IN THE SUPREME COURT OF THE STATE OF NEVADA

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ROBERT YBARRA, JR.,

Appellant,

vs.

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

Respondents.

CASE NO. 43981

FILED

JUN 24 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

MOTION TO STRIKE

Respondents, by and through counsel, Brian Sandoval, Attorney General of the State of Nevada, move to strike portions of Ybarra's appendix, to wit, pages 102-193, 200-234, 235-416, 431-460, 489-744, 783-943, and 2137-5204 of the appendix. This motion is made and based on the attached points and authorities.

ARGUMENT

Petitioner-appellant Robert Ybarra (hereinafter Ybarra) filed a petition for writ of habeas corpus (post-conviction) which the district court dismissed. EOR 1-87, 3363-3376.

The state district court noted that Ybarra had filed a mountain of documents purportedly in support of his petition for writ of habeas corpus. 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 3376.

Ybarra responded. EOR 3377-3384.

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 with respect to Ybarra's response, "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.

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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.

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

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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 3386-3389.

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.

Respondents respectfully request that this Court strike from Ybarra's appendix those documents ordered stricken from the record by the district court and which, therefore, do not constitute part of the record on appeal.

RESPECTFULLY SUBMITTED this 24th day of June, 2005.

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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 MOTION TO STRIKE, by placing said document in the U.S. Mail, postage prepaid, addressed to:

MICHAEL PESCETTA
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