

No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Weldon Smith, Petitioner,

v.

William Gittere, Warden, et al., Respondents.¹

On Petition for Writ of Certiorari to the
Nevada Supreme Court

**PETITIONER'S APPLICATION TO EXTEND TIME TO FILE
PETITION FOR WRIT OF CERTIORARI**

CAPITAL CASE

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Brad_Levenson@fd.org

Counsel for Petitioner

¹ William Gittere is automatically substituted for Renee Baker as the Warden of Ely State Prison; Aaron Ford is automatically substituted for Adam Paul Laxalt as the Attorney General for the State of Nevada. Sup. Ct. R. 35.3.

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**Petitioner's Application to Extend Time to File Petition for Writ of
Certiorari**

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner Joseph Weldon Smith respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for fifty-eight days to and including April 3, 2020. The Nevada Supreme Court issued its order denying rehearing on November 7, 2019. Absent an extension of time, the Petition for Writ of Certiorari would be due on February 5, 2020. Petitioner is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE EXTENSION

The time for filing a Petition for Writ of Certiorari should be extended for fifty-eight days for the following reasons:

1. Counsel of record for Petitioner, Assistant Federal Public Defender Brad D. Levenson, has been unable to complete the Petition for Writ of Certiorari because of filing deadlines in other capital cases that could not be further extended. Specifically, counsel filed a petition for rehearing and suggestion for rehearing en banc in the Ninth Circuit Court of Appeals capital case of *Floyd v. Filson*, Case No. 14-99012, which had a deadline of December 24, 2019. Counsel also filed a reply to the Nevada Supreme Court in *Chappell v. Gittere*, Case No. 77002, an appeal to the denial of a capital habeas petition, which had a deadline of December 30, 2019. Counsel has also devoted substantial time to work on *U.S.A. v. Schlesinger*, Case No. 4:18-cr-02719-RCC-BGM, a death qualified case from the District of Arizona. To that end, counsel had to submit written materials to the United States Attorney, District of Arizona, and his capital case committee on December 31, 2019, and appear in-person before the committee on January 7, 2020, to explain why the committee should not recommend the death penalty in Schlesinger's case.
2. In addition, counsel has had extensive case-related travel over the past ninety days including trips to Arizona, Northern Nevada, and California.
3. As a result of these obligations, counsel cannot complete the Petition for Writ of Certiorari before February 5, 2020. The fifty-eight-day extension requested here

will allow counsel to complete the Petition for Writ of Certiorari no later than April 3, 2020.

4. Mr. Smith's certiorari petition will raise substantial issues regarding the application of this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), that warrant the consideration of the Court. His argument has been found meritorious by at least one justice of this Court, *see Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 410 (2013) (Sotomayor, J., dissenting from the denial of certiorari); has resulted in divided decisions among the state courts; has resulted in differing decisions by the Nevada Supreme Court, *see Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), *overruled by Nunnery v. State*, 263 P.3d 235 (Nev. 2011); and is an issue currently being litigated by eight Nevada death row inmates.

5. This Court has repeatedly noted that death is different: "[t]he taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring); *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). Capital litigants should be given every reasonable opportunity to be heard by the courts.

6. No meaningful prejudice to Respondents would arise from the extension as this Court would decide the matter in the October, 2019 Term regardless of whether an extension was granted. Moreover, Mr. Smith currently has a federal habeas

proceeding that was not stayed and which is currently pending in the Ninth Circuit Court of Appeals.

7. This request is not made solely for the purposes of delay or for any other improper purpose, but only to ensure that Mr. Smith receives an opportunity to seek this Court's review of the constitutional infirmities that infect his death sentence.

DATED this 24th day of January, 2020.

Respectfully submitted,

RENE VALLADARES
Federal Public Defender of Nevada

/s Brad D. Levenson

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CERTIFICATE OF SERVICE

I hereby declare that on 24th day of January, 2020, I served Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari on Respondents by depositing an envelope containing the Application in the United States mail, with first-class postage prepaid, addressed as follows:

Alexander G. Chen
Clark County Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89101

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

APPENDICES

Appendix A Order of Affirmance, *Smith v. State*, Nevada Supreme Court
Case No. 73363 (September 26, 2019).....App.001 - 002

Appendix B Order Denying Rehearing, *Smith v. State*, Nevada Supreme
Court, Case No. 73363 (November 7, 2019).....App.003

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WELDON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73373

FILED

SEP 26 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

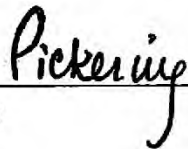
Appellant filed his petition on January 9, 2017, more than one year after the remittitur issued on appeal from the judgment of conviction. *Smith v. State*, 114 Nev. 33, 953 P.2d 264 (1998). The petition was therefore untimely filed. See NRS 34.726(1). Moreover, appellant acknowledges that he previously sought postconviction relief. The petition was therefore successive to the extent it raised claims that were previously litigated and resolved on their merits, and it constituted an abuse of the writ to the extent it raised new claims. See NRS 34.810(2). Finally, because the State pleaded laches, appellant had to overcome the presumption of prejudice to the State. See NRS 34.800(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and actual prejudice, NRS 34.726(1); NRS 34.810(3), or a showing that the procedural bars should be excused to prevent a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

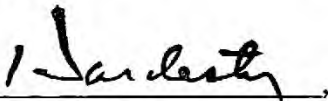
Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars, and that a fundamental miscarriage of justice would result if his petition was not considered,

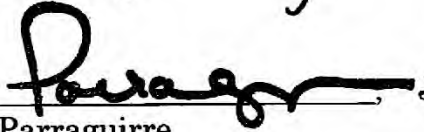
because *Hurst v. Florida*, 136 S. Ct. 616 (2016), set forth a new retroactive rule that requires trial courts to instruct jurors that the State must prove that the aggravating circumstances are not outweighed by the mitigating circumstances beyond a reasonable doubt. We disagree. See *Castillo v. State*, 135 Nev., Adv. Op. 16, 442 P.3d 558 (2019) (discussing death-eligibility in Nevada and rejecting the argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures); *Jeremias v. State*, 134 Nev. 46, 57-59, 412 P.3d 43, 53-54 (same), *cert. denied*, 139 S. Ct. 415 (2018). Accordingly, we

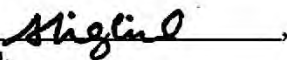
ORDER the judgment of the district court AFFIRMED.¹


C.J.
Gibbons


J.
Pickering


J.
Hardesty


J.
Parraguirre


J.
Stiglich


J.
Silver

cc: Chief Judge, Eighth Judicial District Court
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹The Honorable Elisa F. Cadish, Justice, did not participate in the decision in this matter.

APPENDIX B

APPENDIX B

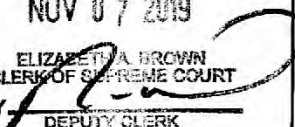
IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WELDON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73373

FILED

NOV 07 2019

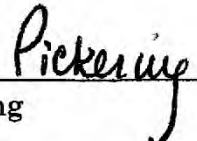
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER DENYING REHEARING


Rehearing denied. NRAP 40(c).¹

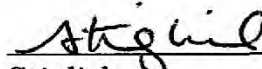
It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Pickering


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Stiglich


_____, J.
Silver

cc: Hon. Elissa F. Cadish, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹The Honorable Elissa Cadish, Justice, did not participate in the decision of this matter.