IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

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

MOTION FOR REMAND

This case is set for oral argument on September 1, 2010. Due to unforeseen circumstances, Mr. Ybarra's position in this case has changed and he now asks this Court, for the reasons discussed below, to remand this case back to the District Court for further hearings.

I. History of the case.

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 last 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.

Ultimately, the district court denied the motion to strike the death penalty because 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 as noted, the case is currently set for oral argument.

A. Testing

Since 2000, Mr. Ybarra has now been tested for his level of intellectual functioning three times. As the District Court noted, Dr. David Schmidt's intellectual testing in 2002, using the WAIS-III, yielded an IQ score of 60 but with no formal assessment of malingering.[1] The State's expert, Dr. Ted Young used a shortened version of the Wechsler instruments, the WASI and obtained a full scale IQ of 66 but with scores on the Test of Memory Malingering, or TOMM that, in Dr. Young's opinion, invalidated the intellectual testing. Id. at 18-19. The District Court relied heavily on the malingering findings to deny relief.

In July, 2010, Dr. Schmidt died in a traffic accident. Because Mr. Ybarra's counsel anticipated that the issues raised in the Atkins' hearing would continue to be litigated, they retained the services of Dr. Jonathan Mack, a neuropsychologist from New Jersey, to replace Dr. Schmidt. Dr. Mack reviewed the material before this Court and then formally assessed Mr. Ybarra again, this time using the latest iteration of the Wechsler testing instruments, the WAIS-IV.

Dr. Mack, accompanied by one of the counsel met with Mr. Ybarra on July 29, 2010 in Carson City, Nevada. Dr. Mack, his assistant, and counsel discussed with Mr. Ybarra his life

[1] As the District Court noted, Dr. Schmidt relied on consistency across a battery of testing to determine whether Mr. Ybarra was putting forth his best effort. District court opinion p. 18.

history and spent several hours reassuring Mr. Ybarra.[2] When the testing commenced, counsel left the room and Dr. Mack and his colleague proceeded with the evaluation.

Dr. Mack's testing yielded a full scale IQ of 65, one point less than Dr. Young's but this time, the test was accompanied by a formal assessment for malingering, a readministration of the Test for Memory Malingering. Mr. Ybarra's scores on the TOMM was 46 out of 50, demonstrating that he was not malingering. Dr. Mack has provided the results of his testing orally to counsel, because of the number of recent examinations he has conducted in which reports also had to be prepared. Counsel will provide the Court and the state with Dr. Mack's formal report as soon as it is received.

Since the May, 2008 hearing, a number of articles on malingering and mental retardation have been published. Some of this was presented in the 2008 hearing and some was simply not available.

The test used by both Drs. Young and Mack, the TOMM is essentially a two part test with an optional third part called a retention trial. Briefly, the subject is shown, in the first part, 50 pictures and asked to try and remember each as it is presented. After the last picture is shown, the subject is shown recognition panels with two pictures in each panel, one from the first part and a second that has not been shown. The subject is simply asked to identify which picture he was shown in Part 1.

In Part 2, the examiner shows the subject the same 50 pictures again and is, at the end, shown the same recognition panels and the same procedure applies as in the first trial.

In the third part, or the Retention Trial, which is administered only if the subject scores less than 45 on the second trial, and then 15 minutes after the conclusion of the second trial, the subject is shown the recognition panels again and asked to identify the pictures he was shown. This part was not administered to Mr. Ybarra by Dr. Mack because he scored sufficiently high

---

[2] A review of prior evaluations contained in the District Court's opinion reveals that almost everyone who has assessed Mr. Ybarra has found him to be a difficult subject to evaluate.

on Part 2.

TOMM interpretation is based on the assumption that anyone can guess the right answer 50% of the time, or get a score of 25. Application of a 95% confidence interval reduces that number to 18. Scores below 18 are unlikely to occur by chance. Any score at the end of the second trial below 45 indicates a possibility of malingering. 95% of adults score 49 or 50 on the second trial. This is not a rigid cutoff but the likelihood of malingering increases as the score deviates lower than 45.

The TOMM is the most popular instrument used in detecting malingering in persons with mental retardation. Kyle Brauer Boone, Assessment of Feigned Cognitive Impairment, Guilford Press 2007, p. 321. Dr. Boone reviewed the various experiments using the TOMM on persons with mental retardation and found that the instrument had misclassified persons with mental retardation as malingering from as little as 27% of the sample to a high of 41% of the sample. Id. at 324. Even in cases where the subject was known to be a person with mental retardation, the TOMM administration yielded correct responses in only 4 out of 40, "well below chance and suggestive of his awareness of the correct answers despite his responses to the contrary. Thus, it is apparent that feigning can occur in some individuals with MR, and this is yet another complicating consideration when conducting these types of assessments." Id. at 335. As to the use of malingering instruments in general, Dr. Boone was skeptical:

> There is now even greater incentive for individuals to feign intellectual deficits in the context of forensic neuropsychological assessment. However, our ability to accurately detect, or rule out, this behavior is complicated by several factors, including (1) the fact that MR is caused by a number of different conditions that are both biologically and environmentally determined and appear to have specific neuropsychological sequelae associated with them; (2) that subjects with MR are typically excluded from effort test validation samples; (3) that the extent of neuropsychological deficits would suggest that standard test cutoffs may not be appropriate for use with this population; and, finally, (4) that the extant empirical literature addressing this issue is limited but would suggest great caution be used in effort test interpretation as the likelihood of false-positive error is probably quite high; individuals of borderline and MR levels of intelligence can fail on average one to four effort tests in a standard battery even when putting forth their full effort.

Id. at 337.

Dr. Boone then discussed results of testing in her own lab and concluded that most of the instruments had an unacceptable level of specificity of less than 90%. That means that in most of these tests, there were false positive rates greater than 10%. Her sample included only subjects known to be persons with mental retardation, who had no history of dementia or schizophrenia, and who had no motive to feign mental retardation, that is they were neither applying for compensation nor involved in any kind of litigation. While acceptable specificity levels of 90% could be obtained if cut-off scores were reduced, serious issues of sensitivity, that is, the ability of the test to detect issues of malingering, were raised and could not be answered adequately. Id. at 334-35.

Finally, Dr. Boone noted that all of the studies rested on the assumption that malingering and mental retardation were mutually exclusive. Her studies revealed at least one patient with an IQ of 58, documented before he was 18 and before he was embroiled in the legal system, was found to be malingering in competency testing before his trial. "Thus, it is apparent that feigning can occur in some individuals with MR, and this is yet another complicating consideration when considering these types of assessments." In other words, subjects with MR can malinger and still be MR.

Subsequent studies, published after the May, 2008 hearing, confirm these conclusions. In the journal, Psychological Assessment, vo. 22, p. 50-56 (2010), the authors, Shandera, Berry, Clark, Schipper, Graue, and Harp, concluded much as Dr. Boone did, that published instruments for detecting malingering in neuropsychological setting were not adequate to accurately detect malingering in subjects with MR if the instrument's procedures and cutoffs were followed. Only if the cutoff scores were lowered could the false positive rate be reduced to an acceptable level and then issues of test sensitivity arose.

Salekin, Olley and Hedge, in the Journal of Mental Health Research in Intellectual Disabilities, Vol 3 pp. 97-116 (2010), concluded that existing measures of malingering had produced disappointing results and were of questionable validity. They suggested relying on adequate documentation of deficits in adaptive behavior before the motive to feign ID arose.

A Salekin article in 2009, coauthored with Doane for the journal Applied Neuropsychology, Vol. 16, pp. 105113 concluded that effort tests and indices of cognitive malingering "are not working with this population [subjects with ID] and that true cases can be misidentified as malingered:"

It is important to remember the context in which the TOMM was developed. Atkins had not been decided when the TOMM was published. It was in no one's interest to feign mental retardation then because there was no direct benefit. Malingering was most common when parties sought to claim traumatic brain injury in order to recover or collect money. Thus, the tests were developed to detect malingering on neuropsychological instruments, not instruments to assess intellectual functioning. The TOMM, as well as other common malingering assessment instruments, were never normed on populations with mental retardation; in effect, forensic practitioners use an instrument for a purpose other than that for which it was intended.

The effect of this can easily be seen by simply comparing the results of the intellectual testing on Mr. Ybarra during the last decade:

1. Dr. David Schidt - WAIS-III; FSIQ- 60, no formal assessment of malingering.
2. Dr. Ted Young - WASI; FSIQ - 66 - TOMM result: Malingering.
3. Dr. Jonathan Mack - WAIS-IV; FSIQ-65 - TOMM result - No Malingering.

The import of this is clear: whatever malingering Mr. Ybarra might have engaged in from the date of his arrest to the present is irrelevant; he is and remains mentally retarded.

B. Flynn Effect

The District Court also found compelling a 1981 IQ test result of 86 using the original WAIS instrument. The Court refused to give any credence to a phenomenon known as the Flynn Effect because he did not believe that the scientific community would give any credence to the notion of adjusting the score.

Testing instruments, unlike wine, do not always age very well. The older the instrument – that is, the longer the time since the instrument was normed -- the less reliable the result, and those in the field call this the Flynn Effect. The American Association on Intellectual and

Developmental Disabilities, formerly known as the American Association on Mental Retardation, or AAMR, specifically recognizes it. AAIDD, Intellectual Disability, Definition, Classification and Systems of Support (AAIDD-2010), p. 37.(hereinafter referred to as the Green Book).

James Flynn, a political scientist at the University of Otago in New Zealand, published in 1984 a startling conclusion: the IQ's of Americans increased on the average 3 points per decade. Dr. Flynn's subsequent papers, as well as those published by a number of other scholars, verified the gain and documented it into the 1980's, 1990's and into this century. The same effect was also noted with every instrument. It has also been found in other countries though at different rates. Alan Kaufman, IQ Testing 101, pp 203-205 (Springer Publishing, 2009).[3]

It is important to note just what is meant by the Flynn effect. It is not that people, as a group, get smarter; it is that the norms for these instruments become obsolete. Kaufman notes that IQ's are relative scores, not levels fixed in time. We know that people with mental retardation are found in the bottom 2-3 percent of intelligence functioning scores; those who are fortunate enough to be gifted are in the top 2 percent and the vast majority in the range of IQ's from 90 to 110. Given that breakdown, when a test is normed, the numbers assigned to intellectual functioning have to correspond with this statistical bell curve. Thus, someone who tests with an instrument at the end of its useful life span and then retested the following year with a new edition will see an IQ drop of several points with the new test. It's not that they are less intelligent; it's only that the norming process has correctly "reset" the instrument.

As noted, the AAIDD agrees with this assessment and, as a result, insists, as part of their best practices requirement, that assessments be conducted with the most reliable instruments available. AAIDD, Green Book, p. 37.

The Flynn Effect, however, is not the only problem with the Wechsler instruments,

---

[3] Dr. Kaufman is one of co-authors of the original Weschler instruments. He is a clinical professor of psychology at Yale Medical School and a co-author, with his wife, of the Kaufman ABC test of intellectual ability. The book was written as a primer for lawyers in Atkins cases.

especially the older ones. Flynn, in 1985, published in the American Journal of Mental Deficiency, an article demonstrating that the Weschler scales "can be grossly unrepresentative of the general population and that psychologists that use them to classify subjects as 2 SD's [standard deviations] below the mean may err by anything from .27 to a full SD. More specifically: . . . (c) 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." Flynn, Wechsler Intelligence Tests: Do We Really Have a Criterion of Mental Retardation, American Journal of Mental Deficiency, Vol. 90, p. 236-244 (1985). His research indicated that by 1980, because of undersampling of the mentally retarded population, those psychologists using the WAIS, "[r]ather than isolating those 2 SD's below the mean , they were isolating 3 SD's below; setting aside pathological cases, only one-seventh of 1% of the population was eligible to be classified as mentally retarded! Moreover, when the WAIS-R was published in 1981, it brought no improvement; the WAIS-R and the WAIS appear to be equivalent at the level of mental retardation." Id. at 242. 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, the test results were 6.2 points too lenient because of obsolescence, and almost 6.6 points too lenient because of sampling error.

What is most important here, however, is that the District Court's conclusion about scientific acceptance is simply wrong. Dr. Kevin McGrew of the University of Minnesota, and himself, a coauthor of another instrument for intellectual assessment, the Woodcock-Johnson battery, compiled a list of every scientific article published on the Flynn Effect. See AP 101 #7, http://www.iapsych.com/IAPWEB/AppliedPsychometrics101(AP101)Series.html. Of the 132 articles published on the Flynn Effect since 1952, McGrew concluded that 86 or 76% agreed that the Flynn Effect existed; only 9 or 8% disagreed. The rest were either neutral or irrelevant. In short, there is overwhelming acceptance in the scientific community that the phenomenon exists.

What is even more important is that it is now also accepted, an acceptance not known at the 2008 hearing, that the Flynn Effect is even more pronounced in the population with mental

retardation, as much as 7 points per decade. Given that the WAIS was normed in 1951, there was a thirty year gap from the date of norming to the date the test was given to Mr. Ybarra. If the 86 obtained score is "adjusted" using newly available data, the score is now 65, in the precise same range as the scores obtained by three different neuropsychologists, using three different instruments, in the last decade.

All of these developments support a remand from this Court back to the District Court to reconsider its decision based on currently available scientific evidence, in the interest of obtaining a fully reliable resolution of the factual issues presented. See U.S. Const. Amends. VIII, XIV.

Dated this 30th day of August, 2010.

Respectfully submitted,
FRANNY A. FORSMAN
Federal Public Defender

MICHAEL PESCETTA
Assistant Federal Public Defender
Nevada Bar No. 002437
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of August, 2010. Electronic Service of the foregoing MOTION FOR REMAND shall be made in accordance with the Master Service List as follows::

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

and

Catherine Cortez Masto
Attorney General
Robert Wieland
Senior Deputy Attorney General
Criminal Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

Jeremy Kip
An Employee of the Federal Public Defender