EXHIBIT 1

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DECLARATION OF STEPHEN GREENSPAN, Ph.D.

I, Stephen Greenspan, declare and state as follows:

1. All of the facts contained in this declaration are known to me personally and if called as a witness, I could and would testify thereto.

PURPOSE OF THIS DECLARATION

2. I was asked by assistant Federal Defender Michael Charlton to conduct a mental retardation evaluation of his client Robert Ybarra, for possible use in a renewed "Atkins v. Virginia" petition. Mr. Ybarra is a 58 year old man condemned to death in 1981 for killing a 16-year-old girl. Mr. Ybarra was recently transferred for medical reasons from Nevada's death row to the state Correctional facility in Carson City, although he is still facing a sentence of death.

3. In an earlier Atkins proceeding, a Nevada district court judge turned down Mr. Ybarra's claim of mental retardation mainly on the basis that prong three (Developmental onset) was not proven by a preponderance of the evidence. In March 2011, the Supreme Court of the state of Nevada confirmed that ruling, writing that "Because Ybarra failed to produce sufficient evidence of subaverage intellectual functioning and adaptive behavior deficits before he reached 18 years of age, the district court did not err in concluding that Ybarra had not demonstrated that he was mentally retarded and denying the motion to strike the death penalty." Because I am the most-cited authority on the definition of mental retardation in the clinical literature as well as in several notable Federal Atkins rulings, I have been asked to review the voluminous material on the case, and gather new material (specifically on adaptive behavior as it relates to the developmental period), and to provide a fresh perspective on the matter.

MY QUALIFICATIONS

4. Over the past half-dozen years, I have been qualified as a psychologist and expert on Mental Retardation and related cognitive disorders in fifteen criminal proceedings, three of them in Federal District Courts (in Idaho, Louisiana and Ohio). My writings or affidavits have been heavily cited in support of rulings by Federal judges in which I testified (Antun Lewis in Ohio) and at least two other jurisdictions in which I either produced an Affidavit (Yokoman Hearn in Texas) or produced articles for the edification of the court (Earl Davis in Maryland). I am a licensed psychologist in the state of Nebraska and was previously licensed in the state of Tennessee (current status: inactive). In addition to testifying in several so-called "Atkins" proceedings, I have been a consultant (and submitted declarations) in other criminal cases. Most of my work has been at the request of defense attorneys, but I did submit one affidavit at the request of a Federal prosecutor (in a non-capital case in Utah) and one at the request of a state court judge (in a capital case in Arizona). Furthermore, although generally hired by defense attorneys, I refuse to support their claims in over a third of the cases in which I consult.

5. I am a Clinical Professor of Psychiatry at the University of Colorado Health Sciences Center, and Emeritus (retired) Professor of Educational Psychology at the University of Connecticut. I received a Ph.D. in Developmental Psychology from the University of Rochester, and was a Postdoctoral Fellow in Mental Retardation and Developmental Disabilities at the University of California at Los Angeles' Neuropsychiatric Institute. Before moving to Connecticut, I held academic

appointments at the University of Nebraska and at George Peabody College of Vanderbilt University.

6. I have been elected "Fellow" (a designation given only to the most qualified members) by the Mental Retardation and Developmental Disabilities division of the American Psychological Association and by the American Association on Intellectual and Developmental Disabilities. I was also elected to a term as President of the Academy on Mental Retardation, which is the most prestigious research organization in the field. I have published extensively on mental retardation and related disorders, with particular emphasis on "adaptive behavior."
I am a leading scholar in the developmental disabilities field, as reflected in my being by far the most-cited authority in both the 2002 and 2010 diagnostic manuals of the American Association on Intellectual Disabilities, which is the basis for all legal and clinical definitions of mental retardation, including Tennessee's [for the most recent manual, see Robert Schalock et al, *INTELLECTUAL DISABILITIES: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS* (11th Edition, 2012)].

7. My book *WHAT IS MENTAL RETARDATION*, co-edited with H. Switzky (AAMR; 2003; rev. ed. 2006) has, in a short time, become one of the most-quoted reference works in the field of mental retardation and has been described by Yale professor Edward Zigler as "the best book ever written about the definition and diagnosis of mental retardation." In 2008, AAMR recognized my contributions to the field by granting me its highest honor, the Gunnar and Rosemary Dybwad Award for Humanitarianism. In August 2011, the MR division of the American Psychological Association presented me its highest honor: the John Jacobson Award for critical contributions to the field of Intellectual Disabilities.

8. I am a major contributor (authoring or co-authoring as many as four chapters) to a book under preparation for publication by AAMR/ AAIDD (most likely to appear in early 2013), titled *THE AAIDD GUIDE TO DEATH PENALTY CASES.* I am the sole author of a chapter in that guidebook titled "Age of Onset and the Developmental Criterion." That chapter spells out for practitioners and attorneys involved in Atkins cases, what is considered best practice (and what is considered questionable practice) in determining whether or not an individual meets prong three. I point this out because prong three seemed to be the main area of contention in the earlier Atkins proceeding for Mr. Ybarra. As author of a clarifying chapter on this prong for a forthcoming AAIDD publication on Atkins practice, I believe am especially well qualified to opine on this matter.

MATERIALS EXAMINED

9. I reviewed the following materials before writing this Declaration:

School records: Washington High School (night), Marshall High School, Grade School
Medical Records (pre-incarceration):.
Kaiser Permanente records
Sacramento Medical Center,
Yolo General Hospital, EEG records
Work Records: Chick's Produce (including worker's ((injury) compensation records)
Mental Health Records (pre- and peri-incarceration): Donald Lunde, MD; John Chappel, MD; Charles Kuhn, MD
Legal rulings
Competency records (two volumes)

Investigation records
Incarceration Records
- Kites (for medical care)
- Master Problem Lists
- Mental Health Records 1979-2001
- Medication Sheets
- "Floor" Sheets (nursing)
- Miscellaneous
- Progress Notes
- Prescribed Medications
- Psychological/Psychiatric Evaluations
- Thyroid treatment records

White Pine County Sheriff Records (Jail)
Dr. Schmidt's Handwritten Interview Notes
Psychiatric/Psychological Summaries
Mental Health Summary
Lake's Crossing Records
David Schmidt, Ph.D. Neuropsychological Evaluation
Update of Dr. Schmidt's report after his death by Erin L. Warnick, PhD
Ted Young, Ph.D. Report
Military Records
Jonathan Mack, Ph.D. Report

ACTIVITIES PERFORMED

10. I performed the following activities before writing this report.

Reviewed all of the documents cited above
Interview with Robert Ybarra, May 28, 2011
Adaptive Behavior interview with Coleen Ybarra (defendant's mother), May 29, 2011
Adaptive Behavior interview with defendant's two surviving brothers, May 29, 2011
Adaptive Behavior interview with defendant's cousin, Martin Ybarra, May 28, 2011

CRITERIA TO CONSIDER WHEN DIAGNOSING MENTAL RETARDATION

11. In considering whether or not an individual qualifies for a diagnosis of Mental Retardation (MR), it is important to spell out the nature of MR and the criteria used to diagnose it. According to NRS 175.554(5), "Mental retardation...means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."This three-pronged definition is derived from clinical definitions contained in diagnostic manuals published by two organizations: the American Association on Intellectual and Developmental Disabilities (AAIDD, formerly the American Association on Mental Retardation, or AAMR) and the American Psychiatric Association, through DSM 4TR (Diagnostic and Statistical Manual, 4th Edition--Text Revision).

12. The two manuals contain very similar definitions, largely because the committee that wrote the MR section in DSM 4TR based it almost entirely on the definition in AAMR's manual. The main differences stem from the lag in publication dates, so that the 2000 DSM- 4TR is based on the 1992 rather the revised 2002 AAMR (now AAIDD) edition. Because the prongs in the Nevada definition are not operationally defined, the typical convention is to rely on one of the clinical manuals referred to above. Because it is the most recently revised, and because it is considered the most authoritative, the 2010 AAMR/ AAIDD diagnostic manual is the one typically most relied upon by knowledgeable experts, as well as judges, in Atkins proceedings.

13. **Deficits in Intellectual Functioning**. Although the statute does not provide an operational definition of this criterion, the standard, in Nevada and elsewhere, for assessing prong one is a score on a standardized intelligence test that is approximately two standard deviations below the population mean on an individually-administered intelligence test, such as the various editions of the WISC (Wechsler child) or WAIS (Wechsler adult) scales. This translates to a full-scale IQ score of 70 to 75 (which takes into account the test's standard error range of 5 points). Correction is also typically made for the problem of obsolete norms (the so-called "Flynn effect", which requires one to subtract 3 full-scale points for each decade of norm obsolescence). Other information besides IQ scores, such as deficits in educational achievement, should be taken into account, however, and the AAIDD manuals emphasize quite strongly that one should not use an absolute IQ ceiling score cut-off when determining whether or not someone meets the first diagnostic prong.

14. **Impairments in Adaptive Behavior**. The AAIDD standard for meeting prong two is that one be significantly impaired in at least one out of the following three areas: (a) Conceptual adaptive skills (abstract problem-solving); (b) Practical adaptive skills (work and other everyday problem-solving); (c) Social adaptive skills (interpersonal problem-solving). There is no precise numerical standard set by Nevada's statutory, or the two clinical definitions, for meeting this prong, although standardized scores can be obtained through "direct" or third party adaptive behavior scales such as the Vineland-2 or the ABAS-2. In addition to using a standardized rating instrument, information about prong two can also be gathered from qualitative interviews, educational and other documents, and interviews with the defendant.

15. An important thing to keep in mind when evaluating prong two, is that one's adaptive functioning does not need to be globally impaired in order to meet the diagnostic criterion. Particularly, for individuals in the sub-category of "mild" MR (IQ 55 to 75), one can do many things of a "normal" nature, such as work, drive a car, live independently, be married, etc. Obviously, there are areas of deficit but these may not be clearly evident under typical circumstances. In situations that put a premium on good judgment, however, one's adaptive functioning deficits are most likely to become evident.

16. **Onset During the Developmental Period**. As noted, Mental Retardation, according to NRS 175.554(5), is defined as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." The term "developmental period" is not defined in that statute, but in the AAMR/ AAIDD manuals is operationally defined as any time between birth and age 18. The purpose of this prong is to rule out from the diagnosis anyone who developed normally as a child or adolescent but then suffered a brain injury or disease after the age of 18 and regressed cognitively (such a person would have dementia rather than MR). Knowledge of a specific cause of the disability (for example, maternal drinking during pregnancy) is not needed, although such knowledge is always helpful. In most cases of MR, especially mild MR, etiology is unknown, even if a cause is suspected.

17. One of the contested questions in interpreting the developmental criterion involves whether one needs test data (IQ or adaptive functioning) that meets the 70-75 standard, obtained during, or retroactively referenced to, the developmental period. The views of AAIDD are instructive in this regard. Both the most recent diagnostic manual produced by the AAIDD in 2010 and AAMR's earlier "User's Guide," contemplate retrospective assessment, especially in *Atkins* cases, long after the end of the developmental period and conceive that such assessment may be possible despite the lack of contemporaneous diagnoses of mental retardation. Under the flexible approach contemplated by these standards, all that is needed to satisfy the developmental criterion is to show that when a person qualifies as having MR as an adult, there were precursors or indicators that developed or were evident during the childhood or adolescent period. Outcome-based evidence, such as a child being retained in elementary school, very low academic achievement, assignment to special education, and receipt of social security disability funding should easily satisfy the developmental criterion, even in the absence of formal IQ or adaptive behavior data collected during that period. However, I have attempted to approach the third definitional criterion using both a flexible framework (by seeing if there was evidence of failure and general impairment) and a more rigid framework (by looking at test scores, including retrospective adaptive behavior ratings) for periods before the age of 18. There are many cases, in which I was involved or know about, in which a court made a favorable Atkins ruling even though the defendant was never labeled as MR or even evaluated educationally, while a child. I will be happy to provide citations for those rulings if asked.

My Findings Concerning Whether Mr. Yberra Has Mental Retardation

19. In my professional opinion, Robert Ybarra meets all three prongs of the definition of mental retardation, under both Nevada 433.174 and the clinical diagnostic manuals from which the statutory definition was derived. My reasons for reaching this conclusion are discussed below under each of the definitional prongs separately.

Mr. Yberra Meets Prong One: Sub-average General Intellectual Functioning

20. Mr. Ybarra has been administered standardized measures of intelligence on several occasions over the years and the obtained test scores are generally well under the clinical standard of a full-scale score with a ceiling under 70-75, or approximately two standard deviations below the population mean. The one exception to this was an evaluation in January, 1981, pursuant to a competence hearing, where Mr. Ybarra was evaluated by a psychology intern under the supervision of Dr. Martin Gutride. However, for reasons discussed below, the

results can be considered to substantially overestimate Mr. Ybarra's intelligence. Further evidence of this can be found in the fact that later testing by four qualified psychologists resulted in test scores substantially lower than those obtained by Dr. Gutride through his intern.

21. The test used by Dr. Gutride was the Wechsler Adult Intelligence Scale (WAIS), which was published in 1955, and normed in 1953. At the time of the 1981 evaluation by Dr. Gutride, the norms for the WAIS (which was replaced by the WAIS-R in the same year of 1981) were 28 years obsolete. A correction for the so-called "Flynn effect" (a correction for norm obsolescence, something that is almost universally accepted by state and federal courts in Atkins proceedings) would cause the full-scale IQ score on the WAIS to be reduced by 9 points (using the correction formula of 0.3 points per every years of obsolescence, times 28 equals 9.3, rounded to 9.0. The full-scale IQ obtained by Dr. Gutride was 86. The Flynn correction of 9 points, subtracted from 86, brings this down to 77, which is very close to the clinically-recommended ceiling of 75. As pointed out in her report of April 2011, neuropsychologist Dr. Erin L. Warnick (the colleague and former wife of the now-deceased Dr. David Schmidt) wrote that " Subsequent evaluators (Dr. Schmidt and Dr. Mack) have criticized Dr. Gutride's findings on the basis that he used an obsolete test with outdated norms [and also]...that Dr. Gutride did not personally evaluate Mr. Ybarra himself instead transferring the responsibility to an intern. Dr. Mack pointed out that this practice is illegal in his state of New Jersey."

22. The late neuropsychologist Dr. David Schmidt evaluated Mr. Ybarra in late 2001 and early 2002. Dr. Schmidt obtained a full-scale IQ score on the WAIS-III (which replaced the WAIS-R in 1997) of 60, which is well under the clinical standard for prong one. Dr. Schmidt felt this might be a slight underestimate of Mr. Yberra's intelligence, given that he seemed to be somewhat distressed. In January 2008, another neuropsychologist, Dr. Ted Young, also tested Mr. Ybarra's intelligence. Using the Wechsler Abbreviated Scale of Intelligence (WASI), which is a shorter version of the WAIS-III that correlates quite highly with the longer version.

23. Dr. Young obtained a Full Scale IQ of 66, which while higher than the score obtained six years earlier by Dr. Schmidt is still well under the clinical ceiling for prong one. Finally, Dr. Jonathan H. Mack, evaluated Mr. Ybarra in July and October of 2010. Using the Wechsler Adult Intelligence Scale –Fourth Edition (WAIS-IV), Dr. Mack obtained a full-scale IQ score of 63, which is in between the scores obtained by Drs. Schmidt and Young, and also well under the ceiling for diagnosing ID. None of these psychologists questioned the sincerity of Mr. Ybarra's effort and Dr. Mack reported that Mr. Ybarra scored in the "good effort range," on the TOMM, which is the most widely-used measure of malingering. . On other indices of cognitive functioning, the results of neuropsychological testing indicate even more substantial academic and reasoning deficits that might be inferred even from Mr. Ybarra's very low IQ scores. Thus, Dr. Schmidt wrote that Mr. Ybarra scored in "the moderate to severely impaired range when comparing overall functioning" on a widely-used neuropsychogical test battery.

24. Of the psychologists who evaluated Mr. Ybarra's intelligence, only one—the prosecution expert Dr. Ted Young—raised any questions about the defendant's effort. He administered the Test of Memory Malingering (TOMM) and he stated that the results suggested that Mr. Ybarra was malingering. Dr. Mack's evaluation included the same instrument, but his TOMM results yielded a score suggestive of Mr. Ybarra's best efforts; however, Dr. Young reached the opposite conclusion with substantially lower numbers. It should be noted that noted forensic psychologist Dr. Karen Salekin—a professor of psychology at the University of Alabama—published the definitive article on malingering in people with low IQ (Salekin, K. L., & Doane, B. (2009). Malingering intellectual disability: The value of available measures and methods. *Applied Neuropsychology, 16*, 105-113). She and her co-author Bridget Doane cited research suggesting that as the TOMM (and similar measures) have never been validated with low-IQ individuals, there is a high likelihood of confusing poor memory with poor effort and, thus, of wrongly concluding that a person is faking, rather than actually having, mental retardation. Their recommendation is that such measures not be used with low-IQ individuals. The best evidence whether someone with low IQ is malingering is congruence of scores across psychologists and clinical suggestions of poor effort (for example, doing better on hard items and worse on easy items). As there is good congruence across tests for Mr. Ybarra and no noted clinical indications of poor effort on his part, it is safe to be skeptical about Dr. Young ascribing Mr. Ybarra's low IQ score to malingering. .

25. In sum, there is significant evidence to support the conclusion of Dr. Mack when he noted that the high degree of congruence across the three qualified psychological examiners leads one to conclude that "based upon the totality of the evidence...Mr. Ybarra has been functioning overall in the range of mild mental retardation for decades" and that "Mr. Ybarra's Full Scale IQ has been in the range of mental retardation since prior to the age of 18."

Mr. Yberra Meets Prong Two: Significant Impairments in Adaptive Behavior

26. In many jurisdictions, an IQ of 60 or less provides presumptive evidence of mental retardation, and assessment of prong two is not required. The reason is because one will find very few if any people who are that significantly impaired intellectually who do not also manifest significant impairments in adaptive behavior (at the upper IQ range of mild mental retardation, it is more possible that IQ and adaptive behavior scores will diverge). In the case of Mr. Ybarra (where most IQ scores clustered near 60), there is substantial evidence of significant prong two impairment.

27. Mr. Ybarra's adaptive behavior was evaluated by the late Dr. David Schmidt and his colleague (and former wife) Dr. Erin L. Warnick, in November 2001. Mr. Ybarra was a poor historian and establishing rapport with him took awhile, given his emotional problems. According to Dr. Warnick's March 2011 report, on "the second day, the examiners were able to connect with Mr. Ybarra around a car he owned, which he stated was a Mustang. He recalled how much he enjoyed 'cruising' his car down 'River Road' and listening to the song, 'Mustang Sally.' This examiner expressed that she liked the song 'Mustang Sally.' From that point forth, 'Mustang Sally' became the fallback topic or phrase when rapport became fragile. Within limits, Mr. Ybarra was able to be distracted from negative feelings and be soothed by the topic when it was reintroduced. He appeared to forgive emotional upset provoked by the examiners' questions simply because both examiners liked the song 'Mustang Sally.' As a result, a personal history was obtained..." Dr. Warnick characterized Mr. Ybarra's behavior on this and future

occasions (when he would repeatedly bring up the song) as extremely childlike and egocentric ("childlike" is an adjective frequently used to describe the behavior of adults who have MR).

28. Although Drs. Schmidt and Warnick did not use a formal adaptive behavior rating instrument with third-party informants, they did obtain considerable information from their interviews with Mr. Ybarra about his level of adaptive functioning. Dr. Warnick noted that "Mr. Ybarra demonstrated a lack of awareness of social conventions as well as a limited and immature manner of relating....His behavior was reminiscent of that of a young child who will engage with you or decide he or she likes you simply because you have the same color shoes on or because you share the same name. In this respect, Mr. Ybarra seems susceptible to manipulation, as he appears to overly rely on superficial qualities of others when making judgments about who to trust. Of import is the demanding and rather exhausting experience of 'relating' to someone like Mr. Ybarra, which required considerable skill and effort on the part of examiners." The description of Mr. Ybarra as functioning like a child is very diagnostically indicative of MR, as for many years MR was defined primarily in terms of a mental or adaptive age-equivalent that never rises above 11 or 12.

29. Because Drs. Warnick and Schmidt did not use a formal measure of adaptive behavior, and apparently did not interview family members, I attempted to remedy that lack in my own meetings with Mr. Ybarra and his family. I separately interviewed Mr. Ybarra's mother Coleen (the father was present but because of severe deafness chose not to participate), his two brothers (together) in a hotel conference room in Sacramento, and a paternal cousin, Martin Ybarra, in the federal Defender office in Reno, near where he lives. Martin Ybarra is close to Robert Ybarra in age and he indicated that he was very close to Robert during childhood and considered himself like a fourth brother (a third brother, who was older than Robert, is no longer alive). In order to provide additional information about prong three (developmental onset), and in line with established practice in Atkins assessment (endorsed by the AAMR/ AAIDD User's Guide to its diagnostic manuals), I used a retrospective method, in which I asked the informants to answer rating questions, keeping in mind Mr. Ybarra's functioning when he was between 16 and 17 years of age and not as he is today (necessitated also by the fact that he has been incarcerated for a long time, items do not apply to a prison setting, and also that they have not seen him in a few years).

30. As noted by others, Robert's mother is not a good informant, as she cannot answer differentiated questions. Therefore, I ended that interview early, as she was becoming quite upset and frustrated by her inability to provide answers and by her habitual responding "I don't know" or "I can't say." The brothers had difficulty answering questions also, as they are both younger than Robert. Even when an older sibling is impaired, it is difficult for younger siblings to answer retrospective adaptive behavior questions, both because of their young ages at that time and also by the natural tendency to look up to an older sibling. Therefore, I ended those interviews prematurely as well, something mandated by the fact that the instruments are not valid if there are excessive numbers of unanswered items. However, I was able to get very good information from the cousin, Martin Ybarra.

31. As noted, I interviewed Martin Ybarra in the Federal Defender office in Reno, near where he lives. I used the adaptive Behavior Assessment Scale, 2nd edition (ABAS-2), which is one of the two most respected and widely used such instruments. Martin Ybarra was quite cooperative, was able to answer all but a small number of items, and was quite definite in his

descriptions of his cousin. On the ABAS-2, Robert Ybarra received the following standard scores, from ratings completed by his cousin Martin: on Conceptual Adaptive Behavior, he received a score of 63; on Practical Adaptive Behavior, a score of 72; on Social Adaptive Behavior a score of 66; and on Composite (overall) Adaptive Behavior, a standard score of 60. (Note: overall is calculated separately from norms, is not an average, and it is commonplace for the composite score to be lower or higher than any of the sub-scales). These scores are all below the statistical cut-score ceiling of 70-75, and far exceed the AAIDD requirement of significant deficits in only one of the four ABAS-2 areas. It should also be noted that these adaptive behavior standard scores are highly congruent with the three full-scale IQ scores obtained by qualified examiners.

32. Martin Ybarra provided much important information of a descriptive nature about his cousin Robert. Among other things, he indicated that kids in school would call him "retard" on a daily basis (being called retarded by peers is a very strong diagnostic indicator), would pick on him unmercifully, and cause him to come home crying repeatedly. In line with the research indicting gullibility and suggestibility is a core behavioral tendency of people with MR, Martin Ybarra indicted that his cousin was very easily tricked. Coleen Ybarra confirmed the view of her son as impaired, saying that Robert would cry whenever he had to do homework, and that his teachers would call the house repeatedly complaining about Robert's inability to learn. Robert also exhibited immature adaptive behavior, and would be told by relatives (such as an aunt) "why don't you grow up and act your age?" It is clear to this evaluator that the members of Mr. Ybarra's family, unsophisticated about developmental disabilities, did not appreciate the true nature and extent of Robert's disability. This was not helped by the absence of adequate special services in the Sacramento school system at that time.

33. In addition to interviewing Mr. Ybarra's family, I also interviewed the defendant himself, in the state correctional facility in Carson City, where he was moved because of serious circulatory problems with his feet. Mr. Ybarra, who is confined to a wheelchair, was quite cooperative with this examiner. In a general discussion about his current situation, Mr. Ybarra demonstrated a very concrete style of reasoning, saying for example that he intends to walk out of prison on his own feet, rejecting the medical reality that he likely will need amputation (not to mention legal realities as well, of course). On an administration of a measure of Common Sense (awareness of social and practical risk), Mr. Ybarra gave several responses of a naïve and unaware fashion. The same was true on an interview tapping his understanding of everyday proverbial sayings. This interview was intended mainly for me to meet the defendant, something mandated by ethical requirements whenever drawing a diagnostic conclusion, even when that conclusion is based mainly on third-person accounts, including reports from other clinicians. Nevertheless, I saw nothing in that interview contradicting a diagnosis of MR.

34. It is my understanding that one of the things noted by the court supporting its negative Atkins ruling on Mr. Ybarra is the fact that he submitted many written kites while in prison. However, the court noted some evidence that he may have been assisted by other inmates, and also noted (properly) that their main concern was with his level of functioning within the developmental period and not on prison functioning (when many persons with mental retardation show some degree of adaptation and growth, especially given the concrete and predictable nature of everyday demands). I would just like to add to this that the AAIDD and DSM manuals make it very clear that that most people with mild MR can do many things, and

that ability to write (especially basic and routinized requests) in no way is incompatible with a valid diagnosis of MR.

35. Both the state trial court and the Nevada Supreme Court rejected Mr. Ybarra's arguments, in large part, because they both concluded that those tasks he could perform either undermined any argument that he might suffer from the requisite deficits in adaptive behavior or that he was malingering. Essentially both courts concluded that Mr. Ybarra had abilities they deemed inconsistent with mental retardation, with the Nevada Supreme Court concluding that Mr. Ybarra's measured level of intellectual functioning was not accurate, stating that Dr. Schmidt's testing did not "withstand scrutiny in the context of Ybarra's real life actions and functioning." Because of various observed activities, such as writing prison requests called kites, he demonstrated "a level of intelligence beyond [that of] a mentally retarded individual." Similarly, the Court focused in part on Mr. Ybarra's ability to drive a fork lift, hold jobs for "lengthy periods of time at salaries that exceed minimum wage at the time." The Court noted that he could live independently because he moved around secured living quarters and was married for a while." These abilities, along with other issues, undermined, in the Court's view, Mr. Ybarra's claim that he met the standard for deficits in adaptive behavior.

36. The two Nevada courts that evaluated Mr. Ybarra's Atkins claim employed methodology that, while seemingly logical to lay persons, in fact, runs afoul of accepted professional practice to those mental health professionals with training and experience in the field of intellectual disability. The opinions of the Nevada Supreme Court and the Nevada District Court rejected Mr. Ybarra's testing scores because they would not "withstand scrutiny in the context of Ybarra's real life actions and functioning. (Ybarra v State of Nevada, 247 P.3d. 269, 289, Nev. 2011). The Nevada Courts concluded that Mr. Ybarra was malingering because he played cards, backgammon, scrabble and other games while at a mental health facility. Both the state district court and the Nevada Supreme Court placed great weight on prior reports of malingering from, presumably, the Lake's Crossing mental health facility that included reports that Mr. Ybarra's hallucinations were not valid, that he was feigning incompetence and that he feigned mental illness in order to remain in the facility. See 247 P.3d at 280. However malingering mental illness, even if it occurs, is not the same thing as malingering cognitive incompetence, and malingering is not a personality trait that generalizes to all forms of functioning.

37. One of the most difficult tasks in the assessment of persons who may have mental retardation or Intellectual Disability as it is now labeled, is evaluating those persons who have mental retardation but higher IQ's: those persons that used to be labeled as having mild mental retardation. That assessment is made more complicated because 85% of people with mental retardation fall within this category. In the criminal justice system, persons with moderate, severe or profound mental retardation are normally not going to get far in the justice process, as usually there is no controversy about their disability. They present serious issues of competency to stand trial, obvious signs of intellectual deficiency and very few people question the MR diagnosis. On the other hand, the population with ID but higher IQs, the so-called mildly retarded, presents a much more difficult diagnostic challenge.

> 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, June 2009, *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).

In short, people with mild mental retardation can marry, live independently, and work. Nothing the two Nevada Courts found persuasive is inconsistent with intellectual disability, as it is reflected in the scholarly literature. The courts' view is, however, in line with questionable lay stereotypes about mental retardation.

38. 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 authors of the AAIDD diagnostic manual caution against relying heavily only on the information obtained from the individual himself. . . ." (Green Book, pp. 52-53). 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. Mild mental retardation is a somewhat hidden disability, given these efforts to "pass" as normal, and given that a large percentage of them graduate from high school, albeit from institutions with less demanding curricula (in Mr. Ybarra's case, a continuation school) or GED equivalents. It is their efforts to mask their disability that result in the failure of systems to adequately identify their disability. This failure to identify them results in their "falling through the cracks". Thus, the absence of prior findings of disability, an absence given great significance by the Nevada courts, is, in fact, consistent with mild mental retardation.

39. The kinds of arguments reflected in the Nevada court decisions, namely that a claimant's ability to do (or claim to do) certain tasks means he cannot be someone with mental retardation, rely not on science but on stereotypes. There is a common misconception that mental retardation affects every aspect of a person's life and with individuals with more severe disability that is likely true. Over three-fourths of the population with mental retardation, however, fall within a category that used to be referred to as mild mental retardation, what we now refer to as someone who falls in the upper IQ range (55-75) of the Intellectual Disability category. For these individuals, the disability is rarely pervasive. These individuals possess skills and abilities that very closely track skill levels in those persons without mental retardation, i.e. borderline functioning. Persons with this level of ID often present in the same fashion as those with borderline intellectual functioning. In this category, you often find individuals who have

never been diagnosed with ID; they are missed in school systems, by military recruiters and employers. They can hold down jobs. They get married. They drive cars. Intellectual disability at this level often manifests itself in ways not measurable by traditional testing. Individuals with this level of ID are often gullible and naive. They are often manipulated as Mr. Ybarra was in the military. Records noted by Dr. Warnick indicated that his homosexual encounters were not initiated by him but by another Marine who had to convince Mr. Ybarra to participate. "[I]t took me a while to convince him, finally after a while he gave in." Mr. Ybarra was clearly vulnerable to sexual exploitation and it is this vulnerability that is a classic hallmark of disability among those who have IQ's in the upper range of mild ID.

Ybarra Meets Prong Three: Onset Before Age Eighteen

40. The purpose of prong three is to establish that any cognitive and adaptive impairments observed during adulthood have roots in the "developmental" period, i.e., during childhood or adolescence. The standard used in Nevada and most other states is that there must be evidence of significant impairment before the age of 18. This does not mean that the person must have early formal IQ or adaptive behavior scores or that he received a special education designation of mental retardation, as these depend too much on local policies, service availability and family sophistication and advocacy. Rather, all that is necessary is to show that concerns were raised early on about an individual's ability to function normally in the cognitive and adaptive spheres and, thus, there was some continuity between limitations noted in adulthood and limitations noted in childhood or adolescence.

41. It is well-documented that Robert Ybarra suffered a severe brain injury around age 8 or 9, and that all of his later cognitive, emotional and adaptive difficulties can be traced to that event. Traumatic Brain Injury is a major known cause of MR, and the seriousness of the injury is documented in educational, family and medical reports (for example he was treated with anti-seizure medications for years, and epilepsy is a major known correlate of MR). It is clear that following the head injury around age 8 or 9, Robert Ybarra was significantly impaired, as reflected in his inability to perform adequately in school, in his difficulties with peers (who tended to call him "retard," which itself is diagnostically very significant) and in his serious emotional problems. This information alone, in my professional opinion, is more than enough to establish that Mr. Ybarra's significant intellectual and adaptive deficits originated in the Developmental (i.e., pre-18) period. Mr. Ybarra grew up in a family where all of the other members were competent at all stages of life, and continue to function normally. He stood out within that family as significantly impaired, and all of his later problems in school and in life can be traced to the severe head injury that he suffered as a child. His incompetence before or just around the age of 18 can be seen in many instances of failure, including dropping out of school early (with the encouragement of school officials), who noted that he could not progress further academically, and in his several aborted efforts at a military career.

42. As noted in my above comments on prong two, I administered a retrospective adaptive behavior instrument, the ABAS-2, to Mr. Ybarra cousin's Martin Ybarra. The results of that evaluation, using ages 16-17 as the target rating age, provide further strong evidence that Robert Ybarra meets the Developmental Onset criterion.

Diagnostic Statement

43. It is my professional opinion, to a reasonable degree of scientific and psychological certainty, that Robert Ybarra meets all three definitional prongs for mental retardation as specified in Nevada 43.174 as well as the clinical diagnostic manuals from which the statutory definition was derived.

.....

I declare under penalty of perjury under the laws of Colorado, Nevada and the Unites States of America that the foregoing is true and correct.

Executed this 28th day of March, 2012

Stephen Greenspan, PhD
Psychological Consultant

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Electronically Filed
Apr 19 2012 03:41 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

ROBERT YBARRA

Appellant,

vs.

RENEE BAKER, WARDEN, and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL FOR THE STATE OF NEVADA,

Respondents.

Case No. 52167

MOTION TO STAY ISSUANCE OF THE REMITTITUR AND TO RECONSIDER OPINION

Appellant Robert Ybarra hereby moves for an order staying the issuance of the remittitur based on his showing of extraordinary circumstances and in order to give this Court the opportunity to reconsider its earlier decision. NRAP 27. This motion

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is based upon the attached memorandum of points and authorities and the entire file herein.

Dated this 19th day, April 2012.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. A Remittitur Can Be Stayed or Recalled by this Court with a Showing of Extraordinary Circumstances, Including Mistake of Fact, Inadvertence or Incomplete Knowledge of the Case Circumstances, and Mr. Ybarra Can Make That Showing.

Extraordinary circumstances justify this Court's decision to reexamine cases, and to, if necessary, either stay the issuance of the remittitur or even recall it. See Walters v. State, 108 Nev. 186, 187, 825 P. 2d 1237, 1238 (1992) ("On February 20, 1990, this court issued an opinion in this matter reversing the decision of the district court. Walters v. State, 106 Nev. 45, 786 P.2d 1202 (1990). "On May 9, 1990, the state filed in this court a motion to recall the remittitur and a petition for rehearing. . . . On October 25, 1990, we recalled our remittitur in this matter, and granted the state's petition for rehearing. We now issue this opinion in the place of our prior opinion."); Bass-Davis v. Davis, 133 P.3d 251 (Nev. 2005) (unpublished) ("On August 11, 2005, a panel of this court issued an opinion in this appeal. Bass-Davis v. Davis, 121 Nev. ___, 117 P.3d 207 (2005). Respondent has petitioned this court for en banc reconsideration of the panel's decision. . . . We recall the remittitur issued on October 25, 2005, and withdraw the panel's opinion in this matter pending resolution of the petition for en banc reconsideration.");[1] see also Lane v. State, 114 Nev. 299, 300, 956 P.2d 88, 89 (1998) (treating suggestion for rehearing on court's own motion as petition for rehearing, (despite untimeliness), granting rehearing, and reversing sentence based on issues not raised at trial or on appeal); Geary v. State, 112 Nev. 1434, 1437, 930 P.2d 719, 721 (1996) (granting untimely petition for rehearing and reversing sentence based on issues not raised at trial or on appeal).

[1] This disposition is not cited as legal authority. SCR 123. It is cited as evidence of the practice of this Court, in the event that a challenge under the State or Federal constitutional guarantees of Equal Protection of the Laws, or any other constitutional or judicial rule, arises due to disparate treatment of appellant compared to other similarly-situated litigants.

In Wood v. State, 60 Nev. 139, 104 P.2d 187 (1940), the Court denied a motion to recall a remittitur because the appellant failed to demonstrate either a mistake of fact, inadvertence or incomplete knowledge of the case circumstances, a showing Mr. Ybarra can make. See also State v. Butner, 67 Nev. 436, 446, 220 P.2d 631, 636 (1950) (Horsey, C.J., dissenting); Dudrey v. Milner, 399 P.2d 455 (Nev. 1964) (unpublished) (motion to recall remittitur granted where original opinion omitted facts of prior payment improperly credited to unaccrued interest rather than principal).[2]

Here, this Court has stayed the issuance of the remittitur pending a decision by the United States Supreme Court on whether to hear Mr. Ybarra's petition for certiorari. On April 16, 2012, the Supreme Court denied the petition. Mr. Ybarra moves this Court under NRAP 27 to withhold the issuance of the remittitur and to reconsider its decision denying relief.

Extraordinary circumstances exist here. What Mr. Ybarra sets forth below are facts that demonstrate why this Court should reconsider its original opinion. Essentially, this Court defined mental retardation in a fashion that excludes 85% of those who suffer the disability. One of the nation's leading authorities on mental retardation, Dr. Stephen Greenspan, has examined the record in this cause, engaged in a detailed assessment of Mr. Ybarra's deficits in adaptive behavior and concluded that this Court's decision is scientifically unsupportable: as noted, the vast majority of persons with mental retardation could never enjoy the protection of Atkins under this Court's interpretation. Defining and interpreting a constitutional mandate in a fashion that excludes the vast majority of those who should benefit from its protection violates Due Process and, in the case of death sentenced inmates, the Eighth Amendment.

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[2] See n.1 above.

Mr. Ybarra claimed in both the district court and in this Court that his death penalty should be set aside because he was mentally retarded and thus he was protected by Atkins v. Virginia, 536 U.S. 335 (2002). In rejecting his claim, this Court construed Nev. Rev. Stat. § 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).[3] "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. ___, 247 P.3d 269, 270 (2011).

Even though this Court acknowledged the appropriate ultimate standards, it ignored the science underlying those standards. Essentially, this Court concluded that Mr. Ybarra had abilities this Court deemed inconsistent with his claim of reduced levels of intellectual functioning and deficits in adaptive behavior. 247 P.3d at 277-79. Both this Court and the court below 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, because no school official thought him a person with MR, and because the armed services thought him of "dull normal" or "borderline" intelligence.[4] The Court held that the testimony of Mr. Ybarra's expert, Dr. David

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[3] 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.

[4] The Armed Forces Qualification Test (AFQT) is administered at induction centers; it is a paper and pencil screening test used to estimate the general

(continued...)

Schmidt, 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 state-run mental health facility, and he filed hundreds of prison communications, called 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.[5] The Court also noted that Mr. Ybarra could live independently because he moved around, secured living quarters and was married for a while. Id.

II. Reasons for Reconsidering the Decision.

Federal court review is "concerned with federal issues and a contention that the state court disregarded a federal constitutional ruling of this Court." Limbach v. Hooven and Allison Co., 486 U.S. 353, 362 (1984). In Atkins v. Virginia, 536 U.S. 335 (2002), the Supreme Court ruled that the Eighth Amendment categorically bans the execution of persons with mental retardation who commit capital crimes, but this

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[4](...continued)
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. . . ."

[5] 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 Marine Corps 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 was submitted to this Court, this suggests that Mr. Ybarra was "vulnerable to being taken advantage of sexually. . . ."

prohibition recognizes a central point: persons with mental retardation can plan, can conceive and can carry out capital crimes. This Court, however, chose, in Mr. Ybarra's case, to implement Atkins in a manner designed to exclude defendants with mental retardation from the decision's protective ambit. In effect, this interpretation of Atkins omits from its scope almost all the criminal defendant population who have mental retardation. This Court has set its interpretation on a collision course with the federal standard.

Atkins was based on a national consensus that those persons with intellectual disability (or, as it is more commonly known, mental retardation) should not be executed. That consensus is premised on a shared national understanding of what constitutes intellectual disability, based on the accepted definitions of ID developed by the American Association on Intellectual and Developmental Disabilities (AAIDD, formerly the American Association on Mental Retardation AAMR) and the American Psychiatric Association.[6] While the Supreme Court did not expressly order the states to adopt those definitions, the court clearly expected that the definitions ultimately adopted would "generally conform" to the generally accepted standards of the AAIDD and APA. 536 U.S. at 317, n.22.

Most states, including Nevada, have adopted the three-part definition of intellectual disability utilized by the AAIDD and APA; most also, have implemented procedures and interpretations that severely constrict the scope of Atkins.[7] To pass constitutional muster, however, a state's definition of ID, together with the procedures to implement it, "must encompass all defendants that 'fall within the range

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[6] Most of the discussion in this motion will use standards adopted by the AAIDD; the definitions of both organizations are substantially identical. AAIDD, however, has simply published more comprehensively on this issue.

[7] Virtually every state, including Nevada, has adopted the three -part definition. See http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation; DeMatteo, D., Marczyk, G., Pich, M. (2007), Assessing mental retardation in death penalty cases: Critical Issues for psychology and psychological practice. Professional Psychology: Research and Practice, 37(6), 658-665.

of mentally retarded offenders about whom there is a national consensus.'" United States v. Cisneros, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005) (quoting Atkins, 536 U.S. at 308, n.3); see also Pruitt v. State, 838 N.E.2d 90, 108 (Ind. 2005) ("Although Atkins recognized the possibility of varying state standards of mental retardation, the grounding of the prohibition in the Federal Constitution implies that there must be a nationwide minimum. The Eighth Amendment must have the same content in all United States jurisdictions. Accordingly, we conclude that states are free to impose a higher standard, but the minimum definition of mental retardation sufficient to meet the national consensus found in Atkins must be uniform. . . .").

A. Any method for evaluating intellectual disability that systematically allows the execution of a defendant with mental retardation is unconstitutional.

"States must properly establish a threshold below which the [death] penalty cannot be imposed. . . . To ensure that this threshold is met, the state must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." Romano v. Oklahoma, 512 U.S. 1, 7 (1994); see also Santosky v. Kramer, 455 U.S. 745, 756, n.8 (1982) (". . . the Court must examine a State's chosen standard to determine whether it satisfies 'the constitutional minimum of fundamental fairness.'" (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)); Mills v. Rogers, 457 U.S. 291, 300 (1982) ("Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution."). This Court's ability to construe Atkins as not applicable to Mr. Ybarra is limited by these federal constraints.

The AAIDD definitions provide only a starting point for States to implement Atkins. They, however, are not arbitrary standards but the result of decades of research and publication and years of efforts at consultation and consensus. They were adopted in the context of what the AAIDD refers to as assumptions and

principles of guidance. In other words, the definitions have a context that is as important to the resolution of a defendant's diagnosis of Intellectual Disability as the definitions themselves. Applying the definitions, without applying the consensus context, risks excluding large numbers of persons with ID 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 ID from protection.

There are essentially two central points that have to be applied to this case:

1) The essential assumption that persons with ID have strengths as well as weaknesses mandates that any assessment of potential Intellectual Disability must look to a person's deficits, not his strengths, to determine whether that person is someone with mental retardation;

2) This assumption becomes extremely important when assessing persons with ID 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 ID, i.e., so-called borderline cases, this assessment of deficits only is critical.

B. 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.
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> . . .
>
> 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. Further, the AAIDD requires, in assessing deficits in adaptive behavior, substandard performance in only one of three domains: conceptual, social, and practical skills: there is no requirement that ID be a pervasive disorder affecting every aspect of a person's life. Green Book, p. 46. The 2002 version of the AAIDD manual, often referred to as the Red Book, concluded in part, that to require more - - that is, to require significant deficits in two of three domains - - would yield the 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. This is essentially what this Court demanded in the original opinion. By focusing on those activities Mr. Ybarra could perform, the Court, in effect, required any person with mental retardation to prove what no professional in the field can establish: that mental retardation be an all-pervasive disorder.

The ultimate point of these principles is that it does not matter what the subject can do, only what he cannot do and the level of that impairment. Intellectual disability or mental retardation is not a pervasive disorder affecting every aspect of

a person's life. Persons with ID or MR have surprising strengths; there are things they can do well or at least reasonably well, despite the weaknesses that make them ineligible to receive the death penalty.

C. Appellant is the archetypal capital defendant with mental retardation.

The assumptions and requirements underlying the ID definition also have to be viewed in the context of the typical criminal defendant who should qualify for Atkins protection, those in the upper mental retardation range. In the capital sentencing arena, persons with moderate, severe or profound mental retardation will normally not get far in the criminal justice process, because there is no controversy about their disability. They will present serious issues of competency to stand trial, and obvious issues of intellectual disability, and very few people will question an ID diagnosis. Eighty-five percent of the population with ID, however, fall in the category of what used to be called mild MR but is 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, 220-33 (AAIDD, June 2009). See also Olley, J.G. (2009),

Knowledge and Experience Required for Experts in Atkins Cases, Applied Neuropsychology, 16, 135-40; Salekin, K.L. and Olley, G., Conducting an Atkins evaluation: What we know, what we don't know, and what we need to find out. Continuing Education Workshop, March 2008 American Psychology-Law Society, Jacksonville, Fla; Olley, G., Challenges in implementing the Atkins decision, American Journal of Forensic Psychology, 27, 63-73 (2009). This description is a far more accurate picture of Mr. Ybarra than the opinion of this Court, if all the facts are considered in the proper context.

To make the matter more difficult, individuals with ID and higher IQs have a great deal in common with those individuals without an ID diagnosis but who 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.[8] More than 70% graduate from high school,

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[8] The district court and this 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 authors of this Manual caution against relying heavily only on the information obtained from the individual himself. . . ." Green Book, p. 52-3. This phenomenon is often labeled as a "cloak of competence," suggesting that those persons with ID will deny any deficits and often appear and try to appear as normal. Olley, 2009 supra. 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. Both courts relied on Mr. Ybarra's activities while incarcerated to

(continued...)

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.

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 that of 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

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[8](...continued)
conclude that he was malingering and that he did not suffer the requisite deficits in adaptive skills. For example, both noted that he played cards, backgammon and Scrabble while a resident of a Nevada mental health facility, Lake's Crossing. AAIDD and Snell and Luckasson make clear that persons with ID often attempt to present themselves to others has having normal skill levels. In any event, merely playing those games is no indication that Mr. Ybarra was not a person with ID, nothing in those records or in any other record relied upon by the Nevada courts indicate how well Mr. Ybarra played those games. Anyone can move a backgammon piece across a board or make simple three letter words for Scrabble, even persons with ID. The same is true for all of the other activities. The Nevada courts, including this Court, have simply made unwarranted assumptions that persons with MR could never engage in any "normal" activity at any level.

average or above average oral language skills, including the use of big words; research shows "that adults with mild MR have relatively normal syntax, grammar, and vocabulary." Id. at 292. Mr. Ybarra's so called skills in writing prison communications, called kites, do not belie his severe limitations. 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). See also Mossman, Atkins v. Virginia: A Psychiatric Can of Worms, 33 New Mexico L.Rev. 255 (2003).

Dr. Greenspan reviewed the evidence adduced at Mr. Ybarra's Atkins hearing and performed additional testing; his report is attached as Exhibit 1. Dr. Greenspan's work and report support Mr. Ybarra's contentions in all respects. First, a person's "adaptive functioning does not need to be globally impaired in order to meet the diagnostic criterion [for mental retardation]." Ex. 1 at 6.

> Particularly, for individuals in the sub-category of "mild" MR (IQ 55 to 75), one can do many things of a "normal" nature, such as work, drive a car, live independently, be married, etc. Obviously there are areas of deficit but these may not be clearly evident under typical circumstances. In situations that put a premium on good judgment, however, one's adaptive functioning deficits are most likely to become evident.

Id. Dr. Greenspan then noted that Mr. Ybarra met all criteria for intellectual disability. With one exception, there was consistent scoring on IQ tests in the MR range. Only the 1981 assessment by Dr. Gutride was higher.[9] Testing by fully qualified psychologists demonstrated consistently lower scores in the MR range.[10]

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[9] A contemporaneous (04/16/1981) assessment of Mr. Ybarra as having "low intelligence" by John Chappel, M.D., without testing, counters Dr. Gutride's assessment. Dr. Gutride's assessment was cited as proof of low-average intellectual functioning by this Court as well as the lower court.

[10] Dr. Greenspan discussed the Flynn effect and Dr. Gutride's use of the intern rather than personally administering the test himself. Ex. 1 at 8. The Gutride test result was simply not reliable.

Greenspan also noted Dr. Ted Young's conclusion of malingering based on the results of the Test of Memory Malingering. After noting that the best

(continued...)

D. 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.[11]

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[10](...continued)
study of the efficacy of formal malingering assessments concluded that these tests should not be used, Greenspan set forth a workable standard for deciding whether a subject put forth his best effort.

> The best evidence whether someone is malingering is congruence of scores across psychologists and clinical suggestions of poor effort (for example, doing better on hard items and worse on easy items). As there is good congruence across tests for Mr. Ybarra and no noted clinical indications of poor effort on his part, it is safe to be skeptical about Dr. Young ascribing Mr. Ybarra's low IQ score to malingering.

Greenspan agreed with Dr. Jonathan Mack that Mr. Ybarra's full scale IQ was in the range of mental retardation prior to the age of 18. Id. at 9.

[11] 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 870927 *23 (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
(continued...)

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. 16 JA 3869, Opinion of District court, p. 40. The environment that must be considered is, as Assumption #1 notes, 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 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 relatively

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[11](...continued)
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.

well.[12]

II. CONCLUSION

For all of the reasons set forth, Mr. Ybarra contends that these circumstances justify this request to the Court that it reconsider its prior decision and, if necessary, remand this case to district court for a second hearing, using the appropriate standards or alternatively, grant Mr. Ybarra a new trial.

Dated this 19th day of April, 2012.

Respectfully submitted

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[12] 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.

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of April 2012. Electronic Service of the foregoing MOTION TO STAY ISSUANCE OF THE REMITTITUR AND TO RECONSIDER OPINION shall be made in accordance with the Master Service List as follows:

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