No. 23-6755

IN THE

Supreme Court of the United States

ROBERT YBARRA, JR.,

Petitioner,

v.

WILLIAM GITTERE, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(Capital Case)

When the federal district court dismissed Robert Ybarra's second federal habeas petition for lack of exhaustion in 1993, the district court warned Ybarra that he would face dismissal of his petition if he returned without fully exhausting his state remedies. But Ybarra returned seven years later with a petition that had 25 unexhausted claims, including a claim alleging that he is categorically ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The district court ordered Ybarra to abandon all of his unexhausted claims. And the Ninth Circuit affirmed. Through that litigation, Ybarra never made any particularized arguments about his *Atkins* claim. But after state courts denied the claim in 2012, Ybarra filed a motion under Fed. R. Civ. P. 60(b) seeking to revive the abandoned claim. The federal district court denied that motion, concluding that Ybarra's challenge to the Nevada Supreme Court's decision on the *Atkins* claim would fail under AEDPA. And after an initial remand for further consideration, the district court denied the motion again, and the Ninth Circuit affirmed.

The question presented is:

Whether the Ninth Circuit faithfully applied AEDPA's deferential standard for reviewing a state court's decision denying a federal claim on the merits when it affirmed the district court's denial of a motion for relief from the judgment that sought to revive an abandoned claim challenging a capital sentence under *Atkins* because the underlying *Atkins* claim would fail under AEDPA review.

LIST OF PARTIES

Petitioner Robert Ybarra Jr. is an inmate at Ely State Prison. Respondent William Gittere is the warden of Ely State Prison.

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INTRODUCTION

Ybarra fails to present this Court with a viable basis to grant review under Sup. Ct. R. 10. First, there is no split of authority about *Wetzel v. Lambert*, 565 U.S. 520 (2012). The cases that Ybarra cites from the Fourth and Sixth Circuits just show that applying *Wetzel* is a fact-bound, case-specific inquiry about the independence of alternative grounds for denying relief. So there is no split, just two circuit courts applying the same fact-bound standard to cases with materially different facts. For that reason, Ybarra has not shown that the Fourth Circuit would have determined that *Wetzel* does not apply here, as it did in *Long v. Hooks*, 972 F.3d 442, 446 (4th Cir. 2020).

Second, any disagreement about when to apply *Harrington v. Richter*, 562 U.S. 86 (2011), or *Wilson v. Sellers*, 584 U.S. 122 (2018), is irrelevant for two reasons. Start with Ybarra's position that the Ninth Circuit rewrote the Nevada Supreme Court's decision. Comparison of the two courts' opinions proves otherwise—the Ninth Circuit appropriately applied AEDPA to test the reasonableness of the Nevada Supreme Court's rationale from its reasoned opinion.

Then consider Ybarra's past argument—and the Ninth Circuit's agreement—that the Greenspan report became part of the state court record when the Nevada Supreme Court considered and denied Ybarra's motion for reconsideration in "an unexplained order." To win on that issue, Ninth Circuit precedent required Ybarra to convince the courts that the unexplained order was a merits determination of his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). And he won on that issue. So the

final merits determination on his claim is not the Nevada Supreme Court's March 3, 2011 opinion. The Nevada Supreme Court's May 23, 2012 order denying his motion for reconsideration is the final merits determination, which is a silent denial.

In such an instance, *Wilson* imposes a rebuttable presumption that the Nevada Supreme Court denied the motion under the same rationale from its opinion. But *Wilson* also says that the Ninth Circuit was free to determine whether the record includes some other obvious reason for denying the motion that would rebut the "look through" presumption. So even if Ybarra were right that the Ninth Circuit rewrote the Nevada Supreme Court's decision, *Wilson* expressly allows the Ninth Circuit to engage in such an analysis.

For those reasons, this case does not present this Court with an opportunity to resolve either of the issues Ybarra presents in his petition. And in any event, there are also numerous alternative grounds to affirm the judgment that obviate the need for this Court to address the questions presented: (1) Ybarra has never shown the extraordinary circumstances necessary for relief under Fed. R. Civ. P. 60(b)(6); (2) Ybarra's theory about the Nevada Supreme Court's failure to strictly follow clinical guidelines is rooted in *Moore v. Texas*, 581 U.S. 1 (2017), which was not clearly established at the time of the Nevada Supreme Court's decision; and (3) Ybarra's *Atkins* claim would still fail under a de novo review.

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STATEMENT OF THE CASE

1. More than forty-four years ago, Ybarra kidnapped, beat, and raped sixteen-year-old Nancy Griffith before he poured gasoline on her body and burned her alive outside of Ely, Nevada. *Ybarra v. State*, 679 P.2d 797, 798-99 (Nev. 1984) (*Ybarra I*). Ybarra had met Griffith and a friend of Griffith's the evening of September 28, 1979. *Id*. at 799. The three of them rode around Ely in Ybarra's red truck. *Id*. Later, Ybarra dropped the other girl at her home. *Id*. Although Griffith made plans to reunite with her friend later that night, Griffith never showed up. *Id*.

The next day, two men that were headed out for a day of fishing discovered Griffith, still alive, lying on the side of an unpaved road outside of town. *Id*. at 798. The men drove back to Ely and returned to Griffith with a deputy sheriff. *Id*. at 799. The deputy knew Griffith, but he did not recognize her due to the extent of her injuries. *Id*. Despite her condition, Griffith was able to describe what happened and provided a basic description that matched Ybarra. *Id*.

Investigators that searched the area "discovered a quarter-mile trail of charred human skin and [Griffith's] burnt clothing leading to where her body was found." *Id*. They also found evidence of a struggle; a burn area; a gas can that had Ybarra's fingerprints on it; and boot prints and tire tracks matching Ybarra's boots and truck tires. *Id*. And a search of Ybarra's mobile home turned up a beer can with Griffith's fingerprints. *Id*.

Griffith was transported to a hospital in Salt Lake City. *Id*. She died there the next day, and an autopsy "revealed that she had been party to sexual intercourse

within the previous two or three days and she had suffered trauma to the genital area and a severe blow to the head." *Id.* Burns "seared [Griffith's] respiratory passages and charred eighty percent of her body surface." *Id.* And patterns of her burns indicated they were caused by ignition of a flammable liquid "when she was either standing or sitting." *Id.*

2. Ybarra was arrested and later charged with kidnapping, battery with intent to commit sexual assault, sexual assault, and murder. *Id.* The trial court had Ybarra transferred to a state facility to be evaluated for competency to stand trial. *Ybarra I*, 679 P.2d at 799. Ybarra was ultimately deemed competent. *Id.* And upon his return to the trial court, Ybarra entered a plea of not guilty. *Id.*

He later changed that plea to not guilty by reason of insanity before the case proceeded to trial. *Id.* The day the trial court swore in the jury, Ybarra withdrew his plea of not guilty by reason of insanity and moved for a change of venue. *Id.* The trial court denied a change of venue, and Ybarra appealed. *Id.* But the Nevada Supreme Court dismissed the appeal. *Id.*

Ybarra's attorney also requested a second competency evaluation, which led to Ybarra's return to the same facility for evaluation. *Id.* In 1981, as part of the competency evaluation, Ybarra underwent intelligence testing through the administration of the Wechsler Adult Intelligence Test (WAIS) performed by Dr. Martin Gutride and his intern Pat Weyl. *Ybarra v. State*, 247 P.3d 269 (Nev. 2011) (*Ybarra II*). Ybarra, who was 27 years-old at the time, scored an 86. *Id.*

Ybarra was again determined to be competent. *Id*. And upon his return to the trial court, Ybarra changed his plea back to not guilty by reason of insanity. *Id*.

3. The jury found Ybarra guilty and imposed three sentences of life without the possibility of parole for the kidnaping, battery, and sexual assault convictions, which the district court ordered to be served consecutively. *Id*. And "the jury found four aggravating circumstances and no mitigating circumstances sufficient to outweigh them," resulting in a sentence of death on the murder conviction. *Ybarra I*, 679 P.2d at 799-800. The trial court imposed three sentences of life without a possibility of parole on the three remaining counts. *Id*. at 799.

Ybarra appealed, and the Nevada Supreme Court affirmed. *Id*. at 803. This Court denied certiorari. *Ybarra v. Nevada*, 470 U.S. 1009 (1985).

4. Ybarra initiated post-conviction litigation with a 1985 state petition. *Ybarra v. McDaniel*, 656 F.3d 984, 988 (2011) (*Ybarra III*). The Nevada Supreme Court affirmed denial of that petition in January 1987, and Ybarra filed his first federal petition the next month, but he sought dismissal of that petition a year later. *Id*. Ybarra pursued a second state petition, which the Nevada Supreme Court dismissed in 1989, and Ybarra filed his second federal petition a little over a month later. *Id*.

After four years, the federal district court dismissed that petition for lack of complete exhaustion. *Ybarra III*, 656 F.3d at 988-89. The judge warned Ybarra "that upon his return to federal court he should bring only exhausted claims." *Id*. at 989.

Ybarra then filed his third state petition, which the Nevada Supreme Court affirmed dismissal of that petition as procedurally defaulted in its entirety in 1999. *Id.*

5. In 2000, Ybarra returned to federal court to file his third federal petition. *Ybarra III*, 656 F.3d at 989. Despite the district court's warning to return with exhausted claims only, Ybarra included 25 unexhausted claims in a 2002 amended petition. *Ybarra III*, 656 F.3d at 989; *see also* 18-ER-5201 (ordering abandonment of unexhausted claims). The unexhausted claims included a conclusory, one-page claim under *Atkins*. 19-ER-5276 (Claim 28 of Ybarra's third federal petition).

In 2004, the district court forced Ybarra to abandon his unexhausted claims or face dismissal of his entire petition. *Ybarra III*, 656 F.3d at 989. About two years later, the district court denied the remaining claims. *Id.* Ybarra then filed a motion for reconsideration seeking reinstatement of his unexhausted claims, which he claimed had since been exhausted. *Id.* The federal district court denied that motion. *Id.*

When Ybarra appealed, he included a request for expansion of the certificate of appealability so he could challenge the forced abandonment of his unexhausted claims. *Id.* at 997. The Ninth Circuit rejected his request because the district court's handling of the unexhausted claims was "not reasonably debatable." *Id.* at 997-98.

6. Meanwhile, in state court, the Nevada Supreme Court had remanded Ybarra's *Atkins* claim to be considered under Nev. Rev. Stat. 177.554(5). *Ybarra III*, 247 P.3d at 271. The trial court held a two-day evidentiary hearing. *Id.*

At that hearing, Ybarra presented two experts, and the State presented an expert of its own. *Id.*[1] The parties also submitted more than 3,000 pages of documentary exhibits. *Id.*

Ybarra first called psychologist Dr. David Schmidt. Dr. Schmidt had initially been retained in 2000 to do neuropsychological testing of Ybarra to help develop mitigation evidence; however, in his August 2002 report, Dr. Schmidt concluded that Ybarra is intellectually disabled. 14-ER-3871, 3918. Although Dr. Schmidt and his assistant were unable to complete all of the testing to complete the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III), he concluded that Ybarra had an IQ of 60. 14-ER-3873, 3915. And Dr. Schmidt testified that Ybarra's challenges could be traced to a head injury that occurred when Ybarra was a child. 14-ER-3883-3886, 3890.

Dr. Schmidt also testified about his own intelligence testing and other evidence he reviewed in assessing Ybarra's intellectual functioning, including a 1971 test that indicated a "dull normal or borderline IQ." 14-ER-3915-3918. And he addressed a 1981 IQ test, conducted by Dr. Gutride, which he challenged by asserting that Dr.

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[1] Respondent provides a summary of the experts' testimony with citations to the excerpt of record filed in the Ninth Circuit in the instant appeal. The opinions from the Nevada Supreme Court and the Ninth Circuit each provide a summary of that testimony too. *Ybarra II*, 247 P.3d at 277-79; *Ybarra v. Gittere*, 69 F.4th 1077, 1081-84 (9th Cir.) (*Ybarra V*).

Gutride used an outdated test because "[t]here was a new test out," and interpretation of the score needed to account for inflation in the score based on a phenomenon called the Flynn Effect. 14-ER-3918-3919. Additionally, he noted he had not had an opportunity to review any raw data on the 1981 test. 14-ER-3920.

On cross-examination, Dr. Schmidt acknowledged that he initially had doubts about the validity of his intelligence testing and included a bold disclaimer in his report. 14-ER-3932-3933. Additionally, he admitted that when he reviewed the case after *Atkins* came out, it "was a case that may or may not fit the standard, but certainly bears looking at further." 14-ER-3956.

Dr. Schmidt also acknowledged that the Marine Corps deemed Ybarra fit for duty, and Ybarra said nothing about a head injury when he enlisted. 14-ER-3964--3965. He acknowledged that a report from a neurologist, Dr. Petzold, indicated Ybarra's "mental capacity was adequate to his age group" when Ybarra was 14 years old. 14-ER-3969. Additionally, Dr. Schmidt acknowledged that the record exhibits in the case included statements reflecting that Ybarra was of "dull, normal, low normal, intelligence." 14-ER-3970.

Finally, under cross-examination, Dr. Schmidt agreed that it is not possible to fake smart on an IQ test but acknowledged that it is possible to intentionally score lower on an IQ test. 14-ER-3982-3983. He also agreed that it is proper to take the higher score when someone has taken more than one IQ test. 14-ER-3982. And he agreed that 75 is the high end of the range for intellectual disability. 14-ER-3991-3992.

Ybarra also recalled Dr. Schmidt to testify on rebuttal. There he mainly focused on the Flynn Effect. 15-ER-4245-4253. And testified that he believed the Flynn Effect would alter the scoring of the 1981 IQ test by up to 15 points, which he claimed was supported by some literature, but he did not have a citation to the article immediately available to him. 15-ER-4251. Additionally, he testified regarding the fact that he did not utilize the Test of Memory Malingering (TOMM) or any other standardized test to account for the possibility of malingering. 15-ER-4260.

Next Ybarra called Dr. Mitchell Young.[2] Dr. M. Young was a psychiatrist from Houston, Texas, and when he began his testimony, the record indicates that he was relying on some notes. 15-ER-4026, 4032. He indicated that he was relying on the notes because he "was not familiar with particular *Atkins* language," and that he had prepared some notes to aid him in explaining how his professional experience aided his ability to inform the Court about intellectual disability. 15-ER-4032-4033. A colloquy ensued, with Dr. M. Young acknowledging that "[l]egal matters and diagnostic matters don't have directly a one-to-one correspondence, and I don't regard my presence here today to decide the ultimate issue before the court would be [sic] or be a substitute decision maker for the court." 15-ER-4033-4034.

After being recognized as an expert, Dr. M. Young initially testified about Dr. Petzold's report, which had been addressed in Dr. Schmidt's testimony. Dr. M. Young indicated that it was his view that the report did indicate that Ybarra was not

[2] There are two Dr. Youngs in this case. For purposes of clarity and brevity, Respondents refer to Dr. Mitchell Young as Dr. M. Young and Dr. Theodore Young, whose testimony is discussed immediately below, as Dr. T. Young.

profoundly or severely intellectually disabled, but the report was not something that would shed light on the possibility of mild intellectual disability. 15-ER-4041-4043.

Dr. M. Young then went on to explain that he had been retained by the Federal Public Defender to evaluate Ybarra and did so in March of 2008. 15-ER-4043. His evaluation began with review of archival material, which he acknowledged was necessary to his evaluation because an interview alone would make it impossible to meet the definition for intellectual disability. 15-ER-4043-4045.

At this point, Dr. M. Young indicated a desire to change his opinion from his report. 15-ER-4047. In particular, his report had identified Ybarra as having either borderline or sub-average intellectual functioning; however, he wanted to remove the borderline designation from his opinion based on Dr. Schmidt's testimony. 15-ER-4047. And then he continued to testify about his evaluation of Ybarra, including how his review of archival records informed his opinion. 15-ER-4047-4054.

On cross-examination, Dr. M. Young acknowledged that a school psychiatrist's comments about Ybarra reaching his limit in school was "clinical" and not based on any "IQ testing." 15-ER-4068. He also indicated that he referenced the 1981 IQ test, which he included in his report because it "was an indication that Ybarra was not [intellectually disabled]." 15-ER-4069-4070. And he testified about various statements Ybarra had made, including that Ybarra had previously stated he "does not want to die by execution and will fight to stay alive." 15-ER-4071-4074.

Dr. M. Young also reiterated that the decision on intellectual disability is "up to the court . . . to weigh the evidence for and again [sic], pro and con, present it to

the court and arrive at that legal, not clinical determination." 15-ER-4076-4077. And before the Court concluded the hearing for the day, Dr. M. Young noted "that it is more difficult to determine at less severe levels of [intellectual disability] and so too, more easily feigned. And that's the difficulty before the court." 15-ER-4077.

On the second day of his testimony, cross-examination began with Dr. M. Young acknowledging that all the adaptive deficits he identified in Ybarra would also be consistent with someone who had low-normal intellectual functioning, which would put them outside the range of intellectual disability. 15-ER-4085. Additionally, he acknowledged that a letter Ybarra had produced included detail that he would not necessarily associate with having been produced by someone with intellectual disability, but he could not rule it out either, especially if Ybarra had obtained help in writing the letter. 15-ER-4087, 4089-4090.

Finally, he testified at length about possibilities of Ybarra's other psychiatric conditions. He took issue with criticism that Dr. T. Young levied at his own work and questioned the validity of Dr. T. Young's decision to quit testing after determining that Ybarra might be malingering, noting the need to look at "multiple data sources" before reaching an opinion. 15-ER-4110-4116. In doing so, Dr. M. Young compared looking at other sources of information when diagnosing intellectual disability with searching for corroborating evidence in the legal context. 15-ER-4116. And he opined that malingering is not necessarily inconsistent with intellectual disability. 15-ER-4122.

The state called Dr. T. Young, a clinical neuropsychologist, to testify about testing he conducted on Ybarra in August of 2007. 15-ER-4128, 4135. The testing began with an interview with Ybarra providing Dr. T. Young with historical information before Dr. T. Young turned to objective testing of Ybarra's cognitive ability. 15-ER-4136-4137. Initially, testing results were "bizarre" and "very difficult to interpret," which suggested the possibility of Ybarra trying to manipulate the test. 15-ER-4137-4140. Dr. T. Young initially continued testing. 15-ER-4137-4138. But later he implemented the TOMM, which indicated Ybarra was malingering. 15-ER-4143-4148. And that led him to the conclusion that Dr. Schmidt's testing was also invalid. 15-ER-4149-4154.

Additionally, Dr. T. Young testified about other evidence, including the 1981 IQ test, indicating Ybarra's intellectual functioning to be in the "low average-range scale" or "dull normal to borderline." 15-ER-4154-4158. And he addressed Dr. Guitride's use of the WAIS for Ybarra's 1981 test, noting that (1) the newer test was not released until April of 1981, after Dr. Gutride's testing, and (2) it often takes "a couple years" for a new test to be adopted. 15-ER-4158. He questioned the inflation of IQ scores over time without any reference to supporting literature. 15-ER-4161-4162. He also subsequently testified that even though Dr. Gutride used an intern, Dr. Gutride cosigned the report, making him responsible for the contents of the report. 15-ER-4176.

Finally, Dr. T. Young acknowledged that with Ybarra's failure to satisfy the first prong of the intellectual disability standard, an evaluation of the other prongs

becomes irrelevant. 15-ER-4172. In particular, he emphasized that that an IQ in the proper range for intellectual disability is a "necessary" condition to establish intellectual disability. 15-ER-4172-4173.

On cross-examination, Dr. T. Young criticized the conclusions of Drs. Schmidt and M. Young regarding adaptive behavior because neither doctor had conducted any "objective tests of adaptive functioning." 15-ER-4178-4179. Additionally, he testified about the difference between intellectual disability, which results form never developing mental capacities, against dementia, which results from having had those capacities "and then lost them due to disease or trauma." 15-ER-4188, 4190.

Additionally, after significant cross-examination on his experience dealing with intellectually disabled clients, Dr. T. Young acknowledged that he had not read the entire clinical guidelines regarding intellectual disability. 15-ER-4195-4196. Ybarra also challenged him on his use of the Wechsler Abbreviated Scale of Intelligence (WASI) instead of the WAIS-III. 15-ER-4198-4203. Dr. T. Young also testified that he was not familiar with the Flynn Effect. 15-ER-4225. And Ybarra challenged Dr. T. Young on the use of the TOMM on the grounds that it had not been validated for use with intellectually disabled individuals, but Dr. T. Young provided literature to the contrary. 15-ER-4228-4235.

Finally, on redirect, he identified prior evaluations in the record when asked about evidence in the record indicating Ybarra had an IQ greater than 70. 15-ER-4242-4244.

7. Ybarra appealed the denial of his third federal petition, and he asked the Ninth Circuit to expand the certificate of appealability to allow consideration of a challenge to the district court's decision requiring abandonment of Ybarra's unexhausted claims. *Ybarra III*, 656 F.3d at 997. But the Ninth Circuit denied Ybarra's request, indicating that "[n]othing the district court did was even remotely improper, much less an abuse of discretion." *Id.* at 997-98. Indeed, the court found Ybarra's argument beyond reasonable debate, denying Ybarra's request for expansion of the certificate of appealability. *Id.* at 998.

8. Following *Atkins*, the Nevada Legislature adopted Nev. Rev. Stat. 174.098. The statute creates a framework for addressing intellectual disability when a defendant or prisoner is facing the death penalty. *See also* Nev. Rev. Stat. 175.554(5). And it defines intellectual disability at Nev. Rev. Stat. 174.098(7) as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period," which was drawn from existing Nevada mental health law. *Ybarra I*, 247 P.3d at 273.

When construing Nev. Rev. Stat. 174.098(7), the Nevada Supreme Court looked to the diagnostic manuals from the American Association on Mental Retardation (AAMR), which is now known as the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA) to "provide useful guidance in applying the definition set forth in NRS 174.098." *Id.* at 274. Although footnoting the definitions for intellectual disability from the 2002 AAMR guidelines—*Mental Retardation: Definition,*

Classification, and Systems of Support 1 (10th ed. 2002) (hereinafter AAMR 2002 guidelines)—and the APA's 2000 guidelines—*Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000) (hereinafter DSM-IV)—the court's opinion indicated it looked to the diagnostic materials for guidance in giving meaning to Nevada's statutory definition because the diagnostic materials and the statutory definition "share three concepts: (1) significant limitations in intellectual functioning, (2) significant limitations in adaptive functioning, and (3) age of onset." *Id.*

In particular, the Nevada Supreme Court acknowledged that the intellectual functioning component of intellectual disability "has been measured in large part by intelligence (IQ) tests," and then turned to the DSM-IV to explain that a measure of intellectual functioning with an IQ test should account for errors in measurement such "that 'individuals with IQs between 70 and 75' fall into the category of subaverage intellectual functioning." *Id.* But the Court also recognized "that objective IQ testing" is not "required to prove [intellectual disability]," and that "[o]ther evidence may be used to demonstrate subaverage intellectual functioning, such as school and other records." *Id.*

Additionally, the Court looked to the DSM-IV to further explain the meaning of "significant deficits in adaptive behavior." *Id.* Noting the importance of "the interplay between intellectual functioning and adaptive behavior" because "individuals with IQs somewhat lower than 70 would not be diagnosed as [intellectually disabled]" in the absence of significant deficits in adaptive functioning, the court defined adaptive behavior "as the collection of conceptual, social, and

practical skills that have been learned by people in order to function in their daily lives. . . ." *Id.* at 274.

Lastly, while defining the age of onset requirement of intellectual disability, the court initially focused on the twin purposes of the requirement: (1) ensuring that the intellectual disability developed during the developmental period, and not as a result of something that happened later in life, and (2) "preclud[ing] defendants from feigning [intellectual disability] once charged with a capital crime." *Id.* at 276. And consistent with DSM-IV and the AAMR 2002 guidelines, as well as a majority of other states, the court recognized that the developmental period constitutes the "period before a person reaches 18 years of age…." *Id.*

After thoroughly discussing the factual development of Ybarra's claim, the Nevada Supreme Court summarized the evidence in the record and the trial court's ruling, and then it turned to assessing the merits of Ybarra's claim. Ybarra I, 247 P.3d at 277-81.

First, while indicating that it did not need to give significant weight to IQ testing from outside the developmental period, the Nevada Supreme Court addressed the evidence of IQ testing alongside record evidence from the developmental period to address Ybarra's intellectual functioning. First, the Court addressed the 1981 IQ test, and assessed it in light of Dr. Schimidt's testimony on the Flynn Effect, concluding that the Court did not need to resolve any dispute over the Flynn Effect because (1) despite disagreement about the need to apply the Flynn Effect, the trial court's decision accounted for the Flynn Effect and did so in a way that was not

without foundation; (2) the trial court looked to other evidence in the record that corroborated the results of the 1981 IQ test; and (3) the test was of little weight because it was conducted outside the developmental period. *Id.* at 281-83.

Additionally, the Court addressed Ybarra's arguments about Dr. T. Young's testimony. The Court rejected Ybarra's argument challenging Dr. T. Young's use of an abbreviated test. *Id.* at 283. Additionally, the court rejected arguments on the issue of malingering because the Court relied on both the TOMM test and extensive evidence in the record to reach its conclusions on malingering. *Id*. And the Court also stated that the TOMM test was of little value due to it being "administered well after Ybarra reached 18 years of age." *Id*.

The court then affirmed the trial court's determinations on adaptive deficits because, contrary to Ybarra's argument that the court simply substituted its lay opinion for Ybarra's experts' opinions. *Ybarra I*, 247 P.3d at 284.

In light of the foregoing, the Nevada Supreme Court held that Ybarra "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." *Id*. at 285.

After an unsuccessful petition for writ of certiorari, Ybarra filed a motion for reconsideration in the Nevada Supreme Court that attached a report from Dr. Greenspan. *Ybarra v. Nevada*, 566 U.S. 940 (2012); *Ybarra v. Filson*, 869 F.3d 1016, 1020-21 (9th Cir. 2017) (*Ybarra IV*). The Nevada Supreme Court denied that motion without explanation. *Ybarra IV*, 869 F.3d at 1021.

9. After the Ninth Circuit denied relief, Ybarra turned to this Court with a petition for writ of certiorari. 18-ER-4943. But he then filed a motion in the district court, asserting that he should be allowed reinstate the abandoned *Atkins* claim because the Nevada Supreme Court had since denied the claim on the merits. 18-ER-5114-5124. And Ybarra filed a motion with this Court seeking a remand, a stay, or leave to amend, which this Court denied when also denying Ybarra's petition for writ of certiorari. *Ybarra v. Baker*, 568 U.S. 959 (2012).

10. The district court initially explained that the circumstances of this case were unique, which might weigh in favor of granting Ybarra's motion, but the court "concluded that additional habeas proceedings 'would be futile' because the state court's intellectual disability determination is entitled to deference under AEDPA." *Ybarra IV*, 869 F.3d at 1021. The district court also declined to consider additional expert reports that Ybarra had presented for the first time in the Nevada Supreme Court, including the Greenspan Report. *Id.*

11. Ybarra appealed, and the Ninth Circuit remanded for two reasons. First, the court had questions about the Nevada Supreme Court's opinion affirming the denial of Ybarra's challenge to his death sentence under *Atkins*. It explained that it had concerns about whether the Nevada Supreme Court's decision "contradicted the very clinical guidelines that it purported to apply." *Ybarra IV*, 869 at 1023. After explaining that there might be multiple ways to read the Nevada Supreme Court's decision, the court remanded without deciding anything to let the district court address the issue. *Id.* at 1025. Second, it reversed the district court's decision to

decline review of the Greenspan Report and remanded for reconsideration of that report. *Id*. at 1027-30.

On remand, the district court again denied Ybarra's motion. *Ybarra V*, 69 F.4th at 1089. Although it concluded that the Nevada Supreme Court unreasonably rejected Ybarra's claim with respect to the adaptive deficits prong of intellectual disability, the court found that the analysis Ybarra's failure to establish significant subaverage intellectual functioning independently supported the Nevada Supreme Court's decision. *Id*.

Ybarra appealed, and the Ninth Circuit affirmed. The court determined that the Nevada Supreme Court reasonably rejected Ybarra's claim based on the failure to satisfy the first prong of intellectual disability. *Id*. at 1089-93. The court explained that—even if the Nevada Supreme Court had unreasonably applied the age of onset requirement—the Nevada Supreme Court's analysis provided two other independent grounds for affirming the district court's determination on Ybarra's failure to prove significant subaverage intellectual functioning: (1) the Nevada Supreme Court's acceptance of the district court's adjustment of the 1981 IQ test, which placed Ybarra outside the range of the upper threshold for intellectual disability, and (2) that other record evidence supported the district court also relied on "Ybarra's school and other records, his writings, and evidence that he was malingering" to support the determination on the absence of significant subaverage intellectual functioning. *Id*. at 1091-93.

* * *

REASONS FOR DENYING THE PETITION

There is no split of authority for the Court to decide here. Ybarra just seeks error correction when there is no error to correct. And in any event, there are multiple alternative grounds for affirmance that obviate the need for this Court to address the issues Ybarra presents in his petition.

I. There is no split of authority on *Wetzel*.

Ybarra argues that there is a relevant split of authority on application of *Wetzel* involving a state court offering "overlapping" reasons for denying a federal claim. Pet. at 10-13. But there is no split to resolve.

The rule from *Wetzel* is that a petitioner must show that all independent reasons a state court gives to support its judgment must be proven unreasonable before a petitioner has satisfied AEDPA. *Wetzel*, 565 U.S. at 525. Ybarra argues that the Fourth Circuit's decision in *Long* sets a different standard for applying *Wetzel* from how the Sixth Circuit applied *Wetzel* in *Blackston v. Rapelje*, 780 F.3d 340 (6th Cir. 2015), and *Young v. Woods*, No. 17-1690, 2018 WL 298152 (6th Cir., Jan. 5, 2018). Pet at 10-13.

But those Courts did not state the rule from *Wetzel* differently. The difference is that the determination on when an alternative ground is sufficiently independent of another ground under *Wetzel* is a fact-bound, context specific question. In *Long*, the Fourth Circuit explained that the state court's application of the wrong burden of proof infected its entire analysis, and that error impacted each of the state court's reasons for denying relief. 972 F.3d at 460. Or as the Fourth Circuit put it, the error

in applying the wrong standard could not be "isolated" from the state court's proffered reasons for denying relief. *Id*.

The Sixth Circuit's decisions in *Blackston* and *Young* are different. *Blackston* analyzed four different reasons the state court gave for why exclusion of some impeachment evidence did not violate the Confrontation Clause with the Sixth Circuit finding all four reasons to be unreasonable. 780 F.3d at 353-59. And *Young* addressed multiple different reasons for why a particular claim of ineffective assistance of counsel failed. 2018 WL 298152, *2. At least two, and possibly three, of those reasons were belied by the record. *Id.* But the Court denied relief because the other three did not suffer from the same problem and were eminently reasonable. *Id*.

The facts of those cases are materially different from what the Fourth Circuit addressed in *Long*. Comparison of the cases drives home the point. In *Long*, the Fourth Circuit determined that a single error undermined both rationales offered by the state court. 972 F.3d at 460. In the other two cases, the same was not true, so the federal court needed to address each reason individually. *Blackston*¸780 F.3d at 353-59; *Young*, 2018 WL 298152, *2.

There is no split, just two courts applying a context-specific rule to cases with materially different facts. With that in mind, Ybarra's grievance boils down to his disagreement with the Ninth Circuit's determination that the Nevada Supreme Court identified two independent, reasonable points for rejecting Ybarra's claim based on the failure to establish significant subaverage intellectual functioning.

Review of the Nevada Supreme Court's opinion aligns with how the Ninth Circuit recounted that decision. First, the Nevada Supreme Court gave a detailed explanation for its rejection of Ybarra's argument that the state district court improperly "disregarded" the testimony of Dr. Schmidt on the Flynn effect, explaining that district court considered the Flynn effect and adequately explained its adjustment of the 1981 score. *Ybarra II*, 247 P.2d at 281-82. And second, the Nevada Supreme Court explained that the district court looked at other record evidence wherein it found additional support for the conclusion that Ybarra did not show that he had significant subaverage intellectual functioning. *Id*. at 282. The Ninth Circuit found both of those reasons for denying Ybarra's claim to be reasonable. *Ybarra V*, 69 F.4th at 1091-93.

Ybarra provides no explanation of how the Fourth Circuit's determination in *Long* demonstrates that *Wetzel* should not apply here. He *says* "All of the Nevada Supreme Court's conclusions are infected" by the Nevada Supreme Court's alleged improper application of the age of onset requirement. Pet. at 23. But he fails to *show* how the alleged incorrect application of the age of onset requirement "infects" the Nevada Supreme Court's decisions (1) concluding "that the district court's adjustment calculation was not without foundation," and (2) explaining that the district court relied on "Ybarra's school and other record, his writings, and evidence that he was malingering," in addition to relying on the 1981 test score. Both of those points require consideration of evidence from outside the developmental period, so there is

no support for the assertion that the Nevada courts refused to consider evidence from outside the developmental period.[3]

For those reasons, this Court should deny the first question presented.

II. Any disagreement on the meaning of *Richter* and *Wilson* has no effect on this case.

Ybarra's argument charging the Ninth Circuit with rewriting the Nevada Supreme Court's opinion lacks record support. Pet. at 13-18. But even if he were right, *Wilson* grants the Ninth Circuit the authority to consider other reasons that might support the Nevada Supreme Court's decision when—as here—the last merits decision is a silent denial. In the Ninth Circuit, Ybarra prevailed in arguing for inclusion of the Greenspan Report in the state court record under *Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013). *Ybarra IV*, 869 F.3d at 1027. Prevailing on that argument meant that the Nevada Supreme Court's "unexplained" order denying Ybarra's motion for reconsideration was a merits determination. For those reasons, any difference in opinion on when to apply *Richter* versus *Wilson* is inapposite.

A. The Ninth Circuit did not rewrite the Nevada Supreme Court's decision.

Ybarra's assertion that the Ninth Circuit rewrote the Nevada Supreme Court's opinion is unfounded. First, Ybarra claims that "the Ninth Circuit overstates the

[3] Respondents further note their disagreement with Ybarra's view that the Nevada Supreme Court misapplied the age of onset requirement at all. The Nevada Supreme Court did not hold that evidence from outside the developmental period is irrelevant. What the Nevada Supreme Court said is that such evidence is entitled to little weight. And what the Nevada Supreme Court appears to have said is simply that evidence from outside the developmental period is not dispositive in proving intellectual disability; the petitioner would still have to identify corroborating evidence showing that the condition manifested during the developmental period to succeed in proving intellectual disability, which the state courts concluded Ybarra failed to do. *See*, *e.g.*, *Ybarra II*, 247 P.3 at 279-80.

Nevada Supreme Court opinion" about the 1981 IQ score because "[t]he Nevada Supreme Court *never* held that the 1981 score disproved Ybarra's significant subaverage intellectual functioning, as the Ninth Circuit suggests." Pet. at 24.

Ybarra overlooks the point that such a conclusion is inherent in the Nevada Supreme Court's rejection of the arguments he asserted on appeal. He claimed that the district court erred by crediting the 1981 score over the score from Dr. Schmidt's testing because the 1981 score was either invalid or fell within the range for intellectual disability when applying the Flynn Effect according to Dr. Schmidt's testimony. *Ybarra II*, 247 P.3d at 281. But the Nevada Supreme Court rejected Ybarra's argument by crediting the district court's determination on Dr. Schmidt's lack of credibility and the district court properly supporting its determination that the score remains outside the range for intellectual disability when accounting for the Flynn effect. *Id*. at 281-82. When the Nevada Supreme Court rejected Ybarra's argument, it necessarily affirmed the district court's decision that relied on the 1981 score to conclude that Ybarra failed to prove significant subaverage intellectual functioning.

Second, Ybarra argues that the Ninth Circuit wrongly concluded that the Nevada Supreme Court relied on the district court's determination that Dr. Schmidt's testimony lacked credibility. Pet. at 24-25. For support, he cites a single page of the Nevada Supreme Court's opinion to assert that the Nevada Supreme Court only rejected Dr. Schmidt's test score because it was conducted outside the developmental period. Pet. at 25. But elsewhere in the opinion the Nevada Supreme Court explained

that credibility determinations are purely the domain of the trier of fact. *Ybarra II*, 247 P.3d at 276-77.[4] And the Ninth Circuit's opinion cites three different pages of the Nevada Supreme Court's opinion, all of which address the district court's determination that Dr. Schmidt's testimony lacked credibility, including two pages addressing significant subaverage intellectual functioning. *Ybarra V*, 69 F.4th at 1092 (*citing Ybarra II*, 247 P.3d at 279, 282, 284).

Finally, Ybarra faults the Ninth Circuit for purportedly giving different reasoning than the Nevada Supreme Court on the relationship between the other record evidence and Dr. T. Young's use of the Test of Memory Malingering. Pet. at 25. Ybarra's complaint is that the "Nevada Supreme Court used the 'wealth of other evidence' to ignore issues related to the TOMM," and "the Ninth Circuit used the TOMM to ignore issues related to the 'wealth of other evidence.'" Pet. at 25.

But the Ninth Circuit did not "ignore" issues with the state courts' reliance on the other record evidence—the Ninth Circuit was responding to Ybarra's argument "that reliance on anything other than expert testimony amounts to a reliance on 'stereotypes' about intellectual disability." *Ybarra V*, 69 F.4th at 1092. And the Court rejected Ybarra's position. *Id*. It explained that the district court was free to "consider the data an expert relied on in reaching an opinion and 'reject' expert testimony based on 'the reasons given for the opinion' and 'the other evidence in the case.'" *Id.*

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[4] The state court's factual determinations are also entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1).

(citations omitted). And the Court explained that it was reasonable for the state courts to reject the testimony of Ybarra's experts "[t]o the extent [they] 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)." *Id.* Then the Ninth Circuit only referenced the TOMM as reinforcing that conclusion it had already made about the state courts' reliance on other record evidence. *Id.*

So the Ninth Circuit did not "ignore" any issues with the state district court's relying on other evidence in the record. It confronted Ybarra's argument head-on and rejected it. *Id.* And it did not rewrite the Nevada Supreme Court's decision.

B. Even if the Ninth Circuit had rewritten the Nevada Supreme Court's decision, *Wilson* allows the Ninth Circuit to consider whether there are other obvious reasons for affirmance on the face of the record.

Even if Ybarra were right that the Ninth Circuit rewrote the Nevada Supreme Court's rationale for denying relief, *Wilson* provides Ybarra no refuge. True, *Wilson* indicates that federal courts are supposed to analyze a state court's reasons for denying relief when applying AEDPA to a reasoned decision. 584 U.S. at 125. But when a reasoned decision is followed by an unexplained decision, the federal courts are to apply a rebuttable presumption that the silent denial is based on the prior reasoned decision. *Id.* at 125-26. The federal court "looks through" the unexplained decision to the "last reasoned" decision and applies a presumption that the unexplained decision adopted the rationale of the last reasoned decision. *Id.* at 125-26, 128-32. If the last reasoned decision is unreasonable, "the federal habeas court is

free" to determine whether there is some other obvious basis on the face of the record to support the state court's judgment. *Id.* at 132-34.

That rule applies here. And Ybarra should now be estopped from arguing otherwise. *See*, *e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, (2001). Ybarra successfully fought to have the Ninth Circuit hold that the Greenspan Report is part of the record. *Ybarra III*, 869 F.3d at 1027-30. But Ybarra's success on that argument meant that the Nevada Supreme Court's unexplained order denying his motion for reconsideration "constitutes an adjudication on the merits" under Ninth Circuit precedent. *Id.* (citing *Cannedy*, 706 F.3d at 1156). So, under *Wilson*, the Ninth Circuit was free to consider whether some other reason in the record supported the denial of Ybarra's motion for reconsideration, which was the last merits denial on his *Atkins* claim in state court. 584 U.S. at 132-34.

For that reason, even assuming Ybarra is right that the Ninth Circuit "rewrote" the Nevada Supreme Court's opinion, and has identified a split amongst the circuits about when *Richter* should and should not apply, the facts of this case do not present this Court with an opportunity to resolve that split.

III. Three alternative grounds for affirming the denial of Ybarra's Rule 60(b) motion undercut his request for review.

Three alternative grounds for affirming the judgment present barriers to this Court reaching the questions Ybarra presents in his petition. The district court required Ybarra to abandon his unexhausted claims—including the *Atkins* claim—and he failed to show extraordinary circumstances for allowing him to revive that

claim nine years later. Also, this Court's opinion in *Shoop v. Hill*, 586 U.S. 45 (2019), holds that Ybarra cannot rely upon legal principles this Court clearly established in *Moore* to attack the Nevada Supreme Court's decision. Finally, Ybarra's claim fails even under a de novo review because Drs. Schmidt. M. Young, and Greenspan all made admissions that disprove Ybarra's claim of intellectual disability.

A. Ybarra has not shown extraordinary circumstances to overcome the dismissal of his *Atkins* claim.

This Court decided *Atkins* after Ybarra had returned from state court to file his third federal petition, and he included a single-page, conclusory claim relying on *Atkins* when he amened his petition in 2002. But in 1993, when the district court dismissed Ybarra's second federal petition without prejudice, the court warned Ybarra that he was not to return with any unexhausted claims—if he did, the judge would dismiss Ybarra's entire petition. *Ybarra III*, 656 F.3d at 988-89.

Ybarra failed to heed the district court's warning. He included 25 unexhausted claims when he amended his third federal petition, with his *Atkins* among them. 18-ER-5201; 19-ER-5276. The district court spared Ybarra from an outright dismissal, in favor of merely requiring dismissal of all the unexhausted claims. *Ybarra III*, 656 F.3d at 997-98.

Ybarra appealed the forced abandonment of his unexhausted claims. But, again, he made no argument specifically addressing dismissal of the *Atkins* claim. And the Ninth Circuit found the issue so noncontroversial, it declined Ybarra's request to expand the certificate of appealability to address the issue. *Ybarra III*, 656 F.3d at 997-98.

Ybarra then filed a Rule 60(b)(6) motion because he had exhausted *Atkins* claim. But Rule 60(b)(6) requires a showing of extraordinary circumstances. *Buck v. Davis*, 580 U.S. 100, 777-78 (2017). But there is nothing extraordinary about the fact that Ybarra subsequently exhausted his *Atkins* claim in state court. The district court should have denied this motion, just the same as it denied Ybarra's prior attempts to revive other abandoned claims after he had exhausted them, especially when considering the Ninth Circuit had previously found the forced abandonment of Ybarra's unexhausted claims "not reasonably debatable." *Ybarra III*, 656 F.3d at 998.

B. Ybarra's theory that the Nevada Supreme Court failed to strictly adhere to the clinical guidelines is improperly based upon this Court's decision in *Moore*, which post-dates the Nevada Supreme Court's denial of Ybarra's *Atkins* claim.

The problem with Ybarra's reliance on clinical standards to attack the Nevada Supreme Court's decision is that this Court's decision in *Moore* provides the foundation for that argument. *Hill*, 586 U.S. at 48-49. This Court decided *Moore* in March 2017, and the Nevada Supreme Court issued its last merits decision on Ybarra's *Atkins* claim in May 2012. And under AEDPA, a federal court's rationale for granting habeas relief must be "sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time." *Hill*, 586 U.S. at 509 (2019).

An analysis of whether the state court applied a legal rule that is contrary to a clearly established holding of this Court is controlled by 28 U.S.C. § 2254(d)(1). *See, e.g.*, *Early v. Packer*, 537 U.S. 3, 8 (2002) (addressing "contrary to" clause of 28 U.S.C. §2254(d)(1)). And this Court has been explicit that the analysis is limited to

considering legal principles that this Court had clearly established by the time of the state court's decision. *White v. Woodall*, 572 U.S. 415, 426 (2014).

But even if consideration of what clearly established federal principles control the analysis of a particular federal claim would be relevant to factual challenges brought under 28 U.S.C. § 2254(d)(2), that analysis should still be limited the clearly established federal law that existed at the time of the challenged state court ruling. To conclude otherwise would turn 28 U.S.C. § 2254(d)(2) into an unintended backdoor around 28 U.S.C. § 2254(d)(1).

For that reason, AEDPA requires denial of Ybarra's claim that the Nevada Supreme Court failed to properly apply the clinical standards. This Court's decision in *Hill* forecloses his ability to rely on that principle because, like in *Hill*, Ybarra's state case was decided before this Court decided *Moore*.

C. Even under a de novo review, the *Atkins* claim fails based on admissions of Drs. Schmidt, M. Young, and Greenspan.

Even if Ybarra were able to prevail in challenging the Nevada Supreme Court's opinion under AEDPA, that does not guarantee him habeas relief. *Brown v. Davenport*, 596 U.S. 118, 134 (2022). And admissions from Ybarra's experts directly undermine his ability to prevail on his *Atkins* claim, even without applying AEDPA deference.

First, during the evidentiary hearing, Dr. Schmidt acknowledged that the higher score a subject receives on an IQ test controls the analysis on intellectual functioning prong of the test for intellectual disability. 14-ER-3982. This is so,

according to Dr. Schmidt, because it is not possible to feign intelligence. 14-ER-3982-3983. Second, Dr. Greenspan agreed that the Flynn Effect only reduces the 1981 score to 78. 18-ER-4970.[5] So the controlling score for assessing Ybarra's intellectual functioning—according to Ybarra's experts—*is* the 1981 test. And that test puts Ybarra outside of the range for intellectual disability. And because he is outside the range on the first part of the test, that ends the inquiry. *Moore*, 581 U.S. at 25 (Roberts, C.J. dissenting) ("Having failed one part of the CCA's three-part test, Moore could not be found intellectually disabled.").

Finally, Dr. M. Young's testimony corroborates this point. He testified that the 1981 test score was an indication that Ybarra is not intellectually disabled. 15-ER-4069-4070. For those reasons, even without AEDPA deference, Ybarra's claim fails on this record.

* * *

[5] Dr. Greenspan actually said 77, but Ybarra admits that Dr. Greenspan made a mathematical error and 78 is the correct number. 2-ER-0329 n.45.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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