No. _____

In the
Supreme Court of the United States

Robert Ybarra, Jr.

Petitioner,

v.

William Gittere, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Appendix

CAPITAL CASE

Rene Valladares
Federal Public Defender, District of Nevada
Randolph M. Fiedler
Counsel of Record
Hannah Nelson
Assistants Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577
(702) 388-5819 (fax)

Counsel for Petitioner

APPENDIX

Appendix A	Opinion and Judgment, *Ybarra v. Gittere, Warden*, Ninth Circuit of Appeals, Case No. 20-99012 (June 9, 2023) …….	App. 001 – 036
Appendix B	Order Denying Rehearing, *Ybarra v. Gittere, Warden*, Ninth Circuit Court of Appeals, Dkt. Entry 49, Case No. 20-99012 (September 14, 2023) …….	App.037 – 038
Appendix C	Order, *Ybarra v. Gittere, Warden*, Case No. 3:00-cv-00233-GMN-VPC (September 23, 2020) …….	App. 039 – 066
Appendix D	Opinion, *Ybarra v. Filson*, Warden, Ninth Circuit Court of Appeals, Case No. 20-99012 (September 1, 2017) ……..	App. 067 – 102
Appendix E	Order of Affirmance, *Ybarra v. The State of Nevada,* Supreme Court of the State of Nevada, Case No. 52167 (March 3, 2011) …….	App. 103 – 142
Appendix F	Decision and Order denying Petitioner's Motion to Strike the Death Penalty, *Ybarra v. E.K. McDaniel, Warden*, Seventh Judicial District Court, Case No. HC-0303002 (June 26, 2008) …….	App. 143 – 189

APPENDIX A

Opinion and Judgment, *Ybarra v. Gittere, Warden*,
Ninth Circuit of Appeals, Case No. 20-99012
(June 9, 2023)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT YBARRA, Jr., *Petitioner-Appellant,* v. WILLIAM GITTERE, Warden, *Respondent-Appellee.*	No. 20-99012 D.C. No. 3:00-cv-00233- GMN-VPC OPINION

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted March 22, 2023
Pasadena, California

Filed June 9, 2023

Before: Richard C. Tallman, Richard R. Clifton, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Tallman

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of Robert Ybarra Jr.'s federal petition for a writ of habeas corpus in a case in which Ybarra, who was sentenced to death for a 1979 murder, argued that he is intellectually disabled and therefore cannot constitutionally be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002).

This court previously identified several errors in the Nevada Supreme Court's reasoning but remanded for the federal district court to determine whether the Nevada Supreme Court's overall intellectual disability determination was unreasonable.

On remand, the district court concluded that it was not and thus denied Ybarra's petition for relief.

In this appeal, the panel held that Ybarra's claim fails on the first prong ("Prong 1") of the three prongs required for relief on an *Atkins* claim—he failed to establish that he suffered from significantly subaverage intellectual functioning.

Ybarra argued that the Nevada Supreme Court unreasonably found that a 1981 IQ test was of "little value" because it was conducted well after Ybarra turned 18 and refused to consider any evidence outside the developmental period. The panel wrote that this argument is belied by a fair

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

reading of the Nevada Supreme Court's opinion, which gave three reasons for rejecting Ybarra's arguments. First, the Nevada Supreme Court explicitly rejected Ybarra's argument that the trial court had erred in crediting the 1981 IQ test over another expert's testing. The second reason was that, based on "Ybarra's school and other records, his writings, and evidence that he was malingering," the record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning." Finally, the Nevada Supreme Court said that it "need not decide the relevance, if any, of" the Flynn Effect, which causes average IQ test scores to inflate over time, "and the necessity of adjusting the 1981 IQ score" because that test occurred well after Ybarra turned 18. The panel wrote that even if the final reason was an unreasonable deviation from the clinical guidelines, the first reason was not. The panel wrote that the Nevada Supreme Court's second reason for rejecting Ybarra's criticism of the 1981 IQ test was also reasonable. The panel wrote that, taken in context, it is clear the Nevada courts did not base their Prong 1 determination on a "lay perception that Ybarra did not 'look like' a disabled person."

Ybarra's second argument was that reliance on anything other than expert testimony amounts to a reliance on "stereotypes" about intellectual disability. The panel wrote that this is incorrect: every expert, including Ybarra's experts, testified that, in forming their conclusions, they had interviewed Ybarra, reviewed records about Ybarra, or both. To the extent Ybarra's experts relied on faulty evidence (i.e., false statements by Ybarra during testing) or failed to consider evidence (i.e., records suggesting Ybarra was not intellectually disabled) it was not unreasonable to

find that their conclusions were invalid—especially since the trial court also considered Test of Memory Malingering ("TOMM") results. The panel wrote that even if the Nevada Supreme Court gave little weight to both the 1981 IQ test and the TOMM test, the Prong 1 finding is still not unreasonable.

Because the panel found that the Nevada Supreme Court's Prong 1 determination was reasonable, the panel did not consider the second and third *Atkins* prongs or the related procedural history.

COUNSEL

Randolph Fiedler (argued), Hannah D. Nelson, and Joanne L. Diamond, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender of the District of Nevada; Federal Public Defenders' Office; Las Vegas, Nevada; for Petitioner-Appellant.

Jeffrey M. Conner (argued), Deputy Solicitor General; Heather D. Procter, Deputy Attorney General; Aaron D. Ford, Attorney General of Nevada; Office of the Nevada Attorney General; Carson City, Nevada; for Respondent-Appellee.

OPINION

TALLMAN, Circuit Judge:

The State of Nevada sentenced Robert Ybarra to die for brutally raping and murdering 16-year-old Nancy Griffith in 1979. Ybarra pled not guilty by reason of insanity but was convicted by the jury after a trial in the District Court for White Pine County in Ely, Nevada. Ybarra argues that he is intellectually disabled and therefore cannot constitutionally be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Nevada trial court held a hearing on Ybarra's *Atkins* claim and found he was not intellectually disabled, and the Nevada Supreme Court affirmed. Ybarra filed a petition for a writ of habeas corpus in federal district court which is subject to the restrictions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254. Ybarra argues that the Nevada Supreme Court's determination that he is not intellectually disabled is unreasonable under § 2254(d)(2).

We previously identified several errors in the Nevada Supreme Court's reasoning but remanded for the federal district court to determine whether the overall intellectual disability determination was unreasonable. *See Ybarra v. Filson* (*Ybarra IV*), 869 F.3d 1016, 1026 (9th Cir. 2017). On remand, the federal district court concluded that it was not and thus denied Ybarra's petition for relief. We agree and affirm. Because we ultimately conclude that Ybarra's *Atkins* claim fails on the first prong—that he failed to establish that he suffered from significantly subaverage intellectual functioning—we do not consider the second and third *Atkins* prongs or the related procedural history. *See Apelt v. Ryan*,

878 F.3d 800, 837 (9th Cir. 2017) (stating that a petitioner must meet all three *Atkins* prongs to prevail on his claim).

Pursuant to § 2253(c), the district court granted a certificate of appealability on the following issue: "Whether [the district] court erred in deferring, under 28 U.S.C. § 2254(d), to the state court's finding that petitioner is not intellectually disabled as contemplated by *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny?"

BACKGROUND

As recounted in prior opinions, this case has a complex and protracted history spanning 42 years. There have been several rounds of review in both state and federal courts.[1] While we have attempted to limit our discussion to factual and procedural matters relevant to Ybarra's *Atkins* claim, our summary remains lengthy.

A

1

On September 29, 1979, two fishermen from Ely, Nevada, found sixteen-year-old Nancy Griffith lying on an unpaved road near that town. *Ybarra v. State* (*Ybarra I*), 679 P.2d 797, 798 (Nev. 1984). Nancy's body was badly burned, but she was still alive. *Id*. at 798-99. Nancy told a sheriff's deputy that she had been raped by a man in a red truck who worked north of where she was found. *Id*. She died the next day. *Id*.

[1] *See generally Ybarra v. State*, 679 P.2d 797, 798 (Nev. 1984); *Ybarra v. McDaniel*, 656 F.3d 984 (9th Cir. 2011); *Ybarra v. Baker*, No. 3:00-cv-0233, 2013 WL 5567586 (D. Nev. Oct. 8, 2013); *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017).

The investigation into Nancy's murder revealed that on the evening of September 28, Nancy had met Robert Ybarra in Ely. *Id*. Ybarra worked on an oil rig near town and had driven Nancy and her friend around in his truck. *Id*. After her friend had left, Ybarra drove Nancy outside Ely where he raped and attempted to murder her. *See id*. Ybarra was arrested and charged with first degree murder, first degree kidnapping, battery with intent to commit sexual assault, and sexual assault. *Id*. at 798. At his state court trial, Ybarra's only defense was insanity. *Id*. at 799. It failed. Ybarra was convicted by a jury and sentenced to three consecutive life sentences and death. *Id*. at 799-800.

2

Ybarra was born in Sacramento, California, on July 20, 1953. His mother was either 15 or 16 when he was born, and he had three younger brothers and one younger sister. Ybarra's development was apparently fairly normal until age 9, when he was struck in the forehead by a railroad tie being used as a swing. After the head injury, Ybarra suffered migraines, and was prescribed various medications including Mebaral, a barbiturate which has sedative and anti-convulsant effects. Ybarra also suffered from auditory hallucinations and depression and started using drugs and alcohol.

By age 14, Ybarra was falling behind in school. Other students bullied him, including by calling him a "retard" on a daily basis. His doctor prescribed an amphetamine. Ybarra eventually transferred schools due to "peer problems and academic failure" before ultimately dropping out of high school entirely in 1969 at age 15. Ybarra instead attended night school, worked during the day, and received an adult education diploma just prior to age 19. Ybarra also enlisted

in the U.S. Marine Corps. Mental testing conducted by the military showed that Ybarra's intelligence was "dull normal" or "borderline," but he was found fit for duty. He was later discharged for homosexual conduct. Ybarra attempted to re-enlist in the Marine Corps but was recognized and kicked out. He also enlisted in the National Guard but was discharged again due to asthma.

Around 1974, Ybarra moved to Oregon where he met a woman who would later become his wife. They moved back to Sacramento where Ybarra's wife became pregnant; however, in 1979 she left him and returned to Oregon. Ybarra then worked in Montana before later moving to Ely in September of 1979. Ybarra worked throughout this period and was employed at the time of Nancy's murder. He was then 26 years old.

B

On June 20, 2002, the United States Supreme Court decided *Atkins v. Virginia*, holding that the execution of intellectually disabled individuals violates the Eighth Amendment's prohibition on cruel and unusual punishment.[2] 536 U.S. at 321. However, *Atkins* recognized that there was still "serious disagreement" about who qualifies as intellectually disabled and "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id*. at 317 (second alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)).

[2] When *Atkins* was decided, courts and medical groups used the term "mental retardation." Medical authorities have subsequently adopted the term "intellectually disabled." We adopt the modern terminology, except when directly quoting from older documents.

To comply with *Atkins*, the Nevada Legislature in 2003 adopted Nevada Revised Statute section 174.098.[3] *See Ybarra v. State* (*Ybarra II*), 247 P.3d 269, 273 (Nev. 2011). That statute provides that a defendant who is intellectually disabled may file a motion to strike the death penalty. Nev. Rev. Stat. § 174.098(1), (6). "The defendant has the burden of proving by a preponderance of the evidence that the defendant is intellectually disabled." § 174.098(5)(b). The statute establishes a three-pronged test for intellectual disability:

> (1) "significant subaverage general intellectual functioning[;]"
>
> (2) "which exists concurrently with deficits in adaptive behavior[;]" and
>
> (3) which "manifested during the developmental period."

§ 174.098(7). This definition is similar to the clinical definition used by the American Association on Intellectual and Developmental Disabilities (AAIDD)[4] and the American Psychiatric Association (APA). *Ybarra II*, 247 P.3d at 274.

We first discuss the evidence presented at Ybarra's *Atkins* hearing, the state trial court's ruling, and the Nevada

[3] The Nevada legislature updated this statute in 2013 and in 2015 simply to remove the outdated language "mentally retarded" and replace it with "intellectually disabled." The statute remains identical in all other respects. *Compare* Nev. Rev. Stat. Ann. § 174.098 (2013), (2015) *with* Nev. Rev. Stat. Ann. § 174.098 (2003).

[4] Previously called the American Association on Mental Retardation (AAMR).

Supreme Court's opinion affirming that ruling. We then turn to our previous opinion, *Ybarra v. Filson (Ybarra IV)*, 869 F.3d 1016 (9th Cir. 2017), and the federal district court's ruling on remand.

1

After the adoption of section 174.098, Ybarra filed a motion to strike the death penalty. In April 2008, the Nevada state trial court held a two-day evidentiary hearing on Ybarra's motion. The trial court (Hon. Steve L. Dobrescu) considered new evidence from two experts who testified on behalf of Ybarra (Drs. David Schmidt and Mitchell Young) and one who testified on behalf of the state (Dr. Ted Young). The trial court also considered roughly 3,000 pages of written exhibits.

A

Dr. David Schmidt, a licensed clinical psychologist, was initially retained by Ybarra's counsel in 2000 to help develop mitigation evidence but, after *Atkins* was decided, he was asked to testify about whether Ybarra was intellectually disabled. Dr. Schmidt administered the Wechsler Adult Intelligence Scale III (WAIS III) test and other intelligence tests but conceded his testing was "problematic . . . at best" because of Ybarra's "problems with anxiety and . . . hallucinations and various things that were going on during the time of the testing." The WAIS III administered by Dr. Schmidt revealed Ybarra's IQ was 60. According to Dr. Schmidt, after accounting for measurement error in IQ scores, a score of 75 or below indicates the reduced level of intellectual functioning associated with intellectual disability. Dr. Schmidt opined that it would be difficult but not impossible for an individual to fake intellectual disability on an IQ test.

Dr. Schmidt also concluded that Ybarra suffered from deficits in adaptive behaviors because he had difficulty in school, had been bullied by classmates, lacked social skills, could not hold a job, had never had a job with more than minimum wage pay, was unable to remain in the military, and was not able to live on his own. For example, Dr. Schmidt cited a 1969 letter from a doctor who opined that, at age 16, Ybarra should have received a medical exclusion from school because he had "gone about as far as he can go within [the] limits of his intellectual and emotional capabilities." Dr. Schmidt concluded that Ybarra's adaptive deficits and significantly subaverage intellectual functioning had manifested in his "developmental years" and offered his professional opinion that Ybarra was "mentally retarded."

Dr. Schmidt also testified about an IQ test that Ybarra had been given in 1981 by Dr. Martin Gutride while Ybarra's competency was being evaluated prior to his trial. This test showed Ybarra's IQ was 86. Dr. Schmidt testified that unlike the newer WAIS III test he administered to Ybarra, the WAIS test administered in 1981 was 26 years old at the time it was administered, and therefore had been affected by the "Flynn Effect." Because IQ is a measure of relative rather than absolute intelligence, the Flynn Effect causes average IQ test scores to "inflate" over time, meaning that IQ tests must be periodically "re-normed" to ensure they are accurate. Dr. Schmidt suggested that the failure to re-norm the test meant Ybarra's 1981 score could have been artificially inflated by as much as 15 points. Dr. Schmidt also criticized the 1981 test because Dr. Gutride's intern had assisted with the testing.

In response to objections and cross-examination from the state, Dr. Schmidt agreed that an earlier version of his expert report included a "bold print" disclaimer stating that the

WAIS III test he had administered "may underestimate [Ybarra's] actual intellectual functioning" because of "the severe distress" testing caused Ybarra. This disclaimer was apparently removed from the final report. Later, Dr. Schmidt testified that he had "good confidence" in his testing but also seemed to equivocate: "[A]s I went back and reviewed post-*Adkins* [sic], this was a case to me that may or may not fit the standard, but certainly bears looking at further." Dr. Schmidt also admitted that if someone has taken multiple IQ tests, the higher score generally controls because it is not possible to fake a higher score. With respect to the 1981 IQ test, administered by Dr. Gutride, Dr. Schmidt conceded he could not "express an opinion about the validity of that test" with professional certainty.

The state further cross-examined Dr. Schmidt about the evidence he reviewed to reach his conclusions, including the military test, which showed Ybarra's intelligence was "dull normal"; Ybarra's marriage and the household he formed with his wife; and Dr. Schmidt's failure to interview Ybarra's prison guards or review prison records. The state also cross-examined Dr. Schmidt about Ybarra's school records, including a letter from Ybarra's seventh-grade teacher, which stated that he did not recall Ybarra "having any learning problems." Dr. Schmidt was generally unwilling to give any ground on cross-examination. For example, when asked about the teacher's letter, Dr. Schmidt suggested it was of little value because it was based on a 35-year-old recollection. When the state pointed out that Dr. Schmidt had relied on the 35-year-old recollections of Ybarra's family members, Dr. Schmidt responded that the teacher only saw Ybarra "for 50 minutes at a time in a class of 35 students."

B

Ybarra's second expert witness was Dr. Mitchell Young, a psychiatrist. As Dr. M. Young started to testify, the state asked "what is that note pad that you're reading from?" Dr. M. Young explained that he had not seen "the applicable legal standard relevant to matters before the court until yesterday morning" and "was not familiar" with the language of *Atkins*. Ybarra's counsel explained that Dr. M. Young was asked to "think in terms of what the Supreme Court noticed or held why those with mental retardation are barred from execution" and "address the concept of adaptive deficits in that context." Dr. M. Young then clarified that he was not intending to be a "substitute decision maker" for the court because "legal matters and diagnostic matters don't have . . . a one-to-one correspondence."

Dr. M. Young's report indicates that he administered a Survival Skills Quotient (SSQ) test to Ybarra and obtained a score of 79. The SSQ is a "test of adaptive behavior," and the raw score is "comparable to IQ." Ybarra's score was "in the borderline range of [intellectual disability]." Dr. M. Young also administered a test called the Rare Symptoms Scale, which is designed to detect malingering. Ybarra had a "markedly elevated" score on this test, and "tended to endorse items that untrained individuals are likely to identify as obvious signs of a major mental illness." The report nonetheless concludes that Ybarra "suffered and continues to suffer deficits in adaptive functioning" prior to age 18. At the hearing, Dr. M. Young testified that, to prepare his report, he had interviewed Ybarra and reviewed documents, including Dr. Schmidt's report, but that he could not reach a conclusion about whether Ybarra was intellectually disabled based solely on this evidence.

However, Dr. M. Young then said that he wanted to change his conclusion from that offered in his written expert report. Dr. M. Young had originally concluded that Ybarra was in the "mild to borderline mentally retarded range" based in part on the 1981 IQ score and Ybarra's adaptive deficits. However, based on what he had just learned from listening to Dr. Schmidt's testimony about the impact of the Flynn Effect and other issues with the 1981 test, he now believed that Ybarra qualified as intellectually disabled under the AAMR and APA standards. Dr. M. Young then opined that Ybarra suffered from adaptive behavioral deficits prior to age 18. Finally, Dr. M. Young testified that a 1991 medical report and Dr. Schmidt's testing indicated Ybarra had suffered from a brain injury during the developmental period.

On cross-examination, the state attacked the data on which Dr. M. Young had relied to form his conclusions. For example, Dr. M. Young agreed that his opinion would change again if Dr. Schmidt's test scores were erroneous. Dr. M. Young also testified about Ybarra's past statements which indicated that he was malingering, such as a statement Ybarra made in 1991 about how he never thought he would end up "having to act crazy" and a statement Ybarra made in 1981 about how he did not want to die by execution and would fight to stay alive. Dr. M. Young conceded that he had considered the possibility that Ybarra was faking his symptoms but insisted that malingering and intellectual disability "can co-exist and frequently do."

C

The state called Dr. Theodore Young, a licensed psychologist, to testify about his objective testing of Ybarra's cognitive ability. Dr. T. Young interviewed Ybarra

and then administered objective tests of Ybarra's cognitive ability, including an abbreviated WAIS III test. The initial results of the objective testing were "bizarre" and not "in any way typical of patients" that Dr. T. Young sees. This caused Dr. T. Young to suspect Ybarra was malingering. For example, Dr. T. Young administered the "Rey Complex Figure" test, which involves copying lines from a picture. Ybarra's performance on this test was so poor that it was impossible to score. Dr. T. Young noted that he had administered this test over 10,000 times, and that Ybarra's results were worse than those seen in Alzheimer's patients or among those with similarly debilitating diseases. Dr. T. Young also observed that Ybarra was apparently unable to spell two-, three-, and four-letter words, which was inconsistent with past samples of Ybarra's writing.[5]

Dr. T. Young went on to test Ybarra's intelligence using the abbreviated WAIS III. He found Ybarra's IQ was 66, which suggested "mild mental retardation." However, Dr. T. Young testified that the result was "not even close to being valid" because of Ybarra's malingering. Dr. T. Young testified that he also administered the "Test of Memory Malingering" (TOMM). The TOMM results suggested that Ybarra was malingering. Dr. T. Young testified that while some literature urges that a lower cut-off score should apply when the TOMM is used to test for malingering among a person who may be intellectually disabled, Ybarra's score was well below even the lower threshold advocated by some

[5] Ybarra argues the trial court's order misquotes Dr. T. Young's testimony about the results of the spelling test. However, the trial court noted that the official transcripts of the proceedings have significant errors and relied at least in part on the videotaped transcript of proceedings.

studies. Dr. T. Young was also asked about Dr. M. Young's report that Ybarra had "a markedly elevated score" on a test of rare psychiatric symptoms and agreed that this unusual result was similar to his own experience testing Ybarra.

Dr. T. Young strongly criticized Dr. Schmidt's testing of Ybarra, which he said did not meet APA standards because Dr. Schmidt failed to test for malingering. Dr T. Young specifically concluded that Dr. Schmidt's test was "invalid" because it was "absolutely clear . . . that the question of [Ybarra's] effort was not adequately addressed." Dr. T. Young also testified about the 1981 IQ test score of 86 obtained by Dr. Gutride and stated that this score put Ybarra "well above" the range for intellectual disability, which was "as high as 75." Dr. T. Young testified that while he had heard Dr. Schmidt's testimony that the 1981 test administered to Ybarra was obsolete, in fact the revised WAIS had not been released until after Ybarra's 1981 test, meaning Ybarra received the most current test then available. Finally, Dr. T. Young testified that Dr. Gutride's use of an intern to conduct the 1981 testing was not problematic because Dr. Gutride co-signed the report and remained fully professionally responsible for the finding.

On cross-examination, Dr. T. Young conceded that he had not evaluated the other two prongs required to establish intellectual disability—adaptive deficits and onset during the developmental period—because without a valid IQ test within the necessary range, "these other prongs don't matter." However, Dr. T. Young noted he had reviewed the same documentation about Ybarra that was available to Dr. M. Young and Dr. Schmidt and criticized their failure to objectively test Ybarra's adaptive functioning. Dr. T. Young also admitted that he had initially produced his report as an "interim" report, which addresses only his objective testing

of Ybarra's intellectual functioning because the background information about Ybarra had not yet been made available to him.

Dr. T. Young further agreed that he had not read the most current AAMR manual and had last reviewed the 1992 edition. He testified that he had read the portions of the current manual that were "reprinted in the *Atkins* decision" because he had reviewed that decision while preparing for his testimony. Ybarra's attorney also cross-examined Dr. T. Young about the studies supporting the use of the TOMM test to identify feigned intellectual disability. Ybarra's counsel and Dr. T. Young disagreed about the meaning of the treatise on which Dr. T. Young relied; the attorney pointed out that the treatise did not recommend use of the TOMM to identify feigned intellectual disability; Dr. T. Young contended that the treatise supported his conclusion that Ybarra's low score on the TOMM indicated malingering.

2

The Nevada district judge concluded that Ybarra failed to demonstrate by a preponderance of the evidence that he was intellectually disabled. The state court started by defining the relevant developmental period for the purposes of section 174.098. Based on his review of other states' laws, expert testimony, and the AAMR standards, Judge Dobrescu determined that the relevant developmental period was up to age 18.. However, Judge Dobrescu went on to consider evidence about Ybarra's intellectual functioning and adaptive behavioral deficits from outside that period because all the aforementioned testing occurred while Ybarra was in his mid-twenties or older.

With respect to Prong 1, Ybarra's intellectual functioning, Judge Dobrescu determined that Ybarra failed to show the onset of significant subaverage intellectual functioning during the developmental period. Judge Dobrescu noted that when Ybarra was tested by the Marine Corps, intelligence testing showed he was "dull normal" or "borderline," which is not intellectually disabled. The trial court credited the 1981 IQ test administered by Dr. Gutride, which had showed Ybarra's IQ was 86. The court also considered other medical records, interviews, and testing conducted by psychiatrists and psychologists after Ybarra's arrest, which suggested that his intelligence was below average but not intellectually disabled.

Judge Dobrescu rejected Dr. Schmidt's testimony about the impact of the Flynn Effect on the 1981 IQ test, finding that "numerous courts have rejected the notion of adjusting IQ scores to accommodate the Flynn Effect." However, the court noted that even after adjusting for the Flynn Effect, Ybarra's IQ would be 78—i.e., not intellectually disabled. Judge Dobrescu also rejected Dr. Schmidt's 2002 IQ test showing Ybarra's IQ was 60, noting the original "bold-faced disclaimer" in Dr. Schmidt's report which suggested Ybarra's IQ could have been underestimated and Dr. Schmidt's failure to employ any kind of test for malingering. The court noted that Dr. T. Young had specifically criticized Dr. Schmidt's failure to test for malingering and that Dr. Schmidt had been recalled to the stand but failed to respond to that criticism. Finally, the court rejected Dr. Schmidt's criticism of the 1981 IQ test as "pure speculation" and concluded that the 1981 score was supported by contemporaneous records from other evaluators who believed Ybarra was "dull normal or borderline" but not "mentally retarded."

Judge Dobrescu then concluded that Ybarra was likely malingering. While recognizing that malingering does not exclude the possibility that Ybarra had an intellectual disability, the court concluded that it must be considered in evaluating intellectual functioning. The court cited various medical records and opinions which supported Ybarra's history of malingering, including:

- A 1979 examination from a Doctor Lynn Gerow, who administered the Minnesota Multiphasic Personal Inventory (MMPI), and concluded Ybarra had "made an attempt to answer each question in a positive manner to indicate psychopathology."
- A 1981 letter from Doctor Donald Molde, who concluded that Ybarra's claims to suffer from hallucinations were "due to extra medical considerations" rather than mental illness.
- A 1981 letter from Doctor Richard Lewis, who, after reviewing three MMPI profiles administered to Ybarra, concluded that "the probability is very high" that Ybarra had "deliberately faked the tests in a pathological direction."
- Ybarra's 1981 statement to Doctor Gutride, while being evaluated for competency to stand trial, that he had "decided the best thing he could do was to pass the Sanity Commission so he could get on with his legal problems." Ybarra then passed three psychiatric examinations.
- A March 1981 letter from Ybarra, in which he indicated that he would be "nuts soon from not taking my meds," and asked the recipient to "pray for me to get a [not guilty by reason of insanity]" so that he

could return to a mental health facility rather than remain in jail. Judge Dobrescu observed that up to that point, Ybarra had generally maintained he was actually innocent of the murder.

- A 1985 progress note signed by a "Dr. Knapp," which indicated that Ybarra was "mentally ill" but "tries to fake psychosis."
- A 1991 progress note recording Ybarra's statement, made while in the prison mental health unit, that he never thought he would end up in here "having to act crazy."

Judge Dobrescu also observed that Ybarra had requested copies of his own medical records on several occasions, repeatedly refused medication, and had written hundreds of prison "kites" (which are "form[s] used by prison inmates to communicate with staff . . . .") and other correspondence which showed a level of intelligence inconsistent with intellectual disability. *Richey v. Dahne*, 807 F.3d 1202, 1205 n.3 (9th Cir. 2015). Some of Ybarra's statements indicated a level of sophistication about legal defenses. For example, Ybarra questioned a doctor about multiple personality disorder and mentioned that that he knew of a person who had his case dismissed because he had that disorder. Judge Dobrescu concluded that Dr. Gutride's 1981 IQ test was most likely to be valid because Ybarra had, at that point, decided to put forward his best effort on the test so he could move on with his case.

Finally, in discussing the expert testimony, the court observed that Dr. Schmidt had testified that a person cannot fake being smarter than they actually are on an IQ test. The court also noted the results of Dr. T. Young's spelling test and concluded that Ybarra's apparent inability to spell

simple words was not consistent with letters and kites he had written. Finally, the court discussed Dr. T. Young's TOMM test and his conclusion that there was "no valid IQ test result . . . below 70 in the record." Judge Dobrescu concluded that the preponderance of evidence showed Ybarra "is not significant [sic] subaverage intellectual functioning."

3

Ybarra appealed to the Nevada Supreme Court, arguing the trial court erred by holding that he had failed to show he was intellectually disabled under section 174.098(7). *Ybarra II*, 247 P.3d at 270. The Nevada Supreme Court first construed the definition of "mentally retarded" in the statute. *Id*. at 273-74. After examining the history of the statute, the appellate court concluded that "[g]iven the similarities between the statutory definition and the clinical definitions of mental retardation, the AAMR and APA provide useful guidance in applying the definition." *Id*. at 274. Looking to Prong 1—intellectual functioning—the state supreme court concluded that "the clinical definitions indicate that 'individuals with IQs between 70 and 75' fall into the category of subaverage intellectual functioning." *Id*. (quoting Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000)).

The appellate court then considered Ybarra's challenges to Judge Dobrescu's decision, concluding it would "defer[] to the court's factual findings so long as those findings are supported by substantial evidence and are not clearly erroneous, but . . . review the legal consequences of those factual findings de novo." *Id*. at 276. The appellate court described the record evidence, hearing testimony, and the trial court's decision at some length. *Id*. at 277-81. The court then turned to Ybarra's two main arguments. Ybarra

argued that the trial court wrongly determined that he did not have subaverage intellectual functioning under Prong 1 because it (1) "erroneously focused on the 1981 IQ test to the exclusion of the IQ results Dr. Schmidt obtained" and (2) "erroneously relied on the tests administered by the State's expert because he used improper testing instruments, scoring, and administration techniques." *Id*. at 281.

First, the Nevada Supreme Court found that the trial court had not improperly focused on the 1981 IQ test. *Id.* at 281-83. Ybarra argued the trial court should not have relied on the 1981 IQ score because, if it had been adjusted to account for the Flynn Effect as suggested by Dr. Schmidt, the adjusted score would suggest Ybarra was mildly intellectually disabled. *Id*. at 281. The state high court held that this argument failed for three separate reasons: First, Judge Dobrescu had found Dr. Schmidt's testimony about the Flynn Effect "incredible" in light of sources that rejected its application and other record evidence which supported the "validity" of the 1981 IQ score. *Id*. at 282. Nevertheless, the trial court had accounted for the Flynn Effect and, after applying an adjustment, concluded Ybarra's IQ was 78—outside the range required for intellectual disability. *Id*. The supreme court held this adjustment was "not without foundation." *Id*.

The state high court gave two other reasons for rejecting Ybarra's argument. It noted that the trial court had also considered other evidence in the record, such as Ybarra's "school and other records, his writings, and evidence that he was malingering" and therefore "did not rely solely on the 1981 IQ test." *Id*. Finally, the court observed that it did not need to decide the relevance of the Flynn Effect "because the 1981 IQ test, as with all of Ybarra's IQ tests, was administered well after he turned 18 years of age. Therefore,

this issue has little value in evaluating whether Ybarra presented sufficient evidence to establish mental retardation." *Id*. at 282-83.

The Nevada Supreme Court then turned to Ybarra's argument that the trial court had improperly relied on the IQ test and TOMM test administered by Dr. T. Young. *Id*. at 283. The court held that the trial court's consideration of Ybarra's TOMM score did not require reversal. *Id.* The Nevada Supreme Court reasoned that while the trial court "clearly" considered the TOMM results, it also considered a "wealth of other evidence in determining that Ybarra was malingering," such as his prison kites, medical progress notes, and emphasized that "comments by mental health professionals who evaluated Ybarra during his incarceration indicated that their testing of Ybarra revealed malingering." *Id.* The state supreme court then added that "as with the 1981 IQ score, the TOMM score is of little value in determining whether Ybarra met his burden of proving significant subaverage intellectual functioning, as the TOMM was administered well after Ybarra reached 18 years of age." *Id*. at 283. The Nevada Supreme Court found that Ybarra had failed to show subaverage intellectual functioning which manifested during the developmental period. *Id*. at 283-84.

4

After the Nevada Supreme Court issued its decision, Ybarra filed a motion to reconsider. This motion included as a newly offered exhibit a report dated March 28, 2012, by Dr. Stephen Greenspan, a psychologist and expert on intellectual disability. Dr. Greenspan interviewed Ybarra, spoke to Ybarra's family members, and reviewed a number of other materials. Dr. Greenspan's report concluded that

Ybarra "meets all three prongs of the definition of mental retardation" under both the statutory and clinical definitions.

Dr. Greenspan's report first argued that Ybarra has significantly subaverage intellectual functioning based on the results of the IQ tests administered by Drs. Schmidt and T. Young. Dr. Greenspan opined that the 1981 IQ test conducted by Dr. Gutride used outdated norms and that after adjusting for the Flynn Effect, Ybarra's score on the 1981 IQ test would be 78—close to, but not below, "the clinically-recommended ceiling of 75." Dr. Greenspan also quoted one of Dr. Schmidt's colleagues, who (like Dr. Schmidt) criticized Dr. Gutride for having an intern administer the test to Ybarra.[6] Finally, Dr. Greenspan suggested that Dr. T. Young erred in using the TOMM to evaluate Ybarra for malingering and contended the TOMM has never been validated on low-IQ individuals.

The Nevada Supreme Court unanimously denied Ybarra's motion to reconsider but did not provide any reasons for doing so and did not strike Dr. Greenspan's late-filed report from the record. *Ybarra IV*, 869 F.3d at 1020-21.

5

In 2012, Ybarra again sought habeas relief from the federal district court. *Ybarra v. Baker*, No. 3:00-cv-0233, 2013 WL 5567586, at *1 (D. Nev. Oct. 8, 2013). He filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6), asking the federal district court to set aside its prior

[6] The Greenspan Report referenced reports by Drs. Mack and Warnick. Those doctors filed reports which were stricken by the Nevada Supreme Court and are not part of the state court record. *See Ybarra IV*, 869 F.3d at 1020, 1029.

judgment denying him habeas relief and consider the merits of his *Atkins* claim. *Id.* The district court denied the motion on the merits, finding that the Nevada Supreme Court's determination that Ybarra was not intellectually disabled was not unreasonable under AEDPA. *Id*. at *8.

6

Ybarra appealed, and we vacated the district court's order. *Ybarra IV*, 869 F.3d at 1019. While we "express[ed] no view as to whether the Nevada Supreme Court's intellectual disability determination was reasonable" under AEDPA, we found that the district court had erred when it "overlooked a number of instances where the Nevada Supreme Court contradicted the very clinical guidelines that it purported to apply." *Id*. at 1019, 1023. We held that Nevada Revised Statute section 174.098 had "incorporated clinical guidelines and diagnostic manuals" in defining intellectual disability well before the Supreme Court had concluded that doing so was a constitutional requirement. *Id*. at 1024. We then identified several errors in the Nevada Supreme Court's reasoning:

> For example, it ignored evidence that Ybarra was bullied in school on the ground that it was irrelevant under Prong 2. The trial court initially expressed concern over the notion that "the victim [of bullying] . . . has the problem," and the Nevada Supreme Court apparently agreed because it stated that evidence of bullying does "little to demonstrate adaptive behavior deficits." But the AAMR specifically lists "gullibility" and an inability to "avoid[] victimization" as examples of limited social adaptive skills.

> Similarly, under Prong 3, the Nevada Supreme Court suggested that any diagnostic test conducted after the age of 18 was "of little value." But the AAMR specifically contemplates retrospective assessment when there are no test scores available from the developmental period.

Id. at 1026 (citations omitted).

In response to the state's argument that Ybarra's failure to prove Prong 1 was dispositive, we agreed that the Nevada Supreme Court's malingering determination was reasonable in light of Dr. T. Young's testimony but remanded for the district court to examine whether that finding "was the basis for the Nevada Supreme Court's determination under Prong 1." *Id*. We observed that "the Prong 1 determination was unreasonable to the extent that it was based on the court's lay perception that Ybarra did not 'look like' a disabled person." *Id*. at 1026-27. We explained that the "state may be correct that the malingering determination constitutes an 'independent basis' for the intellectual disability determination, thus rendering it reasonable under AEDPA. Alternatively, Ybarra may be correct that lay stereotypes and nonclinical factors infect the state court's entire analysis, thus rendering it unreasonable." *Id.* (citation omitted). But "[r]ather than passing on these issues in the first instance, we [left] the task to the district court" to evaluate. *Id.* Finally, we also concluded that the district court erred by refusing to consider the Greenspan Report as part of the state court record and directed it to consider the Report on remand. *Id*. at 1027.

7

On remand, the district court again took up the question of Ybarra's intellectual disability and found the Nevada Supreme Court had not unreasonably determined Ybarra failed to prove the first prong. The district court concluded that the Nevada Supreme Court had not ruled as it did because Ybarra did not "look like a disabled person." Rather, the state courts found that the only sub-75 IQ scores in the record were invalid because of Dr. Schmidt's disclaimer as to the accuracy of his results and Dr. T. Young's testimony about the likelihood that Ybarra was malingering. The state courts also credited Dr. Gutride's 1981 IQ score and rejected Dr. Schmidt's criticism of that test because (1) the AAMR manual did not recommend adjusting for the Flynn Effect, (2) an adjustment would still leave Ybarra with an IQ of 78, and (3) Dr. Schmidt admitted he "really could not talk about" the 1981 score's validity. Finally, the district court noted concerns with Dr. Greenspan's report that called into doubt his analysis of this prong, including the fact that Dr. Greenspan filed two versions of his report because the first one contained errors.

DISCUSSION

We are now asked to review the federal district court's analysis of the questions we remanded for it to consider, namely, whether lay stereotypes and nonclinical factors infected the state court's entire analysis and how the Greenspan Report should factor into that analysis. We review de novo the federal district court's review of the state court's decision. *Ybarra IV*, 869 F.3d at 1023. However, under AEDPA, we may not grant Ybarra habeas relief unless the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented

in the State court proceeding." § 2254(d)(2). A state court's factual determination of his intellectual functioning is not unreasonable simply because we would have reached a different conclusion. *Dixon v. Shinn*, 33 F.4th 1050, 1054 (9th Cir. 2022). "A petitioner challenging the substance of the state court's findings must show 'that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.'" *Prescott v. Santoro*, 53 F.4th 470, 479 (9th Cir. 2022) (quoting *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012)). This "daunting standard" is "satisfied in relatively few cases" but "is not impossible to meet." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *overruled on other grounds by Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

If the state court's determination of the facts was unreasonable, we must then review Ybarra's *Atkins* claim de novo before we may grant habeas relief. *See Maxwell v. Roe*, 628 F.3d 486, 494-95 (9th Cir. 2010). Even if Ybarra's claim has merit, the United States Supreme Court has recently suggested that a state prisoner is "never entitled to habeas relief" unless he persuades the court that both "law and justice require [it]." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022) (alteration in original) (quoting *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022)).

I

To prevail on his petition for habeas relief, Ybarra must show that the Nevada Supreme Court unreasonably determined that he failed to prove that (1) he had significantly subaverage intellectual functioning; (2) he suffered from adaptive behavioral deficits; and (3) those symptoms manifested prior to age 18. Ybarra fails to make

a showing that he had significantly subaverage intellectual functioning. That is dispositive and defeats the basis of his habeas claim.

Ybarra's first argument that the determination is unreasonable rests on a narrow reading of the Nevada Supreme Court's decision. Ybarra argues that the court unreasonably found that the 1981 IQ test administered by Dr. Gutride was of "little value" because it was conducted well after Ybarra turned 18 and refused to consider any evidence from outside the developmental period. Ybarra contends that because we have already held that it would be an error to disregard any testing conducted outside the developmental period, the Nevada Supreme Court's determination of Prong 1 is unreasonable. *Ybarra IV*, 869 F.3d at 1026. Ybarra claims that while the state trial court may have relied on the 1981 IQ test, the Nevada Supreme Court declined to adopt that logic, and so could not have relied on the 1981 test to find that Ybarra had failed to prove Prong 1. Accordingly, Ybarra argues that the federal district court erred in concluding that the Nevada Supreme Court had "affirm[ed] the lower court's reliance on the 1981 IQ test that yielded a score of 86."

This argument is belied by a fair reading of the Nevada Supreme Court's opinion. The sentences in the opinion that Ybarra repeatedly cites are in fact only part of that court's response to Ybarra's contention that the trial court erred by (1) "disregarding" Dr. Schmidt's IQ testing; (2) concluding that the 1981 test "was valid"; and (3) failing to account for the Flynn Effect. *Ybarra II*, 247 P.3d at 281. In fact, the Nevada Supreme Court gave "three reasons" for rejecting Ybarra's arguments. *Id*. at 282. First, the court explicitly rejected Ybarra's argument that the trial court had erred in crediting the 1981 IQ test over Dr. Schmidt's testing:

> [T]he district court did not disregard Dr. Schmidt's testimony regarding the Flynn effect. Rather, the court *found the testimony incredible* considering (a) other sources that either rejected the theory or did not demand adjustments in IQ scores to account for it; and (b) *other evidence in the record supporting the validity of the 1981 IQ score*, including evaluations from mental health professionals and Ybarra's military records reporting that he was of dull-normal to borderline intelligence. And although the district court was "not convinced [that] the scientific community is prepared to adjust the scores according to the Flynn effect," it nevertheless considered the Flynn effect and concluded that an adjustment for that effect reduced the 1981 IQ score to 78, which is outside the range of mental retardation . . . . [That] calculation *was not without foundation*.

Id. (emphasis added).

Only then did the Nevada Supreme Court proceed to give two other, independent reasons for rejecting Ybarra's arguments. The second reason it gave for affirming the trial court's finding was that, based on "Ybarra's school and other records, his writings, and evidence that he was malingering" the "record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning." *Id*. Finally, the Nevada Supreme Court said that it "need not decide the relevance, if any, of the Flynn effect and the

necessity of adjusting the 1981 IQ score" because the 1981 IQ test occurred well after Ybarra turned 18. *Id*. at 282-83.

Even if this final reason was an unreasonable deviation from the clinical guidelines, *see Ybarra IV*, 869 F.3d at 1026, the first reason was not. The Nevada Supreme Court found that the trial court had not erred in finding Dr. Schmidt's criticism of the 1981 IQ test "incredible" and found the "validity" of that test was supported by the record. *Ybarra II*, 247 P.3d at 282. And it affirmed the trial court's finding that, even accounting for the Flynn Effect, Ybarra's 1981 IQ score was still not below 75—which Ybarra concedes is required to show significantly subaverage intellectual functioning. *Id*. This was not unreasonable. Dr. Schmidt admitted his own tests might underestimate Ybarra's "actual intellectual functioning." Dr. T. Young defended the validity of the 1981 IQ score in his testimony and criticized Dr. Schmidt's testing. The state court was free to "credit one expert over another." *Apelt*, 878 F.3d at 837.

The Nevada Supreme Court's second reason for rejecting Ybarra's criticism of the 1981 IQ test was also reasonable. As the court explained:

> [T]he district court did not rely solely on the 1981 IQ test to determine that Ybarra had not proven that he suffers from significant subaverage intellectual functioning. As explained above, the district court also looked to Ybarra's school and other records, his writings, and evidence that he was malingering. In fact, the district court expressly observed in its order that "[t]he record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a

> person who does not have significant subaverage intellectual functioning now or during his developmental years."

Ybarra II, 247 P.3d at 282. We were "troubled by this statement" out of concern that it may have been "based on the court's lay perception that Ybarra did not 'look like' a disabled person." *Ybarra IV*, 869 F.3d at 1026-27. However, we also suggested that to the extent that this finding was informed by a determination that Ybarra was malingering, it was reasonable. *Id*. at 1026.

As the federal district court noted on remand, the quotation about the "record as a whole" is taken from a section in the trial court decision titled "Malingering and Other Evidence of Intellectual Functioning." That section of the state trial court's decision notes that, when asked if he saw evidence of malingering in records he reviewed to prepare for his testimony, Dr. Schmidt mentioned only Dr. T. Young's report and "some issues" from the state correctional medical center where Ybarra was evaluated for competency. The state trial court then criticizes Dr. Schmidt for ignoring numerous other pieces of evidence which suggest malingering, including Ybarra's 1979 and 1981 attempts to manipulate the MMPI, his 1991 statement about "having to act crazy" in prison, and the conclusions of other doctors that Ybarra was faking psychological symptoms. It also discusses in passing Ybarra's ability to "manipulate health care professionals, attorneys, play scrabble, backgammon, racquetball and volleyball, and his ability to type, read medical literature, [and] write coherent meaningful letters." Finally, the trial court closed this section by noting that Dr. T. Young's testing, including the TOMM test, suggested that Ybarra was malingering.

Taken in context, it is clear the Nevada courts did not base their Prong 1 determination on a "lay perception that Ybarra did not 'look like' a disabled person." *Ybarra IV*, 869 F.3d at 1027. Parts of the trial court's decision arguably make this error, such as by discussing Ybarra's ability to play games and write letters. *Ybarra II*, 247 P.3d at 280; *see also Moore v. Texas* (*Moore II*), 139 S. Ct. 666, 671 (2019) (criticizing the appellate court for considering adaptive strengths developed in prison). But most of the section of the state trial court's decision in question (1) finds that Dr. Schmidt's testimony and IQ testing is not credible because he failed to adequately consider evidence that Ybarra was malingering and (2) cites Dr. T. Young's testimony to conclude Ybarra was malingering. This was not unreasonable; a finder of fact may consider the data an expert relied on in reaching an opinion, *see* FED. R. EVID. 705, and "reject" expert testimony based on "the reasons given for the opinion" and "the other evidence in the case." *See* NINTH CIR. MODEL CRIM. JURY INSTR. § 3.14 (2023); *see also Ochoa v. Davis*, 50 F.4th 865, 903-04 (9th Cir. 2022) (citing petitioner's school records, social activities, and criminal conduct in concluding he had failed to show significant adaptive deficits). Courts are not required to credit expert testimony. *See Ochoa*, 50 F.4th at 905; *Apelt*, 878 F.3d at 837-38; *Cain v. Chappell*, 870 F.3d 1003, 1023-24 (9th Cir. 2017).

Ybarra's second argument is that reliance on anything other than expert testimony amounts to a reliance on "stereotypes" about intellectual disability. For example, Ybarra asserts repeatedly that the Nevada Supreme Court erred in relying on a "wealth of other evidence" in concluding that Ybarra was malingering, because "none of the experts relied" on it in reaching a conclusion about

intellectual functioning. But this is simply incorrect: every expert, including Ybarra's experts, testified that, in forming their conclusions, they had interviewed Ybarra, reviewed records about Ybarra, or both. To the extent Ybarra's experts relied on faulty evidence (i.e., false statements by Ybarra during testing) or failed to consider evidence (i.e., records suggesting Ybarra was not intellectually disabled) it was not unreasonable to find that their conclusions were invalid—especially since the trial court also "considered the TOMM results." *Ybarra II*, 247 P.3d at 283. A court's intellectual disability determination must be informed by clinical guidance, but "'the views of medical experts' do not 'dictate'" the outcome. *Moore v. Texas (Moore I)*, 581 U.S. 1, 13 (2017) (quotation omitted).

Finally, even if Ybarra is correct that the Nevada Supreme Court gave little weight to both (1) the 1981 IQ test and (2) the TOMM test, the Prong 1 finding is still not unreasonable. As discussed, it was Ybarra's burden to prove Prong 1 by a preponderance of the evidence, which requires an IQ score of 75 or below. *See* Nev. Rev. Stat. § 174.098(5)(b). There are only two such scores in the record: Dr. T. Young's, which he disclaimed as invalid, and Dr. Schmidt's score. The Nevada Supreme Court affirmed the trial court's finding that Dr. Schmidt's testimony was not credible, *see Ybarra II*, 247 P.3d at 279, 282, 284, and that finding is likely entitled to double deference, *see id*. at 276 ("Matters of credibility . . . remain . . . within the [trial] court's discretion."); and was not unreasonable for the reasons already discussed. Thus, even if the Nevada Supreme Court gave little weight to the 1981 IQ score, the absence of any valid sub-75 IQ would still mean Ybarra failed to meet his burden.

Dr. Greenspan's report adds little in terms of intellectual functioning. Dr. Greenspan recalculated the impact of the Flynn Effect on the 1981 IQ test, and concluded that even accounting for that effect, Ybarra's IQ was 78—essentially confirming that the trial court's calculation was correct. Dr. Greenspan's report otherwise rehashes criticisms that were already made by Dr. Schmidt: he repeats Dr. Schmidt's critiques of the 1981 IQ score and criticizes Dr. T. Young's use of the TOMM test for the same reasons that Dr. Schmidt did. Finally, Dr. Greenspan's report says virtually nothing about the other evidence that Ybarra was malingering. As a result, Ybarra's Prong 1 argument still fails because no valid IQ test has shown significantly subaverage intellectual functioning. Because we find that the Nevada Supreme Court's Prong 1 determination was reasonable, we do not consider Prongs 2 or 3 and Ybarra's petition must be denied. *See Apelt*, 878 F.3d at 837 ("To prevail on his *Atkins* claim, [the petitioner] must meet all three prongs of the test for intellectual disability.").

CONCLUSION

Because the Nevada Supreme Court was not unreasonable in finding that Ybarra had failed to prove he is intellectually disabled by a preponderance of the evidence, the district court's denial of his federal petition for a writ of habeas corpus was correct.

AFFIRMED.

APPENDIX B

Order Denying Rehearing, *Ybarra v. Gittere, Warden*, Ninth Circuit Court of Appeals, Dkt. Entry 49, Case No. 20-99012 (September 14, 2023)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 14 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT YBARRA, Jr., Petitioner-Appellant, v. WILLIAM GITTERE, Warden, Respondent-Appellee.	No. 20-99012 D.C. No. 3:00-cv-00233-GMN-VPC ORDER

Before: TALLMAN, CLIFTON, and FORREST, Circuit Judges.

Judge Forrest has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. Judges Clifton and Tallman so recommend. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Petitioner-Appellant's petition for panel rehearing and petition for rehearing en banc is DENIED.

APPENDIX C

Order, *Ybarra v. Gittere, Warden*, Case No. 3:00-cv-00233-GMN-VPC (September 23, 2020)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT YBARRA, JR.,

Petitioner

v.

WILLIAM GITTERE, et al.,

Respondents

Case No.: 3:00-cv-00233-GMN-VPC

ORDER

This habeas proceeding under 28 U.S.C. § 2254 is on remand from the United States Court of Appeals for the Ninth Circuit. The court of appeals issued a decision vacating this court's order denying petitioner Ybarra's motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). Ybarra's Rule 60(b) motion sought to re-open his federal habeas proceedings to allow him to add a claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment prohibits the execution of intellectually disabled persons.[1] ECF No. 176. This court denied the motion upon concluding that Ybarra's *Atkins* claim would be futile because this court would be

[1] *Atkins* used the terms "mentally retarded" and "mental retardation" but "intellectually disabled" and "intellectual disability" are now the preferred nomenclature in the legal and medical community. *See Hall v. Florida*, 572 U.S. 701, 704 (2014). The former terms are used herein only to accurately quote from cited sources.

required to defer, under 28 U.S.C. § 2254(d),[2] to the Nevada Supreme Court's denial of the claim. ECF No. 228. As discussed below, the court of appeals identified discrete errors in this court's AEDPA analysis and remanded for this court to reconsider its denial of Ybarra's motion for relief from judgment. Having done so, this court concludes, for reasons that follow, that Ybarra's Rule 60(b) motion is denied.

I. BACKGROUND

Most of the history of this case that is relevant to the issues decided herein is recounted in the Ninth Circuit's 2017 opinion. *See Ybarra*, 869 F.3d at 1019-21. The court of appeals identified that following errors in relation to this court's AEDPA analysis of Ybarra's *Atkins* claim:

> First, it overlooked a number of instances where the Nevada Supreme Court contradicted the very clinical guidelines that it purported to apply, which is especially problematic in light of the recent decision in *Brumfield v. Cain*, —— U.S. ——, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015). Second, it erred when it refused to consider the Greenspan report.

Ybarra, 869 F.3d at 1023.

In relation to the first error, the court of appeals concluded that the Nevada Supreme Court's intellectual disability determination "passes muster under § 2254(d)(1)." *Id*. at. 1024. With respect to § 2254(d)(2), however, the court of appeals determined that the Nevada Supreme Court made a "number of contradictory statements" that this court "overlooked." *Id*. at 1027. The court of appeals was careful to point out that it reserved judgment "as to whether the Nevada Supreme Court's intellectual disability determination was reasonable, in which case the district

[2] In particular, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Ybarra*, 869 F.3d at 1019.

court should again defer to it; or unreasonable, in which case the district court should 'proceed to consider' Ybarra's *Atkins* claim de novo." *Id*. at 1019 (citation omitted).

The "Greenspan report" refers to a report "authored by Dr. Stephen Greenspan, . . . who criticized the state courts' analyses and argued that their opinions incorporated 'questionable lay stereotypes.'" *Id*. at 1020–21. Even though this report was not presented to the Nevada Supreme Court until Ybarra filed a second request for the court to reconsider the denial of his *Atkins* claim, the court of appeals held that it "was part of the [state court] record under *Pinholster*[3] because it was not expressly stricken." *Id*. at 1030 (footnote added). Once again, the court of appeals reserved judgment as to "whether the Greenspan report changes the outcome under AEDPA." *Id*. Thus, that issue is also before this court on remand.

In furtherance of the Ninth Circuit's remand, this court entered an order on November 21, 2017, directing Ybarra to file a brief setting forth his position with respect to the issues identified by the court of appeals. After requesting several extensions of time, Ybarra filed his brief in April 2018. Respondents filed a response in September of 2018, after also requesting several extensions. Ybarra filed a reply in January 2019.

II. STATE COURT ADJUDICATION OF YBARRA'S *ATKINS* CLAIM

In March 2003, Ybarra filed a habeas petition in the state district court that included an Eighth Amendment claim under *Atkins*. The state district court dismissed the claim on procedural grounds. On appeal, the Nevada Supreme Court reversed, citing Nevada's then-recent adoption of Nev. Rev. Stat. § 175.554(5), which allows a person sentenced to death to move to set his sentence aside on the grounds that he is intellectually disabled, provided the court has not

[3] *Cullen v. Pinholster*, 563 U.S. 170 (2011).

previously decided the issue.[4] Ybarra then filed a motion in the state district court to set aside his death sentence pursuant to that provision.

In April 2008, the state district court conducted a two-day evidentiary hearing on Ybarra's motion "at which Ybarra presented the testimony of two expert witnesses, the State presented the testimony of an expert witness, and the court considered exhibits totaling more than 3,000 pages." *Ybarra v. State*, 247 P.3d 269, 271 (Nev. 2011). One of Ybarra's experts was a psychologist, Dr. David Schmidt, who had been retained in 2000, pre-*Atkins*, to do neuropsychological testing of Ybarra to help develop mitigation evidence. ECF No. 211-3 at 68-69. He generated a report in August 2002, post-*Atkins*, which included testing that, according to Dr. Schmidt, placed Ybarra's intellectual functioning in the "mildly mentally retarded range." ECF 211 at 50-51; ECF No. 211-1 at 2-20. Ybarra's other expert was a psychiatrist, Dr. Mitchell Young, who evaluated Ybarra in March of 2008. ECF No. 212 at 57-59. According to his report, Ybarra suffered from deficits in adaptive functioning, going back to his developmental period, that are "consistent with someone in the mild to borderline mentally retarded range." ECF No. 211-2 at 65-71; ECF No. 211-3 at 2-18.

The State presented the testimony of a clinical neuropsychologist, Dr. Theodore Young, who tested Ybarra in September of 2007. ECF No. 212-1 at 48. While his testing resulted in an IQ score (66) similar to that obtained by Dr. Schmidt (60), Dr. T. Young opined in his subsequent report that the result was invalid due to malingering. ECF No. 214 at 2-7. His report also criticized Dr. Schmidt's testing and findings and concluded that nothing in the records he (Dr. T. Young) reviewed "indicat[ed] that Mr. Ybarra suffered from mental retardation as

[4] The Ninth Circuit's opinion correctly notes that Section 175.554(5) was enacted in response to *Atkins*. *Ybarra*, 869 F.3d at 1020 n.3. However, the provision was enacted in 2003, not 2015 as the opinion indicates. *See* Nevada 2003 Session Laws, Ch. 137 (A.B. 15).

defined by Nevada law." *Id.* The exhibits presented to the state district court included "school records, mental health and medical records, military records, prison records, and letters and other communications (primarily prison kites) Ybarra authored during his incarceration." *Ybarra*, 247 P.3d at 277 (footnotes omitted).

In a detailed 46-page order, the district court determined that Ybarra had failed to meet his burden of proving intellectual disability. ECF No. 177 at 30-45, ECF No. 177-1 at 1-30. The court's analysis began by noting that the Nevada legislature had, in 2003, responded to *Atkins* by establishing procedures for a defendant to avoid the death penalty on the ground that he is "mentally retarded." ECF No. 177 at 33. The court further noted that "mentally retarded," in this context, is defined as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." *Id*. (quoting Nev. Rev. Stat. § 174.098(7)).

As a matter of first impression, the state district court determined that "the developmental period is up to age 18." *Id* at 39. With respect to Prong 1,[5] the court determined that Ybarra had not demonstrated, by a preponderance of the evidence, the existence of significant subaverage intellectual functioning. *Id*. at 39-45; ECF No. 177-1 at 1-19. This determination was based largely on a finding that Ybarra's test results had been the product of malingering. *Id*. The court also found that the evidence did not support a finding of deficits in adaptive behavior prior to age 25. ECF No. 177-1 at 19-26. The court then explained its concerns with the clinical judgments of

[5] As discussed by the Ninth Circuit and for the purposes of this order, the intellectual disability test consists of three "prongs:" Prong 1 is subaverage general intellectual functioning; Prong 2 is deficits in adaptive behavior; and Prong 3 is manifestation during the developmental period. *See Ybarra*, 869 F.3d at 1023–24.

Dr. Schmidt and Dr. M. Young. *Id*. at 26-30. Ybarra appealed the state district court's denial of *Atkins* relief to the Nevada Supreme Court.

Prior to Ybarra's appeal, the Nevada Supreme Court had yet to consider in a published decision, if at all, the provisions Nevada had enacted in response to *Atkins*.[6] The Nevada Supreme Court began its analysis by noting that Nevada's statutory definition of intellectual disability conforms to the clinical definitions used by two professional associations that are concerned with intellectual disability —the American Association on Intellectual and Developmental Disabilities (AAIDD)[7] and the American Psychiatric Association (APA). *Ybarra*, 247 P.3d at 273, *see also Atkins*, 536 U.S. at 308 n. 3 (citing the definitions of these two organizations). Relying on the age-of-onset used by the AAIDD and the APA and most jurisdictions, the state supreme court affirmed the age of 18 years as the end of the "developmental period." *Ybarra*, 247 P.3d at 276.

For a standard of review, the court announced it would defer to the lower court's factual findings as long as they are supported by substantial evidence and not clearly erroneous, but that it would review the legal consequences of those findings de novo. *Id*. After defining the elements of intellectual disability, the court examined the evidence presented in the district court, the district court's decision, and Ybarra's challenges to that decision, and concluded that the district

---

[6] Nev. Rev. Stat. § 174.098 allows a defendant facing a capital sentence to file a motion, not less than 10 days before the date set for trial, to declare that he is intellectually disabled. The provision Ybarra employed, Nev. Rev. Stat. § NRS 175.554(5), allows a person already sentenced to death without a prior determination regarding intellectual disability under Nev. Rev. Stat. § 174.098 to file a motion to set aside the death penalty by reason of intellectual disability. In either case, the proceedings on the motion are governed by Nev. Rev. Stat. § 174.098(2)–(7). *See Ybarra*, 247 P.3d at 273 n.3.

[7] Although this name had been adopted in 2006, the Nevada Supreme Court in *Ybarra* chose to refer to the organization by its prior name, the American Association on Mental Retardation (AAMR), because that was the name when *Atkins* was decided and when Ybarra first sought relief. *See id*. at 273 n.4.

court did not err in determining that Ybarra failed "to show that he suffered from significant subaverage intellectual functioning that manifested during the developmental period" and "to meet his burden of proving adaptive behavior deficits that manifested during the developmental period." *Id*. at 276-85. The specific aspects of the Nevada Supreme Court's decision relevant to the Ninth Circuit's remand are discussed in the analysis below.

III. AEDPA STANDARD

When the state court has adjudicated a claim on the merits, AEDPA forecloses habeas relief in federal court unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id*. § 2254(d)(2). The phrase "clearly established Federal law" in § 2254(d)(1) refers to the "governing legal principle or principles" previously articulated by the Supreme Court. *Lockyer v. Andrade*, 538 U.S. 63, 71 72 (2003). The § 2254(d)(2) standard is met only if this court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other grounds as stated in Murray*, 745 F.3d at 1000). This court's review under § 2254(d) is limited to the record that was before the state court. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

If a petitioner satisfies either subsection of § 2254(d), then the federal court considers the claim de novo. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (holding that when section 2254(d) is satisfied, "[a] federal court must then resolve the claim without the deference AEDPA

otherwise requires"); *Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008). Thus, this court may grant habeas relief only if it concludes both that § 2254(d) is satisfied and that, on de novo review, the petitioner is in custody in violation of the Constitution of the United States. *See Pizzuto v. Yordy*, 947 F.3d 510, 523 (9th Cir. 2019).

IV. DISCUSSION

Ybarra contends that the Nevada Supreme Court's adjudication of his *Atkins* claim meets both prongs of § 2254(d) and that, applying de novo review, he is entitled to relief under *Atkins*.

A. Section 2254(d)(1)

In his opening brief on remand, Ybarra relies on *Hill v. Anderson*, 881 F.3d 483, 492 (6th Cir. 2018), to argue that, notwithstanding the Ninth Circuit's aforementioned § 2254(d)(1) determination, the inclusion of the Greenspan report as part of the state court record makes the Nevada Supreme Court's decision an unreasonable application of, and contrary to, *Atkins*. The argument is premised on a contention that *Hill* held that a state court's failure to adhere to clinical standards for intellectual disability constitutes an unreasonable application of *Atkins*. According to Ybarra, the Greenspan report highlights how the Nevada Supreme Court deviated from clinical standards, so it brings § 2254(d)(1) back into play.

Granting *certiorari*, the Supreme Court subsequently overruled, explicitly, the holding in *Hill* that Ybarra relies upon in his opening brief. *See Shoop v. Hill*, 139 S. Ct. 504 (2019). Specifically, the Court in *Shoop* determined that the holding in *Moore v. Texas* (*Moore I*), 137 S. Ct. 1039 (2017),[8] was not clearly established federal law for the purposes of deciding whether

[8] In *Moore I*, the Court held that, while strict adherence to medical standards may not be required, determinations of intellectual disability "must be 'informed by the medical community's diagnostic framework.'" 137 S. Ct. at 1048 (quoting *Hall v. Florida*, 572 U.S. 701, 721 (2014)). As such, a court deciding an *Atkins* claim is not permitted to "disregard of current medical standards." *Id*. at 1049.

the state court's pre-*Moore I* decision satisfied § 2254(d)(1). *Id*. at 507-08. Thus, the court of appeals erred by relying "so heavily on *Moore*" in its § 2254(d)(1) analysis. *Id*. at 509.

In his reply filed after the issuance of *Shoop*, Ybarra modifies his argument to claim that, even without *Hall* and *Moore I*, the Nevada Supreme Court's decision was an unreasonable application of, and contrary to, *Atkins*. He fails to adequately explain, however, how the Greenspan report requires this court to deviate from the Ninth Circuit's conclusion that the Nevada Supreme Court's intellectual disability determination "passes muster under § 2254(d)(1)." *Ybarra*, 869 F.3d at 1024. Thus, that conclusion will not be altered.

B. Section 2254(d)(2)

The Ninth Circuit Court of Appeals determined that this court's § 2254(d)(2) analysis was flawed because it overlooked errors by the Nevada Supreme Court comparable to those committed by the Louisiana court in *Brumfield*. *Ybarra*. 869 F.3d at 1025-26. The Ninth Circuit noted that "Louisiana, like Nevada, relied on guidance from the APA and the AAMR to define intellectual disability," but the Louisiana state court, in denying *Atkins* relief, "made a number of statements that clearly contradicted those same guidelines." *Id*. The Ninth Circuit identified the following instances as examples of the Nevada Supreme Court doing likewise.

First, the Nevada Supreme Court "ignored evidence that Ybarra was bullied in school on the ground that it was irrelevant under Prong 2." *Id* at 1026. Second, "under Prong 3, the Nevada Supreme Court suggested that any diagnostic test conducted after the age of 18 was 'of little value.'" *Id*. (quoting *Ybarra*, 247 P.3d at 283). Third, while the Nevada Supreme Court's "malingering determination was reasonable …, the Prong 1 determination was unreasonable to the extent that it was based on the court's lay perception that Ybarra did not 'look like' a disabled person." *Id* at 1026-27.

A recent decision from the Ninth Circuit calls into question whether a state court's alleged failure to properly apply clinical standards to an *Atkins* claim is subject to analysis under § 2254(d)(2). *See Pizzuto*, 947 F.3d at 530 (holding that state court determinations inconsistent with clinical standards discussed in *Atkins* and *Hall* were not reviewable under § 2254(d)(2) because they involve "legal conclusions," not "factual determinations"). *Pizzuto* is distinguishable from this case and *Brumfield*, however, because "the Idaho Supreme Court did not purport to determine whether Pizzuto was intellectually disabled under the clinical definitions." *Pizzuto*, 947 F.3d at 530. So, despite *Pizzuto*, analysis under § 2254(d)(2) is called for where the state court makes findings in the context of determining whether the petitioner meets certain clinical standards for intellectually disability. Thus, if a state court's decision is based on findings that contradict the very intellectual disability guidelines it purports to be applying, it may fail to pass muster under § 2254(d)(2).[9]

Here, the state district court cited to AAMR, Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002) (hereinafter the "AAMR-10"), throughout its decision and used the manual's guidelines to determine whether Ybarra is intellectually disabled. ECF No. 177 at 38-45, ECF No. 177-1 at 1-27. The Nevada Supreme Court relied on the same source in its opinion and also referenced the APA and the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) (commonly referred to as the DSM-IV). *Ybarra*, 247 P.3d at 274-75. Against the backdrop of these guidelines and the Ninth Circuit's remand, the court now addresses "whether the Nevada Supreme Court made a

[9] As discussed above, however, the extent to which the state court is required to adhere clinical standards is dictated by Supreme Court precedent in place at the time and is reviewable under § 2254(d)(1).

reasonable or an unreasonable determination of fact when it concluded that [Ybarra] is not [intellectually disabled]." *Ybarra*, 869 F.3d at 1033.

Adaptive behavior deficits

In deciding Ybarra's appeal, the Nevada Supreme Court recognized that "'[a]daptive behavior' has been defined as the 'collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives,' and thus, 'limitations on adaptive behavior are reflected by difficulties adjusting to ordinary demands made in daily life.'" *Ybarra*, 247 P.3d at 274 (citations omitted). The court recounted the state district court's ruling on alleged deficits in adaptive behavior as follows:

> The district court also concluded that Ybarra failed to present sufficient evidence to establish significant adaptive behavior deficits that manifest during the developmental period. As to Ybarra's adaptive behavior before age 18, the district court concluded that minimal evidence supported any adaptive deficits. The court specifically found incredible Dr. Schmidt's conclusion that bullying by school peers and poor academic performance indicated an adaptive deficit, and instead found that Ybarra's academic and social problems could also be explained by his alcohol and drug abuse, as the other defense expert (Dr. M. Young) acknowledged. And the court pointed out that despite those problems, Ybarra managed to attend night school to secure his adult education diploma while maintaining employment. The district court also rebuffed Dr. Schmidt's opinion that Ybarra had adaptive deficits because he held only menial or minimum-wage jobs, noting that persons under 18 typically hold menial jobs and that Ybarra worked as a forklift driver for several years. The district court also found unpersuasive Dr. Schmidt's reliance on the lack of evidence that Ybarra lived independently, at least before the age of 18, as proof of adaptive deficits because most children do not live independently before the age of 18.
>
> The district court was also unpersuaded by evidence Ybarra introduced concerning adaptive-behavior deficits exhibited between the ages 18 and 25 years. In particular, the district court found incredible Dr. Schmidt's conclusion that Ybarra was unable to hold a job, noting that Ybarra was employed for lengthy periods of time at salaries that exceeded minimum wage at the time. As to Ybarra's brief military service, the district court rejected Dr. Schmidt's opinion that this evidenced adaptive-behavior deficits as Ybarra was discharged for reasons that had nothing to do with his ability to adjust to the ordinary demands of daily life—he was discharged from the Marine Corps the first time for homosexuality and the second time for fraudulent enlistment, and was discharged

> from the Army National Guard for a medical condition. Further, the district court found that the record did not support Dr. Schmidt's conclusion that Ybarra was unable to live independently, pointing out that Ybarra moved to California, Oregon, Montana, and Nevada and secured living quarters and employment, and was married for a brief time.

Ybarra, 247 P.3d at 280–81.

In affirming the state district court's findings, the Nevada Supreme Court rejected Ybarra's arguments that the lower court "(1) disregarded evidence substantiating [adaptive behavior deficits] and (2) improperly relied on its own lay opinions that are contrary to the evidence." *Id*. at 284. With respect to the former, the court concluded:

> [T]he district court was in the best position to assess the credibility of the experts' testimony, and, although Ybarra disagrees with the district court's findings related to adaptive deficits, substantial evidence supports the district court's finding that Ybarra did not meet his burden of proving this element of mental retardation.

Id. As to the latter, the court held that, rather than improperly rely on its lay opinion, the lower court "considered the evidence, making reasonable inferences from it, and ultimately concluded that Ybarra failed to show adaptive behavior deficits considering his alcohol and drug abuse during his youth, his work record, military service, ability to live independently and travel, and written communications in prison." *Id*. The question posed on remand is whether state court's findings on adaptive behavior deficits were reasonable despite the Ninth Circuit's determination that the state court erroneously ignored evidence that Ybarra was bullied in school.

Ybarra argues that "[t]he Nevada Supreme Court's analysis of adaptive behavior resulted in an unreasonable determination of the facts because it ignored the clinical standards." ECF No. 299 at 64. As noted, the Ninth Circuit faulted the Nevada Supreme Court for "ignor[ing] evidence that Ybarra was bullied in school on the ground that it was irrelevant under Prong 2." *Ybarra*, 869 F.3d at 1026. In particular, the Ninth Circuit noted that "the AAMR specifically lists

'gullibility' and an inability to 'avoid[ ] victimization' as examples of limited social adaptive skills." *Id*.

Having reviewed the state court record in light of the Ninth Circuit's decision, this court concludes that the Nevada Supreme Court's Prong 2 determination was based on an unreasonable determination of the facts. This conclusion is based, in part, on the error the Ninth Circuit identified – i.e., the Nevada courts' failure to give due weight to evidence that Ybarra was bullied in school. It is also based on abundant evidence of Ybarra's poor academic performance and Dr. Greenspan's assessment based on objective testing.

The fact that Ybarra was the victim of bullying while in school and prior to the age of 18 is not disputed. Dr. Schmidt testified about Ybarra being the object of taunts and physical abuse from his fellow students and opined that it demonstrated a deficit in adaptive behavior. ECF No. 211-4 at 5-6. The basis for this testimony was a 1969 report that provided detailed background information on Ybarra, who was 15 years old at the time, for the apparent purpose of referring him for psychological counseling. *Id*.; ECF No. 201-5 at 49.[10] Dr. Greenspan interviewed Ybarra's cousin, Martin Ybarra, who, according to Greenspan's report, "indicated that kids in school would call [Robert Ybarra] 'retard' on a daily basis, would pick on him unmercifully, and cause him to come home crying repeatedly." ECF No. 177-2 at 44.

As noted by the Ninth Circuit, the state court erred by disregarding this evidence as suggestive of an adaptive behavior deficit. Even so, respondents argue that Ybarra's victimization could be attributed to his "problem behavior" rather than an adaptive behavior

[10] The report appears in the record with a letter from a psychiatrist, Dr. William M. Asher, M.D., which is dated one day after the report and recommends that Ybarra be referred "to State Vocational Rehabilitation for additional counseling." ECF No. 201-5 at 48. While the documents are obviously related, it is not clear that Dr. Asher was the author of the report.

deficit, which, according to the respondents, was another reason the state court rejected the evidence, relying on AAMR guidelines. ECF No. 307 at 34. The problem with this argument is twofold. First, the "problem behavior" the state district court cited in this context was "the large amounts of alcohol and drugs [Ybarra] was taking every day," but even if such was occurring, there is a paucity of evidence in the record showing a connection between Ybarra's purported substance abuse and the bullying he endured.[11] Second, the state district court cited to the AAMR-10 for the proposition that "the presence of problem behavior is not considered to be a limitation in adaptive behavior" (ECF No. 177-1 at 23), but the court lacked any clinical basis for designating Ybarra's difficulties interacting with his peers as the former to the exclusion of the latter. *See* AAMR-10 at 74-80; *Moore v. Texas* (*Moore II*), 139 S. Ct. 666, 671 (2019) (holding that court of appeals erred by requiring petitioner "to show that the 'cause of [his] deficient social behavior was related to any deficits in general mental abilities' rather than 'emotional problems'").

In addition to Ybarra's social limitations, evidence in the record shows that Ybarra had significant deficits in academic skill in the developmental period. His report cards and transcripts show that, from the fourth grade until he left high school, he received mostly Ds and Fs.[12] ECF No. 212-3 at 34-59; ECF No. 201-5 at 53. In the letter mentioned above, sent when Ybarra was 15 years old, Dr. Asher advised the vice principal of Ybarra's high school that Ybarra "should

[11] The state district court appears to have made this connection based on a portion of a single sentence from Dr. M. Young's written evaluation. ECF No. 177-1 at 23 fn.64 (citing to ECF No. 211-3 at 14). Viewed in context, the cited language from the evaluation does not support a finding that Ybarra was bullied because of his substance abuse. To the extent the Nevada Supreme Court adopted such a finding, it did so unreasonably. *See Ybarra*, 247 P.3d at 280.

[12] When he was 9 years old, about the time he was in the fourth grade, Ybarra suffered a significant head injury as result of being struck in the forehead with a railroad tie. ECF No. 177 at 34; *Ybarra*, 247 P.2d at 277.

receive a medical exclusion from school" because he had "gone about as far as he can within limits of his intellectual and emotional capacities." ECF No. 201-5 at 49. In his testimony, Dr. Schmidt considered Ybarra's academic performance to be among his adaptive behavior deficits. ECF No. 211-4 at 2-6.

As with Ybarra's social problems, the state district court surmised that drug and alcohol abuse were the cause Ybarra's academic problems, but again without appreciable testimony or documentary evidence to support a causal connection. ECF No. 177-1 at 20, 23-24. The state district court also rejected the possibility that academic failure could be an adaptive deficit because Ybarra "continued in night school while working a job," which showed "his ability to adapt and respond to a bad situation." *Id*. at 20. While not cited as a specific example of a statement the Ninth Circuit found "troubling," this is another instance of the state court rejecting an expert opinion and substituting its own without any clinical basis for doing so. *See Ybarra*, 869 F.3d at 1026 (citing *Van Tran v. Colson*, 764 F.3d 594, 610 (6th Cir. 2014)).

Finally, Dr. Greenspan's report supports a finding that the Nevada Supreme Court unreasonably found that Ybarra had failed to meet his burden of proving significant adaptive behavior deficits. Dr. Greenspan used a standardize assessment instrument – the Behavior Assessment Scale, 2nd Edition (ABAS-2) – to assess Ybarra's adaptive behavior, targeting the ages 16-17. ECF No. 215-1 at 44-46. Administered to Ybarra's cousin Martin, who was able to provide specific information about Ybarra's functioning during the relevant period, the ABAS-2 assessment produced scores of 63 on Conceptual Adaptive Behavior, 72 on Practical Adaptive Behavior, 66 on Social Adaptive Behavior, and 60 on Composite (overall) Adaptive Behavior. *Id*. According to Greenspan's report, the scores "far exceed[] the AAIDD requirement" which requires "significant deficits in only one of the four ABAS-2 areas." *Id*.

Thus, based on the foregoing, this court concludes that the Nevada Supreme Court's adaptive behavior deficit analysis relied on an unreasonable determination of the facts for the purposes § 2254(d)(2).

Intellectual functioning

For the intellectual functioning component, the Nevada Supreme Court relied on the DSM-IV standard which provides that "[b]ecause 'there is a measurement error of approximately 5 points in assessing IQ, … the clinical definitions indicate that 'individuals with IQs between 70 and 75' fall into the category of subaverage intellectual functioning." *Ybarra*, 247 P.3d at 274. The court also recognized evidence other than objective IQ testing may be used to demonstrate subaverage intellectual functioning, "[b]ut the burden remains on the defendant to present evidence affirmatively establishing this element of mental retardation." *Id*. (citing Nev. Rev. Stat. § 174.098(5)(b)).

The court recounted the state district court's ruling on subaverage intellectual functioning behavior as follows:

> The district court concluded that Ybarra failed to present sufficient evidence to establish significant subaverage intellectual functioning that manifested during the developmental period. The court was persuaded in part by the fact that Ybarra was not tested for mental retardation before age 18, and despite contact with various school officials, no one suspected that he was mentally retarded. The district court observed that Ybarra obtained his adult education diploma and that military records described him as having "dull normal" or "borderline" intelligence, which the experts agreed was not in the range of mental retardation. The district court concluded that, at best, the evidence showed that Ybarra had below average intelligence prior to age 18.
>
> The district court explained that even if it accepted Dr. Schmidt's testimony that the developmental period extends to age 25, noting that no jurisdiction has done so, Ybarra nevertheless failed to produce sufficient evidence of subaverage intellectual functioning that manifested before age 25, considering documentary evidence from other psychologists and psychiatrists describing Ybarra as having "borderline," normal, or low normal intelligence and IQ scores of 86 and 70 to 80. And the court rejected Dr. Schmidt's opinion regarding

> Ybarra's intellectual functioning as incredible, noting that with all the testing and observation of Ybarra from 1979 to 2002, Dr. Schmidt was the first to conclude that Ybarra was mentally retarded but his report contained a "bold-faced disclaimer" that Ybarra's IQ score "may underestimate his actual intelligence functioning" "due to the severe distress that some portions of the ... testing caused" Ybarra. The district court also focused on Dr. Schmidt's admission that he gave no specific test for malingering, whereas the State's expert administered a test to detect malingering that produced a score that was "off the scale," indicating that Ybarra was malingering. The district court also found that Dr. Schmidt's conclusions regarding the effects of Ybarra's brain damage and of his poor judgment and limited ability to solve problems, handle stress, and deal with his hallucinations did not "withstand scrutiny in the context of Ybarra's real life actions and functioning." The district court further identified in great detail additional evidence of malingering and intellectual functioning that fell outside the range of mental retardation, including: (1) that Ybarra had a motive to fake performance on mental health tests; (2) reports by other mental health professionals that Ybarra was malingering or exaggerating symptoms of mental disorder and displaying psychotic behavior; (3) reports that Ybarra played cards, backgammon, scrabble, and other games while at a mental health facility (Lake's Crossing); (4) a report that Ybarra's hallucinations were not "valid"; (5) suggestions and inferences by mental health professionals that Ybarra feigned incompetence; (6) hundreds of prison kites concerning medical issues showing a level of intelligence beyond a mildly mentally retarded individual; and (7) medical progress notes suggesting that Ybarra feigned mental illness to remain in the prison mental health unit.

Ybarra, 247 P.3d at 279-80 (footnote omitted).

In affirming the state district court's findings, the Nevada Supreme Court rejected Ybarra's arguments that the lower court "(1) erroneously focused on [an] 1981 IQ test to the exclusion of the IQ results Dr. Schmidt obtained and (2) erroneously relied on the tests administered by the State's expert because he used improper testing instruments, scoring, and administration techniques." *Id*. at 281. In affirming the lower court's reliance on the 1981 IQ test that yielded a score of 86, the Nevada Supreme Court held that the lower court did not disregard Dr. Schmidt's testimony about the Flynn effect,[13] but instead gave valid reasons for finding it

[13] As noted by the Nevada Supreme Court, "the Flynn effect … refers to a body of work suggesting that IQ test scores show an upward drift over time until the test is re-normed." *Ybarra*, 247 P.3d at 279.

incredible. *Id*. at 282. It also held that the lower court relied on other evidence that corroborated the result of the 1981 IQ test and that a determination as to the Flynn effect was unnecessary because the test "was administered well after [Ybarra] turned 18 years of age." *Id*. at 282-83.

As for Ybarra's argument that the lower court improperly relied on Dr. T. Young's test results, the Nevada Supreme Court rejected this argument because the score on the IQ test Dr. T. Young administered, if valid, would have placed Ybarra in the mild range of intellectual disability and the result of the TOMM (Test of Memory Malingering) was corroborated by "a wealth of other evidence" that Ybarra was malingering. *Id*. at 283.

The Ninth Circuit agreed that the Nevada courts' malingering determination was reasonable in light of the clinical expertise of Dr. T. Young, who "specifically described Ybarra's 'bizarre' performance on a number of tests, including a 'complex figure test' where his score was worse than that of an Alzheimer's patient or a person with a 'debilitating' or 'severely horrible disease[ ].'" *Ybarra*, 869 F.3d at 1026. The Ninth Circuit's concern, however, was the Nevada Supreme Court's statement that "[t]he record as a whole ... portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning." *Id*. (citing *Ybarra*, 247 P.3d at 282). The Ninth Circuit noted that, based on "relevant clinical guidelines," such an assessment by the state court was unreasonable because it "is a task that requires specialized professional training.'" *Id*. (quoting AAMR-10, at 51). Thus, the question posed on remand with respect to intellectual functioning is whether the "[state] court's lay perception that Ybarra did not 'look like' a disabled person" infected its analysis to the extent that it rendered its Prong 1 determination unreasonable. *Id*. at 1026-27.

As Ybarra notes in his opening brief, the relevant clinical guidelines "require that subaverage intellectual functioning be evaluated based on standardized IQ tests." ECF No. 299 at

55 (citing the AAMR-10 at 52, DSM-IV-TR at 41). In addition, Nevada places on the defendant raising an *Atkins* claim "the burden of proving by a preponderance of the evidence that the defendant is intellectually disabled." Nev. Rev. Stat. § 174.098(5)(b). At the core of the state district court's decision is a finding that Ybarra had not presented evidence of a valid IQ score that would place him in the category of subaverage intellectual functioning. ECF No. 177 at 39-45, ECF No. 177-1 at 1-19. Added to that was an IQ score that placed Ybarra well above the intellectual disability threshold that the state district court determined to be valid and "consistent with the numerous other doctors and evaluators who believed that Ybarra was dull-normal or borderline (which is not mentally retarded)." ECF No. 177-1 at 1.

Dr. Schmidt tested Ybarra, then 48 years old, using the Wechsler Adult Intelligence Scale (3d edition) (WAIS–III) and obtained a full-scale IQ score of 60. ECF 211 at 50-51; ECF No. 211-1 at 2-20. The state district court's reasons for rejecting the result as evidence of subaverage intellectual functioning are recounted in the above excerpt from the Nevada Supreme Court's opinion. One reason was Dr. Schmidt's disclaimer regarding the accuracy of the result. ECF No. 177-1 at1-2. Dr. Schmidt testified at the state court evidentiary hearing that "it was a problematic testing at best." ECF No. 211-3 at 70. The state district court also determined, citing both Dr. Schmidt's and Dr. T. Young's testimony, that Dr. Schmidt had failed to adequately account for the possibility that Ybarra was malingering. ECF No. 177-1 at 2-3. The Nevada Supreme Court did not disturb this finding on appeal.

There was only one other IQ score presented to the state court when it adjudicated Ybarra's *Atkins* claim that placed him in the category of subaverage intellectual functioning. That was the full-scale IQ score of 66 obtained by Dr. T. Young when he attempted to administer the Wechsler Abbreviated Scale of Intelligence (WASI) in 2007, when Ybarra was 54 years old.

ECF 214 at 2-7. Dr. T. Young testified unequivocally that, due to Ybarra's bizarre responses and his results on the TOMM, the IQ score "was not even closed to being valid." ECF No. 212-1 at 56-61. Giving credence to Dr. T. Young's opinion, the state district court found the score to be invalid. ECF No. 177-1 at 18-19. Here again, the Nevada Supreme Court did not disturb this finding on appeal.

The 1981 IQ test that resulted in a score of 86 was the WAIS administered by Dr. Martin Gutride, when Ybarra was 27 years old. ECF No. 205-1 at 5-8; *Ybarra*, 247 P.3d at 278. In his testimony, Dr. Schmidt questioned the result because the test was 26 years old when it was administered and, due to the Flynn effect, the score would "artificially inflate the intellectual functioning of the individual that's in the mildly retarded range." ECF No. 211-4 at 35-36. He also expressed concern that the test "was given by an intern." ECF No. 212 at 6. Dr. Schmidt testified that Flynn effect could have inflated the score by 15 points. ECF No. 212-2 at 63.[14]

The state district court found Dr. Schmidt's testimony on the Flynn effect to be unconvincing. ECF NO. 177 at 45, ECF No. 177-1 at 1. Specifically, the court noted that "numerous courts ha[d] rejected the notion of adjusting IQ scores to accommodate the Flynn effect," the AAMR manual did not specifically recommend an adjustment, and, in any event, the adjustment would at most be only 8 points, bringing the score down to 78. *Id*. The court also noted that Dr. Schmidt, in his testimony, "admitted that he really could not talk about the validity of the 1981 test score." *Id*. (citing ECF No. 212 at 22-23). On appeal, the Nevada Supreme Court affirmed the state district court's assessment of the 1981 IQ test. *Ybarra*, 247 P.3d at 282.

[14] Dr. Schmidt also conceded that the WAIS was the best IQ test available to Dr. Gutride at the time because the WAIS-R did not come out until later in 1981. ECF No. 212-2 at 61-62.

Given these findings, this court is unable to conclude that the "[state] court's lay perception that Ybarra did not 'look like' a disabled person" had a significant impact on the Nevada Supreme Court's determination that Ybarra did not fall into the category of subaverage intellectual functioning. Again, Ybarra had the burden of proving this element by a preponderance of the evidence. And, while a qualifying IQ score on a standardized test was not imperative to meet the burden, Ybarra concedes that clinical guidelines "require that subaverage intellectual functioning be evaluated based on standardized IQ tests." ECF No. 299 at 55 (citing the AAMR-10 at 52, DSM-IV-TR at 41).

The Nevada Supreme Court did not unreasonably find any of Ybarra's IQ scores invalid based on its lay perception of Ybarra's intellectual functioning. Though not specified as such, the statement by the Nevada Supreme Court that raised concern with the Ninth Circuit was a direct quote from the state district court's decision. *Ybarra*, 869 F.3d at 1026 (citing *Ybarra*, 247 P.3d at 282); ECF No. 177-1 at 18. The statement appears near the end of a section captioned, "Malingering and Other Evidence of Intellectual Functioning," and the sentence from which it was taken read, in its entirety, as follows:

> "The record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning now or during his developmental years."

ECF No. 177-1 at 18.

In the section, the state district court recounted "numerous observations by various doctors and others that Ybarra is a faker or malingering." *Id*. at 4-18. The court also cited to "numerous letters written by Ybarra while … awaiting trial" and the "hundreds of 'kites'" written while he was in prison. *Id*. According to the court, these writings contained evidence of both Ybarra attempting to manipulate the legal process and a "clarity of thought" or "level of

intelligence" inconsistent with "the claim of significant subaverage intellectual functioning." *Id*. In addition, the court quoted several examples from "hundreds of pages of medical progress notes" which, according to the court, "portray[ed] Ybarra as a man who knows how to manipulate and fake (or exaggerate) symptoms of mental illness to accomplish his goals." *Id*. Finally, *after* the statement quoted by the Ninth Circuit, the state district court concluded the section by discussing Dr. T. Young's testing and noting his conclusion that the record contained "no valid IQ test result for Ybarra below 70." *Id*. at 18-19.

Viewed in context, the Nevada Supreme Court's reference to the state district court's observation about how "the record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra" was not tantamount to the Nevada Supreme Court rejecting Ybarra's *Atkins* claim because he "did not 'look like' a disabled person." Instead, Nevada Supreme Court was making the point that, separate and apart from the 1981 IQ test score well above the threshold for intellectual disability, the record contained ample evidence that Ybarra did not "suffer[] from significant subaverage intellectual functioning" and that he was malingering. *Ybarra*, 247 P.2d at 282.

If the Nevada Supreme Court had relied on its "lay perception" of Ybarra as a reason to reject convincing evidence of Ybarra's subaverage intellectual functioning, such as a valid IQ score of 75 or below, this court agrees that such reliance would be cause for concern under § 2254(d)(2). That is not what happened here, however. Instead, as discussed above, the state district court found, and the Nevada Supreme Court affirmed, that the sub-75 scores obtained by Dr. Schmidt and Dr. T. Young were invalid for reasons apart from the court's analysis and finding that "[t]he record as whole … portray[ed] Robert Ybarra as a person who does not have significant subaverage intellectual functioning." Because Ybarra did not otherwise meet his

burden of showing the state court that he satisfied Prong 1, this court cannot conclude that the Nevada Supreme Court's Prong 1 determination was unreasonable under 28 U.S.C. § 2254(d)(2).

Dr. Greenspan's report does not change this result. While his report provided solid evidence of Ybarra's adaptive behavior deficits, there are reasons to question Dr. Greenspan's Prong 1 analysis. To begin with, the court is troubled that two versions of the report have been filed in this case, with the first demonstrating that Dr. Greenspan failed to carefully review the materials upon which he based his Prong 1 findings.

The first version of the report was filed with Ybarra's Rule 60(b) motion and is dated February 19, 2012. ECF No. 177-2 at 36-47. That report states that "testing by four qualified psychologists resulted in test scores substantially lower than those obtained by Dr. Gutride through his intern," but the report only identifies three – Dr. Schmidt, Dr. T. Young, and Dr. Mack. ECF No. 177-2 at 41-42. With respect to the first two, Dr. Greenspan does not address any of the concerns raised by their reports and testimony (or the state court's findings on those points) other than to mention that Dr. Schmidt felt that the score he obtained "might be a slight underestimate of Mr. Ybarra's intelligence, given that he seemed to be somewhat distressed." *Id*. And, despite Dr. T. Young's clear position to the contrary, the report states that "[n]one of these psychologists questioned the sincerity of Mr. Ybarra's effort." *Id*. The second version of the report, the one presented to the Nevada Supreme Court, is dated March 28, 2012, and corrects, for the most part, these errors and omissions (presumably after they were brought to Dr. Greenspan's attention). ECF No. 215-1 at 38-50. *Id*. at 42-44. Even so, the fact remains that both reports were signed by Dr. Greenspan and filed as exhibits in this case.

As for the results obtained by Dr. Mack, the issue of whether Dr. Mack's assessment was presented to the Nevada courts for purposes of § 2254(d) has been litigated in this case. This

court determined that it was not, and that determination was not disturbed on appeal. ECF No. 252 at 3-4. Thus, this court gives little weight to Dr. Greenspan's interpretation of Dr. Mack's findings. In addition, other statements throughout Dr. Greenspan's report give this court pause. For example, it states: "The Nevada Courts concluded that Mr. Ybarra was malingering because he played cards, backgammon, scrabble and other games while at a mental health facility." ECF No. 215-1 at 47. This is plainly inaccurate. Reports of Ybarra playing these games constituted a very small part of the state district court's malingering analysis. The state court placed much more emphasis on other evidence, such as reports from many health care professionals going back to the time of Ybarra's arrest and the level of sophistication and writing skill demonstrated by his numerous letters and prison kites.[15] ECF No. 177-1 at 4-19.

Thus, based on the foregoing, this court concludes that the Nevada Supreme Court's intellectual functioning determination was not based on an unreasonable determination of the facts for the purposes § 2254(d)(2).

Age of onset

The Ninth Circuit correctly held that the Nevada Supreme Court deviated from clinical guidelines by "suggest[ing] that any diagnostic test conducted after the age of 18 was 'of little

[15] Dr. Greenspan gave Ybarra's written communications short shrift by focusing only on the prison kites, which he suggested were nothing more than "basic and routinized requests" and possibly written with the assistance of other inmates. *Id*. at 46-47. The state court cited several examples from Ybarra's kites and letters that went well beyond "basic and routinized" requests, such as one to a doctor in which Ybarra stated he had hypothyroidism and wrote that he wanted "any literature you have on the thyroid gland pertaining to its uses, functions, you know, why it's there, what it does. I really don't know anything about it…." ECF No. 177-1 at 7-18. Another example was "a scathing letter to a company that had apparently repossessed [Ybarra's] truck." ECF No. 177 at 101; ECF No. 212 at 101; ECF No. 212-1 at 2. As for the possibility that Ybarra had assistance, the state district court expressly rejected the notion that anyone other than Ybarra was the "author of hundreds of kites and letters which are mostly articulate, to the point, and written in his own hand." ECF No. 177-1 at 24; *see also Ybarra*, 247 P.3d at 279, 280 n.15.

value.'" *Ybarra*. 869 F.3d at 1026 (quoting *Ybarra*, 247 P.3d at 283). Plainly, petitioners raising an *Atkins* claim may rely on scores from tests conducted after their developmental period to demonstrate their intellectual functioning within the period. *See id*. n.10 ("[R]equiring individuals to provide formal test scores from their developmental period would likely 'creat[e] an unacceptable risk that persons with intellectual disability will be executed' because not everyone who is intellectually disabled receives formal testing at a young age." (quoting *Hall*, 572 U.S. at 704)). As the Ninth Circuit noted, "the AAMR specifically contemplates retrospective assessment when there are no test scores available from the developmental period." *Id*. (citing AAMR-10 at 93-94).

While it may have "overlooked" this deviation from guidelines in its prior decision, this court concludes that the error did not render the Nevada Supreme Court's intellectual disability determination unreasonable under § 2254(d)(2). As discussed above, the only sub-75 IQ scores presented to the Nevada courts were determined to be invalid. And, just as the state court's "lay perception" of Ybarra was not the reason, the fact that the tests were administered beyond the developmental period was also not the reason the state court found them to be invalid.[16]

Instead, the *only* test scores the state district court found to be valid were those obtained by Dr. Gutride's testing in 1981. ECF No. 177 at 43-44. The Nevada Supreme Court reasonably rejected Ybarra's challenges to the validity of those results, concluding that the state district court's assessment of the Flynn effect "was not without foundation." *Ybarra*, 247 P.3d at 282. In his report, Dr. Greenspan discusses the Flynn effect, but, like the state court, his adjustment only

[16] There is a clear distinction between finding a test result to be invalid as opposed to suggesting it was "of little value."

brings the Gutride score of 86 down to 78.[17] ECF No. 215-1 at 43. His only other challenges to Dr. Gutride's testing are third-hand allegations from a neoropsychologist's report claiming that Dr. Gutride "used an obsolete test with outdated norms" and "did not personally evaluate Mr. Ybarra himself instead transferring the responsibility to an intern." *Id*. What little credence these allegations might have are refuted by evidence that Dr. Gutride used the then-current version of the WAIS and that, notwithstanding any role the intern may have had, the test results had Dr. Gutride's imprimatur.[18]

Given the 1981 IQ score and the complete absence of a valid sub-75 score in the state court record, the "retrospective assessment" recommended by the Ninth Circuit would not have benefitted Ybarra's *Atkins* claim in state court. Simply put, if there was no valid test score before the state court establishing that Ybarra fell within the range of subaverage intellectual functioning *at any point*, it matters not that the Nevada Supreme Court failed to conduct or consider a retrospective assessment to determine if he did so within the developmental period. Consequently, the Nevada Supreme Court's "suggest[ion] that any diagnostic test conducted after the age of 18 was 'of little value'" did not render its Prong 3 determination unreasonable.

V. CONCLUSION

Based on the foregoing, this court concludes that, notwithstanding its erroneous adaptive deficits analysis, the Nevada Supreme Court's intellectual functioning determination stands as "an 'independent basis' for the intellectual disability determination, thus rendering it reasonable under AEDPA." *Ybarra*, 869 F.3d at 1027 (citing *Moore I*, 137 S.Ct. at 1053 (Chief Justice

---

[17] The report actually indicates an adjusted score of 77, but Ybarra concedes that "Dr. Greenspan made a minor mathematical error." ECF No. 299 at 75 n.45.

[18] Ybarra's argument that the score should be disregarded because Dr. Gutride's original testing data are not available is also without merit. *See Smith v. Ryan*, 813 F.3d 1175, 1186 (9th Cir. 2016).

Roberts's dissent "arguing that a proper determination under Prong 1 insulated an otherwise improper intellectual disability determination"). Having so concluded "in light *Brumfield* and in light of the Greenspan report" (*Id*. at 1033), this court will again defer, under 28 U.S.C. § 2254(d), to the state court decision to deny *Atkins* relief. Accordingly, the court will not conduct a de novo review of Ybarra's *Atkins* claim.

IT IS THEREFORE ORDERED that petitioner's motion for relief under Rule 60(b) (ECF No. 176) is DENIED with prejudice.

IT IS FURTHER ORDERED that the court grants a certificate of appealability as to the following issue:

> Whether this court erred in deferring, under 28 U.S.C. § 2254(d), to the state court's finding that petitioner is not intellectually disabled as contemplated by *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny.

Dated: September 23, 2020

U.S. District Judge Gloria M. Navarro

APPENDIX D

Opinion, *Ybarra v. Filson, Warden*, Ninth Circuit
Court of Appeals, Case No. 20-99012
(September 1, 2017)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT YBARRA, JR., *Petitioner-Appellant*, v. TIMOTHY FILSON, Warden, *Respondent-Appellee.*	No. 13-17326 D.C. No. 3:00-cv-00233- GMN-VPC

ROBERT YBARRA, JR., *Petitioner-Appellant*, v. TIMOTHY FILSON, Warden; ADAM PAUL LAXALT, Nevada Attorney General, *Respondents-Appellees.*	No. 17-15793 D.C. No. 3:00-cv-00233- GMN-VPC

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, Chief Judge, Presiding

ROBERT YBARRA, JR., *Petitioner*, v. TIMOTHY FILSON, Warden; ADAM PAUL LAXALT, Nevada Attorney General, *Respondents.*	No. 17-71465 OPINION

Application to File Second or Successive Petition
under 28 U.S.C. § 2254

Argued and Submitted July 21, 2017
San Francisco, California

Filed September 1, 2017

Before: Barry G. Silverman, Richard C. Tallman,
and Richard R. Clifton, Circuit Judges.

Opinion by Judge Tallman

SUMMARY*

Habeas Corpus / Death Penalty

The panel (1) vacated the district court's order denying Nevada state prisoner Robert Ybarra's motion under Fed. R. Civ. P. 60(b) to reopen his habeas corpus proceedings challenging his death sentence based on *Atkins v. Virginia*, 536 U.S. 304 (2002), and remanded for reconsideration; (2) affirmed the district court's order denying Ybarra's Rule 60(b) motion raising a claim based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), which invalidated Florida's capital sentencing scheme; and (3) denied Ybarra's application for leave to file a second or successive habeas petition raising a claim based on *Hurst*.

Ybarra claims that he is categorically exempt from the death penalty because he is intellectually disabled. The panel held that Ybarra's *Atkins*-based Rule 60(b) motion was not a disguised second or successive habeas petition, and that the district court therefore did not err in concluding that it had jurisdiction to consider it. Reviewing de novo, the panel held that the district court erred in its AEDPA analysis of the *Atkins*-based motion by overlooking a number of instances where the Nevada Supreme Court contradicted the very clinical guidelines that it purported to apply, which is especially problematic in light of the decision in *Bromfield v. Cain*, 135 S. Ct. 2269 (2015), and by refusing to consider a doctor's report concluding that Ybarra was intellectually

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

disabled, which was part of the record under *Cullen v. Pinholster*, 563 U.S. 170 (2011).

The panel held that the Ybarra's *Hurst*-based Rule 60(b) motion was a disguised and unauthorized second or successive habeas petition, and therefore affirmed the district court's order denying the motion.

The panel held that *Hurst* does not apply retroactively, and therefore denied Ybarra's properly-filed application for leave to file a second or successive habeas petition in which he argues, based on *Hurst*, that Nevada's capital sentencing scheme is unconstitutional.

COUNSEL

Randolph M. Fiedler (argued) and Michael Pescetta, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Petitioner-Appellant.

Jeffrey M. Conner (argued), Assistant Solicitor General; Adam Paul Laxalt, Attorney General; Office of the Attorney General, Carson City, Nevada; for Respondents-Appellees.

OPINION

TALLMAN, Circuit Judge:

On September 28, 1979, Robert Ybarra kidnapped, beat, and sexually assaulted sixteen-year-old Nancy Griffith in rural White Pine County, Nevada. He then doused her in gasoline, set her on fire, and left her to die a slow and

agonizing death. At trial, he pled not guilty by reason of insanity. But the jury rejected his defense, found him guilty, and determined that his crime was sufficiently aggravated to warrant the death penalty.

There is no question that Ybarra's crime falls within the "narrow category of the most serious crimes" that would ordinarily render him eligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). But Ybarra now claims he is categorically exempt from the death penalty because he is intellectually disabled. *See Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) ("States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" (alteration in original) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

The Nevada Supreme Court rejected Ybarra's claim of intellectual disability on the merits. *See Ybarra v. State*, 247 P.3d 269 (Nev. 2011). The district court then deferred to its determination under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). For reasons explained below, we vacate its order in Case No. 13-17326, and remand for reconsideration.

To be clear, we express no view as to whether the Nevada Supreme Court's intellectual disability determination was reasonable, in which case the district court should again defer to it; or unreasonable, in which case the district court should "proceed to consider" Ybarra's *Atkins* claim de novo. *See Maxwell v. Roe*, 628 F.3d 486, 494–95 (9th Cir. 2010). Instead, we give the district court an opportunity to consider a number of issues in the first instance. *See Badea v. Cox*, 931 F.2d 573, 575 n.2 (9th Cir. 1991) ("[W]e see no reason to decide *ab initio* issues that the district court has not had an opportunity to consider . . . .").

On the other hand, we conclude that the arguments raised in the consolidated matters, which rely on *Hurst v. Florida*, 136 S. Ct. 616 (2016), are without merit. We therefore affirm the district court's order dismissing that claim in Case No. 17-15793, and we deny Ybarra's application for leave to file a second or successive habeas petition in Case No. 17-71465.

Background

This case has a complex and protracted history spanning nearly thirty-eight years. It involves several rounds of habeas review, a variety of motions, and a number of obscure procedural issues. Although we have tried to limit our discussion to the procedural matters immediately relevant on appeal, even our summary is lengthy.

Ybarra was convicted and sentenced to death in 1981. After his conviction and sentence were affirmed on direct appeal, *see Ybarra v. State*, 679 P.2d 797 (Nev. 1984), he sought relief on collateral review. In total, he filed five state and three federal habeas corpus petitions. *See Ybarra v. McDaniel*, 656 F.3d 984, 988–90 (9th Cir. 2011) (describing the first four state and all three federal petitions).[1]

All three federal petitions were defective due to failure to exhaust. The first was filed in 1987 and dismissed without prejudice in 1988; and the second was filed in 1989 and dismissed without prejudice in 1993. *Id.* At this time, the federal district court warned Ybarra that it would not tolerate another defective petition, and that this would be his "last

[1] Ybarra filed his fifth state petition earlier this year. *See infra* note 14.

opportunity to return to state court to exhaust all grounds for relief." *Id.* at 997. Nevertheless, when Ybarra filed his third federal petition in 2002,[2] he again brought several unexhausted claims—including a claim of intellectual disability under *Atkins*.

The district court cited its prior admonition, ordered Ybarra to abandon his unexhausted claims, and considered the remaining claims on the merits. It then denied habeas relief in 2006, and we affirmed in 2011. Notably, we denied a certificate of appealability (COA) as to whether the district court abused its discretion by ordering Ybarra to abandon his unexhausted claims. We concluded that the issue was not reasonably debatable in light of the prior warning in 1993. *Id*. (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Ybarra also pursued his *Atkins* claim by filing his fourth state habeas petition. This petition was originally dismissed on procedural grounds, but the Nevada Supreme Court reversed and remanded with instructions to proceed in accordance with Nevada Revised Statutes § 175.554(5) (2015).[3] The Nevada state district court then conducted a

[2] Ybarra actually filed his third federal petition in 2000, but this petition was amended in 2002 after he received assistance from the public defender.

[3] Section 175.554(5), enacted in 2015 in response to *Atkins*, provides that:

> If a sentence of death is imposed and a prior determination regarding intellectual disability has not been made pursuant to NRS [§] 174.098, the defendant may file a motion to set aside the penalty on the grounds that the defendant is intellectually disabled. If such a motion is filed, the court shall conduct a hearing

two-day evidentiary hearing, concluded that Ybarra failed to prove intellectual disability, and denied his motion to strike the death penalty in 2008. The Nevada Supreme Court affirmed in a reasoned opinion in 2011. *See Ybarra*, 247 P.3d 269.

But Ybarra filed a petition for rehearing. In support, he attached a supplemental report by Dr. Erin Warnick, who evaluated Ybarra in 2001. That report, dated April 11, 2011, also summarized a report by Dr. Jonathan Mack, who evaluated Ybarra in 2010. Both doctors opined that Ybarra was intellectually disabled, but neither report was ever presented at the trial court's evidentiary hearing.

The Nevada Supreme Court denied the petition on June 29, 2011. Its order read, in its entirety, "Rehearing denied. NRAP 40(c). It is so ORDERED."[4] It also contained a footnote, which specified that:

> In resolving this petition for rehearing, we have not considered any evidence that was not presented to the district court in the first

---

> on that issue in the manner set forth in NRS [§] 174.098.

[4] Rule 40(c) of the Nevada Rules of Appellate Procedure provides that "no point may be raised for the first time on rehearing," and specifies that rehearing is proper:

> When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or . . . [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

> instance. We strike the document attached to the petition for rehearing authored by Dr. Erin Warnick.

Only six of the seven justices joined this order in full. Justice Cherry wrote separately to "concur in the result only."

Ybarra then filed a motion for reconsideration before the state supreme court, and again attached a report that was never presented to the state district court. This report was authored by Dr. Stephen Greenspan, the most-cited authority in the 2002 and 2010 diagnostic manuals of the American Association on Intellectual Disabilities (AAID),[5] who criticized the state courts' analyses and argued that their opinions incorporated "questionable lay stereotypes." Dr. Greenspan also concluded that Ybarra was intellectually disabled after examining him, interviewing several of his family members, and reviewing his academic and medical history.

The Nevada Supreme Court "considered" but denied the motion. Significantly, it did not strike the Greenspan report as it had done with the Warnick report; and all seven justices, including Justice Cherry, joined this order in full.

Having fully exhausted his state court remedies, Ybarra once again returned to federal court. He filed a motion asking the district court to set aside its prior judgment in accordance with Federal Rule of Civil Procedure 60(b), reopen habeas proceedings, and allow him to re-allege his

[5] The AAID was previously known as the American Association on Mental Retardation (AAMR).

previously-abandoned *Atkins* claim. Both the Greenspan report and the Mack report were attached to this motion.

The district court denied the motion on the merits. It acknowledged that Ybarra's "circumstances [were] unique and therefore weigh[ed] in favor of Rule 60(b) relief," but concluded that additional habeas proceedings "would be futile" because the state court's intellectual disability determination is entitled to deference under AEDPA. The district court did not consider either the Mack report or the Greenspan report when it made this determination. It noted that these reports were not part of the record in 2011, when the Nevada Supreme Court issued its reasoned opinion, and concluded that it was therefore barred from considering them under *Cullen v. Pinholster*, 563 U.S. 170 (2011).

Ybarra then filed a motion to alter or amend the order denying his *Atkins*-based Rule 60(b) motion. He argued that the district court committed clear error and made a futility determination that was manifestly unjust when it refused to consider the attached reports. *See Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003) (describing the circumstances warranting relief under Federal Rule of Civil Procedure 59(e)). The district court rejected Ybarra's arguments related to the excluded reports, but it granted a COA as to:

> Whether [it] erred in deferring, under 28 U.S.C. § 2254(d), to the state court's finding that [Ybarra] is not intellectually disabled as contemplated by *Atkins*.

We first heard argument on this question in June 2016. At that time, Ybarra again argued that the district court

should have considered the Greenspan report.[6] He insisted that the Nevada Supreme Court "adjudicated" his *Atkins* claim on the merits when it denied his motion for reconsideration in 2012, and that the Greenspan report was "before" the court at this time. *See Pinholster*, 563 U.S. at 181–82 (quoting 28 U.S.C. § 2254(d)).

We concluded that this issue was reasonably debatable and "deserve[d] encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). We therefore granted a second COA as to whether the district court misapplied *Pinholster* and "improperly declined to consider the Greenspan report."

Now, over a year later, after receiving several rounds of supplemental briefs and after consolidating this appeal with two other matters, *see infra* Part III, we issue our decision.

I

But first, we must address a jurisdictional issue related to the unique posture of this case. As discussed above, Ybarra sought review of his *Atkins* claim by filing a motion to reopen habeas proceedings. Although the state did not pursue the argument on appeal,[7] we agree that this motion is

[6] Ybarra did not make this argument with regard to the other reports.

[7] Instead, the state argues that the district court violated either the law of the case or the rule of mandate when it considered Ybarra's *Atkins*-based motion. These objections are without merit. In our prior decision, we decided that the district court did not err when it ordered Ybarra to abandon his unexhausted claims, including his *Atkins* claim. *See Ybarra*, 656 F.3d at 997. We did not reject that claim on the merits, nor did we suggest that the district court was barred from considering a proper Rule 60(b) motion. These issues were therefore not "decided explicitly or by necessary implication," and the district court did not

not a second or successive habeas petition subject to 28 U.S.C. § 2244(b).

AEDPA generally limits a defendant to one round of federal habeas review and bars him from filing a second or successive petition without authorization from the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A). If a defendant fails to obtain this authorization, a district court lacks jurisdiction to consider his petition. *Rishor v. Ferguson*, 822 F.3d 482, 490 (9th Cir. 2016). Moreover, a defendant cannot evade this requirement by simply calling his petition a Rule 60(b) motion. *United States v. Washington*, 653 F.3d 1057, 1060 (9th Cir. 2011).

To determine whether the district court had jurisdiction to consider Ybarra's motion, we must therefore determine whether it is actually a disguised habeas petition. There is no "bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second or successive [petition]." *Id.* However, the Supreme Court has instructed us that a motion raising an entirely "new claim," or attacking "the federal court's resolution of a claim on the merits," is the latter. *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005).

We conclude that Ybarra's motion does neither of these things. Instead, as the district court has already observed, it is analogous to the motion at issue in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

The defendant in *Martinez-Villareal* originally filed a federal habeas petition that included a claim of incompetency under *Ford v. Wainwright*, 477 U.S. 399,

otherwise "vary" from our prior decree. *See United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (citations omitted).

409–10 (1986) (holding that the Eighth Amendment prohibits the execution of the mentally incompetent). The district court dismissed this claim as premature, explaining that it was not ripe because an execution was not scheduled, and ultimately entered a judgment denying relief on the remaining claims. *Martinez-Villareal*, 523 U.S. at 640. When the defendant's execution warrant issued, he then filed a motion to set aside this judgment and reopen habeas proceedings so that he could pursue his *Ford* claim. *Id*.

The Supreme Court held that this motion was not a second or successive habeas petition under AEDPA. It observed that a *Ford* claim was included in the defendant's original petition, but dismissed for "technical procedural reasons." *Id.* at 645. It then concluded that such a "dismissal . . . [should not] bar the [defendant] from ever obtaining federal habeas review" of his claim. *Id.* at 644–45.

We agree that this case is sufficiently analogous. Like the *Ford*-based motion in *Martinez-Villareal*, Ybarra's *Atkins*-based motion does not raise an entirely new claim. Instead, it seeks to revive an existing claim. And like the *Ford* claim, this claim was originally dismissed for "technical procedural reasons." *Id.* at 645. Therefore, although Ybarra certainly "risk[ed] forfeiting" review of his *Atkins* claim when he abandoned it, *see Rose v. Lundy*, 455 U.S. 509, 520 (1982), his efforts to reinstate that claim do not fall within the purview of § 2244 so as to strip the district court of jurisdiction and categorically bar him "from ever obtaining federal habeas review," *Martinez-Villareal*, 523 U.S. at 645.

For these reasons, the district court did not err when it concluded that it had jurisdiction to consider Ybarra's *Atkins*-based Rule 60(b) motion. However, as explained below, it did err in its analysis concerning that motion.

II

This brings us to the primary issue on appeal. Under Rule 60(b), a defendant may seek relief "from a final judgment, order, or proceeding for . . . any . . . reason that justifies relief." Fed. R. Civ. P. 60(b)(6). To obtain relief under this catchall provision, a defendant must first make a threshold "showing of 'extraordinary circumstances.'" *Towery v. Ryan*, 673 F.3d 933, 940 (9th Cir. 2012) (per curiam) (quoting *Gonzalez*, 545 U.S. at 535).

The district court reasonably held that, to show extraordinary circumstances in this case, Ybarra must show that it would not be futile to reopen habeas proceedings. It then held that Ybarra could not satisfy this requirement because the existing and unfavorable intellectual disability determination is entitled to deference under AEDPA.

Reviewing de novo, *see Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005), we conclude that the district court erred in its analysis under AEDPA. First, it overlooked a number of instances where the Nevada Supreme Court contradicted the very clinical guidelines that it purported to apply, which is especially problematic in light of the recent decision in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). Second, it erred when it refused to consider the Greenspan report. We therefore vacate its order in Case No. 13-17326, and remand for reconsideration.

A

The Nevada legislature responded to *Atkins* by enacting Nevada Revised Statutes § 174.098(7) (2015), which provides that a person is intellectually disabled if he suffers from "[1] significant subaverage general intellectual functioning which [2] exists concurrently with deficits in

adaptive behavior and [3] manifested during the developmental period." When the Nevada Supreme Court issued its opinion in 2011, it explained that this "definition conforms to the clinical definitions espoused by . . . the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA)." *Ybarra*, 247 P.3d at 273–74. It then purported to rely on clinical guidelines issued by these associations, explaining that they "provide useful guidance in applying the [statutory] definition." *Id.* at 274.

For example, it explained that, to show intellectual deficits under Prong 1, a defendant must typically present a valid IQ score between 70 and 75—which accounts for the standard error of measurement. *Id.* (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000) (DSM-IV)); *see also Hall v. Florida*, 134 S. Ct. 1986 (2014) (holding that a test imposing a strict IQ score cutoff at 70 was unconstitutional). It also explained that, to show adaptive deficits under Prong 2, a defendant must prove impairments "in at least two . . . skills areas." *Id.* at 274 n.6 (quoting DSM-IV, at 41). Finally, under Prong 3, it held that the developmental period is "the time before an individual reaches 18 years of age." *Id.* at 275–76 ("[T]he AAMR and the APA focus on the age of 18 years . . . ."). In this way, Nevada law incorporated clinical guidelines and diagnostic manuals well before the United States Supreme Court held that "[t]he medical community's current standards . . . constrain[] . . . States' leeway" to define intellectual disability. *Moore*, 137 S. Ct. at 1053.

At the evidentiary hearing before the Nevada state district court, two defense experts testified that Ybarra met

his burden of proof under all three prongs.[8] But a third expert, testifying for the state, disagreed. He opined that Ybarra was malingering during his IQ tests and failed to present any valid IQ scores. This expert relied on the lack of evidence under Prong 1 to conclude that Ybarra failed to prove intellectual disability. He did not offer further testimony regarding Prongs 2 and 3, explaining that, "to the extent that you don't have that first prong . . . these other prongs don't matter."

The Nevada state district court concluded that Ybarra failed to prove intellectual disability and denied his motion to strike the death penalty. It largely credited the state expert and discredited the defense experts. However, the court did not adopt the theory that, because Ybarra failed to present credible evidence under Prong 1, the other prongs "don't matter." Instead, it held that Ybarra failed to make a showing under all three prongs—rejecting the unrebutted defense testimony under Prongs 2 and 3. The Nevada Supreme Court agreed, adopting a similar analysis in its own opinion. *See Ybarra*, 247 P.3d at 277–85.

The district court concluded that this determination is entitled to AEDPA deference. Under AEDPA, a federal court must defer to a state court's adjudication of a claim unless it "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the

[8] Because we do not ourselves make a determination under AEDPA, we do not recount the state court proceedings at length. *But see Ybarra*, 247 P.3d 269 (summarizing the relevant testimony and evidence).

evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

As an initial matter, we agree that the intellectual disability determination passes muster under § 2254(d)(1). *Atkins* held that the Eighth Amendment prohibits the execution of the intellectually disabled, but left "the task of developing appropriate ways to enforce [this] constitutional restriction" to the States. 536 U.S. at 317 (citation omitted). Significantly, *Atkins* "did not provide definitive procedural or substantive guides" to determine who qualifies as intellectually disabled. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). And although Ybarra insists that the Nevada Supreme Court unreasonably applied *Atkins*, he relies almost exclusively on the Supreme Court's subsequent, more detailed decisions in *Moore*, *Hall*, and *Brumfield*. These decisions might redefine and expand *Atkins*,[9] but they cannot show that the Nevada Supreme Court applied *Atkins* in a way that "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

On the other hand, Ybarra plausibly argues that the Nevada Supreme Court made an unreasonable determination of fact under § 2254(d)(2). Under this subsection, we "may not second-guess a state court's fact-finding process unless, after review of the state-court record, [we] determine[] that

[9] This is especially true with regard to *Moore*, which changed the course of the Supreme Court's intellectual disability jurisprudence. *See* 137 S. Ct. at 1057–58 (Roberts, C.J., dissenting) ("Today's decision departs from this Court's precedents, followed in *Atkins* and *Hall*, establishing that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not a medical assessment of clinical practice.").

the state court was not merely wrong, but actually unreasonable." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). This standard is "difficult to meet," *Harrington*, 562 U.S. at 102, but it is not impossible. In fact, the Supreme Court recently offered helpful guidance as to how this standard might be met in the *Atkins* context.

"Kevan Brumfield was sentenced to death for the 1993 murder of [an] off-duty Baton Rouge police officer . . . ." *Brumfield*, 135 S. Ct. at 2273. He later sought relief from his sentence under *Atkins*, but the Louisiana state court refused to hold an evidentiary hearing because there was no "reasonable ground" to suspect that he was intellectually disabled. *Id.* at 2274. Brumfield then filed a federal habeas petition, arguing that the Louisiana state court's intellectual disability determination was unreasonable under AEDPA. The district court agreed, but the Fifth Circuit did not. The Supreme Court then granted certiorari. *Id.* at 2275–76.

Louisiana, like Nevada, relied on guidance from the APA and the AAMR to define intellectual disability. *Compare Brumfield*, 135 S. Ct. at 2274 (citing American Association of Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports (10th ed. 2002) (AAMR-10); DSM-IV); *with Ybarra*, 247 P.3d at 273 (citing the same diagnostic manuals). But when the Louisiana state court refused to hold an evidentiary hearing, it made a number of statements that clearly contradicted those same guidelines. The Supreme Court relied on these contradictions to conclude that "the two underlying factual determinations on which the trial court's decision was premised—that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment," were

unreasonable under § 2254(d)(2). *Brumfield*, 135 S. Ct. at 2276–77.

For example, the Louisiana court erroneously stated that an IQ score of 75 was inconsistent with intellectual deficits, even though "[t]he sources on which [it] relied in defining subaverage intelligence both describe a score of 75 as being consistent with such a diagnosis." *Id.* at 2278 (citing AAMR-10, at 59; DSM-IV, at 41–42). It also disregarded evidence that Brumfield was antisocial on the ground that he had a personality disorder, which was improper because "an antisocial personality is not inconsistent with . . . adaptive impairment, or with intellectual disability more generally." *Id.* at 2280 (citing DSM-IV, at 47; AAMR-10, at 172).

The Nevada Supreme Court made a number of comparable errors in this case. For example, it ignored evidence that Ybarra was bullied in school on the ground that it was irrelevant under Prong 2. The trial court initially expressed concern over the notion that "the victim [of bullying] . . . has the problem," and the Nevada Supreme Court apparently agreed because it stated that evidence of bullying does "little to demonstrate adaptive behavior deficits." *Ybarra*, 247 P.3d at 284. But the AAMR specifically lists "gullibility" and an inability to "avoid[] victimization" as examples of limited social adaptive skills. AAMR-10, at 42. Similarly, under Prong 3, the Nevada Supreme Court suggested that any diagnostic test conducted after the age of 18 was "of little value." *Ybarra*, 247 P.3d at 283. But the AAMR specifically contemplates retrospective

assessment when there are no test scores available from the developmental period. *See* AAMR-10, at 93–94.[10]

It is true that the contradictory statements played a more central role in the underlying decision in *Brumfield*. The Louisiana state court refused to grant an evidentiary hearing because it concluded there was no "reasonable ground" to even suspect that Brumfield was intellectually disabled. 135 S. Ct. at 2274. This case might ordinarily be distinguishable. We acknowledge that the Nevada Supreme Court engaged in a lengthy and coherent analysis under Prongs 2 and 3; and only made a few, relatively minor, contradictory statements. In another case, we might find these statements insignificant. But in this case, where the only clinical experts to testify on Prongs 2 and 3 opined that the prongs were satisfied, we find these statements troubling. *See Van Tran v. Colson*, 764 F.3d 594, 610 (6th Cir. 2014) ("[T]he courts strain the limits of reasonableness by rejecting expert opinions based exclusively on the courts' own inexpert analysis.").

The state argues that, even if the Nevada Supreme Court was unreasonable with regard to its determination under Prongs 2 and 3, its decision was insulated by a reasonable determination under Prong 1. The state reminds us that a clinical expert concluded that Ybarra was malingering. This expert also specifically described Ybarra's "bizarre" performance on a number of tests, including a "complex figure test" where his score was worse than that of an

[10] We note that requiring individuals to provide formal test scores from their developmental period would likely "creat[e] an unacceptable risk that persons with intellectual disability will be executed" because not everyone who is intellectually disabled receives formal testing at a young age. *Cf. Hall*, 134 S. Ct. at 1990.

Alzheimer's patient or a person with a "debilitating" or "severely horrible disease[]."

We agree that the malingering determination was reasonable in light of this clinical expertise. But it is not clear that the malingering determination was the basis for the Nevada Supreme Court's determination under Prong 1. The court opined that "[t]he record as a whole . . . portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning." *Ybarra*, 247 P.3d at 282. Again, we are troubled by this statement. The relevant clinical guidelines specify that "[t]he assessment of intellectual functioning is a task that requires specialized professional training." AAMR-10, at 51. For this reason, although the malingering determination was reasonable because it was supported by expert testimony, the Prong 1 determination was unreasonable to the extent that it was based on the court's lay perception that Ybarra did not "look like" a disabled person. *See Moore*, 137 S. Ct. at 1051–52 ("Mild levels of intellectual disability, although they may fall outside [the] citizens' consensus, nevertheless remain intellectual disabilities.").

The state may be correct that the malingering determination constitutes an "independent basis" for the intellectual disability determination, thus rendering it reasonable under AEDPA. *Cf. Moore*, 137 S. Ct. at 1053 (Roberts, C.J., dissenting) (arguing that a proper determination under Prong 1 insulated an otherwise improper intellectual disability determination). Alternatively, Ybarra may be correct that lay stereotypes and nonclinical factors infect the state court's entire analysis, thus rendering it unreasonable. Rather than passing on these issues in the first instance, we leave the task to the district court. We conclude only that, in light of *Brumfield*, the

district court erred when it overlooked a number of contradictory statements made by the Nevada Supreme Court.

B

We also conclude that the district court erred when it declined to consider the Greenspan report,[11] and we again remand so that the district court can consider its effect in the first instance.

1

According to *Pinholster*, federal "review under § 2254(d)[] is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. The district court concluded that *Pinholster* barred it from considering the Greenspan report because, although that report may have been before the Nevada Supreme Court in 2012, it was not before the court in 2011.

It is true that the Nevada Supreme Court first adjudicated Ybarra's *Atkins* claim on the merits when it issued its reasoned opinion in 2011. However, it also adjudicated the claim by denying Ybarra's motion for reconsideration in 2012. "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Because the 2012 order is unexplained, we assume that it rests upon the same rationale as the 2011 opinion.

[11] Our review is de novo because the status of the Greenspan report under *Pinholster*, which interprets AEDPA, is a question of law. *See Gilley v. Morrow*, 246 F. App'x 519, 521 n.2 (9th Cir. 2007) (citing *Earp*, 431 F.3d at 1166).

Moreover, because the reasoned opinion rejects Ybarra's *Atkins* claim on the merits, we must assume that the unexplained order does the same. It therefore constitutes an adjudication on the merits under the law of this circuit. *Cf. Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (holding that an unexplained order denying a petition for review was an adjudication on the merits).

Additionally, the order clearly states that the Nevada Supreme Court "considered [the *Atkins*-based] motion" but found "no cause to reconsider" its 2011 opinion. For this reason, even without the *Ylst* presumption, it is clear that the court rejected Ybarra's *Atkins* claim on the merits in 2012.

2

This designation would ordinarily have little practical effect. When we attribute an earlier rationale to an unexplained order, we "look through" that order to the last reasoned opinion. *Ylst*, 501 U.S. at 806. In other words, we essentially change the date, and possibly the author, of the last reasoned opinion.

However, in rare instances, the record may have been "materially improved" between the issuance of the reasoned opinion and the unexplained order. *Cannedy*, 706 F.3d at 1156 n.3. In these instances, "confining our review to [the earlier] record would produce the anomalous result of upholding an erroneous decision . . . on a fuller record because an [earlier] decision was correct on a less-developed record." *Id*.

In *Cannedy*, for example, the California Court of Appeal first rejected a claim of ineffective assistance of counsel in a reasoned opinion. Cannedy then filed a petition for review—along with a duplicative original petition—in the

California Supreme Court. At this time, he also filed a supplemental declaration, in which he explained that his trial lawyer failed to contact a number of favorable witnesses. But the California Supreme Court declined review and denied the duplicative petition in an unexplained order. *Id.* at 1154–56.

Cannedy then filed a federal habeas petition. The district court granted relief, and we affirmed. When we conducted our review, we first assumed that the unexplained order qualified as an adjudication on the merits. *Cannedy*, 706 F.3d at 1156 (citing *Ylst*, 501 U.S. at 803). We then looked through that order, and read the opinion of the California Court of Appeal as if it were written by the California Supreme Court. We concluded that this opinion, although reasonable in light of the record before the California Court of Appeal, was unreasonable in light of the record before the California Supreme Court—which was "materially improved" by the supplemental declaration. *Id.* at 1156 n.3.

Ybarra argues that this case is the same as *Cannedy*. He observes that, like the supplemental declaration, the Greenspan report was attached to a motion seeking review and thus "before" the Nevada Supreme Court when it adjudicated his claim by issuing an unexplained order in 2012. He then asks us to treat the Greenspan report the same way as we treated the declaration in *Cannedy*—by asking whether the 2011 opinion was reasonable in light of the 2012 report.

We agree that *Cannedy* is analogous, but we also find it distinguishable. The Cannedy declaration was submitted, at least in part, "in accordance with state law." 706 F.3d at 1156 n.3. Cannedy filed two separate petitions with the California Supreme Court—a petition for review, and an

original habeas petition. The supplemental declaration was proper with regard to the original petition because, in that context, the California Supreme Court was not acting as a court of review. *See Carey v. Saffold*, 536 U.S. 214, 224–25 (2002) (noting that the original writ is interchangeable with a petition for review in California). In this case, however, the Greenspan report was attached to a motion seeking reconsideration of an opinion affirming a decision by the trial court. It was therefore, by all accounts, filed in violation of the relevant procedural rules. *See* Nev. R. App. Proc. 10 (describing the record on appeal as excerpts from the record below); Nev. R. App. Proc. 40(c) (specifying that rehearing is only warranted when the court "overlooked or misapprehended" a matter in the existing record).

But this only suggests that the Nevada Supreme Court was authorized to ignore the Greenspan report, it does not establish that it did so. And although this is not as clear a case as was before us in *Chambers v. McDaniel*, 549 F.3d 1191 (9th Cir. 2008), where the order specified that the court "considered *all the materials filed* by the parties," *id.* at 1198 (emphasis added), we hesitate to assume that the Nevada Supreme Court ignored the Greenspan report when it "considered" the motion to which it was attached. This is especially true where the motion included lengthy excerpts from that report.[12]

[12] For example, the motion includes the following excerpt:

> [F]or individuals in the sub-category of "mild" [intellectual disability] (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

We also find the differences between the two orders compelling. As discussed above, when the Nevada Supreme Court denied Ybarra's petition for rehearing, it expressly struck the Warnick report from the docket. However, when it denied his motion for reconsideration, it did not strike the Greenspan report. Additionally, although Justice Cherry joined the first order "in the result only," he joined the second order in full. Because the first order only accomplished two things—striking the Warnick report and denying the petition for rehearing—it is reasonable to conclude that Justice Cherry would have considered the Warnick report, and joined the second order in full because the court considered the Greenspan report.

Although these inferences may seem attenuated, the state offers no alternative explanation. Instead, it argues that the Nevada Supreme Court lacks discretion to expand the record on appeal in response to a motion for reconsideration. We are not convinced.

The state cites a number of decisions that appear to support its position, but most of these are dated and do not clearly hold that the court categorically lacks discretion to supplement the record on appeal. *See, e.g.*, *Vacation Village, Inc. v. Hitachi Am., Ltd.*, 901 P.2d 706, 707 (Nev. 1995) (declining "invitation to consider" evidence never presented to the district court and denying motion for leave to supplement the record); *Alderson v. Gilmore*, 13 Nev. 84, 84 (1878) (explaining that the court was unable to review

---

> premium on good judgment, however, one's adaptive functioning deficits are most likely to become evident.

Motion for Stay Issuance of the Remittitur and to Reconsider Opinion at 14, *Ybarra*, 247 P.3d 269 (No. 52167).

findings and conclusions that the petitioner "neglected to include" in his statement of the case). And although there are cases that appear to provide more specific support for the state's position, *see, e.g.*, *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 635 P.2d 276, 277 (Nev. 1981), we are not ultimately persuaded that the Nevada Supreme Court is incapable of considering additional material. For one thing, the Nevada Rules of Appellate Procedure do not constrain the inherent authority of the Nevada Supreme Court, which is permitted to "suspend any provision of the[] rules" "for good cause." Nev. R. App. Proc. 2. Moreover, the Nevada Supreme Court may well have special authority to overlook technical defects in *Atkins* cases due to its legislative mandate to determine whether a prior intellectual disability determination "was correct." Nev. Rev. Stat. § 177.055(2)(b) (2015).[13]

It may be true that the Greenspan report was not filed in accordance with Nevada law. But the state has failed to convince us that the Nevada Supreme Court lacks the authority to overlook these defects, and it has failed to convince us that the differences between the two orders are trivial. We therefore conclude that the Greenspan report was part of the record under *Pinholster* because it was not expressly stricken, and that the district court erred when it refused to consider it. Once again, we express no view as to whether the Greenspan report changes the outcome under AEDPA. Instead, we simply vacate the order in Case No. 13-17326, and remand for reconsideration.

[13] We acknowledge that this appeal does not come to us following mandatory review under this provision, but we nevertheless find it persuasive.

III

We now turn to the consolidated matters. In Case Nos. 17-15793 and 17-71465, Ybarra argues that he is entitled to relief from his death sentence in light of the Supreme Court's recent decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). We conclude that his arguments are without merit.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. This principle was extended to the capital sentencing context in *Ring v. Arizona*, 536 U.S. 584 (2002), when the Supreme Court held that Arizona's sentencing scheme was unconstitutional because it allowed a "sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609. In *Hurst*, the Supreme Court once again applied this principle to invalidate Florida's capital sentencing scheme.

Florida's sentencing scheme was a hybrid one: A jury would offer a recommendation regarding the death penalty, but a judge would exercise his or her own "independent judgment about the existence of aggravating and mitigating factors" to determine whether the defendant was eligible for the death penalty. *Hurst*, 136 S. Ct. at 620 (citation omitted). Florida argued that this scheme was proper because the jury's recommendation was entitled to "great weight." *Id.* (citation omitted). The Supreme Court disagreed. It reiterated that "any fact on which the legislature conditions an increase in the maximum punishment . . . [is an] element," and held that Florida's scheme was unconstitutional because it allowed a judge to determine whether "sufficient aggravating circumstances exist [and

whether] . . . there are insufficient mitigating circumstances to outweigh [those] aggravating circumstances." *Id.* at 620–22 (citations and quotation marks omitted).

Under Nevada's capital sentencing scheme, "(1) the jury must unanimously find, beyond a reasonable doubt, at least one enumerated aggravating circumstance; and (2) each juror must then individually determine that mitigating circumstances, if any exist, do not outweigh the aggravating circumstances." *Servin v. State*, 32 P.3d 1277, 1285 (Nev. 2001). According to Ybarra, *Hurst* creates a new rule of constitutional law, and establishes that both of these findings are elements. Ybarra then argues that Nevada's scheme is unconstitutional because it does not require the "weighing determination" to be made beyond a reasonable doubt.

We are highly skeptical of this argument. In our view, the weighing determination is more akin to a sentence enhancement than to an element of the capital offense. As such, it is not clear that the Nevada sentencing scheme runs afoul of *Hurst*. And even more fundamentally, it is not clear that *Hurst* actually establishes a new rule of constitutional law at all. Instead, it may be nothing more than a direct application of *Ring*. *See Hurst*, 136 S. Ct. at 621–22 ("Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty.").

But for the sake of argument, we assume without deciding that *Hurst* creates a new rule; establishes that the "weighing determination" is an element; and renders the Nevada sentencing scheme unconstitutional. Nevertheless, even after making these generous assumptions, Ybarra cannot obtain relief under *Hurst.*

A

As with his *Atkins* claim, Ybarra first attempted to raise his *Hurst* claim by filing a Rule 60(b) motion. The district court denied this motion on the ground that it was a disguised and unauthorized second or successive habeas petition.

In Case No. 17-15793, we now "review the district court's decision to dismiss [Ybarra's] Rule 60(b) motion as an unauthorized second or successive . . . petition de novo." *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013). As explained above, there is no "bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second or successive [petition]." *Washington*, 653 F.3d at 1060. But we agree that Ybarra's *Hurst*-based motion is clearly a disguised petition. Unlike his *Atkins*-based motion, it does not seek to reinstate a claim that was originally dismissed for "technical procedural reasons." *Martinez-Villareal*, 523 U.S. at 645. Instead, it seeks to set aside a sentence based on an entirely "new claim." *Gonzalez*, 545 U.S. at 531.

Ybarra argues that his motion is proper because it was filed to pursue a claim that was not "ripe" when he filed his original petition. *Cf. Panetti v. Quarterman*, 551 U.S. 930, 945–46 (2007) (holding that a petition raising a previously unripe claim of incompetency was not a second or successive petition under AEDPA). But this is not a question of ripeness. Ybarra seeks relief based on *Hurst*, which he claims establishes "a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). AEDPA already establishes a procedure to address this type of claim; and that procedure requires Ybarra to obtain authorization to file a second or successive habeas petition. *Id.* Ybarra cannot evade this requirement by simply "disguis[ing]" his petition and calling it a Rule 60(b) motion. *See Washington*, 653 F.3d at 1060. We

therefore affirm the district court's order in Case No. 17-15793.

B

After he filed his improper motion, Ybarra also filed a proper application for leave to file a second or successive habeas petition.[14] In Case No. 17-71465, we now consider and deny that application on the ground that *Hurst* does not apply retroactively to cases on collateral review.

We may grant leave to file a proposed second or successive habeas petition "only if it presents a claim not previously raised that satisfies one of the two grounds articulated in § 2244(b)(2)." *Burton v. Stewart*, 549 U.S. 147, 153 (2007) (citations omitted). Ybarra argues that his petition satisfies the first ground because it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). We note that this provision has two components: A new rule must apply retroactively, and the Supreme Court must *hold* that it applies retroactively. *See Tyler v. Cain*, 533 U.S. 656, 663

[14] Ybarra filed a fifth state habeas petition raising his *Hurst* claim one day before the end of the one-year statute of limitations established in 28 U.S.C. § 2244(d)(1)(C). Because that petition remains pending via an appeal, and because "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending" is tolled, his application is timely even though it was filed more than a year after *Hurst* was decided. *See Artuz v. Bennett*, 531 U.S. 4, 9 (2000) ("[W]hether an application has been 'properly filed' is quite separate from . . . whether the claims contained in the application are meritorious and free of procedural bar." (emphasis omitted)); *see also Carey*, 536 U.S. at 219–20 ("[A]n application is pending as long as the ordinary state collateral review process is in continuance—i.e., until the completion of that process." (citation and quotation marks omitted)).

(2001) ("[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive" (quoting 28 U.S.C. § 2244(b)(2)(A))).

A new rule of constitutional law does not usually apply retroactively. *Teague v. Lane*, 489 U.S. 288, 310 (1989). There are, however, two exceptions. First, a rule applies retroactively if it is a substantive rule which "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (citation and quotation marks omitted). Second, a rule applies retroactively if it is a "watershed rule[] of criminal procedure." *Id.*

Ybarra first argues that *Hurst* establishes a substantive rule by "exclud[ing] a class of individuals from a death sentence who would otherwise be found death-eligible based on a standard of proof less rigorous than the beyond-a-reasonable-doubt-standard." In essence, he argues that the death penalty applies to a narrower range of conduct because the weighing determination now requires a higher level of proof.

Even if *Hurst* establishes that the weighing determination must be made beyond a reasonable doubt, this rule is nothing more than an extension of *Apprendi*. We have already held that *Apprendi* does not establish a substantive rule because it does not "decriminalize[] drug possession or drug conspiracies []or place[] such conduct beyond the scope of the state's authority to proscribe." *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir. 2002). The same logic applies here. Even if *Hurst* extends the reasonable-doubt standard to the weighing determination, it does not redefine capital murder or otherwise limit the conduct rendering a defendant eligible for the death penalty.

Ybarra next argues that *Hurst* establishes a watershed rule of criminal procedure because it reduces the risk of condemning a defendant who is actually ineligible for the death penalty due to countervailing mitigating circumstances. He asserts that, without the reasonable-doubt standard, accuracy in capital sentencing is "seriously diminished." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Teague*, 489 U.S. at 313). In support, he cites several instances where the Supreme Court held that cases extending the reasonable-doubt standard applied retroactively. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) (giving retroactive effect to *In re Winship*, 397 U.S. 358 (1970)); *Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977) (giving retroactive effect to *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).

The Supreme Court has already held that *Ring* is not a watershed rule with regard to its holding that a jury, as opposed to a judge, must make the findings that render a defendant eligible for the death penalty. It explained that judicial factfinding does not result in "an 'impermissibly large risk' of punishing conduct the law does not reach." *Schriro*, 542 U.S. at 355–56 (quoting *Teague*, 489 U.S. at 312). Similarly, we have already held that *Apprendi* is not a watershed rule with regard to its holding that "any fact . . . increas[ing] the penalty for a crime . . . must be . . . proved beyond a reasonable doubt." *Sanchez-Cervantes*, 282 F.3d at 666–67 (quoting *Apprendi*, 530 U.S. at 490). We concluded that this rule does "not rise to the level of importance of" other rules extending the reasonable-doubt standard because it "only affects the enhancement of a defendant's sentence once he or she has already been convicted beyond a reasonable doubt." *Id.* at 671.

If neither *Ring* nor *Apprendi* apply retroactively, we fail to see why *Hurst* would apply retroactively. Like these cases, the hypothetical rule established in *Hurst* involves only a sentencing determination. Under Nevada law, the prosecution must already prove both the elements of the capital offense and at least one aggravating sentencing factor beyond a reasonable doubt. *See Lisle v. State*, 351 P.3d 725, 731–32 (Nev. 2015). For this reason, *Hurst* does not "overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of *guilty verdicts*[.]" *Sanchez-Cervantes*, 282 F.3d at 671 (last emphasis added) (quoting *Hankerson*, 432 U.S. at 243).

We acknowledge that this case could be decided on the more narrow ground that, even if *Hurst* applied retroactively, the Supreme Court has never held that it applies retroactively as required with regard to a second or successive petition. *See Tyler*, 533 U.S. at 663. But because we have already held that *Apprendi* does not apply retroactively, and because the Supreme Court has already held that *Ring* does not apply retroactively, we also conclude that *Hurst* does not apply retroactively. We therefore deny Ybarra's application on the broader ground that *Hurst* does not apply retroactively at all—with regard to either initial or successive habeas petitions.

Conclusion

In this appeal, we do not decide whether Ybarra is intellectually disabled, nor do we decide whether the Nevada Supreme Court made a reasonable or an unreasonable determination of fact when it concluded that he is not. Instead, we decide only that the district court erred in its analysis under AEDPA. We therefore vacate its order in

Case No. 13-17326, and remand for reconsideration in light of *Brumfield* and in light of the Greenspan report.

We agree that Ybarra's *Hurst*-based Rule 60(b) motion is a disguised and unauthorized second or successive habeas petition. We therefore affirm the district court's order denying that motion in Case No. 17-15793.

Finally, we hold that *Hurst* does not apply retroactively and consequently deny Ybarra's application for leave to file a second or successive habeas petition in Case No. 17-71465.

VACATED and REMANDED in part; AFFIRMED in part; APPLICATION DENIED.

APPENDIX E

Order of Affirmance, *Ybarra v. The State of Nevada*,
Supreme Court of the State of Nevada,
Case No. 52167
(March 3, 2011)

127 Nev., Advance Opinion 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT YBARRA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52167

Appeal from an order denying a motion to strike the death penalty pursuant to NRS 175.554(5). Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

Affirmed.

Franny A. Forsman, Federal Public Defender, and Michael Pescetta, Assistant Federal Public Defender, Las Vegas,
for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; Richard W. Sears, District Attorney, White Pine County,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

A jury sentenced appellant Robert Ybarra, Jr., to death in 1981 for the murder of 16-year-old Nancy Griffith. Two decades later, the United States Supreme Court held in Atkins v. Virginia, 536 U.S. 304 (2002), that the Eighth Amendment's ban on cruel and unusual

punishment precludes the execution of mentally retarded persons. In compliance with Atkins, the Nevada Legislature adopted a statutory provision to address claims of mental retardation involving defendants who, like Ybarra, were sentenced to death before the decision in Atkins. NRS 175.554(5). Ybarra sought relief under that statute, asking the district court to set aside his death sentence on the ground that he is mentally retarded. In this appeal from the district court's order denying relief, we address two issues.

First, we consider whether the denial of Ybarra's motion to disqualify the post-conviction district court judge based on implied bias violated state and federal guarantees of due process. We conclude that it did not because neither the judge's prior legal representation of the victim's family on matters unrelated to the murder nor the case's notoriety in the judge's community would cause an objective person reasonably to question the judge's impartiality.

Second, we consider whether the district court erred in concluding that Ybarra had not demonstrated by a preponderance of the evidence that he was mentally retarded. NRS 174.098(7) defines "mentally retarded" as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." As matters of first impression, we address the three components of the mental retardation definition and, in particular, hold that the "developmental period" referenced in the statute includes the period before a person reaches 18 years of age. 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.

FACTS

On the evening of September 28, 1979, 16-year-old Nancy Griffith and a girlfriend met 26-year-old Robert Ybarra, Jr., in Ely, Nevada. Ybarra drove the girls around town but eventually dropped off Griffith's girlfriend at her sister's home. Although the two girls arranged to meet later that evening, the girlfriend never saw Griffith again after leaving her with Ybarra. When Griffith was found the next day, she was barely alive. Ybarra had beaten and raped her, set her ablaze with gasoline, and left her to die in the desert outside of Ely. Suffering from burns that seared her respiratory passages and charred 80 percent of her body, Griffith died shortly thereafter.

A jury found Ybarra guilty of first-degree murder, first-degree kidnapping, battery with intent to commit sexual assault, and sexual assault. And after finding four circumstances aggravated the murder and no mitigating circumstances sufficient to outweigh them, the jury imposed death for the first-degree murder and consecutive terms of life in prison without the possibility of parole for the remaining offenses. We affirmed the judgment of conviction and death sentence. Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984).

Over the years, Ybarra filed three state post-conviction petitions, which were denied in the district court. This court upheld the district court decisions in all three instances. Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987); Ybarra v. Director, Docket No. 19705 (Order Dismissing Appeal, June 29, 1989); Ybarra v. Warden, Docket No. 32762 (Order Dismissing Appeal, July 6, 1999).

Ybarra raised the issue of mental retardation in his fourth petition, which he filed on March 6, 2003. In that petition, Ybarra contended that he was incompetent to be executed due to his mental retardation. The district court dismissed the petition, concluding that it was procedurally barred. This court disagreed as to the mental-retardation claim and remanded that issue to the district court for appropriate proceedings under NRS 175.554(5). Ybarra v. Warden, Docket No. 43981 (Order Affirming in Part, Reversing in Part, and Remanding, November 28, 2005). On remand, Ybarra filed a motion under that statute. The district court conducted a two-day hearing on the motion at which Ybarra presented the testimony of two expert witnesses, the State presented the testimony of an expert witness, and the court considered exhibits totaling more than 3,000 pages. The district court determined that Ybarra had failed to meet his burden of proving mental retardation that began during the developmental period. Based on that failure, the district court denied the motion in a detailed 46-page written order. This appeal followed.

DISCUSSION

Judicial bias

The Honorable Steve Dobrescu presided over the post-conviction proceedings at issue in this appeal. Judge Dobrescu disclosed below that when he was an attorney in private practice, he represented Griffith's sister in an adoption proceeding in 1996 and prepared wills for Griffith's parents in 1998. Based primarily on that prior professional relationship, Ybarra filed a motion to disqualify Judge Dobrescu for bias. Another district court judge heard and denied the motion. See NRS 1.235(5). Ybarra challenges that decision, arguing that disqualification

was warranted under state and federal constitutional due-process guarantees and Nevada Code of Judicial Conduct (NCJC) Canon 3E. We disagree.

The NCJC "provides substantive grounds for judicial disqualification." PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 435, 894 P.2d 337, 340 (1995), overruled on other grounds by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 112 P.3d 1063 (2005). Two provisions are relevant here.[1] First, NCJC Canon 2A provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Commentary accompanying that provision explains that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Second, NCJC Canon 3E provides that "[a] judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned," although none of the specific grounds for disqualification enumerated in that Canon apply here. Both provisions address the importance of impartiality.

"[T]he test for whether a judge's impartiality might reasonably be questioned is objective," PETA, 111 Nev. at 436, 894 P.2d at 340, and presents "a question of law [such that] this court will exercise its independent judgment of the undisputed facts," id. at 437, 894 P.2d at 341.

---

[1]The NCJC underwent significant revisions and renumbering effective January 19, 2010, after the proceedings at issue here. We apply the NCJC in effect at the relevant time.

Because a judge is presumed to be impartial, "the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." Goldman v. Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988), abrogated on other grounds by Halverson v. Hardcastle, 123 Nev. 245, 266, 163 P.3d 428, 443 (2007); see PETA, 111 Nev. at 437, 894 P.2d at 341. Ultimately, we must decide "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [the judge's] impartiality." PETA, 111 Nev. at 438, 894 P.2d at 341; see Suh v. Pierce, ___ F.3d ___, ___, 2011 WL 135713, at *5 (7th Cir. 2011) (observing that due process requires fair trial in fair tribunal but that most judicial disqualification matters do not rise to constitutional level and that United States Supreme Court has never held that due process requires recusal based solely on appearance of bias).

The circumstances presented here, with a prior professional relationship between the trial judge and the victim's family, have not been addressed in many published decisions. An Illinois appellate court, however, has dealt with a similar situation. In People v. Booker, the defendant, who was charged with sexually assaulting his stepdaughter, argued on appeal that the trial judge should have been disqualified because the judge had represented the victim's natural father in divorce proceedings against the victim's mother around the time the assault occurred. 585 N.E.2d 1274, 1284 (Ill. App. Ct. 1992). Recognizing that recusal is required "whenever the judge's impartiality could reasonably be questioned," the appellate court could find no evidence in the record suggesting that the trial judge was biased against the defendant, id. at 1285, thus indicating that the prior relationship alone was not sufficient to question the judge's impartiality. See also Suh, ___ F.3d at ___, 2011 WL

135713, at *5-6 (rejecting claim of appearance of bias where trial judge had casual acquaintanceship with members of murder victim's family). See generally Jacobson v. Manfredi, 100 Nev. 226, 230, 679 P.2d 251, 254 (1984) (stating that "a judge, especially a judge in a small town, need not disqualify himself merely because he knows one of the parties").

The same is true here. Although Ybarra asserts that a reasonable person would have doubts about Judge Dobrescu's impartiality based on his prior legal representation of Griffith's family, there are not sufficient facts in the record to support such a conclusion. Nothing in the record suggests that Judge Dobrescu was biased against Ybarra as a result of the prior professional relationship. The prior professional relationship was wholly unrelated to the murder, which had occurred 17 to 19 years before the professional relationship, or the issues facing Judge Dobrescu in the post-conviction proceedings, which commenced 5 to 7 years after the professional relationship. There is no evidence that Judge Dobrescu has any continuing duty or obligations to the Griffith family. Nor is there any evidence that Judge Dobrescu has a direct, personal interest in the outcome of Ybarra's case. Ybarra presents a speculative claim that is not supported by sufficient facts to warrant disqualification. See Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) ("Disqualification must be based on facts, rather than mere speculation."). We therefore cannot conclude that the prior representation would cause an objective person reasonably to doubt Judge Dobrescu's impartiality.

To the extent Ybarra argues that the notoriety of his case requires heightened scrutiny of his disqualification motion, we again disagree. Following Ybarra's reasoning would require the disqualification of the local judges in every high-profile case tried in a community. Given

the presumption that judges are impartial and the challenging party's burden of establishing sufficient factual grounds, not just speculation, to warrant disqualification, id., we decline to ascertain bias merely based on the high-profile nature of a case. Because Ybarra articulated no facts causing doubt as to Judge Dobrescu's impartiality based on the high-profile nature of this case, we conclude that this claim lacks merit.[2]

Because we conclude that Ybarra's grounds for disqualification lack merit, no violation of his state and federal due process rights occurred by Judge Dobrescu's participation in the post-conviction proceedings. The disqualification motion was properly denied.

Mental retardation

Ybarra argues that the district court failed to adequately consider evidence of his mental retardation and, as a result, erroneously denied his motion to strike the death penalty. We disagree.

Definition of mental retardation

Although the United States Supreme Court has held that the execution of mentally retarded individuals violates the Eighth Amendment's prohibition against cruel and unusual punishment, Atkins,

---

[2]Ybarra argues that the disqualification issue presents an equal protection violation because "the degree of impartiality afforded a party is not protected by an equal standard for all judges throughout the state, but is relaxed when the matter is pending in a small community, in which the threat to a judicial officer's impartiality is, as here, greater than in a large community." We conclude that Ybarra's claim lacks merit as he failed to demonstrate that he is a member of a protected class or suffered impermissible discrimination. See Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973) (explaining requirements of equal protection claim).

536 U.S. at 321, the Court did not prescribe a definition of mental retardation or procedures for determining when an individual is mentally retarded. Instead, the Court left "'to the State[s] the task of developing appropriate ways to enforce [this] constitutional restriction upon . . . execution[s],'" id. at 317 (first, third, and fourth alterations in original) (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). The Nevada Legislature accomplished that task with the passage of NRS 174.098, which sets forth the procedure for raising mental retardation in a capital case and defines "mentally retarded." The statute provides that upon motion by a defendant,[3] the district court must conduct an evidentiary hearing to determine whether the defendant is mentally retarded. NRS 174.098(1), (2); see also NRS 175.554(5). The defendant bears the burden of proving by a preponderance of the evidence that he is "mentally retarded," NRS 174.098(5)(b), which the Legislature defines as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period," NRS 174.098(7). This court has not yet had

[3]The statutory scheme accounts for defendants who have not yet been tried and sentenced to death and those who were sentenced to death without a prior determination regarding mental retardation. Under NRS 174.098, a defendant facing a capital sentence may file a motion, not less than 10 days before the date set for trial, to declare that the defendant is mentally retarded. A defendant who has been sentenced to death without a prior determination regarding mental retardation under NRS 174.098 may file a motion under NRS 175.554(5) to set aside the death penalty on the grounds that the defendant is mentally retarded. In both circumstances, the proceedings on the motion are governed by NRS 174.098(2)-(7). See NRS 174.098; NRS 175.554(5).

occasion to address the statutory definition of mentally retarded. We take this opportunity to do so.

The definition of "mentally retarded" in NRS 174.098(7) was taken from NRS 433.174, which was adopted in 1975 and defines "mental retardation" for purposes of NRS Title 39 (Mental Health). See Hearing on A.B. 15 Before the Assembly Comm. on Judiciary, 72d Leg. (Nev., Feb. 25, 2003). The statutory definition conforms to the clinical definitions espoused by two professional associations that are concerned with mental retardation—the American Association on Mental Retardation (AAMR)[4] and the American Psychiatric Association (APA).[5] In particular, the statutory definition and the two clinical definitions share three concepts: (1) significant limitations in intellectual functioning, (2) significant limitations in adaptive functioning, and (3) age of onset.[6] Given the

---

[4]In 2006, the AAMR changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). At the time Atkins was decided and Ybarra sought relief in the district court, the organization was known as the AAMR. Therefore, we use the designation AAMR in this opinion.

[5]This focus on the AAMR's and APA's clinical definitions is not uncommon. As the Supreme Court observed in Atkins, the various statutory definitions of mentally retarded in existence at that time "are not identical, but generally conform to the clinical definitions" set out by the AAMR and APA. 536 U.S. at 317 n.22; see also id. at 318 ("[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.").

[6]The AAMR defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical

continued on next page . . .

similarities between the statutory definition and the clinical definitions of mental retardation, the AAMR and APA provide useful guidance in applying the definition set forth in NRS 174.098.

The first concept—significant limitations in intellectual functioning—has been measured in large part by intelligence (IQ) tests. Because "there is a measurement error of approximately 5 points in assessing IQ," which may vary depending on the particular intelligence test given, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000), the clinical definitions indicate that "individuals with IQs between 70 and 75" fall into the category of subaverage intellectual functioning, id. at 42. See also State v. McManus, 868 N.E.2d 778, 785 (Ind. 2007); State v. Vela, 777 N.W.2d 266, 294 (Neb. 2010); Ex Parte Briseno, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004). Although the focus

---

. . . continued

adaptive skills. This disability originates before age 18." Mental Retardation: Definition, Classification, and Systems of Support 1 (10th ed. 2002). Similarly, the APA defines mental retardation based on the same three criteria:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000).

with this element of the definition often is on IQ scores, that is not to say that objective IQ testing is required to prove mental retardation. Other evidence may be used to demonstrate subaverage intellectual functioning, such as school and other records. See McManus, 868 N.E.2d at 787; Com. v. Vandivner, 962 A.2d 1170, 1187 (Pa. 2009); see also Morris v. State, No. CR-07-1997, 2010 WL 415245, at *10 (Ala. Crim. App. Feb. 5, 2010) (considering school records in determining whether defendant was mentally retarded), petition for cert. filed, 79 U.S.L.W. 3377 (U.S. Dec. 16, 2010) (No. 10-808). But the burden remains on the defendant to present evidence affirmatively establishing this element of mental retardation. See NRS 174.098(5)(b).

To be found mentally retarded, an individual with subaverage intellectual functioning must also meet the second element, showing significant deficits in adaptive behavior. As the APA explains, individuals "'with IQs somewhat lower than 70'" would not be diagnosed as mentally retarded if there "'are no significant deficits or impairment in adaptive functioning.'" Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991) (quoting Diagnostic and Statistical Manual of Mental Disorders 37 (3d ed. 1980)); Myers v. State, 130 P.3d 262, 268 (Okla. Crim. App. 2005) (stating that IQ tests are not solely determinative of mental retardation issue). Thus, the interplay between intellectual functioning and adaptive behavior is critical to a mental retardation diagnosis. "Adaptive behavior" has been defined as the "collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives," and thus, "limitations on adaptive behavior are reflected by difficulties adjusting to ordinary demands made in daily life." Com. v. Miller, 888 A.2d 624, 630 (Pa. 2005); see also In re Hawthorne, 105 P.3d 552, 557 (Cal. 2005);

McManus, 868 N.E.2d at 787 (noting that "Indiana's adaptive behavior prong most closely resembles the AAMR definition"); Vela, 777 N.W.2d at 294; Briseno, 135 S.W.3d at 7 n.25; Diagnostic and Statistical Manual of Mental Disorders 42 (4th ed. 2000) (explaining that "[a]daptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting").

The final element in finding mental retardation is the age of onset. NRS 174.098(7) refers to onset during the "developmental period." We must therefore delineate the boundaries of the "developmental period" referenced in the statute. To do so, we look to the purpose of the age-of-onset requirement, the clinical definitions of mental retardation, and other jurisdictions' definitions of mental retardation. The purpose behind the age-of-onset requirement is twofold. The requirement ensures "that the mental retardation developed during the developmental period, as opposed to forms of brain damage that occur later in life," and, in the criminal arena, it precludes defendants from feigning mental retardation once charged with a capital crime. Alexis Krulish Dowling, Comment, Post-Atkins Problems With Enforcing the Supreme Court's Ban on Executing the Mentally Retarded, 33 Seton Hall L. Rev. 773, 805 (2003); see Penny J. White, Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After Atkins v. Virginia, 76 Tenn. L. Rev. 685, 707 (2009) (stating that "[t]he purpose of this [age] onset requirement is not to exclude some people with intellectual disabilities from the mental retardation category, but rather to differentiate between individuals with mental retardation and individuals with other mental deficits caused by

injuries or diseases that occurred during adulthood"); Nita A. Farahany, Cruel And Unequal Punishments, 86 Wash. U. L. Rev. 859, 884 (2009) (noting that "[i]n medicine, age of onset helps a clinician to distinguish mental retardation from other mental disabilities"). The clinical definitions adopted by the AAMR and the APA focus on the age of 18 years, requiring that subaverage intellectual functioning and adaptive behavior deficits manifest themselves before that age. Most jurisdictions are in step with the AAMR and APA and have required, either by statute or caselaw that these intellectual and adaptive deficits must originate before 18 years of age.[7] E.g., Ariz. Rev. Stat. Ann. § 13-753(K)(3) (2010); Ark. Code Ann. § 5-4-618(a)(1)(A) (2006); Cal. Penal Code § 1376(a) (West Supp. 2011); Conn. Gen. Stat. Ann. § 53a-46a(h) (2009); Conn. Gen. Stat. § 1-1g (2009) (defining mental retardation); Del. Code Ann. tit. 11, §§ 4209(d)(3)(a), 4209(d)(3)(d)(2) (2007); Fla. Stat. Ann. § 921.137(1) (West 2006 & Supp. 2011); Idaho Code Ann. § 19-2515A(1)(a) (2004 & Supp. 2010); 725 Ill. Comp. Stat. Ann. 5/114-15(d) (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1(H)(1) (2008 & Supp. 2011); Kan. Stat. Ann. § 21-4623(e) (Supp. 2010); Kan. Stat. Ann. § 76-12b01(d) (1997); N.C. Gen. Stat. § 15A-2005(a)(1)(a) (2009); Okla. Stat. Ann. tit. 21, § 701.10b(B) (West

---

[7]A minority of three jurisdictions—Indiana, Maryland, and Utah—statutorily define mental retardation as the manifestation of significant subaverage intellectual functioning and substantial impairment of adaptive behavior before the age of 22 years. Ind. Code Ann. § 35-36-9-2 (LexisNexis 1998 & Supp. 2010); Md. Code Ann., Crim. Law § 2-202(b)(1)(ii) (LexisNexis 2002); Utah Code Ann. § 77-15a-102(2) (2008). Although one of Ybarra's experts explained that the developmental period may extend "sometimes to 25," we have found no other support for such an expansive view in other jurisdictions.

2002 & Supp. 2010); S.D. Codified Laws § 23A-27A-26.1 (2004); Tenn. Code Ann. § 39-13-203(a)(3) (2010); Va. Code Ann. § 19.2-264.3:1.1(A) (2008 & Supp. 2010); Wash. Rev. Code. Ann. § 10.95.030(2)(e) (West 2002 & Supp. 2011); In re Brown, 457 F.3d 392, 396 (5th Cir. 2006) (recognizing that Texas courts have adopted the AAMR definition of mental retardation providing that mental retardation must manifest before age of 18 years); Chase v. State, 873 So. 2d 1013, 1027-28 (Miss. 2004) (adopting AAMR and APA definition of mental retardation, including onset before age of 18 years); Com. v. Miller, 888 A.2d 624, 629-31, 630 n.7 (Pa. 2005) (same). A few jurisdictions, like Nevada, have statutes that refer more generally to the "developmental period." Ala. Code § 15-24-2(3) (LexisNexis 1995 & Supp. 2010); Colo. Rev. Stat. § 18-1.3-1101(2) (2010); Ga. Code Ann. § 17-7-131(a)(3) (2008 & Supp. 2010); Ky. Rev. Stat. Ann. § 532.130(2) (LexisNexis 2008); S.C. Code Ann. § 16-3-20(C)(b)(10) (2003). Courts in two of those states have answered the same question that we face in this case—what is the "developmental period"? Those courts have defined "development period" as the time before an individual reaches 18 years of age, consistent with the age of onset used in the clinical definitions and in a majority of jurisdictions. Holladay v. Campbell, 463 F. Supp. 2d 1324, 1341-42 (N.D. Ala. 2006); Ex Parte Perkins, 851 So. 2d 453, 456 (Ala. 2002); Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991) (observing that Georgia's statutory definition of mental retardation is consistent with APA, which identifies developmental period as before age 18).

We conclude that the approach to the age-of-onset requirement taken by the AAMR and APA and the majority of jurisdictions—that a person suffered from mental retardation prior to the age of 18 years—best serves the purpose behind the requirement.

Focusing on the period before a person reaches 18 years of age ensures that the person suffers from mental retardation rather than some other mental impairment that occurred later in life and that a criminal defendant cannot feign mental retardation to avoid a capital sentence. Considering the purpose behind the age-of-onset requirement, the guidance provided by the AAMR and APA, and the consensus among most jurisdictions, we conclude that the "developmental period" referenced in NRS 174.098(7) is the period before a person reaches 18 years of age. Accordingly, subaverage intellectual functioning and adaptive behavior deficits must originate before 18 years of age to meet the definition of mental retardation contemplated by NRS 174.098.[8]

With this understanding of the elements of mental retardation in mind, we turn to the district court's decision and Ybarra's challenges to it. To begin with, we must address the standard of review that applies when a district court's decision regarding a claim of mental retardation is reviewed on appeal. While some courts have reviewed such decisions for an abuse of discretion, see Rondon v. State, 711 N.E.2d 506 (Ind. 1999); State v. White, 885 N.E.2d 905 (Ohio 2008), or clear error, see Com. v. Crawley, 924 A.2d 612, 616 (Pa. 2007) ("[O]ur standard of review [for mental retardation determinations] is whether the factual findings are supported by substantial evidence and whether the legal conclusion drawn therefrom is clearly erroneous."), others have treated it as a mixed question of fact and law, see Walker v. Kelly, 593 F.3d 319, 322-23 (4th

---

[8]The district court found that the developmental period was childhood to age 18 but nevertheless considered evidence of mental retardation between the ages of 18 and 25.

Cir.) (applying Virginia law to mental retardation determinations, appellate courts review district court's factual findings for clear error and legal conclusions de novo), cert. denied, 560 U.S. ___, 130 S. Ct. 3318 (2010); Cherry v. State, 959 So. 2d 702, 712 (Fla. 2007) (noting that in reviewing mental health determinations, appellate courts "employ[ ] the standard of whether competent, substantial evidence supported the [postconviction] court's determination" and questions of law are reviewed de novo). In our view, the determination whether a capital defendant is mentally retarded is based on factual conclusions but requires distinctively legal analysis to determine whether the elements of mental retardation have been proven, and therefore, we will review such a determination as a mixed question of fact and law. See Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008) ("We have noted that review of a district court's decision as a mixed question of law and fact is appropriate where the determination, although based on factual conclusions, requires distinctively legal analysis."). Accordingly, we will give deference to the district court's factual findings so long as those findings are supported by substantial evidence and are not clearly erroneous, but we will review the legal consequences of those factual findings de novo. See Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (applying mixed-question standard of review). Matters of credibility in this area remain, however, within the district court's discretion. See Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) (observing that on remand for evidentiary hearing "the district court will be better able to judge credibility"). See generally Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000) ("The trier of fact determines the weight and credibility to give conflicting testimony."). For

the reasons explained below, we conclude that Ybarra failed to show that the onset of any subaverage general intellectual functioning and adaptive behavior deficits occurred before he reached age 18. Accordingly, the district court did not err by denying the motion to strike the death penalty on this ground.

Evidence concerning Ybarra's alleged mental retardation

The district court conducted a two-day evidentiary hearing vetting the issue of Ybarra's alleged mental retardation. Ybarra presented two expert witnesses—Dr. David Schmidt, a psychologist, and Dr. Mitchell Young, a psychiatrist. The State countered with an expert witness—Dr. Theodore Young, a neuropsychologist. The district court also considered more than 3,000 pages of exhibits, including school records, mental health and medical records, military records, prison records, and letters and other communications (primarily prison kites)[9] Ybarra authored during his incarceration.[10]

Ybarra was born on July 20, 1953, in West Sacramento, California, and is the oldest of five children. He attended school until the age of 16, when he transferred to an alternative school and ultimately obtained his adult education degree shortly before he turned 19. Ybarra has a lengthy history of drug and alcohol abuse beginning in his teenage

---

[9]In its broadest use, "kite" is prison slang for a written communication. More narrowly, it is a written request for services or other assistance within the prison.

[10]On August 30, 2010, Ybarra filed a motion for remand to present additional evidence related to his mental retardation claim. We are not convinced that a remand is warranted on this basis. Accordingly, we deny the motion for remand.

years and extending into adulthood. He enlisted in the Marine Corps twice but was discharged for homosexual conduct and fraudulent enlistment. Ybarra also enlisted in the Army National Guard but was discharged due to a medical condition (asthma). The record shows that Ybarra has been diagnosed with an assortment of mental conditions, including delusions and hallucinations, organic personality disorder, depression, and bipolar disorder, to identify a few. When Ybarra was 25 he married, but the marriage lasted only a few months.

Defense experts

The first defense expert, Dr. Schmidt, interviewed and tested Ybarra in October 2001 and January 2002 and considered a wide range of information in forming his opinion that Ybarra is mentally retarded. During the evaluation, Dr. Schmidt administered the Wechsler Adult Intelligence Scale (3d edition) (WAIS-III) to Ybarra, who scored a full scale IQ of 60, which, Dr. Schmidt explained, placed Ybarra's actual IQ between 57-60, meaning that Ybarra's intellectual functioning fell within the mild range of mental retardation. As further support for this finding regarding Ybarra's limited intellectual functioning, Dr. Schmidt relied on Ybarra's mental health records, which included a psychiatrist's diagnosis during Ybarra's developmental years that he was intellectually challenged. Dr. Schmidt also pointed to a significant head injury sustained when Ybarra was about 9 years old, after which Ybarra suffered headaches and experienced abnormal electroencephalogram (EEG) test results. According to Dr. Schmidt, Ybarra's condition deteriorated into mental illness, which changed the course of his development, driving him into the range of mental retardation. He explained that other evidence supported his conclusions about Ybarra's limited intellectual functioning and

adaptive skills, including that Ybarra displayed an inability to participate in sports, he had difficulty getting along with his school peers, and his performance in school deteriorated with him being transferred to an alternative school at age 16 when a school psychiatrist concluded that he would not benefit from any further schooling. Dr. Schmidt explained that Ybarra's difficulties after his head injury showed that he had limited adaptive functioning but that these problems were masked throughout his developmental period because friends and family assisted him in his care and provided a structured environment. As further evidence of Ybarra's limited adaptive skills as he grew older, Dr. Schmidt testified that Ybarra was unable to maintain steady employment, relying on friends and family for work because he was unable to secure work on his own; when he was employed he only held menial jobs; he was in and out of the military, which suggested that he could not maintain employment; he never lived independently of others; and he became lost easily. Dr. Schmidt opined that the IQ test he administered and the other evidence he considered demonstrated that Ybarra is mentally retarded.[11]

Ybarra's second expert, Dr. M. Young, also concluded that Ybarra is mentally retarded based on interviews with Ybarra and tests that he administered to Ybarra in 2007 and on his review of numerous records, including Ybarra's medical, mental health, school, and police records. Dr. M. Young administered the Street Survival Skills Questionnaire (SSSQ) to Ybarra. Although the SSSQ measures adaptive

---

[11]Dr. Schmidt testified that the developmental period that helps define mental retardation may include the period up to when an individual reaches 25 years of age.

skills, Dr. M. Young's report indicates that the raw score on the SSSQ can be converted to a standard score that is comparable to an IQ score. Ybarra scored a 79, which placed him in the borderline range of mental retardation. Although Dr. M. Young observed factors indicating malingering, he opined in his written evaluation that Ybarra met the criteria for mental retardation based on other sources of information, including the observations of other professionals who had interacted with Ybarra that when Ybarra is "confronted with an excess of information or affective stimuli, he becomes overwhelmed, agitated, avoidant, poorly communicative, and unable to cope with complex scenarios or problem solving," thus indicating to Dr. M. Young limited adaptive skills.

The State's expert

Dr. T. Young, the State's mental health expert, disagreed with Dr. Schmidt's and Dr. M. Young's assessments of Ybarra's intellectual functioning. He interviewed Ybarra on September 27, 2007, and conducted a battery of tests, the results of which he described as "bizarre." Such "bizarre" results, according to Dr. T. Young, indicate that the client manipulated the evaluation and the test results could not be interpreted. Such was the case with Ybarra's test results. Dr. T. Young administered the Wechsler Abbreviated Scale of Intelligence (WASI) to Ybarra, who scored a full scale IQ score of 66, which was consistent with the score Ybarra received on the test administered by Dr. Schmidt and put Ybarra in the mild range of mental retardation. But Dr. T. Young testified that he had no confidence in the IQ score considering the uninterpretable results from the other tests that he administered to Ybarra. Because of the strange test results, Dr. T. Young administered the Test of Memory Malingering (TOMM) to Ybarra, who scored 30, indicating malingering.

Based on the TOMM score, Dr. T. Young concluded that the data he collected from other tests was invalid, and therefore, he was unable to draw any conclusions about brain injury or mental retardation. Because Ybarra scored the same IQ on the test administered by Dr. Schmidt, Dr. T. Young questioned the validity of that IQ test. And, in fact, Dr. T. Young opined that there have been no valid IQ tests obtained from Ybarra that support mental retardation.

Other evidence

No intelligence tests were administered to Ybarra during the developmental period. Ybarra was 27 years old when he took his first intelligence test—the WAIS, which Dr. Martin Gutride administered to him in 1981. Ybarra scored an IQ of 86, which is outside the range of mental retardation. When questioned about the discrepancy between Ybarra's IQ score on the 1981 test and his significantly lower score on the test administered in October 2001 or January 2002,[12] Dr. Schmidt suggested that the 1981 test may have been scored incorrectly and observed that 26 years had passed between the two tests, with new tests having been developed and the norms for IQ tests having changed over time. He also suggested that the 1981 IQ score could be inflated by as much as 15 points[13] according to the Flynn effect, which refers to a body of work suggesting that IQ test scores show an upward drift over time until

---

[12]Dr. Schmidt's report does not indicate the exact date when he administered the WAIS-III to Ybarra. His report indicates that he conducted Ybarra's evaluation on October 17 and 18, 2001, and January 10 and 11, 2002.

[13]Dr. Schmidt explained that a standard deviation is 15 points.

the test is re-normed. See Pruitt v. State, 903 N.E.2d 899, 910 n.7 (Ind. 2009) (noting that Flynn effect refers "to the gradual escalation of intelligence test scores over long periods of time"); Smith v. State, ___ P.3d ___, ___, 2010 WL 4397004, at *4 n.6 (Okla. Crim. App. 2010). According to Dr. Schmidt's testimony that an IQ score of 70 to 75 indicates mild mental retardation, such an adjustment would put the 1981 score within the mild range of mental retardation.

Ybarra's school, mental health, and military records provided generalized assessments of his intellectual functioning that were not based on intelligence tests. Ybarra's seventh-grade teacher described him as a C to C+ student who had no learning problems and could have worked harder.[14] Mental health providers who evaluated Ybarra throughout his life for various reasons, most relating to his competency, described him as having average to below average intellectual functioning, with an estimated IQ between 70 and 80. One mental health evaluator (Dr. William O' Gorman, in 1980) indicated that he suspected that Ybarra was mentally retarded but could not establish to what degree. Military records described Ybarra's intellectual functioning as "dull normal," which Dr. Schmidt acknowledged is not within the range of mental retardation.

The evidence presented at the hearing included Ybarra's writings since his arrest and incarceration. The documents included dozens of prison kites that Ybarra prepared during his incarceration, which mostly dealt with dietary or medication concerns, and letters he wrote to friends, family members, and doctors. The defense experts

---

[14]Dr. Schmidt characterized the teacher's description of Ybarra as "the recollection of the teacher some 35 years later."

suggested that the writings could not be used as evidence of Ybarra's intellectual functioning, as they opined that other inmates may have assisted Ybarra in drafting the documents. No other evidence was presented to support those opinions.

District court's ruling

The district court determined that the evidence simply did not support Ybarra's mental retardation claim, with much of the evidence undermining the testimony and credibility of the defense experts. The district court observed that while the defense experts were "well qualified and honorable," "the record is so full of evidence that contradicts their conclusions that the Court finds the bulk of their testimony to be of little weight." Identifying specific examples, the district court also concluded that Ybarra's experts "focused only on information that supported their conclusions with minimal consideration of evidence that undermined their opinions." Based on "a careful review of the record, an observation of the witnesses while testifying, and an observation of Robert Ybarra, Jr. throughout two (2) days of hearing," the district court concluded that Ybarra failed to demonstrate by a preponderance of the evidence that he is of subaverage intellectual functioning and has significant adaptive behavior deficits and that the onset of his alleged mental retardation occurred during the developmental period.

The district court concluded that Ybarra failed to present sufficient evidence to establish significant subaverage intellectual functioning that manifested during the developmental period. The court was persuaded in part by the fact that Ybarra was not tested for mental retardation before age 18, and despite contact with various school officials, no one suspected that he was mentally retarded. The district court

observed that Ybarra obtained his adult education diploma and that military records described him as having "dull normal" or "borderline" intelligence, which the experts agreed was not in the range of mental retardation. The district court concluded that, at best, the evidence showed that Ybarra had below average intelligence prior to age 18.

The district court explained that even if it accepted Dr. Schmidt's testimony that the developmental period extends to age 25, noting that no jurisdiction has done so, Ybarra nevertheless failed to produce sufficient evidence of subaverage intellectual functioning that manifested before age 25, considering documentary evidence from other psychologists and psychiatrists describing Ybarra as having "borderline," normal, or low normal intelligence and IQ scores of 86 and 70 to 80. And the court rejected Dr. Schmidt's opinion regarding Ybarra's intellectual functioning as incredible, noting that with all the testing and observation of Ybarra from 1979 to 2002, Dr. Schmidt was the first to conclude that Ybarra was mentally retarded but his report contained a "bold-faced disclaimer" that Ybarra's IQ score "may underestimate his actual intelligence functioning" "due to the severe distress that some portions of the . . . testing caused" Ybarra. The district court also focused on Dr. Schmidt's admission that he gave no specific test for malingering, whereas the State's expert administered a test to detect malingering that produced a score that was "off the scale," indicating that Ybarra was malingering. The district court also found that Dr. Schmidt's conclusions regarding the effects of Ybarra's brain damage and of his poor judgment and limited ability to solve problems, handle stress, and deal with his hallucinations did not "withstand scrutiny in the context of Ybarra's real life actions and functioning." The district court further identified in great detail

additional evidence of malingering and intellectual functioning that fell outside the range of mental retardation, including: (1) that Ybarra had a motive to fake performance on mental health tests; (2) reports by other mental health professionals that Ybarra was malingering or exaggerating symptoms of mental disorder and displaying psychotic behavior; (3) reports that Ybarra played cards, backgammon, scrabble, and other games while at a mental health facility (Lake's Crossing); (4) a report that Ybarra's hallucinations were not "valid"; (5) suggestions and inferences by mental health professionals that Ybarra feigned incompetence; (6) hundreds of prison kites concerning medical issues showing a level of intelligence beyond a mildly mentally retarded individual;[15] and (7) medical progress notes suggesting that Ybarra feigned mental illness to remain in the prison mental health unit.

The district court also concluded that Ybarra failed to present sufficient evidence to establish significant adaptive behavior deficits that manifest during the developmental period. As to Ybarra's adaptive behavior before age 18, the district court concluded that minimal evidence supported any adaptive deficits. The court specifically found incredible Dr. Schmidt's conclusion that bullying by school peers and poor academic performance indicated an adaptive deficit, and instead found that Ybarra's academic and social problems could also be explained by his alcohol and

---

[15]The district court rejected the defense experts' suggestions that Ybarra had assistance in preparing the dozens of prison kites, finding that "[n]othing in the record supports a conclusion that Ybarra has had assistance in these writings, and the consistency in the topics and style of writing all support a finding that Ybarra did write his own kites without assistance."

drug abuse, as the other defense expert (Dr. M. Young) acknowledged. And the court pointed out that despite those problems, Ybarra managed to attend night school to secure his adult education diploma while maintaining employment. The district court also rebuffed Dr. Schmidt's opinion that Ybarra had adaptive deficits because he held only menial or minimum-wage jobs, noting that persons under 18 typically hold menial jobs and that Ybarra worked as a forklift driver for several years. The district court also found unpersuasive Dr. Schmidt's reliance on the lack of evidence that Ybarra lived independently, at least before the age of 18, as proof of adaptive deficits because most children do not live independently before the age of 18.

The district court was also unpersuaded by evidence Ybarra introduced concerning adaptive-behavior deficits exhibited between the ages 18 and 25 years. In particular, the district court found incredible Dr. Schmidt's conclusion that Ybarra was unable to hold a job, noting that Ybarra was employed for lengthy periods of time at salaries that exceeded minimum wage at the time. As to Ybarra's brief military service, the district court rejected Dr. Schmidt's opinion that this evidenced adaptive-behavior deficits as Ybarra was discharged for reasons that had nothing to do with his ability to adjust to the ordinary demands of daily life—he was discharged from the Marine Corps the first time for homosexuality and the second time for fraudulent enlistment, and was discharged from the Army National Guard for a medical condition. Further, the district court found that the record did not support Dr. Schmidt's conclusion that Ybarra was unable to live independently, pointing out that Ybarra moved to California, Oregon, Montana, and Nevada and secured living quarters and employment, and was married for a brief time.

Based on these findings and conclusions, the district court determined that Ybarra failed to demonstrate by a preponderance of the evidence that he suffered from significant subaverage intellectual functioning and adaptive behavior deficits that manifested during the developmental period. On appeal, Ybarra challenges specific aspects of the district court's decision. We address those challenges below.

Intellectual functioning

Ybarra's disagreement with the district court's determination that he did not demonstrate subaverage intellectual functioning during the developmental period is twofold: the district court (1) erroneously focused on the 1981 IQ test to the exclusion of the IQ results Dr. Schmidt obtained and (2) erroneously relied on the tests administered by the State's expert because he used improper testing instruments, scoring, and administration techniques. We disagree, concluding that the district court's factual findings are supported by substantial evidence and that its legal conclusions are not erroneous.

1981 IQ test

Ybarra contends that the district court focused on the 1981 IQ test, disregarding the IQ test Dr. Schmidt administered, which resulted in a score (60) that is within the mild range of mental retardation. In this, Ybarra argues that the district court erroneously concluded that the 1981 IQ test, which yielded a score of 86, was valid and that even when adjusted to account for the Flynn effect, the adjusted score was not within the range of mental retardation. According to Ybarra, when the 1981 score is adjusted consistent with Dr. Schmidt's testimony, the result is an adjusted score that is within the mild range of mental retardation.

As noted previously, the Flynn effect refers to a body of work suggesting that scores on a particular IQ test will drift upward over time until the test is re-normed. See Pruitt v. State, 903 N.E.2d 899, 910 n.7 (Ind. 2009) (noting that Flynn effect refers "to the gradual escalation of intelligence test scores over long periods of time"). Whether IQ scores should be adjusted to account for the Flynn effect is a matter of great dispute in other jurisdictions. See, e.g., Walker v. True, 399 F.3d 315, 322-23 (4th Cir. 2005) (remanding for consideration of persuasiveness of Flynn effect where district court did not consider theory); Green v. Johnson, 515 F.3d 290, 300 n.2 (4th Cir. 2008) (noting that "neither Atkins nor Virginia law appears to require expressly that [the Flynn effect and standard error of measurement] be accounted for in determining mental retardation status"); In re Mathis, 483 F.3d 395, 398 n.1 (5th Cir. 2007) (noting that Flynn effect has not been accepted as scientifically valid in Fifth Circuit); Thomas v. Allen, 614 F. Supp. 2d 1257, 1281 (N.D. Ala. 2009) (noting that even though recognized legal cutoff score for finding of significantly subaverage intellectual functioning is IQ of 70 or below, a court should not look at raw IQ score as precise measurement and must consider "Flynn effect" and standard error of measurement in determining whether IQ score falls within range containing scores less than 70); U.S. v. Davis, 611 F. Supp. 2d 472, 488 (D. Md. 2009) (concluding that "Flynn effect" evidence is relevant and persuasive and will consider Flynn-adjusted scores in evaluation of intellectual functioning); Wiley v. Epps, 668 F. Supp. 2d 848, 894-95 (N.D. Miss. 2009) (finding that regardless of whether "'Flynn effect' is considered as a precise mathematical formula in this case, it will take into consideration the obsolescence of test norms in weighing the evidence concerning Petitioner's intellectual functioning" but expressly

declining to rule whether Flynn effect must be applied or that failing to apply theory is unreasonable), aff'd, 625 F.3d 199 (5th Cir. 2010); Maldonado v. Thaler, 662 F. Supp. 2d 684, 713 n.27 (S.D. Tex. 2009) (declining to apply Flynn effect to results of petitioner's IQ scores), aff'd, 625 F.3d 229 (5th Cir. 2010); In re Salazar, 443 F.3d 430, 433 n.1 (5th Cir. 2006) (noting, without deciding whether Flynn effect is valid scientific theory, that petitioner's readjusted IQ score to account for score inflation was still above cutoff for mental retardation); State v. Dunn, 41 So. 3d 454, 470 n.16 (La.) (noting that court has not expressly accepted Flynn effect as scientifically valid), cert. denied, 562 U.S. ___, 131 S. Ct. 650 (2010). And the district court indicated that although the AAMR references the Flynn effect, it makes no recommendation to adjust IQ scores because of it.

We need not, however, take sides in the dispute over the Flynn effect at this time for three reasons. First, the district court did not disregard Dr. Schmidt's testimony regarding the Flynn effect. Rather, the court found the testimony incredible considering (a) other sources that either rejected the theory or did not demand adjustments in IQ scores to account for it; and (b) other evidence in the record supporting the validity of the 1981 IQ score, including evaluations from mental health professionals and Ybarra's military records reporting that he was of dull-normal to borderline intelligence. And although the district court was "not convinced [that] the scientific community is prepared to adjust the scores according to the Flynn effect," it nevertheless considered the Flynn effect and concluded that an adjustment for that effect reduced the 1981 IQ score to 78, which is outside the range of mental retardation. To the extent Ybarra challenges the district court's adjustment computation because it

did not lower the IQ score by 15 points as suggested by Dr. Schmidt, we are not persuaded that the district court committed reversible error. In adjusting the IQ score to account for the Flynn effect, the district court used an adjustment rate of .31 per year "(for 26 years per Dr. Schmidt),"[16] which reduced Ybarra's IQ score from 86 to 78. Many courts have applied an adjustment rate of approximately .3 per year since the IQ test was re-normed. See Witt v. State, 938 N.E.2d 1193, 1200 (Ind. Ct. App. 2010) (citing The American Association on Intellectual and Developmental Disabilities' User's Guide: Mental Retardation Definition, Classification and Systems of Supports (10th ed. 2002)); Bowling v. Com., 163 S.W.3d 361, 374 (Ky. 2005) (noting that Flynn effect suggests that "as time passes and IQ test norms grow older, the mean IQ score tested by the same norm will increase by approximately three points per decade"); Dunn, 41 So. 3d at 462 (citing James Flynn, Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, 12 Psych., Pub. Pol., and L. 170, 176 (2006)). We conclude that the district court's adjustment calculation was not without foundation and does not indicate, as Ybarra suggests, that "the district court acted not as an impartial arbiter but as an advocate for the state" and was ill-informed.

Second, the district court did not rely solely on the 1981 IQ test to determine that Ybarra had not proven that he suffers from

---

[16]Dr. Schmidt testified that 26 to 27 years had elapsed between Ybarra's 1981 IQ test and the introduction of the new IQ test with changed norms.

significant subaverage intellectual functioning. As explained above, the district court also looked to Ybarra's school and other records, his writings, and evidence that he was malingering. In fact, the district court expressly observed in its order that "[t]he record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning now or during his developmental years."

And third, we need not decide the relevance, if any, of the Flynn effect and the necessity of adjusting the 1981 IQ score because the 1981 IQ test, as with all of Ybarra's IQ tests, was administered well after he turned 18 years of age.[17] Therefore, this issue has little value in evaluating whether Ybarra presented sufficient evidence to establish mental retardation as defined in NRS 174.098(7).

Tests administered by the State's expert

Ybarra also argues that the district court erroneously relied on the IQ test administered by the State's expert, Dr. T. Young, because that test was improperly administered and therefore invalid. Specifically, Ybarra argues that Dr. T. Young used a test that was designed for a quick assessment rather than "making a legal determination" of mental retardation and the test was improperly administered because Dr. T. Young acknowledged that prison guards were present during the test, contrary to testing protocol. In considering the IQ test administered by

[17]This is true even had we accepted Dr. Schmidt's characterization of the developmental period as being up to age 25 years.

Dr. T. Young, the district court focused on its relationship to other evidence indicating that Ybarra was malingering. The court considered the test to be invalid because other evidence, including reports from mental health evaluations, prison medical records, letters and prison communications from Ybarra, and other tests that Dr. T. Young administered to Ybarra, indicated that Ybarra was malingering. It is not clear how the court's conclusion that the test was invalid for reasons other than those advanced by Ybarra helps Ybarra, particularly considering that the IQ score on that test, if it were valid, would have placed Ybarra within the mild range of mental retardation.[18] Therefore, we are unpersuaded that any consideration the district court gave to the IQ test administered by Dr. T. Young was improper or unfounded.

Ybarra further argues that Dr. T. Young improperly used and administered the TOMM to support his conclusion that Ybarra was malingering and the district court failed to consider evidence showing the inaccuracy of the TOMM test results, which included evidence that the TOMM should not be used on persons who are mentally retarded and that the test sometimes gives false positive results. We are not persuaded that the district court's consideration of the TOMM score requires reversal.

Clearly, the district court considered the TOMM results in its decision, observing that the TOMM score indicated malingering, but it is also clear that the district court considered a wealth of other evidence in

---

[18]We note in this respect that Dr. Schmidt pointed to the score on the IQ test administered by Dr. T. Young as corroborating the accuracy of the IQ test that he had administered approximately six years earlier.

determining that Ybarra was malingering and therefore had not proved significant subaverage intellectual functioning. Specifically, the district court found evidentiary support for malingering in the prison kites that Ybarra had written over the years, which "reveal[ed] an intelligence level which is clearly not that of a mildly retarded person," and the medical progress notes during his incarceration that "portray[ed] Ybarra as a man who knows how to manipulate and fake (or exaggerate) symptoms of mental illness to accomplish his goals." The district court also observed that comments by mental health professionals who evaluated Ybarra during his incarceration indicated that their testing of Ybarra revealed malingering. And the district court illustrated all of those conclusions with specific references to evidence in the record. The district court further observed Ybarra's "ability to manipulate health care professionals, attorneys, play scrabble, backgammon, racquetball and volleyball, and his ability to type, read medical literature, [and] write coherent meaningful letters and kites." Thus, there is evidence other than the TOMM score to support the district court's finding that Ybarra was malingering.

Moreover, as with the 1981 IQ score, the TOMM score is of little value in determining whether Ybarra met his burden of proving significant subaverage intellectual functioning, as the TOMM was administered well after Ybarra reached 18 years of age.

The district court's factual findings are supported by substantial evidence and support its conclusion that Ybarra did not show that he suffered from significant subaverage intellectual functioning that manifested during the developmental period.

Adaptive behavior deficits

Ybarra claims two errors respecting the district court's ruling related to adaptive behavior deficits: the district court (1) disregarded evidence substantiating that element and (2) improperly relied on its own lay opinions that are contrary to the evidence. We disagree.

Evidence substantiating adaptive behavior deficits

The defense experts opined that Ybarra showed adaptive behavior deficits in several areas of his life based on his victimization at school; his record of menial, minimum-wage, supervised jobs; the lack of evidence that he had lived independently; the short duration of his military service; and other professionals' observations regarding Ybarra's behavior when confronted "with an excess of information or affective stimuli." But as the district court found, those considerations did little to demonstrate adaptive behavior deficits. And rather than disregarding that testimony, the district court found much of it to be incredible given other evidence in the record, all of which is carefully delineated in the district court's thorough written order. We conclude that the district court was in the best position to assess the credibility of the experts' testimony, and, although Ybarra disagrees with the district court's findings related to adaptive deficits, substantial evidence supports the district court's finding that Ybarra did not meet his burden of proving this element of mental retardation.

Lay opinion

Ybarra contends that the district court erroneously relied on its own lay assumptions about adaptive functioning to the exclusion of evidence supporting a finding that he exhibited adaptive behavior deficits.

The essence of Ybarra's argument is that the district court's preconceptions about what a mentally retarded person should or should not be able to do in terms of adaptive functioning led the district court to ignore uncontradicted evidence of particular adaptive deficits, including (1) Ybarra's inability to navigate his hometown; (2) his holding only menial jobs; (3) his problems dealing with others while in school; (4) his lack of independent living as evidenced by his marriage; (5) his reliance on another inmate to litigate a civil rights action; and (6) a school psychiatrist's (Dr. William Asher) conclusion that at age 15, Ybarra had reached his potential in school given his intellectual and emotional capabilities. Ybarra further complains that the district court placed great emphasis on evidence indicative of malingering in the absence of such evidence during his childhood or incarceration and ignored evidence showing that malingering is not inconsistent with a diagnosis of mental retardation. We disagree with Ybarra's assessment of the district court's findings and conclusions in this regard.

What the record shows is that the district court was faced with conflicting evidence concerning Ybarra's alleged adaptive behavior deficits. After listening to two days of expert testimony and considering approximately 3,000 pages of documents, the district court found the testimony of Ybarra's experts to be incredible considering the record as a whole. We do not perceive the district court's conclusions about the evidence to be improper lay opinion. Rather, the district court considered the evidence, making reasonable inferences from it, and ultimately concluded that Ybarra failed to show adaptive behavior deficits considering his alcohol and drug abuse during his youth, his work record,

military service, ability to live independently and travel, and written communications in prison.[19]

As to Ybarra's suggestion that the district court's reliance on evidence of malingering was misplaced, we disagree. The district court's finding that Ybarra had not met his burden of proving adaptive behavior deficits during the developmental period was not based on evidence of malingering. And while malingering played a role in the district court's finding regarding adaptive behavior deficits between the ages of 18 and 25, it considered other evidence in rejecting Ybarra's claim of adaptive behavior deficits during that time.[20] Rather, the bulk of the district court's discussion of malingering related to the intellectual functioning element of mental retardation. The district court expressly acknowledged that malingering does not exclude the possibility of mental retardation but that the record in this case supported a conclusion that Ybarra was malingering, and, in addition to other evidence related to intellectual

---

[19]While the district court acknowledged that a fellow inmate assisted Ybarra with a federal lawsuit, which could support Dr. Schmidt's opinion that mentally retarded individuals often seek assistance from others in preparing written communications, the district court observed that Ybarra authored hundreds of coherent and concise prison kites and letters and that "the consistency in the topics and style of writing all support a finding that Ybarra did write his own kites without assistance."

[20]Although the district court considered evidence of adaptive behavior deficits from Ybarra's childhood to age 18 and age 18 to 25, the developmental period as we have defined it makes evidence related to the former primarily relevant.

functioning, he failed to prove that he had significant subaverage intellectual functioning. In determining that Ybarra was malingering, the district court identified specific evidence in the record where mental health providers who had evaluated Ybarra during his incarceration reported evidence of malingering. We conclude that any consideration the district court gave to malingering was supported by substantial evidence. Therefore, we reject Ybarra's contention that the record lacked evidence of malingering.

The district court's factual findings are supported by substantial evidence and support its conclusion that Ybarra did not meet his burden of proving adaptive behavior deficits that manifested during the developmental period. Because he failed to meet his burden in this regard, the district court did not err in concluding that he did not prove this element of mental retardation.

CONCLUSION

Because Ybarra failed to meet his burden of demonstrating bias based on Judge Dobrescu's prior professional relationship with the murder victim's family or the notoriety of his case, his disqualification motion was unsupportable and properly denied. As to Ybarra's mental retardation claim, we conclude that he failed to prove by a preponderance of the evidence that he suffered from significant subaverage intellectual functioning and adaptive behavior deficits during the developmental period, which extends to 18 years of age. Consequently, he failed to show that he is mentally retarded as provided in NRS 174.098(7). We therefore

affirm the district court's order denying Ybarra's motion to strike the death penalty.

Parraguirre, J.

We concur:

Douglas, C.J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

APPENDIX F

Decision and Order denying Petitioner's Motion to Strike the Death Penalty, *Ybarra v. E.K. McDaniel, Warden*, Seventh Judicial District Court, Case No. HC-0303002
(June 26, 2008)

Case No. HC-0303002

Dept. No. 1

FILED
2005 JUN 26 PM 1:38
WHITE PINE COUNTY CLERK
BY LB
DEPUTY

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

* * * * * *

ROBERT YBARRA, JR.,

Petitioner,

-vs-

E.K. McDANIEL, Warden, et al.,

Respondents.

DECISION AND ORDER DENYING PETITIONER'S MOTION TO STRIKE THE DEATH PENALTY

PROCEDURAL HISTORY

On September 29, 1979, Petitioner Robert Ybarra, Jr. drove sixteen (16) year old Nancy Griffith to a remote location west of Ely where he beat her, raped her, poured gasoline on her, lit her on fire and left. She died less than two (2) days later.[1]

In June 1981, Ybarra was convicted of First Degree Murder, First Degree Kidnaping, Battery With the Intent to Commit Sexual Assault and Sexual Assault. The jury sentenced him to death. Ybarra appealed his conviction and sentences and on March 3,

[1] Complete details of the crime and evidence presented at trial is in the Court's Order Dismissing Petition for Writ of Habeas Corpus filed 7/20/04 in this case.

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

1982, the Nevada Supreme Court affirmed the conviction and sentence.[2] A petition for rehearing was denied and a petition for writ of habeas corpus was denied by the United States Supreme Court on February 25, 1985.

On March 19, 1985, Ybarra filed a petition seeking post-conviction relief. A supplemental petition was filed in June 1985 and a hearing was held on September 16-17, 1985. On July 9, 1986, this court, the Honorable Merlyn H. Hoyt presiding, denied post-conviction relief. The Nevada Supreme Court affirmed on January 27, 1987.[3]

On March 10, 1988, Ybarra filed a Petition for Writ of Habeas Corpus in the First Judicial District Court of the State of Nevada. The Petition was dismissed on December 30, 1988 and the Nevada Supreme Court affirmed the dismissal on June 29, 1989. Ybarra then filed a federal habeas petition on August 14, 1989. A statement of additional claims was filed on May 14, 1990, and a second statement of additional claims was filed on December 14, 1990. The Federal Court dismissed the petition without prejudice on March 31, 1993.

Ybarra filed a Petition for Writ of Habeas Corpus in the above entitled court on April 26, 1993 and a supplemental petition on February 5, 1995. Respondents filed a Motion to Dismiss on October 17, 1997. On June 29, 1998 the Court entered a comprehensive order which denied Ybarra any relief. Ybarra appealed and the Nevada Supreme Court dismissed the appeal on July 6, 1999.

Ybarra filed another Petition for Writ of Habeas Corpus on March 6, 2003.

---

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

[3]Ybarra v. State, 103 Nev. 8, 731 P.2d 353 (1987).

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

Respondents filed a Motion to Dismiss on October 6, 2003, which was opposed by Ybarra. This Court granted the Motion to Dismiss on July 20, 2004, and Ybarra appealed. The Nevada Supreme Court affirmed the dismissal on appeal, but remanded the case to allow him an opportunity to litigate his claim of mental retardation pursuant to NRS 175.554(5).

Ybarra filed a Motion to Strike Death Penalty based on a claim of mental retardation which was opposed by the State. On April 29 - 30, 2008 a hearing was held on Petitioner's Motion to Strike the Death Penalty. Ybarra was present and represented by Michael Pescetta, Esq. and Michael Charleton, Esq., both Federal Public Defenders. Respondents were represented by Richard Sears, Esq., White Pine County District Attorney. The Court received exhibits in excess of three thousand (3,000) pages and testimony from psychologists David Schmidt and Ted Young, and from psychiatrist Mitchell Young.

The Court has reviewed the information presented and finds that additional briefing or argument is not necessary.[4]

DISCUSSION

In Atkins v. Virginia, the U.S. Supreme Court held that the imposition of the death penalty on a mentally retarded defendant constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the Federal Constitution.[5] The Court left the task

---

[4] On May 2, 2008, the State filed a Notice of Supplemental Filing of Doctor's Report. On May 27, 2008 Petitioner filed a Motion to Strike or in the Alternative to Re-Open the Hearing. The State filed an Opposition on 6/13/08. On June 25, 2008 this Court entered an Order Granting the Motion to Strike and ordering the Notice of Supplemental Filing of Doctors Report stricken from the record.

[5] 536 U.S. 304; 122 S. Ct. 2242 (argued February 20, 2002, decided June 20, 2002.)

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

of determining how to implement Atkins to the individual states.[6]

In 2003, the Nevada Legislature responded to Atkins and enacted NRS 174.098, which allows a Defendant facing the death penalty to file a motion to declare he is mentally retarded. The statute requires the Court to conduct a hearing, and if

> ". . . the court determines based on the evidence presented at [the hearing] that the Defendant is mentally retarded, the court must make such a finding in the record and strike the notice of intent to seek the death penalty."[7]

"Mentally retarded" is defined in the statute as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period."[8]

In order to find that a person is mentally retarded, the Court must find that the person

(1) has significant subaverage intellectual functioning;

(2) which exists concurrently with deficits in adaptive behavior, and

(3) that both are manifested during the developmental period.

The burden of proof is on Ybarra to prove by a preponderance of the evidence that he is mentally retarded.[9] The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it

---

[6]Schriro v. Smith, 546 U.S. 6; 126 S.Ct. 7 (2005).

[7]NRS 174.098(6).

[8]NRS 174.098(7).

[9]NRS 174.098(5)(b).

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

appears that the greater probability of truth lies therein.[10] In simple terms, a preponderance of the evidence is presented when the "existence of the contested fact is more probable than its non-existence."[11]

FACTUAL HISTORY

Based on the testimony and exhibits admitted into evidence, the Court finds as follows:

Ybarra Robert Ybarra, Jr. was born in Sacramento, California on July 20, 1953. He had three (3) younger brothers and a younger sister.[12] Ybarra's mother was 15 or 16 when he was born,[13] and his life was normal without difficulties until age 9 when he was knocked unconscious by a railroad tie that struck him in the forehead.[14]

After his head injury, Ybarra began to experience migraine headaches and was prescribed medication from doctors.[15] Ybarra was prescribed Dilantin, Mebaral, a Darvon compound and another drug which he took four (4) times a day.[16]

Mebaral is a barbiturate that was prescribed for headaches and as an anti-

---

[10]Nev. J.I. 3.00 (1986).

[11]Brown v. State, 107 Nev. 164 (1991).

[12]Evidentiary hearing exhibits, Volume II, page 1245 (hereinafter Vol. II, p. 1245).

[13]Vol. II, p. 1245 and Vol. II, p. 1311.

[14]Vol. II, p. 1307; 1311; Vol. I, p. 473.

[15]Vol. I, p. 566, Ybarra testimony, 8/4/1999; Vol. II, p. 1245.

[16]Vol. I, p. 998; Vol. II, p. 1245; Vol I, p. 566.

convulsant.[17] Mebaral acts as a sedative which can cause slurred speech and confound the interpretation of an EEG. The abrupt cessation of the drug can cause erratic behavior and seizures.[18] Dilantin is a similar anti-convulsant that was also prescribed for headaches. It can also confound EEG testing.[19]

Not long after his head injury, Ybarra began smoking marijuana and drinking alcohol.[20] According to Ybarra, because of the headaches and auditory hallucinations (from his head injury) he became involved in illegal drugs, and then became unpopular and chronically depressed.[21] His parents accepted his use of alcohol and marijuana.[22]

By the time Ybarra was 14 years old, he was falling far behind in school, was truant and the subject of bullying from other students.[23] In March 1968, Ybarra's doctor stopped prescribing Mebaral and instead prescribed Dexedrine.[24] Dexedrine is an amphetamine like substance that can cause tremors, tic's and agitation. It can also cause

---

[17] Video Taped Transcript of Proceedings, 4/30/08, p. 46 (hereinafter VT, 4/30/08, p. 46). The official transcript of the proceedings was inaccurate as to various parts of the testimony. Where necessary the Court will refer to the more accurate video taped transcript.

[18] VT, 4/30/08, p. 47.

[19] VT 4/30/08, p. 48-49.

[20] Vol. II, p. 1246; Vol. IV, p. 2361; Vol. V, p. 2802, 2442.

[21] Vol. II, p. 970-971, reported to Dr. Rich 2/12/81.

[22] Vol. II, p. 1245, p. 2802.

[23] Vol. I, p. 26-27; Vol. II, p. 1311.

[24] Vol. I, p. 27.

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

a person to appear moody, irritable or emotionally labile.[25]

In April of 1968 Ybarra transferred to Yolo High School because of peer problems and academic failure.[26] By the time Ybarra turned 15, he was using illicit drugs and alcohol on a daily basis.[27]

Ybarra dropped out of school in 1969.[28] The school psychologist recommended a medical exclusion for Ybarra but found that he did not present any vocational handicaps.[29] Although Ybarra dropped out of regular school at age 15, he then attended night school and worked during the day, receiving an adult education diploma in June 1972 just prior to his 19TH birthday.[30] According to Ybarra, he worked as a fork lift operator in the Sacramento area from 1970 until 1976.[31]

Prior to receiving his diploma, Ybarra enlisted in the U.S. Marine Corps. His mental testing revealed "dull normal" or "borderline" intelligence and he was found to be fit for duty.[32] On October 15, 1971 he was accepted into the Corps having passed the

---

[25]VT, 4/30/08, p. 47-48.

[26]Vol. I, p. 125.

[27]Vol. I, p. 717; Vol. II, p. 2326, 2361; In a 1976 hospital report, Ybarra gave a 10 year history of drinking a six pack of beer per day. Vol. I, p. 46.

[28]Vol. II, p. 998.

[29]Vol. I, p. 124, 123.

[30]Vol. I, p. 128; Vol. II, p. 985.

[31]Vol. II, p. 962.

[32]Vol. I, p. 189, 193-194.

required mental, moral and physical examination.[33] Within a week, Ybarra was apparently caught engaging in homosexual activity with a Private Schillo.[34] Ybarra was examined by a psychologist who found no mental or physical disability, however, after Private Schillo also admitted the homosexual contact, Ybarra was discharged from the Marine Corps.[35]

The next fall, after receiving his high school diploma, Ybarra again enlisted in the Marines, but did not disclose his prior enlistment. He was recognized and then discharged.[36] Ybarra later enlisted in the Army National Guard, but was given an honorable discharge in 1974 because of asthma.[37]

Thereafter, Ybarra moved to Oregon where he met his future wife. They moved back to Sacramento and she became pregnant. In August of 1979, Ybarra's wife left him and returned to Oregon. He then worked in Montana before coming to Ely, Nevada in September 1979. Throughout this period Ybarra was always employed.[38]

DEVELOPMENTAL PERIOD

The Nevada Legislature has not defined "developmental period" as used in NRS 174.098. Thus the Court must look to experts in the field of mental retardation to determine the meaning of "developmental period." Testifying for Ybarra, Dr. Schmidt

---

[33]Vol. I, p. 219.

[34]Vol. I, p. 140, 143, 146.

[35]Vol. I, p. 152, 147, 144.

[36]Vol. I, p. 154-156.

[37]Vol. I, p. 217-218, 230.

[38]Vol. I, p. 133-136; Vol. II, p. 962.

stated that the developmental period is childhood up into early adulthood, sometimes up to 21 years old and sometimes up to 25 years old, depending on the state.[39] The Court was unable to find any State law that defined the developmental period to age 25. A total of 20 States have defined the period prior to age 18, only 4 States have extended the period to age 22, and 11 States did not set an age. Some states do not have the death penalty and thus have no similar statutes.[40] Dr. Mitchell Young, who also testified for Ybarra, implied that the developmental period was before age 18.[41]

The American Association of Mental Retardation (AAMR) has defined mental retardation as a disability that originates before age 18.[42] The 2002 Edition of the AAMR manual indicates that an emerging consensus in the field is that mental retardation is a disability that manifests itself early in life and before age 18.[43]

---

[39]TP 4/29/08, p. 19; 54.

[40]

Before age 18: Arizona (ARS §13-703.02); Virginia (VA Code Ann §19.2-264.3:1.1) California (Cal. Pen. Code §1376); Arkansas (A.C.A. §5-4-618); Florida (Fl. R. Crim. P. 3.203); Tennessee (Tenn. Code Ann. §39-13-203); Idaho (Idaho code §19-2515A); Illinois (725 ILCS 5/114-15); Washington (Rev. Wash. Code (ARCW) §10.95.030); Louisiana (La. C. Cr. P. HRT 905.5.1); Alabama (Ex Parte Perkins, 851 So.2d 453 (2002)); North Carolina (N.C. Gen. STAT. §15A-2005); Oklahoma (21 OKLA. St. §701.10); Missouri (§565.030 R.S. MO); South Dakota (S.D. Codified Law §23A-27A-26.1); Mississippi Chase v. State, 873 So. 2d 1013; New York (N.Y. Crim. Proc. Law 400.27(12)(e)); Pennsylvania Commonwealth v. Gibson, 592 Pa. 411, 415 (2007); Montana (Mont. Code Anno. §53-20-102 (2007)(8)(c); Kansas (K.S.A. §76-12b01(e). Before age 22: Indiana (Burns Ind. Code Ann. §35-36-9.2); Utah (Utah Code §77-150-102); Maryland (Md. Criminal Code Ann. §2-202); Indiana (Ind. Code Sect. 35-36-9-2). No age set in statute: Colorado, Nebraska, Nevada, New Mexico, Kentucky, Oregon, Connecticut, North Dakota, South Carolina, Georgia, Texas.

[41]TP 4/29/08, p. 197.

[42]

MENTAL RETARDATION: Definition, Classification, and Systems of Support, 10TH Edition, AAMR (2002), p. 19, 197 (hereinafter "AAMR, (2002)."

[43]AAMR (2002), p. 16.

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

Since Nevada has not chosen to define the developmental period as extending beyond age 18, the Court finds that in accord with the consensus in the field, and the majority of States with the death penalty, the developmental period is up to age 18.

SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING

As noted above, in order to make a finding of mental retardation, the Court must find by a preponderance of the evidence that Robert Ybarra, Jr. has significant subaverage intellectual functioning.[44] The legislature did not provide a definition for significant subaverage intellectual functioning, and thus the Court must again rely on experts in the field.

According to the AAMR, intelligence is a general mental ability. It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience.[45] Reliance on a general functioning IQ score is the measure of human intelligence that continues to garner the most support within the scientific community.[46] According to the AAMR, the "intellectual functioning" criterion for diagnosis of mental retardation is approximately two standard deviations below the mean, considering the SEM (Standard Error of Measurement, i.e. ±3 to 4 IQ points) for

---

[44] NRS 174.098(7). The Court must also find deficits in adaptive behavior concurrently manifested during the developmental period.

[45] AAMR (2002), p. 51

[46] AAMR (2002), p. 51.

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

the specific assessment instrument used and the instrument's strengths and limitations.[47]

Two standard deviations below the norm would approximate a score of 70. However, an IQ score of 70 is most accurately understood not as a precise score, but as a range of confidence with the parameters of at least one SEM (i.e., scores of about 66 to 74; 66% probability), or parameters of two SEM's (i.e., scores of 62 to 78, 95% probability.)[48]

Evidence of Robert Ybarra's Level of Intellectual Functioning During His Developmental Period to Age Eighteen (18)

As noted above, this Court defines "the development period" in accord with the AAMR: to age 18. Intellectual functioning should be measured using individually administered standardized psychological tests and administered by appropriately trained professionals.[49] No evidence was presented to the Court that Ybarra was tested for IQ prior to age 18.

Although no standardized test scores obtained during the developmental period were presented to the Court, the record contains evidence that is relevant to a determination of Ybarra's intellectual functioning prior to age 18. The record is clear that prior to his head injury at age 9, Ybarra was normal and met intellectual milestones appropriately. After his head injury, doctors prescribed sedatives (and later stimulants). Ybarra also began using alcohol, marijuana and other drugs. Difficulties with peers and

[47]AAMR (2002), p. 58.

[48]AAMR, (2002), p. 57, ref. Grossman, 1983.

[49]AAMR (2002), p. 52.

school work resulted, and by 1969 he was described as having less than average intelligence.[50] Although after testing for the U.S. Marine Corp, Ybarra was described as "dull normal" or borderline,[51] he passed mental tests and was accepted by the Marines with no physical or mental disability.[52] According to the expert testimony presented at the hearing, "borderline" or "dull normal" is not mentally retarded.[53] Ybarra's suggestion that dropping out of high school is indicative of subaverage intellectual functioning is belied by the fact that he later held a job and attended alternate education classes and received a diploma. Mentally retarded persons make up approximately 2-3% of the population.[54] This means a person who is mentally retarded must have intellectual functioning below 97% of the population. Dr. Mitchell Young's report states that people with mild mental retardation can by their late teens acquire academic skills up to approximately the sixth grade level.[55] That a mildly mentally retarded person's academic skills will be limited to about the sixth grade level has been recognized by other courts and the literature in the field.[56]

---

[50]Vol. I, p. 125.

[51]Vol. I, p. 189.

[52]Vol. I, p. 219, 152. This was shortly after his 18TH birthday.

[53]TP 4/29/08, p. 69; TP 4/30/08, p. 54.

[54]AAMR p. 58 (2002).

[55]Vol. V, p. 2842.

[56]
See Murphy v. State, 2003 OK CR 6; 66 P.3d 456 ((OKLA Crim. App. 2003), citing Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994); People v. Braggs, 779 N.E.2d 475 (Ill. App. 1ST Dist. 2002); Lyn Entzeroth Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded From the Death Penalty, 52 ALA. L. Rev. 911, 914 (2001).

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

Considering all the evidence and testimony presented, has Ybarra demonstrated by a preponderance of the evidence that he suffered from significant subaverage intellectual functioning manifested during his developmental period? The answer is no. The record is clear and substantial evidence supports a finding that at best, Ybarra was observed to be somewhat below average prior to age eighteen (18). The fact that no testing for mental retardation occurred prior to age eighteen (18) is also significant because, in spite of his contact with various doctors and school officials, no one apparently suspected mental retardation. Even to the extent Ybarra may have appeared below average, the record supports a finding that such was at least in part affected by his extensive drug and alcohol use.

Evidence of Robert Ybarra's Level of Intellectual Functioning From Age 18 through Age 25

The Court does not accept Dr. Schmidt's testimony that the developmental period has been extended in some states to age 25. As shown above, no state has done so and only 4 States have extended the period to age 22.

Even if the Court accepted Dr. Schmidt's testimony that the developmental period can be extended to about age 25 (1978), Ybarra has not presented sufficient evidence to support his claim of significant subaverage intellectual functioning which was manifested during that period. The record contains no evidence that prior to his arrest at age 25, Ybarra had his IQ tested.

After his arrest in September 1979, Ybarra was subjected to numerous

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

contacts, interviews and testing by psychiatrists and psychologists.[57] In 1980 Dr. Richnak opined that Ybarra was borderline [intelligence].[58] In 1981 he was described as having normal intelligence.[59] In early 1981, Dr. Gutride tested Ybarra extensively and found that his full scale IQ score was 86.[60] In February 1981, Dr. Neal believed Ybarra's intellectual functioning tests were consistent with a low-normal range of intelligence.[61] In August 1990, Dr. Pauly estimated Ybarra's IQ to be 70-80.[62] All of these tests and observations by trained medical professionals support a finding that Ybarra was not of subaverage intellectual functioning.

On November 20, 1980, Ybarra was admitted to Lake's Crossing Center to determine if he was competent to stand trial. While there, Ybarra was evaluated by Dr. Martin Gutride, a Nevada certified psychologist, who administered ten (10) tests on Ybarra.[63] As part of the evaluation, Dr. Gutride gave Ybarra the Weschler Adult Intelligence Scale (WAIS), which yielded a Full Scale IQ score of 86 (dull/normal range).[64] According to Dr. Gutride, this result was consistent with Ybarra's performance on the

---

[57]Indeed this is true up to the present.

[58]Vol. I, p. 964.

[59]Vol. IV, p. 2232.

[60]Vol. II, p. 1258.

[61]Vol. II, p. 1269.

[62]Vol. II, p. 983.

[63]Vol. II, p. 1258-1260.

[64]Vol. II, p. 1259.

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

Peabody Picture Vocabulary Test (score 92) and the Weschler Memory Scale (score 83).[65] As noted below, no other valid test scores were ever obtained on Ybarra.

On October 17-18, 2001, and January 10-11, 2002, Dr. David Schmidt tested Ybarra.[66] The U.S. Supreme Court heard arguments in Atkins v. Virginia, on February 20, 2002,[67] and Atkins was decided on June 20, 2002.[68] On August 12, 2002, Dr. Schmidt issued his report in which he concluded that Ybarra had a full scale IQ of 60 which placed Ybarra in the mildly mentally retarded range.[69]

It is not clear whether or not Dr. Schmidt reviewed Dr. Gutride's report prior to writing his own report, however, it appears he did review it prior to testifying in this case. Dr. Schmidt initially criticized the 1981 results because the test (WAIS) was 26 years old.[70] Because of the "age" of the test and the so-called Flynn effect (erroneously reported in the official transcripts as the "Flynt effect"), Dr. Schmidt implied the 1981 IQ score was inflated. The "Flynn effect" is in essence a body of work associated with James Flynn suggesting that IQ test scores increase over time until a test is "re-normed". In People v. Superior Court,[71] a California appellate court held that consideration must be given to the Flynn

---

[65]Vol. II, p. 1259.

[66]Vol. V, p. 2720.

[67]536 U.S. 304.

[68]Supra.

[69]Vol. V, p. 2720, 2732.

[70]TP 4/29/08, p. 71-73.

[71]124 Cal. App. 4TH 806 (2004).

effect in determining a defendant's IQ score. Dr. Schmidt testified that based on the age of the WAIS in 1981, Ybarra's IQ score could be inflated by 15 points.[72]

According to the Flynn effect, IQ scores on Wechsler scales have increased approximately 0.31 points per year (for each year until the test is "re-normed.")[73] Although the Flynn effect may be recognized in the literature, numerous courts have rejected the notion of adjusting IQ scores to accommodate the Flynn effect.[74]

The 2002 AAMR manual refers to the Flynn effect as follows:

> "However, as others have shown (e.g., Flynn, 1987), it is critically important to use standardized tests with the most updated norms."[75]

Despite this reference, the AAMR does not recommend an adjustment for the Flynn effect as it does for SEM.[76]

After considering Dr. Schmidt's position on the topic, the Court is not convinced the scientific community is prepared to adjust the scores according to the Flynn effect. In any event, even if the 1981 IQ score of 86 was adjusted by 0.31 per year (for 26 years per Dr. Schmidt) the adjustment would only be 8.06 points, reducing the score of 86

---

[72] TP 4/30/08 p. 145, 150.

[73] See People v. Superior Court, supra; Tethering the Elephant, Capital Cases, IQ, and the Flynn effect, James R. Flynn, Psychology, Public Policy and Law, 2006 Vol. 12, No. 2 170-189.

[74] Green v. Johnson, 515 F.3d 290 (4TH C.A. 2008); Black v. Bell, 2008 U.S. Dist. Lexis 33908 (Mid Dist. Tenn 2008); Ledford v. Head, 2008 U.S. Dist. Lexis 21635 (No. Dist. GA. 2008); State v. Burke, 2005 Ohio 7020 (Ohio App. 2005).

[75] AAMR, p. 56 (2002).

[76] State v. Burke, 2005 Ohio 7020 (2005).

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

to 78, which is not in the mildly mentally retarded range. In addition, with the application of SEM (as recommended by the AAMR), Ybarra's score range on the 1981 test would actually be about 83 to 90.

Dr. Schmidt also had concerns that the 1981 test was mis-scored and that an intern was involved in the test.[77] Under cross-examination, the doctor admitted that he really could not talk about the validity of the 1981 test score.[78] Indeed, it appears that the criticism of Dr. Gutride's test results is really no more than pure speculation.

Overall, the record contains substantial evidence and the Court finds that Dr. Gutride's test results are consistent with the numerous other doctors and evaluators who believed that Ybarra was dull-normal or borderline (which is not mentally retarded). Dr. Gutride's results are further supported by the consistency between and among the tests he gave.

Dr. Schmidt's Testing

Of all the testing and observation of Ybarra from 1979 until 2002, Dr. Schmidt's report is the first to conclude that Ybarra is mildly mentally retarded. Although the Doctor testified that he was not aware of the Atkins decision before he wrote his report, no explanation was given why his report took over seven months to prepare and was issued nearly two (2) months after Atkins was decided. Dr. Schmidt's conclusions that Ybarra's intellectual functioning was in the mildly mentally retarded range is highlighted by a bold-faced disclaimer:

---

[77]TP 4/29/08, p. 143. Noteworthy is the fact that Dr. Schmidt also used an intern in his testing.

[78]TP 4/29/08, p. 159-160.

> **"Due to the severe distress that some of the portions of the WAIS-III testing caused Mr. Ybarra, the above scores may underestimate his actual intellectual functioning. However it may also be that due to the chronic nature of his neuropsychological functioning that these scores may reflect day to day problem solving skills."[79]**

Thus, Dr. Schmidt recognized that the scores obtained may be accurate, or they may be low. The bottom line is that the scores certainly cannot be accepted as a true determination of Ybarra's level of intellectual functioning. Further, the specter of Ybarra faking results is one that requires close scrutiny. Despite the disclaimer, Dr. Schmidt stated in his report that "the Halstead-Reitan Neuropsychological Battery (HRB) has specific techniques to control for [malingering] and it is thought that the results of this administration of the HRB are a valid and accurate reflection of Ybarra's abilities.[80] When asked about the tests for malingering, Dr. Schmidt admitted he gave none, but that he looked for patterns or consistency in his other test results.

Dr. Ted Young specifically testified that the tests given by Dr. Schmidt do not include methods to detect malingering, and he asked defense counsel to challenge him on that point.[81] Dr. Schmidt was recalled to the witness stand, but he did not refute Dr. Young's statement. One test Dr. Schmidt did give was the trail making test. Part A of the test requires the subject to draw a line in sequence to connect circles numbered one to 15

---

[79]Ex. Vol. V, p. 2732.

[80]Vol. V, p. 2735-2736.

[81]TP 4/30/08, p. 62-63.

on a piece of paper. According to Dr. Schmidt, Ybarra was unable to complete the task.[82]

After examining Ybarra in October 2001 and January 2002, Dr. Schmidt made the following conclusions which are contained in Vol. V, p. 2739-2740.

"In addition to having a low IQ, the following apply to Mr. Ybarra:

a, His brain damage makes it very difficult to understand or weigh the importance of any facts or mitigating factors in his case.

b. His organic (schizotypal) personality disorder may at times lead to a poor working memory and confabulation so he may not recall complex instructions or multiple tasks or may not even remember important facts of the case.

c. He has poor judgment because of his brain damage which makes him much less likely to think through all the issues involved before making a decision.

d. He has an extremely limited ability to organize information and synthesize a strategy to solve any problems he encounters.

e. He has very limited ability to handle stress and the demands placed upon him by the legal system. For example, at a particularly stressful point in the interview, Mr. Ybarra began talking to his imaginary dog and telling him that everything would be all right, a classic example of his retreat into fantasy to cope with the stress that the evaluation was placing upon him.

f. He suffers command hallucinations as part of his delusions and feels compelled to comply with their demand or face punishment.

g. He has fixed delusions regarding his headaches, being influenced by others, and paranoia regarding the motivations of others around him which have a clearly unpredictable effect on his reactions to individuals he is involved with both in and out of a legal context.

The above problems combine to make it difficult for Mr. Ybarra to act in his own best

---

[82]TP 4/29/08, p. 127-128.

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

interest and complicate his understanding of his role in any legal setting."[83]

Most of these conclusions do not withstand scrutiny in the context of Ybarra's real life actions and functioning. As discussed below, It is clear from the record that he does understand and weigh the importance of mitigating factors in his case (his efforts at advocating and experimenting with different defenses). He can organize information and synthesize strategies to solve problems (study his medical records, fake illness and threaten suicide to get transferred to MHU, stop taking medication and food to help exaggerate symptoms). He can handle stress (once he realizes "acting crazy" will not help him achieve his goal, he becomes normal). Once he got over his "amnesia" in April 1981, he demonstrated great recall of events in the past.

MALINGERING AND OTHER EVIDENCE OF INTELLECTUAL FUNCTIONING

Malingering is the deliberate fabrication or gross exaggeration of psychological or physical symptoms for the attainment of some external goal.[84] The fact that a person is malingering doesn't necessarily exclude the possibility of mental retardation,[85] however, the issue of malingering must be considered by the trier of fact in determining the issue of intellectual functioning. Evidence that a person faked his performance (or gave less than his best effort) on a psychological test does not automatically invalidate other tests taken by that person, but from the Court's perspective,

---

[83]Vol. V, p. 2739-2740.

[84]Vol. V, p. 2847.

[85]TP 4/30/2008, p. 108.

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

the existence of evidence that a person is malingering should lead to a heightened scrutiny of other test results. From the day of his arrest in September 1979 and the State's pursuit of the death penalty, Ybarra Ybarra has had a motive to fake performance on tests.

When asked whether he saw any reference to malingering in the record while preparing for his testimony, Dr. Schmidt said he saw references in Dr. Ted Young's report and he thought there were "some issues floated from Lake's Crossing."[86] In fact, the record contains numerous observations by various doctors and others that Ybarra is a faker or malingering.

Pursuant to a court order issued November 29, 1979 to determine his competence to stand trial, Ybarra was examined by Dr. Lynn Gerow. Dr. Gerow administered that Minnesota Multiphasic Personality Inventory (MMPI) on December 6 and 7, 1979. The profile was not valid because

> ". . . the defendant [Ybarra] appears to have made an attempt to answer each question in a positive manner to indicate psychopathology thereby invalidating the test scores for any clinical usefulness."[87]

Dr. Gerow found Ybarra competent to stand trial, his intelligence to be in the normal range, and found no major mental disorder.[88]

Dr. Donald Molde evaluated Ybarra with interviews conducted in February and April 1981. On May 4, 1981 he wrote to Ybarra's attorney and opined that despite

---

[86]TP 4/29/08, p. 137.

[87]Vol. IV, p. 2231-2232.

[88]Vol. IV, p. 2232.

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

Ybarra's claims, it was Dr. Molde's position that Ybarra "does not have signs or symptoms of a major mental illness" and his claims of hallucinations are "due to extra medical considerations rather than any indication of a major mental illness."[89]

On May 14, 1981, Dr. Hiller suspected that Ybarra was exaggerating his symptoms and he had a hard time believing the claims of visual hallucinations. Ybarra appeared hostile and desperate.[90]

Dr. Richard Lewis wrote to Ybarra's attorney on June 15, 1981 and after reviewing and comparing three (3) MMPI profile patterns, he concluded that Ybarra deliberately faked the tests in a pathological direction in order to appear psychotic.[91] A progress note dated January 22, 1985 indicates that interviewing and testing results indicate the belief that Ybarra is mentally ill (severely psychoneurotic) but that he tries to "fake psychosis."[92]

In May 1990, Dr. Dugan examined Ybarra for Glynn Cartledge, Esq., who was representing Ybarra at the time. Dr. Dugan gave Ybarra the MMPI-II and the scores were reflective of someone who was malingering. He concluded that Ybarra suffered from mental illness, was not a "pure malingerer" and that any malingering or symptom exaggeration he displayed "may be his attempt to avoid criminal responsibility for his

---

[89]Vol. II, p. 1013-1014; Dr. Molde's detailed report of 4/28/81 is found at Vol. II, p. 1000-1002.

[90]Vol. II, p. 1302.

[91]Vol. V, p. 2750.

[92]Vol. IV, p. 2327.

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

actions."[93]

A progress note written on May 31, 1991 (while in the prison mental health unit), quotes Ybarra as saying he never thought he would end up here, "having to act crazy."[94] As noted below, even Ybarra's own expert, Dr. Mitchell Young, received results indicative of malingering. The extensive evidence of malingering, faking symptoms and giving less than his best effort on tests is significant evidence that suggests that Ybarra is not as low functioning as he acts when tested.

The record contains numerous letters written by Ybarra while he was incarcerated in the White Pine County Jail awaiting trial.[95] The earliest dated letter is from October 9, 1979.[96] In all of the letters from 1979 and 1980, Ybarra denies he committed the crime. In most of the letters he talks about killing himself rather than going to prison or facing execution. Ybarra's trial was set to commence on March 31, 1980. A jury was picked and counsel for Ybarra sought a change of venue which was denied by the trial court. The matter was then appealed to the Nevada Supreme Court.

By August 1980, Ybarra's letters were making references to poisoned jail food and that his lawyer and "shrinks" want to put him in the nuthouse.[97] Ybarra began to refuse food and medication, which is a pattern throughout the record. On September 9,

---

[93]Vol. II, p. 686-688.

[94]Vol. IV, p. 2470.

[95]Vol. I, p. 361-398.

[96]Vol. I, p. 367.

[97]Vol. I, p. 361-

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

1980, his attorneys filed a motion for a psychiatric evaluation to determine if he was competent to stand trial. The court ordered evaluations by Dr. Gerow and Dr. Chappell, but Ybarra refused to be examined by Dr. Gerow.[98] On October 10, 1980, the Nevada Supreme Court affirmed the trial court denial of the motion for change of venue. A hearing was held on November 18, 1980 after which the court found Ybarra incompetent to stand trial and ordered him committed to Lake's Crossing until be became competent.[99]

Robert Ybarra was then transported to Lake's Crossing on November 20, 1980.[100] His progress and eventual discharge is extensively documented in the record.[101] Of note is the fact that while at Lake's Crossing, Ybarra played pool, cards, volleyball, racquet ball, backgammon and scrabble.[102] In order to be released from Lake's Crossing, Ybarra needed to pass a "sanity commission." Dr. Gutride wrote a letter to Judge Hoyt on February 17, 1981 which summarizes Ybarra's stay at Lake's Crossing. Dr. Gutride wrote

> "Finally, Mr. Ybarra decided that the best thing he could do was to pass the Sanity Commission so he could get on with his legal problems. He passed all three psychiatrists with no difficulty.[103]

It was during Ybarra's stay at Lake's Crossing from November 1980 to March

---

98 Vol. I, p. 418. Dr. Gerow had examined him in December 1979 and found he was faking on the MMPI.

99 Vol. I, p. 418-422.

100 Vol. I, p. 410.

101 Vol. II, p. 1020-1169.

102 Vol. II, p. 1021, 1025, 1029, 1032, 1040, 1043, 1045, 1063, 1074 and 1078.

103 Vol. II, p. 1279. Also of note is that Ybarra refused to see Dr. Gerow as part of the Sanity Commission saying "that S.O.B. is the one that gave me a hard time in jail and I don't like him." Vol. II, p. 1064.

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

1981 that Dr. Gutride conducted his tests which showed Ybarra had a full scale IQ of 86.[104] The validity of Dr. Gutride's testing is enhanced by the fact that Dr. Gutride had, in addition to his test results, access to Ybarra and his file while Ybarra was at Lakes Crossing. Since Ybarra believed it was in his best interest that he move on with his case, a reasonable inference is that he put his best effort forward on the test and the 1981 results are valid.

Shortly after his admission to Lake's Crossing on November 20, 1980, Ybarra began requesting his medical records to "find out what people think is wrong with him" and "what they think about him."[105] Dr. Gutride's discharge summary provides good insight into Robert Ybarra and notes that virtually all of his professed symptoms of voices or hallucinations are not valid.[106] Dr. Gutride also predicted that Ybarra "could be expected to act-up in jail again, but that such behavior was wilful on his part, rather than a product of mental illness."[107] Just prior to his discharge, a progress note dated February 25, 1981 indicated that Ybarra was trying to get permission to stay at Lake's Crossing but was told that was not possible.[108] Dr. Gutride's prediction came true.

After his discharge from Lake's Crossing Ybarra was returned to the White Pine County Jail where he met with his lawyer. He immediately reported seeing and hearing things. His lawyer then filed a motion to place Ybarra back at Lake's Crossing

---

[104]Vol. II, p. 1258.

[105]Vol. II, p. 1154, 1155 and 1167.

[106]Vol. II, p. 1288-1290.

[107]Vol. II, p. 1290.

[108]Vol. II, p. 1073-1074.

pending the trial.[109] An order re-setting the trial for May 4, 1981 was filed shortly before Ybarra's motion was filed.[110] His motion was set to be heard on March 20, 1981.[111]

After the May trial date was set, but before his motion to return to Lake's Crossing was heard, Ybarra wrote a letter to "Richard" which recited that he tried to hang himself. The letter goes on that

> "I'm not eating and won't be taking my meds. I'm going to court soon to see if the judge will send me back to lakes crossing until the trial which is May. I'll be nuts soon from not taking my meds but so what I'll hang soon . . . ask Meredith if she is enjoying the book and send it to my parents when she is finished. Richard pray for me to get a N.G.R.I. . ."[112]

It appears that at the time the letter to Richard was written, Ybarra intentionally stopped taking his medications, knowing it would make him "nuts." Ybarra's reference to not guilty by reason of insanity (N.G.R.I.) is interesting, because up to that time (March 1981) he had consistently maintained his innocence and non-involvement with Nancy Griffith's death. This letter shows a clarity of thought and understanding of his situation and possible legal defenses. By April 6, 1981, Ybarra had been moved out of the Ely jail to the Northern Nevada Correctional Center where he claimed he had amnesia until two weeks prior when a "screen appeared in the wall and [he] watched [himself] do it -

---

[109]Vol. II, p. 989-992.

[110]Vol. I, p. 329.

[111]Vol. I, p. 992.

[112]Vol. I, p. 364.

everything that happened.[113] Ybarra also was quoted as saying he did not want to die by execution and would fight to stay alive.[114]

By the time Ybarra admitted in April 1981 to lighting Nancy Griffith on fire he had already been examined and tested by at least eight doctors.[115] A fair inference from the record is that once Ybarra realized feigning incompetence would not work, he "decided" to pass the Sanity Commission, with the idea that N.G.R.I. was his next best defense. This type of calculated behavior and manipulation certainly is not indicative of a person with the intelligence level of a 6TH grader.

While held at the White Pine County Jail prior to trial, Ybarra wrote letters to friends and family. Many of the letters belie the claim of significant subaverage intellectual functioning. In one letter he discussed vehicle insurance, in another he refers to books he had apparently read and in another he writes a scathing letter to the company that had apparently repossessed his truck.[116]

Over the years since his conviction, Ybarra has written hundreds of "kites" while in prison. A kite is a written communication between an inmate and the administration or staff. Many of his kites concern medical issues, and many reveal an intelligence level which is clearly not that of a mildly retarded person. For example, in June of 1986 he wrote to a doctor stating that he had hypothyroidism, and wanted "any literature

---

[113]Vol. II, p. 993-994.

[114]Vol. II, p. 994.

[115]
Dr. Gerow, Dr. O'Gorman, Dr. Richnak, Dr. Parly, Dr. Gutride, Dr. Chappell, Dr. Neal and Dr. Rich

[116]Vol. I, p. 377, 378, 389.

you have on the thyroid gland pertaining to its uses, functions, you know, why its there, what it does. I really don't know anything about it . . ."[117] In 1989 he requested vitamin E for his cuticles and phisoderm for his face.[118] Another time wrote to doctors requesting information on chronic fatigue and the names of an internist.[119]

The record contains hundreds of pages of medical progress notes which portray Ybarra as a man who knows how to manipulate and fake (or exaggerate) symptoms of mental illness to accomplish his goals. For example, early in 1990, Ybarra was beginning to act up and a progress note indicates that his

> "death sentence is getting closer, and this could be the cause of his anger. He has acted psychotic in the past and might now be trying to raise questions of his sanity in order to delay his execution."[120]

In October 1990 Dr. Van Valkenberg wrote that Ybarra

> "said he wanted copies of all my progress notes. He looked calm and spoke logically today. Clinically stable. He is refusing medication, but still wants psychotherapy. .. He may have copies of all my progress notes."[121]

By January 1991, Van Valkenberg decided that Ybarra should be transferred to the Mental Health Unit (MHU) at the prison in Jean, Nevada. The doctor noted that

> "He is speaking as if he has multiple personality disorder, psychogenic amnesia, and fugue states. . . I believe that

---

[117]Vol. V, p. 2709.

[118]Vol. III, p. 1389.

[119]Vol. V, p. 1407-1410.

[120]Vol. IV, p. 2379 (3/6/90).

[121]Vol. IV, p. 2395.

part of it is a game. Order transfer to MHU."[122]

While at Jean, Ybarra began to explore various defenses. A progress note dated May 9, 1991 states that

> "After I saw him last time & told him brain damage defense was not a good defense, then he took OD. Said he saved up some pills of Klonopin. Talking about defense of multiple personality."[123]

The same writer also stated that Ybarra

> "briefly questioned or attempted to rehearse a correlation between his behavior and the subject "multiple personality disorder" w/ this writer I/M further mentioned one person in this country having criminal charge dismissed for said diagnosis."[124]

As Ybarra's time at the MHU came to an end, he devised a plan to get returned back from Ely State Prison. On June 4, 1991, Ybarra

> "stated to this writer that he was going to be discharged to max very soon and that as soon as he returned there, that 'the doctors would send me right back to SNCC unit 7 when I start acting weird. . . My attorney is going to hold all appeals because she feels I'm not competent.' "[125]

Once he was returned to ESP, Ybarra began working on his multiple personality defense.

A progress note dated June 17, 1991 indicates that

> I/M wanted to talk to psych or he was going to go off. He states he was hearing voices of his twin brother telling him

---

[122]Vol. V, p. 2405-2407.

[123]Vol. V, p. 2460.

[124]Vol. V, p. 2462.

[125]Vol. V, p. 2474.

to harm himself. Wants to go back to Jean MH.[126]

On June 19, 1991 it was reported that

> "He says the cut he got in Indian Springs was done by Bobby, who is a 9 year old boy who lives inside his body. Bobby will be prevented from doing this by Nimrod, the protector. I'm Norman his twin brother."[127]

Ybarra then began head banging,[128] and on June 19TH Dr. Van Valkenberg ordered his return to MHU.[129]

Dr. Van Valkenberg was very concerned and on June 25, 1991 wrote that

> he is agitating and threatening to create a crisis if he is not readmitted to the MHU. . . He continues to threaten to hurt himself if he is not transferred. I will try to get [the transfer] expedited here in Carson City.[130]

Although Dr. Van Valkenberg apparently bought into Ybarra's "crisis," back at ESP, Ybarra had calmed down, was acting more rational than Dr. Hardy had ever seen and the doctor noted that he thought "[Ybarra] understands behavior on his part will not accelerate the transfer."[131]

While Ybarra was perfectly calm and rational with Dr. Hardy, when he met with Dr. Van Valkenberg just six (6) days later on July 1, 1991, he put the multiple

---

[126]Vol. V, P. 2479.

[127]Vol. V, p. 2480.

[128]Vol. V, p. 2482

[129]Vol. V, p. 2480-2481.

[130]Vol. V, p. 2485.

[131]Vol. V, p. 2484.

personality show on full blast:

> "He says he is "Norman" today. He says he recalls being questioned in the unit and hearing other voices talking, and answering the questions that the voices asked rather than the ones that others ask . . . Continued multiple personality symptoms. He is "Norman" today."[132]

Within two (2) days, Ybarra was back at the MHU at Jean. As soon as Ybarra got himself transferred back to the MHU, he immediately changed. He was happy to be back, smiling and joking with the staff.[133] On July 10, 1991 he was described as spontaneous, and quick-witted with a healthy sense of humor.[134] By August 17TH Ybarra was typing in his room and was the "editor" of the unit newspaper.[135] On August 7TH it was noted that Ybarra felt that assessment scoring was one way to show the courts he's worthy of a sentence reduction, and he presented a self-analyzed symptom list and discussed its meanings.[136] On August 20TH a progress note indicates:

> "Today pt. decided to advocate his multiple personality theory . . . Discussed biogenetics and poly morphism."[137]

On August 23, 1991, Ybarra participated in a group session and discussed poetry, Indian culture and nature. While discussing his progress and eventual return to ESP, Ybarra

---

[132]Vol. V, p. 2486-2487.

[133]Vol. V, p. 2491.

[134]Vol. V, p. 2494.

[135]Vol. V, p. 2510.

[136]Vol. V, p. 2502.

[137] Vol. V, p. 2512. Note that multiple personality disorder first surfaced in Dr. VanValkenberg's dictation of January 1991. See FN#122 above.

began "back pedaling" and complained that he was "still mentally ill." When Ybarra was then asked the advantage of remaining ill, he said

> "that besides court, it enables him to keep other IM's [Inmates] at a distance. provides him with a protective screen."[138]

Ybarra was transferred back to ESP in September 1991 and immediately started the multiple personality symptoms. On September 18TH he told Dr. Van Valkenberg that he was "Norman" and was angry about the transfer back to ESP. The doctor then ordered his return to the MHU.[139]

Why has Ybarra consistently requested doctor notes, progress notes and copies of other medical documentation?[140] The inference is clear: to understand as much as he can about possible defenses to the death penalty. Another inference is clear: he is not of significant subaverage intellectual functioning.

A few weeks before he met with Dr. Schmidt, Robert Ybarra sent a kite advising that he had been bitten on the face by a spider and needed some anti-biotics.[141] Between his meetings with Dr. Schmidt, Ybarra wrote the following kite:

> "I received an appointment slip for a psychiatrist visit on Tuesday 12-18-01, 8AM in visiting holding. If this is with Dr. Sach[?] I have a CMU A wing morning tier this day & it would be more convenient to have this visit during my A

---

[138]Vol. V, p. 2517.

[139]Vol. V, p. 2525.

[140]See FN 105 above; also Vol. IV, p. 2395 (10/30/90); Vol. III, p. 1729 (4/8/91).

[141]Vol. III, p. 1664.

wing morning tier. What do you think?"[142]

These kites show an ability to plan and think about situations and events in the future, and an awareness of potential problems (i.e. spider bite). They are not indicative of a sixth grader, or a person who is so low functioning that he cannot connect numbered circles on a piece of paper (trail making test).[143]

On December 25, 2001, Ybarra wrote a kite asking for medication for depression and insomnia. The response written January 6, 2002 (just prior to his meeting with Dr. Schmidt) was "you are scheduled for an evaluation. I'm not convinced you have any mental illness."[144] In addition to being an indication of malingering and/or drug seeking behavior, this kite also raises the question of Ybarra's manipulation of medications. The record is full of instances when he either refused medication or demanded it starting with his incarceration in the White Pine County Jail.[145]

Further, just a few months after meeting with Dr. Schmidt, Ybarra wrote the following:

> "You are currently charging me $2.00 for 30 aspirin. Please discontinue the order. I can purchase aspirin from ESP canteen $1.44, 100 tablets."[146]

---

[142]Vol. III, p. 1661 (12-13-01)

[143]See FN 82 above.

[144]Vol. III, p. 1660.

[145]
See for example kites demanding medication: Vol. III pages 1374, 1348, 1349, 1350, 1352, 1357, 1359, 1361, 1362, 1382, 1383, 1385, 1393, 1395, 1401, 1415, 1434, 1443, 1446, 1459, 1475, 1531, 1536, 1644; and kites to discontinue medication: Vol. II pages 1324, 1360, 1459, 1535, 1659.

[146]Vol. III, p. 1657.

Although this kite is not an example of high level math, it certainly does not appear to be consistent with someone who has a full scale IQ score of 60. As Dr. Schmidt testified, a person cannot fake being smarter than they actually are. The record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a person who does not have a significant subaverage intellectual functioning now or during his developmental years. His 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.

But there is more. Dr. Ted Young performed certain tests on Ybarra as well. One was a spelling test in which Ybarra spelled an, a-n-n-n; him, h-i-n, make, m-a-k-f, must, m-u-s-t.[147] Such would represent a profound learning disability.[148] One need not be an expert to compare such a result to Ybarra's letters (pre-trial) and his kites (post-trial), and conclude that his results on such tests are of no weight because of his lack of effort or intentional malingering.

On the Rey complex figure test, which Dr. Ted Young has given over 10,000 times, Ybarra's performance was worse than someone with Alzheimer's disease, and so unusual it could not even be scored.[149] Based on the bizarre results Dr. Ted Young obtained on that test he gave an abbreviated form of the Wechsler Adult Intelligence Scale which yielded a full scale IQ score of 66. The result was not valid because of the indication

---

[147]TP 4/30/08, p. 40.

[148]TP 4/30/08, p. 40.

[149]TP 4/30/08, p.39.

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

that Ybarra was malingering.[150]

Dr. Ted Young then gave Ybarra the test of memory malingering (TOMM) and Ybarra got 21 out of 50 correct on the first trial.[151] On the second trial he scored 30. The guidelines on the test and various studies suggest a result below 45 (and perhaps into the high 30's) is indicative of malingering. A score of 30 is basically off the scale.[152] Based on the ample evidence of malingering by Ybarra, Dr. Ted Young concluded that there was no valid IQ test result for Ybarra Ybarra below 70 in the record. Overall the Court finds that the preponderance of the evidence (and in fact substantial evidence) supports a finding that Robert Ybarra, Jr. is not significant subaverage intellectual functioning.

ADAPTIVE BEHAVIOR

Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.[153] For a diagnosis of mental retardation, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities.[154]

***

***

---

[150]TP 4/30/08, p. 42-43.

[151]TP 4/30/08, p. 45.

[152]TP 4/30/08, p. 46-47.

[153]AAMR (2002), p. 73.

[154]AAMR (2002), p. 76.

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

Evidence of Adaptive Behavior Deficits
During Robert Ybarra's Developmental Period to Age 18

No evidence was presented that adaptive behavior tests were administered during Ybarra's developmental period. Other evidence relevant to Robert Ybarra's adaptive behavior is contained in the record.

Dr. Schmidt testified that the victimization of Ybarra at school by other peers was reflective of a failure to adapt to the school environment.[155] In other words, it is the victim of the bully who has the problem. The Court finds this testimony to be without weight. The Court cannot accept the notion that in this case, the fact that Ybarra may have been bullied in school means he was suffering from an adaptive deficit.

As noted above, Ybarra left regular school because of peer problems and academic failure, which Ybarra attributed to his use of drugs and alcohol. Ybarra then continued in night school while working at a job. Rather than evidence of an adaptive deficit as testified by Dr. Schmidt, the Court finds this to be evidence of his ability to adapt and respond to a bad situation.

Dr. Schmidt also found an adaptive deficit in Ybarra's work record because he held menial jobs and never had a job that was above minimum wage or above medium supervision.[156] This factual assumption is contradicted by the record. First of all, it is not unusual for a person under the age of 18 to have menial jobs. Second, the record reveals

---

[155]TP 4/29/08, p. 42-43.

[156]TP 4/29/08, p. 44-45.

that from 1970 until 1976 he worked as a forklift driver.[157]

Dr. Schmidt also testified that he found no evidence that Ybarra lived on his own, independent of other people.[158] To the extent Dr. Schmidt is referring to pre-age 18, the Court finds such to be accurate but without weight. Common sense and everyday experience dictates that most children do not live independently until they graduate from high school. Overall the record contains minimal evidence of adaptive behavior deficits that manifested prior to age 18.

Evidence of Adaptive Behavior Deficits
Manifested From Age 18 to Age 25

Although the Court has defined the developmental period as ending at age 18, much evidence was presented regarding Ybarra after he turned 18 years of age.

Dr. Mitchell Alan Young performed a face-to-face clinical interview, mental state evaluation and testing of Ybarra on March 13, 2008. Ybarra was given an assessment of adaptive behavior called the Street Survival Skills Questionnaire (SSSQ) and an assessment of malingering called The Structured Interview of Reported Symptoms (SIRS).[159] The raw score from the SSSQ is converted to a standard score or Survival Skills Quotient (SSQ) that is comparable to IQ. Ybarra's SSQ score was 79 which placed him in the borderline range of mental retardation.[160] This result is consistent with all other

---

[157]Vol. II, p. 962.

[158]TP 4/29/08, p. 44, 54.

[159]Vol. V, p. 2834.

[160]Vol. V, p. 2846.

testing and observations of Ybarra (except Dr. Schmidt's).

The Doctor also noted the presence of factors which are suggestive of malingering: the relative absence of clear psychiatric history with treatment prior to arrest, and the presence of anti-social personality traits and forensic context.[161] The results on the SIRS are even more compelling in regard to Ybarra's malingering:

> "Mr. Ybarra had a markedly elevated score on the Rare Symptoms Scale that measures symptoms that occur very infrequently in bona fide patients. This elevation is characteristic in individuals that are feigning a mental disorder and is rarely seen in clients responding truthfully. In addition, Mr. Ybarra tended to endorse items that untrained individuals are likely to identify as obvious signs of a major mental illness, indiscriminately endorse psychiatric problems, and increase symptoms when asked about them. Mr. Ybarra evidenced a curious inability or unwillingness to rhyme to stems."[162]

Despite his own test results which suggest Mr. Ybarra was malingering and has an IQ in the borderline range, Dr. Mitchell Young concluded that

> "it is clear that Mr. Ybarra suffered and continues to suffer deficits in adaptive functioning. Specifically, a number of professionals have noted that when Mr. Ybarra is confronted with an excess of information or affective stimuli, he becomes overwhelmed, agitated, avoidant, poorly communicative, and unable to cope with complex scenarios or problem solving. These behaviors are illustrative of deficits in basic domains of adaptive functioning: conceptual, social and practical adaptive skills (AAMR definition); or communication and social/interpersonal skills (DSM IV-TR definition). These deficits in adaptive functioning, with onset during Mr. Ybarra's developmental period, have persisted throughout

---

[161]Vol. V, p. 2846.

[162]Vol. V, p. 2847.

Mr. Ybarra's life, persist to the present, and are consistent with someone in the mild to borderline mentally retarded range."[163]

The Court has reviewed the record extensively and has not discovered the "number of professionals" referred to by Dr. Mitchell Young. School records and medical records from Ybarra's developmental period do not support this conclusion. Further, to the extent that the records document problems Ybarra was having with school and peers, such problems are certainly consistent with the large amounts of alcohol and drugs he was taking every day. Even Dr. Young acknowledges this fact.[164] The effects of Mebaral, Dilantin and Dexedrine were described by Dr. Young, and all are consistent with observations of Ybarra during his developmental period.[165]

The use of drugs and alcohol by Ybarra clearly affected his ability to socialize and perform in school. Behaviors that interfere with a persons daily activities or with the activities of those around him or her, should be considered problem behavior rather than the absence of adaptive behavior.[166] The presence of problem behavior is not considered to be a limitation in adaptive behavior, although it may be important in the interpretation of

---

163 Vol. V, p. 2852-2853. After hearing Dr. Schmidt testify, Dr. Young modified his opinion regarding Ybarra's results of "borderline" to the opinion that Ybarra was in fact mildly mentally retarded. See TP 4/29/08, p. 207.

164 It is impossible to parse out the effects of his consumption of massive amounts of alcohol and illegal drugs. Vol. V, p. 2852.

165 See testimony of Dr. Mitchell Young, VT 4/30/08, pages 46 to 49.

166 AAMR (2002), P. 79.

adaptive behavior scores (i.e. in clinical judgment) for diagnosis.[167]

When determining if a person has adaptive deficits, the examiner must consider the client's environment.[168] In Dr. Schmidt's experience, persons who are mentally retarded typically seek assistance from others to help them write kites or letters to people at home.[169] The record shows that another inmate (Bollinger) helped Ybarra with a federal lawsuit which could be support for Dr. Schmidt's position.[170] The record also shows that Ybarra is the author of hundreds of kites and letters which are mostly articulate, to the point, and written in his own hand. Nothing in the record supports a conclusion that Ybarra has had assistance in these writings, and the consistency in the topics and style of writing all support a finding that Ybarra did write his own kites without assistance.

As noted above, Dr. Schmidt testified that Ybarra was low functioning in holding jobs because according to Dr. Schmidt, Ybarra held minimum wage type jobs. On the contrary, Ybarra held fairly long periods of employment, and was paid $4.50 to $5.00 per hour in 1978-1979.[171] According to the U.S. Department of Labor web site, minimum wage in 1978 was $2.65 per hour and in 1979 was $2.90 per hour.[172] Ybarra's employment application in 1979 shows he had worked in Oregon as a Foreman and left

---

[167]AAMR (2002), P. 75.

[168]TP 4/29/08, p. 64.

[169]TP 4/29/08, p. 65.

[170]TP 4/29/08, p. 65-67.

[171]Vol. II, p. 962, Vol. I, p. 133-134.

[172]www.dol.gov/esa/minwage/chart.htm.

that job to move back to California.[173] The same application indicates that he worked as a truck driver for about six (6) months (at $3.47 per hour) and he was looking for a new (better) job. The fact that he was employed as a truck driver also undercuts Dr. Schmidt's factual assumption that Ybarra would get lost while driving around Sacramento.[174] Ybarra was then hired by Chicks produce for more pay, but was soon hurt on the job.[175]

In the area of military service, Dr. Schmidt found Ybarra's functioning to be low because he didn't spend longer than thirty (30) days in the armed forces.[176] Facially, this conclusion appears to have merit, however, a closer review shows that Ybarra's first discharge from the USMC was for admitted homosexual conduct, the second discharge was for failing to reveal the first discharge, and the discharge from the National Guard was because he had asthma. The Court finds Ybarra's military service is not evidence of low functioning.

Dr. Schmidt testified that he found no evidence that Ybarra lived independently. To the extent this testimony relates up to age twenty five (25) or so, the record again does not support the testimony. It is not clear where Ybarra lived when he moved to Oregon or where he lived in Montana (prior to moving to Ely). It is clear that when he moved to Ely (shortly after his 26TH birthday), he acquired a place to live at the McConley trailer park, was driving a two (2) year old pickup truck, and when arrested, had

---

[173]Vol. I, p. 133.

[174]TP 4/29/08, p. 44.

[175]Vol. I, p. 134-137.

[176]TP 4/29/08, p. 53.

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

various money orders in his possession, as well as a set of dominos.[177] Prior to moving to Ely, Ybarra had left Sacramento, drove to Oregon to visit his estranged wife, then drove on to Montana to work. He quit his job in Montana to move to Ely.[178] The fact that at age 26 Ybarra was able to live independently and travel to and from various states undercuts the contention that he was unable to live independently up to age 25. The Court rejects the contention that a person who legitimately manifests adaptive deficits prior to age 25 could suddenly at age 26 be able to function independently as Ybarra did. From Dr. Schmidt's perspective, the fact that Ybarra got married in Oregon and then moved to California with his wife is not indicative of socialization or independent living, but rather of having someone else to take care of him and to help him do things.[179] The Court finds this assumption to be pure speculation unsupported by the record. Overall, the record does not contain sufficient evidence to find Ybarra suffered from adaptive deficits up to age 25.

CLINICAL JUDGMENT

Making a diagnosis of mental retardation can in some cases be challenging and may require the application of clinical judgment, which is a special type of judgment rooted in a high level of clinical expertise and experience.[180] Without the benefit of IQ scores and adaptive test results on Ybarra during his developmental period, old school records, reports and anecdotal history become very important. In such cases clinical

---

[177]Vol. I, p. 34-; 296-297.

[178]Vol. V, p. 2825.

[179]TP 4/29/08, p. 98.

[180]AAMR (2002), p. 94-95.

judgment may be required.

> "Judgment represents both the best and the worst of assessment data. Judgments made by conscientious, capable and objective individuals can be an invaluable aid in the assessment process. Inaccurate, biased, subjective judgment can be misleading at best and harmful at worst."[181]

In this case it is clear that both Dr. David Schmidt, Dr. Mitchell Young and Dr. Ted Young used their judgment in the administration of tests and formulation of opinions about Ybarra. Once Dr. Ted Young's test results indicated malingering he reduced the battery of tests he would otherwise have given. He then concluded the test scores were invalid because of malingering. Similarly, Dr. Schmidt determined that some parts of his battery were too stressful for Ybarra and therefore he refrained from giving all the tests. As for the malingering issue, Dr. Schmidt looked for patterns of consistency in the tests given, and then used his judgment to discount the effect of malingering. Dr. Mitchell Young's testing indicated malingering and a result not indicative of significant adaptive deficits. He then used his judgment to determine that Ybarra was borderline or mildly mentally retarded.

The concept of "convergent validity" was mentioned by all experts at the hearing of this motion. Convergent validity is described by the AAMR as the consistency of information from different sources and settings.[182] Dr. Mitchell Young's report indicates that by using a process of convergent validity, he arrived at his conclusions regarding

---

[181]AAMR (2002), p. 94, quoting Slavia and Ysseldyke (1991).

[182]AAMR (2002), P. 86.

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

Ybarra's level of functioning.[183] Dr. Mitchell Young explained the concept as relying on more than one source of information, but basically looking for corroboration from different sources.[184] Dr. Schmidt's take on convergent validity was similar. He felt it was to "converge on a particular conclusion" and that you look for consistent behavior and patterns.[185]

After listening to and weighing the testimony of Dr. Schmidt and Dr. Mitchell Young, the Court has concerns with their use of clinical judgment and their use of convergent validity. It appears to the Court that both experts focused only on information that supported their conclusions with minimal consideration of evidence that undermined their opinions.

Both men are well qualified and honorable, however, the record is so full of evidence that contradicts their conclusions that the Court finds the bulk of their testimony to be of little weight. Although Dr. Young was willing to concede some facts that did not support his opinion, he still speculated about some facts necessary to his opinion. For example, when confronted with the letter written regarding the repossession of Ybarra's truck, Dr. Young was unwilling to concede that Ybarra produced the letter independently or without assistance.[186] Dr. Schmidt was even more unwilling to accept facts that did not

---

[183]Vol. V, p. 2852.

[184]TP 4/29/08, p. 197.

[185]TP 4/29/08, p. 62.

[186]TP 4/30/08, p. 7-9. The "repo letter" is in the record at Vol. I, p. 389 and was sent while Ybarra was in the White Pine County jail awaiting trial. To suggest someone in the jail helped write the letter is pure speculation.

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

support his opinion. In virtually every instance where Dr. Schmidt was questioned about information that did not support his position, he took great pains to try and explain away the adverse information. One example is the issue of Ybarra's marriage. Rather than accepting the marriage as an example of Ybarra's ability to care for someone, he saw it as an opportunity for Ybarra to have someone help him.

Other examples include the criticism of the affidavit of one of Ybarra's teachers because of the passage of "35 years,"[187] while on the other hand Dr. Schmidt based much of his opinion on the recollection of family members. In the area of Ybarra's military record, even after being confronted with the reasons Ybarra was discharged from the service, Dr. Schmidt countered that "there's no evidence that he would have adapted to the military."[188] Thus, it appears that Dr. Schmidt presumed that Ybarra would not have adapted, which again is pure speculation.

Dr. Schmidt also testified he did not interview prison guards as part of his evaluation because in past cases it has not been helpful.[189] 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. For example, from Dr. Schmidt's perspective, Ybarra would need assistance in writing kites (especially since he was unable to complete the trial making test) Dr. Schmidt also observed Ybarra talking to his imaginary dog when he was put under stress. Based on Dr. Schmidt's test results and observations, it appears that the

---

[187]TP 4/29/08, p. 110-112.

[188]VT 4/30/08, p. 200-201.

[189]TP 4/29/08, p. 105-106.

concept of "convergent validity" would mandate that he interview prison guards to validate whether Ybarra had help with the hundreds of very coherent kites he has written, or whether he often talks to his imaginary dog.

CONCLUSION

Based on the foregoing, a careful review of the record, an observation of the witnesses while testifying, and an observation of Robert Ybarra, Jr. throughout two (2) days of hearing, the Court finds and concludes as follows:

1. Robert Ybarra, Jr. has failed to demonstrate by a preponderance of the evidence that he was of subaverage intellectual functioning that was manifested during his developmental period.

2. Robert Ybarra, Jr. has failed to demonstrate by a preponderance of the evidence that he had adaptive deficits which were manifested during his developmental period.

Good cause appearing,

IT IS HEREBY ORDERED that Robert Ybarra, Jr.'s Motion to Strike the Death Penalty is **DENIED.**

DATED this 26TH day of June, 2008.

DISTRICT JUDGE

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