

No. \_\_\_\_\_  
IN THE  
Supreme Court of the United States

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TIMOTHY FILSON, WARDEN, *et al.*,

*Petitioners,*

v.

JOSE L. ECHAVARRIA,

*Respondent.*

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**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**

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To the Honorable John G. Roberts, Jr., Chief 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 Filson respectfully requests a 45-day extension of time, to and including Friday, December 7, 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 July 25, 2018. Unless extended, the time within which to file a petition for a writ of certiorari will expire on October 23, 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 opinion is attached as Exhibit A.

1. This case raises important constitutional questions concerning federalism and application of this Court's clearly established precedents on judicial bias. In particular, the Ninth Circuit affirmed a decision from the United States District Court for the District of Nevada, granting a conditional writ of habeas corpus after finding that the Nevada Supreme Court's

resolution of Jose Echavarrai's judicial bias claim was contrary to, or an unreasonable application, of clearly established federal law.

Echavarria and his roommate, Carlos Gurry, were charged with the murder of an FBI agent, John Bailey, which occurred when Bailey intervened in Echavarria's and Gurry's failed attempt to rob a bank in Las Vegas, Nevada. While Gurry, Echavarria's getaway driver, was arrested in Las Vegas, Echavarria was able to escape to Juarez, Mexico before being apprehended by Mexican authorities.

Echavarria was subsequently returned to United States at the border, and Echavarria was extradited from Texas to Nevada to face charges for the murder, burglary, and attempted robbery.

The case was assigned to state district court judge, Hon. Jack Lehman. During a phone conference prior to trial, Judge Lehman disclosed to Gurry's attorneys that he had been investigated by the FBI, and by Agent Bailey specifically, for activities related to Judge Lehman's service on the Colorado River Commission, before he had become a judge. Gurry's attorneys saw no need for Judge Lehman to recuse himself, but Echavarria's attorneys were not present for that meeting. And although the prosecutors had said they would suggest a meeting in chambers to inform Echavarria's attorneys of the prior investigation, there is no record of such a meeting occurring, and Echavarria's attorneys have indicated they never received any information about the investigation of Judge Lehman.

Echavarria initially raised a judicial bias claim on direct appeal based solely upon Judge Lehman's treatment of Echavarria's attorneys at trial. But the Nevada Supreme Court summarily denied that claim in a footnote in its opinion on direct appeal.

After then unsuccessfully pursuing state habeas relief, Echavarria filed a federal habeas petition. While conducting discovery during the federal habeas proceeding, Echavarria uncovered evidence regarding the FBI's investigation of Judge Lehman. Echavarria returned to state court to file a second state habeas petition, which reasserted a claim of judicial bias, now supported by a theory of "compensatory bias" based on the prior investigation of Judge Lehman that was grounded upon this Court's decision in *Bracy v. Gramely*, 520 U.S. 899 (1997).

The Nevada Supreme Court again denied Echavarria's judicial bias claim. The court noted that it denied a claim of judicial bias on direct appeal, and then recounted that the evidence of the investigation of Agent Bailey's investigation of Judge Lehman apparently did not become known to Echavarria "until well after trial." The Court then held that the "[n]ew information as to the source of the alleged bias is not so significant as to persuade us to abandon the doctrine of law of the case."

The United State District Court for the District of Nevada granted a conditional writ in the case, concluding that the Nevada Supreme Court applied an incorrect standard when assessing Echavarria's claim of judicial bias based on Agent Bailey's prior investigation of the trial judge. The court then, applying a *de novo* standard, found that the trial judge should have recused himself, despite the fact that the investigation had been closed with the United States

Attorney's Office declining prosecution years before Echavarria's crimes occurred. The Ninth Circuit affirmed.

2. This case merits this Court's review for numerous reasons. Most significantly, the federal district court's and the Ninth Circuit's decisions in this matter fail to accord proper deference to the Nevada Supreme Court's determination on the judicial bias claim in two respects. First, there is significant room for debate about whether this Court's clearly established precedents, *Bracy* in particular, required Echavarria to make a showing of actual bias to prevail on his theory of compensatory bias at the time he presented that claim to the Nevada Supreme Court. Additionally, because the Nevada Supreme Court's decisions on Echavarria's judicial bias claims amount to a summary denial, the federal district court and the Ninth Circuit erred in not assessing the Nevada Supreme Court's decision on Echavarria's compensatory bias claim under this Court's highly deferential standard of habeas review from *Harrington v. Richter*, 562 U.S. 86 (2011), which requires the federal courts to ask whether there is any reasonable basis upon which the state courts could have denied relief. Finally, even assuming the federal district court and the Ninth Circuit are correct about the Nevada Supreme Court applying an incorrect standard in assessing Echavarria's claim of judicial bias, the federal courts' analysis of the underlying claim of bias conflicts with precedents of this Court; the purported interest that Judge Lehman had in the outcome of the trial was too remote and speculative to compel disqualification under the Due Process Clause of the Fourteenth Amendment.

3. Two attorneys in the State of Nevada's Solicitor General's Office will prepare the petition for a writ of certiorari in this case. Both have been very busy between since the Ninth

Circuit's decision in this case and will continue to be very busy until after the petition's current due date. The Solicitor General has an oral argument on October 19, 2018 in a different habeas case in the Ninth Circuit: *Anderson v. Williams*, No. 17-15265 (9th Cir.). Two weeks later, the Solicitor General has another oral argument to prepare for in the Nevada Supreme Court in another case: *State of Nevada v. Second Judicial District Court of Nevada*, No. 74271 (Nev.). These are in addition to the ordinary press of matters being litigated and managed by the Solicitor General.

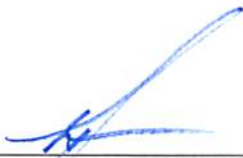
Additionally, while the Assistant Solicitor General who will be aiding in drafting the petition for writ of certiorari in this matter has been involved with this case for a number of years, he has spent the months of August, September, and October focusing on litigating other active, capital habeas matters, including drafting briefing on a complex issue related to the Ninth Circuit's remand of a claim raised under *Atkins v. Virginia*, 536 U.S. 304 (2002), in *Ybarra v. Filson*, No. 3:00-cv-00233 (D. Nev.), and filing a response to a nearly 300-page brief addressing the merits of the petition in *Nika v. Filson*, No. 3:09-cv-00178 (D. Nev.), while balancing his obligations in those cases with his duties in numerous other non-capital habeas matters. And he is assigned as co-counsel to assist with a weeklong evidentiary hearing addressing an ineffective assistance of counsel claim in another federal capital habeas proceeding in *Rogers v. Gittere*, 3:02-cv-00342 (D. Nev.).

In light of the foregoing, Petitioner is seeking a 45-day extension. Counsel for Respondent, Assistant Federal Defender Randolph Fiedler, was contacted, and indicated he has no objection to Respondent's request for additional time to file the petition for writ of certiorari.

Additionally, the Ninth Circuit granted Respondents' request for stay of the mandate pending resolution of the petition.

Accordingly, Petitioners respectfully request the entry of an order extending their time to file a petition for writ of certiorari by 45 days, to and including Friday, December 7, 2018.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**  
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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 12th day of October, 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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Federal Public Defender's Office  
411 E. Bonneville Ave., Suite 250  
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Lawrence VanDyke