IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTAVO RAMOS, Petitioner, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF CLARK, THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT JUDGE Respondent, and THE STATE OF NEVADA, Real Party in Interest.	No. (District Ct. No. C-10-269839)

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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Petitioner, GUSTAVO RAMOS, by and through his attorneys, Ivette Amelburu Maningo, of the Law Offices of Ivette Amelburu Maningo, and Abel M. Yanez, Esq., of the Nobles & Yanez Law Firm, respectfully petitions this Court for a Writ of Mandamus or Prohibition pursuant to NRAP 21, Article 6, §4 of the Nevada Constitution, and N.R.S. §§ 34.160 and 34.330. Specifically, he petitions this Court for an Order directing the Honorable Judge Jennifer Togliatti to preclude the State's intellectual disability expert from administering the Adaptive Behavior

Assessment System-3 (ABAS-3), Spanish Self-Report Adult Form and the Structured Interview of Reported Symptoms-2 (SIRS-2), Spanish Version.

This Petition is supported by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article 1, §6 and §8 of the Nevada Constitution; N.R.S. § 174.098; and the specific facts and arguments presented in the attached memorandum of points and authorities. Petitioner respectfully requests the Court to consider the exhibits attached to Petitioner's Appendix and all arguments deemed necessary by this Court.

DATED this 30th day of October, 2017.

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POINTS AND AUTHORITIES

I.

INTRODUCTION

This Petition raises important issues concerning the constitutional limits of an intellectual disability evaluation by a prosecution expert. Petitioner seeks exemption from the death penalty pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002) and N.R.S. § 174.098. Petitioner does not dispute that the State is entitled to rebut his *Atkins* claim based on an evaluation conducted by its own expert; however, the scope of that evaluation must be limited to protect Petitioner's Fifth Amendment right against self-incrimination, and his Eighth Amendment right to a reliable *Atkins* determination in accordance with current medical standards. *See Buchanan v. Kentucky*, 483 U.S. 402, 423-424 (1987); *Hall v. Florida*, 134 S. Ct. 1998, 2000 (2014).

In violation of these constitutional guarantees, the district court authorized the State's expert to administer instruments that are irrelevant to a diagnosis of intellectual disability and considered extremely unreliable by the medical community. If the court's order is enforced, Petitioner will be compelled to divulge privileged information that far exceeds the scope of admissible rebuttal evidence. Because Petitioner has no "plain, speedy and adequate remedy in the ordinary course of law," N.R.S. §§ 34.170 and 34.330, and because this case presents an

issue of first impression, Petitioner requests this Court to issue a Writ of Mandamus or Prohibition and direct the district court to preclude the use of the objectionable instruments.

II.

ROUTING STATEMENT

Pursuant to NRAP 17(a)(2), this is a death penalty case and must therefore be heard by the Nevada Supreme Court.

III.

RELIEF SOUGHT

Petitioner seeks a Writ of Mandamus or Prohibition ordering Eighth Judicial District Court Judge Jennifer Togliatti to preclude the State's intellectual disability expert from administering the Adaptive Behavior Assessment System-3 (ABAS-3), Spanish Self-Report Adult Form and the Structured Interview of Reported Symptoms-2 (SIRS-2), Spanish Version.

IV.

STATEMENT OF THE ISSUES

1. Did the district court manifestly abuse its discretion and violate Petitioner's Fifth Amendment right against self-incrimination by requiring him to submit to a psychological test that is irrelevant and unnecessary to rebut his intellectual disability claim?

2. Did the district court manifestly abuse its discretion and violate the Eighth Amendment's requirement that intellectual disability determinations be conducted in conformity with current clinical standards by permitting the State's expert to administer the SIRS-2, an instrument that is clinically irrelevant to a diagnosis of intellectual disability?
3. Did the district court manifestly abuse its discretion and violate the Eighth Amendment's requirement that intellectual disability determinations be conducted in conformity with clinical standards by permitting the State's expert to administer the ABAS-3 Self-Report Form, when the clinical and medical community considers such instrument extremely unreliable?

V.

RELEVANT FACTS AND PROCEDURAL BACKGROUND

Petitioner is charged with first-degree murder and the State has filed a Notice of Intent to Seek the Death Penalty. (Petitioner's Appendix (PET APP), Volume (Vol.) I, pgs. 01-05, 57-59). On December 5, 2016, Petitioner filed his Motion to Declare Defendant Intellectually Disabled and Request for Evidentiary Hearing Pursuant to N.R.S. § 174.098. (PET APP, Vol. I, pgs. 24-32). On March 6, 2017, Petitioner filed his Motion for Ruling on the Scope and Conditions of the Intellectual Disability Evaluation by the State's Expert. (PET APP, Vol. I, pgs.

33-42). Petitioner requested the district court to limit the scope of the State expert's intellectual disability ("ID") evaluation and to require certain procedures related to the evaluation in order to protect Petitioner's constitutional rights.

Petitioner also filed a Motion for Ruling on Applicable Standards for Determining Whether Defendant is Intellectually Disabled in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014). (PET APP, Vol. I, pgs. 43-56). In this motion, Petitioner requested that the district court adopt specific standards, in accordance with current medical manuals for diagnosing ID, that would govern the district court's ID determination under N.R.S. § 174.098.

A hearing on the motions was held on March 27, 2017, before district court judge Kenneth C. Cory. (PET APP, Vol. I, pgs. 75-101). In response, the State indicated it did not oppose the following limitations to and procedures for the ID evaluation conducted by its expert:

(1) Any evaluations conducted by the State's expert shall be limited to the sole purpose of determining whether defendant is intellectually disabled under current clinical standards and N.R.S. § 174.098(7);

(2) Any evaluations conducted by the State's expert shall conform to current clinical standards; and

(3) The State shall provide to defense counsel all raw data relevant to testing conducted by the State's expert, a copy of any materials reviewed and

notes generated in connection with the evaluation, and the identity of all individuals interviewed in connection with the evaluation, within a reasonable time after the evaluation is completed.

(PET APP, Vol. I, pg. 95).

Accordingly, the district court granted Petitioner's motion in part. (PET APP, Vol. I, pgs. 60-62). Over the State's objection, the court further ordered the State to provide defense counsel advance notice of the tests and instruments the State's expert intended to administer, and ordered that the evaluation be video recorded. *See id.*

In relation to Petitioner's Motion for Ruling on Applicable Standards for Determining Whether Defendant is Intellectually Disabled in light of *Hall v. Florida*, the State agreed that the court's ID determination should conform to several specific clinical standards. (PET APP, Vol. I, pgs. 129-38). Especially relevant to the issues raised in the instant Petition, the State conceded that:

(1) In determining whether defendant is intellectually disabled, the court shall consider that the presence of another mental disorder, such as a learning disorder or a personality disorder, does not preclude a diagnosis of intellectual disability; and

(2) In determining whether defendant is intellectually disabled, the court shall consider that criminal conduct and/or the presence of maladaptive behaviors does not preclude a diagnosis of intellectual disability.

(PET APP, Vol. I, pgs. 63-66, 88). Following the motions hearing, the district court granted Petitioner's motion in part and deferred its ruling on other requests made by Petitioner. (PET APP, Vol. I, pgs. 63-66).

On April 21, 2017, the State informed undersigned counsel that its retained intellectual disability expert, Martha Mahaffey, Ph.D., intended to administer several instruments during her evaluation of Petitioner, including the ABAS-3, Spanish Self-Report Adult Form and the SIRS-2, Spanish Version. On June 20, 2017, Petitioner filed a written objection to the administration of these instruments.[1] (PET APP, Vol. I, pgs. 14-20).

With respect to the ABAS-3 Self-Report Form, Petitioner argued that self-ratings of adaptive behavior have a high error rate and are considered unreliable by intellectual disability professionals. *See id.* Petitioner further argued that allowing the State's expert to administer the SIRS-2, an instrument used to detect feigning of psychiatric symptoms, would violate his Fifth Amendment right against self-incrimination and the Eighth Amendment's requirement that ID determinations

[1] Petitioner also objected to the administration of the Wechsler Adult Intelligence Scale-III (WAIS-III), Spanish Version, on the ground that a newer version of the

conform to clinical standards. *See id*. The State filed an opposition to Petitioner's objection on July 20, 2017, arguing that Nevada's intellectual disability statute, N.R.S. § 174.098, does not impose "any limitation regarding who is selected as an expert for either party, nor the type of testing administered by the expert." (PET APP, Vol. I, pg. 72).

The case was subsequently reassigned to district court judge Jennifer P. Togliatti, who, on August 29, 2017, conducted a hearing on Petitioner's Objection. (PET APP, Vol. I, pgs. 102-112). Following argument by the parties, the court overruled Petitioner's objections to the SIRS-2 and the ABAS-3 Self Report Form. *See id.* However, the court cautioned that the State runs the risk of having the results of any inappropriate testing excluded, and that reliance on improper testing could negatively impact the State expert's overall conclusions. *See id.* The court also observed that the defense is "free to take up a writ," and indicated it would grant a reasonable stay if one was requested. *See id.*

On September 8, 2017, the defense filed a Motion to Stay the Proceedings in order to pursue a Writ of Mandamus/Prohibition before this Court. (PET APP, Vol. I, pgs. 21-23). The court denied a stay, but recognizing the importance of the issues raised, asked that the State delay the ID evaluation by its expert for at least thirty days. (PET APP, Vol. I, pgs. 113-119). The State's expert is currently scheduled to

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WAIS is available. In response, the State agreed its expert would administer the

perform her evaluation of Petitioner on December 6 and 7, 2017. (PET APP, Vol. I, pg. 13).

VI.

ARGUMENTS

A. Why the writ must issue in this case

This Court has original jurisdiction to issue writs of mandamus or prohibition. *See* NEV. CONST. art. 6, § 4. Pursuant to N.R.S. §§ 34.170 and 34.330, a writ of mandamus or prohibition shall issue in all cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law."

Generally, a writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control manifest abuse or arbitrary or capricious exercise of discretion. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981); N.R.S. § 33.160. A capricious exercise of discretion is one "contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citing BLACK'S LAW DICTIONARY 119 (9th ed. 2009)). "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of law or rule.'" *Id.* (quoting *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297, 400 (1997)).

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more recent version of this instrument. (PET APP, Vol. I, pg. 70).

"This Court considers whether judicial economy and sound judicial administration militate for or against issuing the writ." *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.2d 520, 522 (2006), *holding limited on other grounds by Hidalgo v. Dist. Ct.*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008). The writ is a proper remedy where "the circumstances establish urgency or strong necessity," *Davis v. Eighth Judicial Dist. Court*, 294 P.3d 415, 417, 2013 Nev. LEXIS 6, 3 (2013), or, "'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'" *Diaz v. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (quoting *Business Computer Rentals v. State Treas.*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)).

In addition, this Court has issued writs of mandamus or prohibition "to prevent improper discovery when a district court enters a discovery order in excess of its jurisdiction." *State v. Second Judicial Dist. Court*, 120 Nev. 254, 258, 89 P.3d 663, 666 (2004) (writ of prohibition issued in part to prevent a discovery order in excess of district court's power); *see also Clark v. District Court*, 101 Nev. 58, 692 P.2d 512 (1985) (writ of prohibition issued upon finding that a district court had exceeded its jurisdiction in ordering production and disclosure of privileged information); *Schlatter v. District Court*, 93 Nev. 189, 561 P.2d 1342 (1977) (writ of mandamus issued upon finding that district court had exceeded its jurisdiction in ordering discovery of irrelevant matter). In such cases, writ relief is

an appropriate remedy because "[i]f improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995).

Here, Petitioner has no "plain, speedy and adequate remedy in the ordinary course of law." N.R.S. § 34.170. The district court's order below compels Petitioner to submit to a psychological evaluation by the State's expert that exceeds the scope of what is necessary to rebut his ID claim, in clear violation of Petitioner's Fifth Amendment right against self-incrimination, as well as his Eighth Amendment right to a reliable *Atkins* determination. This is analogous to a situation in which a court orders improper discovery in excess of its jurisdiction. If the district court's order is enforced, Petitioner will be required to divulge privileged and potentially harmful information that "would irretrievably lose its confidential and privileged quality and petitioner[] would have no effective remedy, even by a later appeal." *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84. Accordingly, these "circumstances establish urgency or strong necessity" for writ relief. *Davis*, 294 P.3d at 417.

Furthermore, this Petition raises important constitutional issues that are likely to reoccur in current and future capital cases in Nevada. Although this

Court has previously recognized that clinical standards provide "useful guidance" for ID determinations under N.R.S. § 174.098, *Ybarra v. State*, 127 Nev. 47, 54 247 P.3d 269, 274 (2011), it has yet to consider the extent to which the Eighth and Fifth Amendments limit the scope of examinations by prosecution experts. This Petition thus presents an issue of first impression. *See Mountain View Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184-85, 273 P.3d 861, 865 (2012) (entertaining a writ petition raising a matter of first impression); *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 312 P.3d 491, 496, 2013 Nev. LEXIS 101, 7 (2013); *Haley v. Eighth Judicial Dist. Court*, 128 Nev. 171, 175, 273 P.3d 855, 858 (2012). In light of the Supreme Court's recent decisions in *Hall v. Florida*, 134 S. Ct. 1998 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), there is an even greater need to clarify the procedures under N.R.S. § 174.098 vis-à-vis the fundamental protections guaranteed by the Fifth and Eighth Amendments.

B. <u>The district court manifestly abused its discretion and violated Petitioner's rights under the Fifth and Eighth Amendments by permitting the State's expert to administer the SIRS-2, an instrument that is irrelevant to a diagnosis of intellectual disability</u>.

1. <u>Legal standards</u>

The Eighth Amendment categorically prohibits the execution of persons with ID. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Although *Atkins* left "to the States the task of developing appropriate ways to enforce the

constitutional restriction," *id.*, at 317, the Supreme Court has recognized that "States' discretion is not 'unfettered[.]' " *Moore v. Texas*, 137 S. Ct. 1039, 1042 (2017) (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014)).

In *Hall*, the Court declared that "the legal determination" of ID must be "informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. Failure to consider clinical standards, the Court warned, creates an "unacceptable risk" that persons who meet the clinical definitions of ID will be executed. *Id.* at 1990. More recently, in *Moore*, the Court clarified that States may not "disregard . . . current medical standards," explaining that current medical manuals for diagnosing ID "offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.' " *Moore*, 137 S. Ct. at 1053 (quoting American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2012) ("DSM-5") at xli).

Nevada's framework for *Atkins* determinations is provided in N.R.S. § 174.098. The statute defines "intellectually disabled" as "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." N.R.S. § 174.098(7). This definition closely tracks current medical definitions of ID, which generally require both intellectual and adaptive functioning deficits with

an onset during the developmental period. *See* DSM-5 at 33; *see also* American Association on Intellectual and Developmental Disorders (AAIDD), INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed. 2010) ("AAIDD Manual"), at 5 (intellectual disability is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.").

In *Ybarra v. State*, this Court recognized that the clinical definitions "provide useful guidance in applying the definition set forth in NRS 174.098." *Ybarra v. State*, 127 Nev. 47, 54, 247 P.3d 269, 274 (2011). However, a rote citation to clinical standards is not sufficient to satisfy the Eighth Amendment.

The Ninth Circuit Court of Appeals recently addressed the federal habeas petition of Robert Ybarra, the petitioner in the *Ybarra* case. *See Ybarra v. Filson*, 869 F.3d 1016, 2017 U.S. App. LEXIS 16887, at *14. (9th Cir. 2017). Despite the very onerous standard of review for federal habeas claims, the Ninth Circuit found it necessary to remand to the federal district court for further proceedings because in assessing Ybarra's *Atkins* claim in the first instance, *this* Court "contradicted the very clinical guidelines that it purported to apply." *Ybarra*, 869 F.3d at 1023, 2017 U.S. App. LEXIS 16887, at *14. The Ninth Circuit noted, for example, that this Court ignored evidence that Ybarra was bullied in school as

well as diagnostic testing conducted after he turned eighteen, in contradiction to clinical standards. *Id.* at *20-21. The Ninth Circuit was also concerned that this Court may have relied on the lay perception that Ybarra did not "look like" a person with ID. *Id.* at *22. Accordingly, the Ninth Circuit remanded for the federal district court to reconsider whether this Court's *Atkins* determination is entitled to deference.

Under *Hall*, *Moore*, and the most recent decision in *Ybarra*, State courts do not discharge their duty under *Atkins* and the Eighth Amendment by simply citing to the clinical definitions of ID. Rather, State courts must take necessary precautions to ensure that each step of the analysis hews closely to accepted clinical standards, and to exclude irrelevant or unreliable information that could thwart an accurate assessment of the record. *See Moore*, 137 S. Ct. at 1053; *Ybarra*, 2017 U.S. App. LEXIS 16887, at *22.

It goes without say that in fashioning "appropriate ways" to enforce *Atkins*, States may not devise procedures that contradict other well-founded constitutional principles. Among the critical constitutional protections in a criminal trial is the Fifth Amendment guarantee that "[no] person . . . shall be compelled in any criminal case to be a witness against himself." It is well-settled that if a defendant chooses to testify in a criminal case, this results in a *limited* waiver of his Fifth Amendment right against self-incrimination, opening himself to cross-examination

on *related* facts. *See Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013) (citing *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900)).

This rule applies with equal force when a defendant does not testify, but presents evidence through a mental health expert who has examined him. *See Cheever*, 134 S. Ct. at 601. In such cases, the prosecution may present the testimony of its own mental health expert for the purpose of "limited rebuttal." *Buchanan v. Kentucky*, 483 U.S. 402, 423-24 (1987); *see also Estes v. State*, 122 Nev. 1123, 1133-1134, 146 P.3d 1114, 1121 (2006) (*"*[I]f the defendant seeks to introduce the evaluation or portions of it in support of a defense implicating his or her mental state, the prosecution may also rely upon the evaluation for the *limited purpose* of rebuttal") (emphasis added).

It is a logical corollary of this rule that any mental health evaluation by the government's expert must be limited to exploring the narrow issues put forward by the defense.

In *Estelle v. Smith*, the Supreme Court held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him[.]" *Estelle v. Smith*, 451 U.S. 454, 468 (1981). There, although the defendant did not put his mental capacity in dispute, the state trial judge ordered a psychiatric evaluation "for the limited, neutral purpose of

determining his competency to stand trial." *Id.* at 465. However, "the results of that inquiry were used by the State for a much broader objective that was plainly adverse" to the defendant—to establish his future dangerousness during the capital sentencing proceeding. *Id.* at 465.

The Court later clarified in *Buchanan v. Kentucky* that if a defendant presents psychiatric evidence in support of a mental status defense, the State may introduce the results of a court-ordered mental examination for "limited rebuttal" purposes. *Buchanan v. Kentucky*, 483 U.S. 402, 423-424 (1987). Additionally, in *Powell v. Texas*, the Court explained in dictum that, "[n]othing in *Smith*, or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial." *Powell v. Texas*, 492 U.S. 680, 685-686, n.3 (1989). More recently, in *Cheever*, the Court reiterated that "testimony based on a court-ordered psychiatric evaluation is admissible only for a 'limited rebuttal purpose.'" *Cheever*, 134 S. Ct. at 603 (2013) (quoting *Buchanan*, 483 U.S. at 424).

In accordance with these precedents, courts have imposed strict limits on "rebuttal" testimony based on evaluations conducted by prosecution experts. For example, in *United States v. Williams*, the defendant sought to introduce expert testimony that borderline intellectual functioning ("BIF") and brain damage impacted his ability to form the specific intent to commit the crimes charged. *See*

U.S. v. Williams, 731 F. Supp.2d 1012 (D. Haw. 2010). The government then requested that its own mental health experts be allowed to examine the defendant to determine any possible motive, condition, or disease that may have caused him to commit the crimes. *See id.* at 1016-1017. In response, the defendant filed a motion requesting, among other things, that the court: (1) prohibit the government's experts from administering any instrument or structured interview, including the Psychopathy Checklist-Revised ("PCL-R"), designed to assess dangerousness and/or psychopathy; (2) preclude the use of any unreliable instruments; and (3) preclude the use of any instruments or interview methods that exceed the scope of the purpose of the examination. *Id.* at 1014-1015.

Because the defense subsequently agreed that the government experts could proceed with their examinations before the court ruled on the motion, the court addressed the appropriateness and admissibility of the examinations after they were conducted. Significantly, relying on Fifth Amendment precedents, including *Buchanan* and *Powell*, the court found that "the Government's rebuttal expert testimony must be limited in scope to that which *directly rebuts* Defendant's assertion of BIF and which is based upon expert examinations *that parallel the exploration of the examinations conducted by defense experts*." *Id*. at 1020 (emphasis added). In addition, the court found that the results of the PCL-R were inadmissible, rejecting the government's argument that evidence of

psychopathy or Anti-Social Personality Disorder was relevant to rebut the defendant's evidence of borderline intellectual functioning:

> Such a proposition is not tenable. While a psychopath's description as a 'calculating[] individual[] that will often exploit other people,' certainly intimates that Defendant would be able to form intent, it goes well beyond 'rebuttal' of Defendant's mental status defense. The Court finds that because the PCL-R necessarily addresses such factors as 'Lack of Remorse or Guilt' and the Defendant's post-arrest state of mind, which is not within the scope of an examination necessary to rebut Defendant's assertion of BIF, the PCL-R exceeds the scope of admissible rebuttal by the prosecution.

Id. at 1023-24.

Directly relevant to the issue presented here, other courts have precluded government experts from delving into matters that are irrelevant to the particular mental condition asserted by the defendant, and therefore unnecessary to rebut the defendant's evidence. In *United States v. Taylor*, one of the defendants provided notice that he intended to introduce expert evidence regarding his developmental history and substance abuse during the sentencing phase. *U.S. v. Taylor*, 320 F. Supp.2d 790 (N.D. Ind. 2004). The defendant objected to several instruments the prosecution experts intended to administer on the ground that they were not relevant to the limited mental health evidence he intended to introduce. *See id.* at 794. The court agreed "that the Government must be limited to a parallel testing of substance abuse . . . [and cannot] use [the defendant's] limited notice as an open door for any type of mental testing." *Id.* The court specifically precluded the

prosecution expert from administering the PCL-R and ordered that other instruments could only be used to the extent that they contain testing scales for substance abuse. *Id*.

Similarly, in *United States v. Johnson*, the District Court for the Northern District of Iowa determined that the Fifth Amendment prohibited the government's mental health experts from asking the defendant offense-specific questions, when the defendant intended to assert a mental condition mitigating factor unrelated to the specific circumstances of the offense. *U.S. v. Johnson*, 383 F. Supp.2d 1145, 1164-1165 (N.D. Iowa 2005). The court explained that:

> In such circumstances, allowing the government's experts to ask offense-specific questions of the defendant may well exceed the scope of any examination necessary to determine the validity of the mental condition mitigating factor; thus, at least arguably; such questions would exceed the scope of the defendant's 'limited' waiver of her Fifth Amendment right against self-incrimination, because they would exceed the scope of what is necessary for the government's experts to rebut the defendant's mental condition evidence.

Id. at 1162.

The California Supreme Court addressed the limits of a court-ordered evaluation in the context of an *Atkins* claim in *Centeno v. Superior Court*, 117 Cal. App. 4th 30, 36, 11 Cal. Rptr. 3d 533, 537 (2004). There, the defendant objected to six tests proposed by the prosecution expert, on the ground that they "were either widely discredited, inappropriate, or constituted personality testing designed to uncover psychopathy and other mental personality disorders unrelated to the

determination of [intellectual disability]." *Id.* at 37. The trial court overruled the defendant's objections, concluding that the appropriateness of the tests went to their weight, and that the admissibility of any particular information obtained by the prosecution expert could be decided at trial. *Id*. at 37-38. The appellate court disagreed, finding the trial court erred in refusing to limit the scope of the examination:

> It is true that a defendant who tenders his mental condition as an issue may be subject to examination by prosecution experts. However, those examinations are permissible *only to the extent they are reasonably related to the determination of the existence of the mental condition raised*. Thus, when mental retardation for *Atkins* purposes is the issue, the tests to be conducted by prosecution experts must be *reasonably related* to a determination of whether the defendant has a 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.' *The mental retardation examination must be limited in its scope to the question of mental retardation.*

Id. at 45 (internal citations omitted) (emphasis added). The court further held that the trial court must make a threshold determination of whether the proposed tests "bear some reasonable relation to measuring mental retardation." *Id.* "Otherwise, there is a danger that defendants will be improperly subjected to mental examinations beyond the scope of the precise issue they have tendered and their resulting waiver of constitutional rights." *Id.*

While this Court has not directly addressed the proper scope of government evaluations pursuant to N.R.S. § 174.098, it has rightly acknowledged that

requiring a criminal defendant to disclose mental health information that he has no intention of introducing violates the Fifth Amendment. In *Binegar v. Dist. Court*, the defendant challenged the discovery rule under former N.R.S. § 174.235, which required the defense to disclose the "[r]esults or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case." *Binegar v. Dist. Court*, 112 Nev. 544, 915 P.2d 889 (1996). The Court found this provision unconstitutional because it required the defense

> to disclose witness statements and the results or reports of mental and physical examinations and scientific tests or experiments, even if the defendant never intended to introduce the statements or materials at trial. In such circumstances . . . the defendant would be forced to disclose information that he never intended to disclose at trial, some of which could be incriminating. Such a situation would violate a defendant's constitutional guaranties against self-incrimination.

Id. at 894. The same concerns are implicated where, as in this a case, a defendant is compelled to submit to a psychological examination on issues unrelated to any mental condition he intends to assert at trial.

Accordingly, to protect a defendant's Fifth Amendment right against self-incrimination, any evaluation by a prosecution expert must be limited to an exploration of the particular mental condition asserted by the defendant. Permitting the use of tests, instruments, or methods that are irrelevant to the defendant's asserted mental condition would exceed the scope of the limited Fifth Amendment waiver made by the defendant, and risk the exposure of privileged and potentially

prejudicial information. This conclusion is mandated not only by the legal precedents discussed above, but also the plain language of N.R.S. § 174.098(3)(b), which permits examination by a prosecution expert on the *limited issue* "of whether the defendant is intellectually disabled." Furthermore, in light of *Hall* and *Moore*, what constitutes proper "rebuttal" in the context of an *Atkins* claims must be determined by considering the medical community's diagnostic framework.

2. Requiring Petitioner to submit to the SIRS-2 would violate his Fifth Amendment right against self-incrimination.

The district court's order authorizing the prosecution expert to administer the SIRS-2 constitutes a manifest abuse of discretion because this instrument exceeds the scope of the limited evaluation necessary for the State to rebut Petitioner's *Atkins* claim. The SIRS-2 is used to detect malingering of psychiatric symptoms and is entirely irrelevant to the issue of whether Petitioner is ID under N.R.S. § 174.098 and current clinical standards.[2] Petitioner acknowledges that clinicians typically assess whether an examinee is putting forth an appropriate level of effort in response to test questions; however, "[t]he SIRS is not intended to evaluate feigned cognitive impairment . . . [and] should not be used in the determination of feigned memory or simulated intellectual deficits." CLINICAL

[2] The website of the test publisher, PAR Inc., states that the purpose of the SIRS-2 is to "assess[] feigning of psychiatric symptoms." *See* https://www.parinc.com/Products/Pkey/414 (last visited October 11, 2017).

ASSESSMENT OF MALINGERING AND DECEPTION 321 (Richard Rogers ed., Guilford Press 2012).

Furthermore, the medical community universally recognizes that other mental disorders, including those involving psychiatric symptoms, may coexist with ID. *See* DSM-5 at 40 (noting that "[c]o-occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability"). As such, ID should be diagnosed "whenever the diagnostic criteria are met, *regardless of and in addition to the presence of another disorder*." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000), at 47 (emphasis added); *see also Moore*, 137 S. Ct. at 1051 ("The existence of a personality disorder or mental-health issue, in short, is 'not evidence that a person does not also have intellectual disability.'" (quoting Brief for American Psychological Association, APA, et al. as Amici Curiae 19.)).

Simply put, whether Petitioner suffers from other mental disorders, or whether he is susceptible to feigning psychiatric symptoms, has no bearing on the trial court's determination under N.R.S. § 174.098. Thus, any attempt to explore these issues would exceed the scope of the limited examination necessary to rebut Petitioner's ID claim.

The relevant ethics guidelines for psychologists further support the conclusion that it would be wholly inappropriate to administer the SIRS-2 in this

case. Guideline 10.01 of the American Psychological Association's Specialty Guidelines for Forensic Psychology ("Forensic Psychology Guidelines"), instructs evaluators to "provide information that is most relevant to the psycholegal issue." In addition, forensic examiners must employ methods that "are appropriate in light of the research on or evidence of their usefulness and proper application." Forensic Psychology Guidelines, Guideline 10.02.

In its submissions to the district court, the State conceded: "Clearly, if the State's expert were intending to use a test that was not included within the accepted boundaries of the profession, the defense would have an issue to raise." (PET APP, Vol. I, pg. 73). However, the State offered no valid legal or medical justification for administering the SIRS-2 in this case. By asserting that he is ID, Petitioner has not "opened the door" to the exploration of privileged information pertaining to unrelated mental conditions and symptoms. Accordingly, this Court should grant the Writ and clarify that the Fifth Amendment prohibits such unwarranted intrusions into a defendant's mental state.

Limiting the scope of the State expert's evaluation under N.R.S. § 174.098 is all the more necessary because the statute requires a defendant to waive the right against self-incrimination as a condition of exercising the right not to be executed if ID. Specifically, N.R.S. § 174.098(4) provides that "there is no privilege for any information or evidence provided to the prosecution or obtained by the

prosecution" pursuant to the ID proceedings. Petitioner filed a motion to declare this provision unconstitutional, but the district court found that the statute could be interpreted in such a way as to preserve Petitioner's constitutional rights. (PET APP, Vol. I, pgs. 78-86). However, N.R.S. § 174.098(4) cannot be constitutionally applied to this case if Petitioner is compelled to disclose privileged information about his mental status that is wholly irrelevant to his *Atkins* claim.

3. Permitting the State's expert to administer the SIRS-2 would violate the Eighth Amendment's requirement that *Atkins* determinations adhere to current clinical standards.

Even if the Fifth Amendment does not preclude the administration of irrelevant instruments, allowing the use of the SIRS-2 in this case would violate Petitioner's Eighth Amendment right to a reliable ID determination in conformity with current clinical standards. As the Supreme Court made clear in *Hall* and *Moore*, *Atkins* determinations must adhere to the medical community's diagnostic framework. *Hall*, 134 S. Ct. at 2000; *Moore*, 137 S. Ct. at 1044. The Court in *Moore* expressly condemned Texas's reliance on clinically irrelevant factors, finding that consideration of such factors "pervasively infected" the Texas court's analysis. *Moore*, 137 S. Ct. at 1053. And in *Ybarra*, the Ninth Circuit similarly observed that consideration of irrelevant information may infect a court's entire analysis of an *Atkins* claim. *Ybarra*, 869 F.3d 1016, 1027, 2017 U.S. App. LEXIS

16887, at *23 ("Ybarra may be correct that lay stereotypes and nonclinical factors infect the state court's entire analysis, thus rendering it unreasonable.").

The district court was mindful of this concern when it warned the State that the use of inappropriate instruments could affect the reliability of the State expert's conclusions. (PET APP, Vol. I, pgs. 129-38). However, the court failed to recognize that allowing the State's expert to delve into irrelevant but potentially prejudicial matters could skew the record and infect the court's own ID determination. Because this is a capital case, in which fact-finding procedures must aspire to a heightened standard of reliability, additional measures are necessary to ensure Petitioner's right to a reliable *Atkins* determination. *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

C. The district court manifestly abused its discretion and violated Petitioner's rights under the Eighth Amendment by permitting the State's expert to administer the ABAS-3 Self Report Form, when the medical community considers such instruments to be extremely unreliable.

Using the ABAS-3 Self Report Form for the purpose of diagnosing ID contravenes clinical standards and risks unreliability in the State expert's evaluation—as well as the district court's ultimate determination of ID. The AAIDD, the premier intellectual disability organization in the United States, cautions that "self-ratings have a high risk of error with regard to adaptive behavior." AAIDD, USER'S GUIDE: MENTAL RETARDATION DEFINITION,

CLASSIFICATION AND SYSTEMS OF SUPPORTS, 18-22 (10th ed. 2007); *see also* AAIDD Manual, at 46. This is particularly true for persons with mild ID, who are "more likely to mask their deficits and attempt to look more able and typical than they actually are." AAIDD Manual, at 52. Moreover, "persons with ID typically have a strong acquiescence bias or a bias to please that might lead to erroneous patterns of responding." *Id*.

The tendency of intellectually disabled persons to hide their deficits, referred to as the "cloak of competence," has been established through numerous empirical studies. *See* WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 285-286 (Switzky and Greenspan, ed. 2006). As such, "[c]ourts should *never* use [self-report] assessments . . . as evidence in a high-stakes court proceeding that determines [intellectual disability]." Keith Widaman and Gary Siperstein, *Assessing Adaptive Behavior of Criminal Defendants in Capital Cases: A Reconsideration*, AM. J. OF FORENSIC PSYCH., Vol. 27, Issue 2, at 5, 27 (2009). Rather, a clinically and scientifically sound assessment of adaptive functioning must be based on information from third-party informants, not on self-reports of adaptive behavior. *See U.S. v. Lewis*, No. 1:08 CR 404, 2010 U.S. Dist. LEXIS 138375, at *64-66 (N.D. Ohio Dec. 23, 2010) (finding that the use of self-reporting to assess adaptive functioning is

disfavored by the AAIDD and acknowledged as problematic by both the defense and prosecution experts).

In light of the medical community's understanding that self-reports of adaptive behavior are inherently unreliable, there is a real and unacceptable risk that administering the ABAS-3 Self Report Form in this case will lead to an erroneous *Atkins* determination based on invalid data. Allowing the State's expert to rely on—and the district court to consider—the results of such a problematic instrument would violate the dictates of *Hall*, *Moore*, and the Eighth Amendment.

CONCLUSION

Based upon the foregoing analysis, the district court's order authorizing the State's expert to administer the SIRS-2 and the ABAS-3 Self-Report constitutes a manifest abuse of discretion. Allowing the use of these irrelevant and inherently unreliable instruments would violate Petitioner's Fifth Amendment right against-self-incrimination, as well as his right to a reliable *Atkins* determination in accordance with the Eighth Amendment and Supreme Court precedents.

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Accordingly, Petitioner respectfully requests this Court to issue a decision pre-trial upon this Petition for a Writ of Mandamus or Prohibition.

DATED this 30th day of October, 2017.

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VERIFICATION

Under penalty of perjury, the undersigned declare that they are the attorneys for Petitioners named in the foregoing Petition and know the contents thereof; that the pleading is true of their own knowledge, except as to those matters stated on information and belief, and that as to such matters they believe them to be true. This verification is made by the undersigned attorneys pursuant to NRS §15.010, on the ground that the matters stated, and relied upon, in the foregoing Petition are all contained in the prior pleadings and other records of the district court, true and correct copies of which have been attached hereto.

Executed this 30th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This Petition for Writ of Mandamus or Prohibition has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(C) because it is:

Proportionately spaced, has a typeface of 14 points or more, and contains 6,496 words.

3. I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e) which requires every assertion in the brief regarding matters in the record be supported by reference to the page or transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

DATED this 30th day of October, 2017.

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CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 2017, I served the foregoing PETITION FOR WRIT OF MANDAMUS OR PROHIBITION upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada, with first class postage fully prepaid:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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