No. _____

CAPITAL CASE
Execution Scheduled: October 11, 2018, at 7:00 CST

IN THE
SUPREME COURT OF THE UNITED STATES

EDMUND ZAGORSKI,
Respondent,

v.

TONY MAYS, Warden,
Applicant.

APPLICATION TO VACATE STAY OF EXECUTION OF DEATH SENTENCE

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Applicant Tony Mays, Warden, respectfully requests that the Court vacate the stay of execution entered by a divided panel of the Sixth Circuit. *Edmund Zagorski v. Tony Mays, Warden*, No. 18-6052 (6th Cir., Order, Oct. 10, 2018). Application Appendix ("Appl. Appx."), 1-6. Respondent Zagorski is a Tennessee inmate scheduled for execution by lethal injection on October 11, 2018, for the double murders of John Dale Dotson and Jimmy Porter. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986). The Sixth Circuit's order—entered just 26 hours before Respondent's scheduled execution—blocks the State's enforcement of a thirty-two-year-old criminal judgment for the sole purpose of permitting Respondent to pursue an appeal from the denial of a Rule 60(b) motion described by the panel majority as "an uphill battle" and by the dissenting opinion as "virtually unwinnable." Appl. Appx, 3, 5.

The Sixth Circuit's order disregards the improbable odds of Respondent's likelihood of success on the merits and the State's significant interest in enforcing its criminal judgments, and flatly contravenes the well-settled principle that a prisoner seeking a stay of execution must demonstrate a likelihood of success on the merits. *See Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (before granting a stay of execution, a federal court must consider the likelihood of success on the merits); *see also Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006) (prisoner seeking stay of execution must show a "significant possibility of success on the merits"). And when appealing the denial of relief, as in this case, a stay applicant must demonstrate a *strong* likelihood of success on the merits of his appeal. *See Hilton v. Braunskill*, 481 U.S. 770, 776

(1987) (factors regulating the issuance of stay pending appeal include "whether the stay applicant has made a strong showing that he is likely to succeed on the merits").

PROCEDURAL HISTORY

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

In 1999, Respondent filed a habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Tennessee. *Edmund Zagorski v. Ricky Bell, Warden*, No. 3:99-1193 (M.D. Tenn.). The district court dismissed respondent's habeas petition by judgment entered in March 2006. Appl. Appx. 68-69. The Sixth Circuit affirmed the judgment, and this Court denied certiorari. *Zagorski v. Bell*, 326 Fed. Appx. 336 (6th Cir. Apr. 15, 2009), *cert. denied*, 559 U.S. 1068 (2010), *reh. denied*, 561 U.S. 1019 (2010).

After Respondent's habeas corpus case became final—and more than twenty-five years after his criminal judgment—this Court decided *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), creating for the first time a narrow equitable exception to the habeas corpus procedural default defense. Eleven months later, Respondent moved for relief from the district court's judgment under Fed. R. Civ. P. 60(b)(6) as to certain of his claims, which the district court had years

[1] The facts of Zagorski's crimes are set out in the opinion of the Tennessee Supreme Court. *Zagorski*, 701 S.W.2d at 809-12.

earlier deemed procedurally defaulted. But six months after filing the motion, Respondent insisted that the district court stay the proceeding "pending clarification by the Sixth Circuit Court of Appeals on issues pertinent hereto." Appl. Appx. 23. That clarification came on March 19, 2014, with the Sixth Circuit's decision in *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014). Yet respondent took no action to reopen his Rule 60(b) motion. Appl. Appx. 25.

On March 15, 2018, the Tennessee Supreme Court set October 11, 2018, as Respondent's execution date. Three months later, Respondent filed a motion in the district court to lift the stay of proceedings and for a ruling on his Rule 60(b) motion. Appl. Appx. 42-43. Respondent's motion made no mention of his impending execution but simply noted that the case had "lain dormant for some time." Appl. Appx. 42.

On September 12, 2018, the district court denied Respondent's Rule 60(b) motion. The district court thoroughly analyzed—and rejected—each of Respondent's claims:

> [Respondent's] claims are neither "winning" nor "substantial." The court also observes that none of the claims even arguably establishes that the petitioner is actually innocent of the crimes for which he was convicted. Accordingly, none of the [Respondent's] proposed equitable considerations—either individually or in combination—dictates granting the relief requested.

Appl. Appx. 41.

Along the way, the district court made several key findings. First, the district court found that Respondent's conduct evidenced a lack of diligence. "The [Respondent's] delay of 11 months between the *Martinez* decision and his original motion, combined with his delay of more than four years after *Sutton* was decided and almost three months after his execution date was set before moving to reopen this case, evidences a lack of diligence on his part in pursuing the relief he seeks." Appl. Appx. 25-26. Second, the district court ruled that the procedural rule

announced in *Martinez* did not amount to "extraordinary circumstances requiring Rule 60(b)(6) relief." Appl. Appx. 26. Third, citing this Court's decision in *Davila v. Davis*, 137 S.Ct. 2058 (2017), the district court ruled that *Martinez* does not impact its previous ruling on Respondent's non-ineffective-trial-counsel claims (*i.e.*, Claims 15 and 17). "The [Respondent's] claims are not ineffective-assistance-at-trial claims, and *Martinez* would not apply to them, even if it warranted reconsideration of the court's judgment under Rule 60." Appl. Appx. 31. Fourth, as to Respondent's sole ineffective-assistance claim, the district court observed that it had previously addressed the claim on the merits as an alternative basis for dismissal. "That alternative rejection of Claim 10(c) on the merits dictates that the claim is not sufficiently substantial to warrant further consideration under *Martinez*." Appl. Appx. 34.

More than three weeks later, Respondent filed his notice of appeal to the Sixth Circuit. Appl. Appx. 20. Not until forty-eight hours before his scheduled execution did Respondent file motions to stay his execution—one in the district court and another in the Sixth Circuit. Appl. Appx. 12. The district court denied the motion the same day. Appl. Appx. 7. The Sixth Circuit granted it the following day. Appl. Appx. 1. The Sixth Circuit's order should now be vacated.

REASONS FOR VACATING THE STAY OF EXECUTION

A. Petitioner Cannot Show a Significant Possibility of Success on the Merits of His Appeal.

"[A] stay of execution is an equitable remedy," and "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. A prisoner seeking a stay of execution pending collateral litigation must demonstrate a significant likelihood of success on the merits in that collateral litigation. *See Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (before granting a stay of

execution, a federal court must consider the likelihood of success on the merits); *Hill*, 547 U.S. at 584 (prisoner seeking stay of execution must show a "significant possibility of success on the merits"). The required showing is higher still—it must be a *strong* showing—when a prisoner appeals from the denial of relief, as Respondent has done in this case. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (factors regulating the issuance of stay pending appeal include "whether the stay applicant has made a strong showing that he is likely to succeed on the merits").

The Sixth Circuit's stay order directly contravened these controlling directives. Respondent has virtually no likelihood of success in this appeal, which asks the Sixth Circuit to do what this Court has repeatedly declined to do—extend the *Martinez* exception beyond its unambiguous holding to non-ineffective-trial-counsel claims. *See Davila*, 137 S.Ct. at 2066 ("*Martinez* provides no support for extending its narrow exception to new categories of procedurally defaulted claims."). Moreover, the district court previously rejected on the merits the sole ineffective-assistance claim to which *Martinez* would even arguably apply. Appl. Appx. 34.

Rather than performing any meaningful analysis of Respondent's likelihood of success, the Sixth Circuit simply referred to the district court's issuance of a certificate of appealability, which is, of course, issued under the lower standard in 28 U.S.C. § 2253(c)(2). A certificate of appealability may issue under § 2253(c)(2) if "jurists of reason would find it *debatable* whether the petition states a valid claim of the denial of a constitutional right" and if "jurists of reason would find it *debatable* whether the district court was correct in its procedural ruling." *Slack v. Daniel*, 529 U.S. 473, 484 (2000) (emphasis added). That is a far cry from showing the

substantial likelihood of success necessary for a stay of execution. Indeed, the district court itself found that Respondent's claims are "neither 'winning' nor 'substantial,'" and emphasized that a debatable point under § 2253(c)(2) "is not the same as a strong likelihood of success or even a serious question about the merits" of the claims. *Edmund Zagorski v. Tony Mays, Warden*, No. 3:99-cv-01193 (M.D. Tenn., Order, Oct. 9, 2018). Appl. Appx. 10. *See also Lambrix v. Secretary, DOC*, 872 F.3d 1170, 1183 n.6 (11th Cir. 2017) ("The standard for a stay is, in part, a showing of a substantial likelihood of success on the merits of the claims, which is a higher standard than the one for a COA.").

The Sixth Circuit also failed to consider that "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez*, 545 U.S. at 535 (citing *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n. 7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)). An appellate court "reviews a district court's denial of a Rule 60(b) motion for relief from judgment for an abuse of discretion." *Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012). Moreover, a district court's discretion under Rule 60(b)(6) "is 'especially broad' given the underlying equitable principles involved." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir.1989).

There can be no question of abuse of discretion; the district court's analysis of Respondent's Rule 60(b) request for relief is unassailable. It is entirely in line with this Court's directives in *Martinez*, *Gonzalez*, and *Davila*, and it evidences a careful and proper exercise of discretion.

The Sixth Circuit's reliance on 28 U.S.C. § 2251(a)(1) as authority for issuance of a stay of execution is also specious. Section 2251(a)(1) gives a federal court the authority to stay State

proceedings against a person detained under the authority of any State when a "habeas corpus proceeding is . . . pending appeal." But Respondent's case came before the Sixth Circuit on appeal from the district court's denial of a Rule 60(b) motion seeking relief from a long-final habeas judgment. A motion under Fed. R. Civ. P. 60(b) is not a "habeas corpus proceeding" within the meaning of 28 U.S.C. § 2251(a)(1), and that statute provides no basis for the Sixth Circuit's action. *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524, 533 (2005) ("When no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application."). *See also Spirko v. Bradshaw*, No. 3:95-cv-07209, 2005 WL 1773969, at *1 (N.D. Ohio July 26, 2005) ("Nothing in § 2251 expressly authorizes a stay pending adjudication of a post-judgment motion under Rule 60(b).").

The Sixth Circuit's order staying Respondent's execution pending a meritless appeal should be vacated.

B. Respondent Was Dilatory in Pursuing Relief.

The Sixth Circuit also ignored Respondent's dilatory actions in pursing relief. But as the district court found, Respondent's "delay of 11 months between the *Martinez* decision and his original motion, combined with his delay of more than four years after *Sutton* was decided and almost three months after his execution date was set before moving to reopen this case, evidences a lack of diligence on his part in pursuing the relief he seeks." Appl. Appx. 25-26. And that pattern of delay continued even after the district court's decision when Respondent waited more than three weeks to file a notice of appeal and four days beyond that—just forty-eight hours before his scheduled execution—to file a motion for a stay.

"A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. U.S. Dist. Court of Northern Dist. of California*, 503 U.S. 653, 654 (1992). "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). But the Sixth Circuit panel majority applied no such presumption and did not, as it was bound to do, "take into consideration the State's strong interest in proceeding with its judgment and [an] obvious attempt at manipulation." *Gomez*, 503 U.S. at 654.

C. The Sixth Circuit's Stay of Execution Harms Significant State Interests.

A stay of execution is an equitable remedy, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. *Hill*, 547 U.S. at 584. At this juncture, with Respondent having long since completed state and federal review of his convictions and sentence, the State's interests in finality are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998).

Respondent's case has been thoroughly litigated. In addition to his trial by jury, he obtained direct review by the Tennessee Supreme Court. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986). The state trial court, the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court reviewed his post-conviction claims. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999). The district court reviewed Respondent's federal habeas claims in great detail, even conducting additional evidentiary proceedings, and its decision denying relief was upheld by the Sixth Circuit. *Zagorski v. Bell*, 326 Fed. Appx. 336 (6th Cir. Apr. 15, 2009), *cert. denied*, 559 U.S. 1068

(2010), *reh. denied*, 561 U.S. 1019 (2010). This Court has three times previously examined Respondent's petitions and each time has declined to grant review. *Zagorski v. Tennessee,* 478 U.S. 1010 (1986); *Zagorski v. Tennessee,* 528 U.S. 829 (1999); *Zagorski v. Bell*, 559 U.S. 1068 (2010), *reh. denied*, 561 U.S. 1019 (2010).

This lengthy, thorough litigation process has spanned nearly three decades. Respondent committed double murder more than thirty-five years ago. *Zagorski*, 701 S.W.2d at 810 (crimes occurred April 23, 1983). His conviction became final more than thirty years ago. *Zagorski v. Tennessee,* 478 U.S. 1010 (1986) (cert. denied on June 30, 1986). The judgment in his federal habeas proceedings became final over eight years ago. *Zagorski v. Bell*, 559 U.S. 1068 (2010) (petition for writ of certiorari denied April 19, 2010).

The Sixth Circuit's stay order accords no regard to the State's strong interest in enforcing its criminal judgments and no regard to the victims' compelling interest in finality, points aptly made by the dissenting opinion:

> A State is entitled to the assurance of finality. Only with this certitude can it "execute its moral judgment in a case." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). And "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* Granting the stay shortchanges the State's interests.

Appl. Appx. 6.

This Court should vacate the Sixth Circuit's stay of execution.

CONCLUSION

The Sixth Circuit's Order staying execution of respondent's criminal judgment should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Application to Vacate Stay of Execution was forwarded by United States mail, first-class postage prepaid, and by email on the 11th day of October, 2018, to the following:

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