

No. 23A_____

In the Supreme Court of the United States

JAMES LEBLANC,

Applicant,

v.

BRIAN MCNEAL,

Respondent.

**APPLICATION TO EXTEND TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

ELIZABETH B. MURRILL

Attorney General

J. BENJAMIN AGUIÑAGA

Solicitor General

Counsel of Record

LOUISIANA DEPARTMENT OF JUSTICE

1885 N. Third St.

Baton Rouge, LA 70802

(225) 506-3746

AguinagaB@ag.louisiana.gov

To the Honorable Samuel A. Alito, Jr., as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

The Louisiana Attorney General, on behalf of James LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections, respectfully requests an additional 60 days to file a petition for a writ of certiorari to review the Fifth Circuit's final judgment issued on January 5, 2024 (Ex. A), and with respect to which the Fifth Circuit denied rehearing en banc in an 8-9 vote on February 21, 2024 (Ex. B). This would extend the deadline from May 21, 2024, to July 20, 2024. In accordance with this Court's Rule 13.5, this application is filed "at least 10 days before the date the petition is due." And the Court has jurisdiction to review the Fifth Circuit's judgment under 28 U.S.C. § 1254.

BACKGROUND

This Section 1983 case raises critical legal questions on which the Fifth Circuit itself is deeply divided, resulting below in two separate seven-judge dissents from the denial of rehearing en banc.

Respondent Brian McNeal is a former Louisiana prisoner who sued Applicant James LeBlanc—the Secretary of the Louisiana Department of Public Safety and Corrections (DPSC)—for allegedly "wrongfully detain[ing] him for 41 days." Ex. B at 4 (Oldham, J., dissenting from the denial of rehearing en banc). "All agree McNeal *could* have sought habeas relief during those 41 days"—"[b]ut he chose not to do that." *Id.* Instead, he waited until he got out of jail, "and then sought declaratory relief, compensatory and punitive damages, and attorneys' fees under 42 U.S.C. § 1983." *Id.*

In the panel decision below, the panel deemed itself “bound” by Fifth Circuit precedent to allow McNeal’s case to proceed past the motion-to-dismiss stage. Ex. A at 6, 9, 10. But two members of the panel wrote separately to call for rehearing en banc and course correction in the Fifth Circuit’s caselaw on two separate (but equally critical) issues. First, Judge Jones wrote that, under this Court’s cases such as *Heck v. Humphrey*, 512 U.S. 477 (1994), McNeal cannot circumvent the federal habeas statute by waiting to be released and then suing under Section 1983. Ex. A at 12–14 (Jones, J., concurring). Second, Judge Duncan—the prevailing advocate in *Connick v. Thompson*, 563 U.S. 51 (2011)—wrote that the Fifth Circuit’s precedent contravenes *Connick* by permitting McNeal’s claim against the highest-ranking DPSC official to proceed on what is, in effect, a vicarious-liability theory. Ex. A at 15–21 (Duncan, J., concurring).

The State subsequently filed a petition for rehearing en banc, which the Fifth Circuit denied in an 8-9 vote—this time accompanied by two separate seven-judge dissents. Ex. B. First, Judge Oldham (joined by Judges Jones, Smith, Ho, Duncan, Engelhardt, and Wilson) emphasized that the panel decision “effectively hold[s] that the federal habeas statute and § 1983 offer prisoners like McNeal an election of remedies: The former allows prisoners to get out of jail, while the latter allows prisoners to stay in jail and then sue for compensation later.” Ex. B at 4 (Oldham, J., dissenting from the denial of rehearing en banc). That holding “underrule[s]” this Court’s precedents, Judge Oldham explained, because “[a] prisoner who has a habeas remedy cannot sue under § 1983.” Ex. B at 8, 11. Second, Judge Duncan (joined by

Chief Judge Richman and Judges Jones, Smith, Engelhardt, Oldham, and Wilson) explained that “our pattern of underruling *Connick*” “mocks *Connick* and decades of prior precedent.” Ex. B at 3 (dissenting from the denial of rehearing en banc). The irony, he noted, is that *Connick* itself “overruled our en banc court.” *Id.* Thus, “[i]f this were a movie, it would be called *The Fifth Circuit Strikes Back.*” *Id.*

As half of the Fifth Circuit’s judges have thus demonstrated, this case cries out for Supreme Court review.

REASONS FOR GRANTING AN EXTENSION OF TIME

The Attorney General respectfully requests a 60-day extension of the current May 21 deadline for filing a petition for a writ of certiorari. Good cause for this extension exists in the form of numerous pressing emergencies and obligations for which undersigned counsel is responsible.

Most pressing is Louisiana’s redistricting emergency that is currently being litigated in this Court. *See Landry v. Callais*, No. 23A1002 (U.S.). In the past 72 hours, undersigned counsel prepared and filed the State’s emergency motion for a stay pending appeal; this Court has requested a response by Monday, May 13; and undersigned counsel will be responsible for drafting and filing a reply within a matter of hours.

In addition, on May 10, the Louisiana Supreme Court granted the Attorney General’s application for rehearing in *Bienvenu v. Defendant 1*, No. 2023-CC-01194 (La.), and ordered supplemental briefing due May 20. Undersigned counsel drafted the rehearing application and will be responsible for the May 20 supplemental brief.

Undersigned counsel also was responsible for the preparation and filing of an emergency stay pending appeal on May 7 in *Grace v. Hooper*, No. 24-30218 (5th Cir.). The Fifth Circuit entered an administrative stay the same day, expedited the briefing schedule, and set the case for the next available argument date. Accordingly, undersigned counsel will be required to draft an opening merits brief and argue the case in short order.

Finally, the Attorney General will present en banc oral argument on May 16 in *Chisom v. State of Louisiana*, No. 22-30320 (5th Cir.), and undersigned counsel is responsible for handling the preparation for that argument.

Given these and other similar obligations, there is good cause to extend the deadline for the Attorney General to prepare a certiorari petition by 60 days. This 60-day extension will not prejudice McNeal because litigation in the district court is proceeding and will be unaffected by the extension. *See Order, McNeal v. La. Dep't of Pub. Safety & Corr.*, No. 18-cv-736 (M.D. Apr. 23, 2024) (denying motion to stay or continue October 28, 2024, trial date).

Respectfully submitted,

/s/ J. Benjamin Aguiñaga

ELIZABETH B. MURRILL

Attorney General

J. BENJAMIN AGUIÑAGA

Solicitor General

Counsel of Record

LOUISIANA DEPARTMENT OF JUSTICE

1885 N. Third St.

Baton Rouge, LA 70802

(225) 506-3746

AguinagaB@ag.louisiana.gov