

No. _____
IN THE
Supreme Court of the United States

TIMOTHY FILSON, WARDEN, *et al.*,

Petitioners,

v.

PAUL BROWNING,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO
FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEAL FOR THE NINTH CIRCUIT**

To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to this Court's Rule 13.5, the Warden Timothy Filson¹ and the Attorney General of the State of Nevada respectfully request a 60-day extension of time, to and including Monday, April 2, 2018, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit issued an opinion on September 20, 2017, and subsequently issued an order denying rehearing and an amended opinion on November 3, 2017. Unless extended, the time within which to file a petition for a writ of certiorari will expire on February 1, 2018. This application has been filed more than 10 days before this date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A copy of the Ninth Circuit's original opinion is attached as Exhibit A, the order denying rehearing and amended opinion is attached as Exhibit B.

¹ Warden Timothy Filson replaces Renee Baker, the Warden named in the proceedings below.

1. This case raises important constitutional questions involving the application of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA) and application of *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Strickland v. Washington*, 466 U.S. 668 (1984). In particular, in a split decision, the Ninth Circuit reversed in part a federal district court order denying a writ of habeas corpus after finding that the Nevada Supreme Court unreasonably denied relief on Respondent Paul Browning's (hereinafter Browning) claims for relief under *Brady/Napue* and *Strickland*.

In a thoroughly reasoned opinion the Nevada Supreme Court denied Browning's claims for relief. First, applying *Strickland* to Browning's relevant claims of ineffective assistance of counsel, the Nevada Supreme Court denied each of Browning's challenges to counsel's performance because Browning failed to show (1) that counsel's performance was deficient under the *Strickland* standard for evaluating counsel's performance; or (2) that any alleged deficiencies did not result in actual prejudice. Second, the Nevada Supreme Court denied Browning's *Brady/Napue* claims for two reasons: (1) that the State had not suppressed any favorable testimony because the evidence was available to the defense through alternative means, and (2) because the evidence was ultimately immaterial because its absence did not carry a reasonable likelihood of changing the outcome of the trial.

Browning raised these issues in a federal habeas petition, and in another thoroughly reasoned decision the federal district court denied relief, finding that Browning failed to carry the heavy burden imposed by 28 U.S.C. § 2254(d). The Ninth Circuit, in a split decision, reversed the district court's resolution of Browning's claims based on *Brady* and *Strickland*. But unlike

the dissenting judge in this case, the majority of the panel conducted a *de novo* review of the record to reach their own conclusions as to how they would resolve the issues, and did not focus on whether the Nevada Supreme Court's applications of *Strickland* and *Brady* were objectively unreasonable as required by 28 U.S.C. 2254(d). *See, e.g., Harrington v. Richter*, 562 U.S. 86, 103 (2011) (acknowledging habeas relief is reserved for errors "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement").

2. This case merits this Court's review. The list of this Court's opinions reminding the federal circuit courts of their obligation to adhere to the strict standards for habeas review imposed by 28 U.S.C. § 2254(d) continues to grow on an annual basis. As Judge Callahan's dissent in this case shows, the Ninth Circuit in this case has, contrary to this Court's precedent, merely substituted its own view of the evidence and the application of the law to that evidence for the Nevada Supreme Court's, rather than truly asking whether the Nevada Supreme Court's application of the law to the evidence before it was reasonable. *See, e.g., White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (reiterating that AEDPA precludes habeas relief even if the federal court determines that a state court's holding was wrong or clearly erroneous; the holding must be objectively unreasonable to warrant relief under AEDPA). While the Applicants recognize that this Court generally does not engage in what amounts to error correction, this Court's repeated acceptance of review, and reversal, of circuit court rulings misapplying AEDPA continues to demonstrate that the significant interests of comity and federalism that serve as bedrock principles of this Court's jurisprudence on federal habeas review warrant this Court's review

where the federal circuit court failed to faithfully adhere to the limited scope of review imposed by AEDPA.

3. Counsel of Record for this matter, the State of Nevada's Solicitor General, first became involved in this matter after the Ninth Circuit issued its decisions. And the Assistant Solicitor General assigned to assisting in preparation of the petition had only limited knowledge of the case prior to the Ninth Circuit issuing its decision when he assisted counsel of record in the Ninth Circuit to prepare for the oral argument in this case. In addition to counsels' lack of prior knowledge of the issues and extensive record in this case, the ordinary heavy press of work on other matters described in more detail below has prevented counsel from devoting the time necessary to preparing a petition for writ of certiorari in this matter. As a result, they require additional time to conduct the necessary review of the record, research and analyze the relevant legal issues, and prepare and file a petition for a writ of certiorari that will be helpful to the Court.

Along with many miscellaneous state and federal cases that counsel is currently litigating or supervising, counsel of record has been extremely busy on a handful of demanding cases since the Ninth Circuit issued the denial of rehearing. In particular, counsel has been busy drafting a petition for writ of certiorari and reply brief in *Filson v. Petrocelli*, No. 17-769 (U.S.), and preparing for and appearing for argument in *Ross v. Williams*, No. 16-16533 (9th Cir.). Counsel has also been defending Nevada's recall statutes against constitutional challenges in both federal and state court. See *Luna v. Cegavske*, No. 2:17-cv-02666 (D. Nev.); *Woodhouse v. Cegavske*, No. A-17-764587-C (Nev. 8th J.D. Ct.); *Cannizzaro v. Cegavske*, No. A-17-76685-C (Nev. 8th

J.D. Ct.). And Counsel has been defending a class action challenge to Nevada's rural indigent defense system, as well as a challenge resulting from a recent Nevada initiative petition. *See Davis v. Nevada*, No. 170C02271B (Nev. 1st J.D. Ct.); *Zusi v. Sandoval*, No. A-17-762975-W (Nev. 8th J.D. Ct.).

And the Assistant Solicitor General tasked with assisting counsel of record, in addition to an internal assignment within the office of supervising and assisting with brief writing within the Post-Conviction Unit of the Nevada Attorney General's Office, carries a very heavy caseload of his own active state and federal habeas matters. While not limited to the following, the most significant aspects of counsel's workload since the Ninth Circuit issued its amended opinion in this matter has included drafting a petition for writ of certiorari and reply brief in *Filson v. Petrocelli*, No. 17-769 (U.S.); appearing for argument in a complex capital habeas matter in the Ninth Circuit, *Echavarria v. Baker*, No. 15-99001 (9th Cir.); litigating complex capital habeas proceedings in the federal district court in *Thomas v. Filson*, 2:17-cv-00475 (D. Nev.), and *Hernandez v. Filson*, 3:09-cv-00545 (D. Nev.); drafting a petition for *en banc* reconsideration before the Nevada Supreme Court in *Anselmo v. Bisbee*, Case No. 67619 (Nev.); drafting an answering brief in another complex capital habeas matter before the Nevada Supreme Court, *Ybarra v. Warden*, No. 72492 (Nev.); and assisting the Post-Conviction Unit of the Nevada Attorney General's Office with an evidentiary hearing addressing a complex claim of actual innocence regarding allegations that changes in science on "Shaken Baby Syndrome" undermine the petitioner's conviction for first-degree murder by child abuse in *Hanson v. Baker*, No. 3:04-

cv-00130 (D. Nev.). And counsel's caseload will continue to need attention throughout the period of the requested extension.

4. In light of the foregoing, Petitioners are seeking a 60-day extension of time to file the petition for writ of certiorari in this matter. As a courtesy, Petitioners notified opposing counsel, Timothy K. Ford, of their intention to seek an extension of time for filing a petition for writ of certiorari. Mr. Ford indicated that he would review Petitioners' application and file a timely response.

Accordingly, Petitioners respectfully request the entry of an order extending their time to file a petition for writ of certiorari by 60 days, to and including Monday, April 2, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this Court and that on this 19th day of January, 2018, I caused a copy of the foregoing Application For An Extension Of Time Within Which To File A Petition For A Writ Of Certiorari to be served by first class mail on counsel identified below, pursuant to Rule 29.5 of the Rules of this Court. All parties required to be served have been served.

Counsel for Respondent:

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/s/ Lawrence VanDyke
Lawrence VanDyke