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THE STATE OF NEVADA,
Real Party In Interest.

Electronically Filed
Sep 16 2016 11:03 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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DATED this 16th day of September, 2016.

By: /s/ Christy L. Craig
CHRISTY L. CRAIG, ESQ.
Deputy Public Defender

1 **AFFIDAVIT OF CHRISTY L. CRAIG**

2 STATE OF NEVADA)
3) ss:
4 COUNTY OF CLARK)

5 CHRISTY L. CRAIG, being first duly sworn, deposes and says:

6 1. That affiant is an attorney duly licensed to practice law in the State of Nevada
7 and is the Deputy Clark County Public Defender assigned to represent the Defendant, Javier
8 Righetti, in this matter.

9 2. That on June 17, 2016 Petitioner filed a Petition for Writ of
10 Prohibition/Mandamus with the Nevada Supreme Court (No. 70591).

11 3. That on August 23, 2016 Petitioner filed in District Court, a Motion to Stay Trial
12 (See Exhibit A, Motion to Stay Trial). Simultaneously, Petitioner also filed a Motion for *Atkins*
13 Hearing as defense counsel is seeking to have the Petitioner declared developmentally disabled
14 thereby requiring the court to strike the notice of intent to seek death penalty. (See Exhibit B,
15 Motion for Atkins Hearing).

16 4. On September 6, 2016 the above referenced motions were heard. Instead of
17 ruling on the Motion to Stay Trial, it appears the District Court granted a stay pursuant to NRS
18 174.098 (See Exhibit C, Transcript September 6, 2016, at 4:23-5:18). NRS 174.098(2)(a)
19 requires the district court to "stay the proceedings pending a decision on the issue of intellectual
20 disability." Id.

21 5. That the following facts satisfy the requirements of NRAP 8(a)(2)(A)(ii): First, a
22 motion was made in the district court. Secondly, the district court "failed to afford the relief
23 requested" because a stay was granted pursuant to NRS 174.098(2)(a) to address intellectual
24 disability. While that stay is required by statute, it does not guarantee the resolution of the
25 issues presented in the Writ for Prohibition/Mandamus prior to trial in the district court.
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1 6. That the Petition for Writ of Prohibition/Mandamus springs from the District
2 Court's granting of the State's Motion to Reject the Defendant's Guilty Plea. On February 11,
3 2016, the Petitioner pled guilty to all charges in the Indictment, including Count 10 – Murder,
4 without a negotiation. On that same date, the court found that the Petitioner's plea was made
5 freely, voluntarily, and knowingly. The court accepted that plea. The court, at the request of the
6 State, adjudicated the Petitioner of all counts.

7 7. That Count 10 of the Information alleged three *alternate* theories of culpability:
8 (1) willful, deliberate and premeditated murder; (2) murder perpetrated by means of torture; and
9 (3) murder committed during the perpetration or attempted perpetration of robbery and/or
10 kidnapping and/or sexual assault. The Petitioner provided a factual basis supporting the latter
11 two theories of culpability. The Petitioner did not provide a factual basis supporting willful,
12 deliberate and premeditated murder.

13 8. That on February 16, 2016, the Petitioner filed a Motion to Strike Aggravating
14 Circumstances and Evidence in Aggravation. At the crux of that motion, Petitioner argued that
15 aggravators had to be struck as the result of the Nevada Supreme Court's decision in McConnell
16 v. State, 120 Nev. 1043 (2004). The McConnell Court "deemed it impermissible under the
17 United States and Nevada Constitutions to base an aggravating circumstance in a capital
18 prosecution on the felony upon which a felony murder is predicated." Id. at 1069.
19

20 9. That the State filed on Opposition to the Motion to Strike Aggravators on
21 February 23, 2016.
22

23 10. That at argument on the Motion to Strike Aggravators on February 25, 2016, the
24 District Court asked that the State file a written pleading should it request a rejection of
25 Petitioner's guilty plea after its previous acceptance and adjudication.

26 11. That on March 2, 2016, the State filed a Motion to Reject the Defendant's Guilty
27 Plea to the Murder Count Entirely on in the Alternative to Set the Murder Count for Trial on the
28 Theory of Willful, Deliberate, and Premeditated Murder. Petitioner filed an Opposition on
March 11, 2016.

12. That on March 17, 2016, the District Court rescinded its previous acceptance of the Petitioner's plea of guilty to Count 10.

13. That the Writ for Prohibition/Mandamus ask the Nevada Supreme Court to consider the following issues:

- Does the District Court have the ability to reject a defendant's plea of guilty without negotiations, on State's motion, after the defendant's plea was accepted by the court, and the defendant having been adjudicated?
- As an issue of ***first impression***, can the district court withdraw a valid guilty plea, over a defendant's objection, when, for one charge, the defendant pleaded guilty to two of the three theories of liability?

14. Given that the Writ for Prohibition/Mandamus raises an issue of first impression, and the tremendous impact the acceptance or rejection of the plea will have in the district court, Petitioner requests a stay of the proceedings pursuant to NRAP 8(a).

15. That any inconvenience and/or prejudice to the State is minimal when balanced against Petitioner's due process right to have this matter appropriately determined.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

/s/ Christy L. Craig
CHRISTY L. CRAIG, ESQ.

SUBSCRIBED and SWORN to before me

This 16th day of September, 2016.

/s/Carrie M. Connolly, Cert. No 94-2602-1, Exp. 10-11-17
NOTARY PUBLIC in and for said
County and State

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ADAM LAXALT
STEVEN B. WOLFSON

CHRISTY CRAIG
HOWARD S. BROOKS

Honorable Michelle Leavitt
District Court, Department XII
200 Lewis Avenue
Las Vegas, NV 89101

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EXHIBIT A


CLERK OF THE COURT

1 MOT
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 CHRISTY L. CRAIG, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 6262
6 PUBLIC DEFENDERS OFFICE
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 craigel@clarkcountynv.gov
12 Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA,

14 Plaintiff,

15 v.

16 JAVIER RIGHETTI,

17 Defendant,

CASE NO. C-11-276713-1

DEPT. NO. XII

DATE: Sept. 6, 2016
TIME: 8:30 a.m.

MOTION TO STAY TRIAL

18 COMES NOW, the Defendant, JAVIER RIGHETTI, by and through CHRISTY L.
19 CRAIG, Deputy Public Defender and hereby requests that this Honorable Court grant the defense
20 request to stay the proceedings until the Nevada Supreme Court issues a response to defendant's
21 writ.

22 This Motion is made and based upon all the papers and pleadings on file herein, the
23 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

24 DATED this 23rd day of August, 2016.

25 PHILIP J. KOHN
26 CLARK COUNTY PUBLIC DEFENDER

27 By: 
28 CHRISTY L. CRAIG, #6262
Deputy Public Defender

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DECLARATION

CHRISTY L. CRAIG makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am one of the Deputy Public Defenders for the Clark County Public Defender's Office appointed to represent Defendant Javier Righetti in the present matter;

2. That on June 17, 2016 a Writ of Prohibition/Mandamus was filed with the Nevada Supreme Court ("NSC"). The Supreme Court has not yet responded. The trial date is currently set for October 3, 2016.

3. That on March 17, 2016 defense requested a stay. There was some discussion on the matter of the stay, however, the court's ruling is unclear as to whether it was granted, denied or simply deferred. (March 17, 2016 transcript pg. 27-30). As a result, defense counsel is requesting a ruling on the stay request.

4. That on March 17, 2016, the District Court requested that the State prepare an order commensurate with its ruling and to provide the proposed order to the defense. As of the filing of this Motion, no such order has been filed almost 5 months after the hearing and less than 40 days before trial is set to begin. (March 17, 2016 Hearing, pg. 30, 9-15).

5. That after waiting several months for the state to prepare an order, Righetti filed a Writ of Prohibition/Mandamus petition with the Nevada Supreme Court on June 17, 2016 sans order.

6. That Eighth Judicial District Court Rule ("EJDC") 7.21 requires that an order must be provided to the court within 10 days, unless additional time is allowed by the court.

7. That the state's failure to timely prepare the order led to a delay in the filing of Righetti's Writ of Prohibition/Mandamus petition impacting his ability to seek full appellate review. Additionally, litigation regarding the court's order and/or factual findings regarding the March 17th decision is dependent on an actual signed order. The inexplicable delay by the state in preparing the order is a barrier to effective and required pretrial litigation in this capital case.

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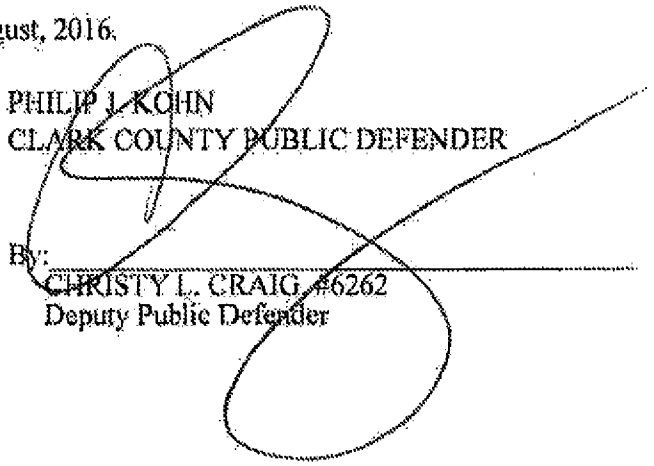
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1 8. That the defense is requesting that this Honorable Court stay these proceedings and
2 that to again order the state to prepare a proposed order based on the March 17, 2016 court
3 hearing.

4 I declare under penalty of perjury that the foregoing is true and correct. (NRS
5 53.045).

6 DATED this 23rd day of August, 2016.

7 PHILIP L. KOHN
8 CLARK COUNTY PUBLIC DEFENDER

9
10 By: _____
11 CHRISTY L. CRAIG #6262
12 Deputy Public Defender
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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the
and foregoing MOTION TO STAY TRIAL on for hearing before the Court on the
t. 6 _____, 2016, at 8:30 a.m., District Court Department XII.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC SERVICE

By: S. Ruano
S. Ruano
Secretary for the Clark County Public Defender's Office

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EXHIBIT B


CLERK OF THE COURT

MOT
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
CHRISTY L. CRAIG, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 6262
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
craigcl@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

JAVIER RIGHETTI,

Defendant,

CASE NO. C-11-276713-1

DEPT. NO. XII

DATE: Sept. 6, 2016
TIME: 8:30 a.m.

MOTION FOR ATKINS HEARING

COMES NOW, the Defendant, JAVIER RIGHETTI, by and through CHRISTY L. CRAIG, Deputy Public Defender and hereby request that this court set a date for an Atkins Hearing to determine if the death penalty must be dismissed pursuant to *Atkins v Virginia*.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 13th day of August, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: 
CHRISTY L. CRAIG, #6262
Deputy Public Defender

1 This motion is made pursuant to the preliminary findings of Dr. George Woods, NRS
2 174.098 and controlling federal authority, specifically *Atkins v. Virginia*, 536 U.S. 304 (2002) and
3 its' progeny. This motion is filed in good faith based upon the findings and report of Dr. George
4 Woods that Javier Righetti is in truth and in fact mildly intellectually disabled or mentally retarded
5 as defined by the DSM V, NRS 174.098 and controlling federal authority. Dr. Woods report and
6 all supporting documentation shall be filed under separate filing.

7 MEMORANDUM OF POINTS AND AUTHORITIES

8 Javier Righetti is charged with First Degree Murder (as well as other charges) and the State
9 has filed a "Notice of Intent to Seek Death Penalty." The defense respectfully submits that the
10 defendant is mentally retarded and that the imposition of the death penalty would violate the Eight
11 Amendment prohibition against cruel and unusual punishment. Based upon the foregoing,
12 pursuant to NRS 178.098 and *Atkins v. Virginia*, 536 U.S. 304 (2002), the defense requests a
13 hearing on the issue of mental retardation and seeks an order from this court striking the State's
14 previously filed "Notice of Intent to Seek Death Penalty."

15 LAW

16 In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court ruled that the
17 Eighth Amendment's prohibition against cruel and unusual punishment precludes the execution of
18 the mentally retarded. In short, under *Atkins*, if the defendant is mentally retarded his execution
19 would be unconstitutional. In issuing its ruling, the high court did not provide a specific definition
20 of mental retardation, or outline the procedures which must be followed to determine the issue.
21 Subsequent to *Atkins*, the various states have come to their own individual conclusions, via
22 legislation and/or case law, as to the procedure by which the issue of mental retardation should be
23 raised and determined. Federal law on this issue appears to vary from circuit to circuit, but it's
24 clear that some minimum standard is required under the constitution.

25 In the wake of *Atkins*, Nevada adopted NRS 174.098 to provide both the procedural
26 framework and standards by which Nevada courts are to resolve claims of mental retardation in a
27 capital trial. While the current motion is tendered pursuant to the procedures and standards set
28 forth in NRS 178.098, the defendant also seeks to avail himself of the protections set forth by the

1 United States Constitution, especially the Fifth, Sixth and Eighth amendments, and by any and all
2 controlling federal law on the issue. By seeking a determination pursuant to NRS 174.098 the
3 defense in no way concedes that the standards set forth therein necessarily control the issue of
4 whether the defendant qualifies as being mentally retarded pursuant to federal authority.

5 Further the defendant does not waive any procedural protection which might be
6 constitutionally afforded him on the issue of mental retardation; in particular he does not waive his
7 right to have the issue factually decided by a jury if the court should somehow determine that the
8 defendant is not mentally retarded. Finally the defense asks this court to issue its ruling under both
9 NRS 174.098 and the federal constitution pursuant to *Atkins*. If the defendant is mentally retarded
10 under either statutory definition or controlling federal authority then the notice of intent to seek
11 death penalty must be stricken.

12 The defense respectfully submits that the defendant is mentally retarded pursuant to NRS
13 174.098(7) in that 1) he has significant subaverage general intellectual functioning, as evidenced
14 by his low scores on various standardized tests and/or measures; 2) he has demonstrated and
15 documented deficit(s) in his adaptive behavior as evidenced by the various norms upon which such
16 functioning is based; and 3) the significant subaverage general intellectual functioning had
17 manifested itself during the developmental period.

18 The defense further submits that the defendant is mentally retarded pursuant to *Atkins* and
19 the prevailing definition of retardation set forth in the DSM V as well as US Supreme Court
20 caselaw¹.

21 Procedure Pursuant to NRS 174.098

22 Once a motion to declare the defendant mentally retarded has been filed the procedure is
23 governed by NRS 174.098 which reads:

24 1. A defendant who is charged with murder of the first degree in a case in
25 which the death penalty is sought may, not less than 10 days before the date set for
26 trial, file a motion to declare that he is mentally retarded.

27 2. If a defendant files a motion pursuant to this section, the court must:

28 ¹ *Hall v. Florida*, 134 S.Ct. 1986 (2014). There is not bright-line IQ threshold requirement for determining whether someone has intellectual disability. "Intellectual disability is a condition, not a number." "A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability." "It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." At 2001.

1 (a) Stay the proceedings pending a decision on the issue of mental
retardation; and

2 (b) Hold a hearing within a reasonable time before the trial to determine
3 whether the defendant is mentally retarded.

4 3. The court shall order the defendant to:

5 (a) Provide evidence which demonstrates that the defendant is mentally
retarded not less than 30 days before the date set for a hearing conducted pursuant
6 to subsection 2; and

7 (b) Undergo an examination by an expert selected by the prosecution on the
issue of whether the defendant is mentally retarded at least 15 days before the date
8 set for a hearing pursuant to subsection 2.

9 4. For the purpose of the hearing conducted pursuant to subsection 2, there
is no privilege for any information or evidence provided to the prosecution or
10 obtained by the prosecution pursuant to subsection 3.

11 5. At a hearing conducted pursuant to subsection 2:

12 (a) The court must allow the defendant and the prosecution to present
evidence and conduct a cross-examination of any witness concerning whether the
13 defendant is mentally retarded; and

14 (b) The defendant has the burden of proving by a preponderance of the
evidence that he is mentally retarded.

15 6. If the court determines based on the evidence presented at a hearing
conducted pursuant to subsection 2 that the defendant is mentally retarded, the court
16 must make such a finding in the record and strike the notice of intent to seek the
17 death penalty. Such a finding may be appealed to the Supreme Court pursuant to
NRS 177.015.

18 7. For the purposes of this section, "mentally retarded" means significant
19 subaverage general intellectual functioning which exists concurrently with deficits
20 in adaptive behavior and manifested during the developmental period.

21 Pursuant to NRS 174.098(2)(a), counsel requests this court to stay the proceeding pending
22 a decision upon the issue of mental retardation. Counsel further request that pursuant to NRS
23 174.098 (2)(b) the court schedule and hold a hearing within a reasonable time before trial to
24 determine whether the defendant is mentally retarded.

25 Counsel understands that under NRS 174.098(3) this court shall order the defendant to
26 provide evidence demonstrating mental retardation not less than 30 days before the date set a
27 hearing on the issue. In anticipation of said order, counsel will provide to the court and opposing
28 counsel the report authored by Dr. George Woods which concludes that Javier meets the criteria

1 for Mild Intellectual Disability (formally mentally retarded) based upon accepted standards of
2 psychological evaluation, said report constituting a prima facie showing of mental retardation
3 pursuant to NRS 178.098 and/or *Atkins*.

4 Counsel anticipates that the State may seek to have defendant further examined by their
5 own expert pursuant to NRS 178.098(3)(b). Should such a request be made defense counsel asks
6 that pursuant to said statute the examination take place at least 15 days prior to the evidentiary
7 hearing. The defense further requests that the State's expert be ordered to either provide a written
8 report and/or meet with defense counsel prior to the date of the ultimate evidentiary hearing so that
9 the basis of the State's experts opinion can be reviewed and/or considered by the defense.

10 Defense counsel also seeks an order from this court 1) limiting questioning and evaluation
11 of the defendant by the state expert to those issues directly related to the defendant's claim of
12 mental retardation; 2) that the said expert further be expressly prohibited from inquiring into the
13 nature and specifics of the alleged crimes and 3) that defense counsel be present during the
14 evaluation by state's expert. This request is necessitated by Nevada's statutory scheme
15 concerning *Atkins* evaluations which, unlike the Federal statutory scheme, does not provide for any
16 privilege whatsoever as to the use of information gained by the State during the course of a court-
17 ordered *Atkins* evaluation by state experts. Under NRS 174.098(4), there is no privilege
18 concerning "any information or evidence" provided or obtained during an examination by the
19 State's mental health expert.

20 An order limiting the scope of inquiry by the State's expert is necessary to protect the
21 defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to
22 counsel. Absent such an order, the defendant will face the unconstitutional, precarious dilemma of
23 having to waive his Fifth Amendment right against self-incrimination in order to assert his Eighth
24 Amendment right to raise a claim under *Atkins*. Clearly the Fifth Amendment requires that such
25 an examination should not become a fishing expedition by the State and must be limited to
26 determining whether the defendant has a valid claim under *Atkins*, otherwise the mental health
27 examination becomes a ruse for an unrestricted and unconstitutional interrogation.

28

1 The absence of privilege concerning information gained by the State during the state's
2 examination of the defendant, who is in State custody, mandates the availability of counsel during
3 the defendant's examination by State expert mandated by the court and implicates the defendant's
4 Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. In
5 *Hoffman v. United States*, 341 U.S. 479 (1951) the Supreme Court indicated that the self-
6 incrimination component of the Fifth Amendment privilege should be given a "liberal
7 construction" so as to include any verbal or nonverbal disclosure by the defendant that might
8 "furnish a link in the chain of evidence needed to prosecute. Such disclosures could easily result
9 from an *Atkins* evaluation. The defendant cannot, consistent with Fifth Amendment principles,
10 be forced to choose between obtaining an adequate *Atkins* evaluation and revealing information
11 that could be used against him at trial or sentencing.

12 The defendant is of insufficient intellect and education to determine the appropriate scope
13 of inquiry by the State's doctor. Based upon the foregoing the defense would submit that, absent
14 defense counsel's presence, the procedure set forth under NRS 174.098 is unconstitutional in that
15 it forces the defendant to waive his privileges under the Fifth Amendment to avail himself of the
16 protections of the Eighth Amendment, and would therefore object to any testing by a State expert
17 in defense counsel's absence.

18 CONCLUSION

19 The defendant is mentally retarded, and as a result, pursuant to *Atkins* and NRS 174.098 the
20 death penalty cannot be constitutionally imposed. The defense seeks a hearing so that he may
21 establish his condition to this court. At the conclusion of the requested hearing, the defense will be
22 seeking to strike the State's "Notice of Intent to Seek Death Penalty".

23 DATED this 23rd day of August, 2016.

24 PHILIP J. KOHN
25 CLARK COUNTY PUBLIC DEFENDER

26 By: 
27 CHRISTY L. CRAIG, #6262
28 Deputy Public Defender

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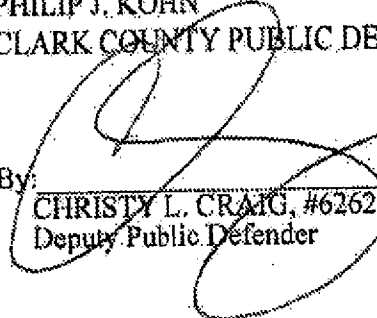
NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the
above and foregoing Motion For Atkins Hearing on for hearing before the Court on the
6th day of September, 2016, at 8:30 a.m., in District Court Department XII.

DATED this 23rd day of August, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: 
CHRISTY L. CRAIG, #6262
Deputy Public Defender

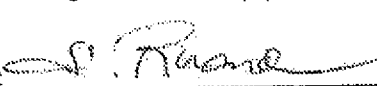
CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of MOTION FOR ATKINS HEARING, was made this

23rd day of August, 2016, by Electronic Filing to:

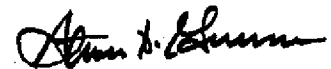
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
Motions@clarkcountyda.com

GIANCARLO PESCI, Chief Deputy District Attorney
E-Mail: giancarlo.pesci@clarkcountyda.com

By: 
S. Ruano
Secretary for the Clark County Public Defender's Office

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EXHIBIT C



CLERK OF THE COURT

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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THE STATE OF NEVADA,

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Plaintiff,

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vs.

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JAVIER RIGHETTI,

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Defendant.

11

12

BEFORE THE HONORABLE MICHELLE LEAVITT, DISTRICT COURT JUDGE

13

TUESDAY, SEPTEMBER 6, 2016

14

15

**RECORDER'S TRANSCRIPT RE:
DEFENDANT'S MOTION FOR ATKINS HEARING**

16

17

DEFENDANT'S MOTION TO STAY TRIAL

18

APPEARANCES:

19

For the State:

20

GIANCARLO PESCI, ESQ.
Chief Deputy District Attorney

21

For the Defendant:

22

CHRISTY L. CRAIG, ESQ.
RYAN J. BASHOR, ESQ.
Deputy Public Defenders

23

24

25

RECORDED BY: KRISTINE CORNELIUS, COURT RECORDER

1 TUESDAY, SEPTEMBER 6, 2016; 8:59 A.M.

2 * * * * *

3 THE COURT: State versus Javier Righetti, C276713. He's present. He's
4 in custody.

5 Good morning.

6 MS. CRAIG: Good morning, Christy Craig and Mr. Bashor on behalf of
7 Mr. Righetti.

8 MR. PESCI: Giancarlo Pesci on behalf of the State.

9 THE COURT: Okay. It's your motion. The State doesn't have any
10 objection to the hearing.

11 MS. CRAIG: That's correct.

12 THE COURT: So I'm going to grant the request. But now the State – has
13 the State hired their expert?

14 MR. PESCI: We've made contact with an expert. That expert is not
15 available until the week of October the 17th; therefore, our trial date is not going
16 to be able to happen.

17 MS. CRAIG: And I would inquire – I filed with the Court, and I think Mr.
18 Pesci got a copy of all the underlying documentation and I think we sent over –

19 THE COURT: Right. I have –

20 MS. CRAIG: – a binder as well, so that you have it all.

21 THE COURT: So the binder contains everything?

22 MS. CRAIG: Everything.

23 MR. PESCI: The State has received that.

24 THE COURT: Okay. So the motion is granted in part. The State is going
25 to have an opportunity to interview the Defendant in order to, I guess, defend

1 the – it's a motion to strike the notice of the death penalty ultimately, so.

2 MS. CRAIG: Yes.

3 THE COURT: And it appears as though you won't be able to go to trial
4 on October 3rd.

5 MR. PESCI: No. And, Judge, the State responded in its response, not
6 opposition, to the positions the Defense took as far as saying that they should
7 be present during the testing and that it should be presented to the jury as a
8 question of fact as to the intellectual disability. We've opposed that and we're
9 looking for your response as far as when the expert actually goes to meet with
10 the Defendant.

11 MS. CRAIG: I'd just submit it on our pleadings.

12 THE COURT: Okay. That portion of the motion is going to be denied.
13 The State has – well, apparently your – your expert is not available to evaluate
14 the Defendant –

15 MR. PESCI: That –

16 THE COURT: – until that time?

17 MR. PESCI: That's my understanding. I called as soon as we got this,
18 Judge, and, unfortunately, the expert wasn't – didn't have this in the pipeline.
19 So that's when she's available to come.

20 THE COURT: Okay. And so when do you want to set the hearing? How
21 much time will your expert need?

22 MR. PESCI: I think it usually takes a couple of days. We could probably
23 set a status check a week or two after that.

24 THE COURT: Okay.

25 MR. PESCI: And then we'll have a better idea, I think, of all sides to be

1 able to set the hearing and then maybe a trial date.

2 THE COURT: And then a trial date.

3 MS. CRAIG: I agree.

4 THE COURT: Okay.

5 [Colloquy between the Court and clerk]

6 THE CLERK: Okay, the 20th?

7 THE COURT: No.

8 MS. CRAIG: No, a couple weeks.

9 THE COURT: A couple weeks.

10 THE CLERK: Okay. It will be the week of the 27th.

11 THE COURT: Yeah.

12 THE CLERK: Okay.

13 THE COURT: Yeah, that's good.

14 THE CLERK: October 27th.

15 Do you want it at 10:30?

16 THE COURT: No.

17 THE CLERK: 10:30.

18 THE COURT: No. It can just be – no. It can be a regular –

19 THE CLERK: Oh.

20 THE COURT: This is just a status check.

21 THE CLERK: I'm sorry.

22 October 27th, 8:30.

23 MR. PESCI: Judge, also I apologize. It's pretty much moot based on the
24 fact of the filing of this *Atkins* request as far as the stay. Defense counsel also
25 filed a motion for a stay. We've sent a proposed order denying their previous

1 motion. I'm not sure if Defense counsel's reviewed it, if they've approved it. If
2 they have, then I'll bring it to you for signature.

3 MS. CRAIG: We got it on Friday. I was off on Friday, so I printed it off.
4 I'll take a look at it today and respond in writing to Mr. Pesci. With regard to
5 the stay, I don't think it's moot. I'm going to ask the Court to – we ultimately
6 – we talked about it back in March.

7 THE COURT: Well, I think it's moot. You're not going to trial.

8 MS. CRAIG: Well, I still think that in order for us to be able to ask the
9 Supreme Court for a stay, which frankly I'd like to do at this point, I think the
10 Court needs to rule one way or another, so that we can approach the Supreme
11 Court.

12 THE COURT: Okay.

13 MR. PESCI: Judge, you can deny the stay. The stay has already
14 occurred pursuant to statute, as soon as the Defense filed this motion seeking
15 [indiscernible].

16 THE COURT: Right. It has to be stayed statutorily.

17 MR. PESCI: Correct.

18 THE COURT: So the stay is going to be granted pursuant to the statute.

19 MS. CRAIG: Okay.

20 MR. PESCI: Thank you, Your Honor.

21 MS. CRAIG: I appreciate it.

22 THE COURT: Thank you.

23 THE CLERK: I'll vacate the trial date.

24 THE COURT: What?

25 THE CLERK: I'll vacate the trial date.

1 THE COURT: Yeah. Yeah. The trial date is vacated.

2 THE CLERK: Thank you.

3 [Proceedings concluded at 9:03 a.m.]

4 * * * * *

5 ATTEST: I hereby certify that I have truly and correctly transcribed the
6 audio/visual proceedings in the above-entitled case to the best of my ability.

7 

8 Kristine Cornelius
9 Court Recorder
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