**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| ROBERT YBARRA, JR., Appellant, vs. E.K. McDANIEL, Warden, et al., Respondents. | Case No. 52167 |

**REPLY TO OPPOSITION TO MOTION FOR REMAND AND OPPOSITION TO MOTION TO STRIKE**

Mr. Ybarra asked this Court to remand the case for additional hearings because of newly available data on two key points: the scientific acceptance of the Flynn Effect and the issue of malingering and its detection. Mr. Ybarra's request for a remand was also predicated on the death of Dr. David Schmidt, Mr. Ybarra's expert who testified at the 2008 evidentiary hearing. The state has responded to this request and moved to strike the motion because, it contends, this Court has only a limited power to remand. State's Opp. and Motion to Strike at 3.

This Court's power to review is not so limited. The Court's ability "to consider relevant issues sua sponte in order to prevent plain error is well established." Bradley v. Romeo, 102 Nev. 103, 106, 716 P.2d 227, 228 (1986), citing Western Industries v. General Ins. Co., 91 Nev. 222, 229-30, 533 P.2d 473, 478 (1975) ("The judgment and the special master's findings of fact are silent concerning disposition of the stock, and this court has been most concerned about the award of the stock's full value to the Moores and Stecher, absent provision for the stock itself. Counsel have raised no issue in this regard, but it seems that were judgment granted the Moores and Stecher for their stock's full value, while allowing them to keep it, this would be plain error. Thus, we treat the problem sua sponte."). Further, errors of constitutional dimension fall clearly

within this Court's power of sua sponte review. McCullough v. State, 99 Nev. 72, 74, 657 P.2d. 1157, 1158 (1983); Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968) ("However, since appellant's contentions are grounded on constitutional questions this court is obligated to consider them on appeal."); see also Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441-42 (2000) ("Collman did not challenge this instruction below or on appeal, but after reviewing the record, we ordered the parties to provide supplemental briefs addressing whether this correctly provided that child abuse constituted conclusive evidence of malice. . . . Having considered the supplemental briefs of the parties and of amici curiae, we conclude that instruction number 11 was erroneous, . . . .").

Mr. Ybarra's claim of mental retardation and the methodology used to determine that issue are both "grounded on constitutional questions" and may be considered by the Court sua sponte even without Mr. Ybarra's request. See Atkins v. Virginia, 536 U.S. 335 (2002). Because this is a capital case, and Atkins categorically excludes death as a possible punishment for people suffering from mental retardation, the resolution of this issue affects the constitutional reliability of the sentence under the Eighth Amendment and state law. See Geary v. State, 112 Nev. 1434, 1440, 930 P.2d 719, 723 (1996) (on direct appeal, "court's greatest concern is whether the [death] sentence is constitutional"). Further, this is an appeal from an order denying a motion to set aside a death sentence under the statutory procedure prescribed by NRS 175.554(5). On appeal from such an order, NRS 177.015, this Court's power is plenary: NRS 175.554(5) does not contain any of the procedural stumbling blocks imposed by statute in habeas corpus proceedings, see NRS 34.726(1); 34.800; 34.810, and thus there is no basis for limiting this Court's power to dispose of the appeal in this matter as "substantial justice" requires. See Lane v. State, 114 Nev. 229, 302, 956 P.2d 88, 90 (1998) (considering time-barred peition for rehearing "to promote substantial justice"); Geary v. State, 114 Nev. 100, 102-03, 952 P.2d 431, 432 (1998) (same); cf. Riker v. Eighth Judicial District Court, 121 Nev. 225, 236-37, 112 P.3d 1070, 1077-78 (2005). Under these circumstances, this Court should remand the case for further proceedings in which the district court can consider developments that have occurred while this

appeal was pending.

This action is particularly appropriate because this case is apparently the first in which the broad standard imposed by NRS 175.554(5) will be applied. During the oral argument of this case, members of the Court queried whether the Court should establish standards for claims of mental retardation in death penalty cases. That decision should not be made in a vacumn but only after the parties have tendered all the available evidence on why their proposed standards would lead to a more accurate or fair determination of the issues. Clearly Atkins has set forth certain general standards: that a petitioner demonstrate "significantly subaverage in intellectual functioning" defined by the AAIDD as at least two standard deviations below the mean (an IQ of approximately 70) together with deficits in adaptive behavior of the same degree and both manifesting before the age of 18. See Atkins, 536 U.S. at 308, fn. 3, quoting from Mental Retardation: Definition, Classification, and Systems of Support, p. 5 (AAMR 9th ed. 1992).[1]

Atkins, however, established only a general definition of mental retardation and left it to the states to develop appropriate procedures for enforcing the constitutional mandate. 536 U.S. at 317. The implementation of those general guidelines, however, requires this Court to consider a multitude of issues, including the Flynn Effect, the application of a standard error of measurement, issues of progressive error and practice effect, the use of short form instruments versus long form and complete test batteries, the level of expertise for assessors, and whether deficits in adaptive behavior can consider only deficits or can that analysis consider strengths. These should be fully developed in the Court below, and a remand would thus be appropriate here.

As appellant showed in his motion for remand, the professional acceptance of the Flynn Effect on IQ scores has now been demonstrated. Motion at 8-9. The district court in this case

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[1] The AAMR, in 2007, changed its name to the American Association on Intellectual and Developmental Disabilities, or AAIDD. The association has published two subsequent editions of its definitional manual; the current edition, the 11th, retains the same definition of mental retardation, now known as intellectual disability. See Intellectual Disability, Definition, Classification, and Systems of Support, (AAIDD, 2010, 11th ed.).

did not accept the legitimacy of the Flynn Effect, and miscalculated its importance to the extent that it did consider it. If this Court were to resolve this case on the basis of a record in which the Flynn Effect is not applied, its decision would have little precedential value, because the validity of the Flynn Effect has now been clearly established.

Similarly, the danger of using the TOMM (Test of Memory Malingering) as the basis for finding that the subject's IQ test results are invalid has now been demonstrated: long-form testing of Mr. Ybarra following the death of Dr. Schmidt has demonstrated that he consistently tests in the range of mental retardation, regardless of the results of the TOMM; and academic research has shown the questionable validity of using the TOMM in this context. Motion at 3-6. Again, if this Court's decision is to have any precedential value in setting general standards for conducting examinations for mental retardation under NRS 175.554(5) and 174.098, it must include consideration of the current state of scientific relevant to such evaluations; and on the issue of the use of the TOMM, like the issue of the acceptance of the Flynn Effect, the scientific community has moved forward on material issues while this appeal has been pending.

Under these circumstances, appellant submits that this Court should remand this matter to allow the district court to consider the current state of scientific knowledge and practice on the material issues cited in appellant's motion, and on any other issues on which this Court, in considering appropriate standards for assessments for mental retardation, may desire further information.

Dated this 13th day of September, 2010.

Respectfully submitted,
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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of September, 2010. Electronic Service of the foregoing REPLY TO OPPOSITION TO MOTION FOR REMAND AND OPPOSITION TO MOTION TO STRIKE shall be made in accordance with the Master Service List as follows::

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