Case No. HC-1702005
Dept. No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

ROBERT YBARRA, JR.,

Petitioner,

v.

TIMOTHY FILSON, Warden, Ely State Prison, and ADAM PAUL LAXALT, Nevada Attorney General,

Respondents.

**NOTICE OF APPEAL**

(Death Penalty Habeas Corpus Case)

NOTICE IS HEREBY GIVEN that the Defendant, Robert Ybarra, appeals to the Nevada Supreme Court from the Order Dismissing Petition for Writ of Habeas

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Corpus (Post Conviction) filed in this action on March 31, 2017.

DATED this 26th day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

RANDOLPH M. FIEDLER
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
Phone: (702) 388-6577
Facsimile: (702) 388-5819

DAVID ANTHONY
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
Phone: (702) 388-6577
Facsimile: (702) 388-5819

Attorneys for Petitioner

SEVENTH JUDICIAL DISTRICT COURT

COUNTY OF WHITE PINE, STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, NOTICE OF APPEAL filed in case number HC-1702005, this document does not contain the social security number of any person.

DATED this 26th Day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

RANDOLPH M. FIEDLER
Assistant Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender

## CERTIFICATE OF SERVICE

In accordance with the NRCP 5(b)(2)(B), the undersigned hereby certifies that on 26th day of April, 2017, a true and accurate copy of the foregoing NOTICE OF APPEAL was served by depositing same in the United States mail, first-class and postage prepaid, addressed as follows:

Michael A. Wheable
District Attorney
County Courthouse
801 Clark St., Suite 3
Ely, Nevada 89301

An Employee of the
Federal Public Defender
District of Nevada

Case No. HC-1702005
Dept. No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WHITE PINE

ROBERT YBARRA, JR.,

Petitioner,

v.

TIMOTHY FILSON, Warden, Ely State Prison, and ADAM PAUL LAXALT, Nevada Attorney General,

Respondents.

**CASE APPEAL STATEMENT**

(Death Penalty Habeas Corpus Case)

1. **Name of petitioner filing this case appeal statement:**

Robert Ybarra, Jr.

2. **Identify the judge issuing the order appealed from:**

Hon. Steve L. Dobrescu

3. **Identify each appellant and the name and address of counsel for each appellant:**

Rene L. Valladares
Federal Public Defender
David Anthony
Assistant Federal Public Defender
Michael Pescetta
Assistant Federal Public Defender
Randolph M. Fiedler
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
Telephone: (702) 388-6577

Facsimile: (702) 388-5819

Counsel for Petitioner, Robert Ybarra, Jr.

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Michael A. Wheable
District Attorney
County Courthouse
801 Clark Street
Suite 3
Ely, Nevada 89301

Adam Paul Laxalt
Nevada Attorney General
Jeffrey M. Conner
Assistant Solicitor General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Counsel for Warden and State of Nevada

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

All attorneys are licensed in Nevada.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

The United State District Court for the District of Nevada appointed counsel on July 28, 2000. See Ybarra v. Filson, No. 3:00-cv-00233-GMN-VPC, Docket No. 7. The Federal Public Defender accepted appointment on October 2, 2000. Pursuant to

our appointment in federal court, undersigned counsel remained Mr. Ybarra's appointed counsel for these state proceedings.

7. **Indicate whether appellant is represented by appointed or retained counsel on appeal:**

Appellant is represented by appointed counsel, the Federal Public Defender for the District of Nevada.

8. **Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:**

The United States District Court granted Mr. Ybarra leave to proceed in forma pauperis on June 19, 2000.

9. **Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):**

The Petition for Writ of Habeas Corpus (Post-Conviction) was filed on January 11, 2017.

10. **Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:**

Mr. Ybarra filed the instant petition and raised two claims: First, his death sentence is unconstitutional because the jury in his capital trial was not instructed that in order to find him eligible for the death penalty, it must have first found that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt. Second, his death sentence is unconstitutional because the depravity of mind aggravating circumstance is unconstitutional.

The state did not respond to this petition.

On March 31, 2017, the district court denied the petition, finding that it is procedurally defaulted.

11. **Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:**

Ybarra v. State, No. 12624 (appeal from denial of motion to change venue)

Ybarra v. State, No. 13590 (direct appeal)

Ybarra v. State, No. 17462 (post-conviction)

Ybarra v. State, No. 19705 (post-conviction)

Ybarra v. State, No. 32762 (post-conviction)

Ybarra v. State, No. 43981 (post-conviction)

Ybarra v. State, No. 52167 (post-conviction)

12. **Indicate whether is appeal involves child custody or visitation:**

This case does not involve child custody or visitation.

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///

///

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

This case is not a civil case.

DATED this 26th day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

RANDOLPH M. FIEDLER
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
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Facsimile: (702) 388-5819

Attorneys for Petitioner

SEVENTH JUDICIAL DISTRICT COURT

COUNTY OF WHITE PINE, STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, CASE APPEAL STATEMENT filed in case number HC-1702005, this document does not contain the social security number of any person.

DATED this 26th Day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

RANDOLPH M. FIEDLER
Assistant Federal Public Defender

DAVID ANTHONY
Assistant Federal Public Defender

## CERTIFICATE OF SERVICE

In accordance with the NRCP 5(b)(2)(B), the undersigned hereby certifies that on 26th day of April, 2017, a true and accurate copy of the foregoing CASE APPEAL STATEMENT was served by depositing same in the United States mail, first-class and postage prepaid, addressed as follows:

Michael A. Wheable
District Attorney
County Courthouse
801 Clark St., Suite 3
Ely, Nevada 89301

An Employee of the
Federal Public Defender
District of Nevada

**Case #:** HC-1702005

**Judge:** DOBRESCU, STEVE L.

**Date Filed:** 02/03/17 **Department:** 01

**Case Type:** HABCRP SPEC PROC/HABEAS CORPUS

**Title/Caption:** ROBERT YBARRA, JR.,
PETITIONER,
VS
TIMOTHY FILSON, WARDEN, ELY STATE PRISON AND ADAM PAUL LAXALT, NEVADA ATTORNEY GENERAL,
RESPONDENTS.

**Comments:** REFER TO CR-1511

| Defendant(s) | Attorney(s) |
|---|---|
| FILSON, TIMOTHY WARDEN | No "Attorney 1" Listed |
| **Defendant(s)** | **Attorney(s)** |
| LAXALT, ADAM PAUL | No "Attorney 1" Listed |
| **Plaintiff(s)** | **Attorney(s)** |
| YBARRA, ROBERT JR #16258 | No "Attorney 1" Listed |

**Disp/Judgment:** DSNV **Date:** 03/31/17

**Filings:**

| Date | Pty | Filing | Fee |
|---|---|---|---|
| 2/03/17 | | ORDER REGARDING IMPROPER CASE NO.ON PETITION FOR WRIT OF HABEAS CORPUS(POST CONVICTION)-COPY | |
| 2/03/17 | | CERTIFICATE OF SERVICE | |
| 2/03/17 | | PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)(DEATH PENALTY HABEAS CORPUS CASE) | |
| 3/31/17 | | ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) | |
| 3/31/17 | | CERTIFICATE OF SERVICE | |
| 3/31/17 | | NOTICE OF ENTRY OF ORDER | |
| 3/31/17 | | CERTIFICATE OF MAILING | |
| 4/27/17 | | NOTICE OF APPEARANCE (DEATH PENALTY HABEAS CORPUS CASE) | |
| 4/27/17 | | RESPONSE TO ORDER TO SHOW CAUSE UNDER NRCP 11(B)(1)&(B)(2) | |
| 4/27/17 | | NOTICE OF APPEAL (DEATH PENALTY HABEAS CORPUS CASE) | |
| 4/27/17 | | CASE APPEAL STATEMENT (DEATH PENALTY HABEAS CORPUS CASE) | |

Case No. HC-1702005

Dept. No. 1

**IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE**

******

ROBERT YBARRA, JR.,

Petitioner,

-vs-

TIMOTHY FILSON, Warden, Ely State Prison and ADAM PAUL LAXALT, Nevada Attorney General

Respondents.

**ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)**



On September 28, 1979, Petitioner "Ybarra" kidnaped sixteen year old Nancy Griffith. Ybarra then beat her, raped her, doused her with gasoline and lit her on fire. On July 23, 1981, a jury convicted Ybarra of first degree murder, first degree kidnaping, battery with intent to commit sexual assault, and sexual assault. He was sentenced to death for first degree murder.

On January 11, 2017, Petitioner Ybarra filed a Petition for Writ of Habeas Corpus (Post Conviction). As noted by Ybarra, he has filed three prior petitions in this Court. In this petition, Ybarra raises two claims. First, that his death sentence is invalid

SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

because the jury was not instructed that in order to find him eligible for the death penalty, the jury must find "that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt." Second, that his death sentence is invalid because "the depravity of mind aggravating circumstance is unconstitutional," or in the alternative, he is "actually innocent of the death penalty."

In regard to post conviction petitions for writs of habeas corpus, NRS 34.745(4) provides as follows:

> "4. If the petition is a second or successive petition challenging the validity of a judgment of conviction or sentence and if it plainly appears from the face of the petition or an amended petition and documents and exhibits that are annexed to it, or from records of the court that the petitioner is not entitled to relief based on any of the grounds set forth in subsection 2 of NRS 34.810, the judge or justice shall enter an order for its summary dismissal and cause the petitioner to be notified of the entry of the order."

This is a successive petition challenging the validity of a sentence, and therefore the court must determine if Ybarra is entitled to relief based on NRS 34.810(2).

Subsection 2 of NRS 34.810 provides that

> "2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

**CLAIM ONE**

In claim one, Ybarra alleges:

> "Mr. Ybarra's death sentence is invalid under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Three and Eight, and Article Four, section Twenty-One of the Nevada Constitution because the jury in his capitol trial was not instructed that in order to find Mr. Ybarra eligible for the death penalty, it must first find that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt."

Petitioner admits on page 16 of his petition that "a version of Claim One was raised as Claim Two" in his March 6, 2003 petition. This allegation is only partially accurate.

A cursory review of Claim Two of the 2003 petition reveals that Claim One is merely a re-phrased version of the prior claim. In the prior petition Ybarra argued

> "Claim Two
> Petitioner's sentence is invalid under the state and Federal guarantees of a fair trial, due process of law, equal protection and a reliable sentence due to the failure of the instructions to require proof of the factors necessary for death eligibility beyond a reasonable doubt . . .." Exhibit 1, page 15, lines 1-4.

The supporting facts for both Claim Two (2003) and Claim One (2016) are virtually the same. In fact, ¶2 of the supporting facts in the 2003 petition specifically alleges that

> "The jury was not instructed that it had to find that aggravation was not outweighed by mitigation beyond a reasonable doubt . . .." Exhibit 1, page 15.

Counsel's clever rephrasing of the issue does not make this a new ground for relief.[1]

In denying Ybarra's 2003 petition this Court found that Claim Two or a

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[1] ". . . aggravation was not outweighed by mitigation beyond a reasonable doubt . . ." (2003 petition) versus ". . . mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt." (2016 petition.)

variation thereof challenging the weighing instruction had been previously raised on direct appeal and rejected by the Nevada Supreme Court in Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In affirming this Court's finding, the Nevada Supreme Court did not specifically find that the claim had been raised, but held that:

> "Ybarra also argues that his death sentence must be reversed because the jury was not instructed that to impose the death penalty it had to find beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. This claim also could have been raised on direct appeal . . .Ybarra has not demonstrated good cause for failing to raise this claim earlier, nor does he show that he suffered actual prejudice." Exhibit 3, p. 7.

Undoubtedly Ybarra's counsel recognizes that this claim has previously been raised or should have been raised and is procedurally barred. In an effort to avoid the procedural bar, it is argued that "good cause exists for raising these claims now because the intervening authority from the United States Supreme Court, Hurst v. Florida, 136 S.Ct. 616 (2016) was not available to Mr. Ybarra in prior state post-conviction proceedings." Petition p. 16, lines 16-19. The passing reference to Hurst does not establish good cause because the facts and holding of Hurst are wholly inapplicable to this case. The appropriateness of a weighing instruction was not raised in Hurst. Indeed, the only issue addressed by Hurst was whether Florida's death penalty law which allowed for an advisory verdict of death by a jury, but required a judge to make findings in order to impose the

death penalty was constitutional in light of Apprendi and Ring.[2]

Even if the court found "good cause" to avoid the procedural bar, the argument on claim one is not supported by law. First, the Nevada Supreme Court rejected the "beyond a reasonable doubt standard" in Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). That holding was recently re-affirmed by the Nevada Supreme Court that

> "the weighing of aggravating and mitigating circumstances is not a factual determination and thus it is not subject to the beyond-a-reasonable doubt standard, see Kansas v. Carr, ____ U.S. _____, 136 S.Ct. 633, 642, 193 L. Ed.2d 535 (2016) (concluding that the weighing of aggravating and mitigating circumstances is not subject to the beyond-a-reasonable doubt standard.)[3]"

Based on the foregoing, the court finds that claim one could have been raised on direct appeal, good cause has not been shown for the failure to properly raise this claim before, and no showing of actual prejudice has been made. In addition, the claim is not supported by law and is wholly without merit.

CLAIM TWO

In claim two, Ybarra alleges:

> "Mr. Ybarra's death sentence is invalid under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Three and Eight, and Article Four, section Twenty-One of the Nevada Constitution because the depravity of mind aggravating circumstance is unconstitutional."

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[2] Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002).

[3] Middleton v. McDaniel, 2016 Nev. LEXIS 700 (December 21, 2016).

The thrust of this argument as detailed in the supporting facts is that this aggravating circumstance instruction is unconstitutionally vague.

Again, Ybarra alleges a "version" of claim two was raised on direct appeal. This allegation is patently false. This claim was in fact raised on direct appeal. In affirming the conviction on direct appeal, the Nevada Supreme Court held that

> ". . . the phrase "depravity of mind" contained in the death penalty statue (NRS 200.033(8) is not impermissibly vague when, as in this case, the court meticulously defined it for the jury . . .."[4]

As with Claim one, Ybarra argues good cause exists to raise this claim because of the Hurst case. The discussion of Hurst provided above is equally applicable here, and this argument is wholly without merit. Thus, Ybarra has not shown he is entitled to relief based on any of the grounds in NS 34.810(2), and his claims are procedurally barred.

Ybarra also argues in the alternative, that procedural bars do not apply because he is "actually innocent" of the death penalty.

## ACTUAL INNOCENCE

Even where a petitioner cannot demonstrate good cause to overcome procedural bars, a court may grant relief when a petitioner can show "actual innocence." See Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006). In this context, "actual

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[4] Ybarra v. State, 100 Nev. 167, 177, 679 P.2d 797 (1984).

innocence means factual innocence, not mere legal insufficiency."[5]

The Nevada Supreme Court recently considered virtually the same argument in Middleton v. McDaniel, 2016 Nev. LEXIS 700 (December 21, 2016.) There, the court noted that "a gateway claim that a Petitioner is actually innocent of the death penalty must focus on the elements of the crime and the aggravating circumstances . . . [and a] claim regarding the weighing instruction is not a basis for an actual innocence claim."[6] Thus, Ybarra's argument that the faulty weighing instruction is some how a basis for an actual innocence claim is directly contrary to, and contradicted by existing Nevada law.

The Middleton actual innocence analysis also applies to the "depravity of mind" instruction challenged in this petition. No claim is made (here or in any prior post-conviction proceeding) that Ybarra did not in fact rape, beat and light Nancy Griffith on fire.

Further, all of Petitioner's arguments regarding the depravity of mind instruction ignore the actual language of the instruction and the finding of the jury. As noted by Ybarra on page 4 of his latest petition, the jury found "the murder involved torture, depravity of mind or the mutilation of the victim." (Emphasis added.) Ybarra's argument is dependant on a finding that the jury found only that his acts were evidence of a depravity of mind. The facts are undisputed that Ybarra stomped or kicked the sixteen year old in the head, poured gasoline on her and lit her on fire while she was still conscious and either

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[5] Mitchell , id. 122 Nev. @ 1273-1274, 149 P.3d @ 36.

[6] Middleton v. McDaniel, Id.

sitting or standing.[7] Any claim that Ybarra is actually innocent of torture or mutilation or depravity of mind has long been dispelled by the record.

In addition to the grounds discussed above, NRS 34.726 is a further basis to dismiss this petition. The statute requires a petition to be filed within 1 year after Remititur issues after direct appeal. Remititur issued in this case over 25 years ago. Ybarra has not alleged any grounds that would support a finding that the delay is not his fault and that dismissal of this petition will unduly prejudice him.

It has now been over 30 years since Judge Hoyt denied Ybarra's first application for post conviction relief and 37 years since he beat, raped and lit sixteen (16) year old Nancy Griffith on fire. The facts of what Ybarra did and the overwhelming evidence of his guilt are not in dispute. In spite of this, Ybarra and his counsel continue to abuse and misuse the judicial system.

The court recognizes that a defendant sentenced to death should have a full and fair opportunity to present and litigate all claims bearing on the validity of his judgment of conviction and sentence. To that end, the court is mindful of counsel's duty to be zealous and thorough in their representation of Petitioner. The current petition, however, goes too far.

As noted above, these claims have been presented in prior appeals and petitions. No sufficient legal or factual basis has even been alleged to justify the filing of

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[7] See Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984); Order Granting Motion to Dismiss Petition for Writ of Habeas Corpus filed July 20, 2004 p. 2-3.

this petition. Particularly troublesome is the fact that counsel made no effort to discuss or even cite Nunnery v. State, supra, and most importantly Middleton v. McDaniel, supra, which are clearly dispositive of the argument that the weighing instruction was improper. Although the statutory form for a Petition for Writ of Habeas Corpus (Post Conviction) does not require a petitioner to cite law in favor or against the request for relief[5], NRPC 3.3(a)(2) provides that "a lawyer shall not knowingly:

> Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client . . .."

NRPC 3.1 provides in part that

> "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

These rules mirror certain sections of NRCP Rule 11 which are applicable to Petitions for Writ of Habeas Corpus. See NRS 34.780. Pursuant to NRCP Rule 11(b)(1)(B), the court finds that the failure by counsel to present even a colorable showing of good cause as to why procedural bars don't apply, the passing argument regarding "actual innocence" and the failure to cite or discuss Nunnery or Middleton appear to suggest that a violation of NRCP Rule 11(b)(1) and (b)(2) may have occurred.

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[5] NRS 34.370(4) actually provides that citations are not necessary.

## CONCLUSION

Based on the foregoing, the court finds and concludes as follows:

1. This is a successive petition for post-conviction relief.

2. The claims presented have been presented on direct appeal and/or in prior petitions.

3. Ybarra has failed to allege sufficient cause to justify the presentation of his claims in a new petition.

4. To the extent the claims raised herein could be construed as new or different claims, Ybarra has failed to allege sufficient cause to justify the failure to present these claims in a prior proceeding.

5. Ybarra has failed to allege sufficient prejudice or a miscarriage of justice to avoid the procedural bars.

6. The instant claims are barred by NRS 34.726, NRS 34.745(4), NRS 34.810(1)(b) and NRS 34.810(2).

7. The claims presented in this petition appear to have been brought without reasonable grounds or to cause unnecessary delay.

8. The claims and defenses or other legal contentions herein appear to be not warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Good cause appearing,

**IT IS HEREBY ORDERED** that Ybarra's Petition for Writ of Habeas Corpus (Post Conviction) filed January 11, 2017 is **DISMISSED**.

**IT IS HEREBY FURTHER ORDERED** that counsel for Ybarra shall on or before May 1, 2017 show cause why the court should not find that the filing of this Petition in whole or in part is a violation of NRCP Rule 11(b)(1) and/or (b)(2).

DATED this 31ST day of March, 2017.

DISTRICT COURT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

FILED

2017 MAR 31 PM 1:24

KAREN A. RAGEN
WHITE PINE COUNTY CLERK
BY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

**********

ROBERT YBARRA, JR.,

Petitioner,

vs.

TIMOTHY FILSON, WARDEN, ELY STATE PRISON, AND ADAM PAUL LAXALT, NEVADA ATTORNEY GENERAL

Respondent.

Case No: HC-1702005

Dept. No: I

**Notice of Entry of Order**

PLEASE TAKE NOTICE that on MARCH 31, 2017, the Court entered a decision or Order in this matter, a true and correct copy of which is attached to this notice.

If you wish to appeal this Order or Judgment, you must file a Notice of Appeal with the Clerk of the above-captioned Court within (30) days after the date this notice is mailed to you. This notice was mailed on MARCH 31, 2017.

Dated this 31ST day of MARCH, 2017.

Rea Wells

Chief Deputy Clerk

Case No. HC-1702005

Dept. No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

* * * * * *

ROBERT YBARRA, JR.,

Petitioner,

-vs-

TIMOTHY FILSON, Warden, Ely State Prison and ADAM PAUL LAXALT, Nevada Attorney General

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**ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)**

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On January 11, 2017, Petitioner Ybarra filed a Petition for Writ of Habeas Corpus (Post Conviction). As noted by Ybarra, he has filed three prior petitions in this Court. In this petition, Ybarra raises two claims. First, that his death sentence is invalid

because the jury was not instructed that in order to find him eligible for the death penalty, the jury must find "that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt." Second, that his death sentence is invalid because "the depravity of mind aggravating circumstance is unconstitutional," or in the alternative, he is "actually innocent of the death penalty."

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This is a successive petition challenging the validity of a sentence, and therefore the court must determine if Ybarra is entitled to relief based on NRS 34.810(2).

Subsection 2 of NRS 34.810 provides that

> "2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

**CLAIM ONE**

In claim one, Ybarra alleges:

"Mr. Ybarra's death sentence is invalid under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Three and Eight, and Article Four, section Twenty-One of the Nevada Constitution because the jury in his capitol trial was not instructed that in order to find Mr. Ybarra eligible for the death penalty, it must first find that the mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt."

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"Claim Two
Petitioner's sentence is invalid under the state and Federal guarantees of a fair trial, due process of law, equal protection and a reliable sentence due to the failure of the instructions to require proof of the factors necessary for death eligibility beyond a reasonable doubt . . .." Exhibit 1, page 15, lines 1-4.

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[1] ". . . aggravation was not outweighed by mitigation beyond a reasonable doubt . . ." (2003 petition) versus ". . . mitigation did not outweigh the statutory aggravating circumstances beyond a reasonable doubt." (2016 petition.)

variation thereof challenging the weighing instruction had been previously raised on direct appeal and rejected by the Nevada Supreme Court in Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984). In affirming this Court's finding, the Nevada Supreme Court did not specifically find that the claim had been raised, but held that:

> "Ybarra also argues that his death sentence must be reversed because the jury was not instructed that to impose the death penalty it had to find beyond a reasonable doubt that the aggravating circumstances were not outweighed by the mitigating circumstances. This claim also could have been raised on direct appeal . . .Ybarra has not demonstrated good cause for failing to raise this claim earlier, nor does he show that he suffered actual prejudice." Exhibit 3, p. 7.

Undoubtedly Ybarra's counsel recognizes that this claim has previously been raised or should have been raised and is procedurally barred. In an effort to avoid the procedural bar, it is argued that "good cause exists for raising these claims now because the intervening authority from the United States Supreme Court, Hurst v. Florida, 136 S.Ct. 616 (2016) was not available to Mr. Ybarra in prior state post-conviction proceedings." Petition p. 16, lines 16-19. The passing reference to Hurst does not establish good cause because the facts and holding of Hurst are wholly inapplicable to this case. The appropriateness of a weighing instruction was not raised in Hurst. Indeed, the only issue addressed by Hurst was whether Florida's death penalty law which allowed for an advisory verdict of death by a jury, but required a judge to make findings in order to impose the

death penalty was constitutional in light of Apprendi and Ring.[2]

Even if the court found "good cause" to avoid the procedural bar, the argument on claim one is not supported by law. First, the Nevada Supreme Court rejected the "beyond a reasonable doubt standard" in Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). That holding was recently re-affirmed by the Nevada Supreme Court that

> "the weighing of aggravating and mitigating circumstances is not a factual determination and thus it is not subject to the beyond-a-reasonable doubt standard, see Kansas v. Carr, ____ U.S. _____, 136 S.Ct. 633, 642, 193 L. Ed.2d 535 (2016) (concluding that the weighing of aggravating and mitigating circumstances is not subject to the beyond-a-reasonable doubt standard.)[3]"

Based on the foregoing, the court finds that claim one could have been raised on direct appeal, good cause has not been shown for the failure to properly raise this claim before, and no showing of actual prejudice has been made. In addition, the claim is not supported by law and is wholly without merit.

## CLAIM TWO

In claim two, Ybarra alleges:

> "Mr. Ybarra's death sentence is invalid under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Three and Eight, and Article Four, section Twenty-One of the Nevada Constitution because the depravity of mind aggravating circumstance is unconstitutional."

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[2] Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002).

[3] Middleton v. McDaniel, 2016 Nev. LEXIS 700 (December 21, 2016).

The thrust of this argument as detailed in the supporting facts is that this aggravating circumstance instruction is unconstitutionally vague.

Again, Ybarra alleges a "version" of claim two was raised on direct appeal. This allegation is patently false. This claim was in fact raised on direct appeal. In affirming the conviction on direct appeal, the Nevada Supreme Court held that

> ". . . the phrase "depravity of mind" contained in the death penalty statue (NRS 200.033(8) is not impermissibly vague when, as in this case, the court meticulously defined it for the jury . . .."[4]

As with Claim one, Ybarra argues good cause exists to raise this claim because of the Hurst case. The discussion of Hurst provided above is equally applicable here, and this argument is wholly without merit. Thus, Ybarra has not shown he is entitled to relief based on any of the grounds in NS 34.810(2), and his claims are procedurally barred.

Ybarra also argues in the alternative, that procedural bars do not apply because he is "actually innocent" of the death penalty.

## ACTUAL INNOCENCE

Even where a petitioner cannot demonstrate good cause to overcome procedural bars, a court may grant relief when a petitioner can show "actual innocence." See Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006). In this context, "actual

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[4] Ybarra v. State, 100 Nev. 167, 177, 679 P.2d 797 (1984).

innocence means factual innocence, not mere legal insufficiency."[5]

The Nevada Supreme Court recently considered virtually the same argument in Middleton v. McDaniel, 2016 Nev. LEXIS 700 (December 21, 2016.) There, the court noted that "a gateway claim that a Petitioner is actually innocent of the death penalty must focus on the elements of the crime and the aggravating circumstances . . . [and a] claim regarding the weighing instruction is not a basis for an actual innocence claim."[6] Thus, Ybarra's argument that the faulty weighing instruction is some how a basis for an actual innocence claim is directly contrary to, and contradicted by existing Nevada law.

The Middleton actual innocence analysis also applies to the "depravity of mind" instruction challenged in this petition. No claim is made (here or in any prior post-conviction proceeding) that Ybarra did not in fact rape, beat and light Nancy Griffith on fire.

Further, all of Petitioner's arguments regarding the depravity of mind instruction ignore the actual language of the instruction and the finding of the jury. As noted by Ybarra on page 4 of his latest petition, the jury found "the murder involved torture, depravity of mind or the mutilation of the victim." (Emphasis added.) Ybarra's argument is dependant on a finding that the jury found only that his acts were evidence of a depravity of mind. The facts are undisputed that Ybarra stomped or kicked the sixteen year old in the head, poured gasoline on her and lit her on fire while she was still conscious and either

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5 Mitchell , id. 122 Nev. @ 1273-1274, 149 P.3d @ 36.

6 Middleton v. McDaniel, Id.

sitting or standing.[7] Any claim that Ybarra is actually innocent of torture or mutilation or depravity of mind has long been dispelled by the record.

In addition to the grounds discussed above, NRS 34.726 is a further basis to dismiss this petition. The statute requires a petition to be filed within 1 year after Remitittur issues after direct appeal. Remitittur issued in this case over 25 years ago. Ybarra has not alleged any grounds that would support a finding that the delay is not his fault and that dismissal of this petition will unduly prejudice him.

It has now been over 30 years since Judge Hoyt denied Ybarra's first application for post conviction relief and 37 years since he beat, raped and lit sixteen (16) year old Nancy Griffith on fire. The facts of what Ybarra did and the overwhelming evidence of his guilt are not in dispute. In spite of this, Ybarra and his counsel continue to abuse and misuse the judicial system.

The court recognizes that a defendant sentenced to death should have a full and fair opportunity to present and litigate all claims bearing on the validity of his judgment of conviction and sentence. To that end, the court is mindful of counsel's duty to be zealous and thorough in their representation of Petitioner. The current petition, however, goes too far.

As noted above, these claims have been presented in prior appeals and petitions. No sufficient legal or factual basis has even been alleged to justify the filing of

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[7] See Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984); Order Granting Motion to Dismiss Petition for Writ of Habeas Corpus filed July 20, 2004 p. 2-3.

this petition. Particularly troublesome is the fact that counsel made no effort to discuss or even cite Nunnery v. State, supra, and most importantly Middleton v. McDaniel, supra, which are clearly dispositive of the argument that the weighing instruction was improper. Although the statutory form for a Petition for Writ of Habeas Corpus (Post Conviction) does not require a petitioner to cite law in favor or against the request for relief[5], NRPC 3.3(a)(2) provides that "a lawyer shall not knowingly:

> Fail to disclose to the tribunal legal-authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client . . .."

NRPC 3.1 provides in part that

> "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

These rules mirror certain sections of NRCP Rule 11 which are applicable to Petitions for Writ of Habeas Corpus. See NRS 34.780. Pursuant to NRCP Rule 11(b)(1)(B), the court finds that the failure by counsel to present even a colorable showing of good cause as to why procedural bars don't apply, the passing argument regarding "actual innocence" and the failure to cite or discuss Nunnery or Middleton appear to suggest that a violation of NRCP Rule 11(b)(1) and (b)(2) may have occurred.

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[5] NRS 34.370(4) actually provides that citations are not necessary.

STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

## CONCLUSION

Based on the foregoing, the court finds and concludes as follows:

1. This is a successive petition for post-conviction relief.

2. The claims presented have been presented on direct appeal and/or in prior petitions.

3. Ybarra has failed to allege sufficient cause to justify the presentation of his claims in a new petition.

4. To the extent the claims raised herein could be construed as new or different claims, Ybarra has failed to allege sufficient cause to justify the failure to present these claims in a prior proceeding.

5. Ybarra has failed to allege sufficient prejudice or a miscarriage of justice to avoid the procedural bars.

6. The instant claims are barred by NRS 34.726, NRS 34.745(4), NRS 34.810(1)(b) and NRS 34.810(2).

7. The claims presented in this petition appear to have been brought without reasonable grounds or to cause unnecessary delay.

8. The claims and defenses or other legal contentions herein appear to be not warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Good cause appearing,

**IT IS HEREBY ORDERED** that Ybarra's Petition for Writ of Habeas Corpus (Post Conviction) filed January 11, 2017 is **DISMISSED.**

**IT IS HEREBY FURTHER ORDERED** that counsel for Ybarra shall on or before May 1, 2017 show cause why the court should not find that the filing of this Petition in whole or in part is a violation of NRCP Rule 11(b)(1) and/or (b)(2).

DATED this 31ST day of March, 2017.

DISTRICT COURT JUDGE

NINTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA

**OFFICE OF**
**COUNTY CLERK**
**OF THE SEVENTH JUDICIAL DISTRICT COURT**
**IN AND WHITE PINE COUNTY, NEVADA**

STATE OF NEVADA, }ss.
COUNTY OF WHITE PINE,

I, Maggie Reed, Deputy Clerk of the Seventh Judicial District Court of the State of Nevada, County of White Pine, do hereby certify that the above and foregoing is a full, correct and true copy of the original of *NOTICE OF APPEAL (DEATH PENALTY HABEAS CORPUS CASE), CASE APPEAL STATEMENT (DEATH PENALTY HABEAS CORPUS CASE), DISTRICT COURT DOCKET ENTRIES, ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION), NOTICE OF ENTRY OF ORDER* which now remains of record in my office at Ely, County of White Pine and State of Nevada, aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at my office in the City of Ely, this 28TH day of APRIL 2017.

J Baldwin
County Clerk

By: Maggie Reed
Deputy Clerk