No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY EDWARDS,
Petitioner,

v.

LORIE DAVIS
Respondent.

ON
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR A STAY OF EXECUTION

This is a Capital Case
Terry Edwards is Scheduled to be Executed January 26, 2017

JENNIFER A. MERRIGAN
Counsel of Record
Joseph J. Perkovich
John R. Mills
P.O. Box 63928
Philadelphia, PA 19147
(Tel.) (888) 532-0897
j.merrigan@phillipsblack.org
j.perkovich@phillipsblack.org
j.mills@phillipsblack.org

CARL DAVID MEDDERS
Burleson Pate & Gibson LLP
900 Jackson Street, Suite 330
Dallas, TX 75202
(Tel.) (214) 871-4900
dmedders@bp-g.com

To the Honorable Justice Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Petitioner Terry D. Edwards ("Petitioner") respectfully requests a stay of his execution, presently scheduled for today, January 26, 2017, after 6:00 p.m. Central Time, pending this Court's disposition of a petition for writ of certiorari, contemporaneously filed today, and in light of the pendency of *Buck v. Davis* and *Davila v. Davis*, cases that will address the scope of equitable relief available to Mr. Edwards under *Martinez v. Ryan*.

Mr. Edwards's case presents substantial issues related to and arising out of his abandonment, at a vital stages in the proceedings, by appointed federal habeas counsel .

PROCEDURAL BACKGROUND

Mr. Edwards' trial was riddled with state misconduct, race bias, false science, and suppressed evidence, all of which call into question the constitutionality of the integrity of his conviction and death sentence. None of these facts were uncovered or presented to the courts until undersigned counsel's appointment approximately seven months ago. Prior to that time, Appellant was represented by ineffective trial counsel, profoundly deficient state habeas counsel, and federal habeas counsel who abandoned him in the midst of the federal proceedings. In accord with their obligations under their appointment under 28 U.S.C. §3599, current counsel worked diligently and as expeditiously as possible to uncover these facts, and present them to the courts. Counsel did so as soon as possible, in light of the volume of work, the issues presented, and their best decision about the appropriate path to proceed in the courts.[1]

[1] Nonetheless, Appellants regretfully find themselves in the looming shadow of Edwards' execution date. They did not do so for purposes of delay, but because of the facts and circumstances of the case, and their ethical duties.

In light of these facts, Mr. Edwards filed in the District Court a Motion to Reopen Judgment based upon (i) the defect in his proceedings caused by prior federal counsel's abandonment, (ii) his state habeas counsel's lack of meaningful representation and apparent fraud against the state court, and (iii) the extensive and substantial bases for claims newly available to him, and asked the District Court to stay his execution in order to reopen the case. *See Hill v. McDonough*, 547 U.S. 573, 584 (2012); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014); *Trevino v. Davis*, 829 F.3d 328 (5th Cir. 2016). The court found that it was without jurisdiction to entertain either the Motion to Reopen or the Motion for Stay, and transferred both to the United States Court.

Mr. Edwards files this motion for a stay of his scheduled execution pursuant to Federal Rule of Appellate Procedure 8(a). He submits a stay is warranted because (1) there is a substantial likelihood of success on one of the two meritorious issues presented in his Opening Brief, (2) he has not delayed in the filing of this Motion, and (3) the equities weigh heavily in his favor – the harm to Edwards clearly outweighs any harm to the state from a brief delay in Edwards' execution. Indeed, in this case – where Edwards has only recently uncovered serious claims of state misconduct on numerous fronts, to permit his execution to proceed would not only fail to hold the state accountable, but reward the State for its transgressions – not only in the prosecution of Mr. Edwards' case, but in appointing transparently deficient counsel to represent Edwards at all prior stages of these proceedings. To permit Mr. Edwards' execution to proceed would both fail to hold the state accountable and encourage similar conduct in other cases, contrary to public interest. At the very least the gravity and complexity of the issues warrant judicious consideration incompatible with the little time left before the execution.

VII. The Proceedings Below

Undersigned counsel were appointed on June 16, 2016, and immediately began the record review and investigation that had never been conducted by prior counsel. On January 10, 2017, counsel for Edwards filed a Motion to Reopen Judgment Pursuant to Rule 60(b) of the Rules of Federal Procedure, arguing that the sum total of the circumstances in the case warranted reopening. On January 13, 2017, Edwards filed a Motion to Stay his Execution, and an Amended Motion to Stay on January 17, 2017.

On January 19, the court entered an order transferring the Motion to Reopen, and Edwards' Motion for Stay of Execution, to this Court.

In its order, the district court noted that it was "deeply troubled by the allegations of abandonment" by federal §3599 counsel but held that was insufficient to reopen the case. The court further concluded that because, upon reopening, counsel may allege new claims (in addition to claims that relate back to those alleged in his petition), the Motion to Reopen constituted successive habeas petition. (*Id.*). As such, the court reasoned, it lacked jurisdiction to consider the pleading and transferred it – and Edwards' Motion to Stay - to this Court. The court issued a certificate of appealability on a single issue: "whether the effective abandonment of Petitioner by his federally appointed habeas counsel constitutes a defect in the integrity of the original habeas proceedings that may authorize Rule 60(b) relief in this Court." (citations omitted).

B. The Fifth Circuit Did Not Address Whether Federal Counsel's Abandonment Constituted A Defect In the Integrity of the Proceedings and Refused to Consider a Motion to Reopen that Would Raise Claims Premised on *Martinez/Trevino*.

Yesterday, the Fifth Circuit denied relief without addressing the question certified: "whether the abandonment by counsel could be the sort of defect in the integrity of the federal habeas proceedings that could warrant Rule 60(b) relief." (App.0152a). The District Court had

engaged in no fact findings on abandonment, and yet the Fifth Circuit declined to answer the legal question, instead finding Mr. Edwards's offer of proof insufficient. Declining to rule on whether abandonment was a non-merits, defect, the Fifth Circuit then concluded that Mr. Edwards had merely presented a successive petition.

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, the federal courts consider the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). This standard requires a petitioner in this Court to show a reasonable probability that four members of the Court would consider the underlying case worthy of the grant of certiorari, that there is a significant likelihood of reversal of the lower court's decision, and a likelihood of irreparable harm absent a grant of certiorari. *See Barefoot*, 463 U.S. at 895.

I. THE ABYSMAL POST-TRIAL REPRESENTATION OF MR. EDWARDS HAS, TO DATE, CLOSED THE COURTHOUSE DOORS TO CLAIMS FUNDAMENTALLY CHALLENGING THE FAIRNESS AND RELIABILITY OF HIS CONVICTION AND SENTENCE

A. Federal Habeas Counsel Abandoned Mr. Edwards During His Federal Proceedings.

Richard Wardroup timely filed Mr. Edwards's habeas corpus petition on December 10, 2010 (App.0972a-1022a). One the same day, counsel requested a stay and abeyance to litigate unexhausted claims in state court. (*Edwards v. Davis*, 3:10-cv-6-M, Doc. 9) On August 11, 2011, a magistrate issued recommendations that the stay be denied. (*Edwards v. Davis*, 3:10-cv-6-M, Doc. 21).

As the district court noted, federal appointed counsel never objected to the Magistrate Report. As detailed in Mr. Edwards' Application, Mr. Wardroup accepted full-time employment in early 2011 with the Texas Criminal Defense Lawyers Association (TCDLA)—where he remains employed today—yet failed to withdraw from this case or otherwise notify the Court of his disengagement from the obligations under his appointment.

Indeed, after the filing of the petition years elapsed with no activity because of his total disengagement in the case and occupation in his fulltime job. Prompted by the Court's ordered response to Respondent's answer to the petition, Mr. Wardroup filed only a threadbare eight-page response in order to perpetuate the veneer of representation that, in actuality, had ended years earlier. (App.0963a-0971a). Upon the Court's judgment on August 6, 2014, he filed notice of appeal. (App.0931a-0932a). On November 14, 2014, Mr. Wardroup presented two issues in a 17-page application for certificate of appealability in this Court. *Edwards v. Stephens*, No. 14-70026. The State responded. Mr. Wardroup filed nothing further and, on May 19, 2015, the Fifth Circuit denied an application for COA.[2]

B. State Habeas Counsel Committed Fraud on the Court

Mr. C. Wayne Huff represented Mr. Edwards in state habeas proceedings. On July 5, 2005, Huff requested a three-month extension for his petition on the grounds that "counsel's investigation of this case will involve the review of many documents not contained in the record, and the interview of witnesses not called at trial." *State v. Edwards*, F02-15086 (August 5, 2005). However, by the time of the November 3, 2005 filing of the petition, the pleading reflected that

[2] Because he was not admitted to practice before the United States Supreme Court, Mr. Wardroup moved successfully to substitute counsel and, on June 23, 2015, Mr. Don Vernay was so appointed. Mr. Vernay filed a petition for a writ of certiorari on August 14, 2015, which was denied on November 2, 2015. *Edwards v. Stephens*, No. 15-5682. Mr. Wardroup never conveyed the file to Mr. Vernay, who has since resigned his bar license after the Fifth Circuit issued show cause orders against him for improper billing practices.

Huff had completed no investigation and offered not a single meaningful claim for Mr. Edwards. The state habeas petition contained just six boilerplate claims. Line-by-line review of the 58-page petition Huff filed for Mr. Edwards – compared to filings he had made for other clients and an appendix prepared by Mr. Edwards's appellate counsel – has determined that *the entire pleading contains only ten original sentences*. (App.500a-556a). Five days after he filed this petition, Huff invoiced the state $24,611.81 for its preparation, which raises facial questions of fraud.) (App.912a).

Less than a month before he filed the state petition for Mr. Edwards, the Western District of Texas published an opinion concerning Huff's performance in a prior state habeas case. That federal court found that his capital habeas work for Mr. Rolando Ruiz was "appallingly" and "egregiously inept", "egregiously deficient", and "wholly incompetent." *Ruiz v. Dretke*, No. Civ SA-03-cv-303-OG, 2005 WL 2620193, at *2-3 (W.D. Tex. Oct. 13, 2005). In a description that easily applies to Mr. Huff's performance in the present case, the district court described his failure to investigate, develop and preserve meritorious extra-record claims surrounding constitutional violations stemming from Mr. Ruiz's capital prosecution. As he did in *Ruiz*, Huff "made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for relief." *Id.* at *2. Here, as in *Ruiz*, Huff made "virtually no effort to present the state habeas court with any evidence supporting the vast majority of the claims for state habeas relief." *Id.*

A national expert on state and federal post-conviction litigation in capital cases described Huff's work in similar terms:

> In the few other cases I am aware of where no additional evidence was presented [in state habeas corpus], the reason was not the lack of new evidence but post-conviction counsel's failure to do a competent, adequate investigation. This, standing alone, is strong

> evidence of counsel's failure to function as counsel for Mr. Edwards. . . . Competent post-conviction representation in a capital case requires more than copying and pasting language from past work. It requires an individualized assessment of the case facts and investigation in response to facts suggestive of potential claims.

(App.901a). Significantly, Huff did not raise either an ineffective assistance of trial counsel claim or a claim that the prosecution suppressed exculpatory evidence, "[t]he most common claims that arise is state post-conviction proceedings." (*Id*.).

The State filed its 20-page Reply on April 6, 2006. The Dallas County District Court entered an order finding that there were no issues warranting a hearing and directed the parties to file Proposed Findings of Fact and Conclusions of Law within 30 days. The State filed its Proposed Findings ten days later on April 17, 2006. Eight days later, on April 25, 2006, without waiting for the 30 days to expire, the Dallas County district judge signed the State's Proposed Findings and Conclusions of Law, with the word "State's" still in the title. Huff failed to object to this or any other aspect of the order or file his own Proposed Findings and Conclusions. The CCA affirmed the trial court on December 16, 2009.

C. Appellate Counsel Missed His Deadline, Filed A Cribbed Brief and Waived Oral Argument

Mr. Edwards' appeal raised only two case-specific claims and the appellate briefing appears to be largely copied and pasted by his lawyer from other briefs prepared for other cases. After granting a five-month extension of time, the court on direct appeal entered an order that counsel for Mr. Edwards would receive "NO FURTHER EXTENSIONS" and threatened him with contempt if he failed to file a brief. (App.228a). Unmoved, the counsel filed nothing on Mr. Edwards's behalf on the due date. On December 16, 2004, the clerk sent appellate counsel in this capital appeal notice that he had failed to file. On December 22, appellate counsel mailed a brief and request for an extension "until December 30, 2004, or the date the Court receives this brief,

whichever is earlier." (*Id*.). In light of the hasty preparation, it is no surprise that, like state habeas counsel's effort, the filing was largely copied and pasted from prior briefs. Having done little to prepare the briefing, appellate counsel then compounded his dereliction by waiving oral argument. (App.918a).

Despite significant preserved issues that struck at the heart of the State's case, appellate counsel failed to raise the claims. Appellate counsel did not raise a claim that the trial court should have provided defense counsel with a short continuance to talk with one of the victims' children and their mother, witnesses who counsel had never spoken to prior to the last day of the penalty phase. Appellate counsel also failed to raise preserved issue of the improper argument by the prosecutor, an argument that went to the heart of the State's (false) case for Mr. Edwards as the shooter. In light of appellate counsel's non-advocacy, the Court of Criminal Appeals reached the predictable result, affirming on March 1, 2006.

II. NEWLY APPOINTED SUBSTITUTE COUNSEL UNCOVERED MERITORIOUS CONSTITUTIONAL VIOLATIONS, WHICH WOULD RELATE BACK IF HIS JUDGMENT WERE REOPENED

Upon appointment, undersigned counsel immediately undertook the first extra-record investigation of their client's case. Compelling evidence of serious constitutional violations emerged. Petitioner has a colorable argument that these claims would relate back, *if* his judgment were reopened. As discussed below, federally appointment counsel's abandonment in combination with the significant change in law in *Martinez/Trevino* constitute extraordinary circumstances which warranted the reopening of his case. The existence of potential claims that could be raised upon a reopening of the case, are relevant to the discussion, insofar as they relate both to the extraordinary circumstances analysis and his potential opportunity for success once the case is reopened.

Significant issues emerged which undermine reliability in his sentence and proceedings. Importantly, these issues relate back to his timely filed petition, and, as such, would not be time barred were his petition to be reopened.

A. Systemic Racist Practices Infected Mr. Edwards's Jury Selection.

Mr. Edwards's jury selection was tainted by the Dallas County DA's racially motivated practices, to which defense counsel readily and unreasonably acquiesced. In the end, unqualified jurors actually sat on his jury.[3]

Mr. Walker and Ms. Goodwin were white. Terry Edwards is black. From an initial pool of approximately 3,000 county residents, the parties individually questioned 143 venire members to select Edwards's jury that, in the end, initially seated only white people. (An alternate of Hispanic ethnicity later replaced one of the initially seated jurors). All African-American jurors were removed from his venire.

The historical context and timing of Mr. Edwards's trial cannot be disregarded. Petitioner's jury was empaneled months after the first Supreme Court opinion addressing the Dallas County DA's racially discriminatory practices in the case of Mr. Thomas Miller-El. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).[4] In Miller-El's Dallas County trial in 1986, the DA's Office used peremptory strikes to eliminate 10 out of the 11 black venire members individually questioned. Months after that trial, the Dallas Morning News published its first investigative journalism on that office's institutionalized practices in capital jury selection.[5] As displayed in

[3] The jury foreman lied on his questionnaire. Five jurors, including the foreman, admit to engaging in premature deliberations in the case. Three of them discussed the case, prior to the beginning of the sentencing phase and, separately, consulted the same Bible passage in order to sentence Mr. Edwards to death.

[4] *See also Miller-El v Dretke*, 545 U.S. 231 (2005), decided shortly after Edwards's case.

[5] The Dallas Morning News extensively chronicled this era, publishing two separate series of stories, one in 1986 and another in 2005, on the actual practices in that office. *See, e.g.*, Steve

the *Miller-El* litigation, the DA's Office under Bill Hill and his predecessors had an entrenched practice of striking prospective African-American jurors that manifested a consistent pattern encompassing the period of the trial at bar.[6]

Current counsel for Appellant have obtained a strike list apparently maintained by the prosecutor that includes, next to 32 of the venire members, a handwritten, encircled "B."[7] (App.227a).[8] Especially in light of the troubled history of this District Attorney's Office,[9] there is obvious reason for "concern[] that these markings strongly suggest racial indications." (App.227a). These present deeply concerning markers of potentially odious prosecutorial misconduct and constitutional violations and, further, strongly reflects the profound consequences of defense counsel's appeasement of the State's trading practice to strip away diversity and representativeness from Edwards's jury.

The jury selection record at bar (consisting of 47 transcript volumes), reflects the District Attorney's use of its practice of trading strikes by mutual agreement based upon juror questionnaires. In Appellant's case, this dictated the removal, off the record and without individual questioning, of swaths of the venire. This trading practice is known to have specially "impacted prospective black jurors far more than others, and kept many of those jurors from ever

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McGonigle & Ed Timms, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases,* Dallas Morning News, Dec. 21, 1986 (1986 WLNR 1716765).

[6] *See* Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors,* Dallas Morning News, Aug. 21-23 (2005).

[7] This marking system may reflect race-based jury selection tactics historically used in the county and encountered elsewhere. *See Foster v. Chatman*, 136 S.Ct. 290 (2016).

[8] The strike sheets were admitted as sealed exhibits at the District Court. Present counsel can make these documents available to the Court as soon as practicable.

[9] In *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003), published months before Edwards's trial, the Supreme Court noted that the fact that Dallas County ADAs marked race on the prospective juror's cards "reinforced" the supposition of racial discrimination established in the record in that case.

graduating to individual voir dire." (App.254a). As reflected in Edwards's case, in combination with systemic infirmities in the venire, the agreement method "stripped" away "the general general demographic representativeness of" Dallas County and enabled the empanelment of a white jury without, apparently, the use of a single peremptory strike exercised against a black venire member.

The ostensible basis for this comprehensive striking by agreement of the entire black venire, apart from the two African-American prospective jurors struck for cause, would have been the individual member's answers to the questionnaire form. However, the DA has provided Appellant's current counsel with copies of what that office has represented is the entirety of the questionnaires in its possession. These copies number only 35 of the 143 questioned venirepersons. Among those 35 is a single questionnaire completed by an African-American. It lacks any material that would supply a creditable basis for a cause strike of that venire member, yet the DA and defense agreed – off the record – to strike her, just as the State and defense had done with every other Black venire member.

Additional attempts to obtain the questionnaires (and other evidence about the venire) from other sources have been repeatedly frustrated. It appears that no prior counsel collected the underlying record of jury selection in this case. Additionally, the Dallas County DA did not disclose the strike list to any prior counsel. The DA's Office has continued to act in bad faith, ignoring requests for information from counsel. In one response to Petitioner's Public Information Act Request, the DA claimed it would send the relevant documents on January 27—the day after Mr. Edwards is to be executed. As noted by the Fifth Circuit, Mr. Edwards obtained a three-month reprieve in September 2016, after current counsel joined the case. The basis for the stay was ongoing negotiations with the Conviction Integrity Unit of the Dallas County DA's

Office, which the DA abruptly and inexplicably halted as the execution date approached. Significantly, neither the DA nor the AG have denied Mr. Edwards's claim regarding the strike list nor offered any explanation for the "B" notations.

If Mr. Edwards were permitted to reopen his judgment, these claims would relate back to his petition, which raised only juror claims, and would thus be timely.

B. The Dallas County DA Suppressed Material Exculpatory Evidence and Continues to Frustrate Counsel's Investigative Efforts.

In addition to, and intrinsically connected with, the Dallas County's DA history institutionalized racism, is its history of wrongful conviction. To date that Office is responsible for a staggering 54 wrongful convictions, including 52 full exonerations. Since coming into the case, counsel for Mr. Edwards have obtained several pieces of key evidence that were previously withheld from prior counsel and that undermine reliability in Mr. Edwards's death sentence.

The Dallas County DA withheld material exculpatory forensic evidence of gunshot residue testing.

The author of the report, forensic technician Vickie Hall, was the only witness defense counsel called at trial. She omitted the existence of the suppressed report from her testimony.[10] The report showed that the victim tested positive for gunshot residue, whereas defendant, in comparison, did not. The report makes it more likely that defendant would have had gunshot residue on him and also further impeaches Ms. Hall's testimony on cross, to the effect that Mr. Edwards could have been positive for GSR (he could not have).

[10] The same prosecutor and state forensic examiner from Mr. Edwards's case provided the critical, and false, evidence that resulted in the wrongful conviction of Richard Miles. In that case, strikingly similar testimony was offered, and the argued, as the basis for concluding Mr. Miles was the perpetrator. DNA evidence would later clear Miles, but only after he spent over two decades incarcerated for a crime he did not commit. *See Ex parte Miles*, 359 S.W.3d 647 (2012). In fact the prosecutor, Mr. D'Amore, has an extensive and well documented history of misconduct from his tenure at the Dallas County D.A.'s Office and is responsible for at least three wrongful convictions resulting in exonerations.

The Dallas County DA withheld the identity of a potential eye-witness who saw Kirk Edwards inside of the Subway.

One witness at trial told police that she saw Mr. Edwards's co-defendant in the Subway, however she changed her testimony at trial, leaving the prosecutor to argue incorrectly that Mr. Edwards was not only the shooter, but that he was the only one in the restaurant at the time of the shootings.

The Dallas County DA withheld material evidence about an alleged prior crime introduced in aggravation.

During the trial's penalty phase, the State introduced evidence that Appellant had been involved in a robbery of a Subway in Fort Worth that had taken place months before the Balch Springs robbery. He was charged with the prior alleged crime after his arrest on the present crime; but then the State dropped the charges once his trial was over. The Dallas County DA failed to disclose conflicting police and prosecutor narratives from Forth Worth County, which called into question the detectives narrative, and exculpatory statements from eye-witnesses (Tr.53 at 87-118, 125-129).

If Mr. Edwards were permitted to reopen his judgment, these claims would warrant an exception to §2244(b).

ARGUMENT

I. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PETITIONER'S CLAIM THAT FEDERAL HABEAS COUNSEL'S CONFLICT OF INTEREST AND ABANDONMENT AMOUNTS TO A DEFECT IN THE INTEGRITY OF THE PROCEEDINGS, SOMETHING THAT THE COURTS BELOW HAVE DECLINED TO ADDRESS.

The district court's order found that while it was "deeply troubled" by the allegations that federally appointed counsel had abandoned his client, Edwards "has not shown how that could have impacted anything that was, or could have been, presented during the limitations period that

had expired months before such employment began." (App.155a). The Court followed that with this statement: "Edwards has not identified any claim that had been asserted in his original habeas petition that could have benefited from any change in law resulting from *Martinez*." *Id.*

However, after *Maples v. Thomas*, it is undisputed that abandonment can constitute "extraordinary circumstances" in order to trigger the equitable remedy of Rule 60(b). Additionally, Edwards has, in fact, identified and presented a claim that was set forth in the original habeas petition "that could have benefited from any change in law resulting from *Martinez*." *Id.*

The facts – and Wardroup's own statement - preclude any conclusion but that he abandoned Edwards. In March 2011 - three months after Wardroup filed the federal petition, he began a full time job. When he did so he "generally stopped work on [his] cases" because of the demanding nature of his new job. (App. 238a). He failed to notify the district court – or Edwards – of his new position. The minimal representation he provided to Edwards after he started his new position reflect his abandonment.

These facts constitute abandonment – and "extraordinary circumstances" – within the meaning of Rule 60(b) jurisprudence. *See Maples v. Thomas,* 132 S.Ct. 912, 924 (2012); *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1083 (1984).

Moreover, Wardroup's abandonment of Edwards mattered. There was one claim presented in the federal habeas petition that had also been presented in the state petition: that trial counsel were ineffective in failing to challenge the Dallas County venire selection process as violating Edwards' right to a fair cross section of the community. However the claim that was presented in the state petition failed to reflect any extra record evidence or even a single fact specific to Edwards' case. Although federal counsel raised the claim, he did not present any new

evidence about trial counsels' egregious failures. As Edwards details in his brief, ample compelling and relevant evidence existed.

It was during the pendency of Edwards' federal habeas proceedings – *after* Wardroup took a new job – that the Supreme Court issued its opinions in *Martinez* and *Trevino* which establish that deficient performance by state habeas counsel may provide grounds to overcome the default of unexhausted claims of constitutionally ineffective trial counsel. Those cases made it incumbent upon Wardroup to identify and present the compelling facts relevant to the ineffective assistance of counsel claim he had presented, and to investigate and assert the (readily available) argument that state habeas counsel's ineffectiveness caused any default that resulted.

In Edwards's case, the facts make clear that there is a substantial likelihood that he will prevail on his argument that Wardroup abandoned Edwards, that such abandonment constitutes "extraordinary circumstances" for purposes of Rule 60(b) analysis, and that the issuance of the Supreme Court's decisions in *Martinez* and *Trevino* during that time, and federal counsel's failure to act on same, definitively impacted Edwards' ability to vindicate his rights.

The Supreme Court currently has two cases pending on its docket that will address the scope of *Martinez* and *Trevino*'s application to excuse substantial procedurally defaulted claims, which will greatly effect the scope and the nature of the relief to which Mr. Edwards is entitled. The first, *Buck v. Davis*, 15-8049 (U.S.), concerns the availability of motions to reopen premised on *Martinez* and *Trevino* claims. The second, *Davila v. Davis*, No. 16-6219, will address whether the rule set forth in *Martinez* will also excuse substantial procedurally defaulted ineffective assistance of appellate counsel claims. As discussed *infra*, the record manifests the bases for "substantial" claims of ineffective assistance of state habeas corpus and appellate counsel that readily could be raised upon reopening of Mr. Edwards's case.

A. The Imminent Resolution of *Buck v. Davis* Will Determine Specifically How, Within The Rule 60(b) Analysis, This Court Must Apply the Equitable Rule in *Martinez* in *Trevino*.

The Supreme Court is currently considering the implications of the substantial change in law wrought by *Martinez* and *Trevino*. In *Buck v. Davis*, No.15-8049 (U.S.), the Court is poised to further articulate what constitutes an "extraordinary circumstance" warranting the reopening of a closed habeas case. Oral argument was held on October 6, 2016 and an opinion explicating the *Martinez/Trevino* equitable rule's consequences for Rule 60(b) analysis is expected at any time. For this reason alone, a stay for Edwards is warranted.

The Supreme Court's resolution of that question—and the linked, severe split among seven circuits—will surely bear upon the resulting analysis currently applicable to the circumstances in Mr. Edwards's case and thereby provide discrete grounds for a stay (separate from and in addition to the foregoing grounds predicated on the severe defect under 18 U.S.C. §3599 in Mr. Edwards's federal proceedings and based on the current, well-established Fifth Circuit authorities (*infra*)). On October 5, 2016, the Supreme Court heard argument in *Buck v. Davis*, No.15-8049 (U.S.) *sub nom. Buck v. Stephens*, 630 Fed. Appx. 251 (5th Cir. 2015). The Court is currently construing the standard for assessing whether to issue a certificate of appealability. The case presents whether claims premised on *Martinez/Trevino* may be categorically excluded as an extraordinary circumstance under Rule 60(b). At the moment, the Fifth Circuit, together with the Fourth, Sixth, and Eleventh Circuits, take that categorical position. *See Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012); *Moses v. Joyner*, 815 F.3d 163, 168-69 (4th Cir. 2016); *Arthur v. Thomas*, 793 F.3d 611, 633 (11th Cir. 2014); *Hamilton v. Sec'y, Florida Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015); *Abdur' Raham v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015). Three other circuits have taken the opposite

approach, considering such equitable claims, along with other extraordinary circumstances, on a case-by-case basis. *See Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015); *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014); *Lopez v. Ryan*, 678 F.3d 1131, 1135-37 (9th Cir. 2012). Judging in part from the four cert. petitions it has held for *Buck*,[11] the Supreme Court could hardly demonstrate a greater interest in this integral element of that case. The sound inference from the high Court's activity is that it is highly concerned about this issue and very likely to establish the Rule 60(b) extraordinary circumstances analysis for *Martinez/Trevino* claims.[12]

Given state habeas counsel's egregious misconduct under his appointment for Mr. Edwards between 2005 and 2009, the Supreme Court's treatment in *Buck* of the *Martinez/Trevino* rule is likely to affect Petitioner's current litigation. In light of *Martinez* (and then *Trevino*), state habeas counsel's failure to investigate and present a single claim of trial counsel ineffectiveness severely compounded trial counsel's myriad failings (*infra*). Since *Martinez*, that state post-conviction breakdown has obligated federal habeas counsel to investigate and present otherwise barred trial counsel claims. For the foregoing reasons, *Buck* is expected to establish whether (and if so, in what way), *Martinez/Trevino* claims may provide a

[11] *See Moses v. Thomas*, No. 16-5507 (petition filed Aug. 5, 2016, last distributed for conference of Nov. 10, 2016); *Abdur'Rahman v. Westbrooks*, No. 16-144 (petition filed July 29, 2016, last distributed for conference of Oct. 7, 2016); *Johnson v. Carpenter*, No. 15-1193 (petition filed Mar. 22, 2016, last distributed for conference of June 2, 2016); *Wright v. Westbrooks*, No. 15-7828 (petition filed Jan. 19, 2016, last distributed for conference of Sept. 26, 2016).

[12] The Court's treatment of two other cases emanating from Texas and the Fifth Circuit suggests as much. While *Trevino* was pending, the Court stayed two executions presenting questions regarding the application of *Martinez* to Rule 60(b) proceedings. Both of those cases "explicitly relied on [Fifth Circuit precedent] that *Martinez* did not amount to an extraordinary circumstance within the meaning of Rule 60(b)(6)" and had their petitions for writ of certiorari granted, judgments vacated, and cases remanded for further consideration after *Trevino* was decided. *Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013). In light of the Court's accepting *Buck* for review, it is exceedingly likely that the Court will squarely address the issue it left unaddressed in those cases: the availability of Rule 60(b)(6) premised on *Martinez* and *Trevino.*

basis for Rule 60(b) relief. These implications from *Buck* also strongly support the grant of a stay of execution here.

B. *Davila v. Davis* Will Address Mr. Edwards's Ability To Present Claims of Ineffective Assistance of Appellate Counsel

In *Davila*, the high Court will address whether substantial procedurally defaulted claims of ineffective assistance of appellate counsel can also be excused by state habeas counsel's ineffective assistance. Such a holding flows logically from *Martinez* and at least one circuit court has concluded as much. *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013). The *Martinez* Court's underlying concern was that, absent excusing the default, "no state court at any level will hear the prisoner's claim" and, therefore, neither will any federal court. *Martinez*, 132 S.Ct. at 1316.

Extending *Martinez*'s reach to ineffective assistance of appellate counsel claims is a logical extension because the same underlying concern applies to those claims. If state habeas corpus counsel is ineffective in failing to raise those claims, "no state court at any level will hear the prisoner's claim," closing all courthouse doors to the claim in federal court as well. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. §2254(b). Excusing the procedural default in federal court ensures that substantial claims of deprivation of the right to counsel have a day in court.

The Fifth Circuit has held that *Martinez*'s equitable rule does not extend to claims of ineffective assistance of appellate counsel. *Davila*, 650 Fed. App'x at 867 (citing *Reed*, 739 F.3d at 778 n.16 (declining to find cause based on appellate counsel ineffectiveness)). The Circuit Court's limitation is the issue on which the Court just accepted review, (*id. cert. granted* No. 16-6219 (U.S.)) and this Court should stay Mr. Edwards' execution pending resolution of that case.

Davila, in addition to clarifying the availability of federal court review of procedurally defaulted ineffective-assistance-of-appellate-counsel claims, may further clarify the application

of *Martinez*. When the Court decided *Martinez*, the dissent criticized the opinion as opening the federal courthouse doors too widely. The dissent posited that all manner of defaulted state habeas corpus claims could be excused by employing the very logic adopted by the *Martinez* Court. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) ("[N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. . . . [M]any other cases in which initial state habeas will be the first opportunity for a particular claim to be raised" are no different.). Leading habeas corpus scholars have also suggested that the logic of *Martinez* suggests broad application. Randy Hertz & James S. Liebman, *Federal Practice and Procedure* §26.3 (6th ed. Supp. 2013) ("the [*Martinez*] Court's reasoning logically extends to other types of claims that, as a matter of state law or factual or procedural circumstances, could not be raised before the postconviction stage.") (App.904a).

In addition to discussing the scope of available claims, the Court may also discuss the appropriate procedure for handling procedurally defaulted claims that may be excused by state habeas counsel's ineffective assistance. In *Davila*, the circuit court indicated that the proper procedure for handling such claims would be to grant a motion to stay and abey the case while the petitioner exhausts the procedurally defaulted claims, as it believed was required by both Fifth Circuit and Supreme Court precedent. *Davila*, 650 Fed. Appx. at 868 (citing *Rhines v. Weber*, 544 U.S. 269 (2005) and *Williams v. Thaler*, 602 F.3d 291 (5th Cir. 2010)). However, if the procedural default is *excused*, then so might the duty to exhaust the claim (that would likely receive little welcome in state court in light of the default).

The high Court in *Davila* is likely to address both the scope of available claims under *Martinez* and the procedure for addressing them in state and federal court. In light of the

important, relevant guidance the Court is likely to provide, this Court should stay Mr. Edwards's execution while the Court resolves these questions.

The record provides at least several bases for substantial claims that could be raised in light of the disposition of *Davila*, as outlined below. In light of the paucity of claims appellate counsel raised that were specifically related to Mr. Edwards' case, it is inexplicable that appellate counsel failed to present these errors. For the same reason, state habeas corpus counsel's failure to raise a claim of ineffective assistance of appellate counsel was quite clearly unreasonable.

1. Appellate counsel failed to appeal the trial court's refusal to grant trial counsel a short continuance to interview members of one of the victim's family who wished to testify on Mr. Edwards's behalf.

On the final day of Mr. Edwards' penalty phase, defense counsel informed the court that Ms. Cassandra McDaniel-Horridge, the mother of two of the children of decedent, Mr. Walker, contacted him to express their support of Mr. Edwards. (Tr. 55 at 8-9). Counsel requested a brief continuance, noting they had not spoken to these potential witnesses. (Tr. 55 at 9). Counsel informed the trial court that these witnesses "could be material to this Jury." (Tr. 55 at 9). Specifically, knowing that Mr. Edwards and Mr. Walker were friends, trial counsel noted that the testimony could "go to the Defendant's background . . . and it may certainly be something that the Court might need to be mitigation evidence." (*Id.*). The trial court denied the continuance, and Ms. McDaniel-Horridge and her children did not have an opportunity to testify.

Despite this preservation of the issue, appellate counsel failed to raise any claim based on the trial court's refusal to grant a short continuance.

2. Appellate counsel failed to raise a claim of improper argument regarding the state's case for Mr. Edwards being the shooter.

Vickie Hall, a forensic examiner employed by Dallas County, was the only witness called by the defense at Petitioner's guilt phase. As discussed above, Ms. Hall testified as to GSR

testing performed on Terry Edwards and Tommy Walker, both of which yielded negative results. (Tr. Vol. 52 at 166-87). On cross-examination, however, the prosecutor was able to elicit false and misleading testimony that Mr. Edwards could have physically removed trace chemical components from his hand. (*See* Tr. 55 at 68-69). The prosecutor elicited from Ms. Hall that GSR could be partially removed from someone's hands through profuse sweating (*See* Tr. 52 at 186: "If there's a large amount of sweat, some of that moisture could rinse some of that residue away"), but, Ms. Hall further explained, its absence would be more likely explained by some sort of physical removal. (*Id*.).

The prosecution then argued, in closing, that presence of traces of barium on Mr. Edwards's hands – without the presence of the other chemical components that testing had established were discharged in equivalent portions from the weapon – was just as strong as evidence that Terry Edwards was the triggerman as evidence that all three chemical components had been deposited would have been.[13] (Tr. 53 at 62). Further, the State argued in closing that Mr. Edwards managed to achieve this scientifically impossible feat while handcuffed in the back of a police car, a location typically covered with gunshot residue as a result of the inherent features of police work. ADA D'Amore introduced that scientifically unsupportable make-believe to the jury despite *the total lack of record support for it*:

> one way that that can happen that those results aren't positive on all three elements, they wipe the hands, hands come in contact with something else. *And we know* he was wiping his hands on his pants. *We know* when he's in the squad car he's seat belted in the back seat with his hands behind his back, *brushing up against the seat, brushing up against his clothes*.

Tr. 53 at 62 (emphasis added).

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[13] Barium is relatively commonplace in the environment and, by itself, without detection of the other two chemical components of the firearm's gunshot residue, does not suggest the likelihood that such residue had been on the individual's hands.

Defense counsel repeatedly objected to this argument, the only scientific argument in support of Mr. Edwards as the triggerperson, but the trial court overruled those objections. Inexplicably, appellate counsel failed to raise the issue on direct review.

II. THE RELATIVE HARM TO THE PARTIES.

A. Edwards Will Suffer Irreparable Harm if a Stay is Not Granted.

There is no question that Mr. Edwards's death necessarily constitutes irreparable harm. "The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases." *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) ("irreparable harm is necessarily present in capital cases"). The remaining questions weigh heavily in review. Petitioner addresses each of them in turn.

B. Defendants will not Suffer from a Delay of Edwards' Execution to Permit Consideration of the Serious Claims of Injustice and *State* Misconduct.

There will be no significant harm to Defendants or the State of Texas if the requested stay is issued. First, a stay would be minimal, giving time for additional briefing and oral argument, and for this Court's adjudication of the issues presented. Second, though a stay would result in some delay, such a delay will not substantially injure the State, and the threatened injury to Appellants outweighs any such potential damage to Edwards. To permit Edwards' execution to go forward despite the very serious allegations of *state* misconduct, and the *state's* appointment of patently inadequate counsel at every prior stage of the proceedings, would be uniquely unjust – and would reward the state for it's misconduct and lack of care.The State's interest in finality is diminished by its interest in the fair administration of justice, the State's interest in finality is at odds with its interest that "justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The State's overall interests are promoted, not disserved, by staying Edwards' executions.

III. MR. EDWARDS HAS NOT DELAYED IN PRESENTING THESE CLAIMS TO THE COURT FOR REVIEW

Undersigned counsel accepted appointment for Petitioner on June 14, 2016 pursuant to 18 U.S.C. §3599. (Doc. 36); *see Harbison v. Bell*, 556 U.S. 180, 185 (2009) (quoting §3599(e) as contemplating the duty to advance "all available post-conviction process"). Upon immersion into this profoundly troubled case and the file, counsel have advanced extensive investigative efforts that have yielded material information calling into question the legitimacy of the Dallas County judgment and have brought to light the substance of meritorious constitutional claims.

Appointment at the end stages of a capital case increases exponentially the amount of work that must be conducted – especially where, as here, prior counsel abandoned Edwards, and never presented a single extra-record claim. *Christeson v. Roper*, 135 S. Ct. 891, 895 (2015) (noting conflict-free counsel not dilatory where claims filed soon after appointment even though petitioner's habeas petition had been denied years earlier). New to the case, counsel had to first become familiar with the entire record below, including the trial, direct appeal, and state and federal post conviction pleadings, rulings and proceedings. Once counsel completed that review, it became clear that trial counsel were constitutionally deficient in numerous respects, that state appellate and habeas counsel were woefully inadequate, and that prior federal counsel abandoned Edwards at a critical stage in his case.

In effect, no meaningful advocacy has ever before been conducted on Mr. Edwards's behalf. These facts compelled counsel, consistent with their duties pursuant to § 3599, to conduct further investigation. What counsel found put trial and habeas counsel's ineffectiveness into stark relief, exposed unconstitutional race bias in the selection of Edwards' jury, and revealed that the State had failed to disclose material information, and presented false and misleading evidence. The sum total of the evidence uncovered makes a powerful case that Edwards should

never have been convicted or sentenced to death. Faced with this information, the only appropriate course was to pursue relief for these serious constitutional errors, by all available procedural avenues, in both state and federal courts. During that time, counsel have accomplished a significant amount of work, which has, necessarily, taken a substantial amount of time. Because of counsel's efforts to

In short, counsel have not sought to delay, but to represent Edwards to the best of their abilities in accordance with their duties as set forth in 18 U.S.C. §3599. Edwards should not pay the price for the inadequacies of prior appointed counsel and the consequent late discovery of viable claims for relief.

"[u]nder *McFarland*, if a prisoner succeeds on his §3599 motion but has insufficient time to meaningfully exercise that right because of an impending execution, the Supreme Court has instructed federal courts to grant a stay.'" *Battaglia*, 824 F.3d at 475 n.32.

CONCLUSION

For the reasons set forth in this application, this Court should grant Mr. Edwards a stay of execution.

Respectfully Submitted,

JENNIFER A. MERRIGAN
Counsel of Record
Joseph J. Perkovich
John R. Mills
P.O. Box 63928
Philadelphia, PA 19147
(Tel.) (888) 532-0897
j.merrigan@phillipsblack.org
j.perkovich@phillipsblack.org
j.mills@phillipsblack.org

CARL DAVID MEDDERS
Burleson Pate & Gibson LLP
900 Jackson Street, Suite 330
Dallas, TX 75202
(Tel.) (214) 871-4900
dmedders@bp-g.com

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 26th day of January 2017:

Office of the Texas Attorney General
Postconviction Litigation Division
PO Box 12548
Austin, TX 78711-2548
Ellen.Stewart-Klein@oag.texas.gov

/s/Jennifer A. Merrigan
Jennifer A. Merrigan
Counsel for Petitioner