IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
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Tracie K. Lindeman
Clerk of Supreme Court

ROBERT YABARRA,

Appellant,

vs.

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

Respondents.

Case No. 52167

OPPOSITION TO MOTION TO STAY ISSUANCE OF THE REMITTITUR AND TO RECONSIDER OPINION

Appellant, Robert Ybarra, Jr.'s Motion to Stay Issuance of the Remittitur and to Reconsider Opinion should be denied. On June 26, 2008, Judge Steve L. Dobrescu entered judgment denying habeas relief to Mr. Ybarra. Appellant has not presented any extraordinary circumstances which would warrant the Court to grant a stay of the remittitur or reconsider its Opinion. Remittitur should therefore follow.

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Docket 52167 Document 2012-13516

MEMORANDUM OF POINTS AND AUTHORITIES

I.
Appellant has not presented any extraordinary circumstances which would warrant the issuance of a stay of remittitur.

On August 4, 2008, Ybarra filed a Notice of Appeal to the Nevada Supreme Court. On September 1, 2010, the Nevada Supreme Court (En Banc) heard oral argument. On March 3, 2011, the Court filed its Opinion affirming the judgment of the District Court. On April 27, 2011, Appellant filed a Petition for Rehearing. On June 29, 2011, this Court filed its Order denying rehearing. On July 22, 2011, Appellant filed a Motion to Stay Remittitur. On July 28, 2011, Remittitur was stayed.

On September 27, 2011, Appellant filed a Petition for Writ of Certiorari in the United States Supreme Court. On April 18, 2012, certiorari was denied. On April 19, 2012, Appellant filed the instant Motion for Stay Issuance of Remittitur and to Reconsider Opinion. This Opposition follows.

Appellant argues that extraordinary circumstances justify this Court's decision to re-examine cases and either stay the issuance of remittitur or even recall it. In support of this argument, Appellant cites Walters v. State, 108 Nev. 186, 825 P.2d 1202 (1990) wherein a subsequent United States Supreme Court ruling in a different case changed the law. This change affected this Court's initial ruling thus supporting a petition for rehearing. Appellant also cites Lane v.

Nevada, 114 Nev. 299, 956 P.2d 88 (1998), wherein a rehearing was granted due to misapprehended matters in the law and record. In the current case there is no such intervening event or misapprehension of the law or record that should cause this Court to issue a stay of the remittitur and reconsider its opinion. Appellant's Motion should be denied and Remittitur should issue.

II.
Appellant has not presented sufficient reasons for reconsideration of the Court's prior decision.

While the current Motion has been characterized by Appellant as a Motion for Stay Issuance of Remittitur and to Reconsider Opinion, it is in fact the same Petition for Rehearing that this Court already denied. This Motion for Reconsideration should likewise be denied. The instant Motion is essentially the same petition that the Appellant filed in this Court on April 27, 2011.

In the current case a Petition for Rehearing has already been denied by this Court. There are no new facts and there is no intervening change in the law. In fact large portions of the language contained in the Appellant's new Motion for Reconsideration are taken directly from the previous Petition for Rehearing that this Court already denied.[1]

[1] For example, the section of the Appellant's Points and Authorities labeled "D. Application to the case at bar" is an argument covering two pages that is word for word the same as the section labeled "V. Application to the case at bar" in the

Appellant makes the unsupported claim that, "this Court defined mental retardation in a fashion that excludes 85% of those who suffer the disability."[2] Appellant also claims that, "the vast majority of persons with mental retardation could never enjoy the protection of Atkins under this Court's interpretation."[3] Appellant provides no support for either of these claims, but merely restates the arguments made in its previous Petition.

The Nevada Legislature set forth the procedure by which a defendant charged with first degree murder can be declared mentally retarded in Nevada Revised Statutes (NRS) §174.098. This Court ruled that the statutory definition conformed to the definitions propounded by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA). Appellant concedes that the Court "acknowledged the appropriate ultimate standards."[4] The Appellant however is not satisfied with the way the definition was applied. The Appellant claims that the district court and this Court considered Ybarra's abilities, and ignored his disabilities. Under NRS §174.098, the burden is on the defendant

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Appellant's Petition for reconsideration except in one location the word "rather" is replaced with "relatively."

[2] Appellant's Motion to Stay Issuance of the Remittitur and to Reconsider Opinion, page 4.

[3] Appellant's Motion to Stay Issuance of the Remittitur and to Reconsider Opinion, page 4.

[4] Appellant's Motion to Stay Issuance of the Remittitur and to Reconsider Opinion, page 5.

to prove by a preponderance of the evidence that he is mentally retarded. The district court ruled that Ybarra did not meet that burden. This Court affirmed the ruling of the district court. Both Courts properly applied Nevada law and came to the conclusion that Ybarra did not prove by a preponderance of the evidence that he is mentally retarded.

CONCLUSION

Mr. Ybarra has nothing new to offer the Court and his motion should be denied and Remittitur should therefore issue forthwith.

DATED this 28th day of April, 2012.

SIGNED: /s/ KELLY C. BROWN,
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of April, 2012. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DATED this 28th day of April, 2012.

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