ORIGINAL

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 OPENING 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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I. STATEMENT OF THE CASE

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

II. STATEMENT OF THE FACTS

Appellant Robert Ybarra, Jr., was convicted of murder and sentenced to death for the killing of Nancy Griffith. This Court upheld the conviction and sentence on direct appeal, Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984), and dismissed the appeals from subsequent denials of collateral relief. In Mr. Ybarra's latest habeas corpus petition, filed in 2003, he alleged that his functioning places him in the range of mental retardation and that his death sentence is therefore invalid. 1 Joint Appendix 1-89. The district court denied all relief, and this Court affirmed the denial except with respect to the claim that Mr. Ybarra functions in the mentally retarded range. This Court remanded that claim to the district court for a hearing under Atkins v. Virginia, 536 U.S. 304 (2002), and NRS 174.098. 1 JA 90.

At the hearing, Mr. Ybarra presented voluminous documentary evidence. 1 JA 210 12 JA 2954. David Schmidt, Ph.D., a neuropsychologist, testified as to the results of his intelligence testing, and other neuropsychological testing, and as to the existence of adaptive deficits, and opined that Mr. Ybarra's functioning is in the range of mental retardation as defined in Atkins and NRS 178.098(7). 12 JA 2963-13 JA 3138; 14 JA 3356-3393.

Dr. Mitch Young testified as to the evidence of Mr. Ybarra's adaptive deficits and also opined that he functions in the range of mental retardation. 13 JA 3139-14 JA 3239. The state presented Ted Young, Ph.D., who testified that, in his opinion, the results of the defense testing were not valid, based on his belief that Mr. Ybarra was malingering. 13 JA 3240-14 JA 3355; 3394-3399.

Following the hearing, the state submitted a letter and other materials from Dr. Ted Young to the court, which purportedly supported his opinion. 14 JA 3403-3413. Mr. Ybarra moved to strike that material on the ground that he had not had the opportunity to cross-examine Dr. Young about it or to submit evidence rebutting it, 15 JA 3640-16 JA 3773, and the district court struck it. 16 JA 3828-3829.

Ultimately, the district court issued an order denying the motion to strike the death penalty on the ground that Mr. Ybarra had not proved that he was mentally retarded. 16 JA 3830-3875. Mr. Ybarra filed a timely notice of appeal and amended notice, 16 JA 3878, 3928-3930, and this appeal follows.[1]

III. ISSUES PRESENTED FOR REVIEW

1. Did the refusal to disqualify the district judge result in a violation of the state and federal constitutional guarantees of due process of law.
2. Is the district court's order refusing to find that Mr. Ybarra functions in the mentally-retarded range consistent with the constitutional standard of retardation imposed by Atkins v. Virginia.

IV. ARGUMENT

A. The Failure to Disqualify the District Judge Violated the State and Federal Constitutional Guarantees of Due Process of Law Because a Reasonable Person Would Question His Impartiality.

Before the Atkins hearing in this matter, Mr. Ybarra requested information from the district judge about any potentially disqualifying circumstances that should be disclosed under the Nevada Code of Judicial Conduct, Canon 3(E)(1). 1 JA 105-106. In his response, the

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[1] This Court may take the opportunity presented by this case to clarify what provision for filing a notice of appeal applies to an order denying a motion to strike the death penalty under NRS 175.554(5). Mr. Ybarra's Atkins claim was originally raised in a petition for a writ of habeas corpus. If the district court's order is considered a final order in the habeas proceeding, which this Court remanded to the district court, the time for filing the notice of appeal begins to run from the filing of the notice of entry of judgment. NRS 34.830. Although the statutory scheme does not, by its terms, eliminate the jurisdiction of courts to adjudicate an Atkins issue in the context of a habeas corpus proceeding, the district court in this case required Mr. Ybarra to file a motion to strike the death penalty under NRS 175.554(5) and 174.098. If the order denying the motion to strike is considered an order in a criminal case, the time for filing the notice of appeal would begin to run from the date of the entry of the order. NRAP 4(b)(1). The statute providing for Atkins hearings also provides for appellate review of an order granting or denying a motion to strike, NRS 175.554(5), but it does not specify which timing provision applies.

In this case, out of an abundance of caution, Mr. Ybarra filed his first notice of appeal on July 24, 2008, to ensure it was within thirty days of the date of the filing of the order on June 26, 2008, 16 JA 3876. After the notice of entry of the judgment was filed on July 25, 2008. 16 JA 3879, Mr. Ybarra filed an amended notice of appeal on July 30, 2008, to ensure that the notice of appeal would comply with NRS 34.830 as well. Because of the confusion about what timeliness provision applies, it would be helpful to the bench and bar if this Court would indicate which provision applies, and thus which notice of appeal filed by Mr. Ybarra in this matter it views as effective.

district judge asserted that he could be impartial but acknowledged that, when he was in private practice, he had performed legal work for the parents and sister of the victim in this matter, Nancy Griffith. 1 JA 102-103. Mr. Ybarra filed a motion for disqualification, 1 JA 107, which was denied. 1 JA 204. The error in the denial of the motion for disqualification deprived Mr. Ybarra of his state and federal constitutional right to due process of law, because the district court could not be expected to be impartial.

A judge must be disqualified "whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply." Nevada Code of Judicial Conduct, Canon 3E(1), Commentary. "As the commentary to the NCJC makes clear, the test for whether a judge's impartiality might reasonably be questioned is objective; whether a judge is actually impartial is not material." PETA v. Berosini, Ltd., 111 Nev. 431, 436, 894 P.2d 337 (1995):

> The commentary to Canon 2A states, in part that [t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

Id. The federal constitutional guarantee of due process of law also requires that the tribunal be impartial, that is, that the judge be free of any influence that would offer a "temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused." Tumey v. Ohio, 373 U.S. 510, 532 (1927); accord In re Murchison, 349 U.S. 133, 137 (1995).

The district judge's response to the request for disclosure acknowledged that, while the judge was in private practice (after Mr. Ybarra's case was under review following his conviction and sentence), he represented Ms. Griffith's sister in an adoption proceeding and represented Ms. Griffith's parents in preparing their wills. 1 JA 101. Representation of a victim's family members can give rise to disqualification. In Steinhorst v. State, 636 S.2d 498, 499 (Fla. 1994), the Florida Supreme Court ordered in a hearing on the issue of recusal, where the trial judge had represented and advised the estate of the victim of the defendant's offense and had recused himself in the proceedings against a co-defendant. See also Goines v. State, 708 S.2d 656, 659-

661 (Fla. App. 1998) (ineffective assistance of counsel for failing to seek disqualification of trial judge, where judge while in practice six years before had prosecuted defendant on unrelated case, giving rise to "well-founded fear in the mind of the moving party that he will not receive a fair trial"); Buchanan v. Buchanan, 587 S.2d 892, 895-897 (Miss. 1991) (remanding for hearing on recusal motion to determine if judge's relationship with son-in-law, who was student at dental school in which party was former faculty member, required disqualification); see also Robertson v. California, 498 U.S. 1004, 1005 (1990) (Blackmun, J., dissenting from denial of certiorari) (due process implicated where judge presiding over capital trial had represented defendant's mother in divorce case involving abuse); cf. People v. Booker, 224 Ill. App. 542, 585, N.E. 2d 1274 (1992) (judge's previous representation of victim's father in divorce proceedings did not require disqualification). 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."

In PETA v. Bobby Berosini, Ltd., 111 Nev. at 435-438, this Court found that a district judge sitting as a temporary member of the Supreme Court had to be disqualified because his "impartiality could reasonably be questioned." The action involved libel and other claims arising from the publication of reports of alleged abuse of performing animals. The district judge was a member of the Advisory Board of the Animal Foundation of Nevada, which had the primary purpose of running a spaying and neutering clinic. This Court described the relationship between the judge and the party to the action as follows:

> [A]t the time this matter was under consideration, Judge Lehman was a member of the advisory board to a foundation that has utilized a defendant in this action as its representative and which had a fairly active animal rights activist as a trustee. Judge Lehman has filed an affidavit in this court stating that he has only attended nine or ten Advisory Board meetings in the entire time he has been on the board. Judge Lehman did not know, and never met, Greenspun-Gale until meeting her at one of the Advisory Board meetings in approximately August of 1992. Since then, Judge Lehman believes that he and Greenspun-Gale have both been at meetings together only two or three times. PETA, PAWS, and the instant litigation have never been discussed at these board meetings. Judge Lehman had never seen PETA literature at AFN or engaged in fund raising activities for AFN. Judge Lehman further states that he believes that the goals of AFN and PETA are substantially different. Judge Lehman "[i]n good faith, and all honesty. . .has

> never thought of a possible conflict with this case because of membership on said Advisory Board." Even in retrospect, Judge Lehman does not think there was a conflict.

111 Nev. at 435.

This Court concluded that the district judge was not subjectively biased, but it ordered his disqualification,

> to avoid even the appearance of impropriety and to promote public confidence in the integrity of the judicial process. We conclude that a reasonable person, knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality. Judge Lehman's role as an Advisor to an animal foundation, even one solely devoted to sterilizing animals and pet care, would cause a reasonable person to wonder whether Judge Lehman could be completely neutral and detached when whether appellants' actions were tortious. Further, a trustee of the foundation was active in the animal rights movement and an occasional spokeswoman for the foundation was an active PETA member and a defendant in this action. Judge Lehman's association with these players could cause a reasonable person to question his impartiality.

Id. at 438.

This mere association with others who were parties, or who were involved in another organization that was a party, was found sufficient to "cause a reasonable person to wonder whether [a judge] could be completely neutral and detached" in deciding a tort case. The actual representation of the victim's family members in this case - - who had already suffered the loss of the victim and the trauma of the trial - - must equally "cause a reasonable person to wonder" whether the judge who had provided that representation to the family members, in a professional relationship of confidence and loyalty, could be "completely neutral and detached" in deciding the claims raised by the person convicted of killing the victim.

Further, the context of this case requires significantly greater scrutiny of the disqualification issue and of the ability of any local judge to adjudicate Mr. Ybarra's case impartially. The district judge, in his answer to the motion to disqualify, complained that disqualification because of the degree of local public sentiment would mean that "every high profile case would have to be heard by a visiting or senior judge," 1 JA 153; and the order denying the motion noted that most people in Ely, Nevada would have relatives who had been represented by a district judge while the judge was in private practice. 1 JA 204. This position presents an equal protection violation under the state and federal constitutions, because the

degree of impartiality afforded a party is not protected by an equal standard for all judges throughout the state, but is relaxed when the matter is pending in a small community, in which the threat to a judicial officer's impartiality is, as here, greater than in a large community. These points also ignore the focal problem here, which is that this case remains the high profile case in White Pine County, which is a very small community.[2]

Mr. Ybarra's case is the most notorious in the history of White Pine County, in which Mr. Ybarra was convicted of kidnapping and raping a fifteen-year-old local girl, and killing her by dousing her with gasoline and setting her on fire. Ybarra v. State, 100 Nev. 167, 170-171, 679 P.2d 797 (1984). Memories of the offense have not faded in White Pine County: the White Pine County Historical and Archaeological Society maintains an internet website (http://www.webpanda.com/white_pine_county/historical_society), which devotes a considerable section to "Nancy Griffith's Heinous Murder," and contains sections on "Nancy Griffith's Biography and Poetry," "Robert Ybarra, Jr. Profile," "The Crime Details," and "The Trial Chronology." (http://www.webpanda.com/white_pine_county/griffith/index.html) 1 JA 122. The articles emphasize that "[j]ustice has yet to be served. There will be no closure for Nancy Griffith or her family until Robert Ybarra Jr. pays the supreme penalty that was imposed on him 20 years ago in a court of law." "The Nancy Griffith Murder," 1 JA 124. The author of the articles, in a discussion group on the same site in 2003, represented that the Griffith family approved of the material and was grateful to the author for "not letting what happened to her be forgotten and that justice has not yet been served for her." 1 JA 148 (emphasis supplied). When this Court remanded this matter to the district court, the local newspaper characterized the proceeding as "another attempt" by the petitioner to "dodge execution." "Ely Murderer Claims He's Mentally Retarded," Ely Times (December 2, 2005) 1 JA 150-151. After the hearing in this matter, the local press focused on the hearing, and quoted the victim's family members' highly

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[2] The projected population of White Pine County as of 2008 was only 7,307. Nevada State Demographer's Office, Population Projections for Nevada and Nevada's Counties from 2002 to 2022 at 5 (April 2002). The number of current active and inactive registered voters as of 2009 is only 5,302. Nevada Secretary of State, 2009 Voter Registration Statistics Figures for the End of July 2003 (http://sos.state.nv.us/nvelection/voter_reg/2009/0109maint.asp.)

negative comments about it. 16 JA 3807-3809.

Most significantly, the on-line comments on the story from local residents were intensely hostile, 16 JA 3809-3823; and they included prayers that "the Judge will rule in favor of the Griffith family" - - his former clients - - and that the community "should hold the local justice system accountable" and not "continue to victimize this good family" - - again, the judge's former clients. 16 JA 3810-3811. Even now, the district court's ruling denying the motion to strike the death penalty was the number one story in the county last year. John Plestina, "Murders, Old and New, Coal Plants Dominated '08 News," Ely Times (December 31, 2008) at 1 ("No. 1 - - Robert Ybarra Still Alive.").

In this context, the judge's professional relationships with members of the victim's family cannot be dismissed as the kind of routine "business and social relations" that do not affect a judge's impartiality, see Jacobson v. Manfredi, 100 Nev. 226, 230, 679 P.2d 251, 254 (1984); 1 JA 208. To the contrary, the entire fabric of the community in White Pine County is so hostile to Mr. Ybarra that any local judge would simply destroy his career by ruling in Mr. Ybarra's favor. The fact that the judge had had a professional relationship with the victim's family could only be viewed as adding insult to injury to the community if he had ruled in Mr. Ybarra's favor. In Nevada, district judges are elected, Nev. Const. Art. 6 § 5, and if the district judge in this case had ruled in Mr. Ybarra's favor, he would certainly have faced a virtually irresistible electoral challenge.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian pressures which would affect the impartiality of an "average person" as a judge in a capital case.[3] Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced inmate poses the threat to a judge of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment

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[3] This Court rejected the claim in the habeas proceedings in this case that election of judicial officers necessarily violates due process. Ybarra v. Warden, No. 43981, Order Affirming in Part, Reversing in Part and Remanding, at 9 (November 28, 2005); 1 JA 98. This Court did not have before it the evidence contained in the judge's disclosure, however; and in any event, Mr. Ybarra does not retreat from his position that elected judges cannot constitutionally preside over capital proceedings. 1 JA 60-61.

against the jurist's perceived pro-capital defendant rulings, and poses the threat of ultimate removal from office. Members of this Court have acknowledged this effect. Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (Ass. Conc. Res. No. 3) (file No. 7, Statutes of Nevada 2001 Special Session), Meeting of February 21, 2002, Partial Verbatim Transcript at 3 (noting that lesson of election campaign, involving allegation that justice of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability."). The extraordinary amount of funding necessary for waging judicial campaigns gives judicial officers a direct pecuniary interest in denying relief to controversial litigants. See, e.g., Progressive Leadership Alliance of Nevada, The Supreme Jackpot II: A Study of Campaign Contributions to Nevada Supreme Court Candidates 2004 at 13 (September 2005); see Supreme Court of Nevada, Annual Report of the Nevada Judiciary 2 (2002).

Controversial decisions do affect the electability of judges. The wrenching proceedings in the Whitehead case led to the retirement of two justices of the Supreme Court, Cy Ryan, "Judge Points To Bigotry as Reason for Retirement," Las Vegas Sun (December 19, 1996); Cy Ryan, "Springer Will Not Run For Reelection," Las Vegas Sun (May 18, 1998); "Washoe Judge Seeks High Court Seat," Las Vegas Sun (March 4, 1998); and, despite the public offering of other explanations, it appears likely that the decision in Guinn v. Legislature, 119 Nev. 277, 71 P.3d 1269 (2003) contributed to the retirement of another justice. See David Berns, "Agosti's Numbers Plummet From Two Years Ago," Las Vegas Review Journal (May 2, 2004). Most recently, the electoral defeat of a sitting justice of this Court was partially the result of her signing of the Guinn v. Legislature decision. See Sherman Fredrick, Editorial, "Voters like R-J's Ideas - - Guess Who Hates That?" Las Vegas Review-Journal (November 12, 2006); Editorial "Brian Greenspun on Tuesday's Victories Amid a Judicial Warning," Las Vegas Sun (November 9, 2006); Carri Geer Thevenot, "Supreme Court's Becker Falls to Saitta - - Douglas

Retains Seat - - Political Consultant Says Justice Hurt by Guinn v. Legislature Ruling in 2003," Las Vegas Review-Journal (November 8, 2006); Editorial, "Nancy Becker Must be Removed - - Supreme Court Justice Backed Guinn v. Legislature Travesty," Las Vegas Review-Journal (November 5, 2006); Editorial, "Nancy Becker has the Right Stuff - - State Supreme Court Justice has Faithfully and Honestly Interpreted the Constitution," Las Vegas Sun (October 22, 2006); Jeff German, "Far Right Targets Justice Becker - - Supreme Court Vote on Tax Increase was Right Thing to do, She Says," Las Vegas Sun (October 15, 2006); Jon Ralston, "Campaign Ad Reality Check," Las Vegas Sun (October 3, 2006); Jon Ralston, "Jon Ralston is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians," Las Vegas Sun (September 22, 2006); Michael J. Mishak, "Libertarian Lawyer has More Issues Up His Sleeve - - Waters' Next Targets: Campaign Funds, Real Estate Tax," Las Vegas Sun (September 16, 2006); Sam Skolnik, "Who Owns Whom is Supreme Theme - - Becker, Saitta Race is Rife with Accusations," Las Vegas Sun (August 27, 2006).

In Tumey v. Ohio, the mayor of a village served as a judge of cases involving violation of the state prohibition act, and the mayor received a portion of any fine levied if the defendant was convicted. The Supreme Court held that disqualification of the mayor was required by due process of law because of the mayor's interest in convicting the defendant. Reviewing the British authorities, the Supreme Court noted that "it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." 373 U.S. at 524 (citations omitted). The Court concluded that, regardless of the evidence against the defendant, the conflicting interests of the judge resulted in a lack of impartiality that required reversal of the conviction. Id. at 534. The Supreme Court stated that the due process test was whether the situation "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. . ." Id. at 532; accord Ward v. Village of Monroeville, 409 U.S. 57, 59-62 (1972) (mayor's interest in obtaining funds for village from fines levied, without personal pecuniary interest, required disqualification). In both Tumey and Ward, the Supreme Court did

not undertake any analysis of whether the individual judge was biased, because the test of disqualification for this sort of bias was objective: in fact, in Ward, the Supreme Court held that a procedure for disqualification for actual bias was irrelevant to its analysis. Ward, 409 U.S. at 61; cf. State v. Haberstroh, 119 Nev. 173, 69 P.3d 676, 685 (2003) (ruling only that elected district judge did not demonstrate bias). The financial and other burdens of a contested election campaign in Nevada offer a "temptation to an average person" to avoid making an unpopular ruling and thus a "pecuniary interest in the outcome" of the procedure." Withrow v. Larkin, 421 U.S. 35, 47 (1975) (footnote omitted). As in the Whitehead and Guinn v. Legislature cases, cited above, making a sufficiently unpopular decision puts an elected judge in significant danger of drawing an electoral opponent, and the cost of a campaign is qualitatively far greater than the modest sums of money at issue in Tumey, the mayor-judge interest in his municipality's financial condition in Ward, or even the campaign contributions at issue in Caperton.

In this case, any local judge, and particularly a judge with relationships with the victim's family, would necessarily face "a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused." At minimum, the potential cost of an electoral campaign offers such a "possible temptation" to a judge to refuse to rule in favor of Mr. Ybarra, and thus requires the disqualification of the judge in this matter under due process principles.[4] Accordingly, this Court should reverse the district court's judgment and remand this matter for a new hearing before an impartial judge.

B. The District Court's Order Does Not Adequately Analyze the Evidence of Mr. Ybarra's Impaired Intellectual Functioning and Adaptive Deficits and it Cannot be Squared with the Standard of Retardation Recognized in Atkins v. Virginia.

The district court's order concluded that Mr. Ybarra had not established that he functions in the mentally-retarded range. In doing so, the district court failed to adequately address the evidence of Mr. Ybarra's adaptive functioning and subaverage intellectual functioning, and the judgment must therefore be reversed.

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[4] Appellant notes that the Supreme Court has just granted certiorari to address whether an elected judge must disqualify himself from a case in which his principal campaign contributor is a party, under the due process clause. Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 593 (2008).

In Atkins v. Virginia, 536 U.S. 304 (2002), the 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. NRS 174.098 provides a procedure for striking the death penalty 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.

"Mentally retarded" is defined in the statue 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 statutory definition is generally in accord with the definition of the American Association on Mental Retardation (AAMR; now the American Association on Intellectual and Developmental Disabilities (AAIDD)), see AAMR Mental Retardation: Definition, Classification, and Systems of Support (10th ed. 2002), which was cited with approval in Atkins, 536 U.S. at 308 n. 3. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000) (DSM-IV-TR) at 49, also includes diagnostic criteria for mental retardation:

> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
>
> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> C. The onset is before age 18 years.

The Supreme Court in Atkins cited the DSM-IV definition with approval as well. Atkins, 536 U.S. at 308 n. 3.

In addressing these diagnostic criteria, courts must avoid the tendency of lay people to 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. That error infects the district court's entire decision. 16 JA 3830-3875.

Similarly, the order relied upon the district court's lay assumptions about what people suffering from retardation can and cannot do as a basis for its conclusion. 16 JA 3837-3875. The district court's primary emphasis on the IQ scores as precluding a finding of mental retardation, 16 JA 3830-3875, is also inconsistent with an adequate analysis of all the data relevant to the question of retardation. See People v. Superior Court (Vidal), 155 P.3d 259, 266-267 (Cal. 2007). Finally, the order places significant - - indeed overwhelming - - reliance on evidence that Mr. Ybarra was malingering. 16 JA 3849-3875. That conclusion disregards clear and uncontradicted evidence that an individual may be malingering and still suffer from a mental disorder. See 12, 13 JA 2977, 2985, 3004, 3090. It also disregards the character of the supposed malingering, which is so inept that it in fact bespeaks Mr. Ybarra's extremely limited intellectual functioning rather than a higher range of functioning. These errors in the district court's conclusions require reversal of the order.

In reviewing the district court's order, this Court must bear in mind the "heightened 'need for reliability'" in capital cases required by the Eighth Amendment. E.g., Caldwell v. Mississippi, 472 U.S. 320, 323 (1985), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opn.). Because the determination of retardation is literally a matter of life and death, a district court's ruling on the issue should not be upheld merely because "a reasonable mind might accept [the evidence] as adequate to support [the] conclusion." Eg., State, Emp. Security v. Hilton Hotels, 105 Nev. 606, 608, 729 P.2d 497, 498 (1986) (emphasis supplied). Rather, this Court's review should assess whether a reasonable mind would accept the conclusion reached below. In this case, however, as shown below, the district court's conclusion is so at odds with the evidence, and is based so much on legally erroneous speculation, see, e.g., Las Vegas Downtown Redev. v. Crockett, 117 Nev. 816, 822, 34 P.3d 553, 557 (2001) (legal issues reviewed de novo), that reversal is required under any standard.

1. The Evidentiary Background.

David Schmidt, Ph.D., a neuropsychologist, tested Mr. Ybarra for the defense before the decision in Atkins, primarily for investigation of mitigation, and gave an IQ test as part of his battery. That test resulted in a full scale IQ score of 60 (verbal 68, performance 56). 13 JA

2963-3030; 12 JA 2810-2811. Dr. Schmidt believed that the test results might be low due to difficulties in testing, because of Mr. Ybarra's brain damage and mental disorders, 12 JA 3963; 13 JA 3047, but in his opinion the test was a valid measurement of Mr. Ybarra's functioning in the mildly mentally-retarded range. 12 JA 2810-2812; 13 JA 3030-3033.[5] Dr. Schmidt reviewed the historical evidence that was consistent with mild retardation. That included Mr. Ybarra's bad grades in school, reports of his less than average intelligence, and a school psychiatrist's conclusion, when he was 15, that Mr. Ybarra had "gone about as far as he can within the limits of his intellectual and emotional capabilities," 2 JA 337-338, 341; non-IQ testing from 1971 referring to his "dull normal" or borderline intelligence, 2 JA 401; and records showing indications of brain damage, including brain atrophy, 4 JA 930. Dr. Schmidt believed that one likely cause of Mr. Ybarra's impaired intellectual and adaptive functioning was a head injury he suffered at the age of nine. 12 JA 2985-13 JA 2997-2999, 3083. Dr. Schmidt also reviewed a WAIS (Wechsler Adult Intelligence Scale), test given by Dr. Gutride in 1981, which yielded an IQ score of 86. Dr. Schmidt could not assess the accuracy of the scoring of that test because the raw data were not available. 13 JA 3104, 14 JA 3365. He did believe that the test could have over-estimated Mr. Ybarra's IQ by as much as 15 points due to the Flynn effect, which is the tendency of IQ tests to yield higher scores the longer they are in use. 14 JA 3362-3364. See pp. 19-21, below.[6]

Dr. Schmidt also found that the IQ scores he obtained were consistent with the adaptive deficits Mr. Ybarra displayed over the course of his life, beginning in the developmental period, which supported a diagnosis of mild retardation. The evidence of those adaptive deficits included problems in coping with school, obtaining jobs only with family assistance, and obtaining only jobs with simple tasks, difficulty holding down jobs, few friends outside his family, retreat into a fantasy life and unrealistic expectations of himself, and difficulty with

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[5] Dr. Ted Young's report also indicated the difficulty of testing Mr. Ybarra due to his mental illness. 12 JA 2959.

[6] The WAIS used for Mr. Ybarra in 1981 had been normed before 1955 and it was replaced by the WAIS-R later in 1981.

personal relationships. 13 JA 3004-3007, 3013, 3017.[7]

Dr. Schmidt considered all of the historical information, including lay reports failing to observe that Mr. Ybarra had any disability, as well as those reporting low intelligence, from the accepted professional perspective that mild mental retardation is most difficult for lay people to identify without specific expertise. 14 JA 3384-3385. Dr. Schmidt also noted that the possibility that an individual may attempt to manipulate others, including malingering on tests, is not inconsistent with a diagnosis of mental retardation, and does not exclude that diagnosis. 12 JA 2983-2990. In both retarded and non-retarded individuals, exaggeration of symptoms, malingering or "faking" can co-exist with genuine impairment. 13 JA 3098, 3108-3110. There is no test for detecting malingering in IQ tests. 13 JA 3098. He concluded that Mr. Ybarra does function in the range of mild retardation. 13 JA 3030-3033.

Mitchell Young, M.D., also reviewed the historical data and interviewed Mr. Ybarra. He also found the existence of the adaptive deficits discussed by Dr. Schmidt, which he described generally as Mr. Ybarra being overwhelmed by trying to cope with his situation. 12 JA 2892-2893; 13 JA 3159-3160. Dr. Young believed that Mr. Ybarra's adaptive deficits resulted from his childhood head injury and were complicated by his other disorders, including schizo-affective disorder with paranoid features, for which he was being treated in prison. 13 JA 3163-3167. Dr. Young testified that medical doctors dealing with the EEG and CAT scan tests of his brain injury could have simply not recognized signs of retarded functioning, 13 JA 3172; and he noted a 1980 report referring to Mr. Ybarra as having a substantially lower than normal IQ. 13 JA 3179-3181. Dr. Young also recognized that people with mild retardation are capable of marrying, having children, working, and seeking medical treatment despite their disability. 13 JA 3223. Dr. Young testified that true illness and faking can co-exist 13 JA 3186, and that some degree of feigning illness does not exclude the possibility of real disorders. 13 JA 3234. He pointed to an instance in which Dr. Gale believed that Mr. Ybarra may have been seeking drugs,

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[7] Mr. Ybarra's first relationship with a woman was when he was 20 or 21 years old, with a girl of 15 or 16, who used him to buy her alcohol and cigarettes. 13 JA 3006, 3018-3020. Later, when his brief marriage was breaking up, he attempted suicide and was placed under a 72-hour psychiatric hold. 2 JA 253-255; 13 JA 3111-3112.

but he nevertheless prescribed lithium and an anti-depressant and put Mr. Ybarra on a suicide watch because of his condition. 5 JA 1013, 1083; 13 JA 3215. Dr. Young testified that an inmate's recognition that he has to "act crazy" to get adequate medication is not inconsistent with an actual need for the drugs. 13 JA 3207.

The state's expert, Ted Young Ph.D., also reviewed the historical material and tested Mr. Ybarra. Dr. Ted Young believed that evidence of adaptive functioning was irrelevant to the determination of mild retardation under Atkins unless testing produced an IQ score clearly in the range of retardation. 14 JA 3284-3286, 3291. (Dr. Mitch Young testified that that position was professionally simply wrong. 13 JA 3230; see People v. Superior Court (Vidal), 155 P.3d at 266 (standard for mental retardation "dictates primary reliance on the Full Scale IQ score of a Wechsler intelligence test"); pp. 21-22 below.)

Dr. Ted Young administered the WASI (Wechsler Abbreviated Scale of Intelligence) and obtained results which he believed were "bizarre." 13 JA 3249-3250. The test measured Mr. Ybarra's IQ as 66, which Dr. Ted Young believed was invalid due to lack of effort, i.e., malingering. 14 JA 3255. Dr. Young admitted that there were prison guards in the room during the testing, and that their presence could have affected Mr. Ybarra's performance. 14 JA 3347-3350. The manual for administration of the WASI test itself cautions that no one other than the tester be in the room during the test. 15 JA 3670; WASI Manual at 30. The WASI testing materials themselves also caution that the test "should not be used for legal, judicial, or quasi legal purposes (e.g. a statutory mandated diagnosis or determination of a disability)," 15 JA 3655; WASI Manual at 5; see AAMR, Mental Retardation at 95 ("clinical judgment should not be thought of as a justification for abbreviated evaluations.") Dr. Ted Young would admit only that the WASI was not the "gold standard" for assessing retardation, 14 JA 3346, although he acknowledged that it was a short form test used only for "quick" assessments. 14 JA 3312.

Dr. Ted Young also administered the Test of Memory Malingering (TOMM), and he viewed the results as confirming the presence of malingering. 14 JA 3260. According to its author , however, the TOMM, should not be used on individuals with neurological impairments

for whom it has not been normed.[8] Dr. Ted Young did not suggest that the TOMM had been normed for people, like Mr. Ybarra, who suffer from traumatic brain injury and schizophrenia; but when he was cross-examined about whether the TOMM had been normed for people with borderline intellectual functioning or lower, he asserted that the norming had now been done, relying on two articles in Assessment of Feigned Cognitive Impairment: A Neuropsychological Perspective (Kyle Brauer Boone, ed. 2007). 14 JA 3319, 3341. As shown below, pp. 24-25, the cited articles show nothing of the kind.

Dr. Ted Young asserted that Mr. Ybarra's enlistment in the Marines was inconsistent with being retarded, not based on any studies or data, but based on Dr. Ted Young's personal experience as a private in the Marines. 14 JA 3267-3268. He was not familiar with the Flynn effect on the inflation of IQ scores, but he claimed that, whatever it was, it would not have changed his opinion of the 1981 test conducted by Dr. Gutride. 14 JA 3336-3339. On the other hand, he admitted that he did not know whether Mr. Ybarra was malingering when Dr. Schmidt tested him, 14 JA 3349; he agreed that traumatic brain injury could produce the equivalent of mental retardation, 14 JA 3301; he agreed that a finding of malingering does not exclude the possibility of retardation, and in particular agreed that Dr. Duggan's report had found malingering in an MMPI test but had also diagnosed Mr. Ybarra as having paranoid schizophrenia, delusional disorder and post-concessive syndrome, 14 JA 3281-3282, 3320; he agreed with Dr. Chappel's opinion that Mr. Ybarra had brain damage and low intelligence, 14 JA 3351-3352; and he agreed that Dr. Asher's letter stating that Mr. Ybarra, at age 15, had reached as far as his intellect would take him, was consistent with mild retardation, as were Mr. Ybarra's grades in school. 14 JA 3333.

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[8] In the assessment of malingering, the effects that a specific neurological impairment has on a neuropsychological test must be determined prior to making an judgment about whether a person is malingering. That is, the detection of malingering requires comparing the performance of patients who have similar types of neurological impairment (e.g., mild TBI) but different levels of motivation.

Tombaugh, The Test of Memory Malingering (TOMM): Normative Data From Cognitively Intact and Cognitively Impaired Individuals, Psychological Assessment, Vol. 9, No. 3, 260, 263 (1997).

On rebuttal, Dr. Schmidt explained that the Flynn research indicated that the inflation on the WASI test given in 1981 could have amounted to a 15 point increase in the IQ score, 14 JA 3357-3367, and he clarified that an adequate analysis of Dr. Gutride's 1981 test was impossible due to the unavailability of the raw data. 14 JA 3365. He explained that the WASI test used by Dr. Ted Young was not accepted as an accurate instrument for assessing retardation by the AAMR, 14 JA 3378-3380, and that the TOMM had not been normed for use in assessing malingering for individuals with mental illness or low intelligence, 14 JA 3371, as the literature indicates. See pp. 24-25, below.

In addition to the testimony, the district court received voluminous exhibits, documenting Mr. Ybarra's many diagnoses of mental impairment during his years of confinement, see, e.g., 6 JA 1317-1318 (evidence of borderline intellectual functioning (Dr. Richnak, 1980)); 6 JA 1361-1362 (provisional diagnosis of chronic organic personality syndrome, focus on fantasies (Dr. Neal, 1981)); 6 JA 1370 (brain damage: total psychosis at time of offense (Dr. Chappel, 1981)); 6 JA 1391 (mixed organic brain syndrome (Dr. Richnak, 1981)); 10 JA 2306 (schizophrenia (Dr. Chappel, 1981)); 10 JA 2312 (organic brain syndrome (Dr. Kuhn, 1980)); 10 JA 2326-2327 (impaired intellectual functioning, poor level of adaptive functioning (Dr. Rich, 1981)); 10 JA 2455 (organic psychosis secondary to head injury and drug abuse (Dr. Van Valkenburg, 1989)); 11 JA 2558-2559 (organic psychosis (Dr. Hardy, 1991).) The records also document the fact that agents of the state have continued to administer strong anti-psychotic and other medications to treat Mr. Ybarra's mental disorders. 8 JA 1958-1968 (klonopin, haldol, mellaril, sinequan (1991)); 8 JA 1945-1949 (klonopin (1993)); 8 JA 1902-1943 (klonopin (1994-1996)); 9 JA 2126 (trazodone, vistaril (2003)); 8 JA 1890-1892 (trazpdone, paxil (2005)); 8 JA 1878-1892 (trazodone, seroquel (2005)); 8 JA 1821, 1834 (thorazine, trazodone (2006-2007)). Also included is the mass of kites submitted by Mr. Ybarra, complaining of problems and seeking medication, 6 JA 1393-1509; 7 JA 1501-1750; 8 JA 1751-1816, as well as documents from the civil rights litigation in federal court that was conducted by another inmate. 3-4 JA 631-983; 14-15 JA 3462-3639. This material also includes Mr. Ybarra's school records, showing his extremely poor performance. 14 JA 3415.

The documentary material also includes information from Mr. Ybarra's relatives and others familiar with his life, all gathered before Atkins, showing that he had adaptive deficits: he had few friends of his own and associated almost entirely with his family and their friends, 12 JA 2863, 2874, 2901, 2902, 2907; he had trouble getting along with others, and some of his friends and relatives thought he was mentally disabled or "crazy," or lacked "full mental capacity," or was "not all there," or had "weird" mood swings, or was an "oddball" 12 JA 2861, 2863, 2864, 2895, 2900; he had trouble with school work, 12 JA 2904, 2877, and had a short attention span, 12 JA 2871; he could do simple math problems involving simple steps but could not do abstract problems, 12 JA 2871; his peers, with the callousness of youth, said he went to "retard school," 12 JA 2877; the vice-principal of his high school recognized that he could do simple, routine work but could not function in an unstructured setting, and was easily influenced by others, 12 A 2893; he was "simple" to a co-worker in the tomato fields, 12 JA 2902; he worked only as a helper at drilling site, a job he got through his brother who had worked for the drilling company, 12 JA 2860, 2862; when he had a delivery job in Sacramento, he could not follow a map or make deliveries, and he quit after a week and a half, 12 JA 2881-2882; he did not handle pressure well, 12 JA 2878; and when his marriage broke up, he turned on the gas in his oven in a suicide attempt. 12 JA 2905. Most of this evidence might as well not exist as far as the district court's decision is concerned.

2. The District Court Impermissibly Focused Upon A 1981 IQ Score to Reject the Claim that Mr. Ybarra has Subaverage Intellectual Functioning.

In this case, the district court fastened upon a test score of 86 obtained by Dr. Gutride in 1981 and basically disregarded the IQ result obtained by Dr. Schmidt, on the erroneous ground that Dr. Schmidt's result was invalid. See pp. 24-25, below. 16 JA 3846-3840, 3872-3874. The district court concluded that the score of 86 was valid (ignoring the fact that the raw data from the test were unavailable and thus could not be reviewed for accuracy), and that even if it was

adjusted to take the Flynn effect[9] into consideration, that adjustment would reduce the score only to 78, which is outside the retarded range. 16 JA 2895-3896.[10] The state offered no evidence contradicting Dr. Schmidt's testimony as to the relevance of the Flynn effect, and the state's expert, Dr. Ted Young, professed complete ignorance of it, 14 JA 3336.[11]

The district court erred in rejecting Dr. Schmidt's uncontradicted estimate that the Flynn effect could account for an inflation of the Gutride IQ score of up to 15 points, 14 JA 3362-3364; 16 JA 3895-3896, without conducting a further hearing on the issue. First, the simple mathematical calculation of the .3 per year rate of "creep" in the IQ scores[12] is only a mean of all the scores obtained in the testing. In lay terms, this means that some of the scores obtained were less than the .3 point per year "creep", some were more, and some were essentially the

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[9] The Flynn effect is the tendency of IQ scores to rise over the time a standardized test is in use until the test is re-normed. Flynn, Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, 12 Psychology, Pub. Policy and Law 170-189 (2006).

[10] The district court was not convinced that the Flynn effect should be taken into account in analyzing the IQ scores. 16 JA 3895. This position is unsupported by any evidence. The district court asserted that the AAMR did not recommend an adjustment of scores to account for the Flynn effect. Id. While that was true in 2002, the AAIDD, the successor to the AAMR, does provide for consideration of the Flynn effect, "when the individual . . . did not receive an official diagnosis of mental retardation during the development period." AAIDD, User's Guide: Mental Retardation: Definition Classification and Systems of Supports 17 (2007). Consideration of the Flynn effect has been required in cases involving a de novo assessment of retardation, Vidal, 155 P.3d at 262-263; Walker v. True, 399 F.3d 315, 322 (4th Cir. 2005); State v. Burke, 2005 WL 3557641*13 (Ohio App. 2005) (holding trial court must consider evidence of Flynn effect). The cases cited by the district court to the contrary deal either with the deferential standard of review of state judgments by federal courts or with state laws imposing a "bright line" IQ cutoff for retardation or both. Green v. Johnson, 515 F.3d 290, 300 n. 2 (4th Cir. 2008); Black v. Bell, 2008 U.S. Dist. Lexis 33908*20-21 (M.D. Tenn. 2008); Ledford v. Head, 2008 WL 754486*6-8 (N.D. Ga. 2008) (dictum).

[11] Young belatedly, in a post-hearing letter, offered an opinion acknowledging the existence of the Flynn effect but asserting that applying the Flynn analysis to Dr. Gutride's 1981 IQ score of 86 would reduce that score only to 78. 16 JA 3895-3896. Mr. Ybarra objected to consideration of that letter on the ground that he had not had the opportunity to cross-examine Dr. Ted Young on his assertions, 15 JA 3640, and the district court struck it, 16 JA 3828; but the district court nevertheless adopted Dr. Young's adjustment to Dr. Gutride's IQ score to 78, citing published sources. 16 JA 3895-3896.

[12] The WAIS loses accuracy at the mean rate of .3 per year or 3 points per decade. See Flynn, Tethering the Elephant, 12 Psychology, Public Policy and the Law 170-189 (2006); Ceci, Scullin and Kanaya, The Difficulty of Basing Death Penalty Eligibility on IQ Cutoff Scores for Mental Retardation, 12 Ethics and Behavior 11-17 (2003); Kanaya, Scullin, and Ceci, The Flynn Effect and U.S. Policies, The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses, 58 American Psychologist 778 (2003). 15 JA 3708-3737.

same. The same process of averaging was used in the other studies. Goldman, Differential WAIS/WAIS-R IQ Discrepancies Among Institutionalized Mentally Retarded Persons, 91 Am. Journal Mental Deficiency 633-635 (1987), ("(mean increase of 6 points in Full Scale IQ)"(emphasis added)); Crawford et al., A Comparison of the WAIS and WAIS-R in Matched U.K. Samples, 29 Br. J. Clinical Psychology 105-109 (1990) ("the WAIS yielded significantly higher mean Full Scale, Verbal and Performance IQs. The WASI and WAIS-R samples. . . provide tentative estimates of population mean scores for both Wechsler scales." (emphasis added).) These adjusted scores are only a statistical average and provide merely an estimate of a person's intellectual functioning, not a formal assessment. Absent the raw testing data from the 1981 test, it is impossible to tell with accuracy what the level of Mr. Ybarra's intellectual functioning was in 1981. 14 JA 3365.

This "adjustment" in the 1981 score is not the only problem presented by the district court's analysis of the WASI. After Flynn's initial publication in 1984, The Mean IQ of Americans, Massive Gains 1932 to 1978, 95 Psychological Bulletin 29-51 (1984), 15 JA 3679, which addressed the inflation of IQ scores across a wide variety of instruments, he published a second analysis on the Wechsler tests, which was referred to by Dr. Schmidt, including the two that are the subject of this case; the WAIS and the WAIS-R, 14 JA 3357. Flynn, Wechsler Intelligence Tests: Do We Really Have a Criterion of Mental Retardation, 90 American Journal of Mental Deficiency 236-244 (1985). 15 JA 3703.

> In this paper, I have attempted to show that Wechsler scales can be grossly unrepresentative of the general population and that psychologists who use them to classify subjects as 2 SDs [standard deviations] below the mean may err by anything from .27 to a full SD. . . . The Wechsler Adult Intelligence Scale (WAIS) may have been a full SD too lenient by the time it was supplanted and the WAIS-R equally misleading the day it was published.

Id. at 236; 15 JA 3703. Because of the small number of mentally retarded subjects used to norm the WAIS and WAIS-R, Flynn was able to demonstrate that by 1972, nine years before Mr. Ybarra took the WAIS, the test results were 6.2 points too lenient because of obsolescence, and almost 6.6 points too lenient because of sampling error. In 1972, psychologists using the WAIS were off by .82 of one standard deviation and, by 1980, off by a full standard deviation. Id. at

242. When applied to Mr. Ybarra's 1981 test, these results yield an estimate of his intellectual functioning of 71 (8.4 points for obsolescence (.3 x 28 years) and 6.6 for sampling error), that is clearly within the range of mental retardation.

Here, the district court rejected Dr. Schmidt's uncontradicted expert testimony, based on the actual Flynn research, that estimated that the 1981 WAIS test could have been inflated by as much as 15 points, 14 JA 3362-3366; 16 JA 3845-3846; and it replaced that expert testimony, not with other expert testimony that could be cross-examined and rebutted, but with its own lay application of the general Flynn formula for the mean rate of IQ inflation, and without considering the other problems with the administration of the WAIS in 1981, with which a qualified expert would have been familiar. In short, on this point the district court acted not as an impartial arbiter but as an advocate for the state, and an ill-informed one at that. See Argument IV A, above.

Even if the district court could have derived an IQ score of 78 through its lay analysis of the Flynn effect on Dr. Gutride's score, it could not properly conclude that this score did not meet a magic number for diagnosing mild mental retardation. The individual's scores on standard IQ tests are, of course, important data in analyzing whether he or she functions in the mentally-retarded range, but they are not the only relevant data:

> mental retardation, as a question of fact, "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." [Citation]. To impose an absolute rule that a trial court's finding of mental retardation must be based primarily on Wechsler Full Scale IQ scores would be to read into the statute a criterion the Legislature chose to omit and would be inconsistent with the principle that a factual finding of retardation must be based on all the relevant evidence. [Citation].

People v. Superior Court (Vidal), 155 P.3d at 267, quoting In re Hawthorne, 105 P.3d 552, 556-557 (Cal. 2005). Thus to hold that an individual cannot be found retarded if his IQ scores are above 70, which is not a requirement of our statute, is impermissible. See Everington & Olley, Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation, 8(1) Journal of Forensic Psychology Practice 1, 6 (2008) ("There is no finite score that can represent one's intellectual functioning with 100% accuracy. There is always a measurement error . . .

Furthermore, this score does not stand in isolation but must be considered with other evidence [of adaptive behavior].").[13]

The district court's order must reversed on this groung alone. By introducing its own lay interpretation of the Gutride IQ score, the district court injected a new analysis into the case, which Mr. Ybarra had no opportunity to litigate. The district court struck the material by which the state and Dr. Ted Young attempted to inject this faulty analysis of the Flynn effect into the case. 16 JA 3828-3829. By relying on that same analysis in its order, however, the district court perpetrated the same state and federal constitutional violation that the state's material did, that is, it deprived Mr. Ybarra of an adequate opportunity to be heard on the proper means of analyzing the Flynn effect, and of cross-examining any state expert on the issue. See e.g., Lankford v. Idaho, 500 U.S. 110, 126 n. 22 (1991) (due process requires "giving the parties sufficient notice to enable them to identify the issue on which a decision may turn. [citations]"); Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner,'" quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Thus the district court's order on this point, in addition to casting further doubt on its impartiality, see Argument IV A, above, rendered the proceedings fundamentally unfair. Accordingly, the order must be reversed.

3. The District Court Erroneously Relied Upon the Test Results Obtained by Dr. Ted Young Who Used Improper Testing Instruments and Scoring and Administration Techniques.

Dr. Ted Young's use of the WASI to assess retardation, which he used in forming his opinion, was also improper. The manual for administration of the WASI lists and discusses its

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[13] Evidence presented at the hearing shows the danger of the district court's reliance on the score of 78. Dr. Ted Young tested a former death row inmate, Thomas Nevius, and obtained an IQ score of 78. After examination by other experts, the board of pardons commuted Mr. Nevius' sentence on the ground that he was mentally retarded and that his execution was therefore impermissible under Atkins, 12 JA 2973-2974; 15 JA 3659-3666. If the pardons board, including the members of this Court, could not accept a rigid numerical IQ score cutoff for finding retardation, it was impermissible for the district court to do so here.

proper applications, and its use in judicial proceedings is not one of them.[14] This testing instrument is neither designed for, nor appropriate for, making a legal determination that a subject is a person functioning in the mentally retarded range. In this case, its use should have been limited to a quick assessment and, when that assessment provided some evidence that Mr. Ybarra might be mentally retarded, as it did when it yielded a score of 66, 14 JA 3255, a full scale assessment should have been conducted.

Further, proper and valid administration of the WASI requires that its procedures be followed carefully. "As a rule, no one other than you (the examiner) and the examinee should be in the room during testing." WASI Manual at 30 (emphasis in original). 15 JA 3670. Dr. Young admitted that prison guards were in the room during the administration of his tests, 13 JA 3247; 15 JA 3350, and he admitted that their presence could have affected Mr. Ybarra's performance, which Dr. Young interpreted as a lack of effort. 15 JA 3350-3351.[15] Thus Dr. Ted

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[14] As its name suggests, the Wechsler Abbreviated Scale of Intelligence test is a short form test not used for legal determinations of mental retardation. 14 JA 3378-3380.

> The WASI was designed for quickly and accurately estimating an individual's intellectual functioning and for screening purposes. When used properly, the WASI is a very effective tool for differentiating between individuals whose intellectual functioning is in the normal range and certain special populations, such as individuals who are gifted and those with mental retardation. The application of the WASI should be based on the testing purpose, the examiner's professional judgment, and the guidelines set forth in the *Standards for Educational and Psychological Testing* (1985). For example, if time is limited and only an estimate of general cognitive functioning is required, the WASI is appropriate. . . . The WASI does not substitute for more comprehensive measures of intelligence, such as the WISC-III and the WASI-III, and should not be used in isolation for diagnosis or classification. In general, it should not be used for legal, judicial, or quasi-legal purposes (e.g. a statutorily mandated diagnosis or determination of a disability).

WASI Manual at 5 (emphasis added). 15 JA 3668.

[15] This was not the only flaw in Dr. Young's administration of the WASI. The test uses differential start points based on a subject's age. The administration of each of the subtests starts with the age-specific start point; the items that precede that point are known as reversal items. The start point item and the next item are known as criterion items. If the examinee obtains a perfect score on the criterion items, he gets full credit for the reversal items even if they are not administered. Except for picture items, if the examinee does not get a perfect score on the criterion items, the reversal items must be administered in reverse order until the subject gets two perfect scores. The Manual recites five pages of examples on how to administer this test in similar circumstances, some of which mirror Mr. Ybarra's scores and efforts; but Dr. Ted Young simply did not follow the testing instructions. 14 JA 3324-3333; (continued...)

Young's administration of the WASI was invalid and his opinion based on it is therefore not supported.

Dr. Ted Young, and in turn the district court, 16 JA 3913-3914, relied on the Test of Memory Malingering (TOMM) to support the conclusion that Mr. Ybarra was malingering in taking the WASI test. When asked on cross examination whether he was aware that the author of the test, Dr. Tom Tombaugh, had strongly advised in 2003 against the use of the TOMM on those subjects with borderline intellectual functioning or lower, Dr. Young disagreed. He contended that the use of the TOMM was now justified based on two articles in Assessment of Feigned Cognitive Impairment: A Neuropsychological Perspective (Kyle Brauer Boone, ed. 2007); he claimed that, as long as the cutoff score was lowered from 45 to 30, its use with persons of limited intellectual ability was justified.[16] 16 JA 3760-3773. Dr. Young asserted that the two papers cited in the Brauer book provided the support for its use.

One of those articles is by Hurley and Deal, Assessment Instruments Measuring Malingering Used With Individuals Who Have Mental Retardation: Potential Problems and Issues, 44 Mental Retardation 112-119 (2006). 16 JA 3751-3758. Those authors, however, cautioned that their study was not a norming procedure but merely supported the "possibility of developing norms specific to individuals with below average intelligence that may more accurately reflect their ability and performance." Id. at 117. There were other problems, as well:

> There are a number of limitations associated with this study that must be acknowledged. The small sample was a relatively restricted one (i.e. the participants were primarily Caucasian, lived in a residential facility, and had no prior criminal record). It is possible that the pattern of results we found may not generalize to a broader population. Further research could involve the

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[15](...continued)
see WASI Manual at 36-40, 15 JA 3673-3677.

[16] This somewhat oversimplifies the testimony. The TOMM requires the administration of two tests. On the first test, Mr. Ybarra's score was just above the published cut off score for malingering set by the TOMM manual. Mr. Ybarra scored well below the published cut off score of 45 on the second test. Were Mr. Ybarra of normal intelligence, his score would clearly indicate malingering. Because of Dr. Tombaugh's cautionary instructions, however, the authors of the two tests cited in Brauer lowered that cut off score from 45 to 30 and, on this lowered cut off, Mr. Ybarra still scored, according to Dr. Ted Young, in the malingering range. 14 JA 3256-3259, 3321. It is the use of this lowered cutoff score in assessing malingering in persons with mental retardation that is at issue.

> participation of individuals with below average intelligence who do not live in residential facilities or those with below average functioning who have experienced contact with the criminal justice system. It is possible that these individuals might produce responses more consistent with expectations.
>
> Taken together, these data at a minimum suggest considerable caution be exercised when using these various instruments for assessment of individuals with below average intelligence or mental retardation. A substantial minority (and in some cases a majority) of participants would have been suspected of "malingering," despite being instructed to perform optimally. In a forensic context, the consequences of being labeled in such a fashion, can be significant. True impairment may be overlooked or minimized, leading to greater vulnerability for the individual.
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> Further research and/or assessment strategies are needed to determine whether these instruments can ever provide valid results for individuals with significantly subaverage intellectual functioning. Including these individuals in a normative sample to determine appropriate cut-off scores would be one strategy. . . . Until this happens, the use of these instruments with individuals functioning at the lower ranges of cognitive abilities will pose substantial problems for the legal system and its participants.

Id. at 117.

The Graue study came with similar cautions. Graue, et al., Identification of Feigned Mental Retardation Using the New Generation of Malingering Detection Instruments: Preliminary Findings, 21 Clinical Neuropsychologist 1-11 (2007). 16 JA 3760-3773. The authors emphasized that cross validation was necessary before the lowered cut off scores could be used in clinical practice. Id. at 11. The size of the study was small, its geographical area limited and the absence of any meaningful way to evaluate the realism of the fake malingerers. Most important, authors were unwilling to generalize their data to subjects evaluated in legal settings. Id. at 12. Dr. Ted Young also did not acknowledge that the author of the TOMM had cautioned against its use in evaluating individuals with brain damage. 14 JA 3321-3323. See pp. 15-16 above.

In short, Dr. Ted Young's use of the TOMM was improper in itself, and it was administered improperly. The district court took no account of the evidence showing the inaccuracy of the results. This total absence of scrutiny of Dr. Ted Young's results, combined with a microscopic, and largely inaccurate, examination of the opinions of the defense experts, bespeaks a lack of impartiality on the part of the court, see Argument IV A, above, and seems to be, in essence, a review of the record that attempts to reach a pre-determined outcome.

4. The District Court's Analysis of Mr. Ybarra's Adaptive Functioning Disregarded the Evidence in the Record and is Infected with the Court's Reliance on its Own Lay Opinions that are Contrary to the Evidence.

The district court also violated Atkins by relying on its lay assumptions about whether an individual's ability to do some things, such as drive a truck or forklift, or be employed, is inconsistent with the adaptive functioning requirements of retardation and by relying on the presence of adequate adaptive skills in some areas as inconsistent with retardation. 16 JA 3865-3866, 3870.

A person's adequate adaptive functioning in some areas does not counterbalance an adaptive deficit in other areas.[17] In short, "[t]he diagnostic criteria for mental retardation do not include an exclusion criterion." DSM-IV-TR at 47; Lambert v. State, 126 P.3d 646, 651 (Okla. Crim. App. 2005). Individuals who have mental retardation can drive, hold jobs, make money, and operate heavy machinery. Id. at 657. It has been estimated that "eighty-nine percent of all persons with mental retardation 'can usually acquire the vocational and social skills necessary for independent living.'" Note, Evolving Standards of Decency in Mississippi: Chase v. State,

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[17] Within an individual, limitations often coexist with strengths. This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

> [M]ental retardation is not something you have, like blue eyes or a bad heart. Nor is it something you are, like being short or thin. It is not a medical disorder, although it may be coded in a medical classification of diseases; nor is it a mental disorder, although it may be coded in a classification of psychiatric disorders. Mental retardation refers to a particular state of functioning that begins in childhood, is multidimensional, and is affected positively by individualized supports. . . . [A] comprehensive and correct understanding of the condition of mental retardation requires a multidimensional and ecological approach that reflects the interaction of the individual and his or her environment, and the person-referenced outcomes of that interaction related to independence, relationships, contributions, school and community participation, and personal well-being.

AAMR, Mental Retardation at 48.

Capital Punishment and Mental Retardation, 25 Miss. St. C. L. Rev. 221 (2006) (quoting Field & Sanchez, Equal Treatment for People with Mental Retardation 32 (1999).) The evidence presented in the hearing was consistent with the literature. 13 JA 3223; 14 JA 3290.

The district court's assessment of Mr. Ybarra's adaptive deficits is also infected by its own preconceptions about what a person suffering from mental retardation should and should not be able to do. For instance, the court relied on the fact that Mr. Ybarra was able to work driving a forklift as inconsistent with retardation, and as the basis for rejecting the uncontradicted evidence of an adaptive deficit, that Mr. Ybarra could not navigate his home town when he had a job as a delivery man. 12 JA 2881; 16 JA 3866, 3870. The court's unexamined assumption that driving a forklift is inconsistent with retardation is not supported by any evidence in the record and is contradicted in the literature on retardation cited above. The district court's reliance on the fact that Mr. Ybarra had a job as a truck driver to counter Dr. Schmidt's "factual assumption that Ybarra would get lost while driving around Sacramento" is equally unsupported. 16 JA 3920. The court ignored the evidence that this was not an "assumption": Mr. Ybarra's brother swore to that fact, and to the fact that Mr. Ybarra held that job for only about a week and a half, in a declaration executed before the decision in Atkins. 12 JA 2881.

The district court also disregarded evidence that Mr. Ybarra never held anything but menial jobs on the ground that young people often start work with menial jobs. 16 JA 3915. This is, of course, entirely beside the point: the issue is not whether people who do not suffer from mental retardation may also have menial jobs, but whether Mr. Ybarra was prevented by his impairment from doing anything else. The district court also rejected the characterization of Mr. Ybarra's work history as showing only menial jobs, not by reference to any evidence about the actual type or conditions of the work, but by reference to the federal minimum wage laws. 16 JA 3919.

The district court's analysis is shot through with these stereotypes. The evidence showed that Mr. Ybarra had trouble dealing with others when he was in school, and Dr. Schmidt testified

that that was evidence of an adaptive deficit. 13 JA 3004-3005. The literature supports the position that people with mental retardation tend to be gullible, naive and prone to victimization. AAMR, Mental Retardation at 42; DSM-IV-TR at 44-45 (individuals with mental retardation "may be vulnerable to exploitation by others"). Despite the absence of any contrary evidence in the record, the district court simply could "not accept the motion that in this case, the fact that Ybarra may have been bullied in school means he was suffering from an adaptive deficit." 16 JA 3915.

The district court, in addition to relying on lay preconceptions to disregard evidence of adaptive deficits, relied on speculation, based on no evidence in the record, as a basis for criticizing Mr. Ybarra's evidence on adaptive functioning. For instance, the district court criticized Mr. Ybarra's experts for not seeking information about his functioning from prison guards. 16 JA 3924-3925. The professional literature supports Dr. Schmidt's testimony about his concerns over obtaining useful information from guards, who have contact with the individual long after the developmental period. 16 JA 3067-3068. Everington & Keyes, Diagnosing Mental Retardation in Criminal Proceedings: The Critical Importance of Documenting Adaptive Behavior, The Forensic Examiner, July/August 1999, at 32 (noting problems using prison personnel information sources for adaptive functioning); Keyes, The Expert Witness: Issues of Competence, Criminal Justice, and Mental Retardation, Impact, Summer 1997, 14, 15 (noting necessity of collecting data on adaptive functioning prior to individual's incarceration); AAMR, Mental Retardation at 85 ("Observations made outside the context of community environments typical of the individual's age, peers and culture warrant severely reduced weight"). The district court did not address the fact that the state presented no evidence from prison guards either, and it must be assumed that the state would have done so if it would have helped its case. In addition, the relevance of prison guards' observations of Mr. Ybarra's behavior, in the highly structured setting of a prison in which he has been held for many years, is of dubious relevance to the existence of adaptive deficits during the developmental period. Here, the district court criticized the defense experts on the basis of its own lay preconceptions about what information should be sought in making an expert

assessment of adaptive functioning, and discredited the expert's testimony because the expert did not do something that the professional literature cautions him not to do. Thus, the district court's evaluation of the evidence and of the defense experts' credibility was not merely jaundiced, see Argument IV A, above, but perverse. Further, the district court did not accept that the developmental period should extend to the age of 25 for purposes of considering evidence of the manifestation of adaptive deficits, 16 JA 3913-3921; but it then criticized the defense expert for not seeking evidence of adaptive deficits that could not have been generated at all until Mr. Ybarra was in prison, which was after the age of 25. 16 JA 3924-3925.

The district court also rejected as speculation Dr. Schmidt's expert testimony that Mr. Ybarra's marriage indicated a lack of independent living skills and concluded that it showed adaptive skills. 16 JA 3921. In addition to the uncontested evidence that people who suffer from mental retardation do marry and have children, 13 JA 3223, the district court's conclusion ignored the uncontradicted evidence that, during the breakup of his marriage, Mr. Ybarra slashed his arm, turned on the gas in his oven, and was placed under a 72-hour psychiatric hold 2 JA 253-255 - - all evidence of highly maladaptive behavior. 13 JA 3111.

The district court's own reliance on speculation, combined with its accusations of speculation on the part of the defense experts, is particularly offensive with respect to the kites filed by Mr. Ybarra while he has been imprisoned. Dr. Mitch Young's professional opinion was that Mr. Ybarra could not have litigated the civil rights action in federal court over his medical treatment without assistance from others, or have produced the mass of "kites" without assistance. 13 JA 3204. The records of Mr. Ybarra's federal civil rights action show that the litigation was in fact conducted by another inmate, David Bollinger, 3 JA 643, 678, 683; 4 JA 864-865, 870-871; 14 JA 3470-15 JA 3620, as the district court acknowledged. 16 JA 3869. The court characterized Dr. Young's opinion as based on mere speculation; but if Mr. Ybarra was capable of generating all of his kites without assistance, and thus showed adaptive functioning in that area, why would he need to have Mr. Bollinger's assistance to litigate the federal case? It is the district court, not Dr. Mitch Young, which based its conclusion on this point by relying on speculation rather than on the only reasonable inference to be drawn from

the evidence. In any event, even if the fact that Mr. Ybarra, after spending almost all of his adult life in the highly structured setting of a prison, has been able to master the rules of filing kites to obtain medications and make complaints, indicates that he may not have an adaptive deficit in that area, which was heavily relied upon by the district court, 16 JA 3899-3913, that does not counterbalance the fact that he has adaptive deficits in other areas.

In 1969, long before the events at issue in Mr. Ybarra's prosecution gave anyone a reason to distort the evidence, a staff psychiatrist at Mr. Ybarra's school agreed that he should be excluded from school on medical grounds. Dr. Asher believed that, at the age of 15, Mr. Ybarra "has gone about as far as he can within limits of his intellectual and emotional capabilities. To continue school now would only expose him to more pressure than he can comfortably tolerate." 2 JA 337. There is nothing in the evidence, other than the stereotypes on which the district court relied, that suggests that Mr. Ybarra's level of functioning has ever gone beyond what Dr. Asher observed. The district court's assumptions are not evidence, and the evidence does not support its conclusion.

Finally, the district court placed great emphasis on the evidence indicating that Mr. Ybarra was malingering. 16 JA 3849-3864. It is clear from the uncontradicted evidence, however, - - including the testimony of Dr. Ted Young, 14 JA 3320 - - that malingering is not inconsistent with the existence of a disorder. Dr. Dugan, for instance, found that Mr. Ybarra was malingering in 1993, but he concluded nevertheless that he was suffering from symptoms of paranoid schizophrenia, in addition to other disorders. 4 JA 795-796. There is no suggestion in the evidence that Mr. Ybarra was malingering as a child when he suffered from a head injury which had long-term medical and mental consequences, 1 JA 213-250; 2 JA 251-325, and which apparently resulted in brain damage and attendant mental disorders, id.; or that Mr. Ybarra was malingering as a child when testing showed that he had abnormal EEG results, 1 JA 213-214; or that he was malingering when he received bad grades in school, 1 JA 327-342, 14 JA 3415-3459; or that he was malingering at the age of 15 when Dr. Asher concluded that he had progressed as far in school as his intellectual abilities would take him, 2 JA 336; or that he was malingering during the entire time he has spent in prison, during which prison authorities have

continuously treated him for symptoms of paranoid schizophrenia or schizo-affective disorders, 8-9 JA 1818-2200. In short, simply invoking the term "malingering" is not a magic wand that makes the evidence of mental retardation vanish. Even the state's expert, Dr .Ted Young, agreed that the presence of malingering was not inconsistent with a diagnosis of mental retardation or of a psychiatric disorders. 14 JA 3320.[18]

Examination of the evidence shows, at most, that Mr. Ybarra's conduct has been completely inconsistent with a high-functioning individual cleverly attempting to appear low functioning, and is consistent only with a low functioning individual exaggerating symptoms in a clumsy and inept manner that demonstrates only the limitations of his intellect. For instance, during his incarceration, in 1991, Mr. Ybarra adopted a transparently fake Mexican accent. 10 JA 2485. Such behavior is indicative only of impaired intellectual functioning: a higher functioning person would recognize the utter futility of such a charade. Similarly, an individual's reflexive endorsement of answers which would appear to show that he suffered from the greatest possible impairment does not show high functioning, since such an individual would recognize that he should not attempt to make the test results to show a degree of impairment that was grossly inconsistent with his other functioning. As shown above, the supposed instances of high functioning cited by the district court, 16 JA 3849-3861, 3865-3871, are in no way inconsistent with functioning in the mentally retarded range.

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[18] Mr. Ybarra's apparent changes in strategy during legal proceedings, in which he was represented and advised by counsel, see 16 JA 3900-3913, say nothing about his adaptive functioning if he were left to rely on his own intellectual or adaptive abilities.

VI. CONCLUSION

For the reasons stated above, this Court must vacate the district court's order and remand this matter for a full and fair hearing.

Dated this 20th day of February, 2009.

Respectfully submitted,
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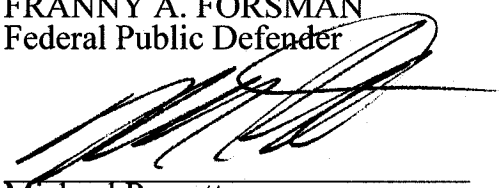

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CERTIFICATE OF COMPLIANCE

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 20th day of February, 2009.

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CERTIFICATE OF SERVICE

In accordance with Rule 25(1)(d) of the Nevada Rules of Appellate Procedure, the undersigned hereby certifies that on the 20th day of February 2009, a true and correct copy of the APPELLANT'S OPENING BRIEF, was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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