IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,

Appellant,

vs.

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

Respondents.

_____/

Case No. 52167

FILED
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RESPONDENT'S ANSWERING 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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2. DOES THE DISTRICT COURT'S ORDER PROPERLY ANALYZE THE EVIDENCE IN CONCLUDIING THAT THE INTELLIGENCE TESTING AND ABSENCE OF ADAPTIVE DEFICITS INDICATE YBARRA WAT NOT MENTALLY RETARDED DURING ANY RELEVENT PERIOD OF TIME?

I.

STATEMENT OF THE CASE

Appeal from order denying motion to strike the death penalty. Seventh Judicial District Court, Honorable Steve Dobrescu, Judge.

II.

STATEMENT OF THE FACTS

Respondent has reviewed the Statement of the Facts submitted by the Appellant and agrees with the Statement of the Facts as stated in their brief.

III.

ISSUES PRESENTED FOR REVIEW

1. Are district judges required to disqualify themselves where a death penalty defendant alleges bias or the absence of impartiality without any evidence?

2. Does the District Court's Order properly analyze the evidence in concluding that the intelligence testing and absence of adaptive deficits indicate Ybarra was not mentally retarded during any relevant period of time?

IV.

ARGUMENT

A. ARE DISTRICT JUDGES REQUIRED TO DISQUALIFY THEMSELVES WHERE A DEATH PENALTY DEFENDANT ALLEGES BIAS OR THE ABSENCE OF IMPARTIALITY WITHOUT ANY EVIDENCE?

NO.

A judge is presumed to be impartial and the party asserting the challenge carries the burden of establishing sufficent factual grounds warranting disqualification. Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997). Disqualification must be based on facts, rather than mere speculation. Id.; PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 437, 894 P.2d 337, 341 (1995). Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and similar non-factual matters ordinarily do not satisfy the requirements for disqualification. Rippo v. State, 113 Nev. At 946 P.2d 1023 (1997).

It is appropriate to substantially discount factual allegations that are not supported by sworn statements and that are not otherwise verifiable from the record. Ainsworth v. Combined Insurance Company of America, 105 Nev. 237, 256 fn. 14, 774 P.2d 1003, 1017 fn. 14 (1989).

A judge has a duty to preside in the absence of some statute, rule of court, ethical standard, or other compelling reason. Goldman v. Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988).

The party making the motion to disqualify has the burden of demonstrating its timeliness and merit. Towbin Dodge v. District Court, 121 Nev. ___, ___, 112 P.3d 1063 ____ (2005). This Court can determine whether or not Ybarra's motion for disqualification is timely pursuant to NRS 1.235. Towbin Dodge v. District Court, 121 Nev. ___, ___, 112 P.3d 1063 ___ (2005).

NRS 1.235 states:

1. Any party to an action or proceeding pending in any court other than the Supreme Court, who seeks to disqualify a judge for actual or implied bias or prejudice must file an affidavit specifying the facts upon which the disqualification is sought. The affidavit of a party represented by an attorney must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Except as provided in subsections 2 and 3, the affidavit must be filed:
   (a) Not less than 20 days before the date set for trial or hearing of the case; or
   (b) Not less than 3 days set before the date set for the hearing of any pretrial matter.
2. Except as otherwise provided in this subsection and subsection 3, if a case is not assigned to a judge before the time required under subsection 1 for filing the affidavit, the affidavit must be filed:
   (a) Within 10 days after the party or his attorney is notified that the case has been assigned to a judge;
   (b) Before the hearing of any pretrial matter; or
   (c) Before the jury is empaneled, evidence taken or any ruling made in the trial or hearing, whichever comes first. If the facts upon which the disqualification of the judge is sought are not known to the party before he is notified or the assignment of the judge or before any pretrial hearing is held, the affidavit must be filed not later than the commencement of the trial or hearing on the case.

In Valladares v. District Court, 112 Nev. 79, 82-83, 910 P.2d 256, 258-259 (1996), the Nevada Supreme Court held that an arraignment is a hearing within the meaning of NRS 1.235(1). The Nevada Supreme Court, citing Nevada Pay TV v. District Court, 102 Nev. 203, 719 P.2d 797 (1986), held that the term "any pretrial matter" is to be read literally. The Nevada Supreme Court also held:

> We interpret the rule as precluding the acceptance of a peremptory challenge at any time after the thirty days preceding the date set for trial or at any time after three days preceding the date set for a hearing of any pretrial matter. In other words the time at which filing a peremptory challenge is foreclosed is set in two ways: failing to file within thirty days of the trial date, or failing to file within three days of the first pretrial hearing. Failure to file within either of these time strictures results in waiver of the

> right to make a peremptory challenge. Id. At 219-220, 626 P.2d at 273-74. Though Jeaness interprets peremptory challenges under SCR 48.1(3), we find this reasoning persuasive. The imposition of a "whichever comes first" standard onto NRS 1.235(1) insures that "for cause" challenges are initiated before any adversarial proceedings are initiated. This will prevent a party from "testing the waters" before making such a challenge, which would be unfair to the adversary and a waste of the court's time and resources. This construction also allows the court to schedule its proceedings more efficiently since it forces parties to make their "for cause" challenges at the earliest possible date. Moreover, NRS 1.235(2) protects a party from waiving all future "for cause" challenges by providing a window of opportunity to make such a challenge when the case is assigned to a new judge after the time requirements of NRS 1.235(1) have elapsed. We therefore conclude that NRS 1.235(1)(a) and (b) allow only one window of opportunity in which to make a "for cause" challenge; either twenty days before the date set for trial or hearing of the case, or three days before the date set for trial or hearing of the case, or three days before the date set for the hearing of any pretrial matter, whichever occurs first.

Valladares, 112 Nev. At 83-84; 910 P.2d at 259-260.

The limitation on the time in NRS 1.235 is not to be extended for a litigant who knew or should have known of the facts at an earlier date. Jacobsen v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984).

A mere allegation that relationships existed does not demonstrate judicial bias sufficient to hold that it was an abuse of discretion to strike the motion for recusation. Id.

NRS 1.230 provides the substantive grounds for disqualifying judges other than Supreme Court justices stating:

1. A judge shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action.
2. A judge shall not act as such in an action or proceeding when implied bias exists in any one of the following respects:
   (a) When he is a party to or interested in the action or proceeding.

(b) When he is related to either party by consanguinity or affinity within the third degree.

(c) When he has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When he is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or uncontested matters, except in fixing fees for an attorney so related to the judge.

3. A judge upon his own motion may disqualify himself from acting in any matter on the ground of actual or implied bias.

4. A judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in this case.

5. This section does not apply to the arrangement of the calendar or the regulation of the order of business.

A judge, especially a judge in a small town, need not disqualify himself merely because he knows one of the parties. [A judge] must have neighbors, friends, and acquaintances, business and social relations, and be a part of his day and generation. The ordinary results of such associations and the impressions they create in the mind of the judges are not the "personal bias or prejudice" to which the statute refers. Jacobson v. Manfredi, 100 Nev. 226, 230, 679 P.2d 251, 254 (1984). Mere allegations that a judge had a prior professional relationship with an individual who is a party (in that case, a working relationship between the judge and Manfredi, a juvenile probation officer for over three years, and Manfredi's aunt, a probation department secretary for eight years) and a current professional relationship with the aunt did not demonstrate judicial bias sufficient to hold that it was an abuse of discretion to strike the motion for recusal.

In some circumstances, a relationship between a judge and a victim may be relevant to the issue of disqualification and should therefore be revealed on the record. However, where no evidence exists beyond the allegations set forth by the movant, that the alleged acquaintance would result in bias, no disqualification is required. Rippo v. State, 113 Nev. 1239, 1250-1251, 946 P.2d 1017, 1024 (1997).

In Towbin Dodge v. District Court, 121 Nev.__., 112 P.3d 1063 (2005), the Nevada Supreme Court addressed a circumstance where the basis for disqualification was not known, and could not have been known, in time to meet the deadlines under NRS 1.235(1). The Nevada Supreme Court concluded that the federal procedure provided a convenient method for enforcing Nevada Code Of Judicial Conduct (NCJC) Canon 3E, in situations when NRS 1.235 does not apply. In a circumstance governed by Towbin, the movant must file his motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information. Towbin Dodge v. Distict Court, 121 Nev. __, __ fn. 21, 112 P.3d 1063, 1069 fn. 21 (2005); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994). Timeliness is an essential element of a recusal motion. U.S. v. Owens, 902 F.2d 1154, 1155 (4th Cir. 1990). Thus, even if a motion to disqualify is untimely under NRS 1.235, it may be saved if it is timely made under Towbin Dodge. However, the discovery of the basis for the motion must not have been known and could not have been known within the time frames of NRS 1.235. Towbin Dodge, supra. The motion must set forth facts and reasons sufficient to cause a reasonable

person to question the judge's impartiality, and the challenged judge may contradict the motion's allegations. The motion must be referred to another judge.

NCJC Canon 3E provides:

E. Disqualification.

1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
   (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
   (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practices law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
   (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any more than a de minimus interest that could be substantially affected by the proceeding;
   (d) the judge or the judge's spouse, or a person within the third degree or relationship to either or them, or the spouse of such a person:
      (i) is a party to the proceeding, or an officer, director or trustee of a party;
      (ii) is acting as a lawyer in the proceeding;
      (iii) is known by the judge to have more than de minimus interest that could be substantially affected by the proceeding;
      (iv) is to the judge's knowledge likely to be a material witness in the proceeding.
   (e) Reserved.
   (f) the judge, while a judge or a candidate for a judicial office, has made a public statement that commits, or appears to commit, the judge with respect to
      (i) an issue in the proceeding; or

(ii) the controversy in the proceeding.

A. The Motion Was Untimely.

Relying on Towbin Dodge v. District Court, 121 Nev. ___, 112 P.3d 1063, 1066-1070 (2005), Ybarra stated in his motion that "[t]he motion is timely, because the critical facts on which it is based were not known to petitioner until the judge filed his Response to Request for Disclosure on March 9, 2006." However, the action was not timely under either NRS 1. 235 or Towbin Dodge.

This action was commenced by the filing of a petition for writ of habeas corpus on March 6, 2003. The petition was prepared by Ybarra's counsel, Michael Pescetta of the Federal Public Defenders Office. The matter was originally assigned to Judge Papez, however, Judge Papez recused himself and the matter was reassigned to Judge Dobrescu. Notice of that reassignment was filed on March 21, 2003, when Judge Dobrescu entered an order directing Respondents to respond to the petition. This Court granted requests for enlargement and signed various orders. These and other documents were served on Ybarra. On October 6, 2003, the Respondents moved to dismiss the action. In November, 2003, Ybarra, in a pleading authored and signed by Pescetta, opposed Respondents' motion. After requesting and being granted enlargements by this Court, Respondents replied to the opposition to Respondents' motion to dismiss on February 12, 2004. On July 20, 2004, the Court granted Respondents' motion to dismiss. That order, as with all other orders, was signed by Judge Dobrescu. Notice of entry of the order was filed

on August 11, 2004. Ybarra appealed from the order dismissing his petition. On November 28, 2005, the Nevada Supreme Court affirmed the District Court's decision in all respects save one.

Following remand from the Nevada Supreme Court, on December 2, 2005, the Court filed an order in which it gave Ybarra a deadline to file a motion pursuant to NRS 175.554(5).

Remitititur issued on February 28, 2006.

Pescetta sent to the Court a letter dated March 3, 2006, in which he claimed following the publication of an article in the Nevada Lawyer in May, 2005, he stated that he learned that this Court had attended White Pine County High School at the same time as the victim, Nancy Griffith. Pescetta also wrote that it appeared that the Court's sister had also attended White Pine County High School and was in the class immediately ahead of the victim. Pescetta requested disclosure of any information on any contact between the Court and members of the Court's family with the victim and on "the effect of the continuing local focus on this case on you."

The Court received Pescetta's letter on March 6, 2006, and filed its response on March 9, 2006.

On March 9, 2005, the Court gave Ybarra a deadline of March 31, 2006, to file a motion pursuant to NRS 175.554(5).

On or about March 24, 2006, Ybarra filed a motion for disqualificication.

B. DOES THE DISTRICT COURT'S ORDER PROPERLY ANALYZE THE EVIDENCE IN CONCLUDING THAT THE INTELLIGENCE TESTING AND ABSENCE OF ADAPTIVE DEFICITS INDICATE YBARRA WAS NOT MENTALLY RETARDED DURING ANY RELEVANT PERIOD OF TIME?

Yes, the court heard three days of testimony and reviewed and analyzed over 3,000 pages of evidence admitted at the hearing in finding that IQ testing performed on Ybarra in the 1980's indicated an IQ of 86, the defense experts testing failed to account for malingering and the defense ignored relevant reporters on Ybarra's behavior and the evidence provided by the defense did not unequivocally support the existence of adaptive deficits.

In Atkins v. Virginia, 536 U.S. 304 (2002), the Supreme Court held that the imposition of the death penalty on a mentally retarded person (those in the bottom 2 percent of intelligence) constituted cruel and unusual punishment prohibited by the Eight Amendment to the U.S. Constitution. The Nevada Legislature defined mental retardation as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." NRS 174.098(7). The Nevada Legislature did not define "developmental period" so that this court is left to opine on the subject. Judge Dobrescu determined, based on a review of other states, that the developmental period preceded age 18, but also analyzed the evidence in the light of a somewhat later period, perhaps to age 25.

In analyzing the facts at hand, the District Judge reviewed evidence related to the defendant's effectiveness in meeting the standards expected for his age in the following areas: communication, self-care, home living, social/interpersonal skills,

On or about March 28, 2005, Ybarra filed a motion to set aside the death penalty.

Pescetta has been Ybarra's counsel since the inception of this action. Since March 21, 2003, Judge Dobrescu has been the judge in the case and Pescetta and Ybarra have known of that since that date. Pescetta did not see fit to seek to disqualify Judge Dobrescu until he filed the instant motion on or about March 24, 2006.

Ybarra's motion could have and should have been filed within the parameters of NRS 1.235. As noted above, those deadlines are not extended in circumstances in which the movant either knew or could have known of the basis asserted for disqualification. Ybarra knew that the case had been assigned to Judge Dobrescu on or about March 21, 2003, long before Respondents moved to dismiss the action. Ybarra suggested that he had no idea that a basis for disqualification existed until his counsel, Pescetta, read an atricle in Nevada Lawyer. Ybarra did not provide the Court with a copy of that article, but the thrust of Ybarra's argument was that until that very moment, he had no idea that Judge Dobrescu had attended White Pine County High School and, thus, had no basis to believe that there may have been any basis to seek disqualification of Judge Dobrescu.

As noted above, the burden of demonstrating timeliness is on the movant.

First, to the extent that any such suggestion or representation was made, Respondents deny the representation or suggestion made by Ybarra's counsel that the basis for Ybarra's claim for disqualification could not have been discovered prior

to the publication of the article. Interestingly, neither Ybarra nor his counsel provided an affidavit to the effect of Ybarra's representation or suggestion. That being the case, Ybarra failed to meet his burden.

Second, just exactly what was it that prevented Ybarra from making any inquiry? Had Ybarra made any inquiry, he could have found out a long time ago from any number of sources where and when Judge Dobrescu went to high school. The most obvious souce of information is the judge himself. Ybarra could have made inquiry long before the article was published. Indeed, nothing prevented Ybarra from making inquiry the moment he learned that Judge Dobrescu had been designated to hear the case. Although Ybarra attempted to portray the publication and his reading of the article as the catalyst for his inquiry, that is a dubious proposition because of the nature of the information that Ybarra's counsel states in his letter he obtained. It is certainly common knowledge among lawyers in Nevada that Nevada district court judges are lawyers, that they went to law school, that they went to college and attended a high school. Thus, it is not surprising that Judge Dobrescu was in private practice in Ely, Nevada, prior to the time that he became a district judge. That information was available to anyone who looked in a phone book or who called the state bar. Likewise, it is no surprise that Judge Dobrescu had clients and the most likely source of those clients were people in Ely, Nevada. Those circumstances in and of themselves would have alerted a reasonable prudent person that Judge Dobrescu may have had clients related to the victim who was a resident of Ely, Nevada. That being the case, nothing prevented Ybarra from making

inquiry. The point is that nothing prevented Ybarra from making the inquiry in his letter to the judge prior to that time. Ybarra could have known of the asserted basis/bases for disqualification years ago. Ybarra's motion was untimely under NRS 1.235.

Likewise, Ybarra's motion was untimely under Towbin. Ybarra could have known of the basis/bases for disqualification years ago.

B. The Motion Was Without Merit.

The affidavit by Ybarra was insufficient. Ybarra submitted to the Court an affidavit in support of his motion for disqualification. That affidavit was attached to his motion as Exhibit 1. Pursuant to NRS 1.235(1), the affidavit must specify the facts upon which the disqualification is sought. Examination of the affidavit signed by Ybarra shows that the allegations contained therein are nothing other than conclusory allegations, devoid of any specificity. Such an affidavit was insufficient.

The affidavit states, "The judge presiding over my case, the Honorable Steve L. Dobrescu, suffers from an actual and implied bias and prejudice against me." That statement is nothing other than a conclusion.

The affidavit states, "The actual and implied bias results from Judge Dobrescu's representation of the parents and sister of the victim, Nancy Griffith, in matters relating to their families, after my conviction and sentence were under review, when the judge was in the private practice of law." That statement is a conclusion, failing to state what the "matters" were or precisely when they occurred.

The statement fails to name the persons referred to. The statement also fails to state precisely what it was about the representation that supposedly would have caused the alleged bias.

The affidavit states, "The continuing duty of loyalty the judge owes to his former clients is inconsistent with maintaining strict impartiality between my interests and those of the state in this matter." That statement is mere argument. It provides no specific facts upon which the disqualification is sought.

The affidavit states, "This effect is exacerbated by the continuing public interest in the small community of Ely, Nevada, in my case, and the strong public statement against me, evidenced by the publicity that the pending legal proceedings are an 'attempt to dodge execution,' that I am 'continu[ing] to cheat justice,' and that Ms. Griffith's family will be 'denied closure' until I am executed." The statement is devoid of specificity, and is merely an argument containing rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and similar non-factual matters.

The affidavit states, "The public sentiment further affects the judge's ability to be impartial due to the necessity for district judges to run for popular election." That statement is not only patently ridiculous, it too amounts to nothing other than rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and similar non-factual matters.

Ybarra provided no specific factual basis for his motion. Therefore, the motion should have been denied and was properly denied by an impartial judge.

In support of his motion, Ybarra submitted documents designated Exhibits 3A-F and Exhibit 4. Exhibits 3A-F appear to be articles found on various web sites. Inasmuch as those exhibits are not referred to in Ybarra's affidavit, they provided no basis upon which disqualification can be considered. Even if the exhibits were referred to in Ybarra's affidavit, what these articles have to do with the bases for disqualification is a mystery. Ybarra made no allegation nor does he show that Judge Dobrescu ever even read the articles prior to their submission to this Court. Ybarra has failed to allege or show that anything contained in the articles is inaccurate, not true or not already reflected in the record before the Court. In sum, Ybarra provided no nexus between the articles and the request for disqualification.[1]

Even if one assumes for the sake of argument that the exhibits are offered in support of Ybarra's ridiculous assertion that Judge Dobrescu would be pressured by local public opinion, the documents fall far short of establishing the existence of any local public opinion sufficient to even warrant a change of venue. See Gallego v. State, 101 Nev. 782, 785-786, 711 P.2d 856, 858-859 (1985); Gallego v. McDaniel, 124 F.3d 1065, 1070-1072 (9th Cir. 1997). The exhibits fell far short of establishing anything that would indicate that Judge Dobrescu might be subject to any pressure at all. Moreover, if one were to adopt Ybarra's reasoning, it follows that all local judges in small communities must be recused. That is, of course, an absurdity.

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[1] If the judge is supposedly on constructive notice of what is on the web, then Ybarra and his counsel most certainly are, too. If that is true, then Ybarra and his counsel were on notice no later than 1999 that the articles were on the web as well. That being the case, then Ybarra and his counsel either knew or could reasonably have known of the articles well before the commencement of this action is 2003 and could have brought their motion for disqualification long before now. Therefore, the motion is not timely.

In the argument for disqualification Ybarra asserts the following reasons for disqualification: 1) the facts contained in the judge's disclosure give rise to a reasonable question of the judge's impartiality; 2) the judge was in private practice and represented the victim's sister in an adoption proceeding; 3) the judge was in private practice and represented the victim's parents in preparing their wills; and 4) "The judge's prior representation of Ms. Griffith's family members and the sharing of their confidences, combined with the certain public obloquy which would be directed at any judicial officer in White Pine County who granted petitioner any relief, leads to a situation in which the judge's impartiality 'might reasonably be questioned.'" JA 108-114.

The argument for disqualification was not properly before the Court because they were not been sworn to in the affidavit.

Even if the assertions could properly be considered, they did not establish a basis for disqualification as suggested by Ybarra, that the judge's impartiality might reasonably be questioned.

First, Ybarra's statement that the facts contained in the judge's disclosure give rise to a reasonable question of the judge's impartiality is nothing more than a conclusion.

Second, Ybarra's statement that the judge was in private practice and represented the victim's sister in an adoption proceeding provides no basis upon which the judge's impartiality might be questioned. There is no showing that the

victm's sister ever even discussed her murdered sister during the course of the representation or that anything having anything to do with Ybarra was discussed.

Third, Ybarra's statement that the judge was in private practice and represented the victim's parents in preparing their will suffers from the same defects. There is no showing that the parents ever even discussed their murdered daughter or anything about Ybarra when the wills were prepared.

Fourth, Ybarra's Statement, "The judge's prior representation of Ms. Griffith's family members and the sharing of their confidences, combined with the certain public obloquy which would be directed at any judicial officer in White Pine County who granted petitioner any relief, leads to a situation in which the judge's impartiality 'might reasonably be questioned,'" is nothing other than a scurrilous insult cast against the Court and the community based on rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and/or similar non-factual matters. Ybarra has not remotely established that there would be "certain public obloquy which would be directed against any judicial officer in White Pine County who granted petitioner any relief. Ybarra has not established what "confidences" he might be referring to. Ybarra has not established even that the victim went to White Pine County High School.

In sum, giving Ybarra the benefit of everything, the only things that Ybarra can claim to have shown is what is in Judge Dobrescu's response to request for disclosure. Ybarra has shown nothing more. Instead of making the affirmative

showing that is required, Ybarra has decided to rely on rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion and/or similar non-factual matters.

The attorney-client relationship between Judge Dobrescu and the victim's relatives arose years after the murder and trial and involved matters unrelated to the instant litigation.

Ybarra attemps to rely on Steinhorst v. State, 636 So.2d 498 (Fla. 1994). However, Ybarra's reliance is misplaced. Examination of the case shows that prior to becoming a judge, the judge has represented and advised the estate of one of the victim's whom the defendant was convicted of killing. The representation included giving counsel to the victim's family and the possibility of pursuing a wrongful death or other tort claim on behalf of the victim's estate. No such circumstance is presented in the instant case. Judge Dobrescu's counsel was unrelated to the victim's murder in this case and consisted only of preparing wills for the victim's parents years after the murder and representing the victim's sister and her husband in an adoption years after the murder. Steinhorst is inapposite.

Ybarra attempts to rely on Goines v. State, 708 So2d 656 (Fla. 1998). Again, Ybarra's reliance is misplaced. Examination of the case shows that the trial judge had previously prosecuted the defendant. No such circumstance is presented in this action.

Ybarra attempts to rely on Buchanan v. Buchanan, 587 So.2d 892 (Miss. 1991). Ybarra's reliance is yet again misplaced. The trial judge's son-in-law was a student at a medical school where a party to a child custody dispute was a faculty

member did not trigger constitutional or statutory prohibitions against the judge's presiding over the case.

Ybarra attempts to rely on People v. Booker, 224 III.App.3d 542 N.E.2d 1274 (1992). This case does not help Ybarra. Rather, it supports Respondents' position. In Booker, the judge's previous representation of the victim's natural father in divorce proceedings and proceedings to modify the divorce decree around the time that the defendant committed the crimes did not render the trial judge partial so as to require his recusal. Judge Dobrescu's representation of the victim's parents in preparing their wills and the victim's sister in adoption proceeding is even more attenuated than the circumstances presented in Booker.

Ybarra attempts to rely on In re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955). In that case the Supreme Court held that a contempt proceeding that was conducted did not comport with due process where the same judge presiding at the contempt hearing had also served as the "one-man" grand jury out of which the contempt charges arose. No such circumstances are presented in the case at bar.

Ybarra attempts to rely on Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927). Again, Ybarra is afforded no solace, Turney involved a case in which the defendant was convicted by the village mayor, whose fees and costs were dependent on the conviction. No such circumstance is presented in the case at bar. Judge Dobrescu has no pecuniary interest in the outcome of the instant action.

Ybarra has not shown that there exist reasons sufficient to cause a reasonable person to question the judge's impartiality.

use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.[2]

The defense finds fault with the court claiming, without authority, that the court committed error because "lay people . . . rely upon the fact that mentally subaverage people may have strengths in functioning as well as weaknesses, and therefore to conclude that if such an individual can do some things well, he cannot be retarded." First, the issue was not whether Ybarra was mentally subaverage or whether he had strengths and weaknesses. The issue is whether Ybarra was mentally retarded with adaptive deficits during the developmental period, the Legislature has called this significant subaverage intelligence not just subaverage intelligence. Since Ybarra shows none of those signs of mental retardation or significant subaverage intelligence, the defense continually attempts to raise the bar of mental retardation until the definition includes persons who exhibit an intelligence level far above the average sixth grader or far above the bottom 2% in the population. This case is not concerned with someone who was "mentally subaverage" rather, it concerns whether Ybarra was mentally retarded, or within the bottom 2% of performers.

The defense had a low burden of proof to meet: preponderance of the evidence. This lowest of the burdens is an appropriate legislative determination. However, the defense could not even meet this low burden where all the facts of the

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[2] The Atkins court approved this definition which stems from the DSM-IV.

case illustrate a clever planner who manipulated the legal system for many years in carrying out his motive to "fight to live."[3]

The defense occasionally confuses mental illness with mental retardation: "Dr. Mitchell Young testified that true illness and faking can co-exist and that some degree of feigning illness does not exclude the possibility of real disorders. 13 JA 3186, 3234." Appellants Brief (AB), pg. 14. The issue before the District Judge was not true illness or feigning illness so that Dr. Mitchell Young's testimony was irrelevant: the issue was mental retardation.

Similarly, the defense confuses the breadth and scope of evidence Dr. Schmidt considered in his analysis: "Dr Schmidt considered **all of the historical information** . . ." [Emphasis supplied.] AB, pg. 14 This statement flies in the face of the facts: there was a complete failure to interview anyone who had been closely

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[3] 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 and 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 reasonable inferences 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 and experts who speak to him, with him and for him, Nancy only has free advocates who cannot communicate with her because she is dead.

associated with Ybarra for the past 26 years, his prison guards and inmate friends. Failure to discover or review 26 years of historical information can hardly be "consider[ing] all of the historical information."

Throughout Dr. Schmidt's testimony, Dr. Schmidt failed to account for the influence controlled substances and alcohol had on Ybarra's performance during the developmental period. Ybarra reported he drank a six pack of beer per day for the ten years prior to his admission to the hospital for a back strain when he was 23 years of age. JA000258. Dr. Schmidt never refers to this when recounting adaptive deficits such as: inability to perform in school, holding low paying jobs, poor school attendance, inability to find his way around town while driving a delivery vehicle. When Ybarra was age 14, Dr. Wilson reports Ybarra had been taking Dilantin for three years along with two other drugs. JA 000238. Dr. Wilson then advises Dexadrine, stop Meboral and continue Dilantin. If no change, then return to the prior medical regimen. JA 000239. Judge Dobrescu describes in his order his opinion about the absence of adaptive deficits based on Dr. Young's description of the effects of these drugs and the description was consistent with Dr. Schmidt's conclusions about Ybarra's exhibition of adaptive deficits during his developmental period. JA003868. Dr. Schmidt fails accurately to account for these medical effects of prescription medications, alcohol and drug abuse by Ybarra in Schmidt's description and testimony about adaptive deficits.

Dr. Schmidt testified that measures of intelligence arrive out of examining job issues, educational records and reports of functioning of the individual --- looking

for a convergence of information to a conclusion. JA2979. Dr. Schmidt testified that he reviewed the school records and Ybarra's performance deteriorates from the accident point forward. JA3015. Dr. Schmidt also relied upon a written record from the school psychiatrist that Ybarra had "gone about as far as he can within the limits of his intellectual and emotional capabilities." JA 337-338, 341. In contrast to this support for Dr. Schmidt's 2002 diagnosis, Dr. Schmidt rejected evidence from Ybarra's homeroom teacher that Ybarra was functioning normally and a C to C+ student. JA 3073.

Finally Dr. Schmidt testified that based on his testing and adaptive deficits Ybarra is in the bottom one percent of the entire population. JA3031. During cross examination Dr. Schmidt also clearly testifies you cannot fake a higher IQ then you possess. JA003097. Contrastingly, one can malinger and get a lower IQ score. JA003098.

Dr. Schmidt also established during testimony that he failed to give a full battery of tests to Ybarra and his analysis indicated the test results underreported Ybarra's true IQ.

Dr. Mitchell Young provided a written report to the Court stating his analysis of adaptive functioning supports a conclusion of "borderline to mild mental retardation." JA 2933. Dr. Mitchell Young also noted "the crimes for which Mr. Ybarra was convicted do not appear to be simply self-defense as the result of gullibility on the basis of subnormal intelligence. " JA 2931. In fact, Dr. Mitchell

Young also stated Ybarra's elevated score during SIRS testing indicated Ybarra was faking during the testing. JA 2928.

Despite the evidence that Ybarra was faking during his March 2008 testing, Dr. Mitchell Young concluded that Ybarra may be borderline or mildly mentally retarded. A classic example of reaching a conclusion then disregarding all contrary evidence. Both Mr. 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.

V.

CONCLUSION

For the reasons stated above, this Court must affirm the District Court's Order.

Dated this 21st day of April, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Respondents 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 the conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of April, 2009.

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CERTIFICATE OF SERVICE

PURSUANT to N.R.C.P. 5 (b), I certify that I am an employee of the WHITE PINE COUNTY DISTRICT ATTORNEY'S OFFICE, and that on the 21st day of April, 2009, I personally placed in the United States Mail Service, Ely, Nevada, postage fully paid, a true copy of the attached document, and addressed to:

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