

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERNESTO SALGADO MARTINEZ,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Ninth Circuit:

Petitioner Ernesto Salgado Martinez (“Martinez”), an Arizona death row prisoner, prays for a 60-day extension of time to file his petition for writ of certiorari in this Court to and including February 7, 2020. Pursuant to the Court’s jurisdiction under 28 U.S.C. § 1254(1), Martinez will petition for certiorari to have the Court review the opinion of the United States Court of Appeals for the Ninth Circuit of June 18, 2019, in which it affirmed the denial of habeas corpus relief in a capital case. *Martinez v. Ryan*, 926 F.3d 1215 (9th Cir. 2019) (attached as Appendix A). The Ninth Circuit denied panel and en banc rehearing in an order of September 10, 2019. *Martinez v. Ryan*, Ninth Cir. No. 08-99009 (Doc. No. 171) (attached as Appendix B). The Petition is presently due to be filed on or before December 9, 2019. Respondent’s counsel, Arizona Assistant Attorney General Lacey Gard, indicated to

undersigned counsel on November 18, 2019, that she consents to the extension requested here.

Martinez was convicted in the Superior Court of Maricopa County, Arizona, of first degree murder and sentenced to death. Appx. A at 1. In state post-conviction relief proceedings and in federal habeas corpus, he brought the claims that his trial judge suffered from implied bias due to his long-time bailiff's social relationship with the wife of the homicide victim, an Arizona Department of Public Safety officer, and the bailiff's professional relationship with the officer, and that his state direct appeal lawyer rendered ineffective assistance for failing to raise the claim on direct appeal. The former claim was denied on procedural default grounds and the latter claim on the merits. *Id.* at 3-6.

On certiorari, Martinez will seek review on the basis that the Ninth Circuit unduly limited the circumstances where the Court's implied judicial bias jurisprudence requires a trial court's recusal, the Ninth Circuit having ruled a judge biased only "where the judge had a direct pecuniary interest in the case, was involved in a controversy with a litigant, or was part of the accusatory process." *Id.* at 6 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971); *In re Murchison*, 349 U.S. 133, 137 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927)). The Ninth Circuit's decision is at odds with more recent decisions in which this Court granted relief on implied bias claims in *Rippo v. Baker*, ___ U.S. ___, 137 S. Ct. 905 (2017) (prosecution suppressed information that the state trial judge had been the subject of a federal bribery investigation, which was participated in by the same district attorney's office that later prosecuted Rippo in state court for capital murder); and, *Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899, 1905 (2016) (judicial bias claim proven where a state supreme court justice who voted to reinstate the death penalty after a grant of PCR relief failed to recuse himself even though, in his earlier role as district attorney, he approved his office's effort to seek the death penalty in the case).

On certiorari, Martinez further intends to present a question similar to one for which the

Court granted certiorari on June 24, 2019, in *Bannister v. Davis*, No. 18-6943. There the question presented by a habeas petitioner is whether the Fifth Circuit has gone too far in applying the second or successive (“SOS”) restrictions of 28 U.S.C. § 2244(b) to limit consideration of habeas claims already pending in proceedings brought pursuant to 28 U.S.C. § 2254. The decision in *Bannister* concerns the Fifth Circuit’s characterizing a motion to alter or amend a habeas judgment under Fed. R. Civ. P. 59(e) as a SOS petition.

The case here implicates the Ninth Circuit’s “construing” Martinez’s good faith motion to remand for straight-up consideration of *Brady* and possible *Napue* claims¹ unearthed during the pendency of his appeal, which undermined the premeditation element of first degree murder under Arizona law, as a Request for Indication Whether the District Court Would Consider a Rule 60(b) Motion, a motion made difficult from the start by virtue of the admonishment in *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005), that the “extraordinary circumstances” justifying the reopening of a final judgment “rarely occur in the habeas context.” On remand, the district court ruled Martinez’s Request for Indication to be a SOS petition and declined to consider the Rule 60(b) motion. The Ninth Circuit agreed and ruled the denial of the Request for Indication to be a non-final, non-appealable interlocutory order. *See* Appx. A at 3, 7. Consistent with the petitioner’s premise in *Bannister*, the lower federal courts here arguably took an overly-expansive view of when a motion in a pending appeal becomes a SOS petition. Martinez was left without an appellate remedy for claims that prosecutors suppressed material exculpatory evidence.

Bannister has been set for argument on December 4, 2019. It would be prudent to extend the time for Martinez to petition for certiorari due to potential implications of the forthcoming decision in *Bannister*.

¹ *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

Undersigned counsel's preparation of the petition has also been delayed by additional efforts on behalf of capital petitioners in the federal courts, including in this Court. On November 14, 2019, undersigned counsel and co-counsel from the Office of the Federal Public Defender for the District of Arizona filed a Reply Brief in Support of Certiorari in *Hedlund v. Arizona*, No. 19-5247. On October 3, 2019, counsel filed Appellant's Opening Brief in the Ninth Circuit in *Darrel Lee v. Ryan*, Ninth Cir. No. 10-99022. On November 14, 2019, the Ninth Circuit ordered counsel to file on or before December 5, 2019, a response to the State of Arizona's petition for rehearing and petition for rehearing en banc in *Ramirez v. Ryan*, Ninth Cir. No. 10-99023, a capital habeas appeal for which the court granted the petitioner relief in the form of an evidentiary hearing on September 11, 2019. *See* Doc. Nos. 75-1, 81. Counsel is also preparing an opening brief in a capital habeas appeal in the Ninth Circuit in *Chad Lee v. Ryan*, Ninth Cir. No. 09-99002, which is currently due to be filed on December 10, 2019, but counsel will seek to extend.

Undersigned counsel has no dilatory purpose in extending the due date to file the petition for writ of certiorari. The time is necessary to adequately represent Martinez before the Court.

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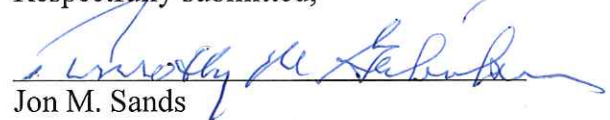
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Wherefore, Petitioner respectfully requests that an order be entered extending his time to petition for certiorari to and including February 7, 2020.

November 25, 2019

Respectfully submitted,



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