IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TERRY D. EDWARDS, SR. *Petitioner*, v. LORIE DAVIS, Director, Texas Department Of Criminal Justice, Correctional Institutions Division, *Respondent*.	§ § § § § § § § § § § §	Case No. 3:10-CV-6-M DEATH PENALTY CASE **EXECUTION SCHEDULED: JANUARY 26, 2017**

OPPOSED MOTION FOR STAY OF EXECUTION
AND INCORPORATED MEMORANDUM OF LAW

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I. PRELIMINARY STATEMENT

Mr. Edwards, currently scheduled for execution on January 26, 2017, has made a substantial showing for the Court to reopen his case in light of (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, should the Court stay his execution. *See Hill v. McDonough*, 547 U.S. 573, 584 (2012).

On January 10, 2017, Petitioner, through his undersigned counsel, moved this Court pursuant to Rule 60(b) to reopen his case and thereupon permit amendment of his habeas application. (Doc. 83, Rule 60(b) Motion to Reopen Judgment). The present motion augments the grounds set forth in the Rule 60(b) Motion for an evidentiary hearing and a stay of execution.

Petitioner's prospective new claims emanate from the apparent misconduct of the Dallas County District Attorney's Office under the auspices of the lead prosecutor in Mr. Edwards's 2003 trial, Mr. Thomas D'Amore.[1] The Dallas County judgment at bar resulted from a broad range of tactics carried out to convict Mr. Edwards at whatever cost but in violation of his rights at trial. The tactics Mr. D'Amore used at Mr. Edwards's trial – including the elicitation of false gunshot residue forensic evidence from a county technician, a Ms. Vicki Hall, represent a

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[1] In light of Mr. D'Amore's substantial misconduct uncovered by present counsel in this and various other cases, undersigned requested the complete file for the prosecution in several communications since August. After delays and a lack of disclosure, undersigned's office submitted a Public Information Act request relating to Mr. D'Amore's file and personnel records on December 14. Today, January 13, the District Attorney's office informed counsel that Mr. D'Amore would be given until January 27 – one day *after* Mr. Edwards' execution – to review his own records and note any objections to its disclosure. (App. 1). (The letter, sent today via first-class mail, indicates that Mr. D'Amore will have ten days from *receipt* to lodge objections.) This process and delay by the DA's office guarantees that no useful information will be forthcoming in advance of Mr. Edwards' execution. (See *infra,* n.13 and related discussion).

repeated a pattern and practice of illegal tactics that have resulted in the reversal of convictions and exoneration of wrongfully prosecuted individuals (*infra* at 14-18). As set forth below, D'Amore, in addition to other grave misconduct, including a racially driven use of strikes to compose a homogenous jury, colluded with Ms. Hall to present knowingly dishonest and inaccurate findings from forensic testing. Defense counsel, for their part, failed to meaningful challenge or resist these excesses and downright abuses. At times, the defense even enabled these abuses through their complicity with the State's misconduct in, for instance, empanelling the jury. It is emerging that Mr. Edwards's 2003 trial is one abhorrent proceeding among a stockpile of very similar prosecutions that, until ultimately corrected, had undermined the rule of law.

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.

A. The Defect In These Federal Habeas Proceedings Necessitates A Stay Of Execution In Order To Allow More Process

The magnitude of the defect in this case can be appreciated only with a sense of its timing. After accepting full time employment, during the pendency of Mr. Edwards's petition and without informing the Court, initial federal counsel made his last required filing for Mr. Edwards (an eight-page reply to Respondent's answer to the petition) on March 9, 2012. (Doc. 21). By counsel's own admission (Doc. 83-1, at 1-2), he then disengaged from the representation and ceased his work, doing so days before a seismic shift in a major facet of federal habeas corpus jurisprudence. But counsel's complete disengagement left Mr. Edwards unrepresented

and abandoned at the very juncture when actual representation would have provided the Court with considerable bases for relief from Petitioner's unconstitutional judgment. Instead, Petitioner's counsel of record, Mr. Richard Wardroup, took no step at all to perform under his appointment. Rather, he stepped away from the case entirely when he needed to react zealously to the Supreme Court handing down *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and then *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Those tandem cases "fundamentally altered the obligations of federal habeas counsel" to investigate trial counsel's performance in order to exploit a "new gateway for additional claims." (Doc. 83-1 at 615). That gateway is the deficient performance of state habeas counsel. *Trevino v. Davis*, 829 F.3d 328 (5th Cir. 2016); *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014).

Judging from the record of Mr. Edwards's state habeas proceedings, it is difficult to conceive of attorney conduct more abjectly inadequate than that of the state attorney, Mr. C. Wayne Huff. Mr. Huff's performance rivals the abandonment of Mr. Wardroup; but in a sense, it is more insidious in that by filing what appears, on its face, to be a habeas petition, the false impression of advocacy is given while, in fact, the papers were simply a prop to justify substantial billing for work that, by every indication, appears was never done for Mr. Edwards.[2] As reflected in Mr. Edwards's pending Rule 60(b) Motion, Mr. Huff submitted not a single trial-counsel-ineffectiveness claim based on any investigation of defense counsel's performance[3] in a trial that, in fact, was riven with extremely deficient performance causing the greatest possible prejudice to Mr. Edwards.

[2] As discussed further in Petitioner's Rule 60(b) Motion, Mr. Huff's state habeas petition was copied and pasted from prior petitions in other cases, and contained a mere 10 original sentences. (Doc. 83-1, at 212). The only facts specific to Mr. Edwards's case were copied directly from the statement of facts from the direct appeal briefing by another attorney. (Doc. 83-1, at 612).

[3] The lone nominal IAC claim in the state petition had been copied verbatim from two other petitions and possessed no specificity to the case or defendant.

Upon reopening Mr. Edwards's federal habeas application, his counsel will be able, for the first time, to present claims meaningfully challenging the reliability and legality of his conviction and sentence. These claims are based on evidence that (i) Mr. Edwards did not, in fact, shoot either victim, (ii) the jury, devoid of African-Americans due to prosecutorial misconduct and defense counsel complicity, was demonstrably unable to fairly consider his case, and (iii) the disgraced former Assistant District Attorney Thomas D'Amore – whose misconduct, including the knowing elicitation of false testimony, is responsible for at least three other wrongful convictions – designed and implemented the State's manufactured theory of the crime and illegal case in aggravation against Mr. Edwards. Despite obstruction to the State's actual case file, it is emerging that the prosecution may very well have suppressed exculpatory witness information, as D'Amore and others in that office had done in scores, or more, of other cases, and presented evidence against Petitioner that, at various turns, was distorted or entirely contrived. The trial record is plain, however, that defense counsel failed to challenge the State's severely tainted case and this pervasive deficiency (bordering on plain disinterest in the adversarial process), explains the outcome.

As discussed more fully below, these conditions demand a stay. Mr. Edwards possesses substantial grounds for relief from his Dallas County judgment and needs further process in this Court in order to secure relief through his current, un-conflicted counsel. The comprehensive failure of Petitioner's prior attorneys at each stage in his case, and especially at trial, prevented the courts from considering this critical evidence, evidence that on this trial record should ultimately force the State to retry Mr. Edwards or otherwise resolve this matter.

B. 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* and *Trevino*

Further, *Buck v. Davis*, No. 15-8049 (U.S.) (argued Oct. 5, 2016), a case from the Fifth Circuit, raises, inter alia, whether the substantial change in law wrought by *Martinez* and *Trevino* (*supra*), may constitute an "extraordinary circumstance" warranting the reopening of a closed habeas case. The Supreme Court's resolution of that question—and the linked, severe circuit 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*)).

II. PETITIONER HAS POSITED A MERITORIOUS MOTION TO REOPEN HIS CASE AND GROUNDS FOR RELIEF, WARRANTING A STAY IN ORDER TO PREVENT IRREPARABLE HARM

A "stay of execution is an equitable remedy." *Hill*, 547 U.S. at 584. 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. *Bruxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

The "movant need not always show a probability of success on the merits, [and instead must only] present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weigh heavily in favor of granting the stay." *O'Bryan v McKaskle*, 729 F.2d 991, 993 (5th Cir. 1984), *quoted in Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987). When Texas entered his execution warrant in February 2016, Mr. Edwards had no actual counsel, only counsel listed on the docket. He needed to repeatedly write from prison to

this Court (Docs. 31, 32) to re-obtain his statutory right to counsel. Of course, Mr. Edwards did absolutely nothing to cause this vital right to evaporate. The severe misfortune in Petitioner's draw of appointed attorneys led, through no fault of his own, to this predicament. (*See* Doc. 33 (Vernay pleading in response to substitution letter-motions)). However, by June 14, 2016, the Court appointed undersigned counsel in substitution of Mr. Don Vernay. (Doc. 36). At that time Mr. Edwards was under a warrant calling for his execution on October 19.

On June 25, 2015, the Fifth Circuit had appointed Mr. Don Vernay in substitution of Mr. Wardroup for the "sole purpose" of filing a cert. petition in the Supreme Court. (Doc. 33 at 2). After immersion in the case and the initiation of investigation on all relevant fronts illuminating profound constitutional infirmities in the Dallas County judgment at bar, the State and Mr. Edwards jointly moved to modify the October 19 date and, on September 29, obtained an order setting the present date of January 26. Counsel have sustained the investigation, thereby accumulating considerable grounds for challenges to the judgment. At this juncture (more than two weeks from the execution date),[4] these bases are adduced in the Rule 60(b) Motion to Reopen Judgment. Further, this investigation justifies additional process in support of securing information highly significant for Mr. Edwards's case yet withheld to date.

"The third requirement – that irreparable harm will result if a stay is not granted – is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring). And the State's interest in finality is diminished by its interest in the fair administration of justice. That is, in light of the substantial claims for relief Mr. Edwards has outlined here and discussed more fully in his Rule 60(b) Motion, the State's interest in finality is

[4] Although timeliness and unnecessary delay is an important consideration for whether to grant a stay, even bringing a challenge to the method of execution three days prior to an execution, in at least some circumstances, does not amount to unnecessary delay. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

at odds with its interest that "justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). In view of Mr. Edwards' overwhelming stakes, the relative harm to the parties weighs heavily in his favor. Further, the primary basis for reopening this case – *viz.*, that the Court, as contemplated in *Elves, Inc. v Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981), may "achieve substantial justice," especially where a profound *injustice* is otherwise poised to occur – strongly militates against the State's counter arguments seeking denial of this stay motion.

The remaining two factors, Mr. Edwards' likelihood of success and diligence, also weigh heavily in his favor, as discussed below.

III. MR. EDWARDS HAS ESTABLISHED THE EXTRAORDINARY CIRCUMSTANCES NECESSARY TO REOPEN HIS CASE

In his Rule 60(b) Motion, Petitioner has presented a substantial likelihood of prevailing, both on the assertion that a fundamental defect in the proceedings warrants reopening the case, and, once re-opened, substantial bases exist to set aside his state court judgment.

At a critical juncture, Mr. Edwards's federal habeas counsel abandoned him, while his habeas petition was pending, for full time employment and without notifying the Court. The attorney now admits to his total disengagement – that he entirely ceased work on the case – during that span and regrettably acknowledges his breach of duty under the appointment.[5] (Doc. 83-1 at 615-16). In the state habeas stage, state counsel had undertaken staggeringly poor representation, simply copying and pasting claims from other cases, absent any facts specific to this case, into a filing with clearly no chance of persuasion and without appreciable engagement with the prosecution that actually resulted in Mr. Edwards's judgment. Historically, the prisoner under this case history would be procedurally barred from raising unexhausted claims in federal

[5] Mr. Wardroup's track record in this regard is, on its own, troubling. He has been suspended from the practice of law as many as six times and publicly reprimanded at least twice on account of his professional misconduct.

court in the first instance. But by March 20, 2012, the Supreme Court decided *Martinez v. Ryan*, and reversed the law whereby "this circuit had consistently held that ineffective assistance of state habeas counsel could not establish [cause to overcome such default]." *Mendoza v. Stephens*, 783 F.3d 203, at 208-09 (Mem.) (5th Cir. 2015) (Owens, J., concurring) (citing cases). creating possible cause to overcome a procedural default of a kind that had stopped in their tracks myriad federal habeas petitioners. *Trevino*, 133 S.Ct. at 1921. Had federal counsel sustained his representation of Mr. Edwards, he could have brought substantial claims for relief in light of newly established law, law established shortly after he disengaged. *See Mendoz*, 783 F.3d at 205 (Owens, J., concurring) (remanding to the district court "to determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings" filed many years prior.).

Further, that change in law, and how it may contribute to the extraordinary circumstances that may warrant reopening a given habeas case, are presently before the Supreme Court in *Buck v. Davis* (*infra*).

A. Prior Federal Counsel's Abandonment Caused A Defect In the Proceedings And Now Requires Reopening

In addition to failing to conduct any meaningful investigation, Mr. Edwards's state post-conviction counsel simply copied and pasted claims from other cases. In federal court, his attorney compounded these failures, conducting no investigation into trial counsel ineffectiveness. From 2011 until the appointment of current counsel, Mr. Edwards has not had the benefit of any meaningful representation pursuant to his statutory entitlement under §3599.

To vacate a judgment under Rule 60(b)(6), a petitioner must demonstrate "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackerman v. United States*, 340 U.S. 193, 199 (1950)). A Rule 60(b) motion

cannot serve to attack "the substance of the federal court's resolution of a claim on the merits," and must instead challenge "some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532.

The abandonment of federal habeas counsel is such a defect. In *Clark v. Stephens*, 627 Fed. Appx. 305 (5th Cir. 2015), the defect concerned "a conflict of interest" arising from the petitioner's §3599 counsel having acted for the petitioner in state habeas proceedings. *Id.* at 307-08. In granting a certificate of appealability, the Fifth Circuit explained that "reasonable jurists could debate" whether the conflict was "sufficient to satisfy Rule 60(b)," either based on the conflict itself or based on counsel's failure to argue his own ineffectiveness. *Id.* at 309. A Rule 60(b) motion could thus be granted based on the failure to provide un-conflicted counsel.

The provision of §3599 counsel likewise played an important role in *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015) (per curiam), to establish the need to remand the case to the district court for further proceedings. In *Mendoza*, the same attorney had served as counsel both in the state and federal habeas corpus proceedings. During *Mendoza*'s pendency in the Fifth Circuit, the Supreme Court decided *Christeson v. Roper*, 135 S.Ct. 891, 895 (2015) (per curiam), which held that a habeas petitioner saddled with attorneys laboring under a conflict of interest is entitled to new habeas counsel and a remand in order to explore available bases under Rule 60(b) for reopening his habeas case closed as a consequence of attorney misconduct. Promptly thereafter, the Fifth Circuit remanded Mendoza's case to the district court "to determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings" filed many years prior. *Mendoza*, 783 F.3d at 205 (Owens, J., concurring).

Mr. Edwards's federal attorney of record abandoned him, leaving him, for the majority of the time in this court, with federal habeas counsel in a "technical" sense only. *Battaglia v. Stephens*, 824 F.3d 470, 473 (5th Cir. 2016) (reversing N.D. Tex. (Boyle, J.) denial of motion for appointment of §3599 counsel and motion for stay of execution, remanding for appointment of conflict-free counsel to perform under the statute's clear criteria), quoting *Christeson*, 135 S.Ct. at 895. On January 11, 2010, this Court appointed Mr. Wardroup. (Doc. 2). Shortly after filing Mr. Edwards's habeas petition, he "accepted a full time position . . . [that] has demanded and continues to demand my full attention." (Doc. 83-1 at 1). "After obtaining an extension, I filed the reply in March 2012. It was eight pages in length. I then did not consider the case, in any meaningful way that I can recall, until it was denied over two years later." (*Id.* at 1-2).

This status change, of which he did *not* notify the Court, created a conflict of interest and culminated in abandonment of his client. (*Id.* at 615-16). That is, "[c]ounsel in federal habeas corpus proceedings are required to do more than merely wait until the court grants or denies relief, or file perfunctory pleadings in response to docket notifications." (*Id.* at 615).

As set forth above, during counsel's abandonment and before the Court denied relief, the Supreme Court decided two seminal cases, *Martinez* and *Trevino*, that opened "a new gateway for additional claims (and facts supporting claims) that would previously have been deemed procedurally barred." (*Id.* at 615).

These decisions were particularly salient to Mr. Edwards' case because the performance of Wayne Huff, state habeas counsel, was so abysmal. Less than a month before Mr. Huff filed the state petition for Mr. Edwards in November 2005, the Western District of Texas issued an opinion concerning Huff's performance in a prior state habeas case. That federal court found that his capital habeas work had been "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*, in this case Mr. 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 . . . relief." *Id*. In Mr. Edwards's case, Huff simply lifted claims, wholesale, from other cases. The entire state habeas petition consisted of only ten sentences original to this case. Huff raised no case specific claims. As illustrated by the readily available claims for relief the all prior counsel failed to investigate, *infra*, Huff's performance was a product of his "failure to do a competent, adequate investigation." (Doc. 83-1 at 612).

B. Upon Reopening, Mr. Edwards Is Likely To Secure A New Trial.

Since the undersigned's appointment for Mr. Edwards, substantial evidence has come to light that undermines the integrity of his state court judgment. The fundamental shortcomings are due to the prosecution's extensive misconduct. The first failing is the State's unconstitutional stripping of African-Americans from the venire and the seating of demonstrably unqualified individuals incapable of deciding questions of culpability and punishment in a constitutional manner. In the guilt phase, the State's failure to disclose exculpatory information and, it is emerging, its manipulation and adulteration of evidence rendered the proceedings unconstitutional. These intertwined and insidious factors, coupled with trial counsel's failure to challenge these excesses and abuses caused the violation of Mr. Edwards's rights, inter alia, to a fair trial, an impartial jury, and, critically, the effective assistance of counsel.

Trial counsel's conduct was prejudicially deficient in virtually every aspect of their handling of the case. Defense counsel failed to subject the State's evidence to adversarial testing, standing by while the prosecution presented false evidence to buttress its fully refutable theory that Mr. Edwards perpetrated the homicides. They failed to interview members of Mr. Edwards' family who could have undermined the State's theory that Mr. Edwards was the triggerman and would have offered mitigating information about him and illuminating evidence about his co-defendant, his older cousin Kirk. Finally, counsel failed to investigate the relationship between Mr. Edwards and one of the victims (Mr. Walker) despite evidence that the two were close and members of his family wished to testify about their relationship. For its part, the State presented false evidence and suppressed important evidence that was at odds with its fundamental theory of the case.

1. Grave pattern and practice of wrongful prosecutions from the Dallas County DA's Office – and especially ADA D'Amore – manifests in Mr. Edwards's case

Despite the pendency of a range of records and information requests, counsel's ongoing investigation has revealed a pattern and practice of similar misconduct by ADA D'Amore and the Dallas County DA's office. Since 1989, Dallas County has seen fifty-two exonerations, [6] including twenty-six wrongful convictions occurring during the tenure of Tom D'Amore.[7]

[6] The National Registry of Exonerations maintains a database of cases involving exonerations since 1989 and is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. It was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law.
https://www.law.umich.edu/special/exoneration/Pages/mission.aspx

[7] The actual number of wrongful convictions in this period is actually higher. Two additional cases, not yet included in the registry, involve misconduct by the Dallas County DA's Office that bear striking resemblance to its misconduct here. In 2014, Dennis Lee Allen and Stanley Orson Mozee's were released in light of the gross prosecutorial misconduct in their cases. DNA confirmed their innocence. The two had been convicted of the 1999 murder of a Dallas pastor, largely on the basis of informant identification. However, undisclosed letters in the DA's file established that the informants had been incentivized by favorable treatment in exchange for

D'Amore was the lead prosecutor *on at least three* of those cases. Undersigned counsel are awaiting a response from Dallas County to a Public Information Act (PIA) request regarding ethical complaints against D'Amore[8] to identify exactly how many of the wrongful prosecutions involved him. Nonetheless, the number of exonerations is staggering and speaks to a pervasive culture of misconduct within his office.

a. D'Amore is responsible for at least three wrongful prosecutions

Though counsel's identification and review of all instances of Mr. D'Amore's misconduct at the District Attorney's Office is ongoing, three case have already emerged wherein D'Amore's misconduct was partially or wholly responsible for a wrongful prosecution. One of these bears several striking and uncomfortable similarities to the present case. In two of those cases, D'Amore procured wrongful convictions by eliciting false testimony from technicians at the Southwestern Institute of Forensic Sciences—one involved the very expert in this case.

b. Miles wrongfully convicted due to collusive testimony from Vicki Hall of SWIFS

On February 15, 2012, the Texas Court of Criminal Appeals granted habeas corpus relief to Richard Miles, on the grounds that he was actually innocent, and set aside his convictions. *Ex parte Miles*, 359 S.W.3d 647 (Tex. Ct. App. 2012). Miles had been convicted of a 1994 murder

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their testimony. Additionally, the DA's office also failed to disclose the identity of two eyewitnesses to the murder who could not identify Mozee or Allen as the perpetrator. In the present case, counsel have uncovered evidence that the DA failed to disclose the existence of exculpatory eyewitness statements pertaining to both the underlying crime and the central aggravator. Further, as to the underlying crime, the DA's file included *only* those witnesses who testified at trial. It is improbable that every interviewed witness testified at trial. In the light of the DA's actions in Mozee and Allen, the DA's omissions must be viewed with suspicion.

[8] In light of increasing concerns about the District Attorney's Office handling of Mr. Edwards's case, counsel initially made this request of the Dallas County District Attorney's Office on December 14, 2016. Despite the Texas PIA's statutory requirement that such requests be answered within ten business days, the Dallas County District Attorney's Office has, to date, failed to produce any documents in response to the request.

and attempted murder in Dallas County and sentenced to a total of sixty years. *Id*. He was convicted on the basis of false testimony from two witnesses, elicited by Tom D'Amore, and in spite of suppressed evidence that squarely implicated a different suspect in the homicides.

One of the witnesses was an eyewitness who, despite protesting that he did not in fact recognize the defendant prior to trial, was instructed by D'Amore to identify the defendant anyway by showing him where the witness would be sitting in the courtroom. *Id*. at 661. This was in spite of the fact that dozens of other eyewitnesses to the offense could not positively identify Mr. Miles as the killer and told the police that the actual perpetrator was substantially taller and darker skinned than Mr. Miles. *Id*. at 668.

The second was Southwest Institute of Forensic Sciences Employee, Vickie Hall, who also testified in Mr. Edwards's case, and whose direct examination by D'Amore was dishonest in a manner that reflects not only collusion and fraud, but also bears substantial similarities to the erroneous forensic testimony that the two presented at Mr. Edwards's trial. Ms. Hall testified in Miles's 1994 trial that she had tested swabs from the defendant's hands for gunshot residue and that the low levels of antimony and barium on one palm indicated that Mr. Miles had either recently "fir[ed] a weapon or handl[ed] a very dirty weapon." *Id*. at 655. In response to questioning from D'Amore, and despite the fact that the barium and antimony levels found on Mr. Miles's hand were below her own agency's set limits for establishing a positive test result for the presence of GSR, Ms. Hall told the jury that the low levels met "FBI standards" for gunshot residue. *Id*. at 655, 662. The "FBI standards" to which Ms. Hall cited at trial were not, in fact, published anywhere, but rather contained in handwritten notes that she said she had taken while attending an FBI training seminar in 1993. *Id*. at 662.

At the prompting of Mr. D'Amore, Ms. Hall also testified that the relatively low levels of the two elements and the presence of residue on only one of Mr. Miles's hands could be explained "because Applicant's washings were done between thirty and forty minutes after the shooting, and 'the more active a person is, the more possibility you have of wiping any residue off.'" *Id.* at 665. However, the more likely explanation, according to a subsequent expert retained by Mr. Miles's postconviction counsel, is that the presence of those compounds at low levels are relatively common, occurring in about 10% of the population.

In 2010, Ms. Hall signed an affidavit admitting that she "would testify differently than" she had in 1995. *Id*. at 662. The reason, she stated, was that the barium and antimony levels present on Miles's hands were below the SWIFS standards both in 1995 and in 2010, meaning that "'both then and now[,] the results would be reported as negative for [gunshot residue].'" *Id*. (quoting Hall's statement). She said that she did not testify to this fact, however, because D'Amore didn't question her about the SWIFS standards and that "instead, her testimony focused on the FBI standards" for which she could provide no published citation. *Id*. Ms. Hall's testimony in Miles represents not only dishonesty and gamesmanship, it suggests collusion with ADA D'Amore. Her omission, as a SWIFS employee, of the SWIFS standard, should be viewed with extreme skepticism, as should D'Amore's questioning, which apparently focused on scientific standards of dubious, if not completely fictitious, provenance.

The Court of Criminal Appeals also found that the prosecution had suppressed material, exculpatory evidence from other witnesses contained in police reports. *Id*. at 670. One undisclosed report documented an anonymous telephone call made to police three months prior to Miles's trial, in which a woman told the police that her ex-boyfriend had admitted to the shooting and that the police had arrested the wrong person. *Id*. at 658-659. The second

undisclosed report recounted an altercation between the victims and a third, undisclosed suspect in the days immediately prior to the shooting. *Id*. at 666. Mr. Miles was released from prison in 2010.[9]

c. Karage wrongfully convicted due to corrupted DNA evidence from SWIFS

D'Amore was also responsible for the wrongful conviction of Entre Nax Karage, who was convicted in 1997 in of sexually assaulting and murdering his 14 year old girlfriend. *See Ex Parte Entre Nax Karage*, 2005 WL 2374440 (2005). D'Amore prosecuted that case based, in part, on testimony elicited from a Southwestern Institute of Forensic Sciences DNA technician, Carolyn Van Winkle, which included that the defendant's clothing had tested positive for blood. *Karage v. State*, 1999 WL 454638 (Tex. App. 1999). In 2005, the defense moved, over objection from the Dallas County DA, to have DNA found on the victim cross-referenced with the national database.[10] That testing resulted in a match—to another defendant who had been convicted in Dallas County on the same day as Karage of a similar crime (the sexual assault and kidnapping of a 14 year old girl). Whether D'Amore actually knew and suppressed evidence of the alternate suspect is irrelevant. He should have known and should have disclosed any evidence about the similar case. Additionally, D'Amore elicited misleading, inadmissible and prejudicial testimony from several witnesses, including a friend of the victim's and a police officer. Though undersigned counsel are currently investigating D'Amore's conduct in the *Karage* and his use of the SWIFS technician's testimony, it is clear that misconduct by D'Amore played a significant role in this wrongful conviction.

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[9] Leslie Minora, *Two Years After Wrongfully Convicted Richard Miles Was Released, He's Officially Innocent*, Dallas Observer (Feb. 15, 2012) available at http://www.dallasobserver.com/news/two-years-after-wrongfully-convicted-richard-miles-was-released-hes-officially-innocent-7108362.

[10] Undue Process, Dallas Observer, 10/5/2006. Available at: http://www.dallasobserver.com/news/undue-process-6377958

d. Catalan exonerated after D'Amore's wrongful prosecution and defense counsel's ineffectiveness

Finally, Moises Catalan was exonerated in 2003, having been prosecuted by D'Amore in 1997 for aggravated assault. *Catalan v. Cockrell*, 315 F.3d 491 (5th Cir. 2002). After the Fifth Circuit affirmed the district court's grant of habeas, the Dallas County DA's office dropped the charges against him. D'Amore had prosecuted Catalan and his brother-in-law, despite the fact that the brother-in-law was apparently the sole actor in the assault. The district court overturned the conviction because Catalan's defense counsel failed to cross-examine the victim about inconsistent statements made before the time of the crime. *Id*. Though the Fifth Circuit did not discuss prosecutorial misconduct, the underlying question is why D'Amore prosecuted the case in the first place, in light of the exculpatory statements from the victim. At bottom, the exoneration exposes the unethical and overreaching practices by D'Amore.

2. State misconduct and suppression of evidence distorted the trial process

a. Complicit defense counsel enabled DA's racially motivated striking of African-American venire

Trial counsel for Mr. Edwards acquiesced to the dismissal of scores of jurors off the record, via "trading" with the prosecution based on questionnaires, a process that is "not a valid, let alone reasonable strategy" because it risks excluding many jurors who may be inclined to vote against returning a death verdict. (Doc. 83-1 at 18-19).

The jurors ultimately seated included a foreperson who withheld information about his prior juror service, service that jaded him about the legal system and explicitly against defendants who exercises their rights to a trial. Two of the jurors prematurely deliberated, relying on a Bible passage during the guilt phase to conclude that death was the appropriate sentence.

b. ADA D'Amore colluded with Vicki Hall – again – to introduce "scientifically unsupportable" forensics testimony; Suppressed GSR report supported conclusion that Petitioner did <u>not</u> fire murder weapon

At trial, the prosecution repeatedly insisted that Mr. Edwards was the shooter and that his cousin Kirk was not. The state insisted that the presence of barium — and barium alone — on Mr. Edwards' hands established that he had fired the weapon. (Tr. 52 at 186; Tr. 53 at 62). The record now shows that it is "scientifically unsupportable" to claim that the presence of barium alone on Mr. Edwards's hands meant he was the shooter. (Doc. 83-1 at 19). Relatedly, the State, until recently, failed to disclose a gunshot residue (GSR) report (Doc. 83-1 at 25) that would have demonstrated that one of the victim's GSR handwipings tested positive around her defensive wound, undermining the state's claim that Mr. Edwards could have fired the gun and not had a positive result. (Tr. 53 at 62). In sum, the forensic evidence, the evidence presented at trial and that which has been disclosed only recently and upon counsel's repeated insistence, tends to establish that the State's presentation was false.

c. DA's Office suppressed potential eyewitness to Kirk Edwards fleeing scene and all records and testing of his car

The State also failed to disclose a potential eyewitness to the offense. In the DA's notes, only recently disclosed for the first time, there is a handwritten note indicating that, during trial, an investigator with the Dallas County DA's office received a report from a witness suggesting that Kirk Edwards was inside the Subway at the time of the offense and fled the store through the front door. (Doc. 83-1 at p. 200). This account flatly contradicts the State's evidence at trial, none of which placed Kirk at the scene inside the store. Likewise, until recently the State has failed to disclose evidence that it had impounded Kirk's car after the crime, the car he used in order to flee the scene. (*Id.* at 205). Despite repeated requests by current counsel, the State has yet to disclose any documents regarding its testing and analysis of the car.

Finally, the State presented false evidence that Mr. Edwards committed an execution style murder with the victims on their knees as he sought vengeance against his prior employer

by killing former co-workers. A key to the State's theory, particularly given the lack of any disclosed eyewitnesses, was the testimony of the medical examiners, who testified that the evidence they reviewed was "consistent" with kneeling victims. (Tr. 52 at 23, 25, 29- 30, 44-45). The State, both in its cross-examination of other witnesses, and in arguments to the jury, insisted the victims were on their knees. (Tr. 52 at 29; Tr. 53 at 66; Tr. 54 at 246; Tr. 55 at 117). This claim was false. A preliminary forensic review of the crime scene, undertaken by a homicide investigator with over 30 years in law enforcement, makes it clear that both victims were standing at the time they were shot. (Doc. 83-1 at 4, 8). The size and location of the blood drops and the discovery of one of the bullets in the back of the store both fatally undermine the State's theory that they were kneeling and thus the predicate for its theory that the murders "personify evil," and were undertaken "with evil in his heart." (Tr. 55 at 115-16).

3. Trial counsel's failure to engage in adversarial testing and basic investigation produced a distorted picture of the crime, Kirk Edwards, and their client

The State's theory of the crime was that Mr. Edwards "engineered" the effort—an effort that matching the modus operandi of a prior offense—seeking "vengeance" on his prior employer, and convinced his cousin, Kirk, to join the effort. None of these areas were investigated or meaningfully challenged by trial counsel. Had trial counsel undertaken investigation into the State's case, they would have uncovered significant evidence that contradicted or refuted the state's theory. This evidence was readily available and it was incumbent upon counsel to uncover it. (Doc. 83-1 at 612-15).

Had counsel investigated the relationship between Mr. Edwards and his prior employer, the jury would have learned that the two were friends and that before the store's district manager fired Mr. Edwards, the victim had gone to bat for him because he "really liked and cared about" Mr. Edwards. (*Id.* at 30). The victim's daughter had gone to court with her mother during the

penalty hearing and tried to provide the jury with this information because she believed and still believes strongly that Mr. Edwards "never intended for [her] dad to die, and [Mr. Edwards] deserved to have the jury hear from the victim's family, who had known him, before they made a decision about whether or not to sentence him to death." (*Id.* at 54). Tragically, trial counsel had not previously interviewed the witness, so he was unprepared when she arrived, and the jury never learned the truth about the friendship between Mr. Edwards and the victim.

Trial counsel also failed to conduct meaningful investigation into Mr. Edwards family, a remarkable shortcoming, especially because his cousin was also charged for the two murders and robbery. (Doc. 83-1 at 613). Had trial counsel conducted such an investigation, multiple family members were available to testify in support of Terry Edwards and against Kirk Edwards. They would have testified that the gun used in the homicides belonged to Kirk and that Kirk, for years, bragged about his assaultive behavior and was widely believed within the family to be the person who took advantage of Terry, planned the robbery, and ultimately perpetrated the homicides. They would have provided a sharply contrasting view of Terry Edwards: that Terry was a timid child, for whom committing the present offenses was unfathomable and a man who overcame a challenging upbringing to become a loving father. This evidence would have powerfully rebutted the State's theory that Mr. Edwards was the mastermind who extinguished the lives, by his own hand, of two former co-workers.

The jury also did not learn that Kirk Edwards, over the course of his criminal career, (i) was convicted of stealing a truck that he insisted, in an unsuccessful attempt to place the blame on his co-defendants, had taken without him (1988); (ii) was convicted of driving yet another stolen vehicle that he told the police he had gotten from someone else (1989); and (iii) was convicted of stealing a television set that he maintained he had instructed a cousin to return to the

victim (1990); before finally (iv) being convicted and sentenced to a twenty-five year term for yet another theft that, by his account, he "did not do" (1994). (Doc. 83-1 at 116-199). While in the custody of the Texas Department of Criminal Justice, Kirk was disciplined thirteen times for fights with other inmates and staff, several of them violent, and had been out on parole for just a few months at the time of the Subway robbery. None of this evidence was obtained or presented by trial counsel (or any other of Mr. Edwards's appointed counsel since), leaving the jury with a profoundly distorted view of Terry Edwards in relation to his older cousin. The jury had no idea about the dynamics that may begin to explain these senseless killings, acts of violence completely out of character for Petitioner.

The jury also did not learn that the State's evidence in aggravation about an alleged prior crime by Terry Edwards was weak-to-nonexistent. Mr. Edwards was never prosecuted with the prior crime (the charges were dismissed), and major irregularities pervaded its investigation. The prior crime was a Subway robbery that took place in Fort Worth, Texas three months prior to the offense at issue in Mr. Edwards' prosecution. The State's case centered on the testimony of a witness who identified Mr. Edwards some four months after the offense and claimed that he took the witness's phone and threatened to kill everyone in the store. However, the descriptions of the perpetrators given to the police at the time of the offense did not match Terry Edwards. (Doc. 83-1 at 101). Mr. Edwards was more than a decade older, half a foot taller, and about 50 pounds heavier than the suspect described at the time of the offense. There is no description of the lineup that led to the witness testimony at trial, and, inexplicably, the DA file lists the date when the Fort Worth and Balsch Springs police departments began communicating about the similarities between the two offenses as having started in May 2002, *two months prior* to the Balch Springs offense *sub judice* in July 2002. Nonetheless, trial counsel did nothing to challenge the state's

presentation and conducted no investigation into this issue, allowing the state to draw imagined, yet pointed, comparisons between the two offenses as part of its case that Mr. Edwards was responsible for the murders here.

Trial counsel did little to nothing to counter the most salient points of the State's theory, despite information readily available to discredit it. The comprehensive failure of Petitioner's prior attorneys at each stage in his case to date has prevented the courts from considering this critical evidence, evidence that on this trial record should ultimately require the State to retry Mr. Edwards or otherwise resolve this matter.

C. Imminent Supreme Court Decision Should Resolve How Equitable Rule In *Martinez* And *Trevino* Bears Upon Rule 60(b) Extraordinary Circumstances Analysis

As discussed above, the defect in these proceedings under §2254 is the breakdown of 18 U.S.C. §3599 due to the abandonment of appointed counsel, Mr. Wardoup, in 2012 through 2014. However, an additional level of analysis factors into the Court's determination of whether to stay Mr. Edward's execution in order to afford him review of potentially availing challenges to his judgment. The Supreme Court is currently deciding the way in which the equitable rule in *Martinez* and *Trevino* shall bear upon the extraordinary circumstances inquiry governing Rule 60(b) motions.

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

[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*.

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

IV. COUNSEL HAVE FILED THIS MOTION AND THE RULE 60(B) AS SOON AS PRACTICABLE

After taking the extraordinary step of accepting new appointment of a client under an execution warrant (Doc. 36), undersigned have taken and overseen considerable efforts in Mr. Edwards's representation. Immediately upon appointment, undersigned counsel began the process of requesting, obtaining, and digesting records related to the investigation and prosecution of Mr. Edwards's original case, the efforts of all prior counsel, and Mr. Edwards's social history. The review and analysis of the newly discovered evidence, and comparison with the files or prior counsel and the state and federal court record, coupled with new investigative efforts have led to the information set forth in the Rule 60(b) Motion in relation to the Court's extraordinary circumstances analysis. *See Gonzalez*, 545 U.S. at 535; *Diaz*, 731 F.3d at 376-77. Some of this material was readily available for discovery by trial counsel. Other material was withheld by the State at that time, despite defense requests. At bottom though, it appears that none of Mr. Edwards's prior counsel had in their possession this critical material. Further, all prior counsel failed to carry out their basic duties to conduct a reasonable investigation into compelling guilt and penalty phase issues.

The Court appointed undersigned in June 2016. By late September, due to evidence unearthed by counsel's preliminary investigation, the Dallas County District Attorney's Office conceded the need to stay Mr. Edwards's October 17, 2016 execution date to afford counsel further opportunity to develop the issues that had emerged. Counsel's request to the Conviction

Integrity Unit specifically invoked numerous public information requests to various state and county law enforcement agencies concerning critical aspects of the case that no prior counsel had attempted to develop. Nonetheless, undersigned counsel continue to experience considerable delay and frustration in many elements of this overall effort.

Despite having requested, received, and digested thousands of pages of records from state and county agencies via the PIA and other avenues, counsel have met with considerable resistance and delay in obtaining evidence to which Mr. Edwards is legally entitled. This evidence concerns several crucial aspects of the case and is critical for the competent investigation and development of Mr. Edwards's case.

Through requests pursuant to the Texas PIA, counsel have sought the personnel files and records of disciplinary actions against the prosecution's lead trial attorney, Assistant District Attorney Thomas D'Amore. Counsel's investigation to date has revealed that Mr. D'Amore has been the subject of numerous misconduct allegations, was responsible for at least three wrongful conviction resulting in exoneration, and was ultimately fired from his position at the District Attorney's Office's. However, requests for Mr. D'Amore's personnel file have been met with repeated, unnecessary and dilatory objections, requests for clarification, and, ultimately, silence from the Appellate Division of the Dallas County District Attorney's Office. In turn, that office has advised that Mr. Edwards may now need to wait an additional forty-five days, or longer, while it seeks clarification from counsel for Respondent, the State Attorney General's Office, as to its responsibilities under the Texas Public Information Act.

Today, January 13, undersigned received notification that the DA's office had only today sent the requested clarification to the Attorney General's Office. (App. 12). Inexplicably, the office also notified that Mr. D'Amore would be afforded an opportunity to lodge objections to

disclosure of the file and provided D'Amore with a list of commonly raised objections. This "fox guarding the henhouse" approach to disclosure of information virtually guarantees no useful information will be forthcoming regarding Mr. D'Amore's time at the office. More troublingly, D'Amore was given ten days from *receipt* of the letter, which was sent via first-class mail. (App. 1). In light of the holiday on Monday, that will likely allow him to wait until *after Mr. Edwards' execution* before he even has to lodge objections to disclosure. Even at this late date, the DA's office continues to delay development of evidence of substantial misconduct by its prior employee.[13]

A request made for copies of the negatives of crime scene photos, originally made in November, and crucial to the competent analysis of the defense's forensic experts, has to date been met only by a partial disclosure of photographic evidence from the crime scene, in the form of photo prints, rather than the negatives requested, and missing more than half of the photos that appeared to be in the State's possession during counsel's initial in-person examination of the DA file on August 9, 2016. Counsel's request for the underlying forensic documents, also made at the recommendation of the forensic experts, has been similarly stalled. Repeated efforts to obtain the underlying data and notes from the forensic testing performed in this case—made by public records act requests to several State agencies—have been met by repeated assurances that such information simply does not exist, despite an independent forensic expert's assessment that the materials thus far disclosed by the Dallas County Sheriff appear to be "incomplete."

Several other requests, pertaining to the aggravator used against Mr. Edwards at trial, are also pending. As discussed *supra*, and in-depth in the Rule 60(b) Motion (Doc. 83 at 64-68), the

[13] In light of the history of wrongful prosecutions of the office, undersigned have today requested the casefiles related to the 54 from that office. Although we have requested all materials related to these cases, we have asked that the office prioritize disclosure of the Conviction Integrity Unit's work on the three cases we know D'Amore's was involved in prosecuting.

State introduced evidence that Mr. Edwards had committed a previous robbery of a Subway franchise in Fort Worth. The State charged him with that crime after he was arrested on the present matter, then withdrew the charges once he was sentenced to death. Counsel's investigation of the prior charge has uncovered strong evidence that the aggravator was based upon fabricated evidence and that the robbery was, in fact, not perpetrated by Terry Edwards. Several requests pertaining to the Fort Worth robbery, including for information about other suspects and similar crimes, remain outstanding.

V. A STAY IS REQUIRED TO PERMIT FURTHER DEVELOPMENT OF THE RECORD IN SUPPORT OF THE MOTION TO REOPEN

This Motion as well as the pending Rule 60(b) Motion, outlines the now growing body of facts demonstrating that "substantial justice" requires the case to be reopened. *United States v. Gould*, 301 F.2d 353, 357 (1962); Fed. R. Civ. P. 60(b)(6). However, the full extent of D'amore's misconduct in this case (and stunning pattern of misconduct in other cases) and the prejudicial deficiencies of Mr. Edwards' trial and state habeas counsel are still coming to light. The State is wholly responsible for the delay in producing the exculpatory information it has withheld (and perhaps continues to withhold). To the extent the record is incomplete or otherwise insufficient to warrant reopening the case, this Court should grant the stay and an evidentiary hearing. *Gould*, 301 F.2d at 357 (remanding for development of further evidence in support of a Rule 60(b) motion). With the support of the Court's discovery authority, the record can then be completed, and the Court will receive any additional information it needs to assess the propriety of reopening the case.

VI. CONCLUSION

For the foregoing reasons, and in light of the serious constitutional defects undermining the legality and reliability of Mr. Edwards' conviction and sentence and in light of the pervasive

state misconduct and the abandonment and gross misconduct of Mr. Edwards' prior counsel, Mr. Edwards respectfully requests this Court to stay his execution, hold an evidentiary hearing, and require any other remedies it may deem appropriate.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

I hereby that I conferred with opposing counsel, Ellen Stewart-Klein, via e-mail on January 10, 2017. I informed her of the details of this filing. She represented that her office does oppose this Motion.

/s/Jennifer A. Merrigan

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2017, the foregoing pleading was served upon all counsel of record in this case via the ECF filing system, pursuant to the Federal Rules of Civil Procedure.

/s/Jennifer A. Merrigan