

No. _____

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

Robert Ybarra, Jr., Petitioner,

v.

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

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

CAPITAL CASE

RENE L. VALLADARES
Federal Public Defender of Nevada
RANDOLPH M. FIEDLER
Counsel of Record
Assistant Federal Public Defender
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Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)
Randolph_Fiedler@fd.org

Counsel for Petitioner

¹ William Gittere is automatically substituted for Timothy Filson 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 Justice Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner Robert Ybarra, Jr., respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for fifty-eight (58) days, to and including April 3, 2020. The Nevada Supreme Court issued its opinion on September 13, 2019, attached as App. A. The Nevada Supreme Court denied rehearing on November 7, 2019, attached as App. B. Petitioner's due date for filing a Petition for Writ of Certiorari is February 5, 2020. *See* Sup. Ct. R. 13.1, 13.3. Petitioner is filing this Application at least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1257(a).

BACKGROUND

Mr. Ybarra was convicted of first-degree murder and sentenced to death for a crime that occurred in 1979. *See Ybarra v. State*, 100 Nev. 167, 679 P.3d 797 (1984). On January 10, 2017, Mr. Ybarra filed a Petition for Writ of Habeas Corpus (Post-Conviction) in the Seventh Judicial District Court of Nevada.² The Nevada Supreme Court affirmed the denial of this petition. *See App. A.*

The instant appeal comes to this Court from that denial.

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. Randolph M. Fiedler, counsel of record for Petitioner has been unable to complete the Petition for Writ of Certiorari, despite diligent efforts to do so, due to caseload and deadlines. Specifically, since the Nevada Supreme Court's denial of rehearing, Mr. Fiedler has been engaged in: a number of prehearing motions, oppositions, and replies, and hearings on those pleadings, in *Adams v. Gittere*, No. 85C069704 (8th Jud. Dist. Ct. Nev.); a Reply to Answer on Remand, filed December 4, 2019, in *Williams v. Gittere*, No. 2:98-cv-00056-APG-VCF (D. Nev.); and a Reply to State's Response to Petition for Writ of Habeas Corpus (Post-Conviction), filed

² In between his direct appeal and the 2017 petition, Mr. Ybarra had state and federal post-conviction petitions pending. Currently, Mr. Ybarra has a claim of intellectual disability pending before the United States District Court for the District of Nevada following remand from the Ninth Circuit. *See Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017).

December 13, 2019, in *Johnson v. Gittere*, No. A-19-789336-W (8th Jud. Dist. Ct. Nev.). All of these are death penalty post-conviction cases.

2. As a result of these obligations, Mr. Fiedler has been unable to complete the Petition for Writ of Certiorari and will not be able to dedicate sufficient time to completing the petition until after February 5, 2020, when it is due. Granting this request will allow Mr. Fiedler to complete the Petition for Writ of Certiorari no later than April 3, 2020.

3. Mr. Ybarra has been under sentence of death since 1981. This Court has consistently held 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 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 bring their claims of constitutional error before the courts.

4. The Petition for Writ of Certiorari that Mr. Ybarra intends to file raises substantial constitutional issues regarding this Court’s ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016). These issues are of critical importance to Nevada’s imposition of the death penalty, and the constitutionality of Mr. Ybarra’s death sentence.

5. No meaningful prejudice would arise from the extension because this Court is likely to decide this matter in the October 2019 term regardless of whether an extension is granted.

6. This application for extension of time is not sought for the purposes of delay or for any other improper purpose, but only to ensure that Mr. Ybarra receives competent representation in this matter.

DATED this 24th day of January 2020.

Respectfully submitted,

Rene Valladares
Federal Public Defender of Nevada

/s Randolph M. Fiedler

RANDOLPH M. FIEDLER
Counsel of Record
Assistant Federal Public Defender
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Las Vegas, Nevada 89101
(702) 388-6577
Randolph_fiedler@fd.org

Counsel for Petitioner

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:

Michael A. Wheable
White Pine County District Attorney
County Courthouse
801 Clark St., Suite 3
Ely, NV 89301

/s Randolph M. Fiedler

RANDOLPH M. FIEDLER
Assistant Federal Public Defender

APPENDICES

Appendix A	Order of Affirmance, <i>Ybarra v. State</i> , Nevada Supreme Court Case No. 72942 (September 13, 2019) App.001 - 003
Appendix B	Order Denying Rehearing, <i>Ybarra v. State</i> , Nevada Supreme Court, Case No. 72942 (November 7, 2019)App.004

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
TIMOTHY FILSON, WARDEN, ELY
STATE PRISON; AND ADAM P.
LAXALT, NEVADA ATTORNEY
GENERAL,
Respondents.

No. 72942

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. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

Appellant filed his petition on January 11, 2017, more than thirty years after the remittitur issued on appeal from the judgment of conviction. *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984). 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). 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).

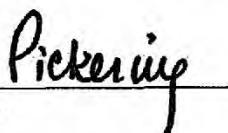
Appellant argues that he demonstrated good cause and prejudice sufficient to excuse the procedural bars, and that a fundamental miscarriage of justice would result if his petition was not considered, because *Hurst v. Florida*, 136 S. Ct. 616 (2016), set forth new retroactive rules that: (1) require 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, and (2) prohibit the reweighing of aggravating and mitigating circumstances when an aggravating circumstance is stricken by a reviewing court. We disagree. *See Castillo v. State*, 135 Nev., Adv. Op. 16, 442 P.3d 558 (2019) (discussing death-eligibility in Nevada and rejecting the arguments that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures or to appellate reweighing); *Jeremias v. State*, 134 Nev. 46, 57-59, 412 P.3d 43, 53-54 (rejecting the argument that *Hurst* announced new law relevant to the weighing component of Nevada's death penalty procedures), *cert. denied*, 139 S. Ct. 415 (2018).

Appellant also argues that the jury was not adequately instructed regarding the "depravity of mind" aggravating circumstance. This claim is waived as it could have been raised in a prior proceeding, and appellant does not explain why he has good cause to raise it now. *See* NRS 34.810(1)(b). To the extent he argues that the error renders him actually innocent, we disagree. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149

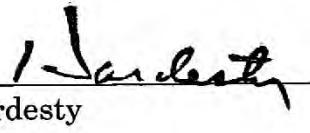
P.3d 33, 36 (2006) (“Actual innocence means factual innocence, not mere legal insufficiency.” (internal quotation marks and alterations omitted)).

Having concluded that no relief is warranted, we
ORDER the judgment of the district court AFFIRMED.

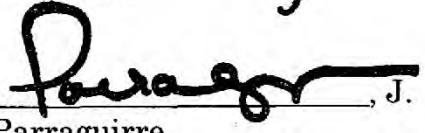

Gibbons C.J.


Pickering, J.

Pickering


Hardesty, J.

Hardesty


Parraguirre, J.

Parraguirre


Stiglich, J.

Stiglich


Cadish, J.

Cadish


Silver, J.

Silver

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
TIMOTHY FILSON, WARDEN, ELY
STATE PRISON; AND ADAM P.
LAXALT, NEVADA ATTORNEY
GENERAL,
Respondents.

No. 72942

FILED

NOV 6 7 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Gibbons, C.J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

cc: Hon. Steve L. Dobrescu, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk

19-45857