ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ROBERT YBARRA, JR.,

Appellant,

vs.

CASE NO. 43981

E.K. MCDANIEL, Warden of the NEVADA STATE PRISON at ELY, NEVADA; AND ATTORNEY GENERAL OF NEVADA, BRIAN SANDOVAL,

Respondents.

FILED

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RESPONDENTS' ANSWERING BRIEF

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)

Seventh Judicial District Court, White Pine County

BRIAN SANDOVAL
Attorney General
ROBERT E. WIELAND
Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Telephone: (775) 688-1818

Attorney for Respondents

05-12473

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5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Telephone: (775) 688-1818

Attorney for Respondents

Office of the Attorney General

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ISSUES PRESENTED

1. Whether the state district court properly determined that it would not consider claims in Ybarra's fourth state post-conviction action because claims had been raised previously and rejected by the Nevada Supreme Court pursuant to NRS 34.726?

2. Whether the state district court properly determined that it would not consider in Ybarra's fourth state post-conviction action new and different grounds pursuant to NRS 34.810(1)(b).

3. Whether the state district court properly determined that it would not consider in Ybarra's fourth state post-conviction action any new and different claims because they were barred by NRS 34.810(2).

4. Whether or not the state district court properly dismissed Ybarra's fourth state post-conviction action pursuant to NRS 34.800.

5. Whether or not the state district court properly dismissed Ybarra's fourth state post conviction action pursuant to NRS 34.726.

Ybarra has filed an opening brief in which he purports to relate the issues that are properly before this Court. In actuality, none of the issues related by Ybarra in his opening brief are properly before this Court.

STATEMENT OF THE CASE

Petitioner Robert Ybarra (hereinafter Ybarra) appeals from the dismissal of his fourth state post-conviction action.

Ybarra was charged with the murder, kidnapping and rape of a woman in Ely, Nevada, in September, 1979. EOR 4232. Ybarra had a jury trial. Id. The following spring, the jury was empaneled, after which trial was postponed until the Nevada Supreme Court decided an interlocutory appeal of the denial of a change of venue. Id. Approximately six months later, the this Court affirmed the lower court and cleared the way for trial to proceed. Id. However, due to mental competence concerns, resumption of the trial was delayed until June, 1981. Ybarra was convicted and later sentenced to death on June 27, 1981. EOR 4233.

Ybarra appealed his conviction and sentence. EOR 3820. Ybarra raised six issues on appeal. EOR 3648-3690. Nearly a year later he filed a supplemental brief raising three additional issues. EOR 3751-3767. In March, 1984, this Court affirmed both the conviction and the sentence, *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984), and his petition for writ of certiorari was denied. *Ybarra v. Nevada*, 470 U.S. 1009 (1985). EOR 3820-3831, 3846. Remittitur issued on March 4, 1985. EOR 4676.

Ybarra commenced a post-conviction action pursuant to NRS 177.315, et seq., in the state district court in Ely, Nevada. EOR 3847-3857, 3858-3884. That action involved forty-seven (47) asserted claims of error. Ybarra filed no motion for discovery in that action. After a two-day evidentiary hearing, the state judge issued a fifty-eight (58) page order denying the petition in which he addressed each ground for relief. EOR 3885-3942. Ybarra appealed. EOR 3943-3978; 3979-3985; 4028-4042; 4043-4053. This Court affirmed the denial of the petition, commending the trial judge for his thoroughness.[1] *Ybarra v. State*, 103 Nev. 8, 731 P.2d 353 (1987). EOR 4043-4054.

A few months later, on March 6, 1987, Ybarra commenced his first federal habeas corpus action, *Ybarra v. Sumner*, CV-N-87-125-ECR. EOR 4054-4065. In that action, Ybarra did not seek to conduct any discovery. The federal district court determined that the claim that the use of the M'Naghten test violated his federal constitutional rights had not been raised in the state courts. EOR 4066-4075. Consequently, that action was dismissed without prejudice as a mixed petition on February 29, 1988. EOR 4076-4078; 4079-4080.

On March 10, 1988, Ybarra commenced a state court action to exhaust the one ground regarding the federal constitutionality of the M'Naghton Rule. EOR 4081-4095. The only argument presented in that petition concerned the constitutionality of the M'Naghten test for sanity. Id. In that action, Ybarra did not seek to conduct any discovery. The state district court denied the petition. EOR 4096-4114. Ybarra appealed. EOR 4115-4169; 4170-4210; 4211-

[1] The federal district court agreed stating in its own footnote: "This court agrees with the commendation for District Judge Hoyt for his clear and thorough findings of facts and conclusions of law. As stated by the supreme court, federal courts give great deference to state court findings, thus specific findings, as made by Judge Hoyt, are extremely beneficial to the integrity of the judicial process. His hard work has not gone unnoticed." EOR 4233.

4228; 4229-4231. This Court affirmed the denial of the state petition for writ of habeas corpus on June 29, 1989. EOR 4229-4231.

On August 14, 1989, Ybarra filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody on August 14, 1989. EOR 4234. The petition contained twelve (12) grounds for relief, all of which were averred to have been fully exhausted. Id. A stay of execution was ordered and counsel was appointed to represent Ybarra. Ybarra was then advised of the need to state all known grounds for relief, both unexhausted as well as exhausted, and directed to file a Statement of Additional claims asserting all known grounds. Id. Four months later, on December 18, 1989, second counsel was appointed. Id. After several stipulations of time in which to file a Statement of Additional Claims, counsel for Ybarra were granted an additional three-month extension until April 30, 1991, to file the statement. EOR 4234-4235.

During the next six months, Ybarra's counsel began filing requests for investigative and discovery matters, with most requests being granted: a psychologist, investigative services, paralegal assistance. EOR 4235. During this period, to-wit: May 14, 1990, Ybarra's counsel filed the First Statement of Additional Claims, which contained sixteen grounds. Id. Ybarra admitted therein that most of the new grounds had not been exhausted. Id. Thus, there were twenty-eight grounds for relief on file at that time, and approximately half of the grounds were admittedly unexhausted. Id.

Additionally, during this period, to-wit: June 26, 1990, new "lead" counsel was appointed in substitution for original counsel. EOR 4236. During a July 10, 1990 hearing, it was recognized that additional investigation would be needed, and that yet additional claims would be likely after new lead counsel had had an opportunity to review the record. Id. A Second Statement of Additional Claims was filed on December 14, 1990, asserting a total of fifty-eight (58) grounds for relief, which included restating the sixteen grounds from the First Statement of Additional Claims. Id. Again, essentially all of the grounds were unexhausted. Id. Thus, there were more than fifty grounds for relief on file at that time that were admittedly unexhausted. Id.

On March 25, 1991, nearly a year and a half after the action commenced, Respondents filed their motion to dismiss arguing that the action should be dismissed because of the mixed and unexhausted grounds for relief.[2] EOR 42-36. Before the motion was addressed, Ybarra filed a motion to compel notifying the court that his investigator was having difficulty in securing cooperation from former jurors. Id. The federal district court thereafter determined "Respondents' motion should not be considered until the discovery process is complete and Petitioner has a final opportunity to set forth all known claims for relief." Id. Accordingly, the motion to dismiss was denied without prejudice. Id.

Ybarra's counsel then commenced a new series of requests for discovery. EOR 4236. The first request was denied: "[T]he burden is not on Respondents to show that Ybarra has failed to show good cause. Rather, under 28 U.S.C. § 2254 Rule 6(a), the burden is on Ybarra to make an adequate showing of good cause." Id. Counsel then supplemented the motion, and before it was ruled upon, new counsel was allowed to substitute for "lead" counsel and a motion to stay the proceedings was then filed on January 6, 1993, so that new "lead" counsel could become familiar with the case. Id. Because new "lead" counsel would have the assistance of second counsel, who had been counsel of record in this action since nearly the beginning, and because the substitution had been approved a couple of months earlier, new counsel was given thirty days to get prepared to proceed. EOR 4236-4237.

Ybarra's attorneys then filed three voluminous motions under seal for authorizations for medical experts, investigators, and an expert on jury prejudice. EOR 4237. Although the motions remain sealed, the court found it unnecessary to seal the order denying the motions. Id. The order granted Ybarra one last showing that good cause exists for the need for further discovery. Id. That final ex parte showing was filed on March 15, 1993, with the request that any resulting order be filed under seal. Id. The court thereafter filed an order that did not disclose the substance nor address the merits of that motion. Id.

[2] Respondents also argued that the unexhausted claims constituted an abuse of the writ.

The federal district court noted that the vast majority of the grounds would have to be presented to the state court in compliance with the exhaustion requirement before it could review the merits of any of the grounds for relief. EOR 4238.

More than ten years ago, the federal district court also declared:

> This conviction and sentence now under attack was pronounced nearly twelve years ago, for an offense which occurred more than thirteen and a half years ago. What is particularly troubling is that at some point this action must return to state court to exhaust the many grounds for relief heretofore never raised in state court. Moreover, this Petitioner was allowed to return to state court once before to exhaust what was at that time the only known exhausted ground. The entire judicial system, both federal and state, are abused and belittled when a litigant is allowed to bounce back-and-forth between the systems through the artifice of piece-meal litigation. (footnote 2: The court does not mean to imply that Petitioner herein has been guilty of that practice. That finding will be reserved for a later date after Petitioner returns to federal court with a fully exhausted petition.)

EOR 4238.[3]

The federal district court noted that retention of the action any longer would simply delay the process. EOR 4239-4240.

The federal district court, with unmistakable clarity, stated:

> Petitioner is admonished that when a new federal petition for writ of habeas corpus is filed, it should contain only fully exhausted grounds for relief, and it should contain all (without exception) of Petitioner's claims for habeas corpus relief. Petitioner will not be given another opportunity to return to state court. Petitioner should therefore use this last opportunity to return to state court to exhaust all grounds for relief.

EOR 4239-4240.

On March 31, 1993, the federal district court denied Ybarra's renewed motion for investigative and expert funds. EOR 4240. The federal district court dismissed Ybarra's petition for writ of habeas corpus and statements of additional claims. Id. The federal district court ordered when Ybarra returned to federal court "by filing a new petition after having exhausted

[3] With all due respect to the federal judge, it was patently obvious to Respondents that even then Ybarra and his counsel were belittling and abusing both the state and federal processes. Ybarra has no interest in doing anything other than piece-meal litigation.

all known grounds, the action shall be assigned to the undersigned instead of by random draw." Id.

After his federal habeas petition was dismissed, Ybarra commenced on April 26, 1993, yet another state post-conviction action. EOR 4241-4333. Ybarra filed a supplemental petition for writ of habeas corpus (post-conviction) and request for evidentiary hearing. EOR 4340-4389. Ybarra also filed a motion for psychiatric and psychological expert assistance and for investigative assistance. EOR 4390-4391. The state district court allotted $24,000 for such expenses. EOR 4392-4394.

Finally, on October 11, 1996, the state district court entered an order in which it stated:

> Petitioner has been granted everything within the power of this Court in order to comply with the requirements of the U.S. District Court decision. Petitioner has received court appointed counsel and several extensions of time to aid that counsel. In addition,
>
> Petitioner was granted Twenty-Four Thousand Dollars ($24,000.00) for investigative and/or expert assistance. This Court has authorized and paid out over Twenty-Five Thousand Dollars ($25,000.00) in Attorney's fees, One Thousand Two Hundred Dollars ($1,200.00) in expenses, and Fifteen Thousand Dollars ($15,000.00) in investigative and expert services, with additional claims for compensation pending.
>
> It has been over three and one half (3 ½) years since the U.S. District Court dismissal and over six (6) months since Petitioner was granted an extra Twenty-Four Thousand Dollars ($24,000.00) in funds for investigative and expert assistance. Given the foregoing, this Court believes that the Petitioner has had a reasonable time to prepare his case and the state should be notified and have an opportunity to respond.
>
> This case has been pending in the courts for approximately fifteen (15) years. At some point there must be a resolution of the issues and a final determination. This Court has done everything it can do to satisfy the federal district court and moves this case on for resolution.

EOR 4395-4396.

The state district court considered and dismissed Ybarra's third state post-conviction petition for writ of habeas corpus. EOR 4398-4439. Ybarra appealed and on July 6, 1999, this Court affirmed the dismissal of Ybarra's petition. EOR 4440-4483; 4484-4514; 4515-4528;

4529-4534. On February 28, 2000, the United States Supreme Court denied Ybarra's petition for writ of certiorari. EOR 4535.

On July 28, 2000, Ybarra filed his third federal habeas action. EOR 4536-4641. Ybarra asked the federal district court for leave to conduct discovery. EOR 4642-4652. Although Respondents opposed Ybarra's motion, the court granted Ybarra's requests. EOR 4653-4665; 4666-4671; 4672-4675. Respondents recently answered the surviving grounds.

On or about March 4, 2003, Ybarra filed a petition for writ of habeas corpus (post-conviction) in the above-entitled matter. The petition is 87 pages long and presents no fewer than thirty-four separate claims for relief, many of which have many sub-parts and sections. EOR 1-87.

Respondents moved to dismiss the state petition. EOR 3611-3626. Respondents argued that the petition is not in the required form and must be dismissed pursuant to NRS 34.730(2), that the petition is untimely and must be dismissed pursuant to NRS 34.726, that the petition must be dismissed pursuant to NRS 34.810(1)(b), that the petition must be dismissed pursuant to NRS 34.810(2), that the petition must be dismissed pursuant to NRS 34.800, that the petition must be dismissed pursuant to *Groesbeck v. Warden*, 100 Nev. 259, 679 P.2d 1268 (1984), and that several of the claims are not cognizable in this action. Id.

Ybarra opposed Respondents' motion to dismiss. EOR 3190-3217. Ybarra argued that Respondents' objections to the form of the petition were unsupported by authority and were meritless. EOR 3191. Ybarra argued that consideration of the petition was not barred by NRS 34.726 because the delay in filing is not the petitioner's fault within the meaning of NRS 34.726(1) (it was not petitioner's fault personally, rather, it was someone else's). EOR 3195. Ybarra argued that the Nevada Supreme Court in *Pellegrini v. State*, 117 Nev. 860, 36 P.3d 519 (2001), adopted the "subjective standard" of fault. EOR 3196. Ybarra claimed that cause existed to overcome any default. Ybarra argued that the cause to overcome the default was "counsel's actions." EOR 3197. Ybarra argued that the application of NRS 34.726 to bar consideration of his claims would violate state and federal constitutional principles because it was not in effect at the time that the defaults occurred. Ybarra argued that this Court's decision

in *Pellegrini* violated due process and equal protection because it ignores principles of statutory construction that the court applies in other cases. EOR 3201-3202.

Ybarra argued that the court could not apply the procedural bars in NRS 34.726, NRS 34.800, NRS 34.810 without violating Ybarra's right to due process of law under the state and federal constitutions. EOR 3204. Ybarra argued that this Court has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, notwithstanding the procedural default rules in NRS 34.726, NRS 34.800, and NRS 34.810. EOR 3205. Ybarra claimed that the Nevada Supreme Court has routinely failed to apply NRS 34.726 to preclude its review of constitutional claims in successive petitions. EOR 3208. Ybarra argued that NRS 34.800 and NRS 34.810 are inconsistently applied. EOR 3209. Ybarra argued that the Nevada Supreme Court has applied inconsistent rules when deciding whether a petitioner can demonstrate "cause." EOR 3210. Ybarra argued that the discretionary and inconsistent application of procedural default rules precludes this court form declining to entertain Ybarra's claims. EOR 3212. Ybarra argued that consideration of the petition could not be barred by applying the successive petition rules because it is inconsistently applied and he has shown cause to overcome it. EOR 3213. Ybarra argued that consideration of the petition was not barred by laches because the state has not argued prejudice as a result of the delay. EOR 3214. Ybarra argued that consideration of the petition cannot be barred under NRS 34.800 because it is inconsistently applied and he has rebutted the presumption of prejudice. EOR 3215. Ybarra argued that the same allegations he has cited above preclude the application of the bar. EOR 3215. Ybarra stated that any delay occasioned by the pendency of the initial habeas proceeding without effective assistance of counsel cannot be attributed to him. EOR 3215. Ybarra argued that his claims based on international law can be the basis of relief. EOR 3216.

Respondents replied. EOR 3354-3362.

The district court granted Respondents' motion to dismiss. Because the court found that dismissal was proper on other grounds, the court determined that it need not resolve whether the petition is in substantial compliance with the statute, NRS 34.735. The district court found that numerous claims had been raised previously and rejected by the Nevada Supreme Court. The

court determined that it would not consider such claims as the prior determinations are the law of the case. The court found that to the extent that Ybarra raised any new grounds, those grounds were barred by NRS 34.810(1)(b), that any new and different claims were barred by NRS 34.810(2), that the petition was dismissed pursuant to NRS 34.800, and that the petition was dismissed pursuant to NRS 34.726. EOR 3363-3376.

The court ordered Ybarra's counsel to show cause why the court should not order stricken all Ybarra's exhibits which are not specifically referred to in his petition. EOR 3376.

Ybarra responded to the court's order. EOR 3377-3384.

The district court struck certain exhibits. EOR 3385-3389. The district court found Ybarra's argument "spurious, at best, and deliberately misleading at worst." EOR 3386. The district court ordered stricken all exhibits filed by Ybarra in support of the instant petition except exhibits 1.1.E, 2.1 through 2.6, 4.33 through 4.36, 5.1-5.2, 1.2.G and 1.2.J. EOR 3389.

Ybarra has appealed from the dismissal of his fourth state post-conviction petition. Ybarra has submitted his opening brief. Respondents submit their answering brief.

STATEMENT OF FACTS

Factual findings and recitations of those findings are found in various places throughout the record. Among the various places those findings can be found are EOR 3820-3831, 4395-4396, 4529-4534, and 3363-3376. Those findings need not be recited here yet again.

DENIAL OF FACTUAL ALLEGATIONS

Respondents deny 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 to exist by a Nevada court of competent jurisdiction.

ARGUMENT

A. The State District Court Properly Dismissed Ybarra's Fourth State Post-Conviction Action.

Ybarra filed a petition for writ of habeas corpus (post-conviction). It was no less than his fourth state post-conviction action. EOR 1-87.

Respondents moved to dismiss the petition. EOR 3611-3626.

Ybarra opposed Respondents' motion to dismiss. EOR 3190-3217.

Respondents replied. EOR 3354-3362.

The district court granted Respondents' motion to dismiss. EOR 3363-3376. Because the court found that dismissal was proper on other grounds, the court determined that it need not resolve whether the petition is in substantial compliance with the statute, NRS 34.735. The district court found that numerous claims had been raised previously and rejected by the Nevada Supreme Court. The court determined that it would not consider such claims as the prior determinations are the law of the case. The court found that to the extent that Ybarra raised any new grounds, those grounds were barred by NRS 34.810(1)(b), that any new and different claims were barred by NRS 34.810(2), that the petition was dismissed pursuant to NRS 34.800, that the petition was dismissed pursuant to NRS 34.726. Id.

In this appeal, Ybarra does not contest that the bars are properly applied in the first instance. Instead, he relies upon his claim that the procedural default rules relied upon by the district court to bar consideration of his claims cannot be enforced because this Court applies them in his discretion and in an inconsistent manner. Ybarra, citing *Bush v. Gore*, 531 U.S. 98, 106-109 (2000), *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-565 (2000), and *Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir. 1990), argues that the supposed inconsistent and discretionary application of the procedural default rules "would violate the due process right to adequate notice and the equal protection right to consistent treatment of similarly-situated litigants." Opening Brief at 8. In support of his argument, Ybarra engages in wholesale misrepresentation of fact and law.

Ybarra's argument is based upon an unfounded, fallacious and specious factual predicate which this Court has already rejected. *State v. Eighth Judicial Dist. Ct.* (Riker), No. 441000 WL 1355548, Nev. June 9, 2005 ("Riker offers a number of flawed, misleading, and irrelevant arguments to back his position that this court 'has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the default rules contained in [NRS] 34.726, 34.800, and 34.810'"),

Pellegrini v. State, 117 Nev. 860, 879-886, 34 P.3d 519, 532-536 (2001), *Valerio v. State*, 112 Nev. 383, 389, 915 P.2d 874, 878 (1996).

Ybarra's arguments regarding the purported inconsistent application of the procedural bars that Respondents argue are applicable in this case are irrelevant. Those arguments, based on a patently false factual predicate, namely that the Nevada Supreme Court inconsistently applies the procedural bars found in NRS 34.726, NRS 34.800 and NRS 34.810, are properly presented, if at all, in a challenge to the adequacy of a state procedural bar in federal habeas litigation. They have no relevance in this action. Indeed, the fact that they are made in this action demonstrates the folly of the argument that Ybarra is presenting. Ybarra's apparent argument is that because the bars have been inconsistently applied, a point denied by Respondents and repeatedly rejected by this Court, or because some other entity misconstrued Nevada law and thinks that the procedural bars are inconsistently applied, this court either should not or cannot apply the bars in this action notwithstanding the command of the statutes and Nevada law. On its face, Ybarra's argument is absurd. All that Ybarra is looking for is another means to fuel an attack on the adequacy of the procedural bars in federal habeas litigation.

In a footnote, Ybarra suggests that the district court did not address Ybarra's argument that the delay in filing the petition was not his own "fault." Opening Brief at 13, fn. 10. Ybarra is simply and plainly wrong. EOR 3373-3374. The state district court found and held:

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

EOR 3373-3374.

Ybarra does not deny that his petition is untimely or otherwise barred. Rather, Ybarra argues that his failure to timely file the petition is not his fault. If it is not Ybarra's fault, then whose is it? Ybarra attempts to parse the language of NRS 34.726 and assert that it must be Ybarra's fault personally. Ybarra's argument is patently ridiculous. None of the cases offered by Ybarra even remotely stands for the proposition offered by Ybarra or applies to NRS 34.726.

The net result of Ybarra's perverse logic would be that nothing that appointed counsel does operates to bind the petitioner because the petitioner can always claim that it is not his "fault." Such a construction as offered by Ybarra is not supported either by the law or by reason. Indeed, Ybarra's construction is patently absurd. Moreover, contrary to Ybarra's assertion, *Pellegrini v. State*, 117 Nev. 860, 36 P.2d 519 (2001), did not adopt any such construction. Ybarra asserted below that since he has been continuously represented by counsel, any delay is attributable counsel's actions and not to Ybarra's fault. EOR 3197.

Ybarra has not even bothered to identify whose fault it might be if it is not Ybarra's. Ybarra has failed to ascribe "fault" to any particular counsel. Therefore, notwithstanding anything else, Ybarra's claim of "cause" fails.

Ybarra claims that the record demonstrates cause to allow review of his claims because he is innocent of the aggravating factors found at trial and the refusal to entertain his claims would result in a miscarriage of justice. Ybarra did not present this argument below. EOR 3190-3217. Therefore, it is waived. *Gibbons v. Martin*, 91 Nev. 269, 270, 534 P.2d 915 (1975). Respondents will not address the argument unless ordered to do so by this Court. It is clear that Ybarra not only abused the process below to abuse the writ, but is abusing the appellate process as well. It is clear that Ybarra is presenting extraneous claims and arguments in this appeal so that he can claim that he "exhausted" those claims

B. Ybarra's Statement That Additional Constitutional Errors Require Reversal Of His Sentence.

Ybarra lists twenty-four (24) errors that he claims require reversal of his conviction and sentence. Opening Brief at 26-67. The purported errors that are alleged therein are not properly before this Court for two reasons. First, the state district court found that Ybarra's fourth state post-conviction petition and the claims presented therein were procedurally barred. Thus, the claims in Ybarra's petition were not addressed. Further discussion of the claims is inappropriate unless and until Ybarra overcomes the procedural bars.

Second, Respondents have compared the "claims" that Ybarra presents in his opening brief with the claims that he presented in his petition. At first glance, one would think that the

claims in the brief mirror the claims presented in Ybarra's petition for writ of habeas corpus. However, a close examination of the claims shows that some are not even the same claim that was presented to the state district court. Some allege new facts and/or theory. Virtually every one of the "claims" in Ybarra's opening brief has been supplemented with argument that was not presented below.

For example, a comparison of Ybarra's first claim in his opening brief that the death sentence must be reversed because the sentencing jury did not find the elements required for eligibility for capital murder beyond a reasonable doubt is roughly analogous to the claim presented as Ground 2 of Ybarra's petition. Compare Opening Brief at 26-29 with EOR 15. However, Ybarra, in addition to citing a variety of cases and presenting argument, changes the claim. The claim that was presented in Ground 2 was that the instructions failed to require proof of the factors necessary for death eligibility beyond a reasonable doubt. EOR 15. In his opening brief, Ybarra changes his claim to an assertion that the jury did not find the aggravating circumstances beyond a reasonable doubt. The claim in the petition alleged instructional error and the assertion in the opening brief alleges error akin to *Jackson v. Virginia*, 443 U.S. 307 (1979).

For example, a comparison of Ybarra's second claim in his opening brief that his death sentence is invalid due to the reduced standard of reliability for admission of evidence at the penalty phase of the capital trial is similar to but not the same as Ground 2 of Ybarra's petition. Compare Opening Brief at 30 with EOR 15. Ybarra now claims a violation of *Ring v. Arizona*, 536 U.S. 584, 602-609 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 474-477 (2000), with respect to *all* of the evidence presented during the penalty hearing.

For example, a comparison of Ybarra's third claim in his opening brief that his conviction and sentence are invalid due to juror misconduct is similar to but not the same as Ground 21 of Ybarra's petition. Compare Opening Brief at 30-33 with EOR 58-59. Ybarra has supplemented his claim with argument and citation to cases not presented below.

For example, Ybarra has supplemented his claims with argument and citation to cases not presented below.

Compare Ybarra's fourth claim in his Opening Brief at 33-34 with Ground 5 of Ybarra's petition, EOR 23. Compare Ybarra's fifth claim in his Opening Brief at 34-35 with Ground 6 of Ybarra's petition, EOR 24. Compare Ybarra's sixth claim in his Opening Brief at 35-36 with Ground 7 of Ybarra's petition, EOR 25. Compare Ybarra's seventh claim in his Opening Brief at 36-41 with Ground 4 of Ybarra's petition, EOR 18-22. Compare Ybarra's eighth claim in his Opening Brief at 41-44 with Ground 22 of Ybarra's petition, EOR 60-61. Compare Ybarra's ninth claim in his Opening Brief at 44-45 with Ground 23 of Ybarra's petition, EOR 62-63. Compare Ybarra's tenth claim in his Opening Brief at 45-46 with Ground 15 of Ybarra's petition, EOR 49. Ybarra now attempts to rely on *Riggins v. Nevada*, 510 U.S. 127, 135-136 (1992). Compare Ybarra's eleventh claim in his Opening Brief at 46-47 with Ground 16 of Ybarra's petition, EOR 50-51. Compare Ybarra's twelfth claim in his Opening Brief at 47-48 with Ground 26 of Ybarra's petition, EOR 68. Compare Ybarra's thirteenth claim in his Opening Brief at 48-55 with Ground 13 of Ybarra's petition, EOR 41-46.

For example, compare Ybarra's fourteenth claim in his Opening Brief with Ground 11 of Ybarra's petition, EOR 30-39. Respondents note that Ybarra now claims that the evidence should have been presented to mitigate. Compare opening brief at 57, l. 18-58, l.1 with EOR 33e. 15-16.

For example, compare Ybarra's fifteenth claim in his Opening Brief at 59-60 with Ground 12 of Ybarra's petition, EOR 40. Respondents note that in his opening brief, Ybarra argues that his appellate counsel was ineffective for failing to raise the claims raised in his opening brief as arguments III C 1; 2, III D 1, 2, 4-6, 8-13 and 18. Those references correspond to analogous Grounds 2, 1, 2, 1, 5, 6, 7, 22, 23, 15, 16, 26, 13 and 25 of his petition, respectively. Comparison of those references with the claims presented in Ground 11 of Ybarra's petition in which Ybarra listed his claims of ineffective assistance of counsel, EOR 40, shows that claims 1, 2, 22 and 23 were not alleged as bases for a claim of ineffective assistance of counsel.

For example, Ybarra has supplemented his claims with argument and citation to cases not presented below.

Compare Ybarra's sixteenth claim in his Opening Brief at 60-61 with Ground 9 of Ybarra's petition, EOR 28. Compare Ybarra's seventeenth claim in his Opening Brief at 61 with Ground 28 of Ybarra's petition, EOR 70. Compare Ybarra's eighteenth claim in his Opening Brief at 61-63 with Ground 25 of Ybarra's petition, EOR 66-67. Compare Ybarra's nineteenth claim in his Opening Brief at 63-64 with Ground 17 of Ybarra's petition, EOR 52. Compare Ybarra's twentieth claim in his Opening Brief at 64 with Ground 35 of Ybarra's petition, EOR 86. Compare Ybarra's twenty-first claim in his Opening Brief at 64-65 with Ground 29 of Ybarra's petition, EOR 71. Compare Ybarra's twenty-second claim in his Opening Brief at 65-66 with Ground 30 of Ybarra's petition, EOR 72. Compare Ybarra's twenty-third claim in his Opening Brief at 66 with Ground 31 of Ybarra's petition, EOR 73-74. Compare Ybarra's twenty-fourth claim in his Opening Brief at 66-67 with Ground 34 of Ybarra's petition, EOR 80-85.

The changes to and the arguments in support of Ybarra's claims were not presented below. Thus, in addition to the claims being procedurally barred, the new additions to the claims in this action are arguments presented for the first time on appeal and may not be considered. *Gibbons v. Martin*, 91 Nev. 269, 270, 534 P.2d 915 (1975).

Ybarra and his counsel continue to abuse the appellate process by presenting in Ybarra's appellate brief claims that he did not raise in his petition below.

C. The State District Court Did Not Err By Striking Exhibits Not Referred To In Ybarra's Fourth State Post-Conviction Action.

The state district court noted that Ybarra had filed a mountain of documents purported in support of his petition for writ of habeas corpus. EOR 3375. In its order dismissing the petition, the district court ordered Ybarra to show cause why the court should not order stricken all Ybarra's exhibits which are not specifically referred to in his petition. EOR 336.

Ybarra responded. EOR 3377-3383. According to Ybarra, his most recent federal habeas petition was filed on July 28, 2000. The federal public defender was appointed to represent Ybarra and after extensive discovery was conducted, an amended petition was filed on September 20, 2002. Ybarra filed the action from which he now appeals, his fourth state

petition, on March 6, 2003. On October 16, 2003, the State moved to dismiss the federal petition, arguing in part that the petition contained unexhausted claims for relief. EOR 3379. Ybarra argued that because the State asserted in federal court that all of the exhibits had not been presented to the Nevada Supreme Court, and, therefore, the petition was unexhausted, Ybarra had no option but to present that material to the state courts. EOR 3377-3383.

The district court appropriately noted that the argument "smacks of the same type of blame shifting that has been consistently presented to the courts in Petitioner's decades long abuse of the legal system." EOR 3386. The court also stated, "In addition, it is difficult for the Court to understand how the above entitled action could be the result of a motion to dismiss filed in the Federal case over six (6) months later. It appears to the Court that this argument is spurious at best, and deliberately misleading at worst." EOR 3386. The court found that Ybarra offered no legitimate explanation for presenting claims and exhibits in support of claims that have been considered on the merits by the Nevada Supreme Court in published opinions and written orders. The court also found that Ybarra offered no explanation because there is simply no justification for Ybarra to burden the judicial system by presenting previously litigated claims with voluminous exhibits attached. The court ordered all exhibits submitted by Ybarra stricken except exhibits 1.1.E, 2.1 through 2.6, 4.33 through 4.36, 5.1-5.2, 1.2.G and 1.2.J. EOR 3389.

Ybarra argues that the striking of the exhibits violated his right to due process of law under the Fourteenth Amendment and Nev. Const. Art. 1 § 8, which require notice and an opportunity to be heard before an adverse action is taken. Ybarra's argument should not detain this Court long.

First, the argument is not properly before this Court. Nowhere below did Ybarra claim that his due process rights were somehow being violated. EOR 3377-3383. It is axiomatic that an issue must be presented and preserved at the trial level. *Gibbons v. Martin*, 91 Nev. 269, 270, 534 P.2d 915 (1975). Ybarra made no claim below that he was not given notice and an opportunity to be heard. Therefore, the issue is not properly before this Court. *Gibbons v. Martin*, 91 Nev. 269, 270, 534 P.2d 915 (1975).

Second, even if the issue is properly before the Court, the record belies Ybarra's contention. The district court notified Ybarra of its intent and afforded him an opportunity to show cause why the exhibits should not be stricken. EOR 3376. Ybarra availed himself of that opportunity to be heard. EOR 3377-3383. Ybarra was, in fact, heard before the district court ordered the exhibits stricken. EOR 3385-3389. Ybarra's argument is, at best, specious.

Ybarra argues that the district court ordered stricken exhibits different from the ones cited in its previous order, that the district court struck exhibits relating to claims that had been raised in previous state proceedings. Opening Brief at 6. Ybarra's argument is deliberately misleading because the exhibits were offered in support of claims that although they had been raised in previous state proceedings were also presented in the instant petition and were not referred to in the petition. The district court did not do anything other than what it said it would do.

In this case appellant Ybarra is represented by Michael Pescetta of the Federal Public Defender's Office.[4] Respondents note that Pescetta has once again filed a mountain of documents in his appendix. Indeed, the appendix comprises twenty-four (24) volumes and more than 5200 pages. Respondents have moved to strike portions of the appendix because it includes material stricken by the district court. Respondents include this argument in their answering brief should this Court deny Respondents' motion to strike. Given petitioner-appellant's counsel's comments in his opening brief, Respondents believe it necessary to make the following observations. There are several problems with Pescetta's comments and actions.

First, the appendix contains documents that were stricken from the record. EOR 3389. Ybarra has included in his appendix many documents that were ordered stricken from the record. Compare EOR 3389 with Appellant's Appendix. Rule 10(a) of the Nevada Rules of Appellate Procedure provides:

> (a) The Trial Court Record. The trial court record consists of the papers and exhibits filed in the district court, the transcripts of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.

[4] Why anyone from the Federal Public Defender's Office appeared in the action below and/or in this appeal is a question worthy of consideration. After all, this is an appeal from the dismissal of a state post-conviction action. It would seem that the Federal Public Defender's Office would be representing defendants and appellees in the federal system. Evidently, there is not enough work there to keep them busy.

NRAP 30(b) provides, "**Contents of the Appendix.** Except as otherwise required by this Rule, all matters not essential to the decision of the 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."

This appeal is being determined on the basis of the record on appeal. The record on appeal does not include material that was stricken by the district court. Therefore, this Court cannot consider the items included in Ybarra's appendix that were stricken by the district court. *Harris v. Harris*, 62 Nev. 473, 476, 153 P.2d 904 (1944), *Hartford Mining Co., v. Home Lumber & Coal Co.*, 61 Nev. 1, 11, 107 P.2d 128 (1940), *Magee v. Whiteacre*, 60 Nev. 202, 96 P.2d 201 (1939). This Court should strike those documents from the appendix.

Respondents note that this Court has previously admonished Mr. Pescetta for filing an appendix which violates NRAP 30(b) and has cautioned him that it would consider sanctions for similar conduct in the future. *State v. Haberstroh*, 119 Nev. 173, ____, 69 P.3d 676, 680-681 (2003). It appears that Pescetta has not learned his lesson. Pescetta offers that he has attempted to comply with this Court's decision in *Haberstroh*, however, "since the district court did not conduct any hearing on the petition before dismissing it, the allegations of the petition must be taken as true for the purpose of including the references to the records of the previous pleadings." Opening Brief at 1 fn. 1.

Pescetta's explanation fails for several reasons. First, it is meaningless.

Second, to the extent that it has meaning, it is irrelevant to any issue properly before this Court. It seems that Pescetta is confusing a motion for summary judgment with a motion to dismiss based upon procedural bars. The truth or falsity of the allegations of a petition when a procedural bar or bars is applied has nothing to do with the application of the procedural bars. This Court has already rejected Pescetta's arguments. In *Means v. State*, ___ Nev. ___, 103 P.2d 25, 37 (2004), this Court, citing *Beets v. State*, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994), again recognized that reference to the rules of civil procedure is only appropriate when the statutes governing post-conviction practice do not address the issue presented. This Court has previously determined that statutes governing post-conviction habeas proceedings do not provide

for summary judgment as a method for determining the merits of issues raised in habeas proceedings. *Beets v. State*, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994).

Third, it is not supported by any authority. Pescetta reiterates his statement that the allegations of the petition must be taken as true in his opening brief at p. 9, and purports to support that statement by citations to *Vacation Village v. Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994), and *Doleman v. Meiji Mutual Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984). Examination of the cases shows that neither has any applicability to the instant appeal.

Fourth, in their motion to dismiss, Respondents denied each and every factual allegation made in Ybarra's petition for writ of habeas corpus (post-conviction) save and except for those expressly found to exist by a Nevada court of competent jurisdiction. EOR 3617. Thus, there was no basis upon which the allegations could be accepted as true.

Fifth, as the district court found and held, Ybarra offered no legitimate explanation for presenting claims and exhibits in support of the claims that have been considered on the merits by the Nevada Supreme Court in published opinions and written orders. EOR 3388.

Sixth, they have no bearing on any issue properly before this Court. Respondents note that nowhere in his opening brief does Pescetta claim that he must include the "exhibits" so that this Court can properly review the question posed in his opening brief, i.e., whether the district court violated Ybarra's due process rights because it did not give him notice and an opportunity to be heard. The "exhibits" bear no relation to the argument he does make.

Seventh, the inclusion of the "exhibits" itself demonstrates Ybarra's and Pescetta's intent to persist in their abuse of the system. They admit that the exhibits relate to claims previously adjudicated by this Court. Having offered no legitimate explanation for presenting the claims again or for presenting the exhibits in support of the claims, Ybarra's and Pescetta's true rationale for bringing this action and presenting the exhibits becomes readily apparent. The exhibits were not included in the previous state actions brought by Ybarra. Thus, the only reason Ybarra brought this action and included the exhibits was to use this action as a vehicle to try to get the "exhibits" as part of the state record, perhaps for use in Ybarra's federal habeas litigation,

without regard to the merit of the petition or any claim in the petition or the applicable procedural bars. *Means v. State*, ___ Nev. ___, 103 P.2d 25, 37 (2004), *Beets v. State*, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994).

Eighth, Ybarra does not contend that the district court abused its discretion. Such argument is waived. Even so, the court did not abuse its discretion. *Citizens v. Secretary of State*, 116 Nev. 939, 925-53, 11 P.3d 121, 130 (2000).

CONCLUSION

Ybarra has abused Nevada's legal system and the writ long enough. Ybarra has embarked on a calculated and designed effort to frustrate and burden Nevada's legal system with yet another abusive petition. The instant litigation is brought and conducted in bad faith. Ybarra's arguments are based upon wholesale misrepresentation of law and fact. This Court should affirm the state district court's decision dismissing Ybarra's fourth state post-conviction action. Respondents respectfully request that this Court consider sanctioning Ybarra and his counsel for their obvious bad faith in bringing this action and pursuing this appeal.

RESPECTFULLY SUBMITTED this 14th day of June, 2005.

BRIAN SANDOVAL
Attorney General

By: Robert E. Wieland

ROBERT E. WIELAND
Senior Deputy Attorney General
Criminal Justice Division
(775) 688-1818

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.

RESPECTFULLY SUBMITTED this 24th day of June, 2005.

BRIAN SANDOVAL
Attorney General

By: Robert E. Wieland

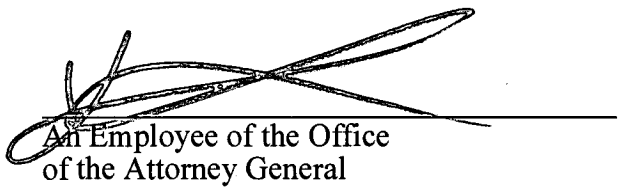
ROBERT E. WIELAND
Senior Deputy Attorney General
Criminal Justice Division
(775) 688-1818

Office of the Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 24th day of June, 2005, I served a copy of the foregoing RESPONDENTS' ANSWERING BRIEF, by placing said document in the U.S. Mail, postage prepaid, addressed to:

MICHAEL PESCETTA
Assistant Federal Public Defender
330 S. Third Street, Ste. 700
Las Vegas, Nevada 89101



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