ORIGINAL

Case No. HC-0303002

Dept. No. 1

FILED

04 SEP -7 PM 2:17

BONNIE M. RAU
WHITE PINE COUNTY CLERK
BY Campbell
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

FILED

SEP 21 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ROBERT YBARRA, JR.,

Petitioner,

vs.

E.K. McDANIEL, Warden, et al.

Respondents.

No. 43981

NOTICE OF APPEAL

(Death Penalty Habeas Corpus Case)

NOTICE is hereby given that the Defendant, Robert Ybarra, appeals to the Nevada Supreme Court the Order Granting Motion to Dismiss Petition for Writ of Habeas Corpus entered in this action on July 20, 2004. Notice of Entry of Order of the foregoing Order Granting Motion to Dismiss Petition for Writ of Habeas Corpus was mailed August 11, 2004.

FURTHER NOTICE is hereby given that Mr. Ybarra also appeals to the Nevada Supreme

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RECEIVED

SEP 20 2004

CLERK OF SUPREME COURT
By DEPUTY CLERK

04-17509

Court the Order Striking Certain Exhibits Submitted by Petitioner in Support of His Petition for Writ of Habeas Corpus entered August 16, 2004.

Dated this 30 day of September 2004.

FRANNY FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender

CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 3 day of September 2004, she caused to be deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing **NOTICE OF APPEAL** addressed to the parties as follows:

White Pine County District Attorney's Office
Richard W. Sears, District Attorney
801 Clark Street, Suite 3
Ely, Nevada 89301

Brian Sandoval
Attorney General
Robert E. Wieland
Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

Donna Jack
An employee of the Federal Public Defender

ORIGINAL

Case No. HC-0303002

Dept. No. 1

FILED

04 SEP -7 PM 2:18

WHITE PINE COUNTY CLERK

BY Campbell DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

ROBERT YBARRA, JR.,

Petitioner,

vs.

E.K. McDANIEL, Warden, et al.

Respondents.

CASE APPEAL STATEMENT

(Death Penalty Habeas Corpus Case)

1. **Name of petitioner filing this case appeal statement:**

Robert Ybarra, Jr.

2. **Identify the judge issuing the order appealed from:**

Hon. Steve Dobrescu

3. **All parties to the proceedings in the district court:**

Same as in caption; State of Nevada is real party in interest.

4. **All parties involved in this appeal:**

Same as in caption; State of Nevada is real party in interest.

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5. **Set forth the name, law firm, address and telephone number of all counsel on appeal and party or parties whom they represent:**

Richard W. Sears
White Pine County District Attorney
Ely, Nevada 89301
(775) 289-8828
and
Brian Sandoval
Attorney General
Robert E. Wieland
Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775)-850-4115

Counsel for Warden, and State of Nevada

Michael Pescetta
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, NV 89101
(702) 388-6577

Counsel for Defendant/Petitioner, Robert Ybarra

6. **Whether petitioner/appellant was represented by appointed or retained counsel in the district court:**

Petitioner/Appellant was represented by counsel appointed in the pending federal proceedings, Ybarra v. McDaniel, Case No. CV-N-00-233-ECR(RAM).

7. **Whether petitioner/appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:**

No; Petitioner/Appellant was granted leave to proceed *in forma pauperis* in the pending federal proceeding, Ybarra v. McDaniel, Case No. CV-N-00-233-ECR(RAM), on July 28, 2000.

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8. **Date proceedings commenced in the district court (e.g., date complaint, indictment, information or petition was filed):**

Petitioner for Writ of Habeas Corpus (Post-Conviction) was filed March 7, 2003.

Dated this 3d day of September 2004.

FRANNY FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender

CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 3 day of September 2004, she caused to be deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing **CASE APPEAL STATEMENT** addressed to the parties as follows:

White Pine County District Attorney's Office
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Ely, Nevada 89301

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Attorney General
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Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

An employee of the Federal Public Defender

Case #: HC-030-30-02 09/14/04

Date Filed: 03/06/03 Department: 02

Case Type: HABCRP SPEC PROC/HABEAS CORPUS

Title/Caption: ROBERT YBARRA, JR.,
Petitioner
-vs-
E.K. McDaniel, Warden, et al,
Respondents

COMMENT: CRIMINAL FILE 1511 IS IN THIS FILE

Parties:	Name(s)	Attorney(s)
Plaintiff(s)	YBARRA, ROBERT JR.	
Defendant(s)	MCDANIEL, E.K.	

Filings:

Date	Pty	Action	Fees
03/06/03		PETITION FOR WRIT OF HABEAS CORPUS	
03/06/03		EXHIBITS VOLUMES 1THRU 15	
03/21/03		DISQUALIFICATION (JUDGE PAPEZ)	
03/21/03		NOTICE OF DEPARTMENT REASSIGNMENT	
03/25/03		AFFIDAVIT OF SERVICE	
04/01/03		ORDER TO RESPOND	
04/02/03		AFFIDAVIT OF SERVICE	
04/11/03		NOTICE OF REPRESENTATION OF RESPONDENTS	
06/20/03		ORDER GRANTING MOTION FOR ENLARGEMENT OF TIME	
06/20/03		AFFIDAVIT OF SERVICE	
07/14/03		ORDER GRANTING MOTION FOR ENLARGMENT OF TIME	
07/16/03		AFFIDAVIT OF SERVICE	
08/22/03		MOTION FOR ENLARGMENT OF TIME (THIRD REQUEST)	
09/04/03		ORDER GRANTING MOTION FOR ENLARGMENT OF TIME	
09/04/03		AFFIDAVIT OF SERVICE	
10/06/03		RETURN	
10/06/03		MOTION TO DISMISS	
10/13/03		INDEX OF EXHIBITS IN SUPPORT OF MOTION TO DISMISS VOL I OF III	
10/13/03		INDEX OF EXHIBITS IN SUPPORT OF MOTION TO DISMISS VOL II OF II	
10/13/03		INDEX OF EXHIBITS IN SUPPORT OF MOTION TO DISMISS VOL III OF I	
11/21/03		OPPOSITION TO MOTION TO DISMISS	
11/21/03		OPPOSITION TO MOTION TO DISMISS	
12/01/03		MOTION FOR ENLARGMENT OF TIME (FIRST REQUEST)	
12/08/03		ORDER	
12/08/03		AFFIDAVIT OF SERVICE	
01/14/04		MOTION FOR ENLARGMENT OF TIME (SECOND REQUEST)	
01/14/04		NOTICE OF CHANGE OF ADDRESS	
01/14/04		TO JUDGE WITH ORDER	
01/15/04		ORDER	
01/15/04		AFFIDAVIT OF SERVICE	
02/12/04		REPLY TO OPPOSITION TO MOTION TO DISMISS	
07/20/04		ORDER GRANTING MOTIN TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS	
07/20/04		AFFIDAVIT OF SERVICE	
08/02/04		MOTION FOR ENLARGEMENT OF TIME (FIRST REQUEST)	
08/02/04		RESPONSE TO COURT'S ORDER	

08/02/04	LIST OF PETITIONER'S EXHIBITS TO RESPONSE TO COURT'S ORDER
08/06/04	AFFIDAVIT OF SERVICE
08/06/04	APPLICATION FOR ISSUANCE OF WARRANT OF EXECUTION TO JUDGE
08/06/04	WARRANT OF EXECUTION OF PENALTY OF DEATH TO JUDGE
08/06/04	AFFIDAVIT OF SERVICE TO JUDGE
08/11/04	NOTICE OF ENTRY OF ORDER
08/11/04	AFFIDAVIT OF MAILING
08/11/04	ORDER GRANTING IN PART RESPONDENT'S MOTION FOR ENLARGEMENT OF TIME
08/16/04	ORDER STRIKING CERTAIN EXHIBITS SUBMITTED BY PETITIONER IN SUPPORT OF HIS PETITION FOR WRIT OF HABEAS CORPUS
08/16/04	AFFIDAVIT OF SERVICE
09/03/04	MEMORANDUM OF COSTS

FILED
04 JUL 20 AM 11:20
DONNA M. RATH
WHITE PINE COUNTY CLERK
BY D. Jones
DEPUTY

Case No. HC-0303002

Dept No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

****

ROBERT YBARRA, JR.,

Petitioner,

-vs-

E.K. McDANIEL,

Respondent.

ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT I
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

On September 28, 1979, sixteen (16) year old Nancy Griffith and her friend, Johnna Cordova, met Robert Ybarra at a gas station/convenience store in Ely, Nevada. Ybarra invited the two girls to ride around with him in his truck. The girls agreed and got into Ybarra's truck. A short while later, Johnna was dropped off and Nancy remained in the vehicle with Ybarra. Although the two girls planned to meet later in the evening, Johnna never saw Nancy again.

The next morning two (2) fishermen were traveling on Thirty Mile Road, a rural road approximately thirty (30) miles from Ely, on their way to fish at Ruby Lake. They noticed a woman's purse and signs of a struggle on the road. Farther up the road they discovered the charred living remains of Nancy Griffith lying by the side of the road.

Most of her body was horribly burned, her hair was burned off, her eyes were swollen shut and her face was unrecognizable. There was a deep gash in her left shoulder, and she was wearing only socks.

The fishermen covered Nancy with their shirts, drove to Ely and returned with a deputy sheriff. The deputy knew Nancy but was unable to recognize her. Nancy said she was kidnaped, beaten, raped and set on fire by a man in a red truck. She said the man worked north of where she was found. Nancy also told an Emergency Medical Technician that she had been kicked.

Nancy was rushed to the hospital in Ely and then airlifted to a burn unit in Salt Lake City, Utah. She died there shortly after her arrival.

An autopsy on September 30, 1979, revealed that semen was present in her vagina which indicated that she had sexual intercourse within the previous two or three days. She had suffered trauma to the genital area and a severe blow to the head. Nancy's death was caused by burns which seared her respiratory passages and charred eighty percent (80%) of her body surface. The burn pattern on her body indicated that she had been doused with a flammable liquid and lit on fire while she was still conscious and either sitting or standing.

Although Nancy had been beaten, raped, set on fire and left for dead, she managed to crawl a quarter-mile to where she was found. Pieces of charred flesh fell off her and marked the trail to the burn site. Investigator's found the skin from one of her hands complete with fingernails. At the burn site, investigators found evidence of a

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

struggle, a gas can and shards of a broken mirror.

Robert Ybarra worked at a drill site further up Thirty Mile Road and he and a co-worker were driving back to Ely on September 29, 1979, when they came upon the investigation. Deputies questioned the men and both voluntarily left boot prints for the officers.

Investigators quickly matched Ybarra's boot print to prints at the burn site. Nancy's blood and hair from her head was found imbedded in his boots. His truck tires matched those at the scene. The mirror shards contained both Nancy and Ybarra's fingerprints, and the mirror was from Ybarra's trailer. Ybarra's fingerprints were found on the gas can, and Nancy's fingerprints were found on a beer can in Ybarra's trailer. Prior to meeting Nancy, Ybarra had told others that he was going to have sex that night and was not going to pay for it.

The fact that Ybarra drove Nancy Griffith to a remote area outside of Ely, beat her, raped her and then while she was still alive poured gas on her and lit her on fire has never been questioned. Despite the horrific nature of what Ybarra did to Nancy Griffith, he continues to abuse the legal system by filing petitions such as the pending matter.

PROCEDURAL HISTORY

On October 6, 1979, Ybarra was charged with first-degree murder, first-degree kidnaping, battery with intent to commit sexual assault and sexual assault. A preliminary hearing was held on October 30, 1979. A jury trial commenced on March 31,

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

1980, and Ybarra moved for a change of venue. The motion was denied and Ybarra appealed to the Nevada Supreme Court, which affirmed the lower court ruling on October 8, 1980.

On September 22, 1980, a hearing was held to consider Ybarra's competence to stand trial. After the hearing Ybarra was transferred to a state mental facility until he regained sufficient ability to consult with his attorney and assist in his defense. Ybarra was returned to Ely in the spring of 1981 after several doctors had given their opinion that Ybarra was competent to stand trial. The trial resumed on June 9, 1981. The jury found Ybarra guilty on all counts, and after a separate penalty hearing, imposed the death sentence. Ybarra appealed his conviction and sentences and on March 3, 1984, the Nevada Supreme Court affirmed the conviction and sentence.[1] A petition for rehearing was denied and a petition for writ of certiorari was denied by the United Sates Supreme Court on February 25, 1985.

On March 19, 1985, Ybarra filed a petition seeking post-conviction relief. A supplemental petition was filed in June 1985 and a hearing was held on September 16-17, 1985. On July 9, 1986 this court, the Honorable Merlyn H. Hoyt presiding, denied post-conviction relief. The Nevada Supreme Court affirmed on January 27, 1987.[2]

On March 10, 1988, Ybarra filed a Petition for Writ of Habeas Corpus in the First Judicial District Court of the State of Nevada. The petition was dismissed on

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[1]Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

[2]Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

December 30, 1988, and the Nevada Supreme Court affirmed the dismissal on June 29, 1989. Ybarra then filed a federal habeas petition on August 14, 1989. A statement of additional claims was filed on May 14, 1990, and a second statement of additional claims was filed on December 14, 1990. The Federal Court dismissed the petition without prejudice on March 31, 1993.

Ybarra filed a petition for writ of habeas corpus in the above entitled court on April 26, 1993 and a supplemental petition on February 5, 1995. Respondents filed a motion to dismiss on October 17, 1997. On June 29, 1998 the court entered a comprehensive order which denied Ybarra any relief. Ybarra appealed and the Nevada Supreme Court dismissed the appeal on July 6, 1999.

Ybarra filed the instant petition on March 6, 2003. Respondents filed a motion to dismiss on October 6, 2003, which is opposed by Ybarra. The Court has reviewed the record and finds that additional briefing or argument is not necessary.

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

DISCUSSION

Ybarra raises fifty (50) claims (including subparts) in the instant petition. The eighty nine (89) page petition is accompanied by fifteen (15) volumes of exhibits which measure approximately eighteen (18) inches high. Respondent has moved to dismiss the petition on numerous grounds.[3]

Form of Petition - NRS 34.730(2)

Respondent argues initially that the petition does not answer questions 17,

[3]NRS 34.730(2); 34.726; 34.810(1)(b); 34.810(2); 34.800 and laches.

18 or 19 as spelled out in the statute. (NRS 34.735). Ybarra agrees that the petition does not mirror the statutory form, but argues the petition is in substantial compliance. Although the petition does list grounds that were previously raised, the petition does not comply with the statute by explaining why such claims are being raised again.

In any event, because the Court finds the dismissal is proper on other grounds, the Court need not resolve whether the petition is in substantial compliance with the statute.

Application of Default Rules

Ybarra argues that this Court cannot apply default rules to his petition because the Nevada Supreme Court has applied the rules and exceptions to the rules in an inconsistent manner. This argument was raised and rejected in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). Ybarra's attempts to update this argument are unpersuasive.

The following claims or variations thereof were previously raised on direct appeal and rejected by the Nevada Supreme Court in Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

> Claim 2 (Instructions regarding mitigating and aggravating circumstances); Claim 11(M)(admission of probation order to prove aggravation); Claim 14 (change of venue appeal denied him a speedy trial); Claim 19 (improper evidence of prior felony); Claim 20 (improper proof of prior felony) and Claim 27 (gruesome photo of victim).

The following claims or variations thereof were raised in Ybarra's 1985 post

conviction state habeas proceeding, and rejected on appeal in Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

> Claim 8 (admission of victim's statements); Claim 9 (instruction on insanity); Claim 10 (concession of guilt by counsel); Claim 11(B) victim's statements); Claim 11(C) (Ybarra's competence after release from Lake's Crossing); Claim 11(D) (voir dire on insanity); Claim 11(E) (lack of objection to Ybarra's medication); Claim 11(F) (lack of investigation regarding sanity/ competence); Claim 11(G) (lack of defense experts); Claim 11(H) (prosecutional misconduct); Claim 11(I) (defense counsel invited error); Claim 11(J) (faulty voir dire); Claim 11(K) (lack of objection to instructions on elements and aggravators); Claim 11(L) (lack of objection to insanity instructions); Claim 11(M) (lack of objection to evidence of prior felony); Claim 11(O) (trial counsel's ineffectiveness was prejudicial); Claim 13 (prosecutorial misconduct); Claim 15 (Ybarra was improperly medicated at trial); Claim 16 (lack of competency hearing after Ybarra's release from Lake's Crossing); Claim 17 (Ybarra's competence at trial); Claim 23 (Nevada Supreme Court's review of death penalty cases is inadequate); Claim 26 (double jeopardy); and Claim 28 (cumulative error).

At trial, counsel for Ybarra sought a change of venue which was denied by the District Court. The Nevada Supreme Court dismissed the appeal which challenged the lower court order. Ybarra v. State, Case No. 12624, October 10, 1980. Thus Claim 4 has been previously raised and rejected.

NRS 34.810(1)(b)

As noted above, many of Ybarra's claims have been raised previously and rejected by the Nevada Supreme Court. This Court will not consider such claims in this

petition, as the prior determinations are now the law of the case. To the extent Ybarra raises any new grounds, he must satisfy the requirements of NRS 34.810(1)(b), which provides as follows:

> "1. The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief;
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner."

In an effort to show cause for the failure to raise the new grounds in prior proceedings, Ybarra argues that his trial counsel, appellate counsel, and post-conviction counsel were ineffective. This same argument was previously presented to this Court and rejected. See Order filed June 29, 1998, Ybarra v. E.K. McDaniel, HC-9304009. On appeal, the Nevada Supreme Court affirmed. In so doing, the court specifically found that Ybarra had no right to effective assistance of second post-conviction counsel, thus any alleged errors by that counsel do not excuse the failure to previously raise the new grounds alleged in his petition. See Order Dismissing Appeal, Ybarra v. Warden, No. 32762, filed July 6, 1999.

The Nevada Supreme Court also noted in its order that Ybarra could not overcome procedural default because he cold not prove cause and prejudice. The identical analysis applies in the instant case, and Ybarra has again failed to show

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

cause or prejudice.

NRS 34.810(2)

NRS 34.810(2) provides as follows:

> "2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits, or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

Subsection 3 of NRS 34.810 provides that

> ". . . the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
> (b) Actual prejudice to the petitioner."

Despite the fact that Ybarra has previously raised many of the claims presented in this petition, and the claims have been determined on the merits, he makes no showing of good cause to present the claims again or actual prejudice.[4]

As for any new and different claims raised in this petition, good cause and actual prejudice must be shown. Just as Ybarra failed to satisfy the requirements of NRS 34.810(1)(B), he has also failed to meet the requirements under NRS 38.810(3), and the Court finds that the failure to assert these claims in a prior petition constitutes an abuse of the writ.

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[4] In fact, no explanation is even offered as to why claims which have been determined on the merits are being presented again.

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT I
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

NRS 34.800

In the motion to dismiss, Respondent referred to NRS 34.800 and specifically pled laches. Subsection (1)(b) of the statute provides that a petition may be dismissed if the delay in the filing of the petition

> "(b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence."

The fact that this petition was filed more than five (5) years after the decision on direct appeal raises a rebuttable presumption of prejudice to the State.[5]

Ybarra has offered nothing to rebut the presumption of prejudice, nor has he shown that a fundamental miscarriage of justice has occurred. A fundamental miscarriage of justice can be demonstrated by showing that a defendant is "actually innocent of the crime or ineligible for the death penalty.[6]

The bottom line is that Ybarra is guilty of the crime and deserving of the penalty imposed. Nothing presented in this petition changes that fact.[7]

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[5] NRS 34.800(2). The Court notes that this petition was filed nineteen (19) years after the decision in Ybarra v. State, 100 Nev. 167 (1984).

[6] Leslie v. Warden, 118 Nev. Adv. Op. 78, 59 P.3d 440, 445 (2002); citing Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

[7] In Ybarra v. State, 103 Nev. 8 (1987) the Nevada Supreme Court noted at page 16 that evidence of Ybarra's guilt was "overwhelming and the death penalty is particularly appropriate. . ."

SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

NRS 34.726

Unless good cause is shown for the delay, NRS 34.726 requires that a petition for post-conviction relief be filed within one (1) year of the issuance of remittur by the Nevada Supreme Court of the direct appeal. Good cause exists if the petitioner demonstrates to the satisfaction of the Court

> "(a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner."[8]

Ybarra does not dispute that this petition is untimely. Instead, he first argues that NRS 34.726 does not apply to this petition because the statute was enacted in 1993, and until Pellegrini v. State[9] was decided there was no binding authority that NRS 34.726 would apply to successive petitions. In Pellegrini the court held that NRS 34.726 would apply to successive petitions filed more than one-year after the effective date of the statute (January 1, 1993). However, the one-year grace period did not apply to Pellegrini because his successive was filed in 1999. Pellegrini is on all fours with the instant case.

Instead of acknowledging that Pellegrini applies to this case, Ybarra argues that his petition is timely because it was filed within one year of remittur of the Pellegrini decision. This argument is without merit.

In a final effort to show good cause, Ybarra argues that the delay was not

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[8]NRS 34.726(1)(a) & (b).

[9]117 Nev. 860, 34 P.3d 519 (2001).

his fault, meaning he "personally." This argument is also without merit. The logical conclusion of this position would be that so long as a petitioner was represented by counsel, the delay would rarely be the fault of the petitioner. In addition, this argument was presented previously by Ybarra in his appeal of the 1998 order entered by Judge Hoyt.

The Court also notes that Ybarra's claim that he did not have notice that NRS 34.726 would apply to successive petitions ignores the fact that prior to the enactment of NRS 34.726 a virtually identical statute was found in NRS 177.315(3). NRS 177.315(3) was specifically applied to a successive petition in Deutscher v. Warden, 102 Nev. 388, 724 P.2d 213 (1986).

It has now been eighteen (18) years since Judge Hoyt denied Ybarra's first application for post-conviction relief. In the 1986 order, Judge Hoyt wrote:

> "Defense counsel's representation of the Petitioner, ROBERT YBARRA, did not cause the conviction or the sentence of death, nor were these the result of errors by the prosecution or the Court. The plain truth of the matter is that the facts demonstrated through the evidence clearly portray the criminal conduct of MR. YBARRA. The facts in this case are unchangeable and forever fixed in time; no amount of desire, preparation or expertise by others could ever change them. The twelve (12) jurors heard and considered all of the evidence presented by both sides at both the trial and penalty hearing phase of the case. They applied the law to the facts and made their determination as our system of Justice requires."

Robert Ybarra committed this horrible crime nearly twenty-five (25) years ago. Despite overwhelming evidence of guilt, Ybarra and his various counsel continue

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

to misuse limited judicial resources.

The instant petition is particularly troublesome. Counsel for Ybarra raises dozens of claims which have been previously considered in written opinions by the Nevada Supreme Court. No explanation is even tendered as to why these matters are being presented again. In addition, the thousands of pages of exhibits submitted with the petition has placed a significant burden on the Court. Only a handful of the exhibits are even referred to in the petition.

Based on the foregoing, the Court finds and concludes as follows:

1. Ybarra has failed to allege sufficient cause to justify the failure to present his new or different claims in a prior proceeding.

2. The failure of Ybarra to previously raise the new or different claims constitutes an abuse of the writ.

3. Ybarra has failed to allege anything to rebut the presumption of prejudice in NRS 34.800.

4. Ybarra has failed to allege sufficient prejudice or a miscarriage of justice to excuse his failure to bring his new or different claims in a prior, timely proceeding.

5. Ybarra's claims are barred by the application of NRS 34.726, NRS 34.800, NRS 34.810(1)(b) and NRS 34.810(2).

6. The claims presented in this petition which have been previously presented were brought without reasonable ground or to harass.

Good cause appearing;

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is **GRANTED**.

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

IT IS HEREBY FURTHER ORDERED that the instant Petition for Writ of Habeas Corpus is **DISMISSED**.

IT IS HEREBY FURTHER ORDERED that Respondent file and serve on or before August 2, 2004, a verified statement of costs and attorney fees incurred in this action with sufficient detail to enable the Court to consider an award of attorney fees.

IT IS HEREBY FURTHER ORDERED that counsel for Ybarra shall on or before August 2, 2004, show cause as to why the Court should not order stricken all Petitioner's exhibits which are not specifically referred to in the instant petition.

DATED this 20TH day of July, 2004.

DISTRICT COURT JUDGE

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

FILED
04 AUG 11 AM 10:53
DONNA M. BATH
WHITE PINE COUNTY CLERK
BY L. Jones
DEPUTY

Case No: HC-0303002
Dept. No: 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE

OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

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ROBERT YBARRA, JR.,
Petitioner,

vs.

Notice of Entry of Order

E.K. McDANIEL, WARDEN, ESP,
Respondent.

PLEASE TAKE NOTICE that on July 20, 2004, the Court entered a decision or Order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or Order of this Court. If you wish to appeal, you must file a notice of Appeal with the Clerk of this Court within 33 days after the date this notice is mailed to you. This notice was mailed on August 11, 2004.

Dated this 11th Day of August, 2004

DONNA M. BATH
Clerk of the Court

L. Jones
Deputy

FILED

04 JUL 20 AM 11:20

WHITE PINE COUNTY CLERK

BY H Jones DEPUTY

Case No. HC-0303002

Dept No. 2

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

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ROBERT YBARRA, JR.,

Petitioner,

-vs-

E.K. McDANIEL,

Respondent.

ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

On September 28, 1979, sixteen (16) year old Nancy Griffith and her friend, Johnna Cordova, met Robert Ybarra at a gas station/convenience store in Ely, Nevada. Ybarra invited the two girls to ride around with him in his truck. The girls agreed and got into Ybarra's truck. A short while later, Johnna was dropped off and Nancy remained in the vehicle with Ybarra. Although the two girls planned to meet later in the evening, Johnna never saw Nancy again.

The next morning two (2) fishermen were traveling on Thirty Mile Road, a rural road approximately thirty (30) miles from Ely, on their way to fish at Ruby Lake. They noticed a woman's purse and signs of a struggle on the road. Farther up the road they discovered the charred living remains of Nancy Griffith lying by the side of the road.

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Most of her body was horribly burned, her hair was burned off, her eyes were swollen shut and her face was unrecognizable. There was a deep gash in her left shoulder, and she was wearing only socks.

The fishermen covered Nancy with their shirts, drove to Ely and returned with a deputy sheriff. The deputy knew Nancy but was unable to recognize her. Nancy said she was kidnaped, beaten, raped and set on fire by a man in a red truck. She said the man worked north of where she was found. Nancy also told an Emergency Medical Technician that she had been kicked.

Nancy was rushed to the hospital in Ely and then airlifted to a burn unit in Salt Lake City, Utah. She died there shortly after her arrival.

An autopsy on September 30, 1979, revealed that semen was present in her vagina which indicated that she had sexual intercourse within the previous two or three days. She had suffered trauma to the genital area and a severe blow to the head. Nancy's death was caused by burns which seared her respiratory passages and charred eighty percent (80%) of her body surface. The burn pattern on her body indicated that she had been doused with a flammable liquid and lit on fire while she was still conscious and either sitting or standing.

Although Nancy had been beaten, raped, set on fire and left for dead, she managed to crawl a quarter-mile to where she was found. Pieces of charred flesh fell off her and marked the trail to the burn site. Investigator's found the skin from one of her hands complete with fingernails. At the burn site, investigators found evidence of a

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struggle, a gas can and shards of a broken mirror.

Robert Ybarra worked at a drill site further up Thirty Mile Road and he and a co-worker were driving back to Ely on September 29, 1979, when they came upon the investigation. Deputies questioned the men and both voluntarily left boot prints for the officers.

Investigators quickly matched Ybarra's boot print to prints at the burn site. Nancy's blood and hair from her head was found imbedded in his boots. His truck tires matched those at the scene. The mirror shards contained both Nancy and Ybarra's fingerprints, and the mirror was from Ybarra's trailer. Ybarra's fingerprints were found on the gas can, and Nancy's fingerprints were found on a beer can in Ybarra's trailer. Prior to meeting Nancy, Ybarra had told others that he was going to have sex that night and was not going to pay for it.

The fact that Ybarra drove Nancy Griffith to a remote area outside of Ely, beat her, raped her and then while she was still alive poured gas on her and lit her on fire has never been questioned. Despite the horrific nature of what Ybarra did to Nancy Griffith, he continues to abuse the legal system by filing petitions such as the pending matter.

PROCEDURAL HISTORY

On October 6, 1979, Ybarra was charged with first-degree murder, first-degree kidnaping, battery with intent to commit sexual assault and sexual assault. A preliminary hearing was held on October 30, 1979. A jury trial commenced on March 31,

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1980, and Ybarra moved for a change of venue. The motion was denied and Ybarra appealed to the Nevada Supreme Court, which affirmed the lower court ruling on October 8, 1980.

On September 22, 1980, a hearing was held to consider Ybarra's competence to stand trial. After the hearing Ybarra was transferred to a state mental facility until he regained sufficient ability to consult with his attorney and assist in his defense. Ybarra was returned to Ely in the spring of 1981 after several doctors had given their opinion that Ybarra was competent to stand trial. The trial resumed on June 9, 1981. The jury found Ybarra guilty on all counts, and after a separate penalty hearing, imposed the death sentence. Ybarra appealed his conviction and sentences and on March 3, 1984, the Nevada Supreme Court affirmed the conviction and sentence.[1] A petition for rehearing was denied and a petition for writ of certiorari was denied by the United Sates Supreme Court on February 25, 1985.

On March 19, 1985, Ybarra filed a petition seeking post-conviction relief. A supplemental petition was filed in June 1985 and a hearing was held on September 16-17, 1985. On July 9, 1986 this court, the Honorable Merlyn H. Hoyt presiding, denied post-conviction relief. The Nevada Supreme Court affirmed on January 27, 1987.[2]

On March 10, 1988, Ybarra filed a Petition for Writ of Habeas Corpus in the First Judicial District Court of the State of Nevada. The petition was dismissed on

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[1]Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

[2]Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

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December 30, 1988, and the Nevada Supreme Court affirmed the dismissal on June 29, 1989. Ybarra then filed a federal habeas petition on August 14, 1989. A statement of additional claims was filed on May 14, 1990, and a second statement of additional claims was filed on December 14, 1990. The Federal Court dismissed the petition without prejudice on March 31, 1993.

Ybarra filed a petition for writ of habeas corpus in the above entitled court on April 26, 1993 and a supplemental petition on February 5, 1995. Respondents filed a motion to dismiss on October 17, 1997. On June 29, 1998 the court entered a comprehensive order which denied Ybarra any relief. Ybarra appealed and the Nevada Supreme Court dismissed the appeal on July 6, 1999.

Ybarra filed the instant petition on March 6, 2003. Respondents filed a motion to dismiss on October 6, 2003, which is opposed by Ybarra. The Court has reviewed the record and finds that additional briefing or argument is not necessary.

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DISCUSSION

Ybarra raises fifty (50) claims (including subparts) in the instant petition. The eighty nine (89) page petition is accompanied by fifteen (15) volumes of exhibits which measure approximately eighteen (18) inches high. Respondent has moved to dismiss the petition on numerous grounds.[3]

Form of Petition - NRS 34.730(2)

Respondent argues initially that the petition does not answer questions 17,

[3]NRS 34.730(2); 34.726; 34.810(1)(b); 34.810(2); 34.800 and laches.

18 or 19 as spelled out in the statute. (NRS 34.735). Ybarra agrees that the petition does not mirror the statutory form, but argues the petition is in substantial compliance. Although the petition does list grounds that were previously raised, the petition does not comply with the statute by explaining why such claims are being raised again.

In any event, because the Court finds the dismissal is proper on other grounds, the Court need not resolve whether the petition is in substantial compliance with the statute.

Application of Default Rules

Ybarra argues that this Court cannot apply default rules to his petition because the Nevada Supreme Court has applied the rules and exceptions to the rules in an inconsistent manner. This argument was raised and rejected in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001). Ybarra's attempts to update this argument are unpersuasive.

The following claims or variations thereof were previously raised on direct appeal and rejected by the Nevada Supreme Court in Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

> Claim 2 (Instructions regarding mitigating and aggravating circumstances); Claim 11(M)(admission of probation order to prove aggravation); Claim 14 (change of venue appeal denied him a speedy trial); Claim 19 (improper evidence of prior felony); Claim 20 (improper proof of prior felony) and Claim 27 (gruesome photo of victim).

The following claims or variations thereof were raised in Ybarra's 1985 post

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conviction state habeas proceeding, and rejected on appeal in Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

> Claim 8 (admission of victim's statements); Claim 9 (instruction on insanity); Claim 10 (concession of guilt by counsel); Claim 11(B) victim's statements); Claim 11(C) (Ybarra's competence after release from Lake's Crossing); Claim 11(D) (voir dire on insanity); Claim 11(E) (lack of objection to Ybarra's medication); Claim 11(F) (lack of investigation regarding sanity/ competence); Claim 11(G) (lack of defense experts); Claim 11(H) (prosecutional misconduct); Claim 11(I) (defense counsel invited error); Claim 11(J) (faulty voir dire); Claim 11(K) (lack of objection to instructions on elements and aggravators); Claim 11(L) (lack of objection to insanity instructions); Claim 11(M) (lack of objection to evidence of prior felony); Claim 11(O) (trial counsel's ineffectiveness was prejudicial); Claim 13 (prosecutorial misconduct); Claim 15 (Ybarra was improperly medicated at trial); Claim 16 (lack of competency hearing after Ybarra's release from Lake's Crossing); Claim 17 (Ybarra's competence at trial); Claim 23 (Nevada Supreme Court's review of death penalty cases is inadequate); Claim 26 (double jeopardy); and Claim 28 (cumulative error).

At trial, counsel for Ybarra sought a change of venue which was denied by the District Court. The Nevada Supreme Court dismissed the appeal which challenged the lower court order. Ybarra v. State, Case No. 12624, October 10, 1980. Thus Claim 4 has been previously raised and rejected.

NRS 34.810(1)(b)

As noted above, many of Ybarra's claims have been raised previously and rejected by the Nevada Supreme Court. This Court will not consider such claims in this

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petition, as the prior determinations are now the law of the case. To the extent Ybarra raises any new grounds, he must satisfy the requirements of NRS 34.810(1)(b), which provides as follows:

> "1. The court shall dismiss a petition if the court determines that:
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> (1) Presented to the trial court;
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief;
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence, unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner."

In an effort to show cause for the failure to raise the new grounds in prior proceedings, Ybarra argues that his trial counsel, appellate counsel, and post-conviction counsel were ineffective. This same argument was previously presented to this Court and rejected. See Order filed June 29, 1998, Ybarra v. E.K. McDaniel, HC-9304009. On appeal, the Nevada Supreme Court affirmed. In so doing, the court specifically found that Ybarra had no right to effective assistance of second post-conviction counsel, thus any alleged errors by that counsel do not excuse the failure to previously raise the new grounds alleged in his petition. See Order Dismissing Appeal, Ybarra v. Warden, No. 32762, filed July 6, 1999.

The Nevada Supreme Court also noted in its order that Ybarra could not overcome procedural default because he cold not prove cause and prejudice. The identical analysis applies in the instant case, and Ybarra has again failed to show

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cause or prejudice.

NRS 34.810(2)

NRS 34.810(2) provides as follows:

> "2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits, or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

Subsection 3 of NRS 34.810 provides that

> ". . . the petitioner has the burden of pleading and proving specific facts that demonstrate:
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
> (b) Actual prejudice to the petitioner."

Despite the fact that Ybarra has previously raised many of the claims presented in this petition, and the claims have been determined on the merits, he makes no showing of good cause to present the claims again or actual prejudice.[4]

As for any new and different claims raised in this petition, good cause and actual prejudice must be shown. Just as Ybarra failed to satisfy the requirements of NRS 34.810(1)(B), he has also failed to meet the requirements under NRS 38.810(3), and the Court finds that the failure to assert these claims in a prior petition constitutes an abuse of the writ.

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[4] In fact, no explanation is even offered as to why claims which have been determined on the merits are being presented again.

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DISTRICT JUDGE
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NRS 34.800

In the motion to dismiss, Respondent referred to NRS 34.800 and specifically pled laches. Subsection (1)(b) of the statute provides that a petition may be dismissed if the delay in the filing of the petition

> "(b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence."

The fact that this petition was filed more than five (5) years after the decision on direct appeal raises a rebuttable presumption of prejudice to the State.[5]

Ybarra has offered nothing to rebut the presumption of prejudice, nor has he shown that a fundamental miscarriage of justice has occurred. A fundamental miscarriage of justice can be demonstrated by showing that a defendant is "actually innocent of the crime or ineligible for the death penalty.[6]

The bottom line is that Ybarra is guilty of the crime and deserving of the penalty imposed. Nothing presented in this petition changes that fact.[7]

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[5] NRS 34.800(2). The Court notes that this petition was filed nineteen (19) years after the decision in Ybarra v. State, 100 Nev. 167 (1984).

[6] Leslie v. Warden, 118 Nev. Adv. Op. 78, 59 P.3d 440, 445 (2002); citing Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

[7] In Ybarra v. State, 103 Nev. 8 (1987) the Nevada Supreme Court noted at page 16 that evidence of Ybarra's guilt was "overwhelming and the death penalty is particularly appropriate. . ."

NRS 34.726

Unless good cause is shown for the delay, NRS 34.726 requires that a petition for post-conviction relief be filed within one (1) year of the issuance of remittur by the Nevada Supreme Court of the direct appeal. Good cause exists if the petitioner demonstrates to the satisfaction of the Court

> "(a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner."[8]

Ybarra does not dispute that this petition is untimely. Instead, he first argues that NRS 34.726 does not apply to this petition because the statute was enacted in 1993, and until Pellegrini v. State[9] was decided there was no binding authority that NRS 34.726 would apply to successive petitions. In Pellegrini the court held that NRS 34.726 would apply to successive petitions filed more than one-year after the effective date of the statute (January 1, 1993). However, the one-year grace period did not apply to Pellegrini because his successive was filed in 1999. Pellegrini is on all fours with the instant case.

Instead of acknowledging that Pellegrini applies to this case, Ybarra argues that his petition is timely because it was filed within one year of remittur of the Pellegrini decision. This argument is without merit.

In a final effort to show good cause, Ybarra argues that the delay was not

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[8]NRS 34.726(1)(a) & (b).

[9]117 Nev. 860, 34 P.3d 519 (2001).

his fault, meaning he "personally." This argument is also without merit. The logical conclusion of this position would be that so long as a petitioner was represented by counsel, the delay would rarely be the fault of the petitioner. In addition, this argument was presented previously by Ybarra in his appeal of the 1998 order entered by Judge Hoyt.

The Court also notes that Ybarra's claim that he did not have notice that NRS 34.726 would apply to successive petitions ignores the fact that prior to the enactment of NRS 34.726 a virtually identical statute was found in NRS 177.315(3). NRS 177.315(3) was specifically applied to a successive petition in Deutscher v. Warden, 102 Nev. 388, 724 P.2d 213 (1986).

It has now been eighteen (18) years since Judge Hoyt denied Ybarra's first application for post-conviction relief. In the 1986 order, Judge Hoyt wrote:

> "Defense counsel's representation of the Petitioner, ROBERT YBARRA, did not cause the conviction or the sentence of death, nor were these the result of errors by the prosecution or the Court. The plain truth of the matter is that the facts demonstrated through the evidence clearly portray the criminal conduct of MR. YBARRA. The facts in this case are unchangeable and forever fixed in time; no amount of desire, preparation or expertise by others could ever change them. The twelve (12) jurors heard and considered all of the evidence presented by both sides at both the trial and penalty hearing phase of the case. They applied the law to the facts and made their determination as our system of Justice requires."

Robert Ybarra committed this horrible crime nearly twenty-five (25) years ago. Despite overwhelming evidence of guilt, Ybarra and his various counsel continue

STEVE ... DISTRICT JUDGE DEPARTMENT I WHITE PINE, LINCOLN AND EUREKA COUNTIES STATE OF NEVADA

to misuse limited judicial resources.

The instant petition is particularly troublesome. Counsel for Ybarra raises dozens of claims which have been previously considered in written opinions by the Nevada Supreme Court. No explanation is even tendered as to why these matters are being presented again. In addition, the thousands of pages of exhibits submitted with the petition has placed a significant burden on the Court. Only a handful of the exhibits are even referred to in the petition.

Based on the foregoing, the Court finds and concludes as follows:

1. Ybarra has failed to allege sufficient cause to justify the failure to present his new or different claims in a prior proceeding.

2. The failure of Ybarra to previously raise the new or different claims constitutes an abuse of the writ.

3. Ybarra has failed to allege anything to rebut the presumption of prejudice in NRS 34.800.

4. Ybarra has failed to allege sufficient prejudice or a miscarriage of justice to excuse his failure to bring his new or different claims in a prior, timely proceeding.

5. Ybarra's claims are barred by the application of NRS 34.726, NRS 34.800, NRS 34.810(1)(b) and NRS 34.810(2).

6. The claims presented in this petition which have been previously presented were brought without reasonable ground or to harass.

Good cause appearing;

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is **GRANTED**.

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DISTRICT JUDGE
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STATE OF NEVADA

IT IS HEREBY FURTHER ORDERED that the instant Petition for Writ of Habeas Corpus is **DISMISSED**.

IT IS HEREBY FURTHER ORDERED that Respondent file and serve on or before August 2, 2004, a verified statement of costs and attorney fees incurred in this action with sufficient detail to enable the Court to consider an award of attorney fees.

IT IS HEREBY FURTHER ORDERED that counsel for Ybarra shall on or before August 2, 2004, show cause as to why the Court should not order stricken all Petitioner's exhibits which are not specifically referred to in the instant petition.

DATED this 20TH day of July, 2004.

DISTRICT COURT JUDGE

STEVE L. OBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

OFFICE OF

County Clerk and Ex-Officio Clerk

of the Seventh Judicial District Court

IN AND FOR

WHITE PINE COUNTY, NEVADA

State of Nevada,
County of White Pine, }ss.

I DONNA M. BATH, County Clerk

and ex-officio Clerk of the Seventh Judicial District Court of the State of Nevada, County of White Pine, do hereby certify that the above and foregoing is a full, correct and true copy of the original NOTICE OF APPEAL, CASE APPEAL STATEMENT, ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, NOTICE OF ENTRY OF ORDER, CASE SUMMARY

which now remains of record in my office at Ely, County and State aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at my office in the City of Ely, this 16 Day of September A.D. 2004.

DONNA M. BATH

County Clerk, Ex-Officio Clerk

J. Jones

Deputy Clerk

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