IN THE SUPREME COURT OF THE STATE OF NEVADA

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ROBERT YBARRA, JR., Appellant, vs. E.K. McDANIEL, Warden, et al., Respondents.	Case No. 52167

APPELLANT'S REPLY BRIEF

Appeal From Decision and Order Denying Petitioner's Motion to Strike the Death Penalty Seventh Judicial District Court, White Pine County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

Appellant Robert Ybarra, Jr., replies as follows to the argument made in the state's Answering Brief on appeal.

I. DISQUALIFICATION OF THE PRESIDING JUDGE, WHO HAD PERFORMED LEGAL WORK FOR RELATIVES OF THE VICTIM OF THE NOTORIOUS OFFENSE INVOLVED HERE, WAS REQUIRED TO PROTECT MR. YBARRA'S RIGHT TO DUE PROCESS OF LAW.

Mr. Ybarra showed in the opening brief that the judge who presided over the Atkins hearing, Atkins v. Virginia, 536 U.S. 304 (2002); NRS 174.098, should have been disqualified. The judge had represented members of Ms. Griffith's family in highly personal family law matters while he was in practice. In combination with the notoriety of the case, the small size of the county, and the already-strong public sentiment against Mr. Ybarra, the judge's attorney-client relationship with Ms. Griffith's family created a situation in which his "impartiality might reasonably be questioned," requiring his disqualification. Nev. Code of Judicial Conduct, Canon 3 E(1), Commentary; PETA v. Bobby Berosini, Ltd., 111 Nev. 437, 436, 894 P.2d 337 (1995).

There is no factual dispute that the judge did not disclose his prior representation until counsel for Mr. Ybarra inquired about another issue, whether there was any basis for disqualification based on the fact that the judge attended high school at the same time as Ms. Griffiths. 1 JA 102-103, 105-106. The state nevertheless argues that the motion to disqualify should not have been heard at all, because it was filed after the judge presided over the habeas corpus proceeding, which this Court remanded on appeal for the Atkins hearing. Respondent's Answering Brief at 8-10. Given that the judge did not disclose this relationship, it would be entirely unreasonable for this Court to impose a duty on the parties or their counsel to conduct a background investigation of every judge before whom a case is pending, or scour the court records to determine what clients a judge had in practice, in order to discover grounds for disqualification. The purpose of the disclosure parts of the Canons, Canon 3 E(1), Commentary; Canon 3F, is to place the burden on the judge to disclose facts "that the judge believes the parties or their lawyers might reasonably consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification," Canon 3E(1), Commentary, so that

the parties can then decide whether to seek disqualification. The burden of disclosure is properly placed on the judge, since he or she is the one who has the necessary information.

In this case, Mr. Ybarra inquired about the judge's possible knowledge or relationship with the victim, when counsel learned from a published source that the judge had attended high school with the victim in Ely. 1 JA 105.[1] The district judge, commendably, disclosed his previous representation of members of Ms. Griffith's family, even though he did not believe it required disqualification, and explained his lack of contact with the victim in high school. 1 JA 102. At that point, Mr. Ybarra had the necessary information upon which to base a decision whether or not to move for disqualification, and filed a motion. 1 JA 107. There is no basis for finding the motion untimely when it was made properly after the disclosure of the necessary evidence. This Court squarely held, in Towbin Dodge, LLC v. Eighth Judicial District Court, 121 Nev. 251, 260, 112 P.3d 1063, 1070 (2005), that the deadlines under NRS 1.235(1) do not apply when the evidence supporting the motion to disqualify is discovered after those deadlines elapsed, as long as the motion is filed as soon as possible after discovery. That is exactly what happened here; and the district judge who ruled on the motion implicitly so found, by addressing the motion on the merits. 1 JA 206.

The state also argues that the motion was untimely because Mr. Ybarra should have discovered the evidence supporting it earlier. Respondent's Ans. Br. at 11-12. The state's position is essentially that the litigants are required to investigate everything about a judge as soon as a case is assigned rather than being able to rely upon the judge to be aware of, and disclose, potential conflicts under the Code of Judicial Conduct. The state's position would turn the constitutionally-fundamental question of judicial impartiality into a perverse game. Nothing in this Court's caselaw, or in any other authority, requires litigants to investigate judges to find evidence of conflicts that the judges do not disclose; and Mr. Ybarra submits that this Court, and the state, would be the first to object to any attempt to investigate confidential information to

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[1] This published source is cited in counsel's letter seeking disclosure. 1 JA 105.

support a motion for disqualification. See Hogan v. Warden, 112 Nev. 553, 558-560, 916 P.2d 805, 808 (1996). Here, the matters disclosed by the district judge appear to have involved confidential matters involving wills, and information about the adoption proceeding referred to would not have been available even if Mr. Ybarra had an obligation to search for it. See NRS 127.140. The judge himself claimed that he did not remember the facts he disclosed until he was alerted by counsel's letter, 1 JA 103, and putting a burden on the litigants to discover evidence of a potential conflict when the jurist himself does not remember it would be unjustifiable. The state cites no authority of any sort to support its position, and it is absurd.

The state also argues that the motion was properly denied on the merits. That state's brief includes extensive argument about what is or is not in the affidavit supporting the motion, Respondent's Ans. Br. at 12-15, but none of it is of any moment. The basic facts, that the district judge had previously represented members of the victim's family, in highly personal, confidential matters, was admitted by the judge's own disclosure, and they cannot be considered in dispute. The exhibits to the motion support the allegation that the public climate in White Pine County, which is, and has always been, highly inflamed against Mr. Ybarra. Those materials put the district judge's implied bias into context: in the habeas proceeding, Mr. Ybarra attacked the use of elected judges to preside over capital cases in general, and this Court rejected that argument. But with the addition of evidence that the judge had an attorney-client relationship with members of the victim's family, and therefore a continuing duty of loyalty to them,[2] increases the due process violation in using elected judges.

Mr. Ybarra does not retreat from his position that elected judges cannot preside over capital cases, because, at the time of the adoption of the federal constitution, judges empowered to hear capital cases had tenure during good behavior. See, e.g., 1 William Blackstone, Commentaries on the Laws of England * 258 (1765). The practice at the time of the adoption

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[2] See, e.g., In re Agent Orange Product Liability Litigation, 800 F.3d 14, 17 (2d Cir. 1986); Arifi v. Transport du Cocher, Inc., 290 F.Supp.2d 344, 348 (E.D. N.Y. 2003); Schwed v. General Electric Co., 990 F.Supp. 113, 115 (N.D. N.Y. 1998).

is normally the benchmark for the due process protections of the federal due process guarantee. E.g., Medina v. California, 505 U.S. 437, 446-447 (1992). The necessity of electioneering, and its necessary adjunct, obtaining money, gives every judge a pecuniary interest in the outcome of a case that is sufficiently notorious to inflame the public and provoke an electoral opponent. See, e.g., Tumey v. Ohio, 273 U.S. 510, 532 (1927); Nev. Legislature, 75th Sess. Senate Committee on Judiciary, Minutes at 5 (February 23, 2009) (testimony of Chief Justice, noting necessity of raising $750,000 in campaign funds). In capital cases, that interest is fundamentally inconsistent with due process.

The passage of Senate Joint Resolution 2, with the support of the Chief Justice, shows the legislature's concern over the effect of popular election of judges on impartiality and the appearance of impartiality. See Nev. Legislature, 75th Sess., Senate Committee on Judiciary, Minutes at 4-9 (February 23, 2009) (testimony of Chief Justice). Even more telling, however, is the opposition to the resolution and in favor of the current system. One opponent claimed that the resolution would make the judiciary "independent" and argued "[w]e do not want the judiciary to be independent of the people." Id. at 12. Another cited a county which had "replaced a judge two years ago. . . who functioned very well as a judge, but did not reflect the values of our community." Id. at 13. It is precisely because popular election makes judges "dependent on [the popular] will alone for the tenure of their offices," Declaration of Independence ¶ 11 (1776), that allowing elected judges to preside over capital cases in general is inconsistent with due process of law under the state and federal constitutions. See 1 JA 60-61. But in the particular circumstances of this case, where the presiding judge had actually performed work for the relatives of the victim's family, giving relief to the most notorious perpetrator in the last generation would clearly "not reflect the values of [the] community," to the point that the judge's recall or defeat at the next election would be a virtual certainty.

Appellant does not claim that the district judge had to read any of this material to understand that ruling in Mr. Ybarra's favor would be political suicide: it is precisely because it is to be expected that judicial officers in small communities have relationships with members

of the community, as the state points out, Respondent's Ans. Br. at 5, 11, that the district judge would be well aware of the temper of the community with respect to Mr. Ybarra's case. That temper would have been inflamed by any grant of relief that spared Mr. Ybarra from the death penalty; but if the judge who granted that relief had also represented members of the victim's family, the affront to the community would also have been a personal betrayal of the victim's family. No "average [person] as a judge" could possibly "hold the balance nice, clear, and true between the state and the accused," Tumey v. Ohio, 273 U.S. 510, 534 (1927), under these circumstances.

The assumption that a judge in a small community will have a network of relationships which could affect his or her impartiality, but that those potential affects must be tolerated simply because the community is small, may be traditional, see Order Denying Motion for Disqualification, 1 JA 208, citing Jacobson v. Manfredi, 100 Nev. 226, 230, 679 P.2d 251, 254 (1984); Respondent's Ans. Br. at 5, but it cannot be indulged in a capital case. The "heightened 'need for reliability'" required by the Eighth Amendment, see, e.g., Caldwell v. Mississippi, 472 U.S. at 320, 323 (1985), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opn.), cannot tolerate a lesser standard of impartiality based merely on locale, nor can the state and federal guarantees of equal protection of the laws to all similarly-situated litigants. U.S. Const. Amend. XIV; Nev. Const. Art. 4 § 21. And, as a practical matter, there is no scarcity of district judges, who would not have to travel to Ely by horse and buggy to try this matter, without the cloud over judicial impartiality that affected the district judge here.

The state's basic position is that it would be "ridiculous" to believe that the judge "would be pressured by local public opinion." Respondent's Ans. Br. at 14. As Mr. Ybarra pointed out in the opening brief, two former justices of this Court have not found that effect "ridiculous," but, rather, obvious; and the evidence of justices losing office because of making unpopular decisions completely bears out that position. Appellant's Opening Br. at 8-9. The state portrays the substantive issue of whether Mr. Ybarra is retarded as merely a credibility contest between the experts, which the district judge was entitled to resolve. Respondent's Ans. Br. at 19. It is

thus likely to be outcome-determinative, in favor of the state, if the judge has "any temptation," Tumey, 273 U.S. at 534, not to be impartial. In the context of this case, any reasonable person would doubt whether the district judge could be impartial; and therefore disqualification of the district judge was required by the Code of Judicial Conduct as well as the state and federal constitutional guarantees of due process of law. U.S. Const. Amend. XIV; Nev. Const. Art. 1 § 8. The district court's order must be reversed and the case remanded for a hearing before an impartial judge.

II. THE DISTRICT COURT'S ORDER FILED TO CONSIDER ALL THE EVIDENCE OF MR. YBARRA'S SUBAVERAGE INTELLECTUAL FUNCTIONING AND ADAPTIVE DEFICITS AND IS INCONSISTENT WITH THE STANDARD OF ATKINS V. VIRGINIA.

In the opening brief, Mr. Ybarra showed at length that the district court's order in this matter ignored relevant evidence of Mr. Ybarra's impaired intellectual functioning and adaptive deficits, and injected its own lay opinions about how people suffering from mental retardation should act rather than relying on the evidence. See Appellant's Opening Br. at 12-32. The state's argument does not address appellant's arguments in any substantial way, other than making a gratuitous and unsupported attack on the defense doctors' credibility.[3] The state only briefly refers to evidence contrary to the doctors' testimony, but does not offer substantive argument in response to the arguments advanced by Mr. Ybarra.[4] Accordingly, there is really

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[3] The state's brief refers to Dr. Mitchell Young's testimony as "[a] classic example of reaching a conclusion then disregarding all contrary evidence. Both [Dr.] Mitchell Young and Dr. Schmidt demonstrated their belief in a fact that no set of circumstances can disprove. This was not professional science, this was personal opinion unsupported by the evidence." Respondent's Ans. Br. at 24. This is merely a caricature of their testimony, which included analysis of the evidence showing possible exaggeration of symptoms and of the fact that such exaggeration can co-exist with the existence of retardation. Compare 13 JA 3053, 3108-3110, 3185-3186; see also 14 JA 3320 (testimony of Dr. Ted Young) (acknowledging that malingering can co-exist with retardation), with Respondent's Ans. Br. at 23-24. Since the district court found that the conclusions of the defense doctors were bona fide ones (despite its disagreement with them), 16 JA 3873, it is difficult to see what relevance the state's argument has, other than expressing a "personal opinion" itself.

[4] The state does contest appellant's assertion that Dr. Schmidt considered all the relevant evidence, on the ground that Dr. Schmidt did not interview any correctional personnel (continued...)

nothing substantive to which appellant can respond, and he relies upon the arguments made in the opening brief.

Counsel for appellant believes, however, that one point in the state's brief requires comment. The state argues that this case involves not only Mr. Ybarra, but "two people" and that it is speaking for the victim in this matter; it describes the facts of the offense; and it suggests that this Court might not "appreciate" this part of the argument, but that it is necessary to give the victim a "voice" in this case.[5]

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[4](...continued)
who had observed Mr. Ybarra currently. Respondent's Ans. Br. at 21-22. Neither the state, nor the court below, 16 JA 3924-3925, explains how current observations of Mr. Ybarra would be relevant to the existence of adaptive deficits during Mr. Ybarra's developmental period, which ended long ago. The state also does not address what relevance such observations would have, when Mr. Ybarra's behavior in prison is tightly - - indeed completely - - regimented and thus does not replicate in any way his functioning in the unstructured setting in which adaptive functioning during the developmental period occurred. See, e.g., Marc J. Tassé, Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases, 16 Applied Neurology 114, 118-119 (2009) ("correctional officers and other prison personnel should probably never be sought as respondents to provide information regarding the adaptive behavior of an individual that they've observed in a prison setting."). The state also ignores Dr. Schmidt's testimony on this issue and the support for it in the professional literature. 16 JA 3067-3068; Appellant's Opening Br. at 28. The state's argument is groundless.

[5] The defense ably points out this matter is one of life and death and argues for a change to the Supreme Court definition of substantial evidence. The State must, in the face of this argument, remind this court the case is about two lives, not one. Nancy Griffith was the first life involved in this matter. There is no question that Ybarra would like this whole death penalty business to just go away. Nancy Griffith surely had the same sentiments as she was being raped and beaten, she just wanted the whole business to stop. At some point, Nancy's wish was granted and the beating stopped. Unfortunately, rather than being left in the sagebrush to suffer, she had white gasoline poured over her body an was then lit on fire. Nancy surely wanted this to stop as well: stop it did. Unfortunately, the burning only stopped when she lost consciousness and then died a few days after the incident. Because Ybarra chose a remote location to commit the crime, it was highly unlikely he would have been disturbed during his acts. In fact, he selected a remote roadway, about thirty miles from town, a road on the way to his drill site, one which he would have experience on because of his own commuting to the remote site. JA000122, JA000128.

This Court may not appreciate this recitation of the facts and the

(continued...)

Mr. Ybarra and his counsel in no way denigrate or minimize the suffering of Ms. Griffith or her tragic death, or the suffering of her family, and mean no disrespect to Ms. Griffith or her family. This part of the state's argument, however, is egregiously improper.[6] The suffering of the victim in this case, or obtaining a "just" result for her, is entirely irrelevant to the question of whether Mr. Ybarra is mentally retarded or not. The state's aim in making this argument is transparent: it is merely to further prejudice this Court against Mr. Ybarra on a basis that is irrelevant to the resolution of the legal issues presented here.[7]

The fact that the state feels compelled to make this argument in this Court suggests that the same prejudicial effect was present, if implicit, in the court below, where the notoriety of Mr. Ybarra's case and the suffering of Ms. Griffith remains present to the whole community without

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[5](...continued)

> reasonable that arise therefrom. But this case is not only about Ybarra, it is about seeing to it that a fair and just result occurs for the State of Nevada and the victim of the crime. If the State does not at least mention Nancy, she will have no voice in this case because she is dead. The defense constantly refers to the newspaper accounts and the remembrance of Nancy in Ely as though these are bad things. However, there are people in Ely who believe that because Nancy is dead and cannot speak out for justice, someone in the community should do so. Ybarra has expensive counsel experts who speak to him, with him and for him, Nancy only has free advocates who cannot communicate with her because she is dead.

Respondent's Ans. Br. at 21 n. 3.

[6] If made to a jury, this argument would be considered misconduct. See Rose v. State, 123 Nev. 24, 163 P.3d 408, 419 (2008) (argument that jury should give "justice" to victims improper); Bennett v. State, 111 Nev. 1099, 1107, 901 P.2d 676, 682 (1995) ("arguable" misconduct for state to assert it represented victim).

[7] Circuit Judge Stephen S. Trott of the Ninth Circuit Court of Appeals was a life-long prosecutor, who was a deputy district attorney, the United States Attorney for the Central District of California, and the Associate Attorney General of the United States, before President Reagan appointed him to the Court of Appeals. Faced with a similar argument, Judge Trott wrote for the court: "We reject California's transparent attempt to focus our attention on Boardman's crimes rather than on the significant Constitutional question he raises. . . . California's view would limit the Constitutional rights of those defendants who commit unusually distasteful crimes. We cannot accept such a result." Boardman v. Estelle, 957 F.2d 1523, 1525 n. 2 (9th Cir. 1992). The state presents no argument or authority suggesting why the Nevada courts should adhere to a lesser standard of fairness.

the necessity of emphasis by the state. The state's attempt to replicate the situation in this Court is an implicit acknowledgment that the court below could only have been influenced by these improper considerations. See pp. 3-5, above.

III. CONCLUSION.

For the reasons stated above and in the opening brief, appellant submits that the district court's order should be reversed.

Dated this 28th day of May, 2009.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of May, 2009.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of May, 2009. Electronic Service of the foregoing APPELLANT'S REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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