

1 persons who are intellectually disabled. This court denied the motion (ECF No. 228), and Ybarra’s
2 appeal of that decision remains pending before the Ninth Circuit.

3 Now before the court is another Rule 60(b) motion. ECF No. 271. With the current motion,
4 Ybarra argues that his death sentence is unconstitutional in light of the Supreme Court’s decision in
5 *Hurst v. Florida*, 136 S.Ct. 616 (2016).

6 In *Hurst*, the Court held that Florida's capital sentencing scheme violates the Sixth
7 Amendment right to a jury trial because, under the scheme, the jury renders an advisory verdict but
8 the judge makes the ultimate sentencing determination. 136 S.Ct. at 624. In reaching that holding,
9 the Court relied upon *Ring v. Arizona*, 536 U.S. 584 (2002), which held that any fact necessary for
10 the imposition of the death penalty must be found by a jury, not a judge. 536 U.S. at 589. Ybarra
11 argues this court’s judgment denying habeas relief must be set aside because this court and the Ninth
12 Circuit engaged in judicial fact-finding that, under *Hurst*, must be conducted by a jury.

13 Rule 60(b) entitles the moving party to relief from judgment on several grounds, including
14 the catch-all category “any other reason justifying relief from the operation of the judgment.” Fed. R.
15 Civ. P. 60(b)(6). Because Ybarra seeks relief under subsection (b)(6), he must make a showing of
16 “extraordinary circumstances,” which “will rarely occur in the habeas context.” *Gonzalez v. Crosby*,
17 545 U.S. 524, 535 (2005).

18 Rule 60(b) applies to habeas proceedings, but only in conformity with AEDPA,² including
19 the limits on successive federal petitions set forth at 28 U.S.C. § 2244(b). *Gonzalez*, 545 U.S. at
20 529. If a Rule 60(b) motion seeks to add a new ground for relief or attack this court's previous
21 resolution of a claim on the merits, it is, in substance, a successive habeas petition subject to the
22 requirements of 28 U.S.C. § 2244(b). *Id.* at 531. If, however, the motion “attacks, not the substance
23 of the federal court's resolution of a claim on the merits, but some defect in the integrity of the
24 federal habeas proceedings,” the motion is not a successive habeas petition. *Id.* at 532.

25 ² The Antiterrorism and Effective Death Penalty Act.
26

1 Ybarra’s motion clearly falls in the former category. Accordingly, this court is not permitted
2 to address the merits of Ybarra’s *Hurst*-based claim until Ybarra obtains authorization from the court
3 of appeals pursuant to 28 U.S.C. § 2244(b)(3).

4 Ybarra argues that his motion is not a successive petition because his appeal is still pending
5 before the Ninth Circuit. As noted above, however, only the appeal of this court’s denial of *Atkins*
6 relief remains pending. The portion of this court’s disposition that Ybarra challenges with his
7 current Rule 60(b) motion has been affirmed by the Ninth Circuit, and his petition for writ of
8 certiorari has been denied by the United States Supreme Court.

9 Moreover, Ybarra does not cite to any controlling authority for the proposition that the
10 pendency of his appeal excuses him from obtaining permission from the court of appeals to raise a
11 new claim or re-litigate an old one. While a Second Circuit case arguably supports Ybarra’s position
12 (*Whab v. United States*, 408 F.3d 116 (2nd Cir. 2005)), opposing cases from other circuits are more
13 persuasive. *See Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (holding that no controlling
14 authority “suggests that whether a Rule 60(b) motion or other procedural vehicle may be used to
15 circumvent § 2244(b) depends on the incidental fact that an appeal is or is not pending from the
16 underlying habeas proceeding”) and *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012)
17 (“Nothing in the language of § 2244 or § 2255 suggests that time-and-number limits are irrelevant as
18 long as a prisoner keeps his initial request alive through motions, appeals, and petitions.”).

19 Ybarra also argues that, even if § 2244 does apply, he is still entitled to relief because §
20 2244(b)(2)(A) permits him to pursue a claim that “relies on a new rule of constitutional law made
21 retroactive to cases on collateral review by the Supreme Court that was previously unavailable.”
22 That provisions does not, however, provide a basis for this court to grant Ybarra’s motion. Setting
23 aside the absence of a decision from the Supreme Court making *Hurst* retroactive,³ the determination

24
25 ³ The Court has held that *Ring*, the case on which *Hurst* is premised, applies only prospectively.
26 *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

1 under § 2244(b)(2)(A) is to be made by the court of appeals, not this court. *See* 28 U.S.C. §
2 2244(b)(3).

3 Based on the foregoing, this court must deny Ybarra's motion for relief under Rule 60(b).

4 In the event Ybarra chooses to appeal this decision, this court denies a certificate of
5 appealability (COA).

6 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a
7 substantial showing of the denial of a constitutional right." With respect to claims rejected on the
8 merits, a petitioner "must demonstrate that reasonable jurists would find the district court's
9 assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484
10 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA
11 will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the
12 denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

13 The issue of whether Ybarra's Rule 60(b) motion should be treated as a successive petition
14 under *Gonzalez v. Crosby* is not debatable among reasonable jurists and, therefore, does not warrant
15 the issuance of a COA.

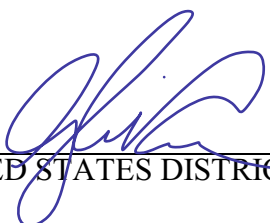
16 **IT IS THEREFORE ORDERED** that petitioner's motion for relief from judgment pursuant
17 to Rule 60(b) (ECF No. 271) is DENIED.

18 **IT IS FURTHER ORDERED** that a certificate of appealability is DENIED with respect to
19 this decision.

20 **IT IS FURTHER ORDERED** that petitioner's motion for extension of time (ECF No. 277)
21 is GRANTED *nunc pro tunc* as of February 8, 2017.

22 DATED: [March 17, 2017](#)

23
24
25
26


UNITED STATES DISTRICT JUDGE