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THE STATE OF NEVADA,
Real Party in Interest.

PETITIONER'S APPENDIX VOLUME 1

Attorney for Real Party in Interest

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CLERK OF THE COURT

AINF
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
ROBERT J. DASKAS
Chief Deputy District Attorney
Nevada Bar #004963
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GUSTAVO RAMOS,
#1516662

Defendant.

Case No: C-10-269839
Dept No: VII

**AMENDED
INFORMATION**

STATE OF NEVADA }
COUNTY OF CLARK } ss.

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That GUSTAVO RAMOS, the Defendant(s) above named, having committed the crimes of MURDER WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Felony - NRS 200.010, 200.030, 193.165, 193.167); SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, VICTIM 65 YEARS OF AGE OR OLDER (Felony - NRS 200.364, 200.366, 193.165, 193.167); and SEXUAL PENETRATION OF A DEAD HUMAN BODY (Felony - NRS 201.45), on or between May 15, 1998 and May 16, 1998, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

1 COUNT 1 – OPEN MURDER WITH USE OF A DEADLY WEAPON, VICTIM 65
2 YEARS OF AGE OR OLDER

3 did then and there wilfully, feloniously, without authority of law, and with malice
4 aforethought, kill WALLACE SIEGEL, a human being, the victim being 65 years of age or
5 older, by striking the head of the said WALLACE SIEGEL, with a deadly weapon, to-wit: a
6 dumbbell weight and/or unknown heavy blunt object, the actions of Defendant resulting in
7 the death of the said WALLACE SIEGEL, said killing having been (1) willful, deliberate
8 and premeditated; and/or (2) committed during the perpetration or attempted perpetration of
9 burglary and/or robbery.

10 COUNT 2 – OPEN MURDER WITH USE OF A DEADLY WEAPON, VICTIM 65
11 YEARS OF AGE OR OLDER

12 did then and there wilfully, feloniously, without authority of law, and with malice
13 aforethought, kill HELEN SABRAW, a human being, the victim being 65 years of age or
14 older, by stabbing at and into the body of the said HELEN SABRAW, with a deadly
15 weapon, to-wit: a knife, the actions of Defendant resulting in the death of said HELEN
16 SABRAW, said killing having been (1) willful, deliberate and premeditated; and/or (2)
17 committed during the perpetration or attempted perpetration of burglary and/or robbery
18 and/or sexual assault.

19 COUNT 3 – SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON VICTIM 65
20 YEARS OF AGE OR OLDER

21 did then and there willfully, unlawfully, and feloniously sexually assault and subject
22 HELEN SABRAW, a female person, the victim being 65 years of age or older, to sexual
23 penetration, to-wit: anal intercourse, by inserting his penis and/or an unknown object into the
24 anal opening of said HELEN SABRAW, with a deadly weapon, to-wit: a knife.

25 ///

26 ///

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1 COUNT 4 – SEXUAL PENETRATION OF A DEAD HUMAN BODY

2 did then and there willfully, unlawfully, and feloniously sexually penetrate a dead
3 human body, to-wit: HELEN SABRAW, in the following manner, by inserting his penis
4 and/or and unknown object into the anal opening of said HELEN SABRAW.

7 BY /s/ROBERT J. DASKAS
8 ROBERT J. DASKAS
9 Chief Deputy District Attorney
Nevada Bar #004963

13 Names of witnesses known to the District Attorney's Office at the time of filing this
14 Information are as follows:

<u>NAME</u>	<u>ADDRESS</u>
ALBY, ROCKY	LVMPD P#1810
ATKIN, MICHAEL	LVMPD P#5409
BENOIT, LEANITTIA	LVMPD P#6784
BRAGG, ALMEDIA	LVMPD P#4150
BRANDON, JACK	LVMPD P#3419
CHANDLER, ROY	LVMPD P#712
COLEMAN, LUCY	4255 SPENCER, LVN
COLEMAN, THOMAS	4255 SPENCER, LVN
CRAIG, MICHAEL	LVMPD P#5585
CUSTODIAN OF RECORDS	CCDC
CUSTODIAN OF RECORDS	CCFD, 575 E. FLAMINGO RD., LVN
CUSTODIAN OF RECORDS	LVMPD – DISPATCH
CUSTODIAN OF RECORDS	LVMPD RECORDS

1	FLYNN, DENNIS	LVMPD P#3028
2	FOX, STEPHANIE	LVMPD P#5712
3	GARLEY, THOMAS	UNKNOWN ADDRESS
4	GONZALES, FNU	CCFD/575 E. FLAMINGO RD., LVN
5	HALL, RICHARD	LVMPD P#6756
6	HERIFORD, R.	CCME, 1704 PINTO LN., LVN
7	JOHNSON, DAVID	LVMPD P#9933
8	JOHNSON, THOMAS	LVMPD P#3171
9	JOSEPH, MARC	LVMPD P#3383
10	KYGER, TERESA	LVMPD P#4191
11	LAUER, DEAN	LVMPD P#5613
12	LEMASTER, DEAN	LVMPD P#4243
13	MANNING, KEVIN	LVMPD P#2434
14	MARSCHNER, JULIE	LVMPD P#8806
15	MIKOLAINIS, J.	LVMPD P#1511
16	NEVIN, KATHLEEN	LVMPD P#900
17	OLSON, ALANE	CCME, 1704 PINTO LN., LVN
18	PARKS, PEGGY	c/o CCDA/VWAC, 200 LEWIS, LVN
19	PETERSEN, WAYNE	LVMPD P#1913
20	PORTER, R.	CCFD/575 E. FLAMINGO RD., LVN
21	RAETZ, DEAN	LVMPD P#4234
22	RAMOS, PHILLIP	LVMPD P#799
23	REED, GARY	LVMPD P#3731
24	REEDER, ROBERT	4800 E. TROPICANA, LVN
25	SIEGEL, JACK	c/o CCDA/VWAC, 200 LEWIS AVE., LVN
26	SPRAGUE, FNU	CCFD/575 E. FLAMINGO RD., LVN
27	SZUKIEWICZ, JOSEPH	LVMPD P#5411
28	THOMPSON, MICHAEL	LVMPD P#1988

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VACCARO, JAMES
WILSON, MICHAEL

c/o CCDA/MVU, 200 Lewis Ave., LVN
LVMPD P#5319

DA#10F19783X/dd-mvu
LVMPD EV#101013-1210;
980517-0848; 980516-0400
(TK5)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

March 27, 2017

C-10-269839-1 State of Nevada
 vs
 Gustavo Ramos

March 27, 2017 9:00 AM All Pending Motions

HEARD BY: Cory, Kenneth **COURTROOM:** RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Lisa Lizotte

PARTIES	Maningo, Ivette A.	Attorney for the Defendant
PRESENT:	Ramos, Gustavo	Defendant
	State of Nevada	Plaintiff
	Weckerly, Pamela C	Attorney for the State
	Yanez, Abel M.	Attorney for the Defendant

JOURNAL ENTRIES

DEFENDANTS MOTION FOR RULING ON THE APPLICABLE STANDARD FOR DETERMINING WHETHER DEFENDANT IS INTELLECTUALLY DISABLED IN LIGHT OF HALL V. FLORIDA... DEFENDANTS MOTION TO DECLARE NRS 174.098(4) UNCONSTITUTIONAL... DEFENDANTS MOTION FOR RULING ON THE SCOPE AND CONDITIONS OF THE INTELLECTUAL DISABILITY EVALUATION BY THE STATES EXPERT... DEFENDANT'S MOTION TO DECLARE DEFENDANT INTELLECTUALLY DISABLED AND REQUEST FOR EVIDENTIARY HEARING PURSUANT TO N.R.S. 174.098... STATUS CHECK: SCHEDULING EVIDENTIARY HEARING

Defendant Ramos PRESENT in custody. Interpreter, Maria Peters, also present.

DEFENDANTS MOTION TO DECLARE NRS 174.098(4) UNCONSTITUTIONAL:
COURT ORDERED, Motion DENIED; as far as being facially unconstitutional because the Court believes that it can be interpreted in such a ways as to preserve the Defendant's rights under the constitution. The Court will require the State to notify the dense five days before the hearing of the type of test which have been administered.

PRINT DATE: 04/03/2017

Page 1 of 2

Minutes Date: March 27, 2017

000006

DEFENDANTS MOTION FOR RULING ON THE APPLICABLE STANDARD FOR DETERMINING WHETHER DEFENDANT IS INTELLECTUALLY DISABLED IN LIGHT OF HALL V. FLORIDA: Mr. Yanez advised there is no opposition to 1, 3, 6, 7 and 8. As to remaining RULING DEFERRED until after the IDD hearing.

DEFENDANTS MOTION FOR RULING ON THE SCOPE AND CONDITIONS OF THE INTELLECTUAL DISABILITY EVALUATION BY THE STATES EXPERT:

Mr. Yanaz advised there is no opposition to 1, 2, and 4 and the Court previously rule on 3 on the constitutionality of 174.098(4) and that the Court would allow. COURT ORDERED, as to number 5 the evaluation be VIDEOTAPED the State five (5) days before the exam either demonstrate or describe to the defense how it will be done.

Mr. Yanaz to prepare the Order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

August 29, 2017

C-10-269839-1 State of Nevada
 vs
 Gustavo Ramos

**August 29, 2017 9:00 AM Status Check: Atkins
Hearing/ Trial Hearing**

HEARD BY: Togliatti, Jennifer **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Athena Trujillo

RECORDER: Yvette G. Sison

REPORTER:

PARTIES

PRESENT:	Maningo, Ivette A.	Attorney for Defendant
	Ramos, Gustavo	Defendant
	State of Nevada	Plaintiff
	Weckerly, Pamela C	Deputy District Attorney
	Yanez, Abel M.	Attorney for Defendant

JOURNAL ENTRIES

- State advised the Defense filed several motions with respect to testing and Judge Cory ruled the Defense can be present at the time of testing, however; the Defense had an opposition that the order did not address. Mr. Yanez argued that the testing must be subject to certain medical standards and be related to the issue of intellectual disability. Further arguments by counsel. COURT noted it agrees with the State's position and ORDERED, motion DENIED; State to prepare the order and submit to opposing counsel as to form and content. Upon Court's inquiry, Mr. Yanez advised they will request a stay if necessary at a later date. COURT ORDERED, matter SET for status check.

CUSTODY

10/5/17 9:00 AM STATUS CHECK: STATE'S EXPERT EVALUATION / STATUS CHECK: SET
ATKINS HEARING

PRINT DATE: 09/13/2017

Page 1 of 2

Minutes Date: August 29, 2017

000008

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 26, 2017

C-10-269839-1 State of Nevada
 vs
 Gustavo Ramos

**September 26, 2017 9:00 AM Defendant's Motion for
 Stay of Proceedings**

HEARD BY: Togliatti, Jennifer

COURTROOM: RJC Courtroom 10C

COURT CLERK: Athena Trujillo

RECORDER: Patti Slattery

REPORTER:

PARTIES

PRESENT:	Maningo, Lance A.	Attorney for Defendant
	Ramos, Gustavo	Defendant
	State of Nevada	Plaintiff
	Weckerly, Pamela C	Deputy District Attorney
	Yanez, Abel M.	Attorney for Defendant

JOURNAL ENTRIES

- Court made a record off all documents reviewed. Counsel submitted. COURT STATED its FINDINGS and ORDERED, motion DENIED; State to prepare the order and submit to opposing counsel as to form and content. Colloquy regarding trial date. State advised their expert planned on coming down at the end of October. Court requested the appointment be rescheduled to November to allow the Defense time to request a stay from the Supreme Court. COURT FURTHER ORDERED, status check set for 10/5/17 VACATED and RESET.

CUSTODY

10/12/17 9:00 AM STATUS CHECK: SET ATKINS HEARING / RESET TRIAL DATE & STATUS CHECK: STATE'S EXPERT EVALUATION

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

October 12, 2017

C-10-269839-1 State of Nevada
 vs
 Gustavo Ramos

October 12, 2017 9:00 AM All Pending Motions

HEARD BY: Togliatti, Jennifer

COURTROOM: RJC Courtroom 10C

COURT CLERK: Athena Trujillo

RECORDER: Yvette G. Sison

REPORTER:

PARTIES

PRESENT:	Maningo, Ivette A.	Attorney for Defendant
	Ramos, Gustavo	Defendant
	State of Nevada	Plaintiff
	Weckerly, Pamela C	Deputy District Attorney
	Yanez, Abel M.	Attorney for Defendant

JOURNAL ENTRIES

- STATUS CHECK: SET ATKINS HEARING / RESET TRIAL ... STATUS CHECK: STATE'S EXPERT EVALUATION

State advised their expert is available 11/1/17 and 11/3/17 and requested the evaluation be done on one of those two dates. Mr. Yanez advised they received the transcripts a few years ago and they are finalizing their writ. Further, Mr. Yanez requested the evaluation be pushed out to allow the Supreme Court to make a decision on the writ. State advised it does not believe the evaluation needs to be pushed out, noting it believes the Supreme Court will make a decision quickly. COURT ORDERED, matter SET for status check; counsel is to consult with their expert and get two additional dates of availability the Defense will have to choose from.

CUSTODY

10/19/17 9:00 AM STATUS CHECK: EXPERT

PRINT DATE: 10/13/2017

Page 1 of 2

Minutes Date: October 12, 2017

000011

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

October 19, 2017

C-10-269839-1 State of Nevada
 vs
 Gustavo Ramos

**October 19, 2017 9:00 AM Status Check: Expert
Availability**

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 10C

COURT CLERK: Athena Trujillo

RECORDER: Yvette G. Sison

REPORTER:

PARTIES

PRESENT:	Maningo, Ivette A.	Attorney for Defendant
	Pesci, Giancarlo	Deputy District Attorney
	Ramos, Gustavo	Defendant
	State of Nevada	Plaintiff
	Yanez, Abel M.	Attorney for Defendant

JOURNAL ENTRIES

- Mr. Yanez advised the State's experts will be meeting with the Defendant on December 6th and 7th.
COURT ORDERED, matter SET for status check.

CUSTODY

1/16/18 9:00 AM STATUS CHECK: REPORT / SET ATKINS HEARING / SET TRIAL DATE



OBJ

LAW OFFICES OF IVETTE AMELBURU MANINGO, ESQ.
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NOBLES & YANEZ LAW FIRM
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(F): (702) 641-6002
EMAIL: ayanez@noblesyanezlaw.com

Attorneys for Defendants Gustavo Ramos

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO: C-10-269839-1
)	
v.)	DEPT. NO: XI
)	
GUSTAVO RAMOS)	
#1516662)	
)	
Defendant.)	

DEFENDANT'S OBJECTION TO STATE EXPERT'S TESTING

COMES NOW, the Defendant, 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, and respectfully requests that this Court issue an order precluding the State's intellectual disability expert from administering the following instruments:

- (1) Wechsler Adult Intelligence Scale-III (WAIS-III), Spanish Version
- (2) Adaptive Behavior Assessment System-3 (ABAS-3), Spanish Self Report Adult Form

1 (3) Structured Interview of Reported Symptoms-2 (SIRS-2), Spanish Version

2 Defendant's objection is supported by the Fifth, Sixth, Eighth, and Fourteenth
3 Amendments to the United States Constitution, article I, sections 6 and 8 of the Nevada
4 Constitution, N.R.S. § 174.098, and the following memorandum of points and authorities.
5

6 DATED this 20th day of June, 2017.

7 **Nobles & Yanez Law Firm**

Law Offices of Ivette Amelburu Maningo

8
9 /s/ Abel Yanez

10 ABEL M. YANEZ, ESQ.

11 Nevada Bar No.: 7566

324 South Third St., Ste. #2

Las Vegas, Nevada 89109

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/s/ Ivette Maningo

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14 *Attorneys for Defendant Gustavo Ramos*
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MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Mr. Ramos is charged with first-degree murder and the State of Nevada has filed a Notice of Intent to Seek the Death Penalty. On December 5, 2016, Mr. Ramos filed his Motion to Declare Defendant Intellectually Disabled and Request for Evidentiary Hearing Pursuant to N.R.S. §174.098. On March 6, 2017, Mr. Ramos filed his Motion for Ruling on the Scope and Conditions of the Intellectual Disability Evaluation by the State's Expert. The Court granted Mr. Ramos's motion in part on May 24, 2017. Specifically, the Court ordered that:

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

The Court further ordered the State to provide to defense counsel a list of all tests and instruments the State's expert intends to administer no later than five days before the State expert's evaluation, and that the defense shall be permitted to file timely objections to any tests or instruments that are inappropriate in light of current clinical standards.

On April 21, 2017, the State informed undersigned counsel that its retained intellectual disability expert, Martha Mahaffey, Ph.D., intends to administer several instruments during her evaluation of Mr. Ramos, including the WAIS-III, Spanish Version; the ABAS-3, Spanish Self Report Adult Form; and the SIRS-2, Spanish Version.

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ARGUMENT

Mr. Ramos objects to these instruments for several reasons. First, the WAIS-III was substituted by the WAIS-IV in 2014. As the United States Supreme Court recently made clear in *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017), States must consider “current medical standards” in making *Atkins* determinations. The fifth and latest edition of the Diagnostic and Statistical Manual of Mental Disorders, commonly referred to as the DSM-5, recognizes that scores on outdated IQ tests may be artificially inflated due to a scientifically established phenomenon called the Flynn Effect. *See* DSM-5, at 37; *see also* AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (“AAIDD Manual”), 37 (11th ed. 2010). This underscores the importance of administering the most current version of an IQ test. Accordingly, the WAIS-IV should be administered.

Furthermore, it is inappropriate to administer the ABAS-3 Self Report Adult Form for diagnostic purposes. The AAIDD 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). Thus, 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.

1 Finally, the SIRS-2 is used to detect malingering of psychiatric symptoms and is entirely
2 irrelevant to the issue of whether Mr. Ramos is exempt from the death penalty under *Atkins*.¹ The
3 medical community universally recognizes that other mental disorders, including those involving
4 psychiatric symptoms, may coexist with intellectual disability. DSM-5 at 40 (noting that “[c]o-
5 occurring mental, neurodevelopmental, medical, and physical conditions are frequent in
6 intellectual disability”). As such, ID should be diagnosed “whenever the diagnostic criteria are
7 met, *regardless of and in addition to the presence of another disorder*.” DSM-IV-TR, at 47
8 (emphasis added.)
9

10 As previously argued in Mr. Ramos’s Motion for Ruling on the Scope and Conditions of
11 the Intellectual Disability Evaluation by the State’s Expert, the State expert’s evaluation may not
12 serve as a fishing expedition, and must be limited to the sole purpose of determining whether Mr.
13 Ramos is ID under current clinical standards and N.R.S. § 174.098(7). By raising an *Atkins* claim,
14 Mr. Ramos does not “open the door” to other mental health issues that have no bearing on the ID
15 determination. *Powell v. Texas*, 492 U.S. 680, 685-86, n.3 (1989). Thus, any attempt to assess Mr.
16 Ramos for other disorders would be incompatible with both the legal and medical framework for
17 ID evaluations.
18

19 The relevant ethics guidelines for psychologists further support the conclusion that it would
20 be wholly inappropriate to administer the SIRS-2 in this case. Specifically, Guideline 10.01 of the
21 American Psychological Association’s Specialty Guidelines for Forensic Psychology (“Forensic
22 Psychology Guidelines”), instructs evaluators to “provide information that is most relevant to the
23 psycholegal issue.” In addition, forensic examiners must employ methods that “are appropriate in
24
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27
28 ¹ The website of the test publisher, PAR Inc., states that the purpose of the SIRS-2 is to “assess
feigning of psychiatric symptoms.” See
<http://www4.parinc.com/Products/Product.aspx?ProductID=SIRS-2> (last visited June 11, 2017).

1 light of the research on or evidence of their usefulness and proper application.” Forensic
2 Psychology Guidelines, Guideline 10.02.

3 Accordingly, this Court should preclude the State’s expert from administering the WAIS-
4 III, the ABAS-3 Self Report Form, and the SIRS-2. These instruments have no relevance to the
5 issue at hand, and their use for diagnostic purposes is not supported by current medical standards.
6 *Moore*, 137 S. Ct. at 1049. Allowing the use of these instruments in the *Atkins* context would
7 infect the ID determination with inaccurate and irrelevant information, and would “create[] an
8 unacceptable risk that [a] person[] with [ID] will be executed.” *Hall v. Florida*, 134 S. Ct. 1986,
9 1990 (2014).

11 CONCLUSION

12 For the foregoing reasons, and pursuant to the Fifth, Sixth, Eighth, and Fourteenth
13 Amendments to the United States Constitution, article I, sections 6 and 8 of the Nevada
14 Constitution, and N.R.S. § 174.098, Mr. Ramos requests the Court to enter an order precluding the
15 State’s intellectual disability expert from administering the WAIS-III, the ABAS-3 Self Report
16 Form, and the SIRS-2.

18 DATED this 20th day of June, 2017.

19 **Nobles & Yanez Law Firm**

Law Offices of Ivette Amelburu Maningo

20 /s/ Abel Yanez

/s/ Ivette Maningo

21 ABEL M. YANEZ, ESQ.

IVETTE AMELBURU MANINGO, ESQ.

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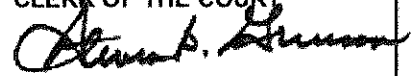
25 *Attorneys for Defendant Gustavo Ramos*
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Attorneys for Defendants Gustavo Ramos

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,)
)
v.)
)
GUSTAVO RAMOS)
#1516662)
)
Defendant.)
_____)

CASE NO: C-10-269839-1

DEPT. NO: IX

DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS

COMES NOW, the Defendant, GUSTAVO RAMOS, by and through his attorneys of record, Ivette Amelburu Maningo, of the Law Offices of Ivette Amelburu Maningo, and Abel M. Yanez, Esq., of the Nobles & Yanez Law Firm, and hereby moves this Court for a stay of proceedings so the Defense can pursue a Petition for a Writ of Mandamus on the issues articulated in Defendant's Objection to State Expert's Testing.

1 This motion is made pursuant to NRAP 8(a)(1), in good faith, and not for the purpose of
2 delay.

3 DATED this 8th day of September, 2017.

4 **Nobles & Yanez Law Firm**

Law Offices of Ivette Amelburu Maningo

5 /s/ Abel Yanez

/s/ Ivette Maningo

6 ABEL M. YANEZ, ESQ.

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10 *Attorneys for Defendant Gustavo Ramos*

11
12 **NOTICE OF MOTION**

13
14 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

15 YOU WILL PLEASE TAKE NOTICE that Ivette Amelburu Maningo, of the Law Offices
16 of Ivette Amelburu Maningo, and Abel M. Yanez, Esq., of the Nobles & Yanez Law Firm, will
17 bring the above and foregoing Motion on for hearing before the Court on the 19 day of
18 September 2017, at 9:00 a.m.

19 DATED this 8th day of September, 2017.

20 **Nobles & Yanez Law Firm**

Law Offices of Ivette Amelburu Maningo

21
22 /s/ Abel Yanez

/s/ Ivette Maningo

23 ABEL M. YANEZ, ESQ.

IVETTE AMELBURU MANINGO, ESQ.

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27 *Attorneys for Defendant Gustavo Ramos*

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CLERK OF THE COURT

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Attorneys for Defendants Gustavo Ramos

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,)	
)	CASE NO: C-10-269839-1
Plaintiff,)	
)	DEPT. NO: XI
v.)	
GUSTAVO RAMOS)	
#1516662)	DATE: 01/09/17
)	TIME: 9:00 AM
Defendant.)	

**MOTION TO DECLARE DEFENDANT INTELLECTUALLY DISABLED AND
REQUEST FOR EVIDENTIARY HEARING PURSUANT TO N.R.S. § 174.098**

COMES NOW, the Defendant GUSTAVO RAMOS MARTINEZ, by and through undersigned counsel, Ivette Amelburu Maningo, of the Law Offices of Ivette Amelburu Maningo, and Abel M. Yanez, of the Nobels & Yanez Law Firm, pursuant to the Eighth Amendment of the United States Constitution; article I, section 6 of the Nevada Constitution; and N.R.S. § 174.098, comes now with this Motion to Declare Defendant Intellectually Disabled and Request for Evidentiary Hearing. This motion is filed in good faith based on the preliminary finding of clinical

1 neuropsychologist Ricardo Weinstein, Ph.D., that Mr. Ramos Martinez is intellectually disabled as
2 defined by N.R.S. § 174.098(7) and current clinical standards, and considering the United States
3 Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S.
4 Ct. 1986 (2014).

5 DATED this 5th day of December, 2016.

6 **Nobles & Yanez Law Firm**

6 **Law Offices of Ivette Amelburu Maningo**

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12 *Attorneys for Defendant Gustavo Ramos*

13 **NOTICE OF MOTION**

14
15 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

16 YOU WILL PLEASE TAKE NOTICE that Ivette Amelburu Maningo, of the Law Offices
17 of Ivette Amelburu Maningo, and Abel M. Yanez, Esq., of the Nobles & Yanez Law Firm, will
18 bring the above and foregoing MOTION TO DECLARE DEFENDANT INTELLECTUALLY
19 DISABLED AND REQUEST FOR EVIDENTARY HEARING PURSUANT TO N.R.S. §
20 174.098 on for hearing before the Court on the 09 day of Jan. 20¹⁷, at 9:00 A.m.

21 DATED this 5th day of December, 2016.

22 **Nobles & Yanez Law Firm**

22 **Law Offices of Ivette Amelburu Maningo**

23 /s/ Abel Yanez
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28 *Attorneys for Defendant Gustavo Ramos*

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MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Defendant, Gustavo Ramos Martinez is charged with Open Murder with Use of a Deadly Weapon, Victim 65 Years of Age or Older (Count 1), Open Murder with Use of a Deadly Weapon, Victim 65 Years of Age or Older (Count 2), and Sexual Assault with Use of a Deadly Weapon Victim 65 Years of Age or Older (Count 3).¹ The State filed a Notice of Intent to Seek the Death Penalty on January 24, 2011 and trial is currently set for January 17, 2017.

LAW

I. MR. RAMOS MARTINEZ IS INTELLECTUALLY DISABLED AS DEFINED BY N.R.S. § 174.098(7) AND CURRENT CLINICAL STANDARDS.

The Eighth Amendment categorically prohibits the execution of persons with intellectual disability ("ID"). *Atkins*, 536 U.S. at 321. Mr. Ramos Martinez is charged with first degree murder and the State has filed a Notice of Intent to Seek the Death Penalty. Trial is currently scheduled for January 17, 2017. Based on the clinical evaluation conducted by Dr. Ricardo Weinstein, Mr. Ramos Martinez is a person with ID as defined by N.R.S. § 174.098(7) and current clinical standards. Accordingly, Mr. Ramos Martinez falls within the category of persons the Supreme Court has deemed exempt from the death penalty.

A. Relevant Legal Standards and Procedures for Determining Intellectual Disability.

In *Atkins*, the United States Supreme Court recognized that no legitimate penological purpose is served by executing persons with ID, due to their diminished capacity and reduced

¹ On July 27, 2012, the Court dismissed a former Count 4 (Sexual Penetration of a Dead Human Body) of the Amended Information, pursuant to a motion to dismiss filed by Mr. Ramos Martinez. However, the State has yet to file a Second Amended Information reflecting the dismissal of Count 4. Further, Mr. Ramos Martinez filed a Petition for Writ of Mandamus on October 12, 2016 related to Count 3 (Sexual Assault with Use of a Deadly Weapon Victim 65 Years of Age or Older) to which the Supreme Court of Nevada has directed the State to file an Answer via an Order Directing Expedited Answer filed on November 16, 2016.

1 moral culpability. *Id.*, at 319-321. The Court also expressed concern that persons with ID “in the
2 aggregate face a special risk of wrongful execution.” *Id.*, at 321. In *Hall*, the Court reaffirmed that
3 “to impose the harshest of punishments on an intellectually disabled person violates his or her
4 inherent dignity as a human being.” 134 S. Ct. at 1992. The Court explained that “*Atkins* did not
5 give the States unfettered discretion to define the full scope of the constitutional protection.” *Id.*, at
6 1998. Rather, the clinical definitions of ID “were a fundamental premise of *Atkins*” and the “legal
7 determination” of ID must be “informed by the medical community’s diagnostic framework.” *Id.*,
8 at 1999, 2000.

10 In both *Atkins* and *Hall*, the Court cited with approval the definition of ID provided by the
11 American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders.
12 *Atkins*, 536 U.S. at 317 n. 22; *Hall*, 134 S. Ct. at 1998-1999. The fifth and latest edition of the
13 manual, commonly referred to as the DSM-5, defines ID as “a disorder with onset during the
14 developmental period that includes both intellectual and adaptive functioning deficits in
15 conceptual, social, and practical domains.” DSM-5, at 33.

17 In the wake of *Atkins*, the Nevada legislature enacted N.R.S. § 174.098 to provide both the
18 procedural framework and the standards by which Nevada courts are to resolve ID claims in a
19 capital cases. While the current motion is submitted pursuant to N.R.S. § 174.098, Mr. Ramos
20 Martinez in no way concedes that the standards set forth therein necessarily control the issue of
21 whether he is intellectually disabled for Eighth Amendment purposes, and does not waive the
22 benefit of any greater substantive or procedural protections that might be afforded to him under the
23 United States Constitution and controlling federal authorities.

25 N.R.S. § 174.098(7) defines “intellectually disabled” as “significant subaverage general
26 intellectual functioning which exists concurrently with deficits in adaptive behavior and
27 manifested during the developmental period.” In *Ybarra v. State*, 127 Nev. 47, 247 P.3d 269
28

1 (2011), the Nevada Supreme Court held that the clinical definitions of intellectual disability,
2 including those provided by American Association of Mental Retardation (now the American
3 Association on Intellectual and Developmental Disabilities) and the American Psychiatric
4 Association, “provide useful guidance in applying the definition set forth in NRS 174.098.” Mr.
5 Ramos Martinez submits that he satisfies both the statutory and clinical definitions of ID and will
6 provide evidence of his condition to the Court and prosecution in advance of the hearing, as
7 required by N.R.S. § 174.098(3)(a).
8

9 Under N.R.S. § 174.098, the filing of this motion automatically triggers several important
10 protections. First, pursuant to sub-section (2)(a) of the statute, this Court must stay these
11 proceedings pending a decision on the issue of ID. Second, under sub-section 2(B), the Court must
12 schedule a hearing within a reasonable time to determine whether Mr. Ramos Martinez is ID. At
13 the hearing, Mr. Ramos Martinez must be permitted to present evidence “from any witness
14 concerning whether [he] is intellectually disabled.” N.R.S. § 174.098(5)(a). If Mr. Ramos Martinez
15 proves by a preponderance of the evidence that he is ID, the Court “must make such a finding in
16 the record and strike the notice of intent to seek the death penalty.” N.R.S. § 174.098(6).
17
18

19 **B. Mr. Ramos Martinez Meets the Statutory and Clinical Definitions of**
20 **Intellectual Disability.**

21 Based on the results of Dr. Weinstein’s clinical evaluation and the information obtained by
22 the defense team thus far, Mr. Ramos Martinez satisfies both the statutory and clinical definitions
23 of ID. Mr. Ramos Martinez has deficits in intellectual functioning, as demonstrated by his IQ
24 scores, poor academic performance, memory problems, and difficulty following instructions. As
25 the Supreme Court emphasized in *Hall*, a defendant’s IQ must be considered as a range of
26 numbers as opposed to a single numerical score. *Hall*, at 134 S. Ct. at 1995. Dr. Weinstein
27 measured Mr. Ramos Martinez’s IQ with the Wechsler Adult Intelligence Scale, third edition
28

1 (“WAIS-III”), universally recognized as “the standard instrument in the United States for assessing
2 intellectual functioning.” *Atkins*, 536 U.S. at 309. Considering the Standard Error of Measurement
3 (“SEM”) and the Flynn Effect, as required by best practices, Dr. Weinstein determined that Mr.
4 Ramos Martinez’s IQ is between 67 and 77. Mr. Ramos Martinez also obtained a full-scale
5 composite index score of 65 to 75 on the Comprehensive Test of Nonverbal Intelligence, second
6 edition (“CTONI-2”). In addition, while in custody with the Nevada Department of Corrections in
7 2006, Mr. Ramos Martinez obtained a scaled score of 72 on the Shipley Institute of Living Scale.
8 As this instrument was published in 1940, applying the Flynn Effect would significantly lower the
9 score.
10

11 In addition, Mr. Ramos Martinez had difficulty in school in both Mexico and the United
12 States. His relatives thought he was “dumb” because he couldn’t learn, and his siblings often had
13 to do his homework for him. Mr. Ramos Martinez also had difficulty following instructions since
14 he was young. When his sister sent him to the store to buy necessities for the family, he lost the
15 money on the way and returned empty handed. As an adult, when helping with his family’s
16 produce selling business, he was unable to separate lemons from limes.
17

18 Mr. Ramos Martinez also suffers from adaptive deficits that impair his daily functioning in
19 multiple areas of his life. While an ID diagnosis under the DSM-5 requires adaptive deficits in
20 only one of three adaptive behavior domains – conceptual, practical, or social – the defense has
21 obtained information strongly suggesting Mr. Ramos Martinez is impaired in all three domains.
22 Mr. Ramos Martinez’s poor performance in school, memory problems, and difficulty following
23 instructions are all indicative of impaired functioning in the conceptual domain.² In the practical
24 domain,³ he had difficulty maintaining employment for more than a few months, never lived
25
26

27 ² The conceptual (academic) domain involves competence in memory, language,
28 reading, writing, math reasoning, acquisition of practical knowledge, problem
solving, and judgment in novel situations, among others.” DSM-5, at 37.

³ “The practical domain involves learning and self-management across life settings,

1 independently, and does not know how to maintain a banking account. In the social domain,⁴ Mr.
2 Ramos Martinez exhibited poor judgment since he was a young child and was easily frustrated
3 when he did not understand something. These are only a few examples of his impairments and is
4 by no means exhaustive of the evidence that will be presented at the evidentiary hearing, as
5 investigation is ongoing.

6 The available information also demonstrates that Mr. Ramos Martinez's intellectual and
7 adaptive deficits manifested during the "developmental period." N.R.S. § 174.098(7); DSM-5, at
8 33. There is no indication that his impairments emerged suddenly in his adult years; rather, family
9 members indicated that his impairments were evident since childhood. In addition, as a child Mr.
10 Ramos Martinez was exposed to numerous risk factors for ID including extreme poverty and
11 parental neglect. See American Association on Intellectual and Developmental Disorders
12 (AAIDD), INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND
13 SYSTEMS OF SUPPORT 60 (11th ed. 2010). The circumstances of his childhood make it all the
14 more likely that his ID originated during his developmental years as opposed to adulthood.
15
16

17 CONCLUSION

18
19 For the foregoing reasons, and pursuant to NRS 174.098(2)(a), the Eighth Amendment of
20 the United States Constitution and article I, section 6 of the Nevada Constitution, Mr. Ramos
21 Martinez requests this Court to stay the proceedings pending a decision on the issue of intellectual
22 disability. Mr. Ramos Martinez further requests an opportunity to present evidence of his
23

24 ///

25
26 including personal care, job responsibilities, money management, recreation, self-management
27 of behavior, and school and work task organization, among others."
28 DSM-5, at 37.

⁴ "The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others." DSM-5, at 37.

1 intellectual disability at an evidentiary hearing consistent with full due process guarantees under
2 the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 8(5)
3 of the Nevada Constitution.

4 DATED this 5th day of December, 2016

6 **Nobles & Yanez Law Firm**

6 **Law Offices of Ivette Amelburu Maningo**

7 /s/ Abel Yanez

7 /s/ Ivette Maningo

8 ABEL M. YANEZ, ESQ.

8 IVETTE AMELBURU MANINGO, ESQ.

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14 *Attorneys for Defendant Gustavo Ramos*

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CLERK OF THE COURT

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Attorneys for Defendants Gustavo Ramos

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

GUSTAVO RAMOS
#1516662

Defendant.

CASE NO: C-10-269839-1

DEPT. NO: XI

DATE:
TIME:

**MOTION FOR RULING ON THE SCOPE AND CONDITIONS OF
THE INTELLECTUAL DISABILITY EVALUATION BY THE STATE'S EXPERT**

Defendant GUSTAVO RAMOS MARTINEZ, by and through undersigned counsel, Ivette Amelburu Maningo, of the Law Offices of Ivette Amelburu Maningo, and Abel M. Yanez, of the Nobels & Yanez Law Firm, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; article I, sections 6, 8 of the Nevada Constitution; and N.R.S. § 174.098, requests this Court to issue an order outlining the scope and conditions of any intellectual

1 disability evaluation conducted by an expert selected by the State. Specifically, Mr. Ramos
2 Martinez requests the Court to order the following:

- 3 (1) Any evaluations conducted by the State's expert shall be limited to the sole purpose of
4 determining whether Mr. Ramos Martinez is intellectually disabled under current
5 clinical standards and N.R.S. § 174.098(7);
6
7 (2) Any evaluations conducted by the State's expert shall conform to current clinical
8 standards;
9
10 (3) Within five days before the State expert's evaluation, the State shall provide to defense
11 counsel a list of all tests and instruments the State's expert intends to administer during
12 the evaluation; the defense shall be permitted to file timely objections to any tests or
13 instruments that are inappropriate in light of current clinical standards;
14
15 (4) The State shall provide to defense counsel all raw data relevant to testing conducted by
16 the State's expert, a copy of any materials reviewed and notes generated in connection
17 with the evaluation, and the identity of all individuals interviewed in connection with
18 the evaluation, within a reasonable time after the evaluation is completed;
19
20 (5) Defense counsel and the defendant's intellectual disability expert shall be allowed to
21 observe the evaluation. Alternatively, the evaluation shall be video recorded by a
22 professional videographer in a manner that records the physical gestures, vocal
23 intonations, and facial expressions of both the examiner and the examinee.

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1 This Motion is made and based on the following points and authorities, the pleadings and
2 papers on filed herein, and any oral argument at the time set for hearing on the Motion.

3 DATED this 15 day of March, 2017.

4
5 
6 IVETTE AMELBURU MANINGO, ESQ.
7 LAW OFFICES OF IVETTE AMELBURU MANINGO
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10 Las Vegas, Nevada 89101
11 (T): (702) 384-9800
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13 Email: iamaningo@iamlawnvlaw.com


14 **NOTICE OF MOTION**

15 TO: THE STATE OF NEVADA, Plaintiff; and

16 TO: STEVEN WOLFSON, ESQ., District Attorney:

17 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will
18 bring the foregoing Motion on for hearing before the above-entitled Court on the 20 day of
19 March, 2017, at the hour of 9:00am or as soon thereafter as counsel
20 may be heard.

21 DATED this 15 day of March, 2017.

22 
23 IVETTE AMELBURU MANINGO, ESQ.
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. RELEVANT FACTS

3 Mr. Ramos Martinez is charged with first degree murder and the State has filed a Notice of
4 Intent to Seek the Death Penalty. Trial is currently scheduled for January 17, 2017. On December
5 5, 2016, Mr. Ramos Martinez filed his Motion to Declare Defendant Intellectually Disabled and
6 Request for Evidentiary Hearing Pursuant to N.R.S. § 174.098. Mr. Ramos Martinez submits that
7 he intellectually disabled under both the statutory and clinical definitions of intellectual disability,
8 based on the evaluation conducted by clinical neuropsychologist Ricardo Weinstein, Ph.D. The
9 State has not yet indicated whether it intends to hire its own expert to conduct an intellectual
10 disability evaluation pursuant to N.R.S. § 174.098(3)(b).
11

12 II. LEGAL ARGUMENT

13 **A. IN ORDER TO PROTECT MR. RAMOS MARTINEZ'S 8TH AMENDMENT**
14 **RIGHTS UNDER *ATKINS V. VIRGINIA* AND *HALL V. FLORIDA*, ANY**
15 **EVALUATIONS CONDUCTED BY THE STATE'S EXPERT MUST BE BASED**
16 **ON CURRENT CLINICAL STANDARDS.**

17 Mr. Ramos Martinez submits that he is intellectually disabled ("ID") as understood in
18 *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014). While the
19 State is entitled to rebut Mr. Ramos Martinez's claim with evidence from its own expert,
20 *Buchanan v. Kentucky*, 483 U.S. 402, 422-423 (1987); N.R.S. § 174.098(3)(b), precautions must
21 be taken to ensure that any evaluations conducted by the State's expert are limited to issues related
22 to the ID claim, and to ensure that Mr. Ramos Martinez has "a fair opportunity to show that the
23 Constitution prohibits [his] execution." *Hall*, at 2001. As the United States Supreme Court made
24 clear in *Hall*, the clinical definitions of ID "were a fundamental premise of *Atkins*" and the "legal
25 determination" of ID must be "informed by the medical community's diagnostic framework." *Id.*,
26 at 1999, 2000. Accordingly, to comply with the Eighth Amendment's mandate, this Court should
27
28

1 order that the State expert's evaluation comports with current clinical practices for ID assessments
2 and any applicable rules of professional conduct for psychologists.

3 The evaluation may not serve as a fishing expedition for the State, and must be limited to
4 the sole purpose of determining whether Mr. Ramos Martinez is ID under current clinical
5 standards and N.R.S. § 174.098(7). *See Powell v. Texas*, 492 U.S. 680, 685-86, n.3 (1989)
6 (defendant does not "open the door" to admission of mental health evidence on all mental health
7 issues by placing limited mental health issues in question). The State's expert must be prohibited
8 from assessing Mr. Ramos Martinez for other mental conditions or disorders that have no
9 relevance to a clinical ID assessment. *See American Psychological Association's Specialty*
10 *Guidelines for Forensic Psychology* ("Forensic Psychology Guidelines"), Guideline 10.01, Focus
11 on Legally Relevant Factors ("Forensic examiners seek to assist the trier of fact to understand
12 evidence or determine a fact in issue, and they provide information that is most relevant to the
13 psycholegal issue."). In addition, the assessment must be based on methods and principles that are
14 accepted by the "medical community's diagnostic framework," *Hall*, 134 S. Ct. at 2000, and that
15 "are appropriate in light of the research on or evidence of their usefulness and proper application."
16 Forensic Psychology Guidelines, Guideline 10.02.

17 Furthermore, in order to ensure that the State expert's evaluation comports with accepted
18 clinical practices as required by the Eighth Amendment and *Hall*, the State should be required to
19 provide advance notice to defense counsel of all tests and instruments the State's expert intends to
20 administer, and the defense should have an opportunity to object to any inappropriate tests or
21 instruments. Within a reasonable time after the evaluation is completed, the State should be
22 required to provide to defense counsel all raw data relevant to testing conducted by the State's
23 expert, a copy of any materials reviewed and notes generated in connection with the evaluation,
24 and the identity of all individuals interviewed in connection with the evaluation. Access to these
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1 materials is necessary not only to ensure that the State expert's conclusions are consistent with the
2 medical community's standards for diagnosing ID, but also to determine whether the State expert's
3 testimony is admissible under NRS § 50.275 and *Daubert v. Merrell Dow Pharmaceuticals,*
4 *Inc.*, 509 U.S. 579 (1993).

5 **B. THE PRESENCE OF COUNSEL OR VIDEO-RECORDING THE EVALUATION**
6 **IS NECESSARY TO PROTECT MR. RAMOS MARTINEZ'S RIGHTS TO DUE**
7 **PROCESS, THE ASSISTANCE OF COUNSEL, AND THE PRIVILEGE AGAINST**
8 **SELF-INCRIMINATION.**

9 In this capital case, in which heightened standards of due process apply, this Court should
10 further order that defense counsel and the defendant's intellectual disability expert be allowed to
11 observe the State expert's evaluation. Alternatively, the evaluation should be video recorded by a
12 professional videographer in a manner that records the physical gestures, vocal intonations, and
13 facial expressions of both the examiner and the examinee. Such precautions are necessary to
14 protect Mr. Ramos Martinez's rights to due process, the assistance of counsel, and the privilege
15 against self-incrimination.

16 In a capital case like this one, "factfinding procedures [must] aspire to a heightened
17 standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Because Mr. Ramos
18 Martinez's life is at stake, this Court must employ adequate measures to ensure that the State
19 expert's evaluation is conducted in a reliable manner. The presence of counsel and the defendant's
20 ID expert, or alternatively – video recording the evaluation, is necessary to verify that the
21 evaluation is based on appropriate, scientifically-validated methods and meets professional
22 standards of practice. Such verification is particularly important in this case because Mr. Ramos
23 Martinez is completely blind in one eye and rapidly losing vision in his other eye, and will require
24 accommodations during the evaluation process. See *Forensic Psychology Guidelines*, "Guideline
25 10.03 ("Forensic practitioners are encouraged to consider how the assessment process may be
26 impacted by any disability an examinee is experiencing, make accommodations as possible, and
27
28

1 consider such when interpreting and communicating the results of the assessment.”).

2 Requiring either the presence of counsel or the video recording of the evaluation is also
3 necessary to protect Mr. Ramos Martinez’s right to counsel under the Sixth Amendment to the
4 United States Constitution and article I, section 8 of the Nevada Constitution. A mental health
5 examination is a “critical stage” of the proceedings at which the right to counsel attaches. *Estelle*
6 *v. Smith*, 451 U.S. 454, 470-471 (1981). Counsel’s presence will enable the performance of critical
7 defense tasks, including assessing the adequacy of the examination, preparing for effective cross-
8 examination of the State’s expert, and mounting any challenges to the admissibility of the expert’s
9 conclusions. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE
10 COUNSEL IN DEATH PENALTY CASES, Guideline 1.1, commentary, at 924 (2003) (“Counsel must be
11 experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic
12 evidence, and must be able to challenge zealously the prosecution’s evidence and experts through
13 effective cross-examination.”).

14
15
16 Counsel’s presence or video recording the evaluation is further necessary to protect Mr.
17 Ramos Martinez’s constitutional right against self-incrimination. See *United States v. Fell*, 372
18 F.Supp.2d 753, 761 (D.Vt. 2005) (noting that the absence of defense counsel at a mental health
19 examination implicates a defendant’s Fifth Amendment right against self-incrimination). Should
20 the State’s expert delve into any prohibited areas of inquiry including the circumstances of the
21 alleged crimes or any prior criminal conduct, defense counsel will be available to object to such
22 questioning and ensure that privileged information is not used for improper purposes. Indeed,
23 other courts have recognized that defendants are entitled to the presence of counsel and/or the
24 recording of mental health evaluations in order to protect the defendants’ Fifth and Sixth
25 Amendment rights. See *Fell*, 372 F.Supp.2d at 762 (advance notice of testing by government’s
26 expert, tape recording of the testing, and a contemporaneous audio-video feed of the testing
27
28

adequately protected the defendant's Fifth and Sixth Amendment rights); *United States v. Sampson*, 335 F.Supp.2d 166, 247-48 (D. Mass. 2004) ("the court has the discretion to order that a defense representative be allowed to attend or that the testing be recorded"); *United States v. Johnson*, 362 F.Supp.2d 1043, 1091 (N.D.Iowa 2005) ("Johnson's Sixth Amendment right to counsel will be adequately protected by advance notice of testing and the recording of her [mental health] examinations and interviews"); *United States v. Kaczynski*, 1997 WL 668395, at *3 (E.D. Cal. Oct. 22, 1997) (allowing examinations to be audio-taped and permitting defense counsel to monitor examinations via live audio or video feed); *Commonwealth v. Baldwin*, 426 Mass. 105, 113, 686 N.E.2d 1001, 1005 (1997) (holding that while Sixth Amendment does not categorically demand that defense counsel be allowed to attend or videotape government testing, court has discretion to allow either procedure).

III. CONCLUSION

For the foregoing reasons, and pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; article I, sections 6, 8 of the Nevada Constitution; and N.R.S. § 174.098, Mr. Ramos Martinez requests the Court to order the following:

- (1) Any evaluations conducted by the State's expert shall be limited to the sole purpose of determining whether Mr. Ramos Martinez 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;
- (3) Within five days before the State expert's evaluation, the State shall provide to defense counsel a list of all tests and instruments the State's expert intends to administer during the evaluation; the defense shall be permitted to file timely objections to any tests or instruments that are inappropriate in light of current clinical standards;

1 (4) The State shall provide to defense counsel all raw data relevant to testing conducted by
2 the State's expert, a copy of any materials reviewed and notes generated in connection
3 with the evaluation, and the identity of all individuals interviewed in connection with
4 the evaluation, within a reasonable time after the evaluation is completed;

5 (5) Defense counsel and the defendant's intellectual disability expert shall be allowed to
6 observe the evaluation. Alternatively, the evaluation shall be video recorded by a
7 professional videographer in a manner that records the physical gestures, vocal
8 intonations, and facial expressions of both the examiner and the examinee.
9

10 DATED this 6th day of March, 2017.

11
12 
13 IVETTE AMELBURU MANINGO, ESQ.
14 LAW OFFICES OF IVETTE AMELBURU MANINGO
15 Nevada Bar No. 7076
16 720 S. Seventh St., 3rd Floor
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of The Law Offices of Ivette Amelburu Maningo and that on the 6th day of March, 2017, I served a true and correct copy of the foregoing **MOTION FOR RULING ON THE SCOPE AND CONDITIONS OF THE INTELLECTUAL DISABILITY EVALUATION BY THE STATE'S EXPERT**, via electronically for filing and/or service within the Eighth Judicial District Court Pursuant to Administrative Order 14-02 for e-service to the following:

Pamela Weckerly, Esq.
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
pamela.weckerly@clarkcountynvda.com
Attorney for Plaintiff


An Employee of The Law Offices Of Ivette Amelburu Maningo


CLERK OF THE COURT

MOT

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Attorneys for Defendants Gustavo Ramos

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

GUSTAVO RAMOS
#1516662

Defendant.

CASE NO: C-10-269839-1

DEPT. NO: XI

DATE:
TIME:

**MOTION FOR RULING ON THE APPLICABLE STANDARDS FOR DETERMINING
WHETHER DEFENDANT IS INTELLECTUALLY DISABLED
IN LIGHT OF HALL V. FLORIDA**

Defendant GUSTAVO RAMOS MARTINEZ, by and through undersigned counsel, Ivette Amelburu Maningo, of the Law Offices of Ivette Amelburu Maningo, and Abel M. Yanez, of the Nobels & Yanez Law Firm, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 6 and 8 of the Nevada Constitution, and considering the United States Supreme Court's decision *Hall v. Florida*, 134 S. Ct. 1986 (2014),

1 requests this Court to order that the determination of whether Mr. Ramos Martinez is intellectually
2 disabled under N.R.S. § 174.098 shall be based on current clinical standards, including the
3 diagnostic criteria and standards provided in the American Psychiatric Association's Diagnostic
4 and Statistical Manual of Mental Disorders and by the American Association on Intellectual and
5 Developmental Disabilities ("AAIDD"). Mr. Ramos Martinez specifically requests an order that
6 the Court's intellectual disability determination conform to the following standards:
7

- 8 (1) In determining whether Mr. Ramos Martinez has deficits in intellectual functioning, the
9 Court shall consider the Standard Error of Measurement ("SEM") for any intelligence
10 tests administered;
- 11 (2) In determining whether Mr. Ramos Martinez has deficits in intellectual functioning, the
12 Court shall consider the Flynn Effect for any intelligence tests administered;
- 13 (3) In determining whether Mr. Ramos Martinez has deficits in intellectual functioning, the
14 Court shall consider both the results of any intelligence tests as well as information
15 regarding Mr. Ramos Martinez's history and background;
- 16 (4) In determining whether Mr. Ramos Martinez has deficits in adaptive functioning, the
17 Court shall consider that clinical standards require limitations in only one of three
18 adaptive functioning domains—conceptual, social, or practical—to qualify for an
19 intellectual disability diagnosis;
- 20 (5) In determining whether Mr. Ramos Martinez has deficits in adaptive functioning, the
21 Court shall consider that "limitations often coexist with strengths," and that deficits in
22 one adaptive functioning domain are not outweighed by strengths in other domains;¹
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28 ¹ American Association on Intellectual and Developmental Disorders, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 1, 47 (11th ed. 2010)

1 (6) In determining whether Mr. Ramos Martinez is intellectually disabled, the Court shall
2 consider that the presence of another mental disorder, such as a learning disorder or a
3 personality disorder, does not preclude a diagnosis of intellectual disability;

4 (7) In determining whether Mr. Ramos Martinez is intellectually disabled, the Court shall
5 consider that criminal conduct and/or the presence of maladaptive behaviors does not
6 preclude a diagnosis of intellectual disability;

7 (8) In determining whether Mr. Ramos Martinez's intellectual disability manifested during
8 the developmental period, the Court shall not require evidence of an intellectual
9 disability diagnosis prior to age 18, and shall consider that it is sufficient to present
10 evidence that intellectual and adaptive deficits were present during childhood or
11 adolescence.
12

13 In addition, Mr. Ramos Martinez requests the Court to consider any additional standards of
14 practice that are part of the "medical community's diagnostic framework," and that may be
15 testified to at the evidentiary hearing.
16

17 This Motion is made and based on the following points and authorities, the pleadings and
18 papers on filed herein, and any oral argument at the time set for hearing on the Motion.

19 DATED this 6th day of March, 2017.

20
21 
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NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: STEVEN WOLFSON, ESQ., District Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion on for hearing before the above-entitled Court on the 20 day of March, 2017, at the hour of 9:00am or as soon thereafter as counsel may be heard.

DATED this 10 day of March, 2017.


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MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS

Mr. Ramos Martinez is charged with first degree murder and the State has filed a Notice of Intent to Seek the Death Penalty. Trial is currently scheduled for January 17, 2017. On December 5, 2016, Mr. Ramos Martinez filed his Motion to Declare Defendant Intellectually Disabled and Request for Evidentiary Hearing Pursuant to N.R.S. § 174.098. Mr. Ramos Martinez submits that he intellectually disabled under both the statutory and clinical definitions of intellectual disability, based on the evaluation conducted by clinical neuropsychologist Ricardo Weinstein, Ph.D. The

1 State has not yet indicated whether it intends to hire its own expert to conduct an intellectual
2 disability evaluation pursuant to N.R.S. § 174.098(3)(b).

3 **II. UNDER *ATKINS*, *HALL*, AND THE 8TH AMENDMENT, THIS COURT MUST**
4 **APPLY N.R.S. § 174.098 IN CONFORMITY WITH THE CLINICAL STANDARDS.**

5 Executing an intellectually disabled person violates the Eighth Amendment. *Atkins v.*
6 *Virginia*, 536 U.S. 304, 321 (2002). While *Atkins* left “to the States the task of developing
7 appropriate ways” to enforce the prohibition,” 536 U.S. at 304 (quoting *Ford v. Wainwright*, 477
8 U.S. 399, 405 (1986), “*Atkins* did not give the States unfettered discretion to define the full scope
9 of the constitutional protection.” *Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014). In *Hall*, the
10 United States Supreme Court held Florida’s intellectual disability (“ID”) statute unconstitutional
11 because it went “against the unanimous professional consensus” regarding the interpretation of IQ
12 scores and “create[d] an unacceptable risk that persons with [ID] will be executed.” *Id.*, at 1990,
13 2000. *Hall* clarified that “[t]he clinical definitions of [ID] . . . were a fundamental premise of
14 *Atkins*,” and that the “legal determination” of ID must be “informed by the medical community’s
15 diagnostic framework.” *Id.*, at 1999, 2000. Since “persons who meet the ‘clinical definitions’ of
16 [ID] ‘by definition’ . . . bear ‘diminish[ed] . . . personal culpability,’ *id.* (quoting *Atkins*, 536 U.S.
17 at 318), this Court must consider the clinical standards for ID assessment in determining whether
18 Mr. Ramos Martinez is intellectually disabled under N.R.S. § 174.098.
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21 *Hall*’s mandate is consistent with the Nevada Supreme Court’s interpretation of N.R.S. §
22 174.098(7). The statute defines “intellectually disabled” as “significant subaverage general
23 intellectual functioning which exists concurrently with deficits in adaptive behavior and
24 manifested during the developmental period.” N.R.S. § 174.098(7). In *Ybarra v. State*, 127 Nev.
25 47, 247 P.3d 269 (2011), the Nevada Supreme Court explained that “[g]iven the similarities
26 between the statutory definition and the clinical definitions of mental retardation,” the clinical
27 definitions, including those provided by American Association of Mental Retardation (now the
28

1 American Association on Intellectual and Developmental Disabilities) and the American
2 Psychiatric Association, “provide useful guidance in applying the definition set forth in NRS
3 174.098.” 127 Nev. At 54. After *Hall*, the clinical definitions are not simply “guides”; rather,
4 courts may not disregard “established medical practice” in implementing *Atkins*. *Hall*, 134 S. Ct at
5 1995.

6 Like the Nevada Supreme Court in *Ybarra*, the United States Supreme Court has relied on
7 the definitions of ID provided by the American Psychiatric Association’s Diagnostic and Statistical
8 Manual of Mental Disorders (“DSM”) and the American Association on Intellectual and
9 Developmental Disabilities (“AAIDD”). *Atkins*, 536 U.S. at 308 n. 3; *Hall*, 134 S. Ct. at 2000-
10 2001. The fifth and latest edition of the DSM, commonly referred to as the DSM-5, defines ID as
11 “a disorder with onset during the developmental period that includes both intellectual and adaptive
12 functioning deficits in conceptual, social, and practical domains.” DSM-5, at 33. Among other
13 sources, the DSM and the AAIDD provide a framework for diagnosing ID that reflects standard
14 practice in the medical community. The applicable standards for each of the three prongs of ID—
15 the intellectual functioning prong, the adaptive functioning prong, and the age of onset prong—are
16 discussed further below.

17 18 19 20 **A. Relevant Standards for Assessing Intellectual Functioning**

21 As *Hall* makes clear, the Eighth Amendment requires courts “to consider the psychiatric
22 and professional studies that elaborate on the purpose and meaning of IQ scores to determine how
23 the scores relate to the holding of *Atkins*.” *Hall*, 134 S. Ct. at 1993. This includes considering the
24 standard error of measurement for IQ scores. As recognized by the *Hall* Court, each test has a
25 standard error of measurement or SEM, which “reflects the reality that an individual’s intellectual
26 functioning cannot be reduced to a single numerical score.” *Hall*, 134 S. Ct. at 1995. Thus, an IQ
27 score of 70 “is most accurately understood not as a precise score but as a range of confidence with
28

parameters of at least one standard error of measurement.” AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (“AAIDD Manual”), 224 (11th ed. 2010). See also DSM-5, at 37; *Ybarra v. State*, 127 Nev. at 54-55 (recognizing that IQ tests have “a measurement error of approximately 5 points”).

In *Atkins* cases, “best practices” also require adjusting IQ scores to account for the Flynn Effect, a scientifically established phenomenon that artificially inflates IQ scores on outdated versions of IQ tests. Kevin S. McGrew, “Norm Obsolescence: The Flynn Effect,” in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 156, 160 (AAIDD 2015). See also AAIDD Manual, at 37; DSM-5, at 37. Scientific research supports a Flynn Effect correction of 3 IQ points per decade, calculated from the year an IQ test was normed. McGrew, *supra*, at 162; AAIDD Manual, at 37. “Failure to adjust intelligence test scores based on this phenomenon invalidates test scores and may be in violation of the Standards for Educational and Psychological Testing as well as the ‘Ethical Principles for Psychologists and Code of Conduct.’” Frank M. Gresham and Daniel J. Reschly, “Standard of Practice and Flynn Effect Testimony in Death Penalty Cases,” *Intellectual and Developmental Disabilities*: June 2011, Vol. 49, No. 3, pp. 131-140.²

In addition to IQ scores, “experts in the field . . . consider other evidence” such as school history and past behavior as probative of intellectual functioning. *Hall*, 134 S. Ct. at 1994-1995.

² Several courts have recognized that the Flynn effect should be considered in interpreting IQ scores. See, e.g., *Smith v. Schriro*, 813 F.3d 1175, 1184-1185 (9th Cir. 2016); *United States v. Wilson*, 170 F. Supp. 3d 347, 353 (E.D.N.Y. 2016); *Black v. Bell*, 664 F.3d 81, 96 (6th Cir. Tenn. 2011); *Winston v. Kelly*, 592 F.3d 535, 557 (4th Cir. 2010) (instructing district court to address evidence of the Flynn Effect on remand); *Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005) (directing the district court to consider the Flynn Effect on remand); *Brumfield v. Cain*, 854 F. Supp. 2d 366, 391 (M.D. La. 2012) (“[T]he Court gives great weight to the AAIDD’s clinical standards, which tip the balance in favor of at least considering the Flynn Effect...”); *U.S. v. Hardy*, 762 F. Supp. 2d 849, 862-866 (E.D. La. 2010) (finding the Flynn effect “well established scientifically”); *U.S. v. Lewis*, 2010 U.S. Dist. LEXIS 138375 (N.D. Ohio 2010) (recognizing the Flynn Effect as a “best practice”); *U.S. v. Shields*, 2009 U.S. Dist. LEXIS 130612, at *45 (W.D. Tenn.) (the Flynn Effect “is a valid scientific phenomenon”); *U.S. v. Davis*, 611 F. Supp. 2d 472, 485-488 (D. Md. 2009) (considering the defendant’s “Flynn-adjusted” IQ score); *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1281 (N.D. Ala. 2009) (Requiring consideration of the Flynn effect and the SEM); *People v. Superior Court (Vidal)*, 129 Cal. App. 4th 434 (Cal. App. 2005) (requiring consideration of the Flynn effect.”).

1 Thus, deficits in intellectual functioning can be “confirmed by both clinical assessment and
2 individualized, standardized intelligence testing.” DSM-5, at 33. *See also* AAIDD Manual, at 41
3 (“the assessment of intellectual functioning . . . may, at times, require information from
4 multiple sources”). The Nevada Supreme Court has likewise recognized that “objective IQ testing
5 is [not] required to prove mental retardation. Other evidence may be used to demonstrate
6 subaverage intellectual functioning, such as school and other records.” *Ybarra v. State*, 127 Nev.
7 at 55.
8

9 **B. Standards for Assessing Adaptive Functioning**

10 The AAIDD defines adaptive behavior as “the collection of conceptual, social, and
11 practical skills that have been learned and are performed by people in their everyday lives.”
12 AAIDD Manual, at 43. The DSM-5 provides that for a diagnosis of intellectual disability, the
13 individual must have:
14

15 Deficits in adaptive functioning that result in failure to meet developmental and
16 socio-cultural standards for personal independence and social responsibility.
17 Without ongoing support, the adaptive deficits limit functioning in *one* or more
18 activities of daily life, such as communication, social participation, and independent
19 living, across multiple environments, such as home, school, work and community.

20 DSM-5, at 33 (emphasis added). Under the DSM-5, the adaptive deficits requirement “is met when
21 at least *one domain* of adaptive functioning—conceptual, social, or practical—is sufficiently
22 impaired that ongoing support is needed in order for the person to perform adequately in one or
23 more life settings at school, at work, at home, or in the community.” DSM-5, at 37-38 (emphasis
24 added).

25 From a clinical standpoint, within a person who has ID, “limitations often coexist with
26 strengths.” AAIDD Manual, at 1. Importantly, a person meets the adaptive deficits requirement of
27 ID as long as he has significant impairments in one of the three adaptive behavior domains, even if
28 he has strengths in other areas. *See* AAIDD Manual, at 47 (“significant limitations in conceptual,

1 social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive
2 skills.”); *Smith v. Schriro*, 813 F.3d 1175, 1195 (9th Cir. 2016) (recognizing that the existence of
3 some adaptive skills, such as having romantic relationships, does not preclude a finding of
4 significant impairment in adaptive functioning); *Lambert v. State*, 126 P.3d 646, 651 (Okla. Crim.
5 App. 2005) (“Unless a defendant’s evidence of particular limitations is specifically contradicted by
6 evidence that he does not have those limitations, then the defendant’s burden is met no matter what
7 evidence the State might offer that he has no deficits in other skill areas”).

9 In addition, the existence of other disorders that may impact a person’s functioning, such as
10 a learning disorder or a personality disorder, does not preclude an ID diagnosis. ID should be
11 diagnosed “whenever the diagnostic criteria are met, *regardless of and in addition to the presence*
12 *of another disorder.*” DSM-IV-TR, at 47 (emphasis added.) Accordingly, courts have recognized
13 that other mental conditions can coexist with ID. *See Smith v. Schriro*, 813 F.3d 1175, 1195 (9th
14 Cir. 2016) (Smith’s “personality disorder with antisocial features [is not] inconsistent with our
15 conclusion regarding impaired adaptive behavior, especially in light of Smith’s immaturity and
16 childlike conduct.”); *Brumfield v. Cain*, 135 S. Ct. 2269, 2280 (2015) (recognizing that antisocial
17 personality disorder is compatible with ID); *Brumfield v. Cain*, 808 F.3d 1041, 1062 (5th Cir.
18 2015); *United States v. Wilson*, 170 F. Supp. 3d 347, 371-372 (E.D.N.Y. 2016) (learning disorders
19 can coexist with ID); *State v. Grell (Grell III)*, 231 Ariz. 153, 158, 291 P.3d 350 (2013)
20 (recognizing that antisocial personality disorder “can coexist with mental retardation”).

22 Likewise, it is firmly established in the medical and psychological community that criminal
23 behavior should not be used “to infer level of adaptive behavior or about having ID. . . . There is
24 not enough available information and there is a lack of normative information.” American
25 Association on Intellectual and Developmental Disorders, *INTELLECTUAL DISABILITY: DEFINITION,*
26 *CLASSIFICATION, AND SYSTEMS OF SUPPORTS*, 102 (11th ed. 2010). In the same vein, evidence of
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1 maladaptive behaviors such as substance abuse is entirely compatible with and does not preclude a
2 finding of ID. See DSM-5, at 38 (persons with intellectual disability may have “associated
3 difficulties with social judgment; assessment of risk; self-management of behavior, emotions, or
4 interpersonal relationships”); *Lambert v. State*, 126 P.3d 653-655 (rejecting state’s argument that
5 defendant’s adaptive limitations were caused by drug use, not mental retardation, and finding
6 evidence of drug use was “irrelevant and was improperly admitted.”).
7

8 C. Standards for Assessing the Age of Onset Criterion

9 The age of onset requirement “refers to recognition that intellectual and adaptive deficits
10 are present during childhood or adolescence.” DSM-5, at 38. A person need not present a previous
11 ID diagnosis or childhood IQ tests to satisfy this requirement. *Hall*, 134 S. Ct. at 1994 (noting that
12 “medical histories, behavioral records, school tests and reports, and testimony regarding past
13 behavior and family circumstances” are all “substantial and weighty evidence” accepted by the
14 medical community as “probative of intellectual disability”). The AAIDD provides specific
15 guidelines for assessing an individual who never received a clinical diagnosis of ID during the
16 developmental period. AAIDD Manual, at 95-56. In such situations, “the clinician must use other
17 sources of information . . . including the persons’ history, in order to determine the manifestations
18 of possible ID” during the developmental period. *Id.*, at 96. “The key . . . is not whether the person
19 was seen as having ID . . . but, rather, whether there were clear signs that the person’s post-18
20 impairment did not emerge suddenly . . . in adulthood.” Stephen Greenspan et al., “Age of Onset
21 and the Developmental Period Criterion, in in THE DEATH PENALTY AND INTELLECTUAL
22 DISABILITY 79.
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24
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26 The Nevada Supreme Court has also recognized that “[t]he purpose of this [age] onset
27 requirement is not to exclude some people with intellectual disabilities from the mental retardation
28 category, but rather to differentiate between individuals with mental retardation and individuals

1 with other mental deficits caused by injuries or diseases that occurred during adulthood.” Ybarra
2 v. State, 127 Nev. at 56 (quoting Penny J. White, *Treated Differently in Life but Not in Death: The*
3 *Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 Tenn. L. Rev. 685, 707
4 (2009)). Thus, to satisfy the age of onset requirement in the absence of a formal ID diagnosis
5 during the developmental period, it is sufficient to present evidence that intellectual and adaptive
6 deficits were present during childhood or adolescence.

7 8 **III. CONCLUSION**

9 For the foregoing reasons, and pursuant to the Fifth, Sixth, Eighth, and Fourteenth
10 Amendments of the United States Constitution, and article I, sections 6, 8 of the Nevada
11 Constitution, Mr. Ramos Martinez respectfully requests this Court to order that the determination
12 of whether he is intellectually disabled under N.R.S. § 174.098 shall be based on current clinical
13 standards, including the diagnostic criteria and standards provided in the American Psychiatric
14 Association’s Diagnostic and Statistical Manual of Mental Disorders and by the American
15 Association on Intellectual and Developmental Disabilities (“AAIDD”). Mr. Ramos Martinez
16 specifically requests an order that the Court’s intellectual disability determination conform to the
17 following standards:
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- 19 (1) In determining whether Mr. Ramos Martinez has deficits in intellectual functioning, the
20 Court shall consider the Standard Error of Measurement (“SEM”) for any intelligence
21 tests administered;
22
- 23 (2) In determining whether Mr. Ramos Martinez has deficits in intellectual functioning, the
24 Court shall consider the Flynn Effect for any intelligence tests administered;
25
- 26 (3) In determining whether Mr. Ramos Martinez has deficits in intellectual functioning, the
27 Court shall consider both the results of any intelligence tests as well as information
28 regarding Mr. Ramos Martinez’s history and background;

1 (4) In determining whether Mr. Ramos Martinez has deficits in adaptive functioning, the
2 Court shall consider that clinical standards require limitations in only one of three
3 adaptive functioning domains—conceptual, social, or practical—to qualify for an
4 intellectual disability diagnosis;

5 (5) In determining whether Mr. Ramos Martinez has deficits in adaptive functioning, the
6 Court shall consider that “limitations often coexist with strengths,” and that deficits in
7 one adaptive functioning domain are not outweighed by strengths in other domains;
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9 (6) In determining whether Mr. Ramos Martinez is intellectually disabled, the Court shall
10 consider that the presence of another mental disorder, including a personality disorder,
11 does not preclude a diagnosis of intellectual disability;

12 (7) In determining whether Mr. Ramos Martinez is intellectually disabled, the Court shall
13 consider that criminal conduct and/or the presence of maladaptive behaviors does not
14 preclude a diagnosis of intellectual disability;
15

16 (8) In determining whether Mr. Ramos Martinez’s intellectual disability manifested during
17 the developmental period, the Court shall not require evidence of an intellectual
18 disability diagnosis prior to age 18, and shall consider that it is sufficient to present
19 evidence that intellectual and adaptive deficits were present during childhood or
20 adolescence.
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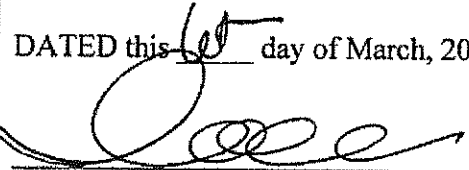
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1 In addition, Mr. Ramos Martinez requests the Court to consider any additional standards of
2 practice that are part of the "medical community's diagnostic framework" and that may be testified
3 to at the evidentiary hearing.

4 DATED this 6th day of March, 2017.

5 
6 _____
7 IVETTE AMELBURU MANINGO, ESQ.
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28

Attorney for Defendant Gustavo Ramos

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of The Law Offices of Ivette Amelburu Maningo and that on the 10th day of March, 2017, I served a true and correct copy of the foregoing **MOTION FOR RULING ON THE APPLICABLE STANDARDS FOR DETERMINING WHETHER DEFENDANT IS INTELLECTUALLY DISABLED IN LIGHT OF *HALL V. FLORIDA***, via electronically for filing and/or service within the Eighth Judicial District Court Pursuant to Administrative Order 14-02 for e-service to the following:

Pamela Weckerly, Esq.
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
pamela.weckerly@clarkcountyda.com
Attorney for Plaintiff


An Employee of The Law Offices Of Ivette Amelburu Maningo


CLERK OF THE COURT

NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GUSTAVO RAMOS,
#1516662

Defendant.

CASE NO: C-10-269839

DEPT NO: VII

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through PAMELA WECKERLY, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. The murder was committed by a person who has been convicted of a felony involving violence. (NRS 200.033 (2)). In case number C151842, on July 13, 1998, Defendant Ramos pled guilty to Assault with Use of a Deadly Weapon, in Department XIV. He was sentenced to 12 to 48 months, suspended and placed on 5 years probation. The charged stemmed from the Defendant beating his then-girlfriend, Yolanda Guzman, with a metal folding chair on June 13, 1998. On or about May 9, 2006, the court revoked Defendant's probation and the 12 to 48 month sentence was imposed. The underlying facts of the case indicate that this incident clearly involved violence as Defendant Ramos beat

1 Guzman with a chair. Moreover, the plea to Assault With a Deadly Weapon is a plea to a
2 crime of violence as the crime of Assault inherently involves the use or threat of violence.

3 2. The murder was committed while the person was engaged in the commission
4 of a robbery and the person charged killed the person murdered. (NRS 200.033 (4)). To
5 establish this aggravating circumstance, the State will rely on the fact that the murder of
6 victim Wallace Siegel was not only willful, deliberate and premeditated, but also involved a
7 robbery or an attempt to rob. On May 16, 1998, at 4255 South Spencer, Room 120, Wallace
8 Siegel was found by his son. Wallace Siegel had been beaten to death. Wallace Siegel was
9 found sitting slumped over in a chair. Below his knee was an empty money clip. The
10 evidence at the scene indicated that the motive for the murder appeared to be robbery.

11 3. The person subjected the victim to nonconsensual sexual penetration
12 immediately before, during, or immediately after the commission of the murder. (NRS
13 200.033 (13)). To establish this aggravating circumstance, the State will present the
14 testimony of a medical examiner who will state that victim Helen Sabraw sustained injuries
15 to her anal and/or vaginal area or introitus which were consistent with having suffered a
16 sexual assault at or near the time of death. The autopsy report notes an injury to the thighs,
17 pelvic bone and/or hip bone(s). In addition, there are noted lacerations to the anal verge in
18 two locations as well as a generalized contusion in the area. Moreover, there is some
19 contusion to the introitus. This aggravating circumstance will also be proven with
20 photographic evidence. The State will rely on the fact that Ms. Sabraw was found lying on
21 the floor of her residence wearing only a nightgown. The nightgown was pulled up,
22 exposing Ms. Sabraw's breasts. Ms. Sabraw's underwear was found underneath her head
23 with apparent blood. In addition, on the carpet on the residence, away from Ms. Sabraw's
24 body was the presence of biological material or fecal matter. Biological or fecal matter also
25 appeared to be issuing from Ms. Sabraw's anal cavity at a different location on the carpet.
26 Moreover, Ms. Sabraw clearly had suffered extensive injuries, including head and upper
27 torso trauma. Finally, a shirt belonging to the perpetrator was left at the scene, further
28 evidence that this crime was sexual in nature.

4. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. (NRS 200.033(12)). To establish this aggravating circumstance, the State will rely on the guilty verdict in the instant case for the murder of Wallace Siegel and Helen Sabraw. At the time of the penalty hearing, the defendant will have been convicted of two murders in the same proceeding.

DATED this 24th day of January, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/PAMELA WECKERLY
PAMELA WECKERLY
Chief Deputy District Attorney
Nevada Bar #006163

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing, was made this 24th day of January, 2011, by Electronic Filing to:

Clark County Public Defender's Office
email: pdclerk@co.clark.nv.us
Attn: Scott Coffee, Dep. PD

/s/Deana Daniels
Secretary for the District Attorney's
Office



ORDR

LAW OFFICES OF IVETTE AMELBURU MANINGO, ESQ.
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Attorneys for Defendants Gustavo Ramos

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

GUSTAVO RAMOS
#1516662

Defendant.

CASE NO: C-10-269839-1

DEPT. NO: I

ORDER

On March 27, 2017, this matter having come on for hearing on *Defendant's Motion for Ruling on the Scope and Conditions of the Intellectual Disability Evaluation by the State's Expert*, on March 27, 2017, and Plaintiff, the State of Nevada, appearing through Pamela Weckerly, Esq., and Defendant, appearing through his attorneys, Ivette A. Maningo, Esq., of the Law Offices of Ivette A. Maningo, and Abel M. Yanez, Esq., of the Nobles & Yanez Law Firm, and the Court

1 having reviewed the pleadings and papers on file herein and having heard argument, and good
2 cause appearing, the Motion is hereby granted in part as follows:

3 (1) The State of Nevada, having no opposition to the following defense requests, they are
4 hereby **GRANTED**:

5 (a) Any evaluations conducted by the State's expert shall be limited to the sole purpose of
6 determining whether Defendant is intellectually disabled under current clinical
7 standards and N.R.S § 174.098(7).
8

9 (b) Any evaluations conducted by the State's expert shall conform to current clinical
10 standards.

11 (c) The State of Nevada shall provide to defense counsel all raw data relevant to testing
12 conducted by the State's expert, a copy of any materials reviewed and noted generated
13 in connection with the evaluation, and the identity of all individuals interviewed in
14 connection with the evaluation, within a reasonable time after the evaluation is
15 completed.
16

17 (2) The State of Nevada, having opposition to the following defense requests, they are hereby
18 **GRANTED** over the State's objections:

19 (a) Within five days before the State expert's evaluation, the State shall provide to defense
20 counsel a list of all tests and instruments the State's expert intends to administer during
21 the evaluation; further, Defendant's counsel shall be permitted to file timely objections
22 to any tests or instruments that are inappropriate in light of current clinical standards.
23

24 (b) The evaluation performed by the State of Nevada's expert shall be video recorded by
25 the State, or, at the State's discretion, by Defendant's counsel.
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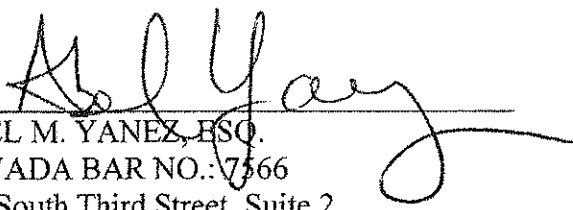
1 **IT IS FURTHER ORDERED** that defense counsel shall prepare the Order from today's
2 hearing on Defendant's Motion and the State of Nevada is to review and sign off.

3 Dated this 24 day of May, 2017.

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5
6 
7 _____
8 DISTRICT COURT JUDGE

9 Respectfully submitted by:

10 **NOBLES & YANEZ LAW FIRM**

11 
12 _____
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20 Attorney for Defendant



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Attorneys for Defendants Gustavo Ramos

**DISTRICT COURT
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

GUSTAVO RAMOS
#1516662

Defendant.

CASE NO: C-10-269839-1

DEPT. NO: I

ORDER

On March 27, 2017, this matter having come on for hearing on *Defendant's Motion for Ruling on the Applicable Standards for Determining whether Defendant is Intellectually Disabled in Light of Hall v. Florida*, and Plaintiff, the State of Nevada, appearing through Pamela Weckerly, Esq., and Defendant, appearing through his attorneys, Ivette A. Maningo, Esq., of the Law Offices of Ivette A. Maningo, and Abel M. Yanez, Esq., of the Nobles & Yanez Law Firm, and the Court

1 having reviewed the pleadings and papers on file herein and having heard argument, and good
2 cause appearing, the Motion is hereby granted in part as follows:

3 (1) The State of Nevada, having no opposition to the following defense requests, they are
4 hereby **GRANTED**:

5 (a) In determining whether Defendant has deficits in intellectual functioning, the Court
6 shall consider the Standard Error of Measurement ("SEM") for any intelligence tests
7 administered.

8 (b) In determining whether Defendant has deficits in intellectual functioning, the Court
9 shall consider both the results of any intelligence tests as well as information regarding
10 Defendant's history and background.

11 (c) In determining whether Defendant is intellectually disabled, the Court shall consider
12 that the presence of another mental disorder, such as a learning disorder or a personality
13 disorder, does not preclude a diagnosis of intellectual disability.

14 (d) In determining whether Defendant is intellectually disabled, the Court shall consider
15 that criminal conduct and/or the presence of maladaptive behaviors does not preclude a
16 diagnosis of intellectual disability;

17 (e) In determining whether Defendant's intellectual disability manifested during the
18 developmental period, the Court shall not require evidence of an intellectual disability
19 diagnosis prior to age 18, and shall consider that it is sufficient to present evidence that
20 intellectual and adaptive deficits were present during childhood or adolescence.
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1 (2) The State of Nevada, having opposition to the following defense requests, it is hereby

2 **ORDERED** that:

3 (a) The Court defers its ruling on whether it will consider the Flynn Effect for any
4 intelligence tests administered until after its takes evidence about the Flynn Effect at
5 the evidentiary hearing to be held on Defendant's *Atkins* Motion.

6 (b) The Court defers its ruling on whether, in determining if Defendant has deficits in
7 adaptive functioning, the Court must consider that "limitations often coexist with
8 strengths," and that deficits in one adaptive functioning domain are not outweighed by
9 strengths in other domains, until after its takes evidence at the evidentiary hearing to be
10 held on Defendant's *Atkins* Motion.
11

12 (c) The Court shall defers its ruling on whether, in determining if Defendant has deficits in
13 intellectual functioning, the Court must consider that clinical standards require
14 limitations in only one of three adaptive functioning domains—conceptual, social, or
15 practical, to qualify for an intellectual disability diagnosis, until after its takes evidence
16 at the evidentiary hearing to be held on Defendant's *Atkins* Motion.
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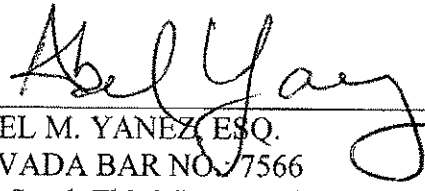
1 **FURTHER ORDERED** that defense counsel shall prepare the Order from today's hearing
2 on Defendant's Motion and the State of Nevada is to review and sign off.

3 Dated this 25 day of May, 2017.

4
5
6 
7 _____
8 DISTRICT COURT JUDGE

9 Respectfully submitted by:

10 **NOBLES & YANEZ LAW FIRM**

11 
12 _____
13 ABEL M. YANEZ, ESQ.
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20 Attorney for Defendant



1 **ORDR**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 PAMELA WECKERLY
6 Chief Deputy District Attorney
7 Nevada Bar #006163
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

CASE NO: C-10-269839-1

13 GUSTAVO RAMOS,
14 #1516662

DEPT NO: IX

15 Defendant.

16 **ORDER DENYING DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS**

17 DATE OF HEARING: 09/26/2017
18 TIME OF HEARING: 9:00 A.M.

19 THIS MATTER having come on for hearing before the above entitled Court on the
20 26th day of September, 2017, the Defendant being present, represented by LANCE
21 MANINGO, ESQ., the Plaintiff being represented by STEVEN B. WOLFSON, District
22 Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and the Court
23 having heard the arguments of counsel, the court denies the motion for a stay because it does
24 not believe there is a probability of success on the merits, and good cause appearing therefor,

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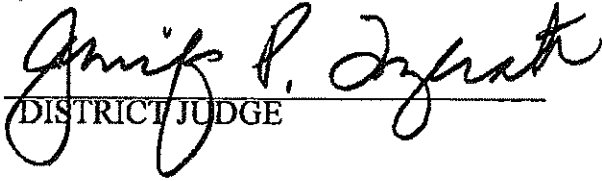
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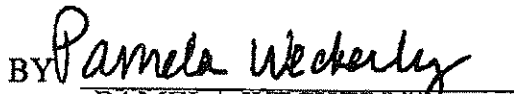
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1 IT IS HEREBY ORDERED that the Defendant's Motion for Stay of Proceedings, shall
2 be, and it is DENIED.

3 DATED this 17th day of October, 2017.

4 
5 DISTRICT JUDGE

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY 
10 PAMELA WECKERLY
11 Chief Deputy District Attorney
12 Nevada Bar #006163
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1 **OPPS**

2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #1565
5 PAMELA WECKERLY
6 Chief Deputy District Attorney
7 Nevada Bar #6163
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-10-269839-1

12 GUSTAVO RAMOS,
13 #1516662

DEPT NO: IX

14 Defendant.

15 **STATE'S OPPOSITION TO DEFENDANT'S OBJECTION**
16 **TO STATE EXPERT'S TESTING**

17 DATE OF HEARING: 08-15-2017
18 TIME OF HEARING: 9:00 A.M.

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and
21 hereby submits the attached Points and Authorities in Opposition to Defendant's Objection to
22 State Expert's Testing.

23 This Opposition is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

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1 POINTS AND AUTHORITIES

2 STATEMENT OF FACTS

3 Defendant Ramos seeks to preclude a jury from considering the death penalty as a
4 potential punishment in the killing of two elderly individuals by means of an Atkins motion.

5 Ramos filed a motion to limit the State's ability to challenge his assertion that he is
6 intellectually disabled. Ramos requested and Judge Cory granted an order providing that the
7 State provide the defense with a list of all testing instruments and permit the defense to object.
8 Complying with Judge Cory's order, the State provided defense counsel with the tests that its
9 expert intended to administer. The defense notified the State of its objection and the testing
10 was cancelled—and delayed. Judge Cory ordered briefing on the issue.

11 The defense since filed a motion indicating that it objected to the State not using the
12 most recent version of the WAIS test. The State has no objection to utilizing the most recent
13 version. Regarding the other two tests the State's expert intended to use, the ABAS-3 and the
14 SIRS-2, the defense objects on grounds that the tests are "inappropriate" to diagnose
15 intellectual disability and that the issue of malingering is allegedly irrelevant to an Atkins
16 claim. Thus, the defense asks the Court to order the State to utilize different test. The State
17 opposes.

18 ARGUMENT

19 A. NRS 174.098 Does Not Limit the State's Ability to Test.

20 The Nevada statute reflecting the Atkins decision is NRS 174.098.

21 174.098. Motion to declare that defendant is intellectually disabled: When
22 authorized; procedure.

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

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

27 (a) Stay the proceedings pending a decision on the issue of intellectual
disability; and

28 (b) Hold a hearing within a reasonable time before the trial to determine
whether the defendant is intellectually disabled.

1 3. The court shall order the defendant to:

2 (a) Provide evidence which demonstrates that the defendant is intellectually
3 disabled not less than 30 days before the date set for a hearing conducted
4 pursuant to subsection 2; and

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

8 4. For the purpose of the hearing conducted pursuant to subsection 2, there
9 is no privilege for any information or evidence provided to the prosecution
10 or 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
13 evidence and conduct a cross-examination of any witness concerning
14 whether the defendant is intellectually disabled; and

15 (b) The defendant has the burden of proving by a preponderance of the
16 evidence that the defendant is intellectually disabled.

17 6. If the court determines based on the evidence presented at a hearing
18 conducted pursuant to subsection 2 that the defendant is intellectually
19 disabled, the court must make such a finding in the record and strike the
20 notice of intent to seek the death penalty. Such a finding may be appealed
21 pursuant to NRS 177.015.

22 7. For the purposes of this section, “intellectually disabled” means
23 significant subaverage general intellectual functioning which exists
24 concurrently with deficits in adaptive behavior and manifested during the
25 developmental period.

26 Notably, the statute does not limit the type of testing to be conducted by either side.

27 The question of what type of testing the State was utilizing was raised in Ybarra v.
28 State, 127 Nev. 47, 247 P.3d 269 (2011). Ybarra raised an Atkins claim after receiving a
sentence of death. After an evidentiary hearing, the district court denied Ybarra’s Atkins
claim. On appeal, one of the issues raised by Ybarra was that the district court’s denial of his
claim “erroneously relied on the tests administered by the State’s expert because he used
improper testing instruments, scoring, and administration techniques.” Id. at 66, 247 P.3d at
281. In affirming the district court’s finding, the Nevada Supreme Court observed:

Therefore, we are unpersuaded that any consideration the district court gave to
the IQ test administered by Dr. T. Young was improper or unfounded.

1 Ybarra further argues that Dr. T. Young improperly used and administered the
2 TOMM to support his conclusion that Ybarra was malingering and the district
3 court failed to consider evidence showing the inaccuracy of the TOMM test
4 results, which included evidence that the TOMM should not be used on persons
5 who are mentally retarded and that the test sometimes gives false positive
6 results. We are not persuaded that the district court's consideration of the TOMM
7 score requires reversal.

8 Clearly, the district court considered the TOMM results in its decision,
9 observing that the TOMM score indicated malingering, but it is also clear that
10 the district court considered a wealth of other evidence in determining that
11 Ybarra was malingering and therefore had not proved significant subaverage
12 intellectual functioning. Specifically, the district court found evidentiary support
13 for malingering in the prison kites that Ybarra had written over the years, which
14 "reveal[ed] an intelligence level which is clearly not that of a mildly retarded
15 person," and the medical progress notes during his incarceration that
16 "portray[ed] Ybarra as a man who knows how to manipulate and fake (or
17 exaggerate) symptoms of mental illness to accomplish his goals." The district
18 court also observed that comments by mental health professionals who evaluated
19 Ybarra during his incarceration indicated that their testing of Ybarra revealed
20 malingering. And the district court illustrated all of those conclusions with
21 specific references to evidence in the record. The district court further observed
22 Ybarra's "ability to manipulate health care professionals, attorneys, play
23 scrabble, backgammon, racquetball and volleyball, and his ability to type, read
24 medical literature, [and] write coherent meaningful letters and kites." Thus, there
25 is evidence other than the TOMM score to support the district court's finding
26 that Ybarra was malingering.

27 Moreover, as with the 1981 IQ score, the TOMM score is of little value in
28 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.

The district court's factual findings are supported by substantial evidence and
support its conclusion that Ybarra did not show that he suffered from significant
subaverage intellectual functioning that manifested during the developmental
period.

Id. at 50-51, 247 P.3d at 283-84. Clearly, the Nevada Supreme Court contemplates that an
Atkins hearing will encompass a broad range of information about which the district court has
wide discretion to evaluate. What the statute does not restrict is any limitation regarding who
is selected as an expert for either party, nor the type of testing administered by the expert.
United States v. Hardy, 644 F. Supp. 2d 749, 751 (E.D. La. 2008) ("The Court is simply not

1 in a position to know what lines of inquiry are appropriate from the standpoint of the experts”
2 who are performing an examination in response to an Atkins claim).

3 Clearly, if the State’s expert were intending to use a test that was not included within
4 the accepted boundaries of the profession, the defense would have an issue to raise. That is
5 not the case here. The tests proposed by the State’s expert are normal, accepted tests used in
6 the profession. Whatever concerns the defense has about the tests’ accuracy or applicability
7 can be raised on cross examination.

8 If the Court were to grant this motion, it would be allowing the defense to dictate what
9 tests the State’s expert could use. If the defense chose not to do that, the defense could
10 basically veto, and delay, any State testing by constantly raising objections to the proposed
11 tests to be administered by the State. This is unworkable. It is not provided for in the statute.
12 The defense raised the issue of Atkins. The statute allows the State access to a defense to
13 challenge the claim. If the defense can also dictate the tests used by the State, the State
14 effectively has no ability to challenge the claim.

15 CONCLUSION

16 Based on the foregoing, given that the tests proposed by the State are within
17 professional norms, the State asks the Court to deny the instant motion.

18 DATED this 20th day of July, 2017.

19 Respectfully submitted,

20 STEVEN B. WOLFSON
21 Clark County District Attorney
Nevada Bar #1565

22
23 BY /s/ Pamela Weckerly
PAMELA WECKERLY
24 Chief Deputy District Attorney
Nevada Bar #6163
25
26
27
28

1 CERTIFICATE OF ELECTRONIC TRANSMISSION

2 I hereby certify that service of the above and foregoing was made this 20th day of July,
3 2017, by electronic transmission to:

4 IVETTE MANINGO, ESQ.

5 E-mail Address: iamaningo@iamlawnv.com

6 ABEL YANEZ, ESQ.

7 E-mail Address: ayanez@noblesyanezlaw.com

8 BY: /s/ J. Georges

9 Secretary for the District Attorney's Office

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28 jg/MVU


CLERK OF THE COURT

1 RTRAN

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3
4 DISTRICT COURT
5 CLARK COUNTY, NEVADA
6

7 THE STATE OF NEVADA,)
8)
9 Plaintiff,) CASE NO. C269839-1
10 vs.) DEPT. NO. 1
11)
12 GUSTAVO RAMOS,)
Defendant.)

13
14 BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE
15 MONDAY, MARCH 27, 2017 AT 9:46 A.M.

16 RECORDER'S TRANSCRIPT RE:
17 STATUS CHECK: SCHEDULING EVIDENTIARY HEARING
18 DEFENDANT'S MOTION TO DECLARE DEFENDANT INTELLECTUALLY
19 DISABLED AND REQUEST FOR EVIDENTIARY HEARING PURSUANT TO
20 NRS 174.098
21 DEFENDANT'S MOTION FOR RULING ON THE APPLICABLE STANDARD
22 FOR DETERMINING WHETHER DEFENDANT IS INTELLECTUALLY
23 DISABLED IN LIGHT OF HALL V. FLORIDA
24 DEFENDANT'S MOTION TO DECLARE NRS 174.098(4)
25 UNCONSTITUTIONAL
DEFENDANT'S MOTION FOR RULING ON THE SCOPE AND CONDITIONS
OF THE INTELLECTUAL DISABILITY EVALUATION BY THE STATE'S
EXPERT

Recorded by: LISA A. LIZOTTE, COURT RECORDER

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APPEARANCES:

FOR THE STATE:

PAMELA WECKERLY
Chief Deputy District Attorney

FOR THE DEFENDANT:

IVETTE A. MANINGO, ESQ.
ABEL M. YANEZ, ESQ.

ALSO PRESENT:

MARIA PETERS
Spanish Court Interpreter

1 (MONDAY, MARCH 27, 2017 AT 9:46 A.M.)

2 THE CLERK: Page 1, the State of Nevada versus Gustavo Ramos,

3 Case Number C269839.

4 THE COURT: Good morning.

5 MS. WECKERLY: Good morning, Your Honor. Pam Weckerly on

6 behalf of the State.

7 MS. MANINGO: Ivette Maningo on behalf of Mr. Ramos, Your

8 Honor. My Co-Counsel -- this is a capital case. Mr. Yanez is finishing a

9 sentencing upstairs. He will be down in a few minutes.

10 THE COURT: Okay.

11 MS. MANINGO: I apologize.

12 THE COURT: All right. Let us know when he's here. We'll recall it.

13 MS. MANINGO: Thank you.

14 (Whereupon, the matter was trailed and recalled at 9:54 a.m.)

15 THE CLERK: Recalling Page 1, the State of Nevada versus

16 Gustavo Ramos, Case Number C269839.

17 MS. WECKERLY: I think we need an interpreter for this one, Your

18 Honor.

19 THE COURT: All right.

20 MS. MANINGO: Your Marshal called earlier but we haven't seen

21 one yet.

22 THE COURT: All right. But we do expect one to show up here?

23 Okay.

24 MS. MANINGO: Thank you.

25 THE COURT: We'll wait until we have the interpreter.

1 (Whereupon, the matter was trailed and recalled at 10:08 a.m.)

2 THE CLERK: Recalling Page 1, the State of Nevada versus
3 Gustavo Ramos, Case Number C269839.

4 THE COURT: Good morning. This is on for a number of things.
5 Oh, we have an interpreter. Can we make a record of that?

6 THE COURT INTERPRETER: Yes. My name is Maria Peters.

7 MS. MANINGO: Ivette Maningo on behalf of Mr. Ramos with Co-
8 Counsel Abel Yanez.

9 MR. YANEZ: Good morning, Judge.

10 THE COURT: We have several things on calendar. Does anybody
11 have a preference as to what order we take them in?

12 MR. YANEZ: I don't, Judge, so whatever the Court prefers. If not I
13 can – I was looking to jump motion by motion and after each motion maybe see
14 what the Court's ruling is before I move on to the other motion unless the Court
15 prefers something different.

16 THE COURT: Okay.

17 MR. YANEZ: I didn't get a chance to file a reply but I can respond
18 orally today, Judge.

19 THE COURT: Okay. Let's go with that one, then. You're speaking
20 of the motion to declare it unconstitutional, is that correct?

21 MR. YANEZ: Correct, Judge. NRS 174.098(4), and for the Court's
22 – to refresh the Court's memory that section states that, quote, there is no
23 privilege for any information or evidence provided to the prosecution or obtained
24 by the prosecution pursuant to the evaluation. Now, the case law both in US
25 Supreme Court and from the Nevada Supreme Court I think recognizes a very

1 limited waiver of the Fifth Amendment right that Mr. Ramos has but not the
2 complete blanket, basically blank check that Section 4 provides, and I don't think
3 necessarily that the State disagreed that it might be unconstitutional, at least the
4 way I read their opposition.

5 Their opposition states, well, we should just wait to see,
6 continue this out and perhaps the information could be relevant in the penalty
7 phase of this case if we, in fact, have a penalty phase. A couple things on that.
8 Number one, just the express language of Section 4 is facially unconstitutional. It
9 does not provide for any type of limited waiver, it's a blanket waiver, so just on
10 the language itself it is facially invalid. Addition –

11 THE COURT: What do you – what do you do if you have a – that
12 argument of facial unconstitutionality for a statute that may, if it's interpreted by
13 the Court to satisfy that concern for its constitutionality or in this case what the
14 usage might be made – that might be made of the information given by the
15 Defendant himself, then it's no longer unconstitutional, is it?

16 MR. YANEZ: Well, other than declaring it unconstitutional the
17 position is at a minimum -- any information obtained during evaluation cannot be
18 presented during the penalty phase at a minimum. I don't think the State
19 necessarily disagreed with that. Their opposition was geared towards perhaps
20 the defense opening the door and that information becoming relevant at a
21 penalty phase.

22 THE COURT: Then what do you say to that?

23 MR. YANEZ: I'm sorry?

24 THE COURT: What do you say to that?

1 MR. YANEZ: Well, that is the – I think that is the minimum that the
2 Court should order at this point, that none of that information is provided.
3 Obviously our position –

4 THE COURT: Unless the Defendant opens the door?

5 MR. YANEZ: Potentially. I mean what I don't – here's the issue
6 with that is the State can obtain certain information during evaluation and
7 perhaps not present it but they can use that information to their benefit in their
8 case in chief either through investigation, through witnesses, through whatever
9 means that they have in investigating the case, so even though they might not
10 present that evidence they can still take advantage of that situation by learning of
11 certain facts that otherwise wouldn't come out with a limited waiver as opposed
12 to the blank check that this statute gives the prosecution.

13 So a lot of times the State might not present evidence that they
14 gained in evaluation but they still gain an advantage based on information they
15 receive.

16 THE COURT: And, therefore, your argument is that there's no way
17 to cure it by interpreting it narrowly?

18 MR. YANEZ: Correct.

19 THE COURT: Okay. What says the State?

20 MS. WECKERLY: The State says I think a basic principle of
21 interpreting statutes is that if there's a way to interpret it and find it constitutional
22 the courts are obligated to do that, and certainly the statute has actually been
23 looked at once by the Nevada Supreme Court pretty thoroughly in the *Ybarra*
24 case and there was no defect noted there.

1 I would also note that courts routinely in Fifth Amendment, you
2 know, suppressing statements hear from defendants, they hear from them in a
3 Fourth Amendment context and the rules that are typically used in those cases is
4 that what's testified to in a hearing on a Fourth Amendment or a Fifth
5 Amendment suppression issue is discreet for that hearing only.

6 Certainly the same could be true for an *Atkins* claim because
7 it's a constitutional claim, and unless -- as our opposition notes, unless they raise
8 some aspect of his mental functioning or any kind of intellectual defect we would
9 be precluded from using it in our case in chief, but certainly they wouldn't be able
10 to raise it and have us not answer it because that would be obscuring facts and
11 what could be a truthful determination from the jury.

12 THE COURT: Am I correct that -- that unlike the burden in this case,
13 or that is for the motion to declare the Defendant intellectually disabled, that
14 when it comes to raising a defense -- and I assume this is what you're talking
15 about, a defense of insanity at the time of the offense?

16 MS. WECKERLY: Yeah.

17 THE COURT: If they raise that then the State would be able to --

18 MS. WECKERLY: Well, they can't -- I mean it would be more than
19 insanity. I mean it would be any kind of intellectual -- it depends on what our
20 results are honestly, but I mean it depends what they would bring in and maybe if
21 we had evidence that would contradict that in terms of his capacity or intellectual
22 functioning. It's a little hard to say because I don't have -- my expert hasn't done
23 the testing yet. She's coming down, I think, at the end of April to do it, so it's -- I
24 mean it could be that this is all a little bit premature because if she makes the
25

1 same finding of an intellectual disability then none of these motions are really
2 ripe.

3 THE COURT: Unless – unless the Court agrees with the State –
4 with the Defendant that it would be unconstitutional – facially unconstitutional –

5 MS. WECKERLY: Yes.

6 THE COURT: -- which – which I don't frankly agree with.

7 MS. WECKERLY: Yeah. You could do that I guess, yes.

8 THE COURT: Yeah. It seems to me that at most you'd be looking
9 at an as applied in this case particularly that there is a way to interpret this
10 statute as being constitutional so long as some things that you brought up – so
11 long as the Defendant does not open the door. The question then might evolve
12 to what constitutes opening the door, and so I need to hear from both sides on
13 that.

14 MS. WECKERLY: I mean –

15 THE COURT: Your view is that opening the door means not only
16 that he says something or tries to do something at trial but even by giving notice
17 of a defense of –

18 MS. WECKERLY: No. Not in the guilt phase. I see the door
19 opening more in a penalty phase –

20 THE COURT: Okay.

21 MS. WECKERLY: -- depending on what the defense elects to
22 present. If they – if they stay away from certain topics that we don't have
23 contradictory testing on then it probably -- the door is never opened, but it's – it's
24 a little bit hard for me to predict now what that would be.

1 THE COURT: So if that's the case, if that's the State's position then
2 it seems to me even clearer that it could be interpreted constitutionally – as being
3 constitutional –

4 MR. YANEZ: And I understand –

5 THE COURT: -- because they're not even claiming that by raising a
6 defense of insanity at the time of the offense you have opened the door. They're
7 not saying that.

8 MR. YANEZ: Right.

9 THE COURT: They're merely saying that if you raise something
10 during the penalty phase.

11 MR. YANEZ: Right. And obviously we're not dealing with insanity
12 here, we're dealing with IDD, and I understand that courts have a duty to try to
13 salvage statutes by interpreting them in a constitutional manner, however, even
14 doing that in this case doesn't prevent the fear that I have that the State is going
15 to learn of information, which the statute allows them to get any information that
16 they can use to their benefit, whether they present that evidence or not.

17 And this argument somewhat dovetails into our other motion
18 where we asked that the State provide us with what type of assessments and
19 testing they're going to do five days before they do it in that we have an
20 opportunity to see what type of testing and assessments they're going to do, and
21 if we feel or our expert feels that has no relevance to the issue of IDD that we
22 can file an objection and – and prevent the fear that I have that the State's going
23 to gain other information that they might not use at trial but still benefit from.

24 THE COURT: I'm a little rusty here. You spoke of an IDD.
25

1 MR. YANEZ: I'm sorry, what's formerly known as mental retardation
2 is now Intellectual and Developmental Disability, ID or IDD.

3 THE COURT: Okay. What do you say to that?

4 MS. WECKERLY: Well, it's hard to know, right, I mean I don't know
5 what they're going to present. I don't know what the results of our testing is. I
6 kind of – I don't control what our expert does in terms of testing because I want it
7 to be a fair evaluation, not one that the State says, well, do this test and do this
8 test. Obviously our expert is qualified and has professional licenses and has
9 been recognized by numerous Eighth Judicial Courts for this specific type of
10 issue and has done many evaluations, so I leave it to her to decide what the
11 appropriate testing is.

12 Now, certainly this Court will sit and hear the – the whole
13 *Atkins* hearing and I – the Court has a lot of discretion under the statute, and if
14 there's something the Court deems is irrelevant testing, you know, there can be –
15 the Court can preclude us from doing that, but –

16 THE COURT: Well, in connection with that do you – do you object
17 to giving that information of what kind of testing is being proposed five days
18 before the hearing?

19 MS. WECKERLY: I do because that's not provided for in the
20 statute, and also the *Ybarra* case, that was a Nevada Supreme Court case, there
21 was a dispute actually in that case about a test that the State used, the defense
22 didn't like a particular test and the Nevada Supreme Court didn't find error with
23 the use of the test and gave the District Court hearing the evidence the discretion
24 to give it whatever weight it deemed appropriate.

1 I don't think our expert – this is their motion, they're raising it to
2 preclude us from seeking a particular penalty. There's nothing in the statute that
3 says we have to preview how we're going to do our examination or that we have
4 to provide the defense with any kind of list of the type of testing so that can be
5 pre-litigated. Obviously, though, the Court sitting when you hear the hearing can
6 disregard what you think isn't appropriate or isn't on target to the question of
7 intellectual disability if you deem any of the testing is – is irrelevant or not on
8 point.

9 MR. YANEZ: And, Judge, the problem with *Ybarra* is that that
10 analysis was after the fact. That was done after the evaluation had been done.
11 We're making the request beforehand. You can't unring the bell. If the Court's
12 going to find that the statute – that section of the statute is constitutional if we
13 apply it in a limited fashion, then the only fair thing to do at that point, then, is to
14 grant our request that at least five days before they do their testing they provide
15 that information to us.

16 I mean it's not a secret that information is going to come out
17 anyway. The fair thing is to give us that information beforehand and let us review
18 it. We might not have an objection but if we do we can bring it before the Court,
19 and that will also obviously support what appears to be the Court's position of
20 trying to harmonize the broad language of that statute and keep it constitutional.
21 I think that other request kind of goes hand in hand with the Court's decision if it
22 decides to read the statute in that fashion, that it's a limited waiver and not a full
23 waiver.

24 THE COURT: Okay. Anything further on the motion?

25 MS. WECKERLY: No.

1 MR. YANEZ: No, Judge.

2 THE COURT: The Court denies the motion as far as being facially
3 unconstitutional because the Court believes that it can be interpreted in such a
4 way as to preserve the Defendant's rights under the constitution. Secondly,
5 the Court as in – in an as applied analysis would hold that it's not
6 unconstitutional, again, so long as the – no. I'm not going to use that case.

7 It's not unconstitutional because the Court is interpreting it in a
8 way which would preserve the Defendant's rights, and what I'm going to do is as
9 part of the Court's discretion, not because I'm totally convinced that it's required
10 under our case law or other case law on constitutionality, but as a – out of an
11 abundance of caution only the Court will require the State to notify the defense
12 five days before the hearing of the type of tests which have been administered
13 or, I guess, just limited to the type of tests which the State intends to put forward
14 in that hearing. Does that cover your objections and concerns?

15 MR. YANEZ: It does, Judge. And I just want to make clear unless
16 the Court did say it that the possibility of information that the State gains through
17 evaluation being admitted is strictly limited to potential rebuttal in mitigation
18 phase, not in penalty phase. Is that –

19 THE COURT: Well, that's true. In mitigation, right? In the penalty
20 phase?

21 MS. WECKERLY: In rebuttal to what they present in mitigation,
22 yeah.

23 THE COURT: Correct.

24 MR. YANEZ: And we're in agreement that none of this information
25 comes out during the guilt phase?

1 THE COURT: Well –

2 MS. WECKERLY: Well, I mean that depends. If you raise a mental
3 defense it could be relevant to that.

4 THE COURT: Yeah. I'm not going to hold that at this time. This
5 motion, I think, carries on throughout the – the application of the statute and so if
6 it's your contention that – that the State is making some improper usage then
7 you're free to raise that with the Court, however, I would not be tempted to hold
8 as you – as you urge that the State cannot make use of the information and go
9 do further – further investigation on the case and perhaps adduce evidence.

10 It would be a question to me of whether or not that evidence
11 and that production, whether that was to be brought out during the case in – that
12 is the trial in chief, the initial question of whether the defense violated the statute
13 versus the penalty phase. I'm not sure yet and I think to that extent I still – I
14 guess I would say I agree with the State that when you're looking at it as an – as
15 an applied question it is a little early for the Court to tell whether or not the
16 application is going to mean that they want to bring that evidence out earlier than
17 the penalty phase.

18 If that's what they want to do I suppose I would say they do
19 need to let the Court know beforehand so that we can discuss then whether –
20 whether the application of the statute in a constitutional manner requires that the
21 Court prevent that evidence from coming forward. I'm not -- to this point I'm
22 really not convinced that it does. I think the – the question you've raised has to
23 do with – with using the Defendant's own words given during the – against him
24 but only in a – I don't know how to put this – only in the sense of bringing it up
25 and cross-examining the Defendant with it. That assumes that the Defendant

1 testifies. I'm just going to leave that until we get down to that point, so we may
2 have to raise it mid-trial and take a minute and hash it out. Okay?

3 MR. YANEZ: Understood.

4 THE COURT: I'm not sure that's been clear enough to even be put
5 down in an order, but I'll say the defense should produce an order on this motion
6 and show it to the State and then submit it to me and if it matches what I'm
7 thinking at this point I'll sign it. Okay?

8 MR. YANEZ: Understood, Judge.

9 THE COURT: All right. That takes care of that motion.

10 MR. YANEZ: All right. The next one I was going to move into is our
11 motion for applicable standards for determining whether Defendant is
12 intellectually disabled in light of *Hall v. Florida*. In that one, Judge, even though
13 it's a single motion there were several requests in there some of which the State
14 had no objection to. I just want to make sure the Court makes that part of its
15 order and we're on the same page as to which ones the State did not have an
16 opposition to.

17 I can go numerically and/or give basically the – what the issue
18 was, but numerically our Request Number 1, Number 3, Number 6, Number 7,
19 Number 8 the State had no opposition to. If that's correct –

20 THE COURT: Is that a correct statement?

21 MR. YANEZ: -- I'd ask the Court to make that its order.

22 MS. WECKERLY: I think that's correct.

23 THE COURT: 1, 3, 6, 7, 8, is that what you said?

24 MS. WECKERLY: Yes. No – yes. Well, I mean I will be able to tell
25 as we argue but I think that's correct.

1 MR. YANEZ: Right. Okay. And then the other one where I don't
2 think the State had an opposition but they weren't in agreement, I think they were
3 trying to wait and see what the evidentiary hearing showed, was Number 2, the
4 Flynn Effect, the issue of the Flynn Effect on intellectual testing, and on that issue
5 my comments are going to be responsive to the State's opposition. The State's
6 opposition in that case cited to the *Ybarra* case again, and why that case is not
7 applicable and why the Flynn Effect now we believe has been accepted by the
8 medical or psychological/psychiatric community is that since Flynn in 2011 a
9 couple of things have happened.

10 Number one and most importantly, the DSM-5 was published
11 in 2013 and that is basically the holy grail of evaluations by psychologists and by
12 psychiatrists, that which was published in 2013 recognizes it, expressly
13 recognizes the Flynn Effect. Again, that's two years after the *Ybarra* case which
14 in that case the Supreme Court didn't even expressly decide the issue. It made
15 reference to the Flynn Effect but it did not give a thumbs up or a thumbs down as
16 to whether courts should acknowledge that.

17 Also another authority that accepted the Flynn Effect, and it
18 was cited in our motion in the article by Kevin McGrew, is the American
19 Association of Intellectual and Developmental Disability with along with the DSM-
20 5 is the authority on IDD, mental retardation. That organization expressly
21 recognizes the Flynn Effect, so if the Court, which the case law is clear, has to
22 adopt today's current clinical or medical standards in determining IDD, the Court
23 must recognize the Flynn Effect based on the two major authorities in this field.
24 The DSM-5 and the American Organization of IDD recognizes the Flynn Effect,
25

1 and I would ask the Court to do so at this point and not wait for the actual
2 evidentiary hearing.

3 THE COURT: What do you say, Ms. Weckerly?

4 MS. WECKERLY: Your Honor, they're -- the State cited at length
5 that the Flynn Effect is highly controversial, it's not accepted in the Fourth Circuit,
6 it's not accepted in the Fifth Circuit, I don't think it's accepted in the Eleventh
7 Circuit and certainly there have been many state courts along the way and
8 federal district courts that haven't accepted it. It is very controversial.

9 The *Ybarra* case, the reason why I included it is because it
10 shows the Nevada Supreme Court doesn't mandate that the District Court accept
11 it or not accept it, and I think at a minimum the Court has to hear testimony about
12 it before you make a determination about it from the experts because --

13 THE COURT: Would that be at the hearing or is that -- would that
14 be --

15 MS. WECKERLY: At the hearing, yeah, because they know -- you
16 know, the experts know about it. Now, with respect to what Mr. Yanez just
17 argued he argued it from what's in the DSM-5 and what's in the psychological
18 community. That's a little different than how -- the rigor that is applied by courts
19 and -- as to whether or not to apply it in a particular case, and certainly there's a
20 lot of aspects to the Flynn Effect as applied to each individual defendant that
21 make it -- that kind of make it more or less relevant in terms of their testing
22 results.

23 So for this Court to make a decision now without hearing any
24 testing (sic) about it or any testing about why it should apply to this particular
25 Defendant seems premature to me. At a minimum I would say the Court should

1 – obviously you can apply it if you decide after you hear the hearing but you're
2 not bound to apply it, many courts find it not persuasive and we've heard no
3 specific testimony, I mean as applied to this Defendant, why we should be
4 utilizing it.

5 MR. YANEZ: And, Judge, one –

6 THE COURT: I tend to agree with that, so go ahead.

7 MR. YANEZ: Well, one circuit and probably one of the most
8 important circuits where we fall under that has accepted the Flynn Effect is the
9 Ninth Circuit, so the Ninth Circuit does recognize it. Additionally the US Supreme
10 Court since it's –

11 THE COURT: There are some who maintain that the Flynn Effect
12 needs to be applied to the Ninth Circuit, but --

13 MR. YANEZ: Well, I have no comment on that, Judge. I fully
14 respect the Ninth Circuit. Additionally, Judge, the US Supreme Court and the
15 Nevada Supreme Court have both sided with authority -- since *Atkins* came down
16 through *Hall*, the most recent decision, has sided with authority the DSM-5 and
17 publications from the American Association of IDD. They have both recognized
18 that and both those sources accept and recognize the Flynn Effect.

19 THE COURT: I don't doubt that, but I do agree with Ms. Weckerly
20 that the -- in order to make the best decision on this, I mean and this is one that
21 hits the cutting edge of this -- of this whole area, I think the Court would be well
22 advised to hear the testimony at the hearing and make a determination at that
23 point, so it's not denied, it's simply deferred to -- or maybe it would be. You're
24 asking the Court to require the State to -- to produce something before trial or
25 simply to --

1 MR. YANEZ: No. Just –

2 THE COURT: -- not apply a certain argument at trial?

3 MR. YANEZ: No. Well, the Court – for the Court to apply the Flynn
4 Effect -- that at the end of the day it's Your Honor that makes the decision if we
5 have met our standard or our burden, so we were asking that the Court apply
6 that in making its decision.

7 THE COURT: I can only tell you that I will defer the ruling, then, on
8 that until the hearing. I'm not going to require the State to – to not introduce
9 evidence including evidence of the standard that they feel is relevant at the
10 hearing.

11 MR. YANEZ: Okay.

12 THE COURT: So we'll defer it to the hearing.

13 MR. YANEZ: The other two, Judge, and they're similar, are request
14 Number 4 and Number 5 in regards to adaptive behaviors and what we have to
15 show to meet our burden and the analysis the Court has to consider when it
16 comes to adaptive behaviors. On that issue our position is the DSM-5, all of the
17 medical/psychological literature shows that our burden is to show a deficit in one
18 of the three areas of adaptive functioning which is either conceptual, practical or
19 social, and I think – at least every expert that I've dealt with, all the literature I've
20 reviewed and then we've cited, all of them indicate that IDD is about limitations
21 and not necessarily strengths, that you might have a situation where a defendant
22 has a deficit in one of those three areas but also might have a strength.

23 At that point once we have met our burden of showing at least
24 one limitation in those – one of those three areas the fact that the Defendant has
25 a strength in one of the other ones doesn't cancel the deficit out. There's no

1 weighing or balancing of the two that the State – or that the Court is supposed to
2 engage in. It is simply once the def –

3 THE COURT: What is -- what is the authority you cited for that
4 interpretation?

5 MR. YANEZ: Well, the DSM-5 explicitly requires a deficit in only
6 one adaptive behavior. I'm not sure if we actually cited this case because the
7 State indicated in their opposition that we cited no case law. There is a Fifth
8 Circuit case, *Brumfield versus Cain*, for the record it's 808 F. 3d 1041, it's a Fifth
9 Circuit case from 2003.

10 THE COURT: Could you repeat that – repeat that case and cite
11 again?

12 MR. YANEZ: Sure. *Brumfield versus Cain*, C-a-i-n, it's 808 F. 3d
13 1041, and the specific pinpoint cite is Page 1060 going into Page 61. That case
14 is also authority that only deficits need to be considered, that you might have the
15 situation where a person has a strength and a deficit but as long as the deficit
16 has been proven that is sufficient.

17 The State points out a case or disagrees with a case that we
18 cited, *Lambert*, it's an Oklahoma case -- actually at this point I can't remember if
19 we cited it or the State cited it – that talked about the Oklahoma statute – it was
20 an Oklahoma statute requiring two deficits in one of the adaptive behaviors. That
21 case is before the *Hall* decision of the US Supreme Court and before the DSM-5
22 which is the current standard, so we're asking the Court when making its
23 decision in this case that it only look to see if the defense has provided a deficit in
24 one of those adaptive behaviors and if there's a strength that co-exists with that
25

1 deficit that doesn't cancel a deficit out or the Court doesn't have to engage in a
2 weighing, balancing of the two.

3 THE COURT: If it's still an open question in Nevada at least why
4 would the Court not wait to hear the evidence and argument at the hearing?

5 MR. YANEZ: Well, an open question in that the Supreme Court has
6 never addressed it directly I understand, but indirectly I think they have. If the
7 Nevada Supreme Court has pointed with authority the requirements of the DSM-
8 5 and the DSM-5 only requires one deficit irrespective of there being strengths, I
9 think we can conclude, reasonably conclude that the Nevada Supreme Court
10 would be in agreement with the DSM-5.

11 THE COURT: Well, they may well be but I think – I think given the
12 fact that – the Court would be making a decision that will go up on appeal no
13 doubt which it would be either way, and the Supreme Court always seems to
14 favor really going in depth and looking at an issue only if there's been a full
15 factual record in the Court below, I don't know why the Supreme Court would
16 favor the Court making a decision on that in a bit of a vacuum. I understand from
17 your argument that you would say, well, of course it can. All you have to do is
18 say the DSM-5 rules and that you don't have to have – you don't have to have
19 anything other than the DSM-5.

20 MR. YANEZ: And, Judge, I want to make sure my position is clear.
21 I'm not arguing that the State's not entitled to challenge whatever deficits we
22 bring up. They're fully entitled to explore that and challenge that. My position is
23 if we show a deficit in a certain adaptive behavior but the State points out, well,
24 he had a strength in another adaptive behavior what the medical literature
25 research shows is the deficit itself is sufficient – if you meet the other prongs

1 sufficient in itself to declare someone IDD, that a court or a medical professional
2 is not to engage in balancing which one is stronger, which one is weaker, so I'm
3 not trying to argue that the State's hands are tied and they can't challenge what
4 we claim are deficits, I'm saying if they point to something else that's a strength
5 as long as we have proven to the Court satisfaction of preponderance of
6 evidence, that we have met that, then the Court can reasonably make that
7 finding.

8 THE COURT: Okay. I maintain the viewpoint that the best way to
9 answer that question is at the hearing after hearing the evidence and the
10 argument, so it will be deferred to the IDD hearing. Where does that leave us?

11 MR. YANEZ: I think the last one, Judge, is the ruling on the scope
12 and conditions of the intellectual disability evaluation by the State's expert which,
13 again, for the record the State did not have opposition to three of the five
14 requests that we had. According to my calculation, our Request Number 1,
15 Number 2 and Number 4 the State had no opposition to those and I would ask
16 that that be made an order of the Court.

17 THE COURT: Is that a correct statement?

18 MS. WECKERLY: Yes. 1, 2 and 4. That's correct.

19 THE COURT: 1, 2 and 4.

20 MR. YANEZ: And then as to Number 3, Your Honor already ruled
21 on that, that was the one that I argued in light of the Court's ruling on the con -
22 as applied the constitutionality of 174.098(4), that the Court would allow Number
23 3, so I think that issue has been resolved.

24 THE COURT: Okay.
25

1 MR. YANEZ: And that leaves Number 5 where our request is that
2 the State's evaluation either be observed by one of the attorneys or – and/or our
3 retained expert or that at a minimum it be videotaped, and I did read through the
4 State's opposition and they did provide some reports and studies that had been
5 conducted, one of which I think is the State's expert in regards to this being
6 disfavored, it's not categorically not allowed, it is just disfavored, however, there
7 is an exception which the literature points out and which I think is applicable here
8 in this situation, and I'm reading from the *Committee on Psychological Tests and*
9 *Assessment*.

10 It's a *Statement on Third Party Observers in Psychological*
11 *Testing and Assessment: A Framework for Decision Making* which was attached
12 to the State's opposition, and I'm just going to briefly quote the section that I think
13 allows in this case for either an in person evaluation or a less intrusive
14 videotaping of the evaluation.

15 On that first page of the last two sentences it states, however,
16 in some cases the presence of a third party may help develop and sustain
17 rapport in order to facilitate validity. Examples of such cases include the use of
18 sign or voice language interpreters or – I'm sorry, an assistant or aid to support
19 physical accessibility or the inclusion of a caregiver for an examinee whose
20 ability to perform may be significantly impaired when the examinee is separated
21 from the caregiver.

22 In this case, Judge, as Your Honor can see our client has had
23 issues with his vision for several years now. That is why he wears those glasses
24 here before Your Honor. He is blind in one eye and very close to blind in the
25 other eye. He has been receiving treatment for glaucoma to salvage whatever

1 vision he has left in that eye, so physically there is an impairment here that I think
2 based on that limitation should be reasonable basis for the Court to allow either
3 video observation or in person observation.

4 That same article goes on to state on Page 2, another example
5 is the case of an immigrant from a substantially different culture who may not feel
6 comfortable with one-on-one testing. Mr. Ramos is from the Federal District of
7 Mexico, from Mexico City, he is a primarily Spanish speaker with limited English,
8 these are all exceptions that are noted in the literature provided by the State
9 itself, so if the Court is not inclined to allow one of the attorneys or our expert to
10 sit in, a less intrusive means would be for the evaluation by the State to be
11 videotaped. I don't see how that would be that intrusive in this case, and based
12 on these two facts, Judge, about his vision, about his culture and his primary
13 language, which is supported by the literature, I'd ask the Court to allow one of
14 those two in this case.

15 THE COURT: In this case I am inclined to this point, so you can see
16 what you have to talk me out of –

17 MS. WECKERLY: Okay. Sure.

18 THE COURT: I'm inclined to allow the video.

19 MS. WECKERLY: The – we actually specifically selected the expert
20 we selected because she's fluent in Spanish and has conducted evaluations of
21 this type on people who are exclusively Spanish speakers, and, you know, there
22 are no wide range of people who can do that, she's done that successfully in
23 other cases in the Eighth Judicial District Court, so I think that reason is pretty
24 much eliminated.

1 With regard to his vision, I fail to see how videotaping it at all
2 compensates or helps him in the test taking process in terms of addressing a
3 deficit in vision, and our expert did supply us with the attachments to the motion
4 and certainly this Court has the discretion, but because we went to the extent of
5 specifically getting an expert who would be able to – who is completely fluent and
6 would be able to administer this test those concerns as raised in that article
7 aren't present in this case, and while I do recognize the Court has the discretion
8 to do that most of – most experts agree that any intrusion tends to have some
9 effect, I mean maybe not a complete invalidation but to get the most accurate
10 results there shouldn't be a third party present.

11 This is obviously, I don't have to tell the Court, a hugely
12 important issue to both sides, and I think we want the best results we can get and
13 those should be under the conditions the experts tell us are the best – are the
14 best conditions especially because none of those concerns raised by Mr. Yanez
15 are present.

16 MR. YANEZ: Let me address, Judge, because I think it's very
17 important and I think not everyone might realize this if they're not from a Spanish
18 culture when it comes to linguistics and culture, I'm Spanish speaking, my family
19 is from Argentina, Ms. Maningo's family is from Cuba, she's Cuban descent and
20 our client is from Mexico. Although we all speak Spanish there are huge
21 differences not only when it comes to words but also when it comes to culture.
22 I'm not saying one is better than the other but it's very different.

23 THE COURT: I am – I am completely aware of that because my
24 wife spent two years in Argentina, I spent two years in Mexico and I spoke to
25 people who came from Cuba. I can't say I understood them exactly, they speak

1 like a machine gun and my wife from Argentina has very peculiar vocabulary.
2 I've taken her to Mexico and she didn't even understand some of the basic signs
3 like groceries, abarrotes, she doesn't -- that's not her word from -- that she
4 learned in Argentina, so I am aware of the difference in linguistics that different
5 cultures produce even in the ostensibly same language, and not so much
6 because of that but because I think that it is important to provide the best record
7 that we can, assuming this goes to the Supreme Court, I am going to order that it
8 be videoed.

9 What I will do in connection with that is order that the State,
10 say, five days before the exam either demonstrate or describe -- or describe to
11 the defense how that will be done, in other words, it gives you the best discretion
12 to do it in the least intrusive way or if you want you can simply say to the defense
13 you do it. I mean it's your option.

14 MS. WECKERLY: Okay.

15 THE COURT: Do you think that you would set that up yourself or --

16 MS. WECKERLY: We'll have to set it up through the jail.

17 THE COURT: I'm sorry?

18 MS. WECKERLY: He's in custody. It has to be through the jail --

19 THE COURT: Right. But I mean would you --

20 MS. WECKERLY: -- so that is a little bit -- I've never done it that
21 way. I've done a lot of these. I'll have to ask them how we go about doing that.

22 THE COURT: Okay. All right.

23 MR. YANEZ: And just for clarification, I'm not sure if the State can
24 answer this because it looks like the State has to contact the jail, would this be a
25

1 videotape and then we get a disc and we review it later or like a live stream, we
2 look at it while it's being done?

3 MS. WECKERLY: There's no live feed from the jail I don't think.

4 THE COURT: It would be some form of – it would probably be on a
5 CD I assume.

6 MS. WECKERLY: Yeah. I don't know what they can accommodate.
7 I'll have to ask about that.

8 THE COURT: All right. I do want, though, for there to be a good
9 record of that, but besides other things for the issue that was just raised about
10 whether or not you get into a linguistics problem even though they speak
11 ostensibly the same language, any idea where your expert picked up Spanish?

12 MS. WECKERLY: I think – I think she is Mexican American.

13 THE COURT: From Mexico. Okay.

14 MS. WECKERLY: We may be in luck.

15 THE COURT: That should be – it shouldn't really be any problem,
16 then.

17 MS. WECKERLY: I don't think so. She's – she's done this before
18 with people from Mexico, so –

19 THE COURT: Yeah. All right. Anything else?

20 MR. YANEZ: I think that's it. You want me to do an order on all the
21 motions, Judge?

22 THE COURT: Would you please, yes.

23 MR. YANEZ: Okay.

24 THE COURT: All right.

25 MS. MANINGO: Thank you very much, Your Honor.

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THE COURT: Thank you.

(Whereupon, the proceedings concluded.)

* * * * *

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



LISA A. LIZOTTE
Court Recorder



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 GUSTAVO RAMOS,

12 Defendant.

} CASE NO. C-10-269839-1

} DEPT. IX
}
}
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13 ***BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE***

14
15 ***TUESDAY, AUGUST 29, 2017***
16 ***TRANSCRIPT OF PROCEEDINGS***
STATUS CHECK: ATKINS HEARING/TRIAL HEARING

17 **APPEARANCES:**

18 For the State:

PAMELA WECKERLY, ESQ.
Deputy District Attorney

19
20 For the Defendant:

ABEL YANEZ, ESQ.
IVETTE MANINGO, ESQ.

21
22 Also Present:

RICK LUCCI
Mexican Legal Assistance Program

23
24 Also Present:

MARIA PETERS
Court Certified Interpreter - Spanish

25
RECORDED BY: YVETTE SISON, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, August 29, 2017 at 10:14 a.m.

2
3 THE COURT: State of Nevada versus Gustavo Ramos. Status check Atkins
4 hearing, etcetera. You can be seated. The record should reflect the Defendant is
5 present in custody. He has the services of the court certified interpreter. Ms.
6 Interpreter could you state your appearance for the record please.

7 THE COURT CERTIFIED INTERPRETER: Maria Peters.

8 THE COURT: Thank you.

9 THE COURT: Why is he standing up?

10 MS. MANINGO: I asked him to stand, Your Honor.

11 THE COURT: Okay. Can he move to the middle and then everyone can sit
12 down? Can they just shimmy over and –

13 THE CORRECTIONS OFFICER: Yes, just slide over.

14 THE COURT: Slide over one and sit down. Thank you. Okay, this is the time
15 set for whatever you want to address.

16 MR. YANEZ: Do you want appearances, Your Honor. I don't think we've
17 given appearances.

18 THE COURT: Go ahead.

19 MS. WECKERLY: Pam Weckerly on behalf of the State, Your Honor.

20 MR. YANEZ: Abel Yanez and Ivette Maningo on behalf of Mr. Ramos.

21 MR. LUCCI: Your Honor, Rick Lucci on behalf of the Mexican [indiscernible]
22 Legal Assistance Program, appearing for the Government of Mexico.

23 MS. WECKERLY: Your Honor, this is just on – as the Court's aware, I think
24 the Court was going to review the record with regard to a specific issue related to an
25 Atkins hearing.

1 THE COURT: Yes.

2 MS. WECKERLY: The Defense filed a motion requesting several conditions
3 on the State's testing. We appeared in front of Judge Cory, and he did order that
4 they could be present and/or videotaped, the administration of our testing by our
5 expert.

6 In addition, he said that we were required to disclose the tests our
7 expert intended to administer to the Defendant.

8 We actually had a date set. Our expert was traveling down from Reno,
9 and I disclosed to Defense Counsel the tests that she planned to administer. They
10 had an objection to that. The order from Judge Cory though didn't really address
11 whether – what that would be – like if they had an objection because there really is –
12 I don't believe there's any law in it. But in any event, I don't believe that the order of
13 Judge Cory addressed that, so now we're before this Court regarding this conflict.
14 They object to two of the three tests. One of them that they objected to, the
15 objection was it wasn't the most recent version. Obviously we'll – the expert has
16 agreed to administer the most recent version of that test. Regarding the other two
17 tests, the Defense has objections to those. The State's position is that all can be
18 addressed on cross examination, and there's no legal authority for that, but that's
19 sort of where we are right now.

20 THE COURT: Okay. Well, before you address that, I'm going to go through
21 what I've reviewed.

22 I reviewed motion to declare Defendant intellectually disabled and
23 request for evidentiary hearing, pursuant to NRS 174.098.

24 I've reviewed the motion for ruling on the applicable standards for
25 determining whether the Defendant is intellectually disabled in light of Hall v. Florida,

1 and State's opposition to that motion, and an order entered by Judge Cory.

2 I've reviewed a motion to declare 174.098 (4) unconstitutional in the
3 State's Opposition.

4 I've reviewed motion for ruling on the scope and conditions of the
5 intellectual disability evaluation by the State's expert, the opposition, and the order
6 that we're talking about.

7 I've reviewed March 31, 2017 transcript from Judge Cory's hearing at
8 9:46 a.m.

9 And I've reviewed Defendant's objection to State's expert testing,
10 position to that, and the reply.

11 So if you have – so I'm prepared to hear whatever you want to argue on
12 your objection to the State's expert testing. I think we're, you know – my view is
13 discovery and testing is one thing, admissibility and/or impact on the opinion is
14 another, two different things really in my view.

15 MR. YANEZ: I don't know if the – do you have anything else, Your Honor?

16 THE COURT: Nope, that's it.

17 MR. YANEZ: Okay. And our position is, Judge, the testing that the State's
18 going to administer has to be both pursuant to current medical standards as
19 indicated by the U.S. Supreme Court in Hall v. Florida and Moore v. Texas. It also
20 has to be relevant to the issue of intellectual disability, which is the black and white
21 language of the statute. The issue to be addressed is intellectual disability.

22 Our position besides the WAIS-IV which the State now has agreed
23 they're going to administer that one, that's a non-issue.

24 The ABAS is not, in today's current medical standard, is not
25 appropriate. That is self-reporting that is done by the actual person being tested.

1 The medical literature out there, the current medical standards, all indicate that that
2 is an unreliable assessment, that people in the position of Mr. Ramos tend to
3 downplay their function when it comes to adaptive behaviors and give more of a
4 positive light. The proper assessment should be done with third-party informants.
5 So based on that, we don't believe the ABAS is appropriate under current medical
6 standards.

7 As to the other tests that we're objecting, Judge, the SIRS, which is a
8 malingering test for psychiatric issues. We're not here dealing with psychiatric
9 issues. We are here dealing with the issue of intellectual disability.

10 The literature, the medical field to the psychiatric field all are in
11 agreement that other illnesses or other disabilities, even psychiatric issues can co-
12 exist with intellectual disability. The whole point of that exam is to determine
13 whether there's malingering and psychiatric issues, not to determine anything
14 related to intellectual disability, so it's completely irrelevant.

15 So based on those arguments, Judge, we're objecting to those two
16 tests. We don't feel they're appropriate under U.S. Supreme Court Law and the
17 statute as written here in Nevada.

18 MS. WECKERLY: So, I've never had a motion like this granted, except for by
19 Judge Cory. I could see the relevance of a motion like this if the State was
20 proposing to administer non-scientific, non-professionally recognized, or tests that
21 weren't even normed within the professional community; but that's not the case
22 here. These are tests that are normed, are professionally recognized.

23 As the Court is aware, once the Defense administers tests, the State's
24 expert shouldn't be, for test validity, administering identical tests you know, within a
25 6-month period; so that limits the number of tests.

1 But more importantly, in this setting, this is their motion, their burden,
2 their request to limit the range of punishments that can be imposed on this particular
3 Defendant, and nothing in the statute suggest that they have the authority to limit
4 what test are expert chooses to administer. Obviously, when the Court conducts the
5 hearing, the Court can attach any weight or admissibility standards or any relevance
6 the Court deems appropriate to determine whether or not the State's expert used a
7 test that the Court considers applicable for the Atkins inquiry. All of that can be
8 addressed on cross examination.

9 But, were the Defense able to reject any test that the State's expert
10 chooses to administer in every single case where there's an Atkin's hearing, this
11 could go on forever. They could keep rejecting tests. They could limit what test we
12 administer down to what they've already administered, and that's not really an
13 appropriate standard, and that's not provided for in the statute, and I don't think the
14 statute contemplates having a mini hearing on the State's expert testing prior to the
15 hearing itself.

16 The Court can hear what tests were administered. Our expert is
17 subject to cross examination. If our expert can't persuade the Court that the
18 particular tests were relevant or appropriate for an Atkins inquiry, the Court is free to
19 reject the testimony in totality, but there's nothing in the statute that dictates or that –
20 I guess provides that they can dictate what test we choose to administer to a
21 Defendant who is making this type of claim; and so the State's position is once we
22 disclose what we intend, which I'm not even sure why that's relevant, but assuming
23 that order is appropriate, we disclose professionally normed recognized tests, and
24 that should be the end of the inquiry until we get to cross examination.

25 MR. YANEZ: And Judge, the State is not entitled to a fishing expedition.

1 They can't give any examination under the sun even though it's been normed and
2 it's been tested. I disagree strongly with the claim that the statute doesn't provide or
3 doesn't address the issue. It does. The language is the State will do an evaluation
4 on an examination "on the issue of whether the Defendant is intellectually disabled."

5 I haven't heard anything from the State on how a test of malingering for
6 psychiatric issues is going to determine whether or not Mr. Ramos is intellectually
7 disabled. And also, we have to remember, not just the statute but the frame work
8 that the U.S. Supreme Court has provided us of current medical standards; it's a
9 case that was decided just this year, four, and three years ago in the Florida case. It
10 has to be under current medical standards, and I haven't heard anything how a test,
11 the ABAS, which has been basically shoved aside in the medical and psychiatric
12 community as reliable – how it is reliable in this case. They haven't provided any
13 authority indicating that self-reporting from someone who's been diagnosed mental
14 – intellectually – mildly intellectually disabled, how that is a proper examination.

15 The American Association of Intellectual and Developmental Disability,
16 all of them indicate that that is not a reliable exam, and under U.S. Supreme Court
17 case law, it can't be administered.

18 THE COURT: I agree with the State's position. The objection is overruled.
19 You're free to take up a writ. State, I need you to prepare an order. I'm not going to
20 have a pre-hearing to determine what I can determine during the hearing, which is
21 the test is of, respectfully to you, I can determine the test is of zero value. I can
22 determine that it infects the opinion, and you run the risk of that. So I hope, you
23 know, you're sure that your expert thinks this is a really important test, because
24 quite frankly, if he were to opine, and there's no way to call out what was relied up,
25 properly or improperly until I do the evidentiary hearing, you know, you take that risk,

1 I guess.

2 MS. WECKERLY: Sure.

3 THE COURT: But, at this point, I decline to limit the testing mechanisms that
4 the State can engage in because it's an evidentiary hearing in front of me, where all
5 of these matters can be vetted and if, you know, you seek a reasonable stay, I'll give
6 you one; not forever, but otherwise, then we're going to go forward with the testing.
7 So – and we'll have this hearing, and I'll make a determination after I hear testimony
8 from this expert, under oath, about the literature, your expert, and why it is that their
9 view is different, and then I can make a ruling.

10 So what, if any, request for a stay do you have? Or do you won't to
11 consult and let me know – or put it back – we'll just move in the ordinary course, and
12 then if you request a stay, you can put it on calendar. What would you prefer?

13 MR. YANEZ: That would be our preference, Judge. Let's just move forward.
14 If we think a stay is appropriate, we'll bring it to the Court and the State's attention.

15 THE COURT: Okay. Then the – I don't know how we're going to deem it –
16 objection is denied or overruled. Based upon the review of all of these matters and
17 – you know, I'm not touching the law of the case, I mean I appreciate you dispute
18 Judge Cory's previous order, but that's the law of the case, and I'm going to follow it,
19 and you're going to follow it. We're all going to follow it.

20 MS. WECKERLY: So, I think we probably need to set the hearing and if they
21 – the Defense decides to seek a stay maybe they could put it on calendar.

22 MR. YANEZ: The only thing – or the question I had is I'm not sure when –

23 THE COURT: I would prefer the reports get exchanged first, and then we can
24 set the hearing.

25 MS. WECKERLY: Sure, that's fine.

1 MR. YANEZ: Right. That would be our preference too.

2 MS. WECKERLY: Okay.

3 THE COURT: The other thing is, the order that you prepare evidencing this
4 ruling, if you could run it by counsel as to form and content. I guess, you know,
5 there's a difference between allowing the test to go forward versus accepting the
6 test and the results, and all those things. That's still pending –

7 MS. WECKERLY: Absolutely.

8 THE COURT: -- in the hearing. Okay. Just so we're clear. Okay.

9 MS. WECKERLY: Wait it's just – yeah – I mean we just didn't want to go
10 through it if – because of the –

11 THE COURT: Look, I'm not having an evidentiary hearing on every single
12 test before it's granted or denied, and then you know, you run the risk though if you
13 choose to do a salad bowl approach of all the ingredients in every possible test that
14 if I agree with the Defense's position that it would be excluded and it might affect the
15 opinion.

16 MS. WECKERLY: Sure.

17 MR. YANEZ: I'm not sure when the State was proposing to have their expert
18 test Mr. Ramos. I don't know if a status check in 30 or 45 days is appropriate.

19 MS. WECKERLY: I'll have to contact the expert today because I didn't know
20 the outcome of this ruling, and then I can inform Defense Counsel and if – hopefully
21 we'll arrive at a date where they're available.

22 THE COURT: Well here's what I would propose then. I suggest we do a
23 status check Atkins hearing – setting Atkins hearing, status check evaluation in 30
24 days; not that you'll have it done, but in 30 days you'll know, you know, we're
25 seeking a stay, we're going to be done in a week. You'll have more information

1 okay.

2 THE CLERK: September 26 at 9 a.m.

3 MR. YANEZ: Court's indulgence. Judge, we actually might be – we're
4 probably going to be unavailable that week. Can we do the following week if
5 possible?

6 THE COURT: Sure.

7 THE CLERK: October 3rd at 9 a.m.

8 THE COURT: That work?

9 MS. MANINGO: I just set a mitigation trip; I just want to make sure it doesn't
10 conflict with that.

11 THE COURT: What about the 5th? That's a Thursday.

12 MS. MANINGO: October 5th –

13 THE COURT: Would be better?

14 MS. MANINGO: -- would be better, Judge.

15 THE COURT: Okay. October 5th. Does that work?

16 MS. MANINGO: Yes.

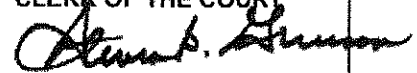
17 MS. WECKERLY: Yes. Sorry, yes.

18 MR. YANEZ: Thank you.

19 [Proceedings concluded at 10:31 a.m.]

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4 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video
5 proceedings in the above-entitled case to the best of my ability.
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8 Yvette G. Sison
9 Court Recorder/Transcriber
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1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 GUSTAVO RAMOS,

12 Defendant.

CASE NO. C-10-269839-1

DEPT. IX

13
14 ***BEFORE THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT COURT JUDGE***

15 ***TUESDAY, SEPTEMBER 26, 2017***
16 ***TRANSCRIPT OF PROCEEDINGS***
DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS

17 **APPEARANCES:**

18
19 For the State:

PAMELA WECKERLY, ESQ.
Deputy District Attorney

20
21 For the Defendant:

ABEL YANEZ, ESQ.
LANCE MANINGO, ESQ.

22
23 Also Present:

YUL HASSMAN
Court Certified Interpreter - Spanish

24
25 **RECORDED BY: PATTI SLATTERY, COURT RECORDER**

1 Las Vegas, Nevada, Tuesday, September 26, 2017 at 9:53 a.m.

2
3 THE COURT: State of Nevada versus Gustavo Ramos, C269839-1.

4 MS. WECKERLY: Good morning, Your Honor, Pam Weckerly on behalf of
5 the State.

6 MR. YANEZ: Good morning, Judge, Abel Yanez; and Lance Maningo is also
7 present. He's filling in for Ivette Maningo, so we can proceed forward.

8 THE COURT: Okay. The record should reflect that the Defendant is present
9 in custody and he has the services of the Court Certified Interpreter. Mr. Interpreter,
10 could you state your appearance again?

11 COURT CERTIFIED INTERPRETER: Yul Hassman, Court Interpreter.

12 THE COURT: All right. This is on for Defendant's motion for stay of
13 proceedings. I have reviewed a motion, an opposition, and a reply. Was there
14 anything separately filed that I did not list and should have?

15 MR. YANEZ: There was, Judge. Just briefly, I forgot to attach the exhibits to
16 my reply, so I submitted it under a separate filing. It was just the order from Judge
17 Cory denying our motion to declare the statute unconstitutional and also a transcript
18 of the hearing, which I think Your Honor already had an opportunity to review
19 previously when you were coming up to speed on the case.

20 THE COURT: And is the writ for his decision, mine, or both?

21 MR. YANEZ: No, it's for your decision based on our motion to prevent the
22 State from administering the two tests that they believe they have a right to
23 administer, so it's – our writ would be based on that denial.

24 THE COURT: Okay. Did you have anything you wish to add to your motion
25 and reply?

1 MR. YANEZ: No, don't want to re-argue or re-state the same things, Judge,
2 unless Your Honor has any questions. I think I laid it out in my reply why this is such
3 an important issue, and respond to the State's argument that this case is six years
4 old, and it's time consuming. So, I think I addressed that. So, unless Your Honor
5 has questions, I'm going to submit it.

6 THE COURT: Do you have anything else to add?

7 MS. WECKERLY: No.

8 THE COURT: All right. I'm denying the motion for stay for a few reasons.
9 Number one, I appreciate that this is important. Everything in this case is important
10 in light of the magnitude of the penalty sought. I just don't happen to agree with your
11 position. Quite frankly, I have a feeling – and I'm going to set the trial out far
12 enough, that if you have begun the process of working on the stay, you can ask the
13 Supreme Court, and perhaps they'll disagree with me and give you argument and
14 those kinds of things, but I'm going to set this trial out, you know, 2018 at some
15 point, and you'll have time to seek a stay from them. I'm not rushing you. If they
16 agree with your position or think there's some meat on the bone of that argument,
17 I'm sure they will stay me.

18 So, I'm denying the motion because I'm comfortable with my ruling. I
19 don't think there's a probability of success on the merits of the writ, but I'm going to
20 set the trial out a bit because I know you're going to be contemporaneously working
21 on a writ, and trying to get ready for trial. What timeframe would you suggest to me
22 that would be?

23 MR. YANEZ: Well, what I would suggest –

24 THE COURT: Including your trial schedules, your writ, and getting ready for
25 trial.

1 MR. YANEZ: Here's what I would suggest, since Ivette is not present, I think
2 we have a status check date next week or in two weeks. That status check date
3 was going to be to set the evidentiary hearing on the Atkins issue. What I would
4 ask, if we can – on that date –

5 THE COURT: Sure.

6 MR. YANEZ: Ms. Maningo will be here, and we can set the trial, and we'll see
7 where we're at with the stay with the Supreme Court at that point as well.

8 THE COURT: State, could you prepare an order. I mean, it's not just the
9 delay – I mean – there's different reasons for the delay that weigh less on this ruling
10 than am comfortable that there's not going to be a probability on the merits, that I'm
11 setting the trial out far enough for them to seek a stay for the Supreme Court in the
12 event they disagree or want to have oral argument, and put that in an order.

13 MS. WECKERLY: Yes, Your Honor --

14 THE COURT: Okay; and can you run it by counsel before, you know, sign off
15 as to form and content counsel for the –

16 MR. YANEZ: Yes.

17 THE COURT: One of you.

18 MR. YANEZ: Yes.

19 MS. WECKERLY: -- I will – previously, Judge Cory had ordered that the
20 Defense could be present while our expert was administering the test and that
21 ordered hasn't been disturbed.

22 My expert had planned on coming down here at the end of October,
23 then they filed the stay, so I just want to make sure that that testing can still go
24 forward.

25 THE COURT: Here's what I would ask, I'm denying the stay. I would ask you

1 to reschedule that appointment for the month of November; give them an addition –
2 at least 30 days more for them to seek a stay from the Supreme Court. I think that
3 is a reasonable accommodation. You know, now they've got to do the stay and – I
4 mean prepare the writ, get that going, and so it kind of loses its ability – they lose
5 their ability to ask for a stay from the Supreme Court that I didn't give down here, if
6 we don't give them a little wiggle room. So I would ask you to reschedule that; and
7 that gives you enough time to ask them.

8 MR. YANEZ: We appreciate that. Thank you.

9 THE COURT: I mean that's fair. And then when you come back October 5th,
10 or I can even push it out a little bit more for resetting of trial, then presumably, you
11 might've talked to your person by then and have a couple dates that you could
12 propose.

13 MS. WECKERLY: That's fine. We probably shouldn't set the trial though until
14 we know the hearing date, in my thinking, because that would affect how long the
15 trial is.

16 MR. YANEZ: I guess if we come back from –

17 THE COURT: If it's two days or nine months, the trial, it doesn't really matter

18 –

19 MS. WECKERLY: Okay.

20 THE COURT: -- you just get the date. I don't pay attention to any of that. I
21 mean, I'm just being honest. It might matter for you all, and if you're asking me to
22 hold off on setting the trial until I set the hearing, I'll do that.

23 MR. YANEZ: Well, I think we come back on October 5th, that's the next status
24 check date. We might have a better idea. Hopefully, we'll have already proceeded
25 to the Supreme Court. We might have a better idea of where we're at with all these

1 issues. And so my suggestion –

2 THE COURT: In a week, in ten days? I mean, are you sure you don't want to
3 push it out to maybe the 12th?

4 MR. YANEZ: We can, whatever the Court's preference is.

5 THE COURT: Because she has to consult with her expert and get some
6 alternative dates in November.

7 MS. WECKERLY: Yeah, and she's not local so –

8 THE COURT: Or December, whatever. I mean, you know, I know it's –

9 MS. WECKERLY: -- I'm fine with the 5th or the 12th.

10 THE COURT: All right, let's do October 12th at 9. And the understanding is
11 what we're going to discuss is setting an evidentiary hearing, and your experts
12 availability for a later date, to allow them a little time to seek a stay, because I'm
13 denying their request for a stay here.

14 MS. WECKERLY: Okay.

15 THE COURT: So even if it's, you know, mid-November, it just gives them
16 some time to ask for a stay.

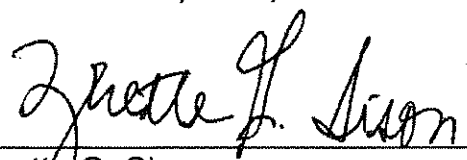
17 MR. YANEZ: Thank you, Judge.

18 THE COURT: Okay. Thank you.

19 [Proceedings concluded at 10:01 a.m.]
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Yvette G. Sison
Court Recorder/Transcriber

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 2017, I served the foregoing PETITIONER'S APPENDIX VOLUME I TO 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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100 N. Carson Street.
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Attorney for Real Party in Interest State of Nevada

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

Honorable Jennifer P. Togliatti
Eighth Judicial District Court, Department IX
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

/s/ Kathy Karstedt
Secretary for Nobles & Yanez, PLLC.