No. 18-756

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

REPLY BRIEF FOR PETITIONERS

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After sifting through the first twenty pages of the Brief in Opposition and its bravado of purported "mistaken factual and legal bases" and "vehicle" problems, this Court will find a single sentence confirming that the Ninth Circuit's published opinion in this case creates a direct conflict with *Johnson v. Williams*, 568 U.S. 289 (2013). In an attempt to reconcile the Ninth Circuit's opinion with the district court's order granting relief, Petitioner Jose Lorrente Echavarria acknowledges that "[b]oth lower courts recognized that the Nevada Supreme Court's ruling was unsustainable *because it misapplied the legal standard*." Opp. at 21 (emphasis added). But the purported misapplication of a legal standard is still a ruling on the merits of the claim. Accordingly, it is the Ninth Circuit's rationale—that the Nevada Supreme Court never decided Echavarria's judicial bias claim—that is unsustainable; *Johnson* imposes a presumption to the contrary that remains unrebutted.

The foregoing point is fundamentally important in the federal habeas context. Even assuming the Nevada Supreme Court misapplied the legal standard—it did not[1]—mere error does not support federal habeas relief. AEDPA requires *the habeas petitioner* to establish that the state court decision is *objectively unreasonable* in

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[1] There are at least two reasonable ways to read the Nevada Supreme Court's decisions that are consistent with clearly established federal law, including Petitioners' position that the Ninth Circuit's opinion in *Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007), would require a different outcome under AEPDA. App. at 22-26. Echavarria waived any response to Petitioners' position on *Crater* when he failed to cite, let alone discuss, *Crater*. Opp at v.

light of this Court's clearly established precedents. *Harrington v. Richter*, 562 U.S. 82 (2010). Combining that principle with (1) the Nevada Supreme Court's summary dispositions of Echavarria's judicial bias claims, and (2) the fact that there are at least two reasonable interpretations of the Nevada Supreme Court's relevant decision shows that the Petition does not raise an "imagined error," as Echavarria suggests. Opp. at 22. The Ninth Circuit's *de novo* analysis and conclusory statement that it would reach the same outcome under AEDPA, when *Richter* required the court to ask whether reasonable grounds exist to support the state court judgment, are nearly identical to the Ninth Circuit's flawed inversion of AEDPA in *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018) (per curiam),

The difference between the two cases is that the inversion of the AEDPA standard here is twofold, creating a practical problem that warrants this Court's consideration. Echavarria's own description of the Ninth Circuit's rationale—that a state court decision is not a ruling on the merits because "it misapplied the legal standard"—suggests that *the state* must prove that a state court properly applied the correct rule before a state court decision receives deference under AEDPA. Opp. 21. That rationale "inverts" the intentionally heavy burden AEDPA imposes *on the habeas petitioner*. *Richter*, 562 U.S. at 102.

This case cleanly presents the straightforward question of whether the Nevada Supreme Court denied Echavarria's judicial bias claim on the merits, thereby entitling that decision to deference under AEDPA. And

because proper application of AEDPA requires a different outcome, a decision from this Court will not be advisory, as Echavarria suggests. This Court should grant the petition.

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH *JOHNSON*.

The district court found that the Nevada Supreme Court denied Echavarria's judicial bias claim on the merits. App. at 49-51. The Ninth Circuit concluded that the Nevada Supreme Court failed to address the claim altogether. App. at 24-25. A critical distinction exists between the two positions: one requires application of AEDPA's highly deferential standard of review and the other does not.

In his attempt to downplay that distinction and reconcile the two decisions—indicating both courts "recognized that the Nevada Supreme Court's ruling was unsustainable because it misapplied the legal standard"—Echavarria exposes the false premise supporting the Ninth Circuit's opinion. Opp. at 21. A determination that a lower court applied the wrong rule to a claim does not mean the lower court did not decide the claim; it is a determination that the lower court made a legal error in deciding the claim. But the Ninth Circuit's view of whether a state court committed error is not grounds for granting federal habeas relief. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015).

While Petitioners do not concede that the Nevada Supreme Court erred at all, even clear error is insufficient to support habeas relief. *Id.* AEDPA

requires habeas petitioners to establish that the state court's decision is *objectively unreasonable. Id.*

The foregoing makes the Ninth Circuit's change of course in this case both telling and troublesome. The change in analysis suggests that the court of appeals recognized that the district court's rationale did not pass muster when measured against a proper AEDPA analysis.[2] As a result, the court sought to evade AEDPA's deferential standard by concluding the Nevada courts never actually decided Echavarria's claim. But the court reached that conclusion without addressing Petitioners' repeated arguments that this Court's decision in *Johnson* required application of a strong presumption that the Nevada Supreme Court denied the claim on the merits. App. at 1-31; C.A. Dkt. 12-1 at 16, 20, 24, 37.

Echavarria insists there is no conflict, but the conflict is obvious. The Ninth Circuit did not discuss or cite *Johnson*. App. at 1-31. Echavarria appears to agree with the proposition that a court did not apply authority it did not cite. Opp. at 25 (arguing the Nevada Supreme Court did not decide Echavarria's claim because it "did not cite or discuss any of this Court's precedents, any federal appellate decisions, or even mention Echavarria's risk of bias claim"). But there is a big difference between the Ninth Circuit's failure to apply *Johnson*'s presumption and the Nevada

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[2] Echavarria's decision not to challenge Petitioners' position that *Crater* would compel a different outcome under AEPDA strongly supports this point. *See supra* n.1.

Supreme Court's summary dispositions of Echavarria's judicial bias claims.

The Ninth Circuit clearly erred when it failed to apply *Johnson*'s presumption to the Nevada Supreme Court's decisions. But Echavarria's argument that the lack of citation to federal precedent means the Nevada Supreme Court did not decide his judicial bias claim is wrong for at least three reasons. First, the very point of *Johnson* is that state courts frequently issue reasoned decisions that do not discuss every aspect of every claim. 568 U.S. at 298-99. That is why the Court extended *Richter*'s presumption to reasoned decisions that do not expressly address every claim presented in the case. *Id.*

Second, although *Johnson*'s presumption is rebuttable, Echavarria has not rebutted that presumption when considering the Nevada Supreme Court's brief indication that it evaluated the facts and arguments Echavarria offered in support of his claim. App. at 138-39. That is precisely how *Johnson* defines a ruling on the merits. *Id.* at 302.[3] The lack of citation to federal precedent when deciding the claim carries no weight in federal habeas review: state courts do not have to even be aware of controlling federal precedent to avoid reversal on federal habeas review. *Early v. Packer*, 537 U.S. 3, 8 (2002). Instead, the absence of an express analysis of the claim leads to application of the

[3] *Foster v. Chatman*, 136 S. Ct. 1737 (2016), further supports the conclusion that application of the doctrine of the law of the case is a ruling on the merits of a claim.

presumptions from *Johnson* and *Richter*, which remain unrebutted.

Third, taking Echavarria's position at face value improperly inverts the burden of proof. It is a habeas petitioner's burden to prove the state court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," not the state's burden to prove the state court correctly applied the right rule. *Richter*, 562 U.S. at 103. And Echavarria has not carried his burden in this case.

II. AEDPA COMPELS A DIFFERENT RESULT

Echavarria challenges the Petition by asserting that an opinion from this Court will be advisory due to the Ninth Circuit's statement that it would reach the same result under AEDPA. Opp. at 2, 21. Not so. The Ninth Circuit's perfunctory statement about AEDPA does not pass muster. *Sexton*, 138 S. Ct. at 2560. Proper application of AEDPA compels a different outcome.

A. *Bracy* requires actual bias to prove compensatory bias.

In response to the Petition's discussion of *Bracy v. Gramley*, 520 U.S. 899 (1997), Echavarria suggests that *Bracy* only addressed whether the federal district court should allow Bracy to conduct discovery. Opp. at 16-18. But it is the award of discovery in *Bracy* that proves Petitioners' point.

In deciding whether to grant Bracy's request for discovery, this Court acknowledged that it needed to decide (1) what Bracy needed to prove to prevail on his

compensatory bias theory, and (2) whether Bracy made a showing of good cause to believe that he might discover evidence supporting that theory. *Bracy*, 520 U.S. at 904-05. The Court concluded that Bracy needed to prove "actual bias in his case" and that he might be able to make that showing because allegations of a preexisting relationship between the trial judge and Bracy's court-appointed attorney supported an inference of collusion. *Id.* at 905-09. This Court's recognition that granting discovery would have been pointless if Bracy could prevail on a theory of compensatory bias by showing the mere appearance of impropriety firmly establishes that *Bracy* does require a showing of actual bias. *Id.* at 903 n.4.

This point raises additional doubt about Echavarria's continued reliance on *Rippo v. Baker*, 137 S. Ct. 905 (2017). Echavarria responds to Petitioners' argument that *Rippo* is irrelevant under AEDPA by arguing that the summary reversal in "*Rippo* simply confirmed what this Court's precedents already established." Opp. at 18. But summary dispositions are frequently accorded less weight than an opinion issued after plenary review. *Hohn v. United States*, 524 U.S. 236, 251 (1998). And *Rippo's* suggestion that *Bracy* does not require a showing of actual bias conflicts with this Court's express recognition in *Bracy* that the decision to grant discovery would have been unnecessary if Bracy only needed to show the mere possibility of bias.

Petitioners' are not alone in their reading of *Bracy*. On remand in that case, the *en banc* Seventh Circuit understood this Court's opinion to require a showing of

actual bias to prevail on the compensatory bias theory. *Bracy v. Schomig*, 286 F.3d 406, 411 (7th Cir. 2002), *cert. denied* 537 U.S. 894 (2002); *see also Guest v. McCann*, 474 F.3d 926, 931-33 (7th Cir. 2007). At a minimum, before *Rippo*, reasonable jurists could debate whether *Bracy* required a showing of actual bias to establish compensatory bias. Therefore, even assuming the Nevada Supreme Court only addressed a claim of actual bias, its decision was not objectively unreasonable.

B. Echavarria does not dispute that a state court could reasonably reject his bias claim under an objective standard.

Petitioners' position on the application of AEDPA to this case does not merely rest on the proposition that *Bracy* requires actual bias. Petitioners also asserted that the Nevada Supreme Court's decision is still reasonable under an objective standard because (1) a theory of bias based on the closed investigation is too remote, and (2) a theory of bias based on the threat of a future investigation is too speculative and generic to all judges. Pet. at 22-26.

Echavarria does not oppose this argument. Instead, he argues that the Ninth Circuit "correctly" identified a due process violation. Opp. at 26-29. But whether the Ninth Circuit's *de novo* analysis is "correct" is not the controlling inquiry; the controlling standard is whether the Nevada Supreme Court's decision was *objectively unreasonable*. *Richter*, 562 U.S. at 100-03.[4] It was not.

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[4] Echavarria asserts *Richter* does not apply because there is a reasoned decision, Opp. at 26, but *Johnson* extended *Richter* to

As Echavarria explains, Nevada's doctrine on law of the case "applies where the court 'actually address[ed] and decide[d] the issue explicitly or by necessary implication.' *Dictor v. Creative Mgmt. Servs., LLC,* 223 P.3d 332, 344 (Nev. 2010) (en banc)." Opp. at 24. This feeds right into Petitioners' argument that the application of the law of the case to Echavarria's judicial bias claim, when given the benefit of the doubt under AEDPA, can be read consistently with this Court's cases applying an objective judicial bias standard. Pet. at 22-25.

As Echavarria's citation to Nevada law shows, Nevada's doctrine on law of the case does not require a claim to be identical to the prior claim to fall within the scope of the doctrine's limits. If the court decided an issue relevant to the newly presented claim by necessary implication, a decision on that issue becomes the law of the case. And the Nevada Supreme Court's decisions on Echavarria's claims of judicial bias on direct appeal and in the second state habeas appeal can be read consistently with this Court's precedents on judicial bias. Pet. at 22-25.

In particular, it is reasonable to read the Nevada Supreme Court's summary disposition on direct appeal as concluding that Echavarria needed to show actual bias *because* he had not presented evidence that the judge had a disqualifying interest in the outcome of the

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state court decisions that address "some but not all of a defendants' claims." 568 U.S. at 298-99. Nevertheless, even assuming *Richter* does not apply, the decision is still consistent with this Court's precedents on judicial bias. Pet. at 22-26.

case. Pet. at 24. It is then reasonable to read the decision in the second state habeas appeal as concluding that Echavarria's new evidence still did not establish a disqualifying interest in the outcome of the case, which means Echavarria still needed to show actual bias to prevail. Pet. at 24. And because reasonable jurists applying the fact-intensive, case-specific[5] standard for judicial disqualification could debate whether the trial judge had a disqualifying interest in the case, *see* Pet. at 22-26, AEDPA requires a different outcome in this case.[6]

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[5] Echavarria charges Petitioners with acknowledging that the issues in this case are "'fact-intensive' and 'case-specific'" while seeking this Court's intervention for mere error correction. Opp. at 1. Echavarria blatantly takes those quotes out of context—they are from Petitioners' argument that deference should be near its apex in this case because the *judicial bias* standard is fact-intensive and case-specific, not the underlying question of whether the Nevada Supreme Court decided Echavarria's judicial bias claim. App. at 26.

[6] Echavarria places great emphasis on the motion to suppress his confession to emphasize that the judge had a motive to favor the prosecution. Opp. at 6-8, 27-28. But Echavarria's emphasis on all the evidence the FBI developed in this case to link Echavarria to the crime only shows that this is not a "who-done-it" case that turned on the admissibility of the confession. Opp. at 6-7, 27-78. He also leaves undisputed Petitioners' contentions that (1) the extent of Judge Lehman's knowledge of the investigation will forever be unknown because Echavarria withdrew his subpoena of the now deceased judge, and (2) the statute of limitations would have barred a prosecution for perjury. Pet. at 8 n.2, 25 n.8; Opp. at 28 n.4.

Echavarria does not dispute that it is reasonable to accord such a reading to the Nevada Supreme Court's decisions; instead he improperly attempts to defend the correctness of the Ninth Circuit's *de novo* review. Opp. at 26-29. AEDPA compels a different outcome in this case.

III. THIS CASE PRESENTS A CLEAN AND STRAIGHTFORWARD ISSUE.

Echavarria contends that the question presented is based on a false premise, does not establish a conflict with this Court's decisions, would result in an opinion that is merely advisory, creates an "imagined error," and seeks error correction on a "fact-intensive" and "case-specific" issue. Opp. at 1, 14-20, 22. But this Court need not concern itself with those arguments; the foregoing analysis firmly rebuts each of those points.

Echavarria also attempts to dissuade this Court from reviewing his case by suggesting that an entanglement with the doctrine of procedural default makes this case "an exceedingly poor vehicle." Opp. at 20-23. Not true. The question presented in this case has nothing to do with procedural default. The question before this Court is clean and straightforward: whether the Nevada Supreme Court's summary dispositions of Echavarria's judicial bias claims adjudicated those claims on the merits, thereby requiring federal courts to review that decision under the deferential AEDPA standard.

They did. And the Ninth Circuit's published decision reaching the contrary conclusion does more than misapply the law; it creates a practical problem

that warrants the expenditure of this Court's precious time and resources. By suggesting that a state court decision that purportedly applies the wrong legal standard is not a decision on the merits, the Ninth Circuit inverted AEDPA's requirement that state court judgments be given the benefit of the doubt and improperly relieved Echavarria of the burden of showing that the Nevada Supreme Court's decision is objectively unreasonable.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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April 2019