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

DEC 19 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

PETITION FOR REHEARING

Petitioner-Appellant Robert Ybarra, Jr., hereby petitions for rehearing of this Court's Order Affirming in Part, Reversing in Part, and Remanding, filed November 28, 2005. Nev. Rev. App. P. 40 (a)(1), (f). The Court has overlooked material facts in the record and material questions of law.

1. This Court's order remands the proceeding for a hearing on the issue of mental retardation. Appellant argued in his opening brief that his IQ scores place him in the mentally retarded range. Opening Br. at 64. Appellant also made clear, however, that the effect of his other disabilities- - including brain damage, which is a condition as much out of his control as retardation, and which reduces his ability to control his behavior, see 4 AA 745, 766, 5 AA 944, 952, 957- - reduces his ability in the same way that retardation does. Opening Br. at 65. The Court's opinion overlooks this argument; and its basis is the same analysis of reduced moral culpability under the Eighth Amendment that the Supreme Court relied upon in Atkins v. Virginia, 536 U.S. 304, 317-321 (2002); see also Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 1195-1198 (2005). This Court's order overlooks this theory and rehearing should be granted to allow this Court to entertain it.

2. The Court's order also rejects Mr. Ybarra's claim that judges who preside over capital trials cannot be constitutionally impartial because they are subject to removal for unpopular decisions. The Court rejects the argument because of the failure to make "any specific

allegations demonstrating actual prejudice." Order at 9. This decision overlooks the controlling constitutional authority cited by appellant. Opening Br. at 43-44. Under federal constitutional standards, the lack of an impartial tribunal is not subject to any analysis of prejudice: it is structural error which is reversible per se. E.g., Tumey v. Ottio, 273, U.S. 51, 535 (1927); see also Neder v. United States, 527 U.S. 1, 8 (1999). Rehearing should be granted to allow this Court to apply the applicable law.

3. The Court's order rejects some claims in part on the ground that supporting documentation for the claims was not included in the appendix. Order at 7, 9. This Court has overlooked material authority on this point, namely the basic due process guarantees of notice and an opportunity to be heard and the legal standards applicable to motions to dismiss.

There is no statute, rule or published decision that suggests that this Court could, or should, reject a claim that is based on the record before the district court on the ground that some documentation is not in the appendix on appeal. The Nevada Rules of Appellate Procedure recognize that the Court has unfettered access to the record in the court below, Rule 10 (a)(1); and the provision for the appendix on appeal expressly provides for monetary sanctions against counsel if the appendix is inadequate, Rule 30 (g)(2), but it does not provide for rejection of an issue on the basis of the inadequacy of the appendix. To the contrary, the rule indicates that the Court will not do so: Nev. R. App. P. 30(g)(2) provides:

> If an appellant's appendix is so inadequate that justice cannot be done without requiring inclusion of documents in the respondent's appendix which should have been in the appellant's appendix, or without the court's independent examination of portions of the original record which should have been in the appellant's appendix, the court may impose monetary sanctions.

That provision clearly contemplates that the Court will order supplementation of the appendix, or will review the original record, if "justice cannot be done" otherwise.

This Court's decision violates elementary principles of due process of law, U.S. Const. Amend. XIV; Nev. Const. Art. 1 § 8, which require notice and an opportunity to be heard before an adverse action is taken. 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"). No existing rule or decision put counsel on notice that rejection of the merits of a constitutional claim could be based on a supposed defect in the appendix. See Ford v. Georgia, 498 U.S. 411, 425 (1991)(default rule cannot bar review of constitutional claim when rule not in existence at the time of supposed default); Liegakos v. Cooke, 928 F.Supp. 799, 805-806 (E.d. Wis. 1996)(state cannot announce new procedural rule and apply it to bar claim in same case). [1] Although the state's briefing attacked virtually every aspect of Mr. Ybarra's opening brief, it made no argument based on the failure to include any documentation in the appendix.[2] Thus Mr. Ybarra had no notice or opportunity to be heard with respect to the new rule this Court applies in this case. Compare State v. Haberstroh, 119 Nev. 173, 69 P.3d 676, 685 (2002) (failure of party to provide supporting argument results in rejection of claim).

On the merits of this point, counsel for Mr. Ybarra must express some frustration with the lack of clarity as to counsel's obligation under the rules. Counsel has previously been personally and publicly castigated at length for including the entire record of the underlying case in the appendix. State v. Haberstroh, 69 P.3d at 680-681. In an attempt to avoid that error, counsel in this case noted that the record of the underlying case would not be included, but that citations to the record would be provided. Opening Br. at 1 n.1. Counsel also noted that the allegations of a petition must be taken as true for the purpose of litigating a motion to dismiss, and thus the citations to the underlying record must be accepted as accurately

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[1] This Court's own unpublished decisions reflect a refusal to bar consideration of claims based on rules not in effect at the time of the supposed default. See Opening Brief at 16, citing Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), 23 AA 5088; Rider v. State, No. 20925, Order (April 30, 1990)(same), 23 AA 5091. Thus in addition to the absence of due process, this Court's action violates the right to equal protection of the laws by applying disparate rules to similarly-situated litigants. E.g., Bush v. Gore, 531 U.S. 98, 106-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562-565 (2000) (per curiam); Myers v. Y1st, 897 F.2d 417, 421 (9th Cir. 1990) (equal protection requires consistent application of state law to similarly-situated litigants).

[2] In fact, the state's argument about the petition and appendix consisted of largely personal attacks on counsel for including too much in the appendix. See Answering Brief at 15-19.

representing the facts in this proceeding. Opening Br. at 1 n.1, 9; Vacation Village v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994); Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984) ("[f]or purposes of the motion, the allegations of the nonmoving party must be accepted as true while the allegation of the moving party which have been denied are assumed to be false.") This Court's order does not address this legal authority at all; and that is an additional basis for granting rehearing, because this Court has apparently overlooked, or has at least not addressed, the legal standard applicable to motions to dismiss.

However the Court decides to resolve this issue, it is fundamentally unfair to Mr. Ybarra for this Court to define the requirements of the appendix rules by trial and error, without providing counsel with any clear guidance on the issue. This is particularly true where, as here, counsel has given notice to the Court and opposing counsel of what is included in the appendix and why, and neither the Court under Rule 30(g), nor opposing counsel, has made any objection. Counsel for Mr. Ybarra is willing to accept any sanction under Rule 30(g) for his mistake, and to provide the individual pages from the record cited in the briefing, or any other material that the Court considers necessary so that "justice. . . be done" in this appeal. Accordingly, rehearing should be granted to address this issue.

4. The Court's order rejects Mr. Ybarra's attacks on the validity of the procedural default rules it applies, relying on the analysis in State v. District Court, (Riker), 121 Nev._____, 112 P.3d 1070, 1076-1082 (2005); Order at 3, which was decided after the filing of the opening brief in this case. In the reply brief, Mr. Ybarra discussed the flaws in the Riker analysis and cited the cases that continue to demonstrate that the default rules are not consistently applied and are still dependent upon this Court's exercise of discretion. Reply Br. at 1-5. The Court's order does not address any of these arguments, and rehearing should be granted because this Court has overlooked the controlling due process and equal protection authority that demonstrates the constitutional infirmities in the court's analysis in Riker. Appellant, of course, has no ability to force the court to address his arguments, see Smith v. Digmon, 434 U.S. 332, 333-334 (1978) (per curiam); but the fact that neither the

state nor this Court will provide any analysis of these claims simply reinforces the inference that there is no way to harmonize this Court's inconsistent dispositions. However this general issue is resolved, two particular issues should be addressed on rehearing.

First, in its sua sponte analysis of the unpublished dispositions in Riker, the Court rejected the argument that Stevens v. State, No.24138, Order of Remand (July 8, 1994), 22 AA 4752, showed that the default rules were applied inconsistently. It reasoned that it has never limited the definition of "cause" in appointment of counsel situations to proceedings in which appointment of counsel was mandatory. Riker, 112 P.3d at 1081. This analysis establishes that the definition of cause remains fluid and discretionary, since the cause found in Stevens cannot be included in the "impediment external to the defense" definition of cause normally used by the court. See Crump v. Warden, 113 Nev. 293, 302, 934 P.3d 247 (1997). Similarly, the Court has expanded the definition of the "miscarriage of justice" exception to the default rules to include the prejudicial use of inapplicable aggravating factors. Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440 (2002).

In this case, Mr. Ybarra is an inmate whose brain damage and other disabilities were not adequately litigated throughout the course of his legal proceedings. If the finding of one invalid aggravating factor out of five can constitute a miscarriage of justice sufficient to warrant review on the merits, see State v. Haberstroh, 69 P.3d at 683, Mr. Ybarra's current evidence of the nature and effect of his disabilities should establish the same sort of miscarriage of justice, since these disabilities equally affect the weighing of aggravating and mitigating circumstances and the ultimate selection of his punishment. Similarly, the failure of counsel to identify and raise all of Mr. Ybarra's constitutional claims over the lengthy course of these proceedings is as egregious as the failure to appoint counsel in Stevens. This Court's evolving standard of cause should extend to Mr. Ybarra's case, and rehearing should be granted to assess the effect of Stevens and Leslie.

Second, this Court has overlooked the cause standard of Nev. Rev. Stat. § 34.726. Although the Court's order restates its devotion to the "mandatory" default rules under the statutes, Order at 3, it continues to ignore the specific language of § 34.726 (1), which

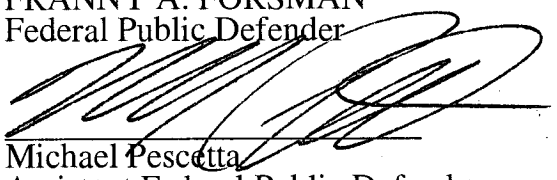
provides that cause exists for purposes of that section if the delay is not "the fault of the petitioner," a standard that is different from the "external impediment" standard of cause. See Opening Br. at 13 n. 10. There is nothing in the record before this Court suggesting that any delay was Mr. Ybarra's own "fault;" neither the state nor the court below cited any such evidence; and Mr. Ybarra alleged that any delay was not his fault but was attributable to prior counsel. 1 AA 6-7. Under these circumstances, rehearing should be granted because this Court has disregarded the specific statutory language of § 34.726(1).

5. For these reasons, appellant Ybarra requests that this Court grant rehearing and address the issues raised in this petition.

Dated this 16th day of December, 2005.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of December, 2005, she deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing **PETITION FOR REHEARING**, addressed to counsel as follows:

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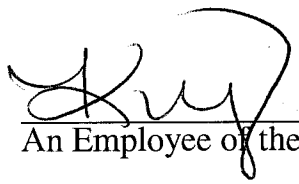

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December 16, 2005

Clerk of Nevada Supreme Court
Supreme Court of the State of Nevada
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Carson City, NV 89701-4702

Re: Ybarra v. McDaniel, et al.
Case No. 43981

Dear Madam:

Enclosed for filing, please find an original Petition for Rehearing and ~~four~~ Six copies for filing in the above-referenced matter. You will also find our self-addressed postage prepaid envelope for return of the file-stamped copy.

Thank you in advance for your assistance with regard to this matter. Should you have any questions, please do not hesitate to contact me at 702-388-5173.

Yours truly,

Katrina Manzi
Capital Habeas Legal Secretary

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Enclosures