ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ROBERT YBARRA, JR.,

Appellant,

vs.

E.K. MCDANIEL, WARDEN, ELY STATE PRISON, Et al.,

Respondents.

Case No. 43981

FILED

JUL 11 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

OPPOSITION TO MOTION TO STRIKE

Robert Ybarra, Jr., hereby opposes respondent's motion to strike certain parts of his appendix on appeal. This opposition is based upon the attached memo of points and authorities and upon the entire file in this matter.

Dated this 7th day of July, 2005.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender

Michael Pescetta (#2347)
Assistant Federal Public Defender
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Attorney for Appellant

RECEIVED

JUL 11 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

05-13731

MEMORANDUM OF POINTS AND AUTHORITIES

The respondents have moved to strike from Mr. Ybarra's appendix on appeal the exhibits to the petition for writ of habeas corpus that were stricken by the district court. The state's motion is baseless.

In the opening brief, Mr. Ybarra argued that he was deprived of due process by the district court's actions, because the district court threatened to strike one category of exhibits (those "not specifically referred to in the instant petition"), but when Mr. Ybarra responded to the court's order to show cause, the court issued an order striking a different category of exhibits (those relating to claims raised in previous state proceedings). AOB at 6-8. A simple comparison of the exhibits referred to in the district court's order to show cause, i.e., those "not specifically referred to in the instant petition" (which Mr. Ybarra interpreted as covering exhibits 1.1.B-H, 4.1, 4.3-18, 4.22-33, 5.5., see 16 AA 3379, with those cited in the district court's order striking the exhibits, 16 AA 3385 (1.1.E, 1.2.G, 1.2.J, 2.1 through 2.6, 4.33 through 4.36, 5.1 through 5.2) shows that they are different ones, and the theories for striking them threatened in the order to show cause, 16 AA 3363, and in the final order, 16 AA 3385, are different as well. The state does not address this issue in its motion, and Mr. Ybarra submits that no rational argument could be made that this tactic did not deprive him of due process. E.g., Lankford v. Idaho, 500 U.S. 110, 126 n.22 (1991); Lippis v. Peters, 112 Nev. 1008, 1011, 921 P.2d 1248 (1996); Anastassotos v. Anastassotos, 112 Nev. 317, 319, 913 P.2d 652 (1991) (notice and opportunity to be heard "twin hallmarks of due process"); Lane v. Second Judicial District Court, 104 Nev. 427, 448, 760 P.2d 1245 (1988); see also, Alford v. State, 111 Nev. 1409, 1414-1415, 906 P.2d 714 (1995) (due process requires state to charge specific felony underlying felony murder to give adequate notice of theory of prosecution).[1]

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[1]Although the state does not make any argument on this piont in its motion, in its answering brief it asserts that the due process issue is not properly before the Court because it was not raised in the district court. Resp. Br. at 16-17. Here, the district court issued its notice of entry of judgment on August 11, 2004, and its order striking that exhibits on August 16, 2004. 16 AA 3385. (The notice of entry of the order denying the petition was inadvertently omitted from the appellant's appendix. It will

The respondents argue that the exhibits must be stricken because they were stricken in the court below. This argument has no support at all. Review of the propriety of an order striking evidence always involves consideration of the evidence stricken, which is part of the record that is brought up to the reviewing court. Examples of this unexceptionable practice are legion. E.g., Sherman v. State, 114 Nev. 998, 1010-1011, 965 P.2d 903 (1998); Pasgove v. State, 98 Nev. 434, 436, 651 P.2d 100 (1982); Claybaugh v. Gancarz, 81 Nev. 64, 81, 398 P.2d 695 (1965). The cases relied upon by the state, Motion at 3, have nothing to do with this issue: they are all cases of appeals on the judgment roll alone, Harris v. Harris, 62 Nev. 473, 474, 153 P.2d 904 (1944); Hartford Mining Co. v. Home Lumber Coal Co., 61 Nev. 1, 3, 11, 107 P.2d 128 (1940); Magee v. Whitacre, 60 Nev. 202, 207, 96 P.2d 201 (1939); see also Magee v. Whitacre, 60 Nev. 208, 211, 106 P.2d 751 (1940), in which none of the evidence is properly before the reviewing court. See Waite v. Burgess, 69 Nev. 312, 314, 250 P.2d 919 (1952).

Respondents argue that there is no justification for burdening the courts with material relating to issues previously rejected. Motion at 4. This Court has repeatedly acknowledged that it has the power to address issues previously rejected, despite the law of the case doctrine, and it has done so on important issues in recent cases. See, e.g., McConnell v. State, 120 Nev. ___, 102 P.3d 606, 620, (2004); Leslie v. Warden, 118 Nev. 775, 779-781, 59 P.3d 440 (2002). Under these circumstances, the state's position that raising claims that were previously rejected is illegitimate is an entirely untenable argument.

Finally, the state argues generally that the appendix filed by Mr. Ybarra is just too big. Motion at 3-4. This argument appears irrelevant to the motion's avowed purpose, which is to strike certain identified documents, Motion at 1-2, and it need not be considered. On that point,

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be provided in a supplemental appellant's appendix.) Since a motion for reconsideration does not toll the time for filing a notice of appeal, Phelps v. State, 111 Nev. 1021, 1022-1023, 900 P.2d 344 (1995), it was not practicable to litigate this issue before the time for filing a notice of appeal expired. In any event, the due process violation arising from the bait-and-switch action of the district court can be reviewed regardless of whether it was raised below. E.g., Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968) (court "obligated" to consider constitutional questions on appeal, regardless of failure to object below).

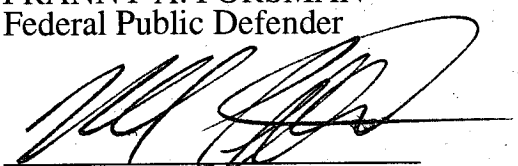
however, the Court should be aware of the context in which this issue arose. In the federal proceedings in this case, the state (through the particular deputy attorney general appearing for respondents here) argued that the entire federal petition was unexhausted, and could not be addressed under 28 U.S.C. § 2254(b), specifically because of the inclusion of all the exhibits to the petition. 16 AA 3396. In order to avoid further arguments by the state that the federal petition was unexhausted, Mr. Ybarra filed his state petition including all of the exhibits submitted with the federal petition, and that is what is included in the appendix before this Court. Counsel for Mr. Ybarra would be more than willing to reduce the size of the appendix by removing virtually all of the exhibits, on the theory that the material filed in the district court is available to, and therefore "before" this Court on appeal. But in the absence of any assurance by the state that this procedure would be considered adequate to exhaust the federal petition, or of a similar assurance by this Court, cf. Nev. Rule App. P. 40(A)(2) (petition for en banc rehearing not necessary for exhaustion), counsel must protect Mr. Ybarra's interest in obtaining complete exhaustion of his federal petition, regardless of any peril to counsel created by the state's intransigence or by this Court's application of its rules.

The state's motion to strike portions of appellant's appendix is baseless and it should be denied.

Dated this 7th day of July, 2005.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of July, 2005, she deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing **OPPOSITION TO MOTION TO STRIKE,** addressed to counsel as follows:

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