ORIGINAL

Case No. HC-0303002

Dept. No. 1

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

IN AND FOR THE COUNTY OF WHITE PINE

FILED
AUG 04 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY _____
DEPUTY CLERK

ROBERT YBARRA, JR.,

Petitioner,

vs.

E.K. McDANIEL, Warden, et al.

Respondents.

No. 52167

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 Denying Petitioner's Motion to Strike the Death Penalty filed in this action on June 26, 2008.

Dated this 23rd day of July 2008.

FRANNY FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender
Nevada Bar No. 2437
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
Telephone (702) 388-6577
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Attorneys for Petitioner

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08-20108

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ORIGINAL

Case No. HC-0303002

Dept. No. 1

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2008 JUL 30 PM 2:23
WHITE PINE COUNTY CLERK
BY
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.

AMENDED NOTICE OF APPEAL

(Death Penalty Habeas Corpus Case)

NOTICE is hereby given that the Defendant, Robert Ybarra, appeals to the Nevada Supreme Court from the Order Denying Petitioner's Motion to Strike the Death Penalty filed in this action on June 26, 2008. The Notice of Entry of Judgment was filed on July 25, 2008.

Dated this 29th day of July 2008.

FRANNY FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender
Nevada Bar No. 2437
Assistant Federal Public Defender
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Telephone (702) 388-6577
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Attorneys for Petitioner

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: July 30, 2008
DONNA M. BATH, Clerk of the Seventh Judicial District Court in and for the County of White Pine, State of Nevada.

RECEIVED
AUG 01 2008
TRACY LAIRSMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

By: Deputy

CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 29th day of July 2008, he caused to be deposited for mailing in the United States mail, first-class postage prepaid, a true and correct copy of the foregoing AMENDED NOTICE OF APPEAL addressed to the parties as follows:

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

and

Catherine Cortez Masto
Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

An employee of the Federal Public Defender

SEVENTH JUDICIAL DISTRICT COURT

COUNTY OF WHITE PINE, STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, Amended Notice of Appeal filed in case number HC-0303002, this document does not contain the social security number of any person.

Dated this 29th day of July, 2008.

FRANNY A. FORSMAN
Federal Public Defender

Michael Pescetta
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Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
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Facsimile (702) 388-5819

Attorneys for Petitioner

ORIGINAL

Case No. HC-0303002

Dept. No. 1

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WP CLERK

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2008 JUL 24 PM 1:36
WHITE PINE COUNTY CLERK
BY _____ 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:**

Warden E.K. McDaniel: Attorney General Catherine Cortez Masto; State of Nevada is real party in interest.

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

Warden E.K. McDaniel: Attorney General Catherine Cortez Masto; 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
Catherine Cortez Masto
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
411 E. Bonneville Ave., Suite 250
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):**

Petition for Writ of Habeas Corpus (Post-Conviction) was filed March 7, 2003; Motion to Strike the Death Penalty, following Remand from this Court, was filed on November 28, 2005.

Dated this 23rd day of July 2008.

FRANNY FORSMAN
Federal Public Defender

By /s/ M. A. Pescetta
MICHAEL PESCETTA
Nevada Bar No. 2437
Assistant Federal Public Defender
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Telephone (702) 388-6577
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Attorneys for Petitioner

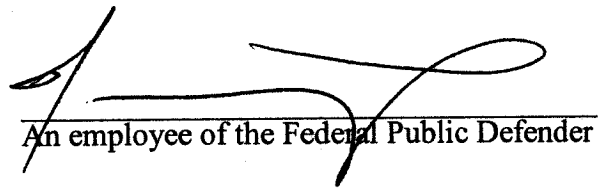
CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on this 23rd day of July 2008, he 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
Richard Sears
District Attorney
801 Clark Street, Suite 3
Ely, Nevada 89301

and

Catherine Cortez Masto
Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511



An employee of the Federal Public Defender

SEVENTH JUDICIAL DISTRICT COURT

COUNTY OF WHITE PINE, STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, Case Appeal Statement filed in case number HC-0303002, this document does not contain the social security number of any person.

Dated this 23rd day of July, 2008.

FRANNY A. FORSMAN
Federal Public Defender

by _____

Michael Pescetta
Nevada Bar No. 2437
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
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Facsimile (702) 388-5819

Attorneys for Petitioner

07/25/08

Case #: HC-030-30-02

Date Filed: 03/06/03 Department: 01

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.	

Hearings:

Date	Time	Event	Reference
10/11/07		MOTION FOR ENLARGEMENT OF TIME FIRST REQUEST	
10/12/07		REQUEST FOR SUBMISSION	

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
09/07/04 NOTICE OF APPEAL
09/07/04 CASE APPEAL STATEMENT
09/17/04 OBJECTION TO MEMORANDUM OF COSTS
09/17/04 LIST OF PETITIONER'S EXHIBITS TO OBJECTION TO MEMORANDUM OF COSTS
09/24/04 RECEIPT FOR DOCUMENTS
08/31/05 NOTICE OF CHANGE OF ADDRESS OF COUNSEL FOR PETITIONER
11/30/05 ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
12/02/05 ORDER SETTING DEADLINE TO FILE MOTION REGARDING ISSUE OF MENTA RETARDATION
12/14/05 ORDER SETTING PRELIMINARY HEARING
12/14/05 MOTION TO VACATE ORDER
12/15/05 ORDER GRANTING MOTION TO VACATE ORDER
12/21/05 AFFIDAVIT OF SERVICE
12/28/05 RECEIPT FOR DOCUMENTS
02/07/06 ORDER DENYING REHEARING
03/09/06 RESPONSE TO REQUEST FOR DISCLOSURE
03/09/06 ORDER SETTING DEADLINE TO FILE MOTION REGARDING ISSUE OF MENTA RETARDATION
03/09/06 AFFIDAVIT OF SERVICE
03/22/06 ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING
03/22/06 O RDER DENYING REHEARING
03/22/06 CLERK'S CERTIFICATE
03/22/06 REMITTITUR
03/28/06 MOTION FOR DISQUALIFICATION (DEATH PENALTY HABEAS CORPUS CASE)
03/29/06 MOTION TO SET ASIDE DEATH PENALTY (DEATH PENALTY HABEAS CORPUS CASE)
03/29/06 ANSWER NRS 1.235(5)(B)
03/29/06 AFFIDAVIT OF SERVICE
04/05/06 EXHIBIT 1 FILED AS PER JUDGE
04/10/06 MOTION FOR ENLARGMENT OF TIME (FIRST REQUEST)
04/20/06 MOTION FOR ENLARGMENT OF TIME (FIRST REQUEST)
04/24/06 MOTION FOR ENLARGEMENT OF TIME (SECOND REQUEST)
04/24/06 REQUEST FOR SUBMISSION
04/24/06 REQUEST FOR SUBMISSION
04/24/06 REQUEST FOR SUBMISSION

05/04/06	OPPOSITION TO MOTION TO DISQUALIFY
05/04/06	OPPOSITION TO MOTION TO SET ASIDE DEATH PENALTY
12/11/06	ORDER REGARDING SELECTION OF JUDGE TO PRESIDE OVER MOTION FOR DISQUALIFICATION
12/11/06	AFFIDAVIT OF SERVICE
12/28/06	OBJECTION AND RESPONSE TO COURT'S ORDER
01/08/07	ORDER
01/09/07	AFFIDAVIT OF SERVICE
01/23/07	AFFIDAVIT OF SERVICE
01/23/07	ORDER DENYING MOTION FOR DISQUALIFICATION
04/03/07	SCHEDULING ORDER REGARDING PETITIONER'S MOTION TO SET ASIDE DEATH PENALTY
04/03/07	AFFIDAVIT OF SERVICE
06/06/07	MEMORANDUM OF TEMPORARY ASSIGNMENT (JUSTICE ROSE TO CASE)
09/10/07	MOTION FOR ENLARGMENT (FIRST REQUEST)
09/10/07	REQUEST FOR SUBMISSION
09/24/07	ORDER
09/24/07	AFFIDAVIT OF SERVICE
10/11/07	MOTION FOR ENLARGEMENT OF TIME
10/12/07	REQUEST FOR SUBMISSION
10/24/07	ORDER GRANTING ATTORNEY GENERAL'S MOTION FOR CONTINUANCE
10/29/07	AFFIDAVIT OF SERVICE
12/07/07	NOTICE TO COURT
12/13/07	NOTICE OF APPEARANCE
12/13/07	MOTION TO COMPEL DISCOVERY OF DEFENDANT'S RECORDS
12/24/07	REQUEST FOR EXTENSION OF TIME TO RESPOND TO MOTION TO COMPEL DISCOVERY
12/28/07	MOTION TO DISQUALIFY FEDERAL PUBLIC DEFENDER FROM NON-FEDERAL LITIGATION MATTER
12/31/07	QUALIFIED OPPOSITION TO FEDERAL PUBLIC DEFENDER'S MOTION FOR EXTENSION TO PROVIDE DISCOVERY
01/04/08	ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO RESPOND TO MOTION TO COMPEL DISCOVERY
01/04/08	AFFIDAVIT OF SERVICE (ORDER GRANTING REQUEST FOR EXTENSION...)
01/11/08	REQUEST FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISQUALIFY FEDERAL PUBLIC DEFENDER
01/16/08	RESPONSE TO MOTION TO COMPEL DISCOVERY
01/16/08	ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISQUALIFY FEDERAL PUBLIC DEFENDER
01/29/08	OPPOSITION TO MOTION TO DISQUALIFY COUNSEL FOR PETITIONER AND PROPOSED ORDER SENT UP TO JUDGE THIS DATE
02/06/08	ORDER (MOTION TO DISQUALIFY COUNSEL/PETITIONER IS DENIED)
02/06/08	AFFIDAVIT OF SERVICE
03/31/08	CERTIFICATE OF SERVICE (PETITIONER'S EXHIBITS VOLUMES 1-5)
03/31/08	NOTICE OF EXPERT WITNESS REPORT
04/15/08	TRANSPORTATION ORDER
04/15/08	AFFIDAVIT OF SERVICE
05/02/08	NOTICE OF SUPPLEMENTAL FILING OF DOCTORS REPORT
05/05/08	TRANSCRIPT OF PROCEEDINGS TAKEN ON TUESDAY, APRIL 29, 2008 AT 9:47 AM AT 801 CLARK STREET, DEPARTMENT 1, ELY, NEVADA
05/05/08	TRANSCRIPT OF PROCEEDINGS TAKEN ON WEDNESDAY, APRIL 30, 2008 AT 9:52 A.M. AT 801 CLARK STREET, DEPARTMENT 1, ELY, NEVADA
05/21/08	ORDER FOR PAYMENT OF COURT REPORTER SERVICES IN DEATH PENALTY HABEAS ACTION

05/27/08	MOTION TO STRIKE TESTIMONY, OR, IN THE ALTERNATIVE, TO REOPEN HEARING TO ENFORCE PETITIONER'S DUE PROCESS RIGHT TO CROSS EXAMINE WITNESSES AND TO PRESENT EVIDENCE
05/27/08	CERTIFICATE OF SERVICE
06/13/08	OPPOSITION TO UNFILED MOTION TO STRIKE TESTIMONY
06/25/08	ORDER GRANTING PETITIONER'S MOTION TO STRIKE NOTICE OF SUPPLEMENTAL FILING OF DOCTOR'S REPORT
06/25/08	AFFIDAVIT OF SERVICE
06/25/08	REPLY TO OPPOSITION TO MOTION TO STRIKE TESTIMONY
06/26/08	DECISION AND ORDER DENYING PETITIONER'S MOTION TO STRIKE THE DEATH PENALTY
06/26/08	AFFIDAVIT OF SERVICE
07/24/08	NOTICE OF APPEAL
07/24/08	CASE APPEAL STATEMENT
07/25/08	NOTICE OF ENTRY OF JUDGMENT

ORIGINAL

FILED

2008 JUN 26 PM 1:38

WHITE PINE COUNTY CLERK

BY _____ 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

* * * * * *

ROBERT YBARRA, JR.,

Petitioner,

-vs-

E.K. McDANIEL, Warden, et al.,

Respondents.

DECISION AND ORDER DENYING PETITIONER'S MOTION TO STRIKE THE DEATH PENALTY

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

PROCEDURAL HISTORY

On September 29, 1979, Petitioner Robert Ybarra, Jr. drove sixteen (16) year old Nancy Griffith to a remote location west of Ely where he beat her, raped her, poured gasoline on her, lit her on fire and left. She died less than two (2) days later.[1]

In June 1981, Ybarra was convicted of First Degree Murder, First Degree Kidnaping, Battery With the Intent to Commit Sexual Assault and Sexual Assault. The jury sentenced him to death. Ybarra appealed his conviction and sentences and on March 3,

[1] Complete details of the crime and evidence presented at trial is in the Court's Order Dismissing Petition for Writ of Habeas Corpus filed 7/20/04 in this case.

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

1982, the Nevada Supreme Court affirmed the conviction and sentence.[2] A petition for rehearing was denied and a petition for writ of habeas corpus was denied by the United States 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.[3]

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 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 another Petition for Writ of Habeas Corpus on March 6, 2003.

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

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

Respondents filed a Motion to Dismiss on October 6, 2003, which was opposed by Ybarra. This Court granted the Motion to Dismiss on July 20, 2004, and Ybarra appealed. The Nevada Supreme Court affirmed the dismissal on appeal, but remanded the case to allow him an opportunity to litigate his claim of mental retardation pursuant to NRS 175.554(5).

Ybarra filed a Motion to Strike Death Penalty based on a claim of mental retardation which was opposed by the State. On April 29 - 30, 2008 a hearing was held on Petitioner's Motion to Strike the Death Penalty. Ybarra was present and represented by Michael Pescetta, Esq. and Michael Charleton, Esq., both Federal Public Defenders. Respondents were represented by Richard Sears, Esq., White Pine County District Attorney. The Court received exhibits in excess of three thousand (3,000) pages and testimony from psychologists David Schmidt and Ted Young, and from psychiatrist Mitchell Young.

The Court has reviewed the information presented and finds that additional briefing or argument is not necessary.[4]

DISCUSSION

In Atkins v. Virginia, the U.S. Supreme Court held that the imposition of the death penalty on a mentally retarded defendant constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the Federal Constitution.[5] The Court left the task

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[4] On May 2, 2008, the State filed a Notice of Supplemental Filing of Doctor's Report. On May 27, 2008 Petitioner filed a Motion to Strike or in the Alternative to Re-Open the Hearing. The State filed an Opposition on 6/13/08. On June 25, 2008 this Court entered an Order Granting the Motion to Strike and ordering the Notice of Supplemental Filing of Doctors Report stricken from the record.

[5] 536 U.S. 304; 122 S. Ct. 2242 (argued February 20, 2002, decided June 20, 2002.)

of determining how to implement Atkins to the individual states.[6]

In 2003, the Nevada Legislature responded to Atkins and enacted NRS 174.098, which allows a Defendant facing the death penalty to file a motion to declare he is mentally retarded. The statute requires the Court to conduct a hearing, and if

> ". . . the court determines based on the evidence presented at [the hearing] that the Defendant is mentally retarded, the court must make such a finding in the record and strike the notice of intent to seek the death penalty."[7]

"Mentally retarded" is defined in the statute as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period."[8]

In order to find that a person is mentally retarded, the Court must find that the person

(1) has significant subaverage intellectual functioning;

(2) which exists concurrently with deficits in adaptive behavior, and

(3) that both are manifested during the developmental period.

The burden of proof is on Ybarra to prove by a preponderance of the evidence that he is mentally retarded.[9] The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it

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[6]Schriro v. Smith, 546 U.S. 6; 126 S.Ct. 7 (2005).

[7]NRS 174.098(6).

[8]NRS 174.098(7).

[9]NRS 174.098(5)(b).

appears that the greater probability of truth lies therein.[10] In simple terms, a preponderance of the evidence is presented when the "existence of the contested fact is more probable than its non-existence."[11]

FACTUAL HISTORY

Based on the testimony and exhibits admitted into evidence, the Court finds as follows:

Ybarra Robert Ybarra, Jr. was born in Sacramento, California on July 20, 1953. He had three (3) younger brothers and a younger sister.[12] Ybarra's mother was 15 or 16 when he was born,[13] and his life was normal without difficulties until age 9 when he was knocked unconscious by a railroad tie that struck him in the forehead.[14]

After his head injury, Ybarra began to experience migraine headaches and was prescribed medication from doctors.[15] Ybarra was prescribed Dilantin, Mebaral, a Darvon compound and another drug which he took four (4) times a day.[16]

Mebaral is a barbiturate that was prescribed for headaches and as an anti-

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[10]Nev. J.I. 3.00 (1986).

[11]Brown v. State, 107 Nev. 164 (1991).

[12]Evidentiary hearing exhibits, Volume II, page 1245 (hereinafter Vol. II, p. 1245).

[13]Vol. II, p. 1245 and Vol. II, p. 1311.

[14]Vol. II, p. 1307; 1311; Vol. I, p. 473.

[15]Vol. I, p. 566, Ybarra testimony, 8/4/1999; Vol. II, p. 1245.

[16]Vol. I, p. 998; Vol. II, p. 1245; Vol I, p. 566.

convulsant.[17] Mebaral acts as a sedative which can cause slurred speech and confound the interpretation of an EEG. The abrupt cessation of the drug can cause erratic behavior and seizures.[18] Dilantin is a similar anti-convulsant that was also prescribed for headaches. It can also confound EEG testing.[19]

Not long after his head injury, Ybarra began smoking marijuana and drinking alcohol.[20] According to Ybarra, because of the headaches and auditory hallucinations (from his head injury) he became involved in illegal drugs, and then became unpopular and chronically depressed.[21] His parents accepted his use of alcohol and marijuana.[22]

By the time Ybarra was 14 years old, he was falling far behind in school, was truant and the subject of bullying from other students.[23] In March 1968, Ybarra's doctor stopped prescribing Mebaral and instead prescribed Dexedrine.[24] Dexedrine is an amphetamine like substance that can cause tremors, tic's and agitation. It can also cause

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17 Video Taped Transcript of Proceedings, 4/30/08, p. 46 (hereinafter VT, 4/30/08, p. 46). The official transcript of the proceedings was inaccurate as to various parts of the testimony. Where necessary the Court will refer to the more accurate video taped transcript.

18 VT, 4/30/08, p. 47.

19 VT 4/30/08, p. 48-49.

20 Vol. II, p. 1246; Vol. IV, p. 2361; Vol. V, p. 2802, 2442.

21 Vol. II, p. 970-971, reported to Dr. Rich 2/12/81.

22 Vol. II, p. 1245, p. 2802.

23 Vol. I, p. 26-27; Vol. II, p. 1311.

24 Vol. I, p. 27.

a person to appear moody, irritable or emotionally labile.[25]

In April of 1968 Ybarra transferred to Yolo High School because of peer problems and academic failure.[26] By the time Ybarra turned 15, he was using illicit drugs and alcohol on a daily basis.[27]

Ybarra dropped out of school in 1969.[28] The school psychologist recommended a medical exclusion for Ybarra but found that he did not present any vocational handicaps.[29] Although Ybarra dropped out of regular school at age 15, he then attended night school and worked during the day, receiving an adult education diploma in June 1972 just prior to his 19TH birthday.[30] According to Ybarra, he worked as a fork lift operator in the Sacramento area from 1970 until 1976.[31]

Prior to receiving his diploma, Ybarra enlisted in the U.S. Marine Corps. His mental testing revealed "dull normal" or "borderline" intelligence and he was found to be fit for duty.[32] On October 15, 1971 he was accepted into the Corps having passed the

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[25]VT, 4/30/08, p. 47-48.

[26]Vol. I, p. 125.

[27]Vol. I, p. 717; Vol. II, p. 2326, 2361; In a 1976 hospital report, Ybarra gave a 10 year history of drinking a six pack of beer per day. Vol. I, p. 46.

[28]Vol. II, p. 998.

[29]Vol. I, p. 124, 123.

[30]Vol. I, p. 128; Vol. II, p. 985.

[31]Vol. II, p. 962.

[32]Vol. I, p. 189, 193-194.

required mental, moral and physical examination.[33] Within a week, Ybarra was apparently caught engaging in homosexual activity with a Private Schillo.[34] Ybarra was examined by a psychologist who found no mental or physical disability, however, after Private Schillo also admitted the homosexual contact, Ybarra was discharged from the Marine Corps.[35]

The next fall, after receiving his high school diploma, Ybarra again enlisted in the Marines, but did not disclose his prior enlistment. He was recognized and then discharged.[36] Ybarra later enlisted in the Army National Guard, but was given an honorable discharge in 1974 because of asthma.[37]

Thereafter, Ybarra moved to Oregon where he met his future wife. They moved back to Sacramento and she became pregnant. In August of 1979, Ybarra's wife left him and returned to Oregon. He then worked in Montana before coming to Ely, Nevada in September 1979. Throughout this period Ybarra was always employed.[38]

DEVELOPMENTAL PERIOD

The Nevada Legislature has not defined "developmental period" as used in NRS 174.098. Thus the Court must look to experts in the field of mental retardation to determine the meaning of "developmental period." Testifying for Ybarra, Dr. Schmidt

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[33]Vol. I, p. 219.

[34]Vol. I, p. 140, 143, 146.

[35]Vol. I, p. 152, 147, 144.

[36]Vol. I, p. 154-156.

[37]Vol. I, p. 217-218, 230.

[38]Vol. I, p. 133-136; Vol. II, p. 962.

stated that the developmental period is childhood up into early adulthood, sometimes up to 21 years old and sometimes up to 25 years old, depending on the state.[39] The Court was unable to find any State law that defined the developmental period to age 25. A total of 20 States have defined the period prior to age 18, only 4 States have extended the period to age 22, and 11 States did not set an age. Some states do not have the death penalty and thus have no similar statutes.[40] Dr. Mitchell Young, who also testified for Ybarra, implied that the developmental period was before age 18.[41]

The American Association of Mental Retardation (AAMR) has defined mental retardation as a disability that originates before age 18.[42] The 2002 Edition of the AAMR manual indicates that an emerging consensus in the field is that mental retardation is a disability that manifests itself early in life and before age 18.[43]

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[39]TP 4/29/08, p. 19; 54.

[40] Before age 18: Arizona (ARS §13-703.02); Virginia (VA Code Ann §19.2-264.3:1.1) California (Cal. Pen. Code §1376); Arkansas (A.C.A. §5-4-618); Florida (Fl. R. Crim. P. 3.203); Tennessee (Tenn. Code Ann. §39-13-203); Idaho (Idaho code §19-2515A); Illinois (725 ILCS 5/114-15); Washington (Rev. Wash. Code (ARCW) §10.95.030); Louisiana (La. C. Cr. P. HRT 905.5.1); Alabama (Ex Parte Perkins, 851 So.2d 453 (2002)); North Carolina (N.C. Gen. STAT. §15A-2005); Oklahoma (21 OKLA. St. §701.10); Missouri (§565.030 R.S. MO); South Dakota (S.D. Codified Law §23A-27A-26.1); Mississippi Chase v. State, 873 So. 2d 1013; New York (N.Y. Crim. Proc. Law 400.27(12)(e)); Pennsylvania Commonwealth v. Gibson, 592 Pa. 411, 415 (2007); Montana (Mont. Code Anno. §53-20-102 (2007)(8)(c); Kansas (K.S.A. §76-12b01(e). Before age 22: Indiana (Burns Ind. Code Ann. §35-36-9.2); Utah (Utah Code §77-150-102); Maryland (Md. Criminal Code Ann. §2-202); Indiana (Ind. Code Sect. 35-36-9-2). No age set in statute: Colorado, Nebraska, Nevada, New Mexico, Kentucky, Oregon, Connecticut, North Dakota, South Carolina, Georgia, Texas.

[41]TP 4/29/08, p. 197.

[42] MENTAL RETARDATION: Definition, Classification, and Systems of Support, 10TH Edition, AAMR (2002), p. 19, 197 (hereinafter "AAMR, (2002)."

[43]AAMR (2002), p. 16.

Since Nevada has not chosen to define the developmental period as extending beyond age 18, the Court finds that in accord with the consensus in the field, and the majority of States with the death penalty, the developmental period is up to age 18.

SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING

As noted above, in order to make a finding of mental retardation, the Court must find by a preponderance of the evidence that Robert Ybarra, Jr. has significant subaverage intellectual functioning.[44] The legislature did not provide a definition for significant subaverage intellectual functioning, and thus the Court must again rely on experts in the field.

According to the AAMR, intelligence is a general mental ability. It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience.[45] Reliance on a general functioning IQ score is the measure of human intelligence that continues to garner the most support within the scientific community.[46] According to the AAMR, the "intellectual functioning" criterion for diagnosis of mental retardation is approximately two standard deviations below the mean, considering the SEM (Standard Error of Measurement, i.e. ±3 to 4 IQ points) for

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[44] NRS 174.098(7). The Court must also find deficits in adaptive behavior concurrently manifested during the developmental period.

[45] AAMR (2002), p. 51

[46] AAMR (2002), p. 51.

the specific assessment instrument used and the instrument's strengths and limitations.[47]

Two standard deviations below the norm would approximate a score of 70. However, an IQ score of 70 is most accurately understood not as a precise score, but as a range of confidence with the parameters of at least one SEM (i.e., scores of about 66 to 74; 66% probability), or parameters of two SEM's (i.e., scores of 62 to 78, 95% probability.)[48]

Evidence of Robert Ybarra's Level of Intellectual Functioning During His Developmental Period to Age Eighteen (18)

As noted above, this Court defines "the development period" in accord with the AAMR: to age 18. Intellectual functioning should be measured using individually administered standardized psychological tests and administered by appropriately trained professionals.[49] No evidence was presented to the Court that Ybarra was tested for IQ prior to age 18.

Although no standardized test scores obtained during the developmental period were presented to the Court, the record contains evidence that is relevant to a determination of Ybarra's intellectual functioning prior to age 18. The record is clear that prior to his head injury at age 9, Ybarra was normal and met intellectual milestones appropriately. After his head injury, doctors prescribed sedatives (and later stimulants). Ybarra also began using alcohol, marijuana and other drugs. Difficulties with peers and

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[47]AAMR (2002), p. 58.

[48]AAMR, (2002), p. 57, ref. Grossman, 1983.

[49]AAMR (2002), p. 52.

school work resulted, and by 1969 he was described as having less than average intelligence.[50] Although after testing for the U.S. Marine Corp, Ybarra was described as "dull normal" or borderline,[51] he passed mental tests and was accepted by the Marines with no physical or mental disability.[52] According to the expert testimony presented at the hearing, "borderline" or "dull normal" is not mentally retarded.[53] Ybarra's suggestion that dropping out of high school is indicative of subaverage intellectual functioning is belied by the fact that he later held a job and attended alternate education classes and received a diploma. Mentally retarded persons make up approximately 2-3% of the population.[54] This means a person who is mentally retarded must have intellectual functioning below 97% of the population. Dr. Mitchell Young's report states that people with mild mental retardation can by their late teens acquire academic skills up to approximately the sixth grade level.[55] That a mildly mentally retarded person's academic skills will be limited to about the sixth grade level has been recognized by other courts and the literature in the field.[56]

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[50]Vol. I, p. 125.

[51]Vol. I, p. 189.

[52]Vol. I, p. 219, 152. This was shortly after his 18TH birthday.

[53]TP 4/29/08, p. 69; TP 4/30/08, p. 54.

[54]AAMR p. 58 (2002).

[55]Vol. V, p. 2842.

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See Murphy v. State, 2003 OK CR 6; 66 P.3d 456 ((OKLA Crim. App. 2003), citing Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994); People v. Braggs, 779 N.E.2d 475 (Ill. App. 1ST Dist. 2002); Lyn Entzeroth Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded From the Death Penalty, 52 ALA. L. Rev. 911, 914 (2001).

Considering all the evidence and testimony presented, has Ybarra demonstrated by a preponderance of the evidence that he suffered from significant subaverage intellectual functioning manifested during his developmental period? The answer is no. The record is clear and substantial evidence supports a finding that at best, Ybarra was observed to be somewhat below average prior to age eighteen (18). The fact that no testing for mental retardation occurred prior to age eighteen (18) is also significant because, in spite of his contact with various doctors and school officials, no one apparently suspected mental retardation. Even to the extent Ybarra may have appeared below average, the record supports a finding that such was at least in part affected by his extensive drug and alcohol use.

Evidence of Robert Ybarra's Level of Intellectual Functioning From Age 18 through Age 25

The Court does not accept Dr. Schmidt's testimony that the developmental period has been extended in some states to age 25. As shown above, no state has done so and only 4 States have extended the period to age 22.

Even if the Court accepted Dr. Schmidt's testimony that the developmental period can be extended to about age 25 (1978), Ybarra has not presented sufficient evidence to support his claim of significant subaverage intellectual functioning which was manifested during that period. The record contains no evidence that prior to his arrest at age 25, Ybarra had his IQ tested.

After his arrest in September 1979, Ybarra was subjected to numerous

contacts, interviews and testing by psychiatrists and psychologists.[57] In 1980 Dr. Richnak opined that Ybarra was borderline [intelligence].[58] In 1981 he was described as having normal intelligence.[59] In early 1981, Dr. Gutride tested Ybarra extensively and found that his full scale IQ score was 86.[60] In February 1981, Dr. Neal believed Ybarra's intellectual functioning tests were consistent with a low-normal range of intelligence.[61] In August 1990, Dr. Pauly estimated Ybarra's IQ to be 70-80.[62] All of these tests and observations by trained medical professionals support a finding that Ybarra was not of subaverage intellectual functioning.

On November 20, 1980, Ybarra was admitted to Lake's Crossing Center to determine if he was competent to stand trial. While there, Ybarra was evaluated by Dr. Martin Gutride, a Nevada certified psychologist, who administered ten (10) tests on Ybarra.[63] As part of the evaluation, Dr. Gutride gave Ybarra the Weschler Adult Intelligence Scale (WAIS), which yielded a Full Scale IQ score of 86 (dull/normal range).[64] According to Dr. Gutride, this result was consistent with Ybarra's performance on the

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[57]Indeed this is true up to the present.

[58]Vol. I, p. 964.

[59]Vol. IV, p. 2232.

[60]Vol. II, p. 1258.

[61]Vol. II, p. 1269.

[62]Vol. II, p. 983.

[63]Vol. II, p. 1258-1260.

[64]Vol. II, p. 1259.

Peabody Picture Vocabulary Test (score 92) and the Weschler Memory Scale (score 83).[65] As noted below, no other valid test scores were ever obtained on Ybarra.

On October 17-18, 2001, and January 10-11, 2002, Dr. David Schmidt tested Ybarra.[66] The U.S. Supreme Court heard arguments in Atkins v. Virginia, on February 20, 2002,[67] and Atkins was decided on June 20, 2002.[68] On August 12, 2002, Dr. Schmidt issued his report in which he concluded that Ybarra had a full scale IQ of 60 which placed Ybarra in the mildly mentally retarded range.[69]

It is not clear whether or not Dr. Schmidt reviewed Dr. Gutride's report prior to writing his own report, however, it appears he did review it prior to testifying in this case. Dr. Schmidt initially criticized the 1981 results because the test (WAIS) was 26 years old.[70] Because of the "age" of the test and the so-called Flynn effect (erroneously reported in the official transcripts as the "Flynt effect"), Dr. Schmidt implied the 1981 IQ score was inflated. The "Flynn effect" is in essence a body of work associated with James Flynn suggesting that IQ test scores increase over time until a test is "re-normed". In People v. Superior Court,[71] a California appellate court held that consideration must be given to the Flynn

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[65]Vol. II, p. 1259.

[66]Vol. V, p. 2720.

[67]536 U.S. 304.

[68]Supra.

[69]Vol. V, p. 2720, 2732.

[70]TP 4/29/08, p. 71-73.

[71]124 Cal. App. 4TH 806 (2004).

effect in determining a defendant's IQ score. Dr. Schmidt testified that based on the age of the WAIS in 1981, Ybarra's IQ score could be inflated by 15 points.[72]

According to the Flynn effect, IQ scores on Wechsler scales have increased approximately 0.31 points per year (for each year until the test is "re-normed.")[73] Although the Flynn effect may be recognized in the literature, numerous courts have rejected the notion of adjusting IQ scores to accommodate the Flynn effect.[74]

The 2002 AAMR manual refers to the Flynn effect as follows:

> "However, as others have shown (e.g., Flynn, 1987), it is critically important to use standardized tests with the most updated norms."[75]

Despite this reference, the AAMR does not recommend an adjustment for the Flynn effect as it does for SEM.[76]

After considering Dr. Schmidt's position on the topic, the Court is not convinced the scientific community is prepared to adjust the scores according to the Flynn effect. In any event, even if the 1981 IQ score of 86 was adjusted by 0.31 per year (for 26 years per Dr. Schmidt) the adjustment would only be 8.06 points, reducing the score of 86

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[72]TP 4/30/08 p. 145, 150.

[73] See People v. Superior Court, supra; Tethering the Elephant, Capital Cases, IQ, and the Flynn effect, James R. Flynn, Psychology, Public Policy and Law, 2006 Vol. 12, No. 2 170-189.

[74] Green v. Johnson, 515 F.3d 290 (4TH C.A. 2008); Black v. Bell, 2008 U.S. Dist. Lexis 33908 (Mid Dist. Tenn 2008); Ledford v. Head, 2008 U.S. Dist. Lexis 21635 (No. Dist. GA. 2008); State v. Burke, 2005 Ohio 7020 (Ohio App. 2005).

[75]AAMR, p. 56 (2002).

[76]State v. Burke, 2005 Ohio 7020 (2005).

to 78, which is not in the mildly mentally retarded range. In addition, with the application of SEM (as recommended by the AAMR), Ybarra's score range on the 1981 test would actually be about 83 to 90.

Dr. Schmidt also had concerns that the 1981 test was mis-scored and that an intern was involved in the test.[77] Under cross-examination, the doctor admitted that he really could not talk about the validity of the 1981 test score.[78] Indeed, it appears that the criticism of Dr. Gutride's test results is really no more than pure speculation.

Overall, the record contains substantial evidence and the Court finds that Dr. Gutride's test results are consistent with the numerous other doctors and evaluators who believed that Ybarra was dull-normal or borderline (which is not mentally retarded). Dr. Gutride's results are further supported by the consistency between and among the tests he gave.

Dr. Schmidt's Testing

Of all the testing and observation of Ybarra from 1979 until 2002, Dr. Schmidt's report is the first to conclude that Ybarra is mildly mentally retarded. Although the Doctor testified that he was not aware of the Atkins decision before he wrote his report, no explanation was given why his report took over seven months to prepare and was issued nearly two (2) months after Atkins was decided. Dr. Schmidt's conclusions that Ybarra's intellectual functioning was in the mildly mentally retarded range is highlighted by a bold-faced disclaimer:

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[77]TP 4/29/08, p. 143. Noteworthy is the fact that Dr. Schmidt also used an intern in his testing.

[78]TP 4/29/08, p. 159-160.

> **"Due to the severe distress that some of the portions of the WAIS-III testing caused Mr. Ybarra, the above scores may underestimate his actual intellectual functioning. However it may also be that due to the chronic nature of his neuropsychological functioning that these scores may reflect day to day problem solving skills."[79]**

Thus, Dr. Schmidt recognized that the scores obtained may be accurate, or they may be low. The bottom line is that the scores certainly cannot be accepted as a true determination of Ybarra's level of intellectual functioning. Further, the specter of Ybarra faking results is one that requires close scrutiny. Despite the disclaimer, Dr. Schmidt stated in his report that "the Halstead-Reitan Neuropsychological Battery (HRB) has specific techniques to control for [malingering] and it is thought that the results of this administration of the HRB are a valid and accurate reflection of Ybarra's abilities.[80] When asked about the tests for malingering, Dr. Schmidt admitted he gave none, but that he looked for patterns or consistency in his other test results.

Dr. Ted Young specifically testified that the tests given by Dr. Schmidt do not include methods to detect malingering, and he asked defense counsel to challenge him on that point.[81] Dr. Schmidt was recalled to the witness stand, but he did not refute Dr. Young's statement. One test Dr. Schmidt did give was the trail making test. Part A of the test requires the subject to draw a line in sequence to connect circles numbered one to 15

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[79]Ex. Vol. V, p. 2732.

[80]Vol. V, p. 2735-2736.

[81]TP 4/30/08, p. 62-63.

on a piece of paper. According to Dr. Schmidt, Ybarra was unable to complete the task.[82]

After examining Ybarra in October 2001 and January 2002, Dr. Schmidt made the following conclusions which are contained in Vol. V, p. 2739-2740.

"In addition to having a low IQ, the following apply to Mr. Ybarra:

a, His brain damage makes it very difficult to understand or weigh the importance of any facts or mitigating factors in his case.

b. His organic (schizotypal) personality disorder may at times lead to a poor working memory and confabulation so he may not recall complex instructions or multiple tasks or may not even remember important facts of the case.

c. He has poor judgment because of his brain damage which makes him much less likely to think through all the issues involved before making a decision.

d. He has an extremely limited ability to organize information and synthesize a strategy to solve any problems he encounters.

e. He has very limited ability to handle stress and the demands placed upon him by the legal system. For example, at a particularly stressful point in the interview, Mr. Ybarra began talking to his imaginary dog and telling him that everything would be all right, a classic example of his retreat into fantasy to cope with the stress that the evaluation was placing upon him.

f. He suffers command hallucinations as part of his delusions and feels compelled to comply with their demand or face punishment.

g. He has fixed delusions regarding his headaches, being influenced by others, and paranoia regarding the motivations of others around him which have a clearly unpredictable effect on his reactions to individuals he is involved with both in and out of a legal context.

The above problems combine to make it difficult for Mr. Ybarra to act in his own best

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[82]TP 4/29/08, p. 127-128.

interest and complicate his understanding of his role in any legal setting."[83]

Most of these conclusions do not withstand scrutiny in the context of Ybarra's real life actions and functioning. As discussed below, It is clear from the record that he does understand and weigh the importance of mitigating factors in his case (his efforts at advocating and experimenting with different defenses). He can organize information and synthesize strategies to solve problems (study his medical records, fake illness and threaten suicide to get transferred to MHU, stop taking medication and food to help exaggerate symptoms). He can handle stress (once he realizes "acting crazy" will not help him achieve his goal, he becomes normal). Once he got over his "amnesia" in April 1981, he demonstrated great recall of events in the past.

MALINGERING AND OTHER EVIDENCE OF INTELLECTUAL FUNCTIONING

Malingering is the deliberate fabrication or gross exaggeration of psychological or physical symptoms for the attainment of some external goal.[84] The fact that a person is malingering doesn't necessarily exclude the possibility of mental retardation,[85] however, the issue of malingering must be considered by the trier of fact in determining the issue of intellectual functioning. Evidence that a person faked his performance (or gave less than his best effort) on a psychological test does not automatically invalidate other tests taken by that person, but from the Court's perspective,

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[83]Vol. V, p. 2739-2740.

[84]Vol. V, p. 2847.

[85]TP 4/30/2008, p. 108.

the existence of evidence that a person is malingering should lead to a heightened scrutiny of other test results. From the day of his arrest in September 1979 and the State's pursuit of the death penalty, Ybarra Ybarra has had a motive to fake performance on tests.

When asked whether he saw any reference to malingering in the record while preparing for his testimony, Dr. Schmidt said he saw references in Dr. Ted Young's report and he thought there were "some issues floated from Lake's Crossing."[86] In fact, the record contains numerous observations by various doctors and others that Ybarra is a faker or malingering.

Pursuant to a court order issued November 29, 1979 to determine his competence to stand trial, Ybarra was examined by Dr. Lynn Gerow. Dr. Gerow administered that Minnesota Multiphasic Personality Inventory (MMPI) on December 6 and 7, 1979. The profile was not valid because

> ". . . the defendant [Ybarra] appears to have made an attempt to answer each question in a positive manner to indicate psychopathology thereby invalidating the test scores for any clinical usefulness."[87]

Dr. Gerow found Ybarra competent to stand trial, his intelligence to be in the normal range, and found no major mental disorder.[88]

Dr. Donald Molde evaluated Ybarra with interviews conducted in February and April 1981. On May 4, 1981 he wrote to Ybarra's attorney and opined that despite

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[86]TP 4/29/08, p. 137.

[87]Vol. IV, p. 2231-2232.

[88]Vol. IV, p. 2232.

Ybarra's claims, it was Dr. Molde's position that Ybarra "does not have signs or symptoms of a major mental illness" and his claims of hallucinations are "due to extra medical considerations rather than any indication of a major mental illness."[89]

On May 14, 1981, Dr. Hiller suspected that Ybarra was exaggerating his symptoms and he had a hard time believing the claims of visual hallucinations. Ybarra appeared hostile and desperate.[90]

Dr. Richard Lewis wrote to Ybarra's attorney on June 15, 1981 and after reviewing and comparing three (3) MMPI profile patterns, he concluded that Ybarra deliberately faked the tests in a pathological direction in order to appear psychotic.[91] A progress note dated January 22, 1985 indicates that interviewing and testing results indicate the belief that Ybarra is mentally ill (severely psychoneurotic) but that he tries to "fake psychosis."[92]

In May 1990, Dr. Dugan examined Ybarra for Glynn Cartledge, Esq., who was representing Ybarra at the time. Dr. Dugan gave Ybarra the MMPI-II and the scores were reflective of someone who was malingering. He concluded that Ybarra suffered from mental illness, was not a "pure malingerer" and that any malingering or symptom exaggeration he displayed "may be his attempt to avoid criminal responsibility for his

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[89]Vol. II, p. 1013-1014; Dr. Molde's detailed report of 4/28/81 is found at Vol. II, p. 1000-1002.

[90]Vol. II, p. 1302.

[91]Vol. V, p. 2750.

[92]Vol. IV, p. 2327.

actions."[93]

A progress note written on May 31, 1991 (while in the prison mental health unit), quotes Ybarra as saying he never thought he would end up here, "having to act crazy."[94] As noted below, even Ybarra's own expert, Dr. Mitchell Young, received results indicative of malingering. The extensive evidence of malingering, faking symptoms and giving less than his best effort on tests is significant evidence that suggests that Ybarra is not as low functioning as he acts when tested.

The record contains numerous letters written by Ybarra while he was incarcerated in the White Pine County Jail awaiting trial.[95] The earliest dated letter is from October 9, 1979.[96] In all of the letters from 1979 and 1980, Ybarra denies he committed the crime. In most of the letters he talks about killing himself rather than going to prison or facing execution. Ybarra's trial was set to commence on March 31, 1980. A jury was picked and counsel for Ybarra sought a change of venue which was denied by the trial court. The matter was then appealed to the Nevada Supreme Court.

By August 1980, Ybarra's letters were making references to poisoned jail food and that his lawyer and "shrinks" want to put him in the nuthouse.[97] Ybarra began to refuse food and medication, which is a pattern throughout the record. On September 9,

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[93]Vol. II, p. 686-688.

[94]Vol. IV, p. 2470.

[95]Vol. I, p. 361-398.

[96]Vol. I, p. 367.

[97]Vol. I, p. 361-

1980, his attorneys filed a motion for a psychiatric evaluation to determine if he was competent to stand trial. The court ordered evaluations by Dr. Gerow and Dr. Chappell, but Ybarra refused to be examined by Dr. Gerow.[98] On October 10, 1980, the Nevada Supreme Court affirmed the trial court denial of the motion for change of venue. A hearing was held on November 18, 1980 after which the court found Ybarra incompetent to stand trial and ordered him committed to Lake's Crossing until be became competent.[99]

Robert Ybarra was then transported to Lake's Crossing on November 20, 1980.[100] His progress and eventual discharge is extensively documented in the record.[101] Of note is the fact that while at Lake's Crossing, Ybarra played pool, cards, volleyball, racquet ball, backgammon and scrabble.[102] In order to be released from Lake's Crossing, Ybarra needed to pass a "sanity commission." Dr. Gutride wrote a letter to Judge Hoyt on February 17, 1981 which summarizes Ybarra's stay at Lake's Crossing. Dr. Gutride wrote

> "Finally, Mr. Ybarra decided that the best thing he could do was to pass the Sanity Commission so he could get on with his legal problems. He passed all three psychiatrists with no difficulty.[103]

It was during Ybarra's stay at Lake's Crossing from November 1980 to March

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98 Vol. I, p. 418. Dr. Gerow had examined him in December 1979 and found he was faking on the MMPI.

99 Vol. I, p. 418-422.

100 Vol. I, p. 410.

101 Vol. II, p. 1020-1169.

102 Vol. II, p. 1021, 1025, 1029, 1032, 1040, 1043, 1045, 1063, 1074 and 1078.

103 Vol. II, p. 1279. Also of note is that Ybarra refused to see Dr. Gerow as part of the Sanity Commission saying "that S.O.B. is the one that gave me a hard time in jail and I don't like him." Vol. II, p. 1064.

1981 that Dr. Gutride conducted his tests which showed Ybarra had a full scale IQ of 86.[104] The validity of Dr. Gutride's testing is enhanced by the fact that Dr. Gutride had, in addition to his test results, access to Ybarra and his file while Ybarra was at Lakes Crossing. Since Ybarra believed it was in his best interest that he move on with his case, a reasonable inference is that he put his best effort forward on the test and the 1981 results are valid.

Shortly after his admission to Lake's Crossing on November 20, 1980, Ybarra began requesting his medical records to "find out what people think is wrong with him" and "what they think about him."[105] Dr. Gutride's discharge summary provides good insight into Robert Ybarra and notes that virtually all of his professed symptoms of voices or hallucinations are not valid.[106] Dr. Gutride also predicted that Ybarra "could be expected to act-up in jail again, but that such behavior was wilful on his part, rather than a product of mental illness."[107] Just prior to his discharge, a progress note dated February 25, 1981 indicated that Ybarra was trying to get permission to stay at Lake's Crossing but was told that was not possible.[108] Dr. Gutride's prediction came true.

After his discharge from Lake's Crossing Ybarra was returned to the White Pine County Jail where he met with his lawyer. He immediately reported seeing and hearing things. His lawyer then filed a motion to place Ybarra back at Lake's Crossing

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[104]Vol. II, p. 1258.

[105]Vol. II, p. 1154, 1155 and 1167.

[106]Vol. II, p. 1288-1290.

[107]Vol. II, p. 1290.

[108]Vol. II, p. 1073-1074.

pending the trial.[109] An order re-setting the trial for May 4, 1981 was filed shortly before Ybarra's motion was filed.[110] His motion was set to be heard on March 20, 1981.[111]

After the May trial date was set, but before his motion to return to Lake's Crossing was heard, Ybarra wrote a letter to "Richard" which recited that he tried to hang himself. The letter goes on that

> "I'm not eating and won't be taking my meds. I'm going to court soon to see if the judge will send me back to lakes crossing until the trial which is May. I'll be nuts soon from not taking my meds but so what I'll hang soon . . . ask Meredith if she is enjoying the book and send it to my parents when she is finished. Richard pray for me to get a N.G.R.I. . ."[112]

It appears that at the time the letter to Richard was written, Ybarra intentionally stopped taking his medications, knowing it would make him "nuts." Ybarra's reference to not guilty by reason of insanity (N.G.R.I.) is interesting, because up to that time (March 1981) he had consistently maintained his innocence and non-involvement with Nancy Griffith's death. This letter shows a clarity of thought and understanding of his situation and possible legal defenses. By April 6, 1981, Ybarra had been moved out of the Ely jail to the Northern Nevada Correctional Center where he claimed he had amnesia until two weeks prior when a "screen appeared in the wall and [he] watched [himself] do it -

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[109]Vol. II, p. 989-992.

[110]Vol. I, p. 329.

[111]Vol. I, p. 992.

[112]Vol. I, p. 364.

everything that happened.[113] Ybarra also was quoted as saying he did not want to die by execution and would fight to stay alive.[114]

By the time Ybarra admitted in April 1981 to lighting Nancy Griffith on fire he had already been examined and tested by at least eight doctors.[115] A fair inference from the record is that once Ybarra realized feigning incompetence would not work, he "decided" to pass the Sanity Commission, with the idea that N.G.R.I. was his next best defense. This type of calculated behavior and manipulation certainly is not indicative of a person with the intelligence level of a 6TH grader.

While held at the White Pine County Jail prior to trial, Ybarra wrote letters to friends and family. Many of the letters belie the claim of significant subaverage intellectual functioning. In one letter he discussed vehicle insurance, in another he refers to books he had apparently read and in another he writes a scathing letter to the company that had apparently repossessed his truck.[116]

Over the years since his conviction, Ybarra has written hundreds of "kites" while in prison. A kite is a written communication between an inmate and the administration or staff. Many of his kites concern medical issues, and many reveal an intelligence level which is clearly not that of a mildly retarded person. For example, in June of 1986 he wrote to a doctor stating that he had hypothyroidism, and wanted "any literature

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[113]Vol. II, p. 993-994.

[114]Vol. II, p. 994.

[115]
Dr. Gerow, Dr. O'Gorman, Dr. Richnak, Dr. Parly, Dr. Gutride, Dr. Chappell, Dr. Neal and Dr. Rich

[116]Vol. I, p. 377, 378, 389.

you have on the thyroid gland pertaining to its uses, functions, you know, why its there, what it does. I really don't know anything about it . . ."[117] In 1989 he requested vitamin E for his cuticles and phisoderm for his face.[118] Another time wrote to doctors requesting information on chronic fatigue and the names of an internist.[119]

The record contains hundreds of pages of medical progress notes which portray Ybarra as a man who knows how to manipulate and fake (or exaggerate) symptoms of mental illness to accomplish his goals. For example, early in 1990, Ybarra was beginning to act up and a progress note indicates that his

> "death sentence is getting closer, and this could be the cause of his anger. He has acted psychotic in the past and might now be trying to raise questions of his sanity in order to delay his execution."[120]

In October 1990 Dr. Van Valkenberg wrote that Ybarra

> "said he wanted copies of all my progress notes. He looked calm and spoke logically today. Clinically stable. He is refusing medication, but still wants psychotherapy. .. He may have copies of all my progress notes."[121]

By January 1991, Van Valkenberg decided that Ybarra should be transferred to the Mental Health Unit (MHU) at the prison in Jean, Nevada. The doctor noted that

> "He is speaking as if he has multiple personality disorder, psychogenic amnesia, and fugue states. . . I believe that

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[117]Vol. V, p. 2709.

[118]Vol. III, p. 1389.

[119]Vol. V, p. 1407-1410.

[120]Vol. IV, p. 2379 (3/6/90).

[121]Vol. IV, p. 2395.

part of it is a game. Order transfer to MHU."[122]

While at Jean, Ybarra began to explore various defenses. A progress note dated May 9, 1991 states that

> "After I saw him last time & told him brain damage defense was not a good defense, then he took OD. Said he saved up some pills of Klonopin. Talking about defense of multiple personality."[123]

The same writer also stated that Ybarra

> "briefly questioned or attempted to rehearse a correlation between his behavior and the subject "multiple personality disorder" w/ this writer I/M further mentioned one person in this country having criminal charge dismissed for said diagnosis."[124]

As Ybarra's time at the MHU came to an end, he devised a plan to get returned back from Ely State Prison. On June 4, 1991, Ybarra

> "stated to this writer that he was going to be discharged to max very soon and that as soon as he returned there, that 'the doctors would send me right back to SNCC unit 7 when I start acting weird. . . My attorney is going to hold all appeals because she feels I'm not competent.' "[125]

Once he was returned to ESP, Ybarra began working on his multiple personality defense.

A progress note dated June 17, 1991 indicates that

> I/M wanted to talk to psych or he was going to go off. He states he was hearing voices of his twin brother telling him

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[122]Vol. V, p. 2405-2407.

[123]Vol. V, p. 2460.

[124]Vol. V, p. 2462.

[125]Vol. V, p. 2474.

> to harm himself. Wants to go back to Jean MH.[126]

On June 19, 1991 it was reported that

> "He says the cut he got in Indian Springs was done by Bobby, who is a 9 year old boy who lives inside his body. Bobby will be prevented from doing this by Nimrod, the protector. I'm Norman his twin brother."[127]

Ybarra then began head banging,[128] and on June 19TH Dr. Van Valkenberg ordered his return to MHU.[129]

Dr. Van Valkenberg was very concerned and on June 25, 1991 wrote that

> he is agitating and threatening to create a crisis if he is not readmitted to the MHU. . . He continues to threaten to hurt himself if he is not transferred. I will try to get [the transfer] expedited here in Carson City.[130]

Although Dr. Van Valkenberg apparently bought into Ybarra's "crisis," back at ESP, Ybarra had calmed down, was acting more rational than Dr. Hardy had ever seen and the doctor noted that he thought "[Ybarra] understands behavior on his part will not accelerate the transfer."[131]

While Ybarra was perfectly calm and rational with Dr. Hardy, when he met with Dr. Van Valkenberg just six (6) days later on July 1, 1991, he put the multiple

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[126]Vol. V, P. 2479.

[127]Vol. V, p. 2480.

[128]Vol. V, p. 2482

[129]Vol. V, p. 2480-2481.

[130]Vol. V, p. 2485.

[131]Vol. V, p. 2484.

personality show on full blast:

> "He says he is "Norman" today. He says he recalls being questioned in the unit and hearing other voices talking, and answering the questions that the voices asked rather than the ones that others ask . . . Continued multiple personality symptoms. He is "Norman" today."[132]

Within two (2) days, Ybarra was back at the MHU at Jean. As soon as Ybarra got himself transferred back to the MHU, he immediately changed. He was happy to be back, smiling and joking with the staff.[133] On July 10, 1991 he was described as spontaneous, and quick-witted with a healthy sense of humor.[134] By August 17TH Ybarra was typing in his room and was the "editor" of the unit newspaper.[135] On August 7TH it was noted that Ybarra felt that assessment scoring was one way to show the courts he's worthy of a sentence reduction, and he presented a self-analyzed symptom list and discussed its meanings.[136] On August 20TH a progress note indicates:

> "Today pt. decided to advocate his multiple personality theory . . . Discussed biogenetics and poly morphism."[137]

On August 23, 1991, Ybarra participated in a group session and discussed poetry, Indian culture and nature. While discussing his progress and eventual return to ESP, Ybarra

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[132]Vol. V, p. 2486-2487.

[133]Vol. V, p. 2491.

[134]Vol. V, p. 2494.

[135]Vol. V, p. 2510.

[136]Vol. V, p. 2502.

[137]Vol. V, p. 2512. Note that multiple personality disorder first surfaced in Dr. VanValkenberg's dictation of January 1991. See FN#122 above.

began "back pedaling" and complained that he was "still mentally ill." When Ybarra was then asked the advantage of remaining ill, he said

> "that besides court, it enables him to keep other IM's [Inmates] at a distance, provides him with a protective screen."[138]

Ybarra was transferred back to ESP in September 1991 and immediately started the multiple personality symptoms. On September 18TH he told Dr. Van Valkenberg that he was "Norman" and was angry about the transfer back to ESP. The doctor then ordered his return to the MHU.[139]

Why has Ybarra consistently requested doctor notes, progress notes and copies of other medical documentation?[140] The inference is clear: to understand as much as he can about possible defenses to the death penalty. Another inference is clear: he is not of significant subaverage intellectual functioning.

A few weeks before he met with Dr. Schmidt, Robert Ybarra sent a kite advising that he had been bitten on the face by a spider and needed some anti-biotics.[141] Between his meetings with Dr. Schmidt, Ybarra wrote the following kite:

> "I received an appointment slip for a psychiatrist visit on Tuesday 12-18-01, 8AM in visiting holding. If this is with Dr. Sach[?] I have a CMU A wing morning tier this day & it would be more convenient to have this visit during my A

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[138]Vol. V, p. 2517.

[139]Vol. V, p. 2525.

[140]See FN 105 above; also Vol. IV, p. 2395 (10/30/90); Vol. III, p. 1729 (4/8/91).

[141]Vol. III, p. 1664.

wing morning tier. What do you think?"[142]

These kites show an ability to plan and think about situations and events in the future, and an awareness of potential problems (i.e. spider bite). They are not indicative of a sixth grader, or a person who is so low functioning that he cannot connect numbered circles on a piece of paper (trail making test).[143]

On December 25, 2001, Ybarra wrote a kite asking for medication for depression and insomnia. The response written January 6, 2002 (just prior to his meeting with Dr. Schmidt) was "you are scheduled for an evaluation. I'm not convinced you have any mental illness."[144] In addition to being an indication of malingering and/or drug seeking behavior, this kite also raises the question of Ybarra's manipulation of medications. The record is full of instances when he either refused medication or demanded it starting with his incarceration in the White Pine County Jail.[145]

Further, just a few months after meeting with Dr. Schmidt, Ybarra wrote the following:

> "You are currently charging me $2.00 for 30 aspirin. Please discontinue the order. I can purchase aspirin from ESP canteen $1.44, 100 tablets."[146]

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[142]Vol. III, p. 1661 (12-13-01)

[143]See FN 82 above.

[144]Vol. III, p. 1660.

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See for example kites demanding medication: Vol. III pages 1374, 1348, 1349, 1350, 1352, 1357, 1359, 1361, 1362, 1382, 1383, 1385, 1393, 1395, 1401, 1415, 1434, 1443, 1446, 1459, 1475, 1531, 1536, 1644; and kites to discontinue medication: Vol. II pages 1324, 1360, 1459, 1535, 1659.

[146]Vol. III, p. 1657.

Although this kite is not an example of high level math, it certainly does not appear to be consistent with someone who has a full scale IQ score of 60. As Dr. Schmidt testified, a person cannot fake being smarter than they actually are. The record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a person who does not have a significant subaverage intellectual functioning now or during his developmental years. His ability to manipulate health care professionals, attorneys, play scrabble, backgammon, racquet ball and volleyball, and his ability to type, read medical literature, write coherent meaningful letters and kites all support such a finding.

But there is more. Dr. Ted Young performed certain tests on Ybarra as well. One was a spelling test in which Ybarra spelled an, a-n-n-n; him, h-i-n, make, m-a-k-f, must, m-u-s-t.[147] Such would represent a profound learning disability.[148] One need not be an expert to compare such a result to Ybarra's letters (pre-trial) and his kites (post-trial), and conclude that his results on such tests are of no weight because of his lack of effort or intentional malingering.

On the Rey complex figure test, which Dr. Ted Young has given over 10,000 times, Ybarra's performance was worse than someone with Alzheimer's disease, and so unusual it could not even be scored.[149] Based on the bizarre results Dr. Ted Young obtained on that test he gave an abbreviated form of the Wechsler Adult Intelligence Scale which yielded a full scale IQ score of 66. The result was not valid because of the indication

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[147]TP 4/30/08, p. 40.

[148]TP 4/30/08, p. 40.

[149]TP 4/30/08, p.39.

that Ybarra was malingering.[150]

Dr. Ted Young then gave Ybarra the test of memory malingering (TOMM) and Ybarra got 21 out of 50 correct on the first trial.[151] On the second trial he scored 30. The guidelines on the test and various studies suggest a result below 45 (and perhaps into the high 30's) is indicative of malingering. A score of 30 is basically off the scale.[152] Based on the ample evidence of malingering by Ybarra, Dr. Ted Young concluded that there was no valid IQ test result for Ybarra Ybarra below 70 in the record. Overall the Court finds that the preponderance of the evidence (and in fact substantial evidence) supports a finding that Robert Ybarra, Jr. is not significant subaverage intellectual functioning.

ADAPTIVE BEHAVIOR

Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.[153] For a diagnosis of mental retardation, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities.[154]

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[150]TP 4/30/08, p. 42-43.

[151]TP 4/30/08, p. 45.

[152]TP 4/30/08, p. 46-47.

[153]AAMR (2002), p. 73.

[154]AAMR (2002), p. 76.

Evidence of Adaptive Behavior Deficits
During Robert Ybarra's Developmental Period to Age 18

No evidence was presented that adaptive behavior tests were administered during Ybarra's developmental period. Other evidence relevant to Robert Ybarra's adaptive behavior is contained in the record.

Dr. Schmidt testified that the victimization of Ybarra at school by other peers was reflective of a failure to adapt to the school environment.[155] In other words, it is the victim of the bully who has the problem. The Court finds this testimony to be without weight. The Court cannot accept the notion that in this case, the fact that Ybarra may have been bullied in school means he was suffering from an adaptive deficit.

As noted above, Ybarra left regular school because of peer problems and academic failure, which Ybarra attributed to his use of drugs and alcohol. Ybarra then continued in night school while working at a job. Rather than evidence of an adaptive deficit as testified by Dr. Schmidt, the Court finds this to be evidence of his ability to adapt and respond to a bad situation.

Dr. Schmidt also found an adaptive deficit in Ybarra's work record because he held menial jobs and never had a job that was above minimum wage or above medium supervision.[156] This factual assumption is contradicted by the record. First of all, it is not unusual for a person under the age of 18 to have menial jobs. Second, the record reveals

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[155]TP 4/29/08, p. 42-43.

[156]TP 4/29/08, p. 44-45.

that from 1970 until 1976 he worked as a forklift driver.[157]

Dr. Schmidt also testified that he found no evidence that Ybarra lived on his own, independent of other people.[158] To the extent Dr. Schmidt is referring to pre-age 18, the Court finds such to be accurate but without weight. Common sense and everyday experience dictates that most children do not live independently until they graduate from high school. Overall the record contains minimal evidence of adaptive behavior deficits that manifested prior to age 18.

Evidence of Adaptive Behavior Deficits
Manifested From Age 18 to Age 25

Although the Court has defined the developmental period as ending at age 18, much evidence was presented regarding Ybarra after he turned 18 years of age.

Dr. Mitchell Alan Young performed a face-to-face clinical interview, mental state evaluation and testing of Ybarra on March 13, 2008. Ybarra was given an assessment of adaptive behavior called the Street Survival Skills Questionnaire (SSSQ) and an assessment of malingering called The Structured Interview of Reported Symptoms (SIRS).[159] The raw score from the SSSQ is converted to a standard score or Survival Skills Quotient (SSQ) that is comparable to IQ. Ybarra's SSQ score was 79 which placed him in the borderline range of mental retardation.[160] This result is consistent with all other

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[157]Vol. II, p. 962.

[158]TP 4/29/08, p. 44, 54.

[159]Vol. V, p. 2834.

[160]Vol. V, p. 2846.

testing and observations of Ybarra (except Dr. Schmidt's).

The Doctor also noted the presence of factors which are suggestive of malingering: the relative absence of clear psychiatric history with treatment prior to arrest, and the presence of anti-social personality traits and forensic context.[161] The results on the SIRS are even more compelling in regard to Ybarra's malingering:

> "Mr. Ybarra had a markedly elevated score on the Rare Symptoms Scale that measures symptoms that occur very infrequently in bona fide patients. This elevation is characteristic in individuals that are feigning a mental disorder and is rarely seen in clients responding truthfully. In addition, Mr. Ybarra tended to endorse items that untrained individuals are likely to identify as obvious signs of a major mental illness, indiscriminately endorse psychiatric problems, and increase symptoms when asked about them. Mr. Ybarra evidenced a curious inability or unwillingness to rhyme to stems."[162]

Despite his own test results which suggest Mr. Ybarra was malingering and has an IQ in the borderline range, Dr. Mitchell Young concluded that

> "it is clear that Mr. Ybarra suffered and continues to suffer deficits in adaptive functioning. Specifically, a number of professionals have noted that when Mr. Ybarra is confronted with an excess of information or affective stimuli, he becomes overwhelmed, agitated, avoidant, poorly communicative, and unable to cope with complex scenarios or problem solving. These behaviors are illustrative of deficits in basic domains of adaptive functioning: conceptual, social and practical adaptive skills (AAMR definition); or communication and social/interpersonal skills (DSM IV-TR definition). These deficits in adaptive functioning, with onset during Mr. Ybarra's developmental period, have persisted throughout

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[161]Vol. V, p. 2846.

[162]Vol. V, p. 2847.

Mr. Ybarra's life, persist to the present, and are consistent with someone in the mild to borderline mentally retarded range."[163]

The Court has reviewed the record extensively and has not discovered the "number of professionals" referred to by Dr. Mitchell Young. School records and medical records from Ybarra's developmental period do not support this conclusion. Further, to the extent that the records document problems Ybarra was having with school and peers, such problems are certainly consistent with the large amounts of alcohol and drugs he was taking every day. Even Dr. Young acknowledges this fact.[164] The effects of Mebaral, Dilantin and Dexedrine were described by Dr. Young, and all are consistent with observations of Ybarra during his developmental period.[165]

The use of drugs and alcohol by Ybarra clearly affected his ability to socialize and perform in school. Behaviors that interfere with a persons daily activities or with the activities of those around him or her, should be considered problem behavior rather than the absence of adaptive behavior.[166] The presence of problem behavior is not considered to be a limitation in adaptive behavior, although it may be important in the interpretation of

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163 Vol. V, p. 2852-2853. After hearing Dr. Schmidt testify, Dr. Young modified his opinion regarding Ybarra's results of "borderline" to the opinion that Ybarra was in fact mildly mentally retarded. See TP 4/29/08, p. 207.

164 It is impossible to parse out the effects of his consumption of massive amounts of alcohol and illegal drugs. Vol. V, p. 2852.

165 See testimony of Dr. Mitchell Young, VT 4/30/08, pages 46 to 49.

166 AAMR (2002), P. 79.

adaptive behavior scores (i.e. in clinical judgment) for diagnosis.[167]

When determining if a person has adaptive deficits, the examiner must consider the client's environment.[168] In Dr. Schmidt's experience, persons who are mentally retarded typically seek assistance from others to help them write kites or letters to people at home.[169] The record shows that another inmate (Bollinger) helped Ybarra with a federal lawsuit which could be support for Dr. Schmidt's position.[170] The record also shows that Ybarra is the author of hundreds of kites and letters which are mostly articulate, to the point, and written in his own hand. Nothing in the record supports a conclusion that Ybarra has had assistance in these writings, and the consistency in the topics and style of writing all support a finding that Ybarra did write his own kites without assistance.

As noted above, Dr. Schmidt testified that Ybarra was low functioning in holding jobs because according to Dr. Schmidt, Ybarra held minimum wage type jobs. On the contrary, Ybarra held fairly long periods of employment, and was paid $4.50 to $5.00 per hour in 1978-1979.[171] According to the U.S. Department of Labor web site, minimum wage in 1978 was $2.65 per hour and in 1979 was $2.90 per hour.[172] Ybarra's employment application in 1979 shows he had worked in Oregon as a Foreman and left

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[167]AAMR (2002), P. 75.

[168]TP 4/29/08, p. 64.

[169]TP 4/29/08, p. 65.

[170]TP 4/29/08, p. 65-67.

[171]Vol. II, p. 962, Vol. I, p. 133-134.

[172]www.dol.gov/esa/minwage/chart.htm.

that job to move back to California.[173] The same application indicates that he worked as a truck driver for about six (6) months (at $3.47 per hour) and he was looking for a new (better) job. The fact that he was employed as a truck driver also undercuts Dr. Schmidt's factual assumption that Ybarra would get lost while driving around Sacramento.[174] Ybarra was then hired by Chicks produce for more pay, but was soon hurt on the job.[175]

In the area of military service, Dr. Schmidt found Ybarra's functioning to be low because he didn't spend longer than thirty (30) days in the armed forces.[176] Facially, this conclusion appears to have merit, however, a closer review shows that Ybarra's first discharge from the USMC was for admitted homosexual conduct, the second discharge was for failing to reveal the first discharge, and the discharge from the National Guard was because he had asthma. The Court finds Ybarra's military service is not evidence of low functioning.

Dr. Schmidt testified that he found no evidence that Ybarra lived independently. To the extent this testimony relates up to age twenty five (25) or so, the record again does not support the testimony. It is not clear where Ybarra lived when he moved to Oregon or where he lived in Montana (prior to moving to Ely). It is clear that when he moved to Ely (shortly after his 26TH birthday), he acquired a place to live at the McConley trailer park, was driving a two (2) year old pickup truck, and when arrested, had

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[173]Vol. I, p. 133.

[174]TP 4/29/08, p. 44.

[175]Vol. I, p. 134-137.

[176]TP 4/29/08, p. 53.

various money orders in his possession, as well as a set of dominos.[177] Prior to moving to Ely, Ybarra had left Sacramento, drove to Oregon to visit his estranged wife, then drove on to Montana to work. He quit his job in Montana to move to Ely.[178] The fact that at age 26 Ybarra was able to live independently and travel to and from various states undercuts the contention that he was unable to live independently up to age 25. The Court rejects the contention that a person who legitimately manifests adaptive deficits prior to age 25 could suddenly at age 26 be able to function independently as Ybarra did. From Dr. Schmidt's perspective, the fact that Ybarra got married in Oregon and then moved to California with his wife is not indicative of socialization or independent living, but rather of having someone else to take care of him and to help him do things.[179] The Court finds this assumption to be pure speculation unsupported by the record. Overall, the record does not contain sufficient evidence to find Ybarra suffered from adaptive deficits up to age 25.

CLINICAL JUDGMENT

Making a diagnosis of mental retardation can in some cases be challenging and may require the application of clinical judgment, which is a special type of judgment rooted in a high level of clinical expertise and experience.[180] Without the benefit of IQ scores and adaptive test results on Ybarra during his developmental period, old school records, reports and anecdotal history become very important. In such cases clinical

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[177]Vol. I, p. 34-; 296-297.

[178]Vol. V, p. 2825.

[179]TP 4/29/08, p. 98.

[180]AAMR (2002), p. 94-95.

Ybarra's level of functioning.[183] Dr. Mitchell Young explained the concept as relying on more than one source of information, but basically looking for corroboration from different sources.[184] Dr. Schmidt's take on convergent validity was similar. He felt it was to "converge on a particular conclusion" and that you look for consistent behavior and patterns.[185]

After listening to and weighing the testimony of Dr. Schmidt and Dr. Mitchell Young, the Court has concerns with their use of clinical judgment and their use of convergent validity. It appears to the Court that both experts focused only on information that supported their conclusions with minimal consideration of evidence that undermined their opinions.

Both men are well qualified and honorable, however, the record is so full of evidence that contradicts their conclusions that the Court finds the bulk of their testimony to be of little weight. Although Dr. Young was willing to concede some facts that did not support his opinion, he still speculated about some facts necessary to his opinion. For example, when confronted with the letter written regarding the repossession of Ybarra's truck, Dr. Young was unwilling to concede that Ybarra produced the letter independently or without assistance.[186] Dr. Schmidt was even more unwilling to accept facts that did not

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[183]Vol. V, p. 2852.

[184]TP 4/29/08, p. 197.

[185]TP 4/29/08, p. 62.

[186] TP 4/30/08, p. 7-9. The "repo letter" is in the record at Vol. I, p. 389 and was sent while Ybarra was in the White Pine County jail awaiting trial. To suggest someone in the jail helped write the letter is pure speculation.

support his opinion. In virtually every instance where Dr. Schmidt was questioned about information that did not support his position, he took great pains to try and explain away the adverse information. One example is the issue of Ybarra's marriage. Rather than accepting the marriage as an example of Ybarra's ability to care for someone, he saw it as an opportunity for Ybarra to have someone help him.

Other examples include the criticism of the affidavit of one of Ybarra's teachers because of the passage of "35 years,"[187] while on the other hand Dr. Schmidt based much of his opinion on the recollection of family members. In the area of Ybarra's military record, even after being confronted with the reasons Ybarra was discharged from the service, Dr. Schmidt countered that "there's no evidence that he would have adapted to the military."[188] Thus, it appears that Dr. Schmidt presumed that Ybarra would not have adapted, which again is pure speculation.

Dr. Schmidt also testified he did not interview prison guards as part of his evaluation because in past cases it has not been helpful.[189] The Court is puzzled as to why Dr. Schmidt believed information from people who are in contact with Ybarra on a daily basis would not be helpful. For example, from Dr. Schmidt's perspective, Ybarra would need assistance in writing kites (especially since he was unable to complete the trial making test) Dr. Schmidt also observed Ybarra talking to his imaginary dog when he was put under stress. Based on Dr. Schmidt's test results and observations, it appears that the

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[187]TP 4/29/08, p. 110-112.

[188]VT 4/30/08, p. 200-201.

[189]TP 4/29/08, p. 105-106.

concept of "convergent validity" would mandate that he interview prison guards to validate whether Ybarra had help with the hundreds of very coherent kites he has written, or whether he often talks to his imaginary dog.

CONCLUSION

Based on the foregoing, a careful review of the record, an observation of the witnesses while testifying, and an observation of Robert Ybarra, Jr. throughout two (2) days of hearing, the Court finds and concludes as follows:

1. Robert Ybarra, Jr. has failed to demonstrate by a preponderance of the evidence that he was of subaverage intellectual functioning that was manifested during his developmental period.

2. Robert Ybarra, Jr. has failed to demonstrate by a preponderance of the evidence that he had adaptive deficits which were manifested during his developmental period.

Good cause appearing,

IT IS HEREBY ORDERED that Robert Ybarra, Jr.'s Motion to Strike the Death Penalty is **DENIED**.

DATED this 26TH day of June, 2008.

DISTRICT JUDGE

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

Case No. HC-0303002

Dept. 02

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, Warden, Et.al.
Respondents

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that on the 26th day of June, 2008, the Court entered a Decision and Order Denying Petitioner's Motion to Strike the Death Penalty in this matter, a true and correct copy of which is attached to this Notice. If you wish to appeal this Order or Judgment, you must file a Notice of Appeal with the Clerk of the above-captioned Court within (33) days after this Notice is mailed to you.

DATED this 25th day of July, 2008

Lin Burleigh

Lin Burleigh
Deputy Clerk

SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

ROBERT YBARRA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52167
District Court Case No. HC030300[illegible]

RECEIPT FOR DOCUMENTS

TO: Federal Public Defender/Las Vegas and Franny A. Forsman, Public Defender and Michael Pescetta, Asst. Federal Public Defender
Attorney General Catherine Cortez Masto/Carson City
White Pine County District Attorney and Richard W Sears, District Attorney
Donna Bath , White Pine Co. Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

08/04/08	Filing Fee Waived: Criminal.
08/04/08	Filed Certified Copy of Notice of Appeal. Appeal docketed in the Supreme Court this day. (Docketing statement mailed to counsel for appellant.)

DATE: August 04, 2008

Tracie Lindeman, Clerk of Court

By: _____
Deputy Clerk