

No. _____

OCTOBER TERM, 2019
IN THE SUPREME COURT OF THE UNITED STATES

Kitrich A. Powell, 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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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 Kitrich Powell 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 judgment sought to be reviewed is the Nevada Supreme Court's Order of Affirmance in *Powell v. State of Nevada*, Case No. 74168 (Nev.), entered on September 13, 2019. 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 Timothy Payne, of the Capital Habeas Unit of the Federal Public Defender's Office for the District of Nevada, has been unable to complete the Petition for Writ of Certiorari due to his death penalty case workload and filing deadlines in other matters. Counsel's recent work and focus has involved preparation of an extensive Amended Petition for Writ of Habeas Corpus with voluminous evidentiary exhibits in the capital federal habeas corpus case of *Byford v. Gittere*, Case No. 3:11-cv-00112-JCM-WGC (D. Nev.), currently due to be filed on January 24, 2020, the date of the filing of the instant application. Counsel has also recently been involved in investigative work on behalf of death row client Fernando Hernandez relative to his capital federal habeas action in *Hernandez v. Gittere*, Case No: 3:09-cv-00545-LRH-WGC (D. Nev.). That work has involved travel, including a recent trip to Houston, Texas, in December 2019 to conduct fact investigation.

2. Counsel has also been involved in case work on behalf of death-row clients in a number of other federal habeas corpus cases, including *Armstrong v. Ryan*, No. CV-15-00358-TUC-RM (D. Az.), *Leonard v. Gittere*, Case No. 2:99-cv-00360-MMD-DJA (D. Nev.), and *Middleton v. Gittere*, Case No. 3:09-cv-00638-KJD-WGC (D.

Nev. With respect to client David Middleton, who also currently has a separate habeas action proceeding in state court (*Middleton v. Gittere*, Case No. CR95-1882, Dept. 15 (Second Judicial District Court of the State of Nevada)), counsel is currently preparing an opposition to a state motion to dismiss that is due to be filed in early March of 2020.

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. Powell'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.

7. This request is not made solely for the purposes of delay or for any other improper purpose, but only to ensure counsel provides Mr. Powell the high quality of representation to which he is entitled, and that Mr. Powell 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 *Timothy R. Payne*
TIMOTHY R. PAYNE
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Las Vegas, Nevada 89101
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Tim_Payne@fd.org

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 Timothy R. Payne

TIMOTHY R. PAYNE
Assistant Federal Public Defender

APPENDICES

Appendix A	Order of Affirmance, <i>Powell v. State</i> , Nevada Supreme Court Case No. 74168 (September 13, 2019)	App.001 - 003
Appendix B	Order Denying Rehearing, <i>Powell v. State</i> , Nevada Supreme Court, Case No. 74168 (November 7, 2019)	App.004

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

KITRICH A. POWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74168
FILED

SEP 13 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; Tierra Danielle Jones, Judge.

Appellant filed his petition on January 9, 2017, more than one year after the remittitur issued on appeal from the judgment of conviction.¹ 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

¹This court affirmed appellant's judgment and sentence in 1992, *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992), but the United States Supreme Court vacated that decision. *Powell v. Nevada*, 511 U.S. 79 (1994). On remand, this court concluded that any error that occurred in the proceeding was harmless beyond a reasonable doubt. *Powell v. State*, 113 Nev. 41, 930 P.2d 1123 (1997).

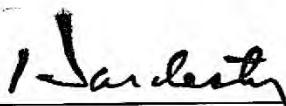
procedural bars should be excused to prevent a fundamental miscarriage of justice, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars 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

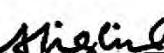
ORDER the judgment of the district court AFFIRMED.


Gibbons

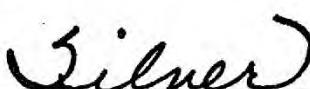

_____, J.
Pickering


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Stiglich


_____, J.
Cadish


_____, J.
Silver

cc: Hon. Tierra Danielle Jones, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

KITRICH A. POWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74168

FILED

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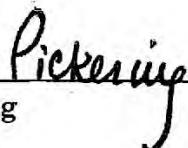
ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

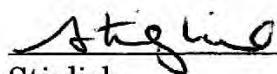
It is so ORDERED.


Gibbons, C.J.


Pickering, J.


Hardesty, J.


Parraguirre, J.


Stiglich, J.


Cadish, J.


Silver, J.

cc: Hon. Tierra Danielle Jones, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk