No. _____

In the Supreme Court of the United States

WILLIAM GITTERE, WARDEN, *et al.*,
Petitioners,
v.
JOSE LORENTE ECHAVARRIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED—CAPITAL CASE

Jose Lorrente Echavarria shot and killed FBI Special Agent John Bailey during a failed bank robbery in June 1990. During a pretrial discussion with a co-defendant's counsel and the State, the trial judge disclosed that he had been investigated by Agent Bailey in the 1980's but that the investigation did not result in any charges. For unknown reasons, no one told Echavarria about the old investigation.

A Nevada jury found Echavarria guilty of first-degree murder and sentenced him to death. On direct appeal, he made a claim of judicial bias based on the judge's conduct at trial. The Nevada Supreme Court summarily denied the claim. But when details of the old investigation surfaced during federal habeas discovery, Echavarria renewed his claim of bias, asserting what he called "compensatory" bias.

The Nevada Supreme Court held that new evidence on the source of the bias was insufficient to warrant a departure from the law of the case from the direct appeal. The federal district court granted relief under AEDPA, and the Ninth Circuit affirmed, applying *de novo* review after concluding that the Nevada Supreme Court never decided Echavarria's claim.

The question presented is:

1. Whether the Nevada Supreme Court's application of the law of the case in the state habeas appeal was an adjudication of Echavarria's compensatory bias claim on the merits that can be read consistently with relevant clearly established federal law on judicial bias.

PARTIES TO THE PROCEEDING

Petitioner William Gittere is the warden of the Ely State Prison in Nevada, and substitutes Timothy Filson, who was the named warden in the Court of Appeals. Petitioner Adam Paul Laxalt, Attorney General of the State of Nevada, is a party to the proceeding not listed in the caption. He joins this petition in full. Respondent Jose Echavarria is an inmate at Ely State Prison.

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In June, this Court issued an opinion reversing the Ninth Circuit for "invert[ing]" the AEDPA standard and conducting a *de novo* analysis while "tacking on a perfunctory statement at the end of its analysis" in a case where "deference to the state court should have been near its apex." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (*per curiam*). Less than a month later, the Ninth Circuit published an opinion in this case that repeats the errors this Court identified in *Sexton* while it sought to evade AEDPA review altogether by concluding the Nevada Supreme Court never addressed the relevant claim. App. 1-31.

In reaching its conclusion about the scope of the Nevada Supreme Court's decision, the Ninth Circuit "inverted" part of the AEDPA analysis while addressing a claim Echavarria did not actually present in state court or his federal habeas petition. Excerpts of Record Filed Under Seal (hereinafter EORUS) at 121-37,158, *Echavarria v. Filson*, No. 15-99001 (9th Cir., May 27, 2015) (Dkt. 16).[1] The first step of any analysis under AEDPA is to identify the relevant clearly established federal law. *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013). Here, the Ninth Circuit recited various holdings from cases on *implied* bias, but it failed to address (1) *Bracy v. Gramley*, 520 U.S. 899 (1997), the preeminent decision governing the *compensatory* bias theory that Echavarria presented in state court and his second-amended petition, and

[1] Although much of the information related to the FBI investigation was initially filed under seal, the Ninth Circuit issued an order unsealing all of those records. Order, *Echavarria v. Filson*, No. 15-99001 (9th Cir., February 12, 2018) (Dkt. 80).

(2) *Crater v. Galaza*, 491 F.3d 1119, 1130-32 (9th Cir. 2007), its own decision narrowly defining this Court's clearly established holdings on judicial bias. Taking those decisions into consideration, the Ninth Circuit's conclusion that the Nevada Supreme Court did not decide the claim Echavarria presented on appeal cannot be squared with the record. Rather, as the district court correctly concluded, Echavarria's claim that the Nevada Supreme Court did not decide his claim on the merits is belied by the record. App. 51.

Nor can the Ninth Circuit's conclusion be squared with this Court's decision in *Johnson v. Williams*, 568 U.S. 289 (2013), which imposes a strong presumption that a state court decision denying relief resolves all the claims presented in the case on the merits. And by concluding that the Nevada Supreme Court never decided Echavarria's claim—without addressing *Johnson*—the Ninth Circuit allowed itself to evade AEDPA's fundamental inquiry on the reasonableness of a state court decision that, similar to *Sexton*, involves a fact-intensive, case-specific issue where AEDPA deference should be near its apex. *See*, *e.g.*, *Jones v. Luebbers*, 359 F.3d 1005, 1012-14 (8th Cir. 2004) (noting the standard for determining when a disqualifying interest in a case exists is "inherently vague" and "leaves state courts considerable latitude").

Correct application of the principles this Court has outlined for applying AEDPA should require a different result in this case. The Ninth Circuit's failure to observe this Court's repeated directives on how to apply AEDPA warrants this Court's consideration. The petition should be granted.

OPINIONS BELOW

The opinion affirming the judgment of the district court is reported at *Echavarria v. Filson*, 896 F.3d 1118 (9th Cir. 2018). *See also* App. 1-31. The order and judgment of the United States District Court for the District of Nevada granting the petition are not reported. App. 32-125.

JURISDICTION

The Ninth Circuit entered judgment affirming the district court's judgment on July 25, 2018. App. 1, 31. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides that: "No State shall … deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides, in part, that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

I. Factual Background

On June 25, 1990, John Bailey, a dedicated and respected Special Agent of the Federal Bureau of Investigation went into a Las Vegas bank on unrelated FBI business, not knowing he'd never walk out. App at 3-4. That day, Echavarria had planned to rob the same bank with the help of his roommate Carlos Gurry. App. 3-4. They selected the bank because they "determined that no security guards were employed there," but they had not accounted for the fact that a law enforcement officer might be present when they went to carry out their plan. *Echavarria v. State*, 839 P.2d 589, 591 (Nev. 1992).

Echavarria, disguised as a woman, entered the bank and drew a pistol on a teller. App. 3, 33. She screamed and jumped back from the counter. App. 3. This simultaneously caused Echavarria to retreat towards the door of the bank and caught the attention of Agent Bailey. App. 3-4.

After learning that Echavarria attempted to rob the teller, Agent Bailey verbally identified himself as an FBI Agent and ordered Echavarria to stop. App. 3-4. Echavarria continued for the exit. App. 4, 34. Agent Bailey then fired a round in Echavarria's direction, shattering the bank's glass door. App. 4.

This caused Echavarria to stop, allowing Agent Bailey to apprehend him. App. 4. Echavarria ultimately dropped his gun at Agent Bailey's request, and Agent Bailey was able to recover Echavarria's wallet while frisking him. App. 4, 35. Agent Bailey then put Echavarria in a seat against the wall,

instructed a bank employee to retrieve his handcuffs from his nearby vehicle, and asked another employee to call the local FBI office. App. 34.

When the bank employee returned with the handcuffs, Agent Bailey momentarily took his attention off of Echavarria. App. 34. Seizing the moment, Echavarria sprang from the chair and physically engaged Agent Bailey in an altercation. App. 34.

A scuffle ensued that left Agent Bailey on the ground. App. 34. But rather than running for the exit, Echavarria retrieved his own pistol from the floor and advanced on Agent Bailey, shooting him three times. App. 4, 34. Echavarria then fled and successfully escaped to Mexico, where he was apprehended in the Juarez City Airport by local Mexican authorities. App. 4. Agent Bailey died after being transported to the hospital. *Echavarria*, 839 P.2d at 592.

Mexican authorities and some FBI Agents that had crossed the border into Mexico questioned Echavarria. Echavarria ultimately confessed and signed a statement to that effect. App. 5. Mexican authorities then turned Echavarria over to United States law enforcement officers at the border with Texas, before being returned to Nevada. App. 37.

II. The Proceedings Below

A grand jury indicted Echavarria and Gurry on single counts of first-degree murder with the use of a deadly weapon, burglary, attempted robbery, escape, and conspiracy. App. 37. Prior to trial, Echavarria moved to suppress his signed confession, arguing that he made the statement as a result of physical abuse and torture at the hands of the Mexican authorities.

App. 37. But the trial court denied the motion after conducting a two-day evidentiary hearing. App. 37. In particular, the district court reviewed the evidence and discredited Echavarria's testimony—the only direct evidence of whether Echavarria was actually tortured or abused—because evidence of his physical condition when he was turned over to American authorities the day after his apprehension in Mexico was inconsistent with his testimony. *Echavarria*, 839 P.2d at 742-43.

Additionally, during a pre-trial teleconference between the judge, Gurry's attorneys, and the State, the judge indicated that he had previously been investigated by Agent Bailey, before he had become a judge, in relation to his service on the Colorado River Commission. App. 13-14. The judge acknowledged that the reason for his disclosure was that he and/or his wife had been approached by a reporter about whether he would disqualify himself because of Agent Bailey's investigation of the Commission. App. 13-14. But Echavarria and his attorneys apparently never learned of the investigation. App. 15.

The case proceeded to trial, which lasted approximately five weeks. The jury convicted Echavarria of all five counts and found Gurry guilty on all counts except for escape. App. 16. The Court then conducted a penalty hearing with the jury sentencing Echavarria to death after finding multiple aggravating circumstances, while sentencing Gurry to two terms of life with a possibility of parole after identifying numerous mitigating circumstances. *Echavarria*, 839 P.2d at 593.

Almost immediately after trial, allegations of juror misconduct surfaced, leading to Echavarria filing a motion for new trial. App. 16. At a hearing following Echavarria's motion, the trial judge harshly questioned and criticized the conduct of Echavarria's attorneys in handling the juror making allegations of misconduct, which caused Gurry's attorneys to question the trial judge's impartiality based on the judge's outburst toward Echavarria's counsel. Respondents-Appellants' Excerpts of Record Volume XXVI at 06448-63, *Echavarria v. Filson*, No. 15-99001 (9th Cir., May 27, 2015 (Dkt. 12-27)).

The trial judge initially indicated he would not recuse himself, but he later changed his mind. *Id*. at 06450-51. And the judge, over the State's objection, allowed the defendants' attorneys to select the judge that would preside over the evidentiary hearing on the motion for new trial. *Id*. at 06454-59. At the conclusion of the evidentiary hearing, the state district court denied the motion for new trial. Respondents-Appellants' Excerpts of Record Volume XXVII at 06707-20, *Echavarria v. Filson*, No. 15-99001 (9th Cir., May 27, 2015) (Dkt. 12-28).

Echavarria appealed the verdict and his sentence. App. 16. Among the claims he raised on appeal were challenges to the trial court's ruling on the motion to suppress his statement from Mexico and a claim of judicial bias grounded on the trial judge's conduct toward Echavarria's attorneys during the trial and the hearing on the motion for new trial. Respondents-Appellants' Excerpts of Record Volume XXVIII at 06825, 06894-903, 06930-32, *Echavarria v. Filson*, No. 15-99001 (9th Cir., May 27, 2015) (Dkt. 12-29).

The Nevada Supreme Court affirmed the conviction and sentence. *Echavarria*, 839 P.2d at 599. It expressly analyzed the challenge to the voluntariness of the confession, and summarily denied the judicial bias claim without discussion. *Id*. at 595, 599.

Echavarria pursued state post-conviction remedies, but the state courts denied relief. App. 17. Echavarria then filed a proper person federal habeas petition. App. 17. The federal district court appointed counsel and granted a motion for discovery. App. 17.

Discovery carried on for seven years. In that time, Echavarria uncovered evidence of Agent Bailey's prior investigation of the trial judge. App. 17. The investigation involved allegations of fraud related to a land transaction in the early 1980's. App. 10-12. By August of 1987, the U.S. Attorney's Office had reviewed the case and declined prosecution because there was no evidence supporting the violation of a federal statute. App. 12.

And although the FBI raised concerns about the possibility that the judge committed perjury before the Nevada Gaming Control Board in 1986, that issue was referred to State authorities. App. 13. The judge was never charged with perjury, nor is there any indication the judge was aware of the allegations of perjury.[2] App. 13.

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[2] During discovery, Echavarria initially subpoenaed the trial judge. But on November 25, 2003, Echavaria withdrew his subpoena, and the trial judge is now deceased. Respondents-Appellants' Excerpts of Record Volume XXIX at 07361, *Echavarria v. Filson*, No. 15-99001 (9th Cir., May 27, 2015 (Dkt. 12-30)); Motion to Unseal, or

Echavarria filed an amended federal petition that included challenges to his statement from Mexico and a claim of judicial bias, which included allegations about the FBI investigation of the judge. App. 17. The federal district court then granted a stay to return to state court. App. 17.

Back in state court, Echavarria renewed his claim of judicial bias, including allegations of "compensatory" bias based on the prior investigation of the judge. App. 17. On appeal, although Echavarria began his judicial bias analysis by making a single statement about implied bias and citing *Richardson v. Quarterman*, 537 F.3d 166 (5th Cir. 2008), he immediately turned to a discussion of *Bracy*, and the Seventh Circuit's decision on remand dealing with the requirements of showing "compensatory" bias to frame his claim for relief. EORUS 158. And after concluding his discussion of compensatory bias, he turned to a discussion of actual bias, while addressing the judge's conduct as he had done on direct appeal. EORUS 148-61.

The Nevada Supreme Court expressly rejected Echavarria's claim. While the Court noted that the issues Echavarria identified with respect to the trial judge's conduct in his state habeas appeal "were largely raised on direct appeal and rejected summarily by the

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in the Alternative, to Close Hearing at 4, *Echavarria v. Filson*, No. 15-99001 (9th Cir., Nov. 22, 2017) (Dkt. 72). While the Ninth Circuit suggests that "Judge Lehman did not fully explain to [Gurry's counsel] the nature of and extent of the FBI investigation," the Ninth Circuit's assessment is based in its review of FBI records that likely were not available to the judge, not based any anything establishing what the judge actually knew of the investigation. App. 14.

court," the court also noted that Echavarria "refined" his bias claim by "contending that the genesis of the trial judge's bias was related to Agent Bailey's investigation of him." App. 139. But the Nevada Supreme Court concluded 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 the law of the case." App. 139.

Echavarria returned to federal court and filed a second-amended petition, which is the operative petition for this proceeding. App. 18. The petition presented numerous claims, including a claim of judicial bias and a challenge to the voluntariness of his confession. App. 19. As in state court, the bias claim alleged two theories of bias: actual bias and compensatory bias. EORUS 121-37, 158.

After the district court granted a motion to dismiss in part, Petitioners answered the remaining claims, including Echavarria's claim of bias and the challenge to his confession. App. 40. The district court then granted a conditional writ in an order that (1) granted relief on Echavarria's bias claim because the Nevada Supreme Court's resolution of the issue of implied bias was objectively unreasonable, (2) found that the court would have reviewed the confession challenge *de novo*, but denied the claim as moot, and (3) denied the remainder of the petition on the merits. App. 32-123.

With respect to the bias claim, the district court concluded that the Nevada Supreme Court reasonably determined that Echavarria failed to show actual bias, but that the decision "on the appeal in Echavarria's second state habeas action, was objectively unreasonable." App. 51, 56. According to the district

court, when viewed in light of the clearly established federal law, the Nevada Supreme Court did not apply the correct legal standard to Echavarria's new allegations of bias. App. 56-57. Accordingly, the district court granted relief based on its own *de novo* review of the issue. App. 57-59.

The Court entered judgment the same day it issued its order, but the Court's order stayed the judgment pending resolution of any appeals. App. 122-25. Petitioners appealed.

On appeal, Petitioners asserted that the district court erred in concluding that the Nevada Supreme Court applied an incorrect legal standard to Echavarria's bias claim because *Bracy* requires a showing of actual bias. Respondents-Appellants' Opening Brief at 20-31, *Echavarria v. Filson*, No. 15-99001 (9th Cir., May 27, 2015) (Dkt. 12-1). Additionally, Petitioners asserted that the Nevada Supreme Court's decision on Echavarria's claim should have been treated as a summary denial and that, even assuming the federal district court correctly conducted a *de novo* analysis, Echavarria's theory for bias did not establish a constitutional violation warranting reversal of his conviction because his claim of bias was too remote or too speculative and generic to warrant reversal. *Id*. at 32-43.

In response, Echavarria defended the district court's conclusion, arguing that the Nevada Supreme Court's decision applied the wrong legal standard to his claim, including development of a new theory that the trial judge had a financial interest in the outcome of the case. Petitioner-Appellee's Sealed Answering Brief at 19-32, *Echavarria v. Filson*, No. 15-99001 (9th Cir.,

Nov. 9, 2015) (Dkt. 31). Additionally, Echavarria maintained that the district court correctly applied a *de novo* analysis to his bias claim, while arguing that the Nevada Supreme Court never addressed the claim. *Id*. at 32-45.

Petitioners responded by arguing that Echavarria's attempt to develop a new theory for relief on appeal was procedurally defaulted and not properly before the appellate court. Respondents-Appellants' Sealed Reply Brief at 5-9, *Echavarria v. Filson*, No. 15-99001 (9th Cir, Mar. 28 2016) (Dkt. 60). Additionally, Petitioners argued that Echavarria's argument for a *de novo* review conflicted with the presumption established in *Harrington v. Richter*, 562 U.S. 86 (2011), and extended by *Johnson*, along with maintaining their original position that *Bracy* required a showing of actual bias to prove a theory for compensatory bias. *Id*. 4-5, 9-14.

The Ninth Circuit issued a published opinion affirming the district court's grant of relief. App. 1-31. In particular, despite the district court's conclusion to the contrary, the Ninth Circuit concluded that the Nevada Supreme Court did not address Echavarria's claim at all and applied a *de novo* analysis to Echavarria's claim. *Compare* App. 24-25 (concluding that the Nevada Supreme Court did not decide the judicial bias claim), *with* App. 51 (finding that the record belies the argument that the Nevada Supreme Court did not rule on the merits of Echavarria's claim).

To reach the conclusion that the Nevada Supreme Court never decided Echavarria's compensatory bias claim, the court treated Echavarria's claim on direct appeal as one of actual bias and his claim in his state habeas appeal as one of implied bias, despite also

referring to it as a claim of compensatory bias, and concluded that the Nevada Supreme Court's law of the case ruling from the direct appeal could not have addressed the issue of implied bias. App, 17, 24-26. This, the Ninth Circuit said, "makes clear" that the Nevada Supreme Court "decided only 'whether the judge was actually, subjectively biased.'" App. 26 (alterations omitted). And then invoked this Court's recent decision reversing the Nevada Supreme Court's decision in *Rippo v. Baker*, 137 S. Ct. 905 (2017), where this Court held that the Nevada Supreme Court applied the wrong legal standard to a claim of judicial bias.

But rather than suggesting that the Nevada Supreme Court decided the claim but applied the wrong legal standard, as the district court did in this case and this Court did in *Rippo*, the Ninth Circuit concluded that "the Nevada Supreme Court never decided the claim." App. 24-28. The court then went on to recount FBI resources that were used to investigate the case before concluding that "Echavarria's right to due process was violated," and that they would have reached the same conclusion "under the deferential standard of AEDPA." App. 28-31. The court based this conclusion on its determination that the average judge in the trial judge's "position would have feared that rulings favoring Echavarria, tipping the outcome of the case towards acquittal or a sentence less than death, could cost him his reputation, his judgeship, and possibly his liberty." App. 29.

REASONS FOR GRANTING THE PETITION[3]

I. The Ninth Circuit's decision not to apply AEDPA is in conflict with the record and this Court's decision in *Johnson*.

This Court has held that a federal claim presented in state court is presumed to have been denied on the merits. *Johnson*, 568 U.S. at 298. In *Johnson*, contrary to the findings of the district court, the Ninth Circuit concluded that the state courts failed to address the federal aspects of a claim challenging a peremptory strike as racially motivated under the Due Process Clause and only addressed the issue as a matter of state law. 568 U.S. at 297. This Court reversed that decision because, even where a reasoned decision is issued that does not address every claim presented in the briefing, federal courts must presume that a state court denied all the claims before it on the merits. *Id*. at 298-301, 304-06. While the presumption is rebuttable, the "presumption is a strong one that may be rebutted only in unusual circumstances" where "the evidence leads *very clearly* to the conclusion that the federal claim was *inadvertently overlooked*." *Id*. at 302, 304 (emphasis added).

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[3] Currently before this Court is a petition seeking review of a Sixth Circuit decision concluding that this Court's relevant clearly established holdings required a showing of actual bias to prevail on a theory that the conduct of the judge during trial established a disqualifying bias. Petition for Writ of Certiorari, *Gordon v. Lafler*, No. 17-1404 (Apr. 5, 2018). If this Court grants review in that case, the resulting opinion of the Court will almost certainly impact this case. In the event this Court grants review in that case, Petitioners respectfully request that this Court consider holding and then remanding this case for additional proceedings consistent with the Court's opinion in that case.

Here, just as in *Johnson*, the presumption has not been rebutted. Without engaging in a specific analysis of the claim, the Nevada Supreme Court described the nature of the claim and denied it by citing its summary denial of Echavarria's claim of bias from direct appeal. App. 138-39; *see also Parker v. Matthews*, 567 U.S. 37, 45 (2012) (noting that claims that are denied "without analysis" are still entitled to deference under AEDPA). This, the district court said, is confirmed by the express language of the Nevada Supreme Court's decision. App. 51.

But the Ninth Circuit sidestepped the district court's conclusion and *Johnson*'s presumption by "inverting" the AEDPA analysis; concluding that the Nevada Supreme Court never decided Echavarria's claim. Nor did the Ninth Circuit address *Bracy*, the preeminent decision from this Court governing the compensatory bias claim that Echavarria advanced in state court and in his federal habeas petition.

This point is critical. The Ninth Circuit concluded that the Nevada Supreme Court did not decide Echavarria's claim on the merits because it only addressed an issue of actual bias. App. 24-25. But all *Bracy* required of the state court when addressing a theory of compensatory bias was to determine whether Echavarria showed actual bias in his case. *See infra* Part II(A). And that is all the Ninth Circuit holding in *Crater* required if the defendant's claim was not based on one of three specific theories not at issue in this case.[4] Additionally, even if the state courts needed to

[4] The Ninth Circuit is not alone in its understanding of what this Court's decisions clearly establish on judicial disqualification under the Due Process Clause. *Whisenhant v. Allen*, 556 F.3d

apply an objective, implied bias standard, when given the benefit of the doubt—as AEDPA requires—the Nevada Supreme Court's decision is not inconsistent with that standard. *See infra* Part II(B). By concluding that the Nevada Supreme Court never addressed the underlying claim on the merits, the Ninth Circuit allowed itself to avoid those issues and make an end-run around the constraints imposed by this Court's decisions applying AEDPA.

II. Applying AEDPA to the claim Echavarria presented in state court and in his federal petition would have led to a different result.[5]

Proper application of AEDPA would change the outcome of this case. First, *Bracy* clearly established that Echavarria needed to show actual bias to prevail on the compensatory bias theory he presented in state court, and the district court concluded that the Nevada Supreme Court reasonably determined that Echavarria

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1198, 1209-10 (11th Cir. 2009) (distinguishing cases where this Court has implied bias); *Buntion v. Quarterman*, 524 F.3d 664, 672-73 (5th Cir. 2008) (requiring a showing of actual bias where habeas petition's claim did not show "the judge has any of the established bases for presumptive bias); *Railey v. Webb*, 540 F.3d 393, 400 (6th Cir. 2008) (identifying two classes of cases of implied bias that rise to the level of a constitutional violation); *Kinder v. Nowersox*, 272 F.3d 532, 540 (8th Cir. 2001) (narrowly defining circumstances where risk of bias requires disqualification); *see also Fero v. Kerby*, 39 F.3d 1462, 1479-80 (10th Cir. 1994) (noting that due process is not coextensive with rules on judicial conduct).

[5] The Ninth Circuit noted in passing that it would have denied relief even if it reviewed the case under AEDPA. App. 29. But as this Court recently indicated in *Sexton*, a passing reference to the AEDPA standard after conducting a *de novo* analysis is insufficient to satisfy the AEDPA standard. 138 S. Ct. at 2560.

failed to show actual bias. Additionally, because the Nevada Supreme Court applied law of the case to a summary denial, meaning no one knows what legal standard the Nevada Supreme Court applied on direct appeal or in the state habeas appeal—*Richter* should apply and require the federal courts to ask whether there is any reasonable basis to support the state court's denial of relief. Finally, even without *Richter*'s extremely deferential standard of review, the Nevada Supreme Court's decision, when given the benefit of the doubt under a proper AEDPA analysis, can be read consistently with application of the objective, implied bias standard.

A. At the time of the Nevada Supreme Court's decision, *Bracy* required a showing of actual bias to prove compensatory bias.

"[M]ost matters relating to judicial disqualification d[o] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). Rather, this Court has repeatedly recognized that "[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications," while it is up to policy makers to decide whether more stringent standards for disqualification are appropriate. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986); *see also Bracy*, 520 U.S. at 904 ("Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar.").

As a result, this Court has long recognized that bias is to be implied only in situations where "experience teaches that the probability of actual bias on the part of the decisionmaker is too high to be constitutionally

tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Under this Court's *Bracy* decision, a theory of compensatory bias does not fall within that window.

In *Bracy*, this Court assessed whether Bracy should be granted discovery during federal habeas review to develop a claim of judicial bias. 520 U.S. at 901. To determine whether Bracy could show good cause for discovery, this Court recognized the need to determine the elements of the claim Bracy would need to prove to prevail. *Id*. at 904.

This Court began by noting that the Due Process Clause requires that a defendant receive a fair trial before an impartial tribunal, which includes a trial judge without actual bias or an interest in the outcome of the case. *Id*. at 904-05. But in analyzing Bracy's theory of bias—that the trial judge, who had been convicted in federal court of accepting bribes to fix the result in certain cases, was biased against Bracy to "deflect any suspicion" away from the cases where the judge had accepted bribes to fix the outcome of the case—this Court declined to imply the existence of a disqualifying bias. *Id*. at 905-09. Instead, the Court agreed with the majority from the lower court opinion by concluding that Bracy's compensatory bias theory was too speculative to establish an "appearance of impropriety" when balanced with the ordinary presumption "that public officials have 'properly discharged their official duties.'" *Id.* at 909.

The Court did note that the trial judge's behavior in other cases sufficiently indicated that Bracy might be able to rebut that presumption. *Id*. To do so, the Court recognized that Bracy would need to produce evidence showing that the trial judge "was actually biased *in*

petitioner's own case." *Id*. (emphasis in original). Accordingly, this Court reversed and remanded with instructions to allow Bracy to conduct discovery. *Id*.

The award of discovery and the result of the proceedings on remand in *Bracy* are fundamental to understanding the scope of this Court's holding in that case. As this Court noted, a dissenting judge in the original Seventh Circuit decision would have granted Bracy "relief whether or not he could prove that [the judge's] corruption had any impact on his trial." *Id.* at 903 n.4. In other words, the dissenting judge was of the opinion that Bracy's compensatory bias theory was sufficient to require disqualification without requiring Bracy to show the judge had violated his oath as a judicial officer in Bracy's case. But this Court noted that if the dissenting judge was correct, her view "would render irrelevant the discovery related question presented in this case." *Id*.

In sum, this Court's opinion in *Bracy* recognized that if Bracy only needed to show the mere possibility of bias based on Bracy's theory that the judge would want "to avoid being seen as uniformly and suspiciously 'soft' on criminal defendants," then discovery would be unnecessary. But by granting discovery, which is not available as a matter of right in a federal habeas proceeding, the Court established that the elements of what Bracy needed to prove to establish compensatory bias was something greater than the mere appearance of impropriety—he need to show that the judge "was actually biased *in petitioner's own case*." *Id*. at 909 (emphasis in original). And the Court further acknowledged that while a theory like Bracy's might otherwise be untenable in most cases,

Bracy had done enough to indicate he might be able to produce evidence supporting his compensatory bias theory due to allegations of an existing relationship between the judge and the attorney the judge had appointed to represent Bracy. *Id*. at 908.

Bracy, thus, requires a showing of actual bias to prevail on a theory of compensatory bias.[6] The Seventh Circuit's decision on remand in the case confirms this point. The lower court issued a fractured decision, but a majority of the court agreed that this Court's opinion in *Bracy* required proof of *actual* bias. *Bracy v. Schomig*, 286 F.3d 406, 411 (7th Cir. 2002) (*en banc*) ("But because of the language in the Supreme Court case in *Bracy*¸ we will focus today on actual bias."); *see also Guest v. McCann*, 474 F.3d 926, 931-33 (7th Cir. 2007) (addressing claim of compensatory bias). And in applying that standard, one grouping of judges composing a majority of the court determined that Bracy failed to carry his burden of showing actual bias during the trial, but a majority made up of a different grouping of judges concluded that Bracy succeeded in showing that the judge was actually biased during the penalty phase of his trial. *Id*. at 408.

In this case, while Echavarria began his argument with a broad reference to a case addressing principles of implied bias, he immediately turned to this Court's decision in *Bracy* to frame his claim for relief. EORUS 158. He then instantly began labeling his claim as one

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[6] To the extent *Rippo* suggests the contrary, *Rippo* is irrelevant to a proper AEDPA analysis because it was decided well after the Nevada Supreme Court rejected Echavarria's claim, and any conflict between the two cases must be resolved in Petitioners' favor. *White v. Woodall*, 572 U.S. 415, 426-27 (2014).

of "compensatory" bias, while discussing the Seventh Circuit's decision on remand where, according to Echavarria, the court "had to come to grips with *the requirements of establishing compensatory bias*." EORUS 158 (emphasis added).

So, even assuming that the Ninth Circuit correctly concluded that the Nevada Supreme Court only addressed an issue of actual bias, the Ninth Circuit wrongly determined that the Nevada Supreme Court did not decide Echavarria's compensatory bias claim on appeal because *Bracy* required Echavarria to make a showing of actual bias. This means AEDPA deference should apply and should require reversal of the grant of habeas relief in this case, particularly when considering the district court's conclusion that Echavarria failed to show that the Nevada Supreme Court unreasonably denied his bias claim on the issue of actual bias. App. 51.

B. Even assuming relevant clearly established federal law imposed an implied bias standard, the Nevada Supreme Court's decision is not to the contrary.

This Court's clearly established precedents at the time of the Nevada Supreme Court's decision did not require the state courts to apply an objective, implied bias standard to Echavarria's claim of compensatory bias. But even if they did, the Nevada Supreme Court's opinion denying Echavarria's claim would not be inconsistent with that standard. As a result, AEDPA should still compel a different result in this case.

1. The Nevada Supreme Court's decisions should have been treated as summary denials.

In *Richter*, this Court held that a summary denial constitutes a ruling on the merits and that, in the face of such a denial, federal courts must ask whether there is any reasonable basis upon which the state court could have denied relief. 562 U.S. at 98. Here, Echavarria presented a claim of judicial bias on direct appeal, which the Nevada Supreme Court summarily denied. And when Echavarria renewed his bias claim supported by new evidence, the Nevada Supreme Court denied relief by indicating the new evidence did not displace the Court's prior determination that Echavarria was not deprived of due process.

The Nevada Supreme Court's application of the law of the case to a prior summary denial should itself be viewed as a summary denial. Thus, *Richter* should apply, requiring the federal courts to ask whether there is any reasonable basis upon which the Nevada Supreme Court could have denied relief. And as is demonstrated below, a reasonable basis for denying Echavarria's claim exists.

2. Absent showing that the judge has an actual interest in the outcome of case, a defendant must show actual bias.

The instances where this Court has required disqualification without a showing of actual bias have required the party seeking disqualification to establish that the judge has an identifiable interest in the outcome of the case. Those circumstances have focused on three interests that require disqualification: (1) the

judge had a financial interest in the outcome, (2) the judge was part of the accusatory process and acting as a one-man "judge-grand jury," or (3) the judge was embroiled in a long and bitter dispute with one of the parties.[7] *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

On the other hand, this Court's holdings demonstrate that a remote interest in the outcome of a case is insufficient to require disqualification, and the decision on where to draw the line on when disqualification is required is context-specific. *Murchison*, 349 U.S. at 136 ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered."). Additionally, this Court has declined to find a disqualifying interest where the judge's interest in the case is based on speculation or is generic to all judges. *Bracy*, 520 U.S. at 905-09 (rejecting implied bias theory as speculative but allowing discovery to show actual bias); *United States v. Will*, 449 U.S. 200, 213-16 (1980) (applying the rule of necessity).

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[7] *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 886 (2009), is not to the contrary—as this Court expressly noted in that case—its holding merely extends the proposition that one cannot be the "judge in his own cause" to establish that litigants cannot inject extraordinary amounts of money into judicial elections with the intent of "choos[ing] the judge in his own cause." This Court was free to extend the law in *Caperton*, but such an extension cannot be made under the principles that govern habeas review under AEDPA. *Woodall*, 572 U.S. at 426-27.

In light of the foregoing, many of the federal circuits, including the Ninth Circuit in *Crater* and the Fifth Circuit in the *Richardson* case Echavarria cited in state court, have recognized that this Court's precedents only clearly establish the existence of a due process violation where a habeas petitioner's claim falls within one of the three circumstances this Court has identified as compelling disqualification. *See Richardson*, 537 F.3d at 475; *Crater*, 491 F.3d at 1130-32; *supra* n.4. When a habeas petitioner's claim does not fall within one of those categories, the matter is not a concern of constitutional magnitude that gives rise to a basis for relief under AEDPA. *Id*. On this point alone, this Court should reverse.

But the Nevada Supreme Court's decision would still pass muster if this Court's holdings compelled the use of an objective, implied bias standard to determine whether some circumstance not identified by this Court establishes a violation of due process. The Nevada Supreme Court's indication that Echavarria's new evidence did not require abandoning the law of the case, when given the benefit of the doubt under AEDPA, should be read to hold (1) that on direct appeal Echavarria had not alleged that the judge had an interest in the outcome of the trial, therefore he needed to show actual bias, and (2) that the state court did not see Echavarria's new evidence as sufficient to establish a disqualifying interest in the outcome of the case, which means Echavarria still needed to show actual bias to prevail. And because the court had already decided the issue of actual bias on direct appeal, the law of the case required denial of his claim.

And if this Court was unwilling in *Bracy* to imply bias where a state court judge had been indicted and convicted of accepting bribes to fix the outcome of other criminal cases, it is reasonable for a state court to conclude that a closed federal investigation that never produced any criminal charges does not create a disqualifying interest in an unrelated state case. Otherwise, anyone wrongfully suspected of criminal conduct could never become a judge. A mere closed investigation is simply too remote to establish a disqualifying interest in the outcome of the case.

Meanwhile the fear of a future investigation—which seems to be the basis of the Ninth Circuit's suggestion that the judge risked his reputation, judgeship, and even his liberty if he ruled unfavorably against the State—is based on speculation that the FBI had something else it could investigate or that the FBI could influence the State authorities to pursue charges against the judge.[8] But that logic is based upon pure speculation. And according to this Court in *Bracy*, mere speculation is insufficient to establish a disqualifying interest in the outcome of the case. And for good reason—such conjecture could be extended to any judge. Essentially all courts—including this one—rule against the interests of law enforcement with

[8] If the Ninth Circuit intended to suggest that the FBI might have encouraged the State to prosecute the judge based on allegations that the judge perjured himself before the Nevada Gaming Control Board, such a claim would have been barred by the statute of limitations. Even assuming the judge actually knew about the allegations of perjury from 1986, which has never been shown, the 3-year statute of limitations would have run before Echavarria killed Agent Bailey in June of 1990 and Echavarria's case went to trial in March of 1991. 1985 Nev. Stat., ch. 658, § 10, at 2167.

regularity. If judges generally, even those with imperfect backgrounds, are afraid to rule against law enforcement merely from fear that an investigation against them might be instigated, our justice system would not be able to sustain itself. The Ninth Circuit's speculation-based compensatory bias theory manages to broadly insult both judges and law enforcement.

Thus, even assuming this Court's decisions clearly established the need for the Nevada Supreme Court to review Echavarria's claim under an objective, implied bias standard, that does not render the Nevada Supreme Court's summary resolution of Echavarria's bias claims objectively unreasonable. As this Court reiterated in *Sexton*, AEDPA deference is near its apex when reviewing such a fact-intensive, case-specific issue. By inverting the AEDPA analysis, the Ninth Circuit managed to avoid its highly deferential review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 2018