IN THE
SUPREME COURT OF THE UNITED STATES

TONY MAYS, Warden	)	
	)	
Applicant	)	No. 18-A-385
	)	**Capital Case**
vs.	)	
	)	
EDMUND ZAGORSKI,	)	
	)	
Respondent	)	

RESPONSE TO MOTION TO VACATE STAY

Paul R. Bottei
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

TABLE OF CONTENTS

Applicant seeks extraordinary relief under 28 U.S.C. §1651, asking this Court to vacate a stay of execution. This Court should deny the motion, because the warden has not satisfied its heavy burden of showing that the court of appeals' balancing of the equities was an "abuse of discretion" – the governing standard which the applicant never even mentions in his application, for it requires that this Court deny his application.

Rather, seasoned court of appeals judges properly stated the factors governing a stay of execution, and then explicitly "balanced these competing factors" to conclude that "this case presents exceptional circumstances warranting a stay." *Zagorski v. Mays,* App. 3. Where the court of appeals properly stated the law and then evaluated the unique circumstances that favor Mr. Zagorski, the court appropriately balanced those factors, and thus did not abuse its discretion. This Court, therefore, must deny the motion to vacate – especially where Edmund Zagorski is ultimately entitled to habeas corpus relief on his *Lockett v. Ohio*, 438 U.S. 586 (1978) claim, as proven by Justice Sotomayor's in *Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting from denial of certiorari).

Moreover, contrary to the warden's contentions, Mr. Zagorski has proceeded appropriately in seeking relief: This Court granted a stay of execution in *Buck v. Thaler*, 564 U.S. 1063 (2011) in a Rule 60(b)(6) proceeding where Buck both filed his Rule 60(b) and sought a stay just days before a

scheduled execution date. *A fortiori*, Mr. Zagorski was properly granted a stay by the court of appeals in this case involving "conditions rarely seen in the usual course of death penalty proceedings" (App. 3) where he has acted with greater diligence than Buck, promptly sought relief after *Martinez*, and as demonstrated *infra*, he establishes (like *Buck*) a strong likelihood of success on the merits.[1]

I.
The Court Of Appeals Did Not Abuse Its Discretion In Balancing The Equities, But Reached A Completely Appropriate Conclusion To Which This Court Must Defer

This Court should deny the motion to vacate because the court of appeals did not abuse its discretion where: (a) the court of appeals properly identified the stay equities and balanced them; (b) stay equities #2, #3, and #4 clearly weigh in Ed Zagorski's favor where his life is at stake, and the state offered him a life sentence before trial, thus deflating their assertion that he must be executed right now; and (c) Ed Zagorski has a likelihood of success on the

[1] This Court granted a stay in *Buck* where Buck filed a Rule 60(b) motion in the district court eight days before his scheduled execution date based on a public news release made *eleven years earlier. Buck v. Thaler*, S.D.Tex. No. 4:04-cv-03965, R. 27. Buck filed his notice of appeal just two days before the scheduled execution date (*Id.*, R. 37) and this Court still granted a stay, given the potential merit of his Rule 60(b) motion. *Buck v. Thaler*, 564 U.S. 1063 (2011). Where Buck's actions were not inappropriate, neither were Mr. Zagorski's actions in pursuing relief. Notably, not one judge of the court of appeals below was moved by the state's claim of inappropriate conduct here, and that certainly was reasonable and not an abuse of discretion when one simply looks at *Buck*, of which the court of appeals was aware. Where Ed Zagorski should ultimately secure habeas relief, he should not be executed.

merits where, *inter alia*, he presents a meritorious challenge to jury instructions under *Lockett v. Ohio* (*See Hodge v. Kentucky*, 568 U.S. 1056 (2012)(Sotomayor, J., dissenting from denial of certiorari)), and a likelihood of securing relief under Fed.R.Civ.P. 60(b), where the court of appeals has acknowledged exceptional circumstances in this case. Especially where this Court has granted stays of execution in Rule 60(b) proceedings to allow review of potentially meritorious underlying claims, the court of appeals' stay here is not an abuse of discretion.

Where this Court must give great deference to the court of appeals in its balancing of the stay equities, this Court should deny the motion to vacate.

A.
The Court Of Appeals Did Not Abuse Its Discretion Where It Cited And Applied The Proper Legal Standard: It Would Be An Exceedingly Rare Case In Which A Court Would Abuse Its Discretion Under Such Circumstances

Before issuing a stay, a court must identify and balance the four traditional stay equities, which is what the court of appeals did here. Here, the court of appeals quoted the four traditional stay equities that apply to Edmund Zagorski under the unique circumstances of his case: (1) "whether there is a likelihood he will succeed on the merits of the appeal;" (2) "whether there is a likelihood he will suffer irreparable harm absent a stay;" (3) "whether the stay will cause substantial harm to others;" and (4) "whether the injunction would serve the public interest." *Zagorski*, App. 3, *quoting Workman v. Bell*, 484 F.3d

837, 839 (6th Cir. 2007). Then, the court of appeals balanced those factors before granting a stay: "After balancing these competing factors, we hold that a stay is warranted." *Zagorski*, App. 3.

The court of appeals did exactly what it was required to do, yet the warden vainly claims that the court somehow engaged in abusive behavior by assessing and balancing the four stay factors. Only in an extremely rare case could this Court find that a lower court stated the proper legal standard and reasonably applied it, yet somehow abused its discretion such that this Court would exercise its extraordinary jurisdiction under §1651 to intervene. *Compare* U.S. Sup. Ct. R. 10 (certiorari rarely granted where lower court allegedly misapplies "a properly stated rule of law.").

As Mr. Zagorski now shows, the court of appeals did not abuse its discretion. This is not such an exceedingly rare case in that regard. As a reviewing court, this Court does not independently reweigh the factors itself, but merely evaluates whether the court of appeals reasonably did so. When this Court objectively evaluates the unique circumstances of this case that the court of appeals balanced, the balance of the equities weighs in Ed Zagorski's favor. It is improper for this Court to second-guess the court of appeals' balancing of the properly-stated four stay equities, especially where the court of appeals has acted reasonably, appropriately, and not abusively. The motion to vacate must be denied.

B.
The Court Of Appeals' Weighing Of The Stay Equities Does Not Constitute A Rare Abuse Of Discretion

Given the "abuse of discretion" standard of review here, this Court must defer to the court of appeals' weighing of the equities and deny the motion to vacate. This is especially true where a review of the four stay equities considered by the court of appeals shows that the court of appeals was eminently reasonable and not abusive.

1.
Under The Unique Circumstances Of This Case, The Court Of Appeals Did Not Abuse Its Discretion In Weighing Stay Equities #2, #3, and #4 Which Together Strongly Favor Edmund Zagorski

In evaluating the court of appeals' assessment of the stay equities, Mr. Zagorski will start with the last three stay equities. Then, he will turn to the likelihood of success on the merits (Stay Equity #1) which, together with irreparable harm to the movant (Stay Equity #2), which heavily weighs in Ed Zagorski's favor, constitute "the most critical" equities (*Nken v. Holder*, 556 U.S. 418, 434 (2009)) evaluated by the court of appeals below:

> Without question, Stay Equity #2 (the likelihood that Ed Zagorski will suffer irreparable harm absent a stay) weighs exceedingly heavily in his favor in the balance of equities. He will lose his life absent a stay. Thus, Stay Equity #2 greatly favors him. The court of appeals certainly gave this equity great weight, as it should.

Stay Equity #3 requires a court to assess whether a "stay will cause substantial harm to others." To be sure, the state has an interest in carrying out any death sentence that is properly and constitutionally imposed. Here, however, not only is Ed Zagorski's death sentence unconstitutional (*see infra*), but the court of appeals granted its stay knowing that the state cannot forcefully argue (as is possible in other cases) "substantial harm" from not carrying out a death sentence here. In its weighing of equitable factors, the court of appeals had before it a unique fact in this case that undermines the applicant's now-professed assertion of substantial harm: Before trial, the state offered Ed Zagorski a life sentence in exchange for a guilty plea. R. 212-1, p. 1, PageID #515; R. 241-3, PageID #858 (affidavit of trial counsel Larry Wilks detailing prosecution's pretrial offer of life imprisonment).

In the balance of equities, the state's purported assertion of "substantial harm" from being unable to execute Ed Zagorski loses almost all its force, when the state proved before trial that it didn't need to execute him in the first place. Any reviewing court, like the court of appeals, would appropriately give this stay equity some, but only minimal, weight against Ed Zagorski, given the state's earlier willingness to accept a life sentence as sufficient punishment.

Stay Equity #4 – the public interest – depends in great measure

upon the fairness and constitutionality of Ed Zagorski's trial. If Ed Zagorski was sentenced to death in violation of the Constitution, it certainly is in the public interest to grant him a stay to allow his claims to be heard and decided in his favor, as he establishes the merit of his claims *infra*. Conversely, if his death sentence was not unconstitutional, then the public interest would shift against him. Yet again, however, the state's undisputed offer of a life sentence before trial undermines any state assertion now that it is in the public interest to execute Ed Zagorski.

All told, therefore, the balance of Equities #2, #3, and #4, weigh in Ed Zagorski's favor and not in favor of the applicant where, as noted, Ed Zagorski faces death, and the state's assertion of substantial harm founders on the fact that the state offered Ed Zagorski a life sentence, proving that his execution is not, and has not been, an unyielding demand.

2.
Under The Unique Circumstances Of This Case, The Court Of Appeals Did Not Abuse Its Discretion When Weighing Stay Equity #1, Because Edmund Zagorski Has A Likelihood Of Success On The Merits, Like Capital Petitioners For Whom This Court Itself Has Granted Stays

Ed Zagorski has a significant likelihood of success on the merits (Stay Equity #1). In granting him a stay, the court of appeals appropriately acknowledged Ed Zagorski's significant likelihood of securing relief. The warden's contentions to the contrary are inaccurate.

Ed Zagorski presents meritorious constitutional claims for which he will likely secure relief: (1) a clearly winning claim under *Lockett* for which he is ultimately entitled to relief, as shown by Justice Sotomayor's opinion on the denial of certiorari in *Hodge v. Kentucky*, 568 U.S. 1056 (2012); (2) a meritorious claim under *United States v. Jackson*, 370 U.S. 570 (1968); and (3) his assertion that counsel was ineffective for failing to establish residual doubt about Ed Zagorski's guilt by showing Jimmy Blackwell's intimate involvement in the homicides here.

Further, Ed Zagorski will likely succeed on the merits of those claims in reopened proceedings under Fed.R.Civ.P. 60(b), where (based on the record before it) the court of appeals has already concluded that "this case presents exceptional circumstances" *Zagorski*, App. 3, as needed for Rule 60(b) relief. Where the court of appeals has already found that this case presents exceptional or extraordinary circumstances that merit a stay, this Court must again defer to that conclusion when reviewing the balance of equities, especially where the court of appeals was well aware of the many shortcomings in the district court's 60(b) analysis. *See* Brief of Appellant, R. 6-2, *Zagorski v. Mays*, 6th Cir. No. 18-6052.

Tellingly, more than once, this Court has granted stays of execution in Rule 60(b)(6) proceedings where a petitioner had shown a likelihood of securing relief from judgment accompanied by a seemingly winning claim for relief –

even when the petitioner sought relief close to a scheduled execution date. *Buck v. Thaler*, 564 U.S. 1063 (2011)(granting stay of execution); *Tharpe v. Sellers*, 582 U.S. ___ (Sept. 26, 2017)(No. 17A330). Just as this Court (by definition) did not abuse its discretion in granting stays of execution in *Buck* and *Tharpe*, the court of appeals here did not abuse its discretion either.[2]

a.
The Court Of Appeals Did Not Abuse Its Discretion In Granting A Stay Because Ed Zagorski Has A Strong Likelihood Of Success On The Merits Of His Underlying Constitutional Claims

***Lockett* Claim**: This has never been a case in which the death penalty was necessary or required. As already noted, the prosecution offered Mr. Zagorski consecutive life sentences in exchange for a guilty plea, and understandably so. The prosecution realized that this was a drug-related murder and robbery, and the trial jury heard the circumstances of the offense that warrant a sentence less death: The victims were drug dealers; they were armed for a firefight (*See* Trial Tr. 757-758: Jimmy Porter brought a .357 magnum to the drug deal); and highly intoxicated. Trial Tr. 642-643 (Porter had a blood alcohol

[2] Eventually, Tharpe was denied relief and even a certificate of appealability (COA) on remand after this Court stayed his execution and then ordered further proceedings. *Tharpe v. Sellers*, 898 F.3d 1342 (11th Cir., 2018). This confirms that a similarly situated petitioner like Mr. Zagorski need only show a likelihood (not a certainty) of success on the merits when his claims are adjudicated. Even more so than Tharpe, for whom this Court granted a stay to allow review of his Rule 60 motion, Mr. Zagorski has received a COA. *A fortiori*, Mr. Zagorski has an even greater likelihood of success than Tharpe ever had, and where Tharpe was granted a stay by this Court, the Sixth Circuit did not abuse its discretion in granting Mr. Zagorski a stay as well.

content of .10, and Dotson's blood alcohol content was .25). R. 212, pp. 3-4, PageID #493-494 (motion for relief from judgment). Thus, while Mr. Zagorski's offense merits severe punishment, reasonable jurors could agree that life sentences were sufficient punishment – exactly as the prosecutor determined before trial, when offering Mr. Zagorski a life sentence.

Jurors did not understand what constituted "mitigating" evidence. Their proper understanding of "mitigating evidence" was essential to any fair sentencing hearing, because in Tennessee, the vote of one juror for life would have resulted in a life sentence. *See Harries v. Bell*, 417 F.3d 631, 641-642 (6th Cir. 2005). Jurors struggled with their decision, and were quite emotional when they came back with their verdict.

Before that, jurors asked the trial judge to explain what mitigating evidence was, but the judge bungled the instruction, stating that mitigating evidence to support a life sentence was only evidence that had "any tendency to – ***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." Trial Tr. 1131-1132 (emphasis supplied); R. 241-2, PageID #855-857.

Those definitions clearly violate the Eighth Amendment, this Court's seminal case on the meaning of mitigating evidence (*Lockett v. Ohio*, 438 U.S.

586 (1978)), and *Lockett*'s progeny. This is evident from Justice Sotomayor's opinion dissenting from the denial of certiorari in *Hodge v. Kentucky*, 568 U.S. 1056, 1060 (2012)(Sotomayor, J., dissenting).

As Justice Sotomayor explained in *Hodge*, defining mitigation evidence as evidence that "provides a rationale" or "explains" one's conduct is a clear violation of the Eighth Amendment. Limiting "mitigation" to evidence that "explains" or gives a reason for an offense is plainly unconstitutional: "We have made clear for over 30 years . . . that mitigation does not play such a limited role."*Hodge*, 568 U.S. at 1060 (Sotomayor, J., dissenting). Rather, under the Eighth Amendment, mitigating evidence is much broader, including "any aspect of the defendant's character or record and ***any of the circumstances of the offense*** that the defendant proffers as a basis for a sentence less than death" and any **"factors which may call for a less severe penalty**." *Lockett v. Ohio*, 438 U.S. at 604, 605 (emphasis supplied).

Thus, cabining the definition of mitigation as a mere "rationale" – or to use the unconstitutional instruction provided here, a "*reason for the act*" – is, "plainly contrary" to *Lockett*. *Hodge*, 568 U.S. at 1061 (Sotomayor, J., dissenting). Likewise, the jury instructions here which defined mitigating evidence as evidence that "tend[ed] to justify" the offense or otherwise directly challenged the aggravating circumstances, were themselves unconstitutional. The fact that the victims were armed, intoxicated, drug dealers does not

"justify" their deaths, but indicates that a sentence less than death is appropriate. The prosecution recognized this before trial by offering Mr. Zagorski a life sentence. Jurors could have done the same, had they simply been properly instructed, which they weren't. Unfortunately, the trial court violated *Lockett* when instructing the jury.

As Mr. Zagorski acknowledged below, this meritorious *Lockett* claim was procedurally defaulted by trial counsel, who had no legitimate basis for not objecting to the *Lockett* violation, and counsel thereby rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). *Hinton v. Alabama*, 571 U.S. ___ (2014)(*per curiam*)(counsel ineffective where actions based on ignorance of the law, not strategy).

Trial counsel's ineffectiveness, which Mr. Zagorski argues as "cause" for the default of his *Lockett* claim, was also procedurally defaulted in state court. Post-conviction counsel ineffectively failed to assert in the initial review collateral proceeding that trial counsel ineffectively failed to make the *Lockett* objection. Post-conviction counsel has admitted he simply overlooked and missed the issue of trial counsel's failure to make the *Lockett* objection and had no strategic reason for not doing so, which was ineffective under *Strickland*. R. 212-5, PageID #591; R. 241-7, PageID #944 (affidavit of post-conviction counsel).

Mr. Zagorski thus prevails on his *Lockett* claim because of *Edwards v. Carpenter*, 529 U.S. 446 (2000), Justice Breyer's concurrence in *Edwards* (*Id.* at 458), and *Martinez v. Ryan*, 566 U.S. 1 (2012).

Under *Edwards*, the ineffective assistance of trial counsel establishes cause for the default of a substantive constitutional claim, but if such an assertion of cause was also procedurally defaulted by post-conviction counsel's failure to allege trial counsel's ineffectiveness, a federal habeas petitioner may still establish "cause" for the default of his "cause" argument. *Edwards*, 529 U.S. at 453 ("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.").

Justice Breyer explicated this law in his concurring opinion in *Edwards* (joined by Justice Stevens), when he explained:

> 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). Justice Breyer is right, and under *Martinez*, Mr. Zagorski satisfies that test.

The combination of *Edwards* and *Martinez* means that Ed Zagorski likely (if not certainly) prevails on his *Lockett* claim. The ineffective assistance of trial counsel provides "cause" for the default of his meritorious *Lockett* claim, but that assertion of cause was defaulted by post-conviction counsel. Yet *Martinez* now holds that the ineffectiveness of post-conviction counsel provides "cause" for the default of a substantial claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 18-19. Thus, where *Martinez* supplies secondary cause for the default of the ineffective-assistance-of-trial-counsel argument asserted as primary cause for the default of the *Lockett* claim, he overcomes all defaults and secures relief under *Lockett*.

Notably, *Martinez* fits precisely within the scenario contemplated and articulated by Justice Breyer in his *Edwards* concurrence. *Edwards*, 529 U.S. at 458 (Breyer, J., concurring). Given the COA issued by the district court, the court of appeals can – and should – ultimately conclude that the combination of *Edwards*, *Martinez*, and *Lockett* entitle Ed Zagorski to relief on his *Lockett*

claim. Accordingly, the court of appeals did not abuse its discretion when evaluating Mr. Zagorski's likelihood of success on the merits, where Justice Breyer seemingly would agree, given his concurrence in *Edwards*.

To be sure, on its facts, *Martinez* concluded that the ineffective assistance of post-conviction counsel provided "cause" for a defaulted ineffective assistance of trial counsel claim not raised in collateral proceedings. But there is no legal, logical, or practical difference between post-conviction counsel defaulting a **claim** of ineffective assistance of trial counsel in initial collateral review proceedings, and defaulting an "ineffective assistance of trial counsel" **argument** to be used later in federal court as "cause" for the default of a substantive claim. In both situations, post-conviction counsel ineffectively failed to raise or argue the very same argument that trial counsel ineffectively failed to do "X." Thus, in federal habeas proceedings, there is no meaningful distinction between counsel's failure to do "X" when alleged as a substantive defaulted ineffectiveness claim, or counsel's failure to do "X" when alleged as a defaulted assertion of cause. It's all the same. In both scenarios, the petitioner has been treated unjustly in state court *because s/he was denied the effective assistance of post-conviction counsel*.

The entire reason Mr. Zagorski's *Lockett* claim has never been heard by *any court* is that trial counsel failed to raise the claim, and post-conviction counsel then failed to allege trial counsel's ineffectiveness. This is precisely the

rationale this Court articulated in *Martinez* as to why the ineffectiveness of post-conviction counsel must provide cause for the default of trial counsel's ineffectiveness. Otherwise, precisely as has occurred up until now, Mr. Zagorski's fundamental right to counsel would mean nothing. And such an error is all the more egregious in a capital case, where here, it has led to an unconstitutional sentence of death.

In light of *Edwards*, *Martinez* applies, and Mr. Zagorski can prevail on the merits of his *Lockett* claim, as the court of appeals may conclude. Based on the *Lockett* claim alone, the court of appeals' balancing of the equities and granting of a stay based on his likelihood of relief on the merits was not an abuse of discretion, especially in light of the other stay equities, as discussed *supra*. The applicant's rhetoric aside, a careful evaluation of the applicable law proves that Ed Zagorski's request for relief does not face "improbable odds" as the warden claims. Nor is this an uphill battle. It is an eminently winnable battle on a plain where *Lockett*, *Edwards*, and *Martinez* ensure success.

***United States v. Jackson* Claim**: Mr. Zagorski further maintains that his death sentence violates due process and the right to be free from the arbitrary infliction of the death sentence, where the prosecution offered him a life sentence before trial, an undisputed fact in these proceedings. Because life was the maximum sentence he faced with a plea, but death was the maximum sentence he faced at trial, Mr. Zagorski's death sentence violated the rule of

United States v. Jackson, 390 U.S. 570 (1968) which so held, in the context of a case in which a criminal statute permitted life as a maximum sentence for a plea, but death for going to trial. There is no difference between making life the maximum sentence via statute, or instead via a plea offer by the prosecution (as occurred here), while death is available at trial. It's all the same, from the defendant's perspective. *See also Hynes v. Tomei*, 706 N.E.2d 1201 (N.Y.Ct. App. 1998).

In light of *Jackson*, its rationale, the fact that it makes no difference whether the maximum sentence of life with a plea is the result of a statute or an offer from the district attorney, and *Hynes*, Mr. Zagorski has a likelihood of success on the merits of this claim. Like his *Lockett* claim, this *Jackson* claim was procedurally defaulted, but as with the *Lockett* claim, the combination of *Edwards* and *Martinez* still entitles him to relief on the merits, as they provide the two levels of cause necessary to overcome any defaults. Again, because there is a likelihood of success on the merits, the court of appeals did not abuse its discretion when considering this claim in the balance of equities.

Counsel's Ineffectiveness For Failing To Investigate Jimmy Blackwell's Involvement: Finally, Mr. Zagorski presents a defaulted ineffectiveness claim subject to *Martinez* that supplies, at a minimum, residual doubt about his guilt that could have led at least one juror to vote for life and spare him the death

penalty where, as noted *supra*, the vote of single juror for life would have avoided the death sentence.

Mr. Zagorski has alleged that trial counsel failed to effectively show Jimmy Blackwell's involvement in the murders (for purposes of showing reasonable doubt at the guilt phase or residual doubt at sentencing), where trial counsel failed to present evidence that Blackwell confessed that he had killed the victims (R. 241-4, p. 4, PageID #862: testimony of Roger Farley), Blackwell wrote a letter essentially admitting his involvement in the offense (R. 241-5, PageID #866), and Centerville, Tennessee, Police Chief Roger Livengood received a report of Blackwell's leaving woods where a similar homicide occurred. R. 241-4, p. 3, PageID #861. Where post-conviction counsel (like trial counsel) was unaware of these facts and failed to present them at trial (R. 241-4, pp. 5-7, PageID #863-865), Mr. Zagorski maintained that he satisfied the *Martinez* test for cause, was entitled to merits review and relief on his claim, given *Martinez* and the doubt established by this new evidence.

In sum, Mr. Zagorski has meritorious claims and a likelihood and significant likelihood of success on the merits of his underlying claims. Thus, the court of appeals did not abuse its discretion when granting a stay by weighing Mr. Zagorski's likelihood of success on the merits.

b.

The Court of Appeals Did Not Abuse Its Discretion In Granting A Stay Because Ed Zagorski Also Has A Likelihood Of Succeeding In Having His Claims Heard In Reopened Habeas Proceedings Under Fed.R.Civ.P. 60(b)(6)

The court of appeals also did not abuse its discretion in finding, based on Mr. Zagorski's argument about exceptional or extraordinary circumstances that warranted Rule 60(b) relief, that "this case presents exceptional circumstances warranting a stay." App. 3. That conclusion was also reasonable, and not an abuse of discretion, where Mr. Zagorski has a likelihood of securing relief on appeal and having his underlying claims decided in reopened habeas proceedings under Fed.R.Civ.P. 60(b).

As this Court recognized in *Buck v. Davis*, 580 U.S. ___ (2017), a district court evaluating a Rule 60(b) motion must consider a wide range of factors (*Id.* at ___ (slip op. at 21)), but here the district court abused its discretion by failing to properly consider and weigh any and all of the equitable factors that support reopening the proceeding under Rule 60(b). Thus, the district court should ultimately be reversed.

As Mr. Zagorski has explained to the court of appeals (*See* Brief of the Appellant, *Zagorski v. Mays*, 6th Cir. No. 18-6052, R. 6-2, pp. 25-29, 35-37), the district court's refusal to grant Rule 60(b) relief was tainted by numerous errors, which combined, make the district court's denial of Rule 60(b) relief an abuse of discretion, contrary to what the applicant now claims.

As Mr. Zagorski explained, the district court chose not to reopen proceedings based on the mistaken belief that Mr. Zagorski has not presented any meritorious (or substantial) underlying constitutional claim. But, as Mr. Zagorski has just shown, that is not true, yet it tainted the district court's very denial of Rule 60(b) relief, making that denial an abuse of discretion. Mr. Zaogrski therefore is likely to succeed on the merits of his 60(b) motion.

In addition, the district court's limited discussion of the equities at the end of its opinion does not remedy the decision's earlier reliance on its premise that by itself "*Martinez* is not an exceptional circumstance warranting relief under Rule 60" (discussed in an entire section of the district court opinion). It is clear under *Buck* that the district court was required to consider *all* equitable factors (not just *Martinez*) when deciding what constitutes extraordinary circumstances supporting the grant of a Rule 60(b) motion. With the district court having premised and introduced its entire discussion of Rule 60(b) on its limited evaluation of *Martinez* alone as an equitable factor, Mr. Zagorski likely secures relief on appeal. Indeed, the Third Circuit granted relief under similar circumstances in 60(b) proceedings in *Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014)(district court abused its discretion by denying Rule 60(b) motion by focusing on whether *Martinez* by itself was an extraordinary circumstance).[3]

[3] At a minimum, the district court's decision denying relief based on *Martinez* but then considering equities (flawed as it was because of its failure to acknowledge the

In addition, the district court only mentioned, but did not analyze or give proper weight to, the equitable factors that: (a) this is a capital case, where Mr. Zagorski's life is at stake, and (b) with its offer of life imprisonment before trial, even the prosecution agreed that life was more than enough punishment here. These factors weigh heavily in favor of reopening the judgment under Fed.R.Civ.P. 60(b)(6), yet the district court failed to meaningfully analyze or weigh these factors in its 60(b) analysis. Instead, the district court weighed its erroneous belief that Mr. Zagorski's underlying constitutional claims could not supply grounds for habeas corpus relief – which is wrong in light of *Hodge*, *Edwards*, and *Martinez* – and that error was before the court of appeals when it weighed the equities.

Consequently, where the court of appeals will likely find Mr. Zagorski's 60(b) appeal meritorious because of the numerous structural or analytical flaws in the district court's denial of Rule 60(b) relief, Mr. Zagorski will likely succeed on his arguments that he is entitled to Rule 60(b) relief. Indeed, this Court itself found that capital petitioners had such a likelihood of success on the merits of their 60(b) appeals in both *Buck v. Thaler*, 564 U.S. 1063

Lockett error) is internally inconsistent. All the more reason for the court of appeals to reverse the district court and require a proper consideration of all equities based in no part on the fundamentally flawed reasoning that *Martinez* is not enough to reopen the proceedings, which undoubtedly influenced the district court's ultimate conclusion to deny relief.

(2011)(granting stay of execution); *Tharpe v. Sellers*, 582 U.S. ___ (Sept. 26, 2017)(No. 17A330).

CONCLUSION:
The Court Of Appeals Did Not Abuse Its Discretion And This Court Should Deny The Motion To Vacate

To secure in this Court the extraordinary remedy of vacating a court of appeals stay, the applicant is required to establish a clear abuse of discretion, which he has not done and cannot do, where the court of appeals cited and balanced the four stay equities to conclude that a stay is warranted, especially where "this case presents exceptional circumstances." The court of appeals did not abuse its discretion in granting a stay, especially where Ed Zagorski's life is at stake, the warden's claim of significant harm is muted by the state's pretrial offer of life imprisonment to Ed Zagorski, and where there is a significant likelihood Ed Zagorski will prevail.

As the court of appeals did not abuse its discretion, this Court, therefore, should not vacate the stay of execution and should deny the applicant's motion.

Respectfully Submitted,

Paul R. Bottei
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: /s/ *Paul R. Bottei*

CERTIFICATE OF SERVICE

I certify that a copy of this response has been served upon Jennifer Smith, Associate Solicitor General, Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee 37202 this the 11th day of October, 2018.

/s/ *Paul R. Bottei*