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In the
Supreme Court of the United States

Robert Ybarra, Jr.

Petitioner,

v.

William Gittere, et al.,

Respondents.

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

CAPITAL CASE

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

Petitioner Robert Ybarra respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for sixty (60) days, to and including February 11, 2024. The Court of Appeals for the Ninth Circuit issued its opinion on June 9, 2023. *See* App. A. The Ninth Circuit denied a timely petition for rehearing/rehearing en banc on September 14, 2023. *See* App. B. Petitioner's current due date for filing a Petition for Writ of Certiorari is December 13, 2023. *See*

Sup. Ct. R. 13.1, Sup. Ct. R. 13.3. Petitioner is filing this Application at least ten days before that date. *See* Sup. Ct. R. 13.5.

BACKGROUND

Mr. Ybarra was convicted of first-degree murder and sentenced to death for a crime that occurred in 1979. *See Ybarra v. State*, 679 P.2d 797 (Nev. 1984).

Following state and federal post-conviction proceedings, Mr. Ybarra filed the federal habeas petition relevant to these proceedings in 2000, followed by an amended federal petition in 2002. *See Ybarra v. Gittere*, No. 3:00-cv-00233-GMN-VPC, ECF Nos. 8, 41 (D. Nev.). Shortly after, Mr. Ybarra filed a petition in state court to exhaust his claims. *Ybarra v. McDaniel*, No. HC-0803002, (7th Jud. D. Ct. Nev.). In both petitions Mr. Ybarra raised a claim that he is ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The federal district court denied Mr. Ybarra's request to stay his federal proceedings, so his state petition and federal petition proceeded in parallel.

Mr. Ybarra's federal petition was ultimately denied; the Ninth Circuit affirmed; this Court denied Mr. Ybarra's Petition for Writ of Certiorari. *See Ybarra v. McDaniel*, 656 F.3d 984 (9th Cir. 2011); *Ybarra v. Baker*, No. 11-10652 (U.S. Oct. 9, 2012).

Mr. Ybarra's state petition was also denied, but the Nevada Supreme Court reversed for an evidentiary hearing on Mr. Ybarra's *Atkins* claim. *See Ybarra v. State*, No. 43981 (Nov. 28, 2005). Following this evidentiary hearing, the state district court denied relief; the Nevada Supreme Court affirmed; this Court denied

Mr. Ybarra's Petition for Writ of Certiorari. *See Ybarra v. Nevada*, No. 11-6741 (U.S. Apr. 16, 2012).

However, while this Court considered Mr. Ybarra's Petition for Writ of Certiorari from his federal habeas proceedings, Mr. Ybarra filed a Motion for Relief from Judgment and Order, pursuant to Fed. R. Civ. P. 60(b), asking the district court to consider his *Atkins* claim on the merits because his *Atkins* claim had become exhausted in State court. *See* No. 3:00-cv-00233-GMN-VPC, ECF No. 176. The district court ordered additional briefing, considered it, denied relief, but certified an issue for appeal to the Ninth Circuit. *See id.* at ECF Nos. 195, 228, 252. On appeal, the Ninth Circuit reversed and remanded. *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). On remand, the district court again denied relief and again granted a certificate of appealability. No. 3:00-cv-00233-GMN-VPC, ECF Nos. 320, 336.

On appeal, the Ninth Circuit affirmed. The instant appeal comes to the Court from this affirmance. *Ybarra v. Gittere*, 69 F.4th 1077 (9th Cir. 2023).

REASONS FOR GRANTING THE EXTENSION

The time for filing a Petition for Writ of Certiorari should be extended for sixty 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 his caseload and deadlines in other capital habeas matters. Specifically, since the Ninth Circuit's denial of rehearing, Mr. Fiedler has had the following deadlines: in *Williams v. Gittere*, No. 2:98-cv-00056-APG-VCF (D. Nev.), a Reply to Response to

Motion to Alter or Amend Judgment Pursuant to Federal R. Civ. P. 59(e) on Sept. 22, 2023; in *Vanisi v. Gittere*, No. 3:10-cv-00448-CDS-CLB (D. Nev.), a Second Amended Petition for Writ of Habeas Corpus on October 16, 2023; in *Welch v. Liggett* (a non-capital matter), No. 23-15200 (9th Cir.), a Reply Brief on November 3, 2023; in *Moore v. Gittere*, No. 2:13-cv-00655-JCM-DJA (D. Nev.), a Reply to Opposition to Motion for Evidentiary Hearing and a Reply to Opposition to Motion for Leave to Conduct Discovery on November 22, 2023. In addition to these deadlines, Mr. Fiedler has had extensive work related to a federal capital case in anticipation of filing a motion under 28 U.S.C. § 2255 in *Coonce v. United States*, No. 6:20-cv-0800-BCW (W.D. Mo.).

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 the current deadline. Granting the instant request for a sixty-day extension of time will allow Mr. Fiedler to complete the Petition for Writ of Certiorari no later than February 11, 2024.

3. The 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 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) (Stewart, Powell, Stevens, JJ., concurring) (plurality opinion) (“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 questions of federal habeas doctrine, and how far a federal court may go in ignoring clinical evidence and testimony in its reasonableness determination under 28 U.S.C. § 2254(d) in analyzing a claim that a petitioner has intellectual disability. *See* Sup. Ct. R. 10(a).

5. This application for an 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 30th day of November, 2023.

Respectfully submitted,

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