No. 23-6755

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

Reply to Respondent's Brief in Opposition

CAPITAL CASE

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The thrust of Ybarra's petition for writ of certiorari is that the Nevada Supreme Court opinion is unreasonable because that court misunderstood Prong 3 of intellectual disability. Specifically, the Nevada Supreme Court assumed that only evidence from before Ybarra turned 18 was relevant in determining whether he has intellectual disability. Ybarra quoted five examples of this egregious error in the court's decision. *See* Pet. at 5–6. Ybarra noted this is unambiguously contradictory to the clinical guidelines for assessing intellectual disability. *See* Pet. at 6; *see also id.* n.6 (collecting sources).

Respondents "note" their disagreement of this reading of the Nevada Supreme Court's decision, in a footnote. Br. in Opp. at 23 n.3. And even then, the Respondents defend only one of the instances where the Nevada Supreme Court expressed its misunderstanding, not the other four. *Id.*

Indeed, the State's brief is notable for what it omits. *Brumfield v. Cain*, 576 U.S. 305 (2015), which is the strongest case in support of Ybarra and was the basis for the Ninth Circuit's remand in its 2017 opinion, goes without mention. *See* App. 085. The State's brief devotes many pages to the procedural history, and to alternative grounds for affirming, but only four pages to defending the Ninth Circuit's reasoning. *See* Br. in Opp. at 22–26.

This short shrift is necessary for the State's position because acknowledging the age of onset error necessarily implicates both the circuit splits identified by Ybarra. If the Nevada Supreme Court made this error, then it infected the rest of its

analysis. In some circuits this would be unreasonable under 28 U.S.C. § 2254(d); in others not. This Court should grant certiorari to resolve either or both of the two circuit splits.

I. There is a split on applying *Wetzel v. Lambert*, 565 U.S. 520 (2012).

In denying a circuit split in the application of *Wetzel v. Lambert*, 565 U.S. 520 (2012), the State cites no additional cases and glosses over Ybarra's argument. Instead, the State over-simplifies the nuances of the various cases and seeks to distinguish *Long v. Hooks*, 972 F.3d 442 (4th Cir. 2020) from both *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). While the State correctly notes that the Sixth Circuit in both *Blackston* and *Young* identified several "different reasons" underlying the state court's decision, it fails to acknowledge that in each of these cases, the several "different reasons" overlapped or lacked independence. The circuit split identified by Ybarra is precisely on the issue of whether the doctrine of *Wetzel* can be applied when the state court gives multiple, but overlapping, reasons for its decision.

In *Long*, the en banc Fourth Circuit majority required isolation from the unreasonable ground before a purportedly alternative ground could validate the state court decision. 972 F.3d at 459–60. In contrast, the Sixth Circuit, in both *Blackston* and *Young*, assumed that *Wetzel* applied even though the state court's reasons were intertwined. The Sixth Circuit, in *Blackston*, noted that the state court advanced four theories—which overlapped—in support of its decision, yet the

Sixth Circuit addressed each of the overlapping theories in turn. 780 F.3d at 354–58. Similarly, in *Young*, the Michigan Court of Appeals articulated six non-independent reasons for rejecting the petitioner's claim. 2018 WL 298152 at *7. On habeas review, and citing *Wetzel*, the Sixth Circuit acknowledged that "habeas relief is not warranted 'unless *each* ground supporting the state court decision is examined and found to be reasonable under AEDPA.'" *Id.* at *2 (emphasis in original).

Thus, the Fourth and Sixth Circuits have split on whether the *Wetzel* doctrine applies where the state court gives multiple, but overlapping, reasons for its decision. And the State's assertion that there is no such split to resolve is wrong.

The State argues that the age of onset error does not infect the Nevada Supreme Court's overall analysis, arguing the two alternate reasons are independent of the age of onset error. Br. in Opp. at 22. But they are not. There are three tests that matter in this case: (1) the 1981 IQ test; (2) the 2000 IQ test (by Dr. Schmidt); and (3) a Test of Memory Malingering. *See* App. 11, 12, 16; *see also* App. 122–25. As to these three tests, the Nevada Supreme Court's reasoning was that they happened after the developmental period, and so were of "little value" in determining whether Ybarra qualified for intellectual disability under Prong 1. The Nevada Supreme Court's proffer of the two other explanations for rejecting challenges to the 1981 test do not answer the broader question of Ybarra's significant subaverage intellectual functioning, they merely hold that any error related to the 1981 IQ test was harmless. App. 133–35. Only the Nevada Supreme Court's age of onset error explains its decision because only the age of onset error

explains how the Nevada Supreme Court reconciled the two IQ tests and the Test of Memory Malingering. That is: it didn't, because all the tests happened after Ybarra turned 18.

II. The State does not dispute that the circuits are split in how to reconcile *Harrington v. Richter*, 562 U.S. 86 (2011), and *Wilson v. Sellers*, 584 U.S. 122 (2018).

The State does not deny a jurisdictional split in how to reconcile *Harrington v. Richter*, 584 U.S. 122 (2011) and *Wilson v. Sellers*, 584 U.S. 122 (2018). Instead, the State offers two arguments in response: First, that the Ninth Circuit did not re-write the Nevada Supreme Court's opinion, as would be contemplated by the circuits deferring to a state court's conclusion instead of its reasoning; second that following the reasoning of Justice Gorsuch's dissent in *Wilson*, the Ninth Circuit was free to re-write the Nevada Supreme Court's opinion.

A. The Ninth Circuit re-wrote the Nevada Supreme Court's opinion.

Ybarra explained in his petition that the Nevada Supreme Court never held that the 1981 IQ test disproved significant subaverage intellectual functioning. *See* Pet. at 24. The State argues that "such a conclusion is inherent in the Nevada Supreme Court's rejection of the arguments he asserted on appeal." Br. in Opp. at 24. But this conclusion is not inherent because there is no textual evidence for it, and there is textual evidence for the Nevada Supreme Court's age of onset misunderstanding. App. 119 n.8; App. 135; App. 135 n.17; App. 137; App. 140 n.20. Relying on a point for which there is not textual evidence to ignore a point for which there is textual evidence demonstrates the Ninth Circuit re-wrote the decision.

Ybarra argued that the Nevada Supreme Court's rejection of Dr. Schmidt's IQ score was based on the court's misunderstanding of the age of onset. Pet. at 25 (citing App. 135). The State notes that Ybarra cites "a single page" of the Nevada Supreme Court opinion, and then notes that the Ninth Circuit cited three pages, "all of which address the [state] district court's determination that Dr. Schmidt's testimony lacked credibility." Br. in Opp. at 24–25. But none of these three pages reject Dr. Schmidt's IQ test. The State points to *Ybarra v. State*, 247 P.3d 269, 279, 282, 284 (Nev. 2011), which are App. 127, 133, and 138. None of these, however, are credibility determinations related to Dr. Schmidt's IQ test.

At App. 127, the Nevada Supreme Court merely summarizes the lower court's opinion, "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." At App. 133, the Nevada Supreme Court noted the credibility related *only* to the issue of the Flynn effect: "[T]he district court did not disregard Dr. Schmidt's testimony regarding the Flynn effect. Rather, the court found the testimony incredible . . . ." Finally, App. 138 is not about Prong 1, but about Prong 2: "But as the district court found, those considerations did little to demonstrate the adaptive behavior deficits. And rather than disregarding that testimony, the district court found most of it to be incredible . . . ." This last point is particularly telling because the U.S. District Court found the Nevada Supreme Court decision on adaptive deficits to be based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). App. 52. Indeed, that the

Ninth Circuit relied on these citations to support a point they do not support demonstrates re-writing of the state court decision.

Ybarra argued that the Ninth Circuit's reliance on the TOMM is another example of how the Ninth Circuit re-wrote the Nevada Supreme Court opinion. Specifically, the Ninth Circuit wrote, "it was not unreasonable to find that [the defense experts'] were invalid—especially since the trial court also 'considered the TOMM results.'" App. 35. About the TOMM, the Nevada Supreme Court wrote, "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." App. 137. Here, the Ninth Circuit credited the TOMM; the Nevada Supreme Court did not. *Compare* App. 35 *with* App. 137. The State argues this is not an example of re-writing, but agrees that the Ninth Circuit relied on the TOMM "as reinforcing" its conclusion. Br. in Opp. at 26. The Ninth Circuit relying on a test that the Nevada Supreme Court did not rely on is evidence of re-writing the state court decision.

B. This Court should decline the State's invitation to adopt Justice Gorsuch's dissent.

The State is silent on, fails to engage with, and effectively concedes Ybarra's argument that the Circuits are split in how they reconcile *Harrington v. Richter*, 562 U.S. 86 (2011), and *Wilson v. Sellers*, 584 U.S. 122 (2018). It acknowledges *Richter*—in its introduction—to say only that "any disagreement about when to apply" *Richter* or *Wilson* is "irrelevant" here. Br. in Opp. 1; *see also* Br. in Opp. 27.

And this "irrelevancy" is born from the State's homing in on Justice Gorsuch's *Wilson* dissent.

To provide some background: after the Nevada Supreme Court issued its 2011 decision, Ybarra filed a motion for reconsideration and attached a report by Dr. Stephen Greenspan. App. 76. The Nevada Supreme Court denied the motion in a single sentence order. *Id.* Adopting the reasoning later endorsed in *Wilson*, the Ninth Circuit explained, "Because the 2012 order is unexplained, we assume that it rests upon the same rationale as the 2011 opinion." App. 89. Without being explicit, the State asks this Court to reverse the Ninth Circuit's 2017 ruling on this issue and adopt the approach in Justice Gorsuch's dissent.

There, Justice Gorsuch criticized the majority's adoption of the look through presumption but stressed "the presumption should count for little in cases 'where the lower state court decision is unreasonable' because it is not 'likely' a state supreme court would adopt unreasonable reasoning." 584 U.S. at 135 (internal citations omitted). And, nevertheless, "federal courts remain free to sustain state court convictions whenever reasonable 'ground[s] for affirmance [are] obvious from the state-court record' or appear in the parties' submissions in state court or the federal habeas proceeding." *Id.*

Holding tightly to the language that federal habeas courts are "free" to "determine whether there is some other obvious basis on the face of the record to support the state court's judgment," the State argues that, here, the Greenspan Report provides that "other obvious basis" because it rebuts Ybarra's claim of intellectual disability. Br. in Opp. at 27. But this overlooks Ybarra's argument, and

the Ninth Circuit's 2017 ruling, which is that the federal court looks through the unreasoned 2012 order to the 2011 published opinion, with the Greenspan report part of the § 2254(d) analysis. Thus, the State's argument is misplaced.

This case invites a straightforward application of *Wilson*'s look-through rule. So, federal courts look through the unreasoned decision to the reasoned decision. *See Wilson*, 584 U.S. at 128–29. And then, federal courts apply 28 U.S.C. § 2254(d) deference to that reasoned decision. *Id.* Here, this Court looks through the unreasoned order to the Nevada Supreme Court's published opinion. This Court should decline the State's de facto invitation to add an unpresented Questions Presented based on Justice Gorsuch's dissenting opinion in *Wilson*.

III. The State's alternate grounds for affirming are belied by the record.

The State offers three alternate grounds that the Ninth Circuit's decision should be affirmed. None of these arguments have merit and they can be quickly disregarded.

First, the State argues that Ybarra has not shown extraordinary circumstances under Fed. R. 60(b)(6). The State waived this argument by failing to present it in its 2015 answering brief to the Ninth Circuit, when it first had an opportunity to raise the issue.[1] *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) ("Generally, an appellee waives any argument it fails to raise in its answering brief."); *see generally Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38–

[1] *See Ybarra v. Filson*, No. 13-17326, Ans. Br. (9th Cir. Aug. 14, 2015) (not raising issue); *see also Ybarra v. Filson*, No. 13-17326, R. Br. (9th Cir. Nov. 15, 2015) (noting that State failed to challenge propriety of Rule 60(b) relief).

39 (1989).[2] Even if not waived, the argument lacks merit: though Rule 60(b) relief is only for "extraordinary circumstances," this Court considers the "the risk of injustice to the parties" and the "risk of undermining the public's confidence in the judicial process." *Buck v. Davis*, 580 U.S. 100, 123 (2017). Because the basis of the Rule 60(b) motion was that Ybarra's previously unexhausted *Atkins* claim became exhausted—allowing federal habeas review—both factors weigh in favor of finding extraordinary circumstances here.

Second, the State argues Ybarra's reliance on clinical standards has its root in *Moore v. Texas*, 581 U.S. 1 (2017), a decision that was not clearly established federal law when the Nevada Supreme Court issued its opinion in this case. Br. in Opp. at 29. But Ybarra did not cite *Moore*; Ybarra relies on 28 U.S.C. § 2254(d)(2) for his argument, which does not require clearly established federal law as in *Shoop v. Hill*, 586 U.S. 45, 46 (2019); and Ybarra's argument is supported by *Brumfield v. Cain*, 576 U.S. 305 (2015), which Ybarra did cite. *See* Pet. at 7, 13, 23. The Ninth Circuit even acknowledged that *Brumfield* supported Ybarra. App. 84–85 (noting Ybarra "plausibly argues" an unreasonable determination of facts and noting "helpful guidance" from *Brumfield* decision). *Brumfield* stands for the proposition that, where a state court purports to rely on clinical guidelines, failure to comply with those guidelines will result in an unreasonable determination of the facts. *See Brumfield*, 576 U.S. at 315; *see also* App. 85–86.

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[2] The State did raise this argument below, but it had already been waived by its failure to raise the issue in its 2015 brief.

Third, the State argues that admissions from Ybarra's experts preclude relief. But all three of Ybarra's experts concluded that Ybarra has intellectual disability. Thus, this argument is meritless.

CONCLUSION

For the foregoing reasons and those stated in his petition, Ybarra requests that this Court grant his petition for writ of certiorari.

Dated this 1st day of May, 2024.

Respectfully submitted,

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