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

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APPELLANT'S REPLY BRIEF

Appeal From Order Denying Petition for Writ of Habeas Corpus (Post-Conviction)

Seventh Judicial District Court, White Pine County

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Appellant Robert Ybarra, Jr. submits the following reply to the respondents' answering brief on appeal. Appellant will not repeat the arguments he made in the opening brief which the state respondents do not discuss in the answering brief, but continues to rely on arguments previously advanced.[1]

ARGUMENT

1. Appellant has argued that the procedural default rules applied by the district court cannot constitutionally bar consideration of his substantive constitutional claims and the state argues that this position has been rejected in State v. District Court (Riker), 121 Nev. ___, 112 P.3d 1070 (2005). First, the Riker decision is not yet final: a petition for rehearing, pointing out the flaws in the Court's analysis, is currently pending. Second, the state in this case, like the state in Riker, did not analyze any of the arguments raised by appellant with respect to the application of the default rules: the analysis in Riker was generated entirely by the Court, and thus the decision rests upon arguments that the real party in interest in that case, like Mr. Ybarra here, had no opportunity to contradict. In fact, the Riker analysis is clearly flawed, and the state's brief does not address any of the criticisms of that decision presented in the petition for rehearing in that case. For instance, the state does not offer any analysis of this Court's disposition in Hardison v. State, No. 24195, Order of Remand (May 24, 1994), 22 App. 4747, in which this Court completely ignored applicable default rules and not only reached the merits of habeas petitioner's claims but granted him

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[1]The state respondents preface their arguments by "deny[ing] each and every factual allegation made in Ybarra's petition for writ of habeas corpus (post-conviction) and in his opening brief save and except for those expressly found by a Nevada court of competent jurisdiction." Ans. Br. at 9. This mirrors the respondents' assertion in their motion to dismiss. 17 AA 3617. While such an assertion may be relevant in federal habeas corpus proceedings, see 28 U.S.C. § 2254 (e)(1), it has no bearing in the proceedings before the district court. Under this Court's jurisprudence, the allegations of a habeas corpus petition, unless they are "belied" by the record, e.g., Evans v. State, 117 Nev. 609, 621, 28 P.3d 498 (2001), must be taken as true for the purpose of adjudicating a motion to dismiss, as are the allegations of any complaint. See Opening Br. at 9. Thus for the purpose of reviewing the propriety of the district court's order dismissing the petition, this Court must take the factual allegations of the petition as true.

relief, ultimately resulting in Mr. Hardison's removal from death row. Neither the state, nor the decision in Riker, explains how such disparate treatment can survive analysis under state and federal due process and equal protection principles. See Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Lankford v. Idaho, 500 U.S. 110, 126 n.2 (1991). Similarly, neither the Riker decision nor the state here discusses this Court's exercise of its discretion to address issues on habeas corpus appeals sua sponte, see, e.g., Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002), 15 AA 3238; Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990), a power utterly at odds with the Court's claim that application of the procedural default rules in habeas cases is mandatory. See Pellegrini v. State, 117 Nev. 860, 880, 886 and n.116, 34 P.3d 519 (2001). The state makes no mention of the examples cited in appellant's opening brief, at 10-12, and appellant continues to rely upon them.

Similarly, the state and the Riker decision did not address the inconsistent application of the exceptions to the default rules. In particular, in Stevens v. State, No. 24138, Order of Remand (July 8, 1994), 22 AA 4752, this Court found cause to address an otherwise barred claim due to the failure of the district court to appoint counsel in a habeas proceeding in which appointment of counsel was not mandatory. In Riker, this Court attempted to explain this action by stating that the ineffective assistance of counsel theory of cause (which is confined to cases in which appointment of counsel is mandatory under Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)) does not define all of the situations in which cause may exist. Riker, 112 P.3d at 1081. There can be no rational contention that a failure to appoint counsel when appointment of counsel is not mandatory would constitute an "impediment external to the defense," for failure to raise a claim under this Court's traditional definition of cause, see, e.g., Crump, 113 Nev. at 302: if the district court in Stevens had appointed incompetent counsel (as is common in capital habeas cases), there is no assurance that the claim resulting in reversal would have been identified and litigated; and thus there is no rational link between the failure to appoint counsel and the default of the claim. In this case, the failure to appoint adequate counsel and of counsel to raise all of Mr.

Ybarra's constitutional claims fits the Stevens theory of cause as well as the Stevens situation does, but neither the lower court, nor the state, nor this Court in Riker, has analyzed that situation. In any event, if the definition of cause is so indefinite that it can extend beyond Crump and the "external impediment" theories to cover the Stevens case, then in fact there is no coherent definition of cause at all. See also Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440 (2002) (expanding definition of "miscarriage of justice" exception to default rules to apply to "actual innocence" of aggravating factor). Barring consideration of Mr. Ybarra's substantive claims under those circumstances would violate state and federal due process principles of notice as well as equal protection principles of similar treatment of similarly-situated litigants.

The state also challenges appellant's position that the district court did not adequately address his argument that the bar of Nev. Rev. Stat. § 34.726 could not be applied because any delay in filing was not Mr. Ybarra's own "fault," under the definition of cause in that section (which is different from the "impediment external to the defense" definition). Ans. Br. at 11; see Opening Brief at 13 n.10. While the district court certainly rejected the general argument, 16 AA 3373-3374, it did not address the authorities cited by appellant that uniformly hold that use of the term "fault" in a statute requires a showing of personal fault on the part of the party and not a mistake on the part of counsel. Opening Br. at 13, n.10. Similarly, the state's brief does not address this issue, confining itself to arguing that appellant's position is "patently absurd" and asking rhetorically, if the failure to raise claims previously is not Mr. Ybarra's "fault, then whose is it?" Ans. Br. at 11-12. Mr. Ybarra did allege, however, that the failure to raise any claims not previously raised was not due to any "fault" on his part and that it was attributable to previous counsel. 1 AA 6-7. Nothing in the record contradicts this assertion, and the state has offered no evidence remotely suggesting that Mr. Ybarra failed to provide previous counsel with relevant information or interfered in any way with previous counsel's ability to identify and litigate these issues. The state's argument must therefore fail.

Further, this Court's decision in Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676

(1995), does support Mr. Ybarra's position. There, this Court "declined to penalize [Mr. Bennett] on the basis of a delay that apparently was not his fault. See NRS 34.726(1)(a)." Bennett, 111 Nev. at 1103 (emphasis supplied). The Court's reference to the fact that the delay occurred "only after counsel was appointed," id., supports Mr. Ybarra's reading of section 34.726(1)(a): the section requires a showing of the petitioner's own "fault" to sustain a timeliness default. This provision is independent of whether ineffective assistance of counsel could constitute cause under that section, since, at the time of Mr. Bennett's petition, appointment of counsel was not mandatory. In any event, the only "patently absurd" point is the state's assumption that a mentally ill death row inmate, who has no hand in the selection of appointed counsel and no control over counsel's actions can, in any real sense, be at "fault" for counsel's derelictions.

Finally, the state does not address on the merits Mr. Ybarra's contention that the invalidity of the aggravating factors requires consideration of the merits of these claims, regardless of any purported default. Ans. Br. at 12; see Opening Br. at 18-25.[2] It is clear that the substantive claims that are the basis of Mr. Ybarra's arguments on appeal were raised in the petition below. Opening Br. at 18-25; 1 AA 16-17, 54-55. The state does not cite any authority for the proposition that consideration of the substantive claims that this Court has held will overcome any default would be barred by failure to cite them in the litigation over dismissal, and to appellant's knowledge there is no such authority. Even if there were such authority, however, the state's argument would only support appellant's argument that this Court's administration of the default rules is entirely inconsistent. In the Feazell case, this Court sua sponte addressed the issue of an invalid aggravator, when the issue had not been

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[2]The other substantive claims raised in the opening brief, notably the failure of the trial jury to find that aggravation did not outweigh mitigation beyond a reasonable doubt, the commission of jury misconduct, and the failure to change venue, also raise "question[s] which, if true, might invalidate [Mr. Ybarra's] death sentence." Hill v. State, 114 Nev. at 178-179. There is no rational basis, under state and federal equal protection and due process principles, for reviewing claims of invalid aggravating factors that would require reversal of a death sentence, regardless of the existence of purported defaults, but refusing to review other constitutional errors that equally affect the constitutionality of the death sentence.

raised in the district court or in this Court. 15 AA 3238. As pointed out in the opening brief, this Court has addressed claims raised for the first time on habeas appeals, see Opening Br. at 10-13, citing, e.g., Hill v. State, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing constitutional claim raised for first time on second habeas appeal because "issue raises a question which, if true, might invalidate Hill's death sentence"), as well as addressing issues sua sponte on habeas appeals. See Bejarano, 106 Nev. at 843; see also Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996) (reversing sentence on basis of invalid aggravating factor where issue not raised at trial or on direct appeal but only after time for filing petition for rehearing had elapsed); Lane v. State, 114 Nev. 279, 956 P.2d 88 (1998) (same). If the state's argument were to prevail on the technicality it raises, this Court would be in the perverse position of holding that it is better for a capital client to have counsel not raise a constitutional issue at all, so this Court could reach the issue sua sponte, rather than have counsel raise the issue in a way that may be considered technically defective. Such a holding could remove any semblance of rationality, much less consistency, from the application of the procedural bars. It would result in an obvious deprivation of due process and equal protection if this Court were to hold that the substantive defects in the aggravating factors in Mr. Ybarra's case could not be reviewed at all, while others obtain reversals of their sentences due to unraised issues relating to aggravating factors. See, e.g., Village of Willowbrook v. Olech, 528 U.S. at 564-565; Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990); Lankford v. Idaho, 500 U.S. at 126 n.22. This Court must therefore reject the state's argument. Since the state has explicitly declined to offer any argument on the merits of Mr. Ybarra's attacks on the validity of the aggravating factors, Ans. Br. at 12, there is nothing for appellant to reply to on this point.

2. The state also argues that the opening brief elaborates and alters the claims made in the petition filed below. Ans. Br. at 12-15. In this case, the habeas petition was dismissed, without briefing or litigation on the merits, solely on procedural grounds. On appeal, appellant must offer some legal argument in order to attempt to persuade this Court that the substantive claims have some merit, see, e.g., State v. Haberstroh, 119 Nev. 17, 69

P.3d 676, 685-686 (2003), and the state cites no authority holding that an appellant is restricted on appeal to reciting in haec verba the arguments in the pleadings in the court below. See also Hill, 114 Nev. at 178-179 (reviewing merits of claim raised for first time on appeal from denial of successor habeas petition). The state's argument on this point must accordingly be rejected.

3. The state finally argues that the district court's order striking those exhibits to Mr. Ybarra's habeas petition that related to claims previously raised was proper. Ans. Br. at 15-16. In fact, the order plainly violates due process. The district court initially directed the petitioner to explain why some exhibits were filed that were not cited in the petition. 16 AA 3376 ("counsel for Ybarra shall ... show cause as to why the Court should not order stricken all Petitioner's exhibits which are not specifically referred to in the petition."). Following the filing of petitioner's response, 16 AA 3377, the district court entered an order striking "all exhibits referred to in the petition [that] involve previously litigated claims ...." 16 AA 3387, 3389; compare 16 AA 3387, 3389 (court's list of exhibits not stricken). This in itself demonstrates the due process violation raised by appellant. Opening Br. at 6-7.[3] The state offers an array of arguments on this point which are all misdirected.

The state argues that the due process claim is barred because it was not raised in response to the district court's order to show cause. Ans. Br. at 16. But the due process violation had not occurred at that point: only after receiving petitioner's response to the order to show cause did the district court change theories and decide to strike different exhibits than those referred to in the order to show cause. Petitioner could not rationally be expected to raise a claim of the district court's violation of due process before the district court took the action in question, and this appeal is the first opportunity appellant has had to raise that claim. The state also argues that the appendix should not contain the stricken exhibits. Ans. Br. at 18. As appellant noted in his opposition to the motion to strike filed in

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[3]This issue has also been the subject of a motion by the state to strike the exhibits stricken in the district court, which this Court denied on July 14, 2005.

this Court, inclusion of stricken material in the record is entirely proper.[4]

The state also argues that the stricken exhibits should not have been included in the appendix because they relate to claims previously rejected by this Court. Ans. Br. at 19. Again, as appellant pointed out in the opposition to the motion to strike, in the majority of recent cases in which capital sentences have been reversed, this Court has not relied upon its previous caselaw but has adopted legal arguments it had previously rejected. See, e.g., McConnell v. State, 120 Nev. ___, 102 P.3d 606, 620 (2004); Leslie v. Warden, 118 Nev. 775, 779-781, 59 P.2d 440 (2002); Feazell, 15 AA 3238. This Court has explicitly recognized that counsel is obligated to raise claims based on arguments that existing caselaw is wrong, Ramos v. State, 113 Nev. 1081, 1085, 944 P.2d 856 (1997); and, as in McConnell, the basis for asserting that the existing caselaw was incorrectly decided is simply the argument on the merits of the claim. There is thus no basis for concluding that the material supporting claims that have previously been rejected could not properly be placed before the Court.

The inclusion of all the exhibits in the appendix does implicate the difficult problem of state and federal relations in light of the federal exhaustion doctrine and this Court's decision in State v. Haberstroh. Under the federal exhaustion doctrine, no claims can be addressed by a federal habeas court unless all of the claims in the petition have been presented to the highest court of the state. See, e.g., Rose v. Lundy, 455 U.S. 509, 520, 522 (1982); Brown v. Allen, 344 U.S. 443, 447 (1957); 28 U.S. C. § 2254 (b)(1)(A). In the

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[4]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 the state, Ans. Br. at 18, 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).

federal courts, the State of Nevada has consistently taken the position that the inclusion of any material in a federal petition, whether a portion of an allegation of a claim or a single exhibit attached to the petition, renders the petition mixed and therefore prevents the federal court from addressing any part of the petition. Anticipating this obstacle, when Mr. Ybarra filed the state habeas corpus petition in this case he included all of the exhibits filed with his pending federal petition. As anticipated, the state moved to dismiss Mr. Ybarra's federal petition, explicitly on the ground that the inclusion of exhibits not previously presented to the state courts rendered the petition mixed. 16 AA 3396. The demands of the exhaustion doctrine put counsel who is trying to comply with Nev. R. App. P. 30(b) and State v. Haberstroh in a quandary. If counsel does not include all of the petition exhibits in the appendix filed in this Court, it is virtually certain that the state will seek to preclude any review of a later federal petition on the ground that the failure to include all the exhibits in the appendix does not satisfy the exhaustion doctrine. On the other hand, if counsel does include the exhibits in the appendix to avoid exhaustion challenges, counsel risks sanctions under Haberstroh and Rule 30(b).

Counsel's duty of undivided loyalty to the client's interests, see, e.g., Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374 (1992), compels counsel to risk personal and professional attack in order to protect the client's right to federal review. The tension between state and federal practice can be rationally resolved, however, if this Court acknowledges the problem, as it has done in another context. In Nev. R. App. P. 40(A)(2), this Court adopted a rule that seeking en banc rehearing of a panel decision was not required for exhaustion of the claims presented, which includes the possibility of imposing sanctions for the filing of a petition for rehearing en banc in a case that does not meet the standards for en banc review. There is no parallel provision under Rule 30, but there is no reason that this Court should not adopt such a rule for inclusion of material in the appendix. The record before the trial court is at all times available to this Court, see Nev. R. App. P. 10(a)(1), and is thus constructively "before" this Court. Adoption of an amendment to Rule 30(b) that makes it clear that the entire habeas record need not be included in the appendix in order to be "before" the Court

for purposes of exhaustion would solve the problem presented here, without any infringement of any party's legitimate interests. Counsel is more than willing to assist the Court in formulating such a rule. Counsel for appellant has no interest in unnecessarily expanding the appendix, as long as Mr. Ybarra's right to federal review is preserved, and has attempted to comply with this Court's rules. Opening Br. at 1 n.1. Under the situation as it currently stands, however, counsel for Mr. Ybarra has no choice but to include the exhibits in the appendix, and the state's arguments that this procedure is improper must be rejected.

CONCLUSION

For the reasons state above, and for the substantive reasons presented in the opening brief, appellant submits that this Court should reverse the district court's orders and grant appellant a writ of habeas corpus.

Dated this 31st day of August, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of August, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of August, 2005, she deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** addressed to counsel as follows:

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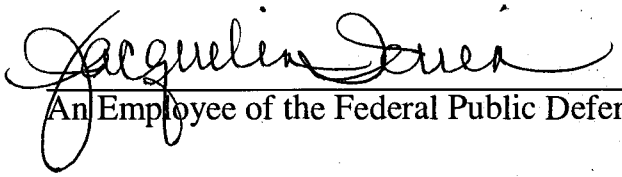

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