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

PETITION FOR REHEARING

Mr. Ybarra asks this Court to reconsider its decision of March 3, 2011, where this Court rejected Mr. Ybarra's claim under Atkins v. Virginia, 536 U.S. 304 (2002). The Court applied NRS 174.098 and ruled that the statutory definition conformed to the definitions propounded by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA) and cited to the defining manuals of each organization. Mental Retardation: Definition, Classification, and Systems of Support, (AAMR- 2002); Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (APA - 2000).[1] "Because Ybarra failed to produce sufficient evidence of subaverage intellectual functioning and adaptive behavior deficits before he reached eighteen years of age, the district court did not err in concluding that Ybarra had not demonstrated that he was mentally retarded . . . ." Ybarra v. State, 127 Nev. Adv. Op. 4, 247 P.3d 269, 270 (2011).

Essentially, both the district court and this Court denied the claim because the court below concluded that Mr. Ybarra had abilities it deemed inconsistent with His reduced levels of intellectual functioning and deficits in adaptive behavior. 247 P. 3d at 277-79. Adopting the findings of the court

[1] In 2008, the AAMR changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) and issued the 11th edition of its manual. Both editions of the manual, 2002 and 2010, will be cited here and will be referred to as the Red Book (2002 edition) and the Green Book (2010 edition). This is the same naming convention used by practitioners in the field.

below, this Court concluded that Mr. Ybarra's evidence of intellectual functioning failed because of the absence of prior testing before the age of eighteen consistent with MR, that no school official thought him a person with MR, and the armed services thought him of "dull normal" or "borderline" intelligence.[2] The Court held that Dr. David Schmidt's testimony would not "withstand scrutiny in the context of Ybarra's real life actions and functioning," 247 P. 3d at 280. Further the Court concluded that Mr. Ybarra was malingering, in part, because he played cards, backgammon, scrabble and other games while at a mental health facility, that he issued hundreds of prison kites "showing a level of intelligence beyond [that of] a mentally retarded individual." Id.

The Court, similarly, rejected Mr. Ybarra's argument of significant deficits in adaptive behavior by attributing poor school performance to drug usage, and his menial jobs to a conclusion that everyone under the age of eighteen held menial jobs and could not live independently. The Court also noted that Mr. Ybarra drove a fork lift and held jobs for "lengthy periods of time at salaries that exceeded minimum wage at the time." Id. at 281. The Court also rejected Mr. Ybarra's failure to adapt to military life because he was discharged for homosexual conduct. Id.[3] The Court also noted that Mr. Ybarra could live independently because he moved around, secured living quarters and was married for a while. Id.

I. Reasons Why Rehearing Should be Granted.

The Court construed NRS 174.098, the statutory procedures for litigating Atkins claims in Nevada, procedures which incorporated the definition of MR in NRS 433.174, in light of the definitions of MR adopted by the AAIDD and the APA. Mr. Ybarra agrees that those definitions are the most appropriate.

These definitions, however, are not arbitrary standards; they are the result of decades of research and publication and years of efforts at consultation and consensus. They were adopted in the context

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[2] The Armed Forces Qualification Test (AFQT) is administered at induction centers; it is a paper and pencil screening test used to estimate the general intelligence of enlistees. AAIDD expressly discourages the use of these types of screening tests. Green Book, p. 41 "Short forms of screening tests are not recommended. . . ."

[3] Rather than contradict MR, the report of the Marine Corps event supports Mr. Ybarra's claim. According to the statement of the other party to the sexual conduct to the Marine Corp's authorities, he "asked the [unreadable] to come into the shower, it took me a while to convince him, finally after a while he gave in." According to Dr. Erin Warnick, whose report is attached as Ex. 1, this suggests that Mr. Ybarra was "vulnerable to being taken advantage of sexually. . . ." Warnick report, p. 7.

of what the AAIDD refers to as assumptions and principles of guidance. In other words, the definitions have a context as important to the resolution of defendant's diagnosis of MR as the definitions themselves. Applying the definitions, without applying the consensus context, risks excluding large numbers of persons with MR from the protections of Atkins. When the Supreme Court in Atkins decided to leave to the states the power to define the procedures by which these claims would be resolved, it did not give the states the leeway to adopt procedures that would exclude persons with MR from protection.

There are essentially three principles that apply to the issues in this case:

1). The essential assumption that persons with MR (or ID as it is now called) have strengths as well as weaknesses and any assessment of potential mental retardation must look to the weaknesses to determine whether someone is a person with mental retardation;

2). This assumption becomes extremely important when assessing persons with MR but higher levels of intellectual functioning (i.e., IQs from 60 to 70, plus or minus the standard error of measurement or 5 points). Because these persons appear to be identical in all major respects to those persons without MR, i.e., so-called borderline cases, this assessment of deficits only is critical;

3). Because of these principles, the assessment requires a much higher degree of skill than just a Ph.D. in psychology, a skill the district court did not possess. When the court below applied its own criteria to determine that Mr. Ybarra's experts were wrong, that Mr. Ybarra's was malingering and did not possess the requisite deficits in adaptive behavior because his conduct was inconsistent with mental retardation, the district court was, inadvertently, relying on stereotypes, not accepted scientific principles. No one contends that a judge must surrender his jurisdiction to experts; he must, however, make these decisions based on reliable evidence, not stereotyping.

II. AAIDD Assumptions.

Five assumptions "are an explicit part of the definition [of ID] because they clarify the context from which the definition arises and indicate how the definition must be applied. Thus the definition of ID cannot stand alone." Green Book, p. 6. Only three are relevant here:

Assumption 1: "Limitations in present functioning must be considered within the context of community standards typical of the individual's age peers and culture." This means that the standards against which the individual's functioning are compared are typical community-based environments, not environments that are isolated or segregated by ability. Typical community environments include homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work and interact.

. . .

Assumption 3: "Within an individual, limitations often coexist with strengths." This means that people with ID are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others. Individuals may have capabilities and strengths that are independent of their ID (e.g., strengths in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they show an overall limitation.

. . .

Assumption 5: "With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve." This means that if appropriate personalized supports are provided to an individual with ID, improved functioning should result. . .. The important point is that the old stereotype that people with ID never improve is incorrect. Improvement in functioning should be expected from appropriate supports, except in rare cases.

Green Book pp. 6-7. The AAIDD requires, in assessing deficits in adaptive behavior, substandard performance in only one of three domains: conceptual, social and practical skills. Green Book, p. 46. The 2002 Red Book concluded in part that to require more, that is, significant deficits in two of three domains would yield a result that "almost no one with an IQ in the upper mental retardation range would be identified as having mental retardation." Red Book, p. 78. The point is that it does not matter what the subject can do, only what he cannot do and the level of that impairment.

III. The Archetypal Defendant with Mental Retardation.

These assumptions and requirements have to be viewed in the context of the typical criminal defendant who qualifies for Atkins protection, those in the upper mental retardation range. In the capital sentencing arena, those persons with moderate, severe or profound mental retardation are normally not going to get far in the criminal justice process; there is no controversy about their disability. They present serious issues of competency to stand trial, obvious issues of intellectual disability and very few people question the MR diagnosis. 85% of the population with ID/MR, however, fall in the category of mild MR now described as people with ID but higher IQs. Describing persons with ID but higher IQs is extremely difficult.

> Most of these individuals are physically indistinguishable from the general population because no specific physical features are associated with intellectual disability at higher IQs. Similarly, unlike in the case of certain genetic "behavioral phenotypes," no definite behavioral features are specifically associated with intellectual disability at higher IQs. Personalities also vary widely, as in the rest of the human population: Some individuals with intellectual disabilities are passive, placid, and dependent, whereas others are industrious cooperative, appropriately assertive, or even aggressive and impulsive. There

> is considerable variation in the lifestyle outcomes achieved by adults with intellectual disability who have higher IQs. Whereas many of these individuals "living 'independently' predictably will need support in relation to specific issues" (e.g., housing, employment, transportation, health services; (citation omitted), some individuals in this group "may develop homes and home lives independent of a formal agency support once the time comes for them to live separately from their families" (citation omitted). These documented outcomes contrast sharply with the incorrect stereotypes that these individuals cannot have friends, jobs, spouses, or children or be good citizens.

Snell and Luckasson, Perspectives, Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs, Vol. 47, Intellectual and Developmental Disabilities, Number 3, pp, 220-233 (AAIDD, June 2009). This description is a far more accurate picture of Mr. Ybarra than the district court's opinion, if all the facts are considered in the proper context.

To make the matter more difficult, persons with ID and higher IQs have a great deal in common with those individuals without an ID diagnosis but are considered borderline, that is those with IQs above the ceiling of 70-75. Id. at 221.

The AAIDD makes it clear that the challenges facing higher functioning persons with ID are significant, and while "it may seem counterintuitive" to equate higher functioning persons with ID with those with lower IQs, the challenges facing persons with ID and higher IQs are severe. Expectations are higher. Because their disability is not apparent, tasks given them are more demanding with failure resulting in blame directed at the individual, rather than the disability. Further, many individuals with ID but higher IQs attempt to mask their disability and try to pass as normal. They try to appear intellectually capable. They claim abilities that are wildly inaccurate in order to present as capable.[4] More than 70% graduate from high school, albeit from institutions with less demanding curricula (in Mr. Ybarra's case, a continuation school) or GED equivalents. Though often identified in the school systems as needing support, their efforts to mask their disability result in them "falling through the cracks" after they leave school because of the absence of support systems.

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[4] The district court put great store in Mr. Ybarra's self-reporting of his abilities, what he earned, the nature of his duties, etc. AAIDD, however, cautions against relying on subject's own self-reporting: "persons with higher IQ scores are more likely to mask their deficits and attempt to look more able and typical than they actually are. . ." Most fight hard not to be identified as MR. "Based on these considerations, the author of this Manual caution against relying heavily only on the information obtained from the individual himself. . . ." Green Book, p. 52-3. In short, people like Mr. Ybarra often create their own "picture" of their abilities, a picture which is just as often lacking in any basis in fact.

Individuals with ID and higher IQs sometimes develop inadequate response systems calling into question their interpersonal competence, social judgment and decision making:

> These challenges are linked to reduced intellectual and adaptive abilities that make it difficult to problem solve and to be flexible in thinking; both limitations create a susceptibility to dangers that is shared among members of this group (Greenspan, 2006a).

Id. at 225.

Dr. Stephen Greenspan, whose work is cited more often in the AAIDD manuals than any other scholar, describes these problems in the context of the criminal justice system.

> Most Atkins applicants fall at the upper end of the MR severity continuum and present a mixed competence profile. People on death row typically have a history of academic failure, marginal social and vocational competence, and even overt brain damage.

Switzky and Greenspan, What is Mental Retardation? Ideas for an Evolving Disability in the 21st Century, AAMR books, p. 283 (2006). He notes later that a person with mental retardation and an IQ in the higher ranges will often demonstrate average or above average oral language skills, including the use of big words; research however, shows "that adults with mild MR have relatively normal syntax, grammar, and vocabulary." Id. at 292. See also Tasse, Marc, Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases, Applied Neuropsychology, Vol. 15, pp. 114, 117 (April 2009).

IV. Clinical Judgment.

The last principle applicable here is the issue of clinical judgment, cited by the district court, though misapplied. It is simply who is qualified to make these judgments about mental retardation. Both the Green Book and the Red Book, as well as the AAMR booklet "Clinical Judgment," Schalock and Luckasson, (AAMR 2005), make it abundantly clear that the concept has a specialized and mandatory definition:

> Clinical Judgment is a key component - along with best practices in intellectual disability, professional standards, and professional ethics - of professional responsibility in the field of [mental retardation]. Clinical judgment is different from either ethical or professional judgment based on one's ethics or standards. Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience. It emerges directly from extensive data and is based on training, experiences, and specific knowledge of the person and his or her environment.

Green Book, p. 85 (emphasis supplied).

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V. Application to the Case at Bar.

Essentially the decisions of both this Court and the court below run afoul of these principles.

The district court summarized Mr. Ybarra's activities while incarcerated and awaiting trial, concluding that the assessed IQs were the result of malingering and not mental retardation.

> His [Mr. Ybarra's] ability to manipulate health care professionals, attorneys, play scrabble, backgammon, racquet ball and volleyball, and his ability to type, read medical literature, write coherent meaningful letters and kites all support such a finding.

16 JA 3913.

The Court used the same rationale to address deficits in adaptive behavior.[5] The Court criticized Dr. Schmidt's opinion because Schmidt refused to interview prison guards. "The Court is puzzled as to why Dr. Schmidt believed information from people who are in contact with Ybarra on a daily basis would not be helpful." 16 JA 3924.

The district court did note that "the examiner must consider the client's environment" but misapplied the concept. Opinion of District court, p. 40. The environment that must be considered is, as Assumption #1 notes, is the community of his peers and cultural group. "This means that the standards against which the individual's functioning are compared are typical community-based environments, not environments that are isolated or segregated by ability. Typical community environments include homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work and interact." Green Book, p. 6-7. The appropriate

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[5] The district court noted that Mr. Ybarra's drug and alcohol usage "clearly affected his ability to socialize and perform in school." The Court correctly characterized this as problem behavior and again correctly noted that "problem behavior is not considered to be a limitation in adaptive behavior, though it may be important in the interpretation of adaptive behavior scores (i.e., in clinical judgment) for diagnosis." 16 JA 3918, citing Red Book, pp. 75, 79. The district court omitted, however, one of the most important elements of the discussion: that problem behavior "often influences the acquisition and performance of adaptive behavior." Id. at 75. Thus, under the Red Book's own guidance, drug usage can influence both the performance of social skills and the acquisition of them. See Rivera v. Dretke, 2006 WL 870827 (S. Dist. Texas 2006))"Regardless of the cause, whether it be due to genetics, accident, disease, or self-induced by illegal drugs, the uncontroverted testimony is that if the three elements in the 1992 AAMR definition are met, a person is considered mentally retarded. This is a medical conclusion that many people may find truly offensive. This Court is troubled by the notion that one can 'fry' his own brain by using illegal drugs and then be excused from some of the possible consequences of committing a gruesome and murderous act."), aff'd in part, remanded in part, Rivera v Quaterman, 505 F.3d 349, 363 (5th Cir. 2007) "We read this quote charitably in support of the district court's own ruling. . . Retardation has, . . . , a number of etiologies."). What is at issue here is that Mr. Ybarra had problems in school and that he has substandard intellectual functioning. That these problems may in part have been either caused by or exacerbated by drug usage is of no moment.

environment is not a penal institution or a mental health facility, such as Lake's Crossing. The reason for this is simple: the appropriate standard for assessing deficits in adaptive behavior is how an examinee typically performs certain tasks, not his best possible performance. In either a prison setting or in the setting of a mental health facility, most inmates face very limited choices and decisions; almost every decision is made for them. While prisons certainly cannot be considered ideal support systems, in this respect they resemble them and in this context, one would expect a person with MR to function rather well.[6]

The district court chastised Dr. Mitchell Young for his claim that a number of professionals had noted Mr. Ybarra's problems. "This Court has reviewed the record extensively and has not discovered the 'number of professionals' referred to by Dr. Mitchell Young." The records, however, are replete with information on both substandard intellectual functioning, deficits in adaptive behavior and medical opinions that Mr. Ybarra might well be mentally retarded. 5 JA 1112-13 (handwritten notes of family interviews, noting traumatic brain injury, noting that Mr. Ybarra could read and write but not work, that a tutor in his third year of high school thought he might not want to learn, that the family noted his childish behavior and that school was "a major struggle."); 5 JA 1228-29 – report of Dr. Pauly – noted that IQ was "substantially lower than normal" because of substantial lack of fund of information, estimated IQ of 70 to 80 and overt psychosis); 5 JA 1233, Opinion of Dr. Gorman: "[t]he defendant has questionable mentality to aid and assist his counsel in the defense of the offense charged." "From his history of having considerable difficulty in school and in the absence of any actual history attesting to his school record, at this time I suspect a mental retardation, the degree of which cannot be established at this point." 5 JA 1240, Ybarra medical history – Cognitive function was moderately impaired, intelligence appeared below average. . . shows some evidence of borderline intellectual functioning, although this is difficult to assess at this time due to his apparent depression." 5 JA 1239, opinion of Dr. Chappel, "Brain damage from childhood resulting in a learning disability and low intelligence." 6 JA 1311, report of Dr. Richnak – interview with parents - "starting in 4th grade, teachers would send

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[6] Tasse noted in his article from Applied Neuropsychology that correctional officers should almost never be used to assess deficits in adaptive behavior. "The prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior." Vol. 15, Applied Neuropsychology at 119.

Robert home from school because of his inability to perform the usual school curriculum . . . ." – In opinion of mother "Robert never was truly able to master the essentials and that teachers simply passed him on to the next higher grade." The record the district court reviewed is simply not as clear as the judge would have it; the mental health professionals who saw Mr. Ybarra simply disagreed about his condition. The district court selectively chose those reports to which he would assign credibility and ignored the rest without hearing from those same people in open court.[7] This Court's reliance on the district court's finding is therefore erroneous.

For these reasons, this Court should grant rehearing and reconsider its decision.

Dated this 27th day of April, 2011.

Respectfully submitted,

FRANNY A. FORSMAN
Federal Public Defender

Michael Pescetta
Nevada Bar No. 2347
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Appellant

[7] As this Court is aware, Dr. Schmidt was killed in an accident in 2010. Dr. Erin Warnick was a graduate assistant in 2000 for Dr. Schmidt and is now a practicing neuropsychologist in Napa California. She assisted Dr. Schmidt in Mr. Ybarra's evaluation. She revisited the assessment in order to provide insight into deficits in adaptive behavior and her report is attached. She concludes that he meets the criteria for mental retardation.

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of April, 2011. Electronic Service of the foregoing PETITION FOR REHEARING shall be made in accordance with the Master Service List as follows:

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

and

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

Jeremy Kip
An Employee of the Federal Public Defender