

No. _____

IN THE
Supreme Court of the United States

TIMOTHY FILSON, WARDEN, *et al.*,

Petitioners,

v.

PAUL BROWNING,

Respondent.

**RESPONDENT'S RESPONSE TO
APPLICATION FOR EXTENSION OF TIME**

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

Respondent Paul Browning submits the following response to Petitioner Filson's request for a maximum 60-day extension of time within which to file a petition for a writ of certiorari.

1. Respondent does not believe there is good cause for the requested 60-day extension. The panel opinion below was issued on September 20, 2017. The Warden sought neither rehearing nor rehearing en banc. The opinion was amended on Mr. Browning's motion on November 3, 2017. The oral argument before the panel was held on March 16, 2017, and the Application indicates that at least one of Petitioner's present counsel was involved at that point. The Nevada Attorney General's Office has been counsel in the case for decades.

2. The Application indicates that the petition will ask this Court for error correction based on Judge Callahan's dissenting opinion below. Respondent strongly disagrees that Judge Gould's majority decision fell into error or misapplied the standards of the AEDPA in any way.

Rather, as a review of his opinion will show, it gave all possible deference to the State courts' decisions but ultimately concluded they were based on "unreasonable application of United States Supreme Court precedent" in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984). App. Ex. B at 26. The *Brady* and *Strickland* violations were severe: because of them the jury never heard highly exculpatory evidence, including evidence that bloody shoeprints leading from the murder scene that admittedly were not Browning's were likely made by the killer, and testimony that the victim gave a dying description of the killer that didn't match Browning, as well as evidence of the prosecution's hidden dealings with its key informant/witness. See *id.* at 37-42.¹ The Nevada Supreme Court's explanation for its holdings that the violations that led to the suppression of this and other exculpatory evidence were nonprejudicial was so flawed that even the dissenting judge on the panel below said its conclusions must have been based on an unreasonable finding of fact. See App. B 33n.7, 95.

3. Even if the dissent's disagreements with the panel majority rose to a level that would warrant error correction by this Court, those disagreements are clearly spelled out in the panel decisions. It should not require more than the four and a half months Petitioner has already had to summarize them. A maximum length extension is not warranted on this showing.

Respectfully submitted,
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¹ Due to ineffective counsel, the jury also never heard about post trial DNA testing that undisputedly showed that blood on a jacket found during Browning's arrest, which the prosecutor told the jury was the victim's blood (and which he said should by itself result in a conviction in "five minutes"), was not the victim's blood at all. See *id.* at 47. However, in what we would argue was an excess of caution even under the standards of the AEDPA, the panel majority said it did not consider this evidence, although it was part of the state postconviction record. *Id.*