 U.S. 722 (1991)] procedural default bar." *Id.*

25. Thus, the panel majority stated that it was up to this Court to apply *Martinez* in light of *Coleman*. *Id.* at 5; Pet. App. 7a. As the panel majority stated: "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 overrules its own decisions." *Id.*

26. The panel majority also asserted that even if it concluded that *Edwards* and *Martinez* allowed Mr. Zagorski to make the two-layered cause showing that overcame the default of his *Lockett* claim, he could not do so in a Rule 60(b) motion, because the panel believed that his "ineffective assistance of counsel as cause" argument should be considered to be filing a new constitutional attack on the state court judgment, and thus subject to 28 U.S.C. §2244. *Id.*

27. And the panel majority further concluded that to prevail on his Eighth Amendment *Lockett* claim, Mr. Zagorski also had to satisfy the due process test of *Cupp v. Naughten*, 414 U.S. 141 (1973), which he does not, and claimed that there was no error in the trial court's mitigating evidence instruction because the jury was informed that it could consider evidence presented at the guilt phase of the trial. *Id.*, pp. 7-8; Pet. App. 9a-10a.

28. But the problem with the trial court's instruction was that it told the jurors *how* to consider the guilt-phase evidence, and jurors were then told that they could not consider the circumstances of the offense as grounds for a life sentence *unless* such circumstances provided "a reason" for the act, or "tend[ed]" to justify the offense. That was the *Lockett* violation, as is clear from Justice Sotomayor's opinion in *Hodge* (568 U.S. at 1060-1061 (Sotomayor, J., dissenting)), for the instruction prevented full consideration of the fact that this was a drug-deal and robbery, involving persons who were armed and intoxicated (for which the prosecution offered life before trial).

29. Chief Judge Cole has dissented. *Zagorski v. Mays*, No. 18-6052 (6th Cir. Oct. 29, 2018)(Cole, C.J., dissenting), pp. 10-15; Pet. App. 12a-17a.

30. According to Chief Judge Cole, "Zagorski is correct" (Id. at 11; Pet. App. 13a) that under *Edwards v. Carpenter*, 529 U.S. 446 (2000), he is allowed to make a two-layer showing of cause, he can show "cause" for the default of his "ineffectiveness as cause" argument, and *Martinez* supplies that cause.

31. Chief Judge Cole has stated: "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." *Zagorski*, p. 11; App. 13a.

32. Further, "Zagorski's reading of *Martinez* and *Edwards* is fully consistent

with the reasoning underlying both cases." *Id.* In fact, "In describing why the *Martinez* exception to the general rule was necessary," this Court "explicitly recognized the relationship between *Martinez* and *Edwards*." *Id.* As Chief Judge Cole explains: "[T]he Supreme Court in *Edwards* contemplated this result" in Justice Scalia's *Edwards* majority opinion. *Id.* at 12; Pet. App. 14a.

33. Mr. Zagorski's *Lockett* claim also fits precisely within the framework of *Edwards* and the logic and theory of *Martinez*, which was designed to ensure that ineffective counsel would not default a meritorious claim -- "exactly what happened to Zagorski" here. *Id.*

34. Moreover, as Chief Judge Cole has concluded, when *Martinez* is applied to Ed Zagorski's *Lockett* claim, he would be entitled to relief, especially where there was evidence of another possible suspect, leading to a reasonable probability that at least one juror would have voted for life had the jury not been improperly instructed. *See Zagorski*, pp. 13-14; App. 15a-16a.

35. Chief Judge Cole has also rejected the majority's claim that Mr. Zagorski may not invoke Rule 60(b) to have his *Lockett* claim heard on the merits. As he has explained, Mr. Zagorski is doing precisely what Rule 60(b) permits: Making a showing of "cause" to lift a procedural bar of a claim earlier found defaulted, so that a claim may for the first time be heard on the merits in federal habeas proceedings. *Zagorski*, p. 13; App. 15a. In arguing "cause," Mr. Zagorski is not arguing an "asserted federal basis for relief from a state court's judgment of conviction," but only cause to reach such a ground, namely the *Lockett* violation, which was presented in his original

federal habeas corpus petition. *See Gonzalez v. Crosby*, 545 U.S. 524, 530, 532 n.4 (2005).

36. Finally, Chief Judge Cole agrees that Mr. Zagorski is indeed entitled to relief from judgment under Fed.R.Civ.P. 60(b)(6), where the District Court abused its discretion in denying relief, given "its failure to fully consider the remaining factors that Zagorski put forth in addition to *Martinez*." *Zagorski*, p. 14; Pet. App. 16a. With the District Court having failed to fully account for and weigh all the equitable factors in Ed Zagorski's favor, it abused its discretion. *Id.* at 14-15; Pet. App. 16a-17a.

37. As Chief Judge Cole explains: "[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." *Id.* at 15; Pet. App. 17a.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari because: (1) This petition presents the doctrinal conflict between two lines of authority (a) the application of *Martinez* via the holding of *Edwards* – which allows Mr. Zagorski to establish "cause" for the default of his "cause" argument and secure relief on his *Lockett* claim -- and *Coleman*, which would otherwise preclude relief, and only this Court can harmonize those two lines of authority; (2) The issue is of national significance, for it affects virtually all federal habeas corpus proceedings; (3) In claiming that Mr. Zagorski has presented a "new constitutional bases for habeas relief" subject to 28 U.S.C. §2244 by simply invoking *Martinez* to overcome the

procedural default of his *Lockett* claim, the Sixth Circuit has flouted the teaching of *Gonzalez v. Crosby*, 545 U.S. 524 (2005) and rendered an outlier opinion that conflicts with decisions of this Court and the other circuits; and (4) This case presents a strong vehicle for addressing the issues presented, where Mr. Zagorski has a meritorious *Lockett* claim, the lower courts have applied incorrect legal standards to his motion for relief from judgment, yet when the proper standards are applied, he is entitled to relief from judgment. *See Zagorski*, p. 15, Pet.App. 17a (Cole, C.J., dissenting).

I. Only This Court Can Resolve The Conflict Between The Two Conflicting Lines Of Cases That Collide In This Case: *Edwards & Martinez* On The One Hand, And *Coleman* On The Other

The decision below presents a classic case in which this Court must reconcile and harmonize two of its own lines of authority: *Edwards v. Carpenter*, 529 U.S. 446 (2000) – which then allows the application of *Martinez v. Ryan*, 566 U.S. 1 (2012) to supply cause for the default of Mr. Zagorski's *Lockett* claim -- and *Coleman v. Thompson*, 501 U.S. 722 (1991), which would appear to preclude such relief. At odds about how to harmonize these two specific decisions – especially in light of the more general rule of *Coleman v. Thompson*, 501 U.S. 722 (1991) which previously did not allow the ineffectiveness of post-conviction counsel to provide "cause" for a procedural default – the panel majority has wisely called upon this Court to intervene (*Zagorski*, p. 5; Pet. App. 7a), and this Court should thus do so.

As Mr. Zagorski has explained, *Edwards v. Carpenter*, 529 U.S. 446 (2000) clearly allows a habeas petitioner to show "cause" for the default of an "ineffective-assistance-of-counsel as cause" argument that was never presented to the state

courts. 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. *See* Pet. App. 68a (Brief of the Appellant).

Justice Breyer agrees, and in his concurring opinion in *Edwards*, he specifically explained that a habeas petitioner may make a two-tiered showing of cause to secure habeas review and relief on an otherwise procedurally defaulted substantive claim. This is precisely the showing that Mr. Zagorski has made here:

> 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). Indeed, in precise accord with *Edwards*: (a) Mr. Zagorski has shown the merits of FCC – his *Lockett* claim, as proven by *Hodge* (*See generally* Pet. App. 59a-60a); (b) he has shown the ineffective-assistance-of-trial counsel as cause C for the default of FCC (where trial counsel had

no valid reason for allowing the jury to be misinstructed under *Lockett* (*See* p. 4, *supra*)); and (c) via *Martinez* and clear proof of post-conviction counsel's ineffectiveness, he has further shown cause C* for the default in state court of his "ineffective-assistance-of-trial-counsel as cause" argument.

In sum, under *Edwards*, Mr. Zagorski is entitled to the very relief he seeks, through the application of *Martinez*, which allows the ineffective assistance of post-conviction counsel to provide cause (in this case C*) for the default of his ineffective-assistance-as-case argument. As Chief Judge Cole rightly acknowledges when one examines *Edwards* and *Martinez* together, one can only conclude that "Zagorski is correct." Zagorski, p. 11; Pet.App. 13a. This is confirmed by the additional factors identified by Chief Judge Cole: "Zagorski's claims fall squarely within the scope of the *Martinez* exception;" "Zagorski's reading of *Martinez* and *Edwards* is fully consistent with the reasoning underlying both cases;" in *Martinez*, this Court "explicitly recognized the relationship between *Martinez* and *Edwards*;" "*Edwards* contemplated this result" permitting a two-tiered showing of cause when an "ineffectiveness as cause" argument has itself been defaulted; and the very problem identified in *Martinez* as flowing from by ineffective counsel – the denial of review in any court of a significant or meritorious claim -- is "exactly what happened to Zagorski" here. *Id.* at 11, 12; Pet. App. 13a-14a.

Thus, if *Edwards* and *Martinez* apply (as they should by their terms), Ed Zagorski wins his case. But the District Court and the panel majority have refused to apply this Court's direct teachings in *Edwards* and *Martinez*, leaving Mr. Zagorski

without a remedy for his meritorious *Lockett* claim (among other claims).

Instead, the panel majority is concerned that applying *Martinez* to Mr. Zagorski's *Lockett* claim via *Edwards'* two-tiered showing of cause will "swallow th[e] rule" of *Coleman*, which would otherwise bar any opportunity for Mr. Zagorski to have his federal constitutional claim ever heard in federal court – notwithstanding its merit. *Zagorski*, p. 5; Pet. App. 7a. The panel majority, however, simply cannot ignore the teachings of *Edwards* and *Martinez*.

The jurisprudential problem is obvious, and the panel majority and Chief Judge Cole are at an impasse. Which line of authority applies here? *Edwards & Martinez*, or *Coleman*? Only this Court can decide. In fact, the panel majority has made manifest that under such circumstances, this Court is the Court that must wade in on the issue and decide the meaning of its own cases: "'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**." *Zagorski*, p. 5; Pet App. 7a (emphasis supplied).

Indeed, this presents a classic case for the grant of certiorari, where two lines of this Court's authority run headlong into each other and they must be harmonized, a task only this Court can undertake. In fact, the situation here is much like the situation that predated this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). In *Hildwin v. Florida*, 490 U.S. 638 (1989)(per curiam) and *Walton v.* Arizona, 497 U.S. 639 (1990), this Court concluded that the Sixth Amendment did not apply to the finding of aggravating circumstances in capital sentencing. That understanding of

the Sixth Amendment, however, started to erode in cases like *Jones v. United States*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which meant that *Hildwin* and *Walton* needed to "be reconsidered in due course." *Jones*, 526 U.S. at 332 (Stevens, J., concurring). They were, and this Court changed the law in *Ring*.

So it is here. Under the circumstances here, *Coleman* simply "cannot survive the reasoning of" *Edwards* and *Martinez*. *Ring*, 536 U.S. at 603. But only this Court can come to that conclusion. This Court alone can reconcile the *Edwards/Martinez* line of cases and *Coleman*. Thus, this Court should grant certiorari, precisely as the panel majority indicates this Court should.

In fact, when the proper scope and application of the fundamental right to effective counsel has been in question, this Court has not hesitated to grant certiorari. In *Martinez* itself, this Court stepped in to grant certiorari in *Martinez* (*Martinez v. Ryan*, 563 U.S. 1032 (2011)) — even though no court of appeals had agreed with Martinez's position – and afterwards gave life to the right to counsel at trial, allowing the ineffectiveness of post-conviction counsel to establish cause for a defaulted ineffectiveness-of-trial-counsel claim.

Then, when the scope and application of *Martinez* itself (and with it, the scope of the right to effective counsel in state court) has been at issue, this Court has not hesitated to step in quickly to resolve for the lower courts the proper scope of *Martinez*. Not long after this Court decided *Martinez*, this Court quickly granted certiorari in *Trevino v. Thaler*, 568 U.S. 977 (2012) to decide, in the face of great uncertainty, whether *Martinez* extended to states like Texas (and, in effect, other

similarly-situated states). Yet again, in *Davila v. Davis*, 580 U.S. ___ (Jan. 13, 2017) (No. 16-6219), this Court granted certiorari to assess whether *Martinez* extended to claims of ineffective-assistance-of-counsel on appeal, an issue of great importance to the administration of justice.

The question whether *Martinez* extends to Ed Zagorski's situation – when that extension fits squarely within the "cause" framework set out in both *Edwards* and *Martinez* – is similarly required. That is especially true where the issue has been squarely joined by the panel majority and dissent, where Chief Judge Cole's dissent appears correct both in theory and in fact, and where the panel majority has made clear that this Court is in the best position to resolve the issue. This is also true where the panel majority has failed to grapple with the very holding of *Edwards* and Justice Breyer's careful explication of the *Edwards* rule – invoked by Mr. Zagorski – that allows a petitioner to show cause for the default of a cause argument that then overcomes the default of a substantive constitutional claim. This is precisely what Mr. Zagorski has done, and he should not be precluded from securing relief from judgment and relief on his meritorious *Lockett* claim by the lower courts' failure to apply this Court's decisions in *Edwards* and *Martinez*.

II. The Conflict Between *Edwards/Martinez* And *Coleman* Affects The Administration Of Justice Nationwide

Throughout the nation, as in Ed Zagorski's case, federal habeas corpus petitioners routinely raise substantive constitutional claims that were procedurally defaulted by state counsel. It was in the face of this reality that this Court decided cases such as *Coleman* to seek a proper balance between the interests of the states,

petitioners, and the federal courts. Yet in cases like *Edwards* and *Martinez*, this Court has ameliorated some of the harsh consequences of cases like *Coleman*, out of solicitousness to the vindication of federal constitutional rights by the federal courts. To be sure, the standards set up by *Edwards*, Justice Breyer's concurring opinion in *Edwards*, and *Martinez*, while available to habeas corpus petitioners, are by no means easy to meet (though Mr. Zagorski has met them here).

The question whether the *Edwards* and *Martinez* tests apply to procedurally defaulted substantive constitutional claims, as Mr. Zagorski argues, is of vital importance to the administration of justice, as issues of procedural default plague habeas proceedings nationwide. On the one hand, if this Court were to conclude that *Coleman* trumps *Edwards & Martinez*, then the numerous defaulted substantive claims presented by petitioners throughout the nation will find no refuge in federal habeas. But if this Court were to conclude that *Edwards & Martinez* do trump *Coleman*, then perhaps petitioners with valid, but defaulted, federal constitutional claims will be able to be heard in federal court – and the federal courts can, as in *Martinez*, vindicate federal rights.

The point is simply that the issue presented by Mr. Zagorski has wide-ranging consequences for any petitioner who comes to federal court with a defaulted substantive (non-ineffectiveness) constitutional claim, which is not infrequent. Just as the rule of *Martinez* has nationwide application, any resolution of the *Edwards/Martinez* vs. *Coleman* conflict will have nationwide implications as well. As such, this is precisely the type of issue on which this Court should grant certiorari, in

order to inform courts throughout the nation whether to follow the *Edwards/Martinez* line of cases when presented with procedurally defaulted substantive claims, or instead *Coleman* – as procedural defaults are pervasive in the lower federal courts in habeas proceedings.

III. The Sixth Circuit's Published Opinion Finding That Application Of *Martinez* To Mr. Zagorski's Claims Is Governed By 28 U.S.C. §2244 And Not Permitted By Fed.R.Civ.P. 60(b)(6) Ignores *Gonzalez v. Crosby*, 545 U.S. 524 (2005), This Court's Granting Of Rule 60(b)(6) Relief In *Buck v. Davis*, 580 U.S. ___ (2017), And The Decisions Of Many Circuits

This Court should also grant certiorari, because in its published opinion below, the Sixth Circuit has flouted this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005) to conclude that Mr. Zagorski's argument of "ineffective-assistance-of-trial-counsel as cause" presents a substantive constitutional claim for relief. Under *Gonzalez*, it most certainly does not.

Justice Scalia made this clear in *Gonzalez*, and he couldn't have been clearer: "[A] claim as used in §2244(b) is **an asserted federal basis for relief from a state court's judgment of conviction**." *Gonzalez*, 545 U.S. at 530 (emphasis supplied). Indeed. When arguing the ineffectiveness of trial counsel as cause, Mr. Zagorski's underlying "federal basis for relief from [the] state court's judgment of conviction" is his ***Lockett* claim**. Mr. Zagorski is not asking the federal courts to grant him a new sentencing hearing because of the ineffectiveness of counsel. Rather, he is asking the federal courts to allow him to have his *Lockett* claim heard on the merits and to grant him relief on his *Lockett* claim – which was presented in his first federal habeas corpus petition.

Gonzalez thus proves the clear error in the panel majority's published opinion that an *Edwards/Martinez* argument for cause is somehow a constitutional claim. It is not. Yet the published opinion portends havoc, as it completely contradicts this Court's teaching in *Gonzalez*, and for this reason, certiorari is warranted to avoid such havoc.

Moreover, the published opinion is a complete outlier in claiming that arguing *Martinez* as "cause" constitutes the assertion of a "federal basis for relief from a state court's judgment of conviction." *Gonzalez* elsewhere makes clear that any argument to overcome a procedural default is completely proper under Fed.R.Civ.P. 60(b). *Gonzalez*, 545 U.S. at 532 n. 4. Chief Judge Cole is thus correct on this point, which itself is proven by numerous cases from this Court and the circuits which have applied *Martinez* in 60(b) proceedings and/or held specifically that Rule 60(b) proceedings allow a petitioner to invoke *Martinez* to overcome a procedural default.

One need look no farther than this Court's recent decision in *Buck v. Davis*, 580 U.S. ___ (2017) in which this Court held that *Martinez* applied to the petitioner's Rule 60(b)(6) motion. Every other circuit agrees. *See Greene v. Superintendent*, 882 F.3d 443 (3d Cir. 2018); *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014); *Moses v. Joyner*, 815 F.3d 163 (4th Cir. 2016); *Haynes v. Davis*, 733 Fed.Appx. 766 (5th Cir. 2018); *Clark v. Stephens*, 627 Fed.Appx. 305 (5th Cir. 2015); *Balentine v. Stephens*, 553 Fed.Appx. 424 (5th Cir. 2014); *Davis v. Kelley*, 855 F.3d 833, 836 n.2 (8th Cir. 2017)("*Buck* clarifies that a Rule 60(b)(6) motion can be a successful mechanism to raise a claim

of *Martinez* default post-judgment."); *Lambrix v. Secretary*, 851 F.3d 1158 (11th Cir. 2017); *Hamilton v. Secretary*, 793 F.3d 1261 (11th Cir. 2015).

The Sixth Circuit's published majority opinion thus stands alone, with the court having published an opinion that has "so far departed from the accepted and usual course of judicial proceedings" that "call[s] for an exercise of this Court's supervisory power." U.S.Sup.Ct. R. 10(a). Certiorari should be granted.

IV. This Petition Presents An Appropriate Vehicle For Addressing The Questions Presented

Ed Zagorski's petition also presents an appropriate vehicle for addressing the questions presented by this petition because, at the end of the day, were this Court to rule in his favor on the questions presented in this capital case, he would secure relief, and his life would be spared precisely because his *Lockett* claim is meritorious, he is entitled to have that claim heard on the merits under *Edwards and Martinez*, and his motion for relief from judgment is meritorious. Thus, this is precisely the type of case in which to address the questions presented.

Indeed, despite the panel majority's protestations to the contrary, Mr. Zagorski's *Lockett* claim is meritorious. Where the prosecution offered life sentences before trial for this drug-related robbery of armed, intoxicated victims, reasonable jurors also could have agreed that life sentences were sufficient punishment – exactly as the prosecutor determined before trial. Yet the jury was misinformed that mitigating evidence was limited to evidecne that would "give a reason for the act" or "justify" the offense, or take away any of the aggravation. *See* pp. 4-5, *supra*. As Justice Sotomayor explained in *Hodge*, defining mitigating evidence as evidence that

"provides a rationale" or "explains" one's conduct violates the Eighth Amendment. *Hodge*, 568 U.S. at 1060, 1061 (Sotomayor, J., dissenting). So, we know that Mr. Zagorski's *Lockett* claim is meritorious (though both the District Court and panel majority erred on this point to conclude that Mr. Zagorski should not be accorded relief from judgment or relief on the merits). *See Zagorski*, pp. 13-14; Pet. App. 15a-16a (Cole, C.J., dissenting).

We also know that Mr. Zagorski was denied the effective assistance of counsel at trial (which is his cause argument C, as denominated by Justice Breyer in *Edwards*) because this Court has made manifest that trial counsel's failure to know operative law and make proper objections based on a misunderstanding of the law constitutes ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). *Hinton v. Alabama*, 571 U.S. ___ (2014)(per curiam); *Kimmelmann v. Morrison*, 477 U.S. 365 (1986). We also know that post-conviction counsel was ineffective in failing to assert trial counsel's ineffectiveness in failing to make the *Lockett* claim, where post-conviction counsel simply missed the issue, and made no tactical decision not to raise trial counsel's ineffectiveness. *See* p. 3, ¶9, *supra*; R. 241-7, p. 1, ¶2, PageID #944 (affidavit of post-conviction counsel). Mr. Zagorski thus has cause C* (as denominated by Justice Breyer in *Edwards*) as well.

Having made the two-layer showing of cause required by *Edwards* and *Martinez*, but with the lower courts having denied relief from judgment based on their failure to apply *Edwards* and *Martinez*, Mr. Zagorski will indeed be entitled to relief if the Court grants his petition for writ of certiorari and reverses the lower

courts, which not only have relied on an incorrect legal standards (having refused to apply *Edwards* and *Martinez* and failing to apply *Gonzalez*), but also having erred in finding the underlying *Lockett* claim to lack merit, when it does not – where all those errors have infected their denial of relief from judgment.

As Chief Judge Cole has aptly noted, when one actually applies the correct legal standards, Mr. Zagorski is entitled to relief from judgment. Mr. Zagorski has not only argued the intervening decision in *Martinez*, but the absence of any valid procedural default or state interest in enforcing such a non-existent default, the fact that his life is at stake, and the prosecution's offer of a life sentence before trial as equitable factors making this case truly extraordinary. His argument is meritorious (*See Buck*, *supra*: granting Rule 60(b) relief in capital case), but clearly tainted by the lower courts' legal errors which infected their ruling against him.

When those legal errors are removed (as this Court should do on certiorari), Mr. Zagorski would indeed be entitled to relief from judgment and relief on the merits. As Chief Judge Cole explains: "[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." *Zagorski*, p. 15; Pet. App. 17a. When one gets to the merits of the *Lockett* claim, Mr. Zagorski wins, where all he has to show is that one properly instructed juror would have voted for life had s/he not been misinstructed about the meaning of mitigating evidence. *See Harries v. Bell*, 417 F.3d 631, 641-642 (6th Cir. 2005)(in Tennessee, death sentence is avoided and life imposed if only one juror votes for life). He easily meets

that test, especially where the prosecution before trial thought the case did not warrant death.

Thus, were this Court to grant certiorari and reverse, Mr. Zagorski would indeed secure relief. Accordingly, this petition is an appropriate and robust vehicle for addressing the questions presented, as the grant of certiorari will affect the outcome below. *See also Buck*, *supra* (this Court granted certiorari to review Rule 60(b)(6) motion in capital case, and reversed the lower courts, ultimately leading to relief for the petitioner).

CONCLUSION

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

Respectfully Submitted,

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

By: /s/ *Paul R. Bottei*

*Counsel of Record

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari and appendix were 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 31st day of October, 2018.

/s/ *Paul R. Bottei*