IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 43981

FILED

FEB 02 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

This is a petition for rehearing of this court's decision in Ybarra v. Warden.[1]

A rehearing may be warranted when the court has overlooked or misapprehended a material fact or question of law or has overlooked, misapplied, or failed to consider controlling authority.[2] However, a petitioner may neither reargue matters that have been presented in previous briefs nor raise points for the first time.[3]

Ybarra argues that rehearing is warranted for several reasons. First, he contends that this court overlooked or misapprehended his claim that his mental disability precluded his execution. This contention lacks merit. This court considered Ybarra's assertion and rejected it, concluding that the record belied his claim. Here, Ybarra

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[1]Docket No. 43981 (Order Affirming in Part, Reversing in Part and Remanding, November 28, 2005).

[2]See NRAP 40(c)(2).

[3]See NRAP 40(c)(1).

merely reargues this matter and offers no basis for this court's further consideration of it. Therefore, we conclude that rehearing is not warranted on this claim.

Ybarra next argues that this court overlooked controlling federal constitutional authority cited in his opening brief in rejecting his claim that judges who preside over capital cases cannot be impartial because they are subject to removal for unpopular decisions. The only federal case to which Ybarra cited was Tumey v. Ohio.[4] However, Tumey is inapposite here. And he has not proffered any evidence of partiality by any judges due to their election by popular vote. Therefore, we reject this claim as a basis for rehearing.

Ybarra further asserts that this court erred in rejecting his claims in part because he submitted an inadequate appendix on appeal. Although Ybarra's failure to provide pertinent records was not central to our rejection of his claims as procedurally barred, we will address his argument, which is two-fold. First, he contends that NRAP 10(a)(1) recognizes that this court has access to district court records and that NRAP 30(g)(2) contemplates that we will order supplementation of the appendix or will review the original record if justice requires. He argues that no rule exists placing counsel on notice that rejection of a claim could be based on an inadequate record and, thus, he had no opportunity to be heard respecting the new rule this court applied in his case.

Contrary to Ybarra's assertion, we did not institute a new rule in his case. Although NRAP 10(a)(1) and NRAP 30(g)(2) may contemplate

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[4]273 U.S. 510 (1927).

in exceptional cases this court's intervention in securing an adequate record with which to review claims on appeal, this court has long held that the appellant bears the responsibility of providing the materials necessary for this court's review.[5] Moreover, NRAP 30(a) and (b) plainly require an appellant to provide this court with an appendix that includes a number of enumerated items "and any other portions of the record essential to determination of issues raised in appellant's appeal."[6] The rules upon which Ybarra relies in no way abrogate his obligation in this regard.

Second, Ybarra's counsel contends that this court has been vague and contradictory respecting his obligations under the rules relating to the content of appendices. Specifically, he points to this court's opinion in State v. Haberstroh wherein this court admonished counsel for submitting a lengthy appendix and only relying on a few pages to support his claims.[7] We concluded that the several thousands of irrelevant pages submitted in that case violated NRAP 30(b) and cautioned counsel against engaging in similar conduct in the future.[8]

Our guidance in Haberstroh is clear—only documentation cited and relied upon in appellant's opening brief should be included in the

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[5]See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); see also Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000).

[6]NRAP 30(b)(3).

[7]119 Nev. 173, 69 P.3d 676 (2003).

[8]Id. at 179, 69 P.3d at 680-81.

appendix. Additionally, NRAP 30(b) places counsel on notice of what materials are not appropriate for the appendix.[9]

Here, Ybarra complained in his habeas petition that the district court committed an instructional error and made improper comments to the jury. However, despite submitting more than 5,000 pages in his appendix, he failed to include a copy of the challenged instruction or the relevant portion of the transcript so that this court could verify the challenged comments and place them in context. Furthermore, counsel's arguments and actions in seeking rehearing do not even speak to the actual merit of these claims. Were there such merit, this court would expect that counsel would have requested leave on rehearing to supplement the record and proffered the missing documents to substantiate the claims. No rehearing is warranted on these claims.

Finally, Ybarra complains that this court misapprehended his argument respecting the application of procedural default rules. Specifically, he argues that this court overlooked controlling due process and equal protection authority, alleged flaws in this court's analysis in State v. Dist. Ct. (Riker),[10] and cases which he claims demonstrate that

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[9] NRAP 30(b) provides:

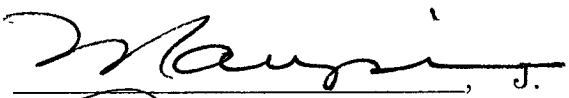
> Except as otherwise required by this Rule, all matters not essential to the decision of issues presented by the appeal shall be omitted. Brevity is required; the court may impose costs upon parties or attorneys who unnecessarily enlarge the appendix.

[10] 121 Nev. ___, 112 P.3d 1070 (2005).

this court continues to apply procedural default rules inconsistently and at our discretion. However, this court considered and simply rejected Ybarra's contention that alleged inconsistencies in this court's application of procedural default rules were routine and warranted abandonment of the rules entirely. Moreover, in Riker we explained that "any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore the rules, which are mandatory."[11] Accordingly, we conclude that rehearing is not warranted on this claim.

For the above reasons, we deny the petition for rehearing.

It is so ORDERED.



_____, J.
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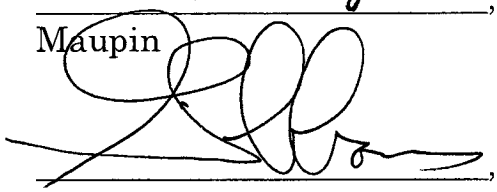

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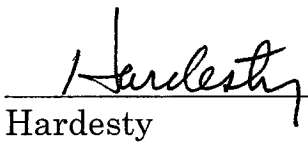

_____, J.
Hardesty

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

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[11]Id. at ___, 112 P.3d at 1077.