

No. 19A-____

In the Supreme Court of the United States

DANIEL ENRIQUE CANTÚ,

Applicant,

v.

JAMES M. MOODY, et al.,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO
FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE
FIFTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Daniel Enrique Cantú respectfully requests a 29-day extension of time, to and including February 14, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied a timely request for rehearing on October 18, 2019. Unless extended, the time to file a petition for a writ of certiorari will expire on January 16, 2020. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

Copies of the Fifth Circuit's opinion (App., *infra*, 1a-18a) and its order denying rehearing (App., *infra*, 19a) are attached.

1. This case arises from an FBI sting operation on August 10, 2011 as part of an investigation into the Texas Mexican Mafia. An FBI informant, accompanied by a

police officer, collected heroin from drug smugglers at the border. App., *infra*, 2a. He then called applicant and asked him to come to a grocery store parking lot so they could talk. *Ibid.* When applicant arrived, he parked and rolled down his passenger-side window. *Ibid.* Thereafter, the informant removed a cooler from his trunk and placed it onto applicant's passenger seat through the open window. *Ibid.* The informant said: "I need you to do me a favor," to which applicant asked: "What are you doing?" Forty-five law enforcement officers then swarmed his car, pulled him out, searched him, and arrested him. *Ibid.* Officers found nearly two kilograms of heroin in the cooler. *Ibid.*

Though applicant remained in his car the whole time and never touched the cooler, two FBI agents swore otherwise. App., *infra*, 3a. Agent James Moody said applicant left his car and personally retrieved the cooler from the informant's car; agent Erin LaBuz said the informant handed the cooler to applicant who personally placed it in his passenger seat. After a grand-jury indictment, applicant stood trial and was acquitted on October 31, 2013. *Ibid.*

2. After his acquittal, applicant brought suit under *Bivens*, the Federal Tort Claims Act, 42 U.S.C. § 1983, 42 U.S.C. § 1985, and state law against various individuals involved in the sting and his subsequent imprisonment. App., *infra*, 3a-4a. As relevant here, the district court dismissed applicant's claims against FBI agents Moody and LaBuz for their evidence fabrication. *Id.* at 4a.

3. The court of appeals affirmed, holding in relevant part that a fabrication-of-evidence claim presents a new *Bivens* context and that "[t]here are legion 'special

factors’ counseling” against recognizing this purportedly new kind of *Bivens* action. App., *infra*, 12a-13a. The panel majority asserted that persons injured by fabricated evidence could sue under the Federal Tort Claims Act and that the cause of action implicates international security concerns because it arose out of “a multi-jurisdictional investigation into transnational organized crime committed by a violent gang that has wreaked havoc along our border with Mexico.” *Id.* at 13a.

Judge Graves dissented, observing that a federal officer’s fabrication of evidence “is exactly the type of run-of-the-mill ‘law enforcement overreach’ claim [*Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)] emphasized could still be recognized under *Bivens*.” App., *infra*, 16a (Graves, J., dissenting).

4. The petition for certiorari will demonstrate that review is warranted on at least the following question: whether *Bivens* authorizes a cause of action to remedy federal officers’ fabrication of evidence.

This question has produced a circuit conflict in the two years since this Court’s decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

Following *Ziglar*, both the Sixth and Ninth Circuits have approved *Bivens* actions to remedy federal officials’ evidence fabrication. In *Jacobs v. Alam*, the Sixth Circuit reexamined its longstanding precedent providing a *Bivens* action arising out of fabrication of evidence, holding that *Ziglar* did not change the action’s availability. 915 F.3d 1028, 1035-1039 (6th Cir. 2019). In *Lanuza v. Love*, the Ninth Circuit held that a *Bivens* action was available to an immigrant where a federal immigration prosecutor falsified an affidavit to deprive the immigrant of his right to seek lawful

permanent residence. 899 F.3d 1019, 1022-1023 (9th Cir. 2018). Ultimately, the Ninth Circuit authorized a *Bivens* remedy “where a government immigration attorney intentionally submitted a forged document in an immigration proceeding to completely bar an individual from pursuing relief to which he was entitled.” *Id.* at 1034.

5. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel of record was retained only recently and has not yet had an opportunity to familiarize himself with the full record and issues involved. Undersigned counsel also has several other matters with proximate due dates, including a reply brief in support of a motion for summary judgment due on January 3, 2020, in *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, No. 16-cv-1170 (D.D.C.); a reply brief due on January 3, 2020, in *Martinez v. LaRose*, No. 19-3908 (6th Cir.); a merits brief due on January 8, 2020, in *State of Illinois ex rel. Leibowitz v. Family Vision Care*, No. 124754 (Ill.); and a merits reply brief due on February 14, 2020, in *Nasrallah v. Barr*, No. 18-1432.

For the foregoing reasons, the application for a 29-day extension of time, to and including February 14, 2020, within which to file a petition for a writ of certiorari in this case should be granted.

December 30, 2019

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Paul W. Hughes". The signature is fluid and cursive, with a large initial "P" and "H".

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