IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBER ERNESTO MARTINEZ GUZMAN,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,
Respondents,
and,
THE STATE OF NEVADA,
Real Party In Interest.
_____/

No.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

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PETITION

TO: The Chief Justice and Associate Justices of the Nevada Supreme Court:

Petitioner, Wilber Ernesto Martinez Guzman (Mr. Guzman), petitions this Court for a writ of mandamus directing the Honorable Connie J. Steinheimer, district judge of the Second Judicial District Court, to vacate that part of her order filed on December 5, 2020 that orders the following:

> If Mr. Guzman chooses to file a motion pursuant to NRS 174.098, he must do so no later than April 12, 2021 at 5 p.m., the State to respond within ten (10) days of service of the motion.
>
> If Mr. Guzman chooses to file a motion pursuant to NRS 174.098, that the State opposes, the State and Defense must be ready to hold an evidentiary Atkins hearing beginning on May 17, 2021 continuing through May 28, 2021.

2PA 322 (Order).[1] Trial is set to commence on September 20, 2021. *Id.*

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[1] The full title of the district court's order is "Order Addressing: (1) Motion to Correct Record and Strike State's Argument Regarding Dr. Puente's Work Methodology in Maricopa County Case Number CR2013-001614-001 Due to the Material Misrepresentation Presented in the State's Argument (D-28) and (2) Motion to Continue Trial for Investigation of Potential Atkins Motion (D-23)." In this Petition the order is identified as "Order."

QUESTION PRESENTED

NRS 174.098(1) allows a defendant "who is charged with murder of the first degree in a case in which the death penalty is sought" to "file a motion to declare that the defendant is intellectually disabled" at any time "not less than 10 days before the date set for trial." Here trial is set to commence on September 20, 2021 but the district court has set April 12, 2021 as the filing deadline for a defense motion to declare that the defendant is intellectually disabled under NRS 174.098. The question presented is: Whether, where trial is set to commence on September 20, 2021, did the district court manifestly abuse its discretion or otherwise commit legal error by setting April 12, 2021—a date that is five months prior to trial—as the filing deadline for a defense motion to declare that the defendant is intellectually disabled.

Stated more generally, the question presented is: Whether a district court may set a deadline for the filing of a motion under NRS 174.098(1) that is in contradiction to the statutorily prescribed filing deadline.

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ROUTING STATEMENT

The Nevada Supreme Court should retain and decide this writ petition because it arises out of a pending death penalty case, NRAP 17(a)(1), and it presents "a principal issue a question of first impression." NRAP 17(a)(10).

PROCEDURAL AND FACTUAL BACKGROUND

By an indictment filed in the Second Judicial District Court on March 13, 2019, Mr. Guzman is charged with ten felony counts. Four of those counts—Counts III, V, VII, and VIII—charge murder with the use of a deadly weapon, a violation of NRS 200.010, NRS 200.030, and NRS 193.165, a category A felony. 1PA 1-8 (Indictment). On March 14, 2019, the State filed a notice of intent to seek the death penalty. 1PA 9-14 (Notice of Intent to Seek Death Penalty). On March 19, 2019, the district court entered not guilty pleas on behalf of Mr. Guzman on each of the ten counts. Trial was set for April 6, 2020, but was reset to commence on August 31, 2020, at Mr. Guzman's request. 2PA at 295-96 (Order).[2]

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[2] The basis for the continuance was in part to allow the defense time to investigate a potential motion under NRS 174.098 and *Atkins v. Virginia*, 536 U.S. 304 (2002) (sometimes collectively referred to as

Subsequently, on March 13, 2020, Mr. Guzman filed a "Motion to Continue Due to Global Pandemic COVID-19 (D-22). 1PA 15-27 (Motion).[3] The State filed an opposition on March 19, 2020. 1PA 32-37 (Opposition to Motion to Continue Due to Global Pandemic Covid-19 (D-23)). Mr. Guzman's reply was filed on March 26, 2020. 1PA 28-43 (Reply to Opposition to Motion to Continue Due to Global Pandemic Covid-19 (D-23)). One predicate for Mr. Guzman's motion to continue the trial and a potential *Atkins* hearing date was that due to recently enacted international travel shutdowns related to the nascent coronavirus pandemic, his expert, Dr. Antonio Puentes, a board-certified neuropsychologist who is bilingual and familiar with Salvadoran culture, was stopped and held in an airport in San Salvador and prohibited from entering the country.[4] Dr. Puente was denied entry

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Atkins motion). See 1PA 16-18 (Motion to Continue Due to Global Pandemic COVID-19 (D-23)).

[3] Mr. Guzman's motion was corrected by erratum to reflect the correct defense-motion-series number ("D-23" in the place of "D-22"). 1PA 28-31 (Errata to Motion to Continue Due to Global Pandemic Covid-19 (D-22)).

[4] Mr. Guzman grew up in El Salvador and thus information concerning his formative years for purposes of adaptive functioning is located there. 1PA 21 (Motion) ("Mr. Guzman spent the entirety of his formative years in El Salvador. Virtually all of the witnesses that can provide information about his adaptive functioning prior to age 18 are in El

solely because he had recently traveled to Spain to attend a conference. 1PA 19-20 (Motion). A second basis for the motion was the pandemic's effect on the ability of the defense to collect mitigation evidence located in El Salvador. *Id.* at 16.

At a hearing[5] held on June 22, 2020 the district court vacated the trial date due to the courthouse shutdown in response to COVID-19. See 1JA 50-51 (Transcript of Proceedings: Oral Arguments/Motion to Continue) ("... I think we all are aware of the issues that we have got right now in the Second Judicial District Court in terms of jury trials ..."); and *Id.* at 63 ("There is no question in my mind this case cannot be tried to a jury on August 31st. That is not going to happen with this. In that regard, the jury trial is vacated and will be continued."). As to an anticipated *Atkins* motion hearing, the district court noted that no *Atkins* motion or motion under NRS 174.098 had yet been filed. See *Id.*

Salvador.").

[5] Due to COVID-19 driven emergency conditions that had caused the closure of the courthouse, the hearing took place by simultaneous audiovisual transmission under Nevada Supreme Court Rules Part IX-A(B). 1PA 46 (Transcript of Proceedings: Oral Arguments/Motion to Continue). The Second Judicial District Court continues to adjust to the coronavirus. See http://www.washoecourts.com (Court's website noting recent administrative order that vacates all civil and criminal jury trials through March 7, 2021). (Last visited on January 14, 2021.)

at 63 ("... there is no Atkins hearing scheduled, because I have no Atkins motion. And I need an Atkins motion in order to conduct an Atkins hearing."). The district court addressed the access to El Salvador concerns noting that none "of us can predict with any amount of certainty what is happening in El Salvador." *Id.* at 51. And the district court worried that travel to El Salvador might not be possible "until after an effective vaccine were created and disseminated and disseminated to a third world country." The district court opined this would be "two years or so." *Id.* at 54 and *Id.* ("I don't believe it is appropriate to wait two years to get testing."). The district court's concern seemed to be based on the possibility that the case would be continued "indefinitely." *Id.* at 63. After hearing argument, the district court concluded that more evidence was necessary. *Id.* at 64 ("... I need more evidence before I can actually make a decision as to what to do about compelling the defense to either conduct the investigation in the manner that is reasonably necessary and reasonably appropriate based upon what the experts tell me, or allow for an unending continuance."[6]).

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[6] As an aside, Mr. Guzman's motion for a continuance did not ask for an "indefinite" or "unending continuance." Instead, Mr. Guzman's motion was directed to vacating the then existing trial and potential hearing

Specifically, the district court said it

> want[ed] to hear from Dr. Puente why he cannot do anything via ZOOM. I want to hear from him why and which particular thing he would be unable to conduct given the pandemic that we are in. And then I am going to give the State an opportunity to put on evidence about why what Dr. Puente tells me, if he does tell me that, is not accurate. Why there is another expert somewhere that will tell me something different. And then what I will do is I will weigh the evidence that I receive and make a decision as to what is appropriate in the environment we are currently in.

Id. at 64.

As relevant here, during an evidentiary hearing held between July 27, 2020 and July 29, 2020, the district court heard the following:

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dates. 1PA 41 (Reply to Opposition to Motion to Continue Due to Global Pandemic Covid-19 (D-23)) ("The proper consideration is ensuring that Mr. Martinez Guzman is given the opportunity to present the most reliable evidence to the Court. A requirement that the case proceed forward, under any means necessary to maintain current deadlines is short sighted and invites reversible error."). Since the filing of the motion two things have occurred. First, vaccines to combat the coronaviruses have been developed and are now being disseminated. Second, El Salvador is now reopened. See 2PA 320-21 (Order) (noting that "as of September 19, 2020, the Government of El Salvador reopened the International Airport with enhanced health protocols."). Ostensibly, the district court's worry of an "unending continuance" has been obviated.

Dr. Antonio Puente testified to his experience conducting *Atkins* investigations, as well as to the type of information he is in search of when conducting such investigations.[7] 3PA 341-48, 350-54 (Transcript of Proceedings: Evidentiary Hearing). Dr. Puente explained that it is necessary to understand the defendant's diagnosis of intellectual deficiency because "[t]he stakes are high. The questions are huge." Prong 2 of the *Atkins* inquiry "demands in many ways even more exhaustive analysis of the [defendant] and their community prior to the age of eighteen." *Id.* at 348. In this case, the vast majority of the information needed to make a reliable *Atkins* determination is located in El Salvador. *Id.* at 349.[8]

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[7] For example, in terms of adaptive functioning Dr. Puente, in trying to get as assessment or an understanding of the life of the defendant prior to the age of eighteen, seeks social, historical, and cultural information from the defendant and from secondary sources such as family, friends, neighbors, classmates and institutions such as schools, churches, medical providers, military, and employment. 3PA 346-48 (Transcript of Proceedings: Evidentiary Hearing). In Dr. Puente's view "[t]he further we get away from face-to-face [contact] the more error in communication becomes." *Id.* at 372. "You want the real deal that stands up to science and stands up to any kind of legal challenge, then it is all face-to-face." *Id.* at 373.

[8] As noted, Dr. Puente had traveled to El Salvador prepared to conduct an *Atkins* investigation but was "unsuccessful in gaining entry into the country." 3PA 354, 354-56. With a vaccine, Dr. Puente was prepared to return to El Salvador and gather information. *Id.* at 375-76.

Dr. Puente explained why face-to-face interviewing was preferable to gathering data through electronic means, noting as an example the need to compare and contrast data. *Id.* at 358-64, *Id.* at 364 (noting that Prong 2 "is the most demanding of the prongs in terms of gathering multiple sources of information from multiple parties in multiple ways to develop a cohesive interpretation of the circumstances."); *Id.* 364-69 (discussing tests and current experiences with video platforms). Specific to this case Dr. Puente questioned the availability of the Internet in El Salvador and especially outside of San Salvador and noted that he had no knowledge of any neuropsychologists or doctor level psychologists in El Salvador. *Id.* at 369-70. Dr. Puente was not aware of any tele-testing or tele-investigations in death penalty cases. *Id.* at 374. On cross-examination Dr. Puente added that while he supported "the use of telehealth both for diagnostic and therapeutic purposes for healthcare," he did not "advocate for the use of telehealth testing for anything involving forensic or legal things." *Id.* at 410. On re-direct he stated further: "I emphasized a couple of time this afternoon that any complicated clinical cases I won't do by telehealth and I don't do any forensic cases by telehealth." *Id.* at 429. Dr. Puente

testified that it was "important to note that telehealth is one thing and forensic teletesting is an entirely different thing." *Id.* at 434.

Dr. Brian Leany, a clinical psychologist who has conducted evaluations concerning adaptive functioning and intellectual disability (but not in an *Atkins* context), testified to a multitude of problems or limitations occasioned by the use of telecommunication in the testing or evaluative process, generally; and in the context of cross-cultural communication. 3PA 446-71, 485. He also expressed concern over the validity and reliability of testing in the areas of cognitive assessment and intellectual functioning over ZOOM. *Id.* at 471-72. Dr. Leany testified that he had professional ethical concerns on the use of ZOOM in the *Atkins* context. *Id.* at 477-82. On cross-examination Dr. Leany testified that current references to a growth in "online therapy" "confuses the issues of therapy with assessment." He added, "I'm sure that there are many more people conducting therapy. I'm unaware of very many people conducting assessments online." *Id.* at 488. On redirect Dr. Leany explained the difference between therapy and assessments. See *Id.* at 495-96 (noting in part that therapy "is usually an ongoing process that occurs at regular intervals after a diagnosis has

been made." Conversely, an assessment is an evaluation of "criteria to make a diagnosis.").

The State presented Dr. Sergio Martinez, a licensed forensic psychologist, the "bulk" of whose work "has been conducting competency-to-stand-trial evaluations, [and] mental state at the time of the offense." Dr. Martinez added, "[t]he rest of my work has been with working for adult probation departments conducting psychological, psychosexual, and some of those evaluations also requiring the assessment of intellectual functioning and, obviously, *to a lesser degree*, conducting Atkins-type cases." 4JA 648-49, 658-59 (italics added). The cases that Dr. Martinez has testified on or conducted *Atkins* evaluations for "have been primarily for the prosecution." *Id.* at 660-61. Dr. Martinez agreed that in *Atkins* investigations there is a need to "obtain as much information from different sources as possible so that one can analyze the information that is gathered and determine whether, you now, how reliable is the information, how pertinent is the information, and whether there is consistency in particular areas addressing the three domains of adaptive behavior, the conceptual, social, and the practical aspects." *Id.* at 662. He agreed further that this

involved the collection of school records, comprehensive social history, family history, medical records, if available, and "any kind of records that may be available pertinent to the individual's developmental period." *Id.* at 662-63 and 669-71 (reiterating the need to get as much information possible regarding the developmental period from "past employers, supervisors, certainly even farther from teachers, parents, family members" because "in this type of [case] ... the stakes are high and especially family members will have some stakes at it."). Dr. Martinez likewise agreed that "ideally you would want to interview the informant face to face." *Id.* at 676.

Dr. Martinez, whose *Atkins* involvement has almost always been at the request of the prosecution, and whose duties involved (aside from interviewing the defendant) the review of documents and reports prepared or generated by the defense, *Id.* 698, 733-28, 730, 733-74[9]—and never as one who has conducted an investigation and participated from the very beginning of an adaptive functioning evaluation—nonetheless opined that if in-person interviews were not possible, one

[9] And who in 10 to 15 cases never found that the legal and medical definitions of intellectual disability had been met. 4JA 693-95.

could use the telephone or some other medium. *Id.* at 676-77.[10] But "you have to take it case by case and then try to get—use clinical judgment in assessing how reliable is the information, how does it coincide with some of the other information that is available from other informants." *Id.* at 687. Dr. Martinez was unaware of any scholarly articles endorsing the use of video conferencing in an *Atkins* investigation. 5PA 772. Dr. Martinez has never employed electronic methodology in a third world country. *Id.* at 784. Comparing his definition of an *Atkins* "best case scenario", *Id.* at 780-81, which did not include any of particular challenges presented in this case, *Id.* at 781-83, Dr. Martinez could only offer that "[e]very case has been challenging" and imagined that this case "would present challenges of its own as well." *Id.* at 783.

Other testimony included a mitigation specialist, Dana Cook, who discussed the parameters of *Atkins* Prong II-adaptive functioning investigations and best practices, 4PA 547-645, and two state witnesses who testified concerning Mr. Guzman's communication with family

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[10] Tellingly, Dr. Martinez commenting on his ZOOM testimony did not know how "the validity of this particular hearing is going to be assessed because we're doing via Zoom" and said it gave "an idea of what we look like and maybe even an idea of what kind of mood we may be in." 4JA 678.

while in custody, including an approximately 20-minute conversation with family members who were in El Salvador via I-Web and a smartphone connection. 5PA 786-869 (Deborah Moreno, Inmate Management Specialist, Washoe County Jail); *Id.* at 872-910 (Detective Stefanie Brady, Washoe County Sheriff's Office).

Following some post-hearing motion practice clarifying aspects of Dr. Puente's *Atkins* work done in an Arizona death penalty case[11], the district court, on December 5, 2020, entered an order setting trial in this matter to begin on September 20, 2021, and further ordering that *if* Mr. Guzman chooses to file a motion under NRS 178.098, "he must do so no later than April 12, 2021"—a date that is approximately five months before the trial date. 2PA 322 (Order).

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[11] Which included the correction of the State's assertion that Dr. Puente had, in response to an inability to travel to an area in Mexico to conduct *Atkins* investigations, "simply picked up a phone and spoke with an informant. He simply watched a video recording of an interview conducted by defense counsel." 2PA 288-89 (Response to State's Supplemental Exhibits to Opposition to Motion to Correct Record and Strike State's Argument Regarding Dr. Puente's Work Methodology in Maricopa County Case Number CR2013-001614-001 Due to the Material Misrepresentation Presented in the State's Argument (D-28)).

In reaching this result the district court concluded:

- "although the purpose of assessing whether Mr. Guzman is intellectually disabled is not for the purpose of providing educational services or treatment, the assessment is still medically diagnostic in natured." *Id.* at 317;
- "that the underlying standards for assessing and diagnosing someone with intellectual disability is the same without regard for the circumstances which precipitate the assessment. *Id.*;
- "the spectrum of potential limitations should not bar the finding that alternative methods exist and are available to further Mr. Guzman's Atkins investigation." *Id.* at 320; and,
- "alternative methods can be employed by the defense team." *Id.*

Though the district court recognized that in-person face-to-face interviews are preferable while conducting *Atkins* investigations into a defendant's intellectual disability, it nonetheless concluded that alternatives, *i.e.*, "technological advances that are being utilized around the world," were available and "since there is no legal requirement that the interviews and assessments of informants be in-person," it denied

Mr. Guzman's "request for"—in the words of the district court—"an indefinite continuance for the Atkins investigation." *Id.* at 321.

While appellate review of the merits of the district court's findings and conclusions as they relate to the use of alternative methods in an attempt to conduct a reliable and valid *Atkins* investigation (as allowed by NRS 174.098) into Mr. Guzman's intellectual disability may have to wait a direct appeal from a sentence of death, the district court's order setting the *timing* of the filing of a motion under NRS 174.098 is immediately reviewable under a writ of mandamus. See *Walker v. Second Judicial Dist. Court*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1196 (2020) (noting that "[t]he chief requisites of a petition to warrant the issuance of a [traditional] writ of mandamus are: (1) The petitioner must show a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.") (citation omitted, alterations in the original).

Because NRS 174.098(1) allows *the defendant* "who is charged with murder of the first degree in a case in which the death penalty is sought" to "file a motion to declare that the defendant is intellectually disabled" at any time "not less than 10 days before the date set for trial" the district court manifestly abused its discretion or otherwise committed legal error in setting April 12, 2021 as the filing deadline for a defense motion to declare that the defendant is intellectually disabled where trial is set to commence on September 20, 2021.

RELIEF SOUGHT

This Court should grant the Petition and issue a writ directing the district court to vacate that part of its order filed on December 5, 2020 that orders the following:

> If Mr. Guzman chooses to file a motion pursuant to NRS 174.098, he must do so no later than April 12, 2021 at 5 p.m., the State to respond within ten (10) days of service of the motion.
>
> If Mr. Guzman chooses to file a motion pursuant to NRS 174.098, that the State opposes, the State and Defense must be ready to hold an evidentiary Atkins hearing beginning on May 17, 2021 continuing through May 28, 2021.

DECLARATION OF JOHN REESE PETTY

I declare under penalty of perjury that the following assertions are true and correct.

1. I am an attorney duly licensed to practice law in the State of Nevada. I am a Chief Deputy Public Defender for Washoe County, and I am counsel of record for Wilber Ernesto Martinez Guzman, the Petitioner herein. The facts stated in this writ petition are within my knowledge as appellate counsel for Mr. Guzman.

2. Mr. Guzman is currently charged with felony offenses in a multi-count indictment returned by the Washoe County Grand Jury and filed in CR19-0447 on March 13, 2019. Counts III, V, VII, and VII of the indictment charge murder with the use of a deadly weapon.

3. The State has filed a notice of intent to seek the death penalty if Mr. Guzman is convicted of first-degree murder.

4. Mr. Guzman's defense team is investigating Mr. Guzman's formative years in El Salvador and has secured expert assistance in this investigation for purposes of a motion under NRS 174.098.

5. NRS 174.098(1) allows a defendant "who is charged with murder of the first degree in a case in which the death penalty is

sought" to "file a motion to declare that the defendant is intellectually disabled" at any time "not less than 10 days before the date set for trial."

6. Here the district court set trial to commence on September 20, 2021, and fixed April 12, 2021—a date that is five months prior to trial—as the filing deadline for a defense motion to declare that the defendant is intellectually disabled. The district court's order, which is in contradiction to the statute, constitutes a manifest abuse of discretion or legal error.

7. Mr. Guzman has no other plain, speedy and adequate remedy at law. There is no statutory right to appeal from an order improperly setting a hearing date that is outside that contemplated by NRS 174.098.

8. This writ petition is brought in good faith and not for delay or any other improper purpose.

DATED this 14th day of January 2021.

JOHN REESE PETTY

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

This court has original jurisdiction to issue a writ of mandamus. *Walker v. Second Judicial Dist. Court*, 476 P.3d at 1196 (noting that Article 6, Section 4 of the Nevada Constitution "grants this court authority to issue writs of *mandamus*[.]"); and *Id.* (adding that NRS 34.160 states "mandamus may issue 'to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal'").

Standards for Writ Relief

"[T]he chief requisites of a petition to warrant the issuance of a [traditional] writ of mandamus are: (1) The petitioner must show a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy." *Id.* (second alteration in the original, citation

omitted). Where the Court is "asked to direct its traditional powers of mandamus at a lower court or judicial officer, there is significant overlap between the first and second requirements." *Id.* (citation omitted). Generally, because mandamus is an extraordinary remedy, the Court "does not typically employ it where ordinary means, already afforded by law, permit the correction of alleged errors." *Id.* at 1197 (citation omitted). This Court however will issue a writ of mandamus where a petitioner presents legal issues of statewide importance requiring clarification and the decision will promote judicial economy and administration by assisting other jurists, parties, and lawyers. *Id.* at 1198-99.

Reasons for Granting the Writ

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the United States Supreme Court concluded that the execution of intellectually disabled criminals did not "measurably advance the deterrent or the retributive purpose of the death penalty" and held that "such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of [an intellectually disabled] offender." (internal quotation marks and citation omitted); see also

Moore v. Texas, 137 S. Ct. 1039, 1048 (2017) (*Moore I*) (noting that in *Atkins* the Court held that the Constitution "restrict[s] ... the State's power to take the life of" *any* intellectually disabled individual" and concluded that "[e]xecuting intellectually disabled individuals ... serves no penological purpose; runs up against a national consensus against the practice; and creates a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.") (ellipsis and italics in the original, citations omitted). But the Court left "to the State[s] the task of developing appropriate ways to enforce [this] constitutional restriction upon ... execution[s]." *Ybarra v. State*, 127 Nev. 47, 53, 247 P.3d 269, 273 (2011) (quoting *Atkins*, 536 U.S. at 317) (internal quotation marks omitted, alterations in the original). In Nevada, the Legislature "accomplished that task with the passage of NRS 174.098, which sets forth the procedure for raising [intellectual disability] claims in a capital case[.]" *Id.*

In relevant part NRS 174.098 provides:

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

> 2. If a defendant files a motion pursuant to this section, the court must:
>
> (a) Stay the proceedings pending a decision on the issue of intellectual disability; and
>
> (b) Hold a hearing within a reasonable time before the trial to determine whether the defendant is intellectually disabled.
>
> ...
>
> 6. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is intellectually disabled, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed pursuant to NRS 177.015.

Mr. Guzman is within that set of persons covered by NRS 174.098(1)

There is no question that Mr. Guzman fits within the set of persons covered by NRS 174.098(1): he has been charged with murder of the first degree and the State has filed its notice of intent to seek the death penalty if he is convicted of first-degree murder. Mr. Guzman has met the first prong of the *Atkins* inquiry. See 2PA 310 (Order) (noting that Dr. Martha Mahaffey "authored a report finding Guzman's GIA and FSIQ scores are two standard deviations below the mean, [and] asserted Mr. Guzman meets the first criteria for intellectual disability

pursuant to NRS 174.098."[12]) Further, he meets the third *Atkins* prong regarding onset before age 18. As such the statute affords him the right to file a motion "to declare that [he] is intellectually disabled" and, importantly, allows him to file such a motion at any time "not less than 10 days before the date set for trial." Presently there has been no *Atkins* motion filed. The statute vests discretion in the defendant whether to and when to file such a motion; it does not grant the district court the power to set a filing date for the filing of such a motion.

"When considering a writ of mandamus, [this Court] generally appl[ies] a manifest abuse of discretion standard[.]" *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 860, 221 P.3d 1240, 1248 (2009). "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (citations omitted, alteration in the original); *Gonzalez v. Eighth Judicial Dist. Court*, 129 Nev. 215, 217-18,

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[12] Dr. Mahaffey's report was filed under seal and is confidential. In a separate motion Petitioner is moving for an order from this Court directing the Clerk of the Second Judicial District Court to transmit Dr. Mahaffey's report to this Court for its review in consideration of this Petition.

298 P.3d 448, 450 (2013) (noting that a district court's failure to apply controlling legal authority is "a classic example of a manifest abuse of discretion that may be controlled through a writ of mandamus").

Here the district court, operating under a clearly erroneous interpretation of the statute or effecting a clearly erroneous application of the statute, set a deadline for the filing of an *Atkins* motion that it did not have the power to set. Thus, this Court should issue a writ of mandamus directing the district court to vacate that part of its order.

A writ will be an availing remedy

NRS 174.098(1)'s use of the word "may" vests discretion *in the defendant* to file a motion to declare that the defendant is intellectually disabled. It limits the exercise of that discretion only in so far as the motion must be filed "not less than 10 days before the date set for trial." The statute assigns to the defendant "the burden of proving by a preponderance of the evidence that the defendant is intellectually disabled." NRS 174.098(5)(b). "Intellectually disabled" means "significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period." NRS 174.098(7). In *Ybarra v. State*, 127

Nev. at 57-58, 247 P.3d at 276, the Nevada Supreme Court concluded that "the 'developmental period' referenced in NRS 174.098(7) is the period before a person reaches 18 years of age" and held that "subaverage intellectual functioning and adaptive behavior deficits must originate before 18 years of age to meet the definition of [intellectual disability] contemplated by NRS 174.098." The United States Supreme Court has said that the adaptive functioning inquiry must focus on "adaptive *deficits*." *Moore v. Texas*, 139 S. Ct. 666, 668-69 (2019) (*Moore II*) (internal quotation marks and citation omitted, italics in the original).

Because Mr. Guzman carries the burden of proving by a preponderance of the evidence that he is intellectually disabled, and because the vast majority of information concerning his formative years is located in El Salvador (he was born in El Salvador and came to the United States at age 17), and because if he successfully meets his burden "the court must ... strike the notice of intent to seek the death penalty," NRS 174.098(6), this Court must allow him the opportunity to investigate, collect, analyze, and marshal the best and most reliable evidence on his intellectual disability. *Cf. Hall v.* Florida, 572 U.S. 701,

704 (2014) (expressly rejecting as unconstitutional a Florida "rigid rule" that "creates an unacceptable risk that persons with intellectual disability will be executed"); and *State v. Gutierrez*, (unpublished *Order of Affirmance*, filed on December 4, 2020), 2020 WL 7183533 *2 ("[e]ven without a medical or forensic component to it, this type of evidence constitutes 'classic mitigation.' (citing *Robinson v. Schriro*, 595 F.3d 1086, 1110 (9th Cir. 2010) and *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) ("More than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system.")). And because Mr. Guzman bears the burden of proving his intellectual disability, this Court must allow Mr. Guzman his statutorily granted right to determine when to file his motion under NRS 174.098(1). Thus, the April 12, 2021 filing deadline arbitrarily set by the district court must be vacated and set aside. This Court should issue its mandate directing the district court to vacate the April 12, 2021 filing deadline.

Mr. Guzan is without any alterative legal remedy

The right to appeal is statutory. Where no court rule or statute provides for an appeal, no right to an appeal exists. See *Castillo v.*

State, 106 Nev. 349, 792 P2d 1133 (1990). No statute or court rule allows Mr. Guzman the right to appeal from the district court's order fixing the timing for the filing of a motion pursuant to NRS 174.098(1).

Even if this Court determines that Mr. Guzman has a remedy through an eventual direct appeal from a criminal judgment and imposition of a sentence of death, this Court should nonetheless exercise its discretion to entertain this writ petition because it involves either a misunderstanding or a misapplication of statutory authority and hence requires a clarification of law. See *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 4-5, 200 P.3d 509, 511 (2009) (where Court exercised discretion to consider merits of petition while acknowledging "that writ review is rarely appropriate when a petitioner has an adequate remedy at law through a direct appeal," but concluding "that writ review is appropriate here because this case involves important questions of law which require clarification and because public policy interests militate in favor of resolving these questions.") (citing *State of Nevada v. Justice Court*, 112 Nev. 803, 805 n.3, 919 P.2d 401, 402 n.3 (1996) (electing to entertain petition for writ of prohibition even though relief should have been sought first in district court "due to

the exigent circumstances presented and because this case presented an unsettled issue of statewide importance")); *cf. Walker v. Second Judicial Dist. Court*, 476 P.3d at 1198-99 (acknowledging that this Court "has alternatively granted mandamus relief where a petitioner presented legal issues of statewide importance requiring clarification, and our decision ... promote[d] judicial economy and administration by assisting other jurists, parties, and lawyers.") (internal quotation marks and citations omitted, alterations in the original).

CONCLUSION

NRS 174.098(1) affords a defendant facing the death penalty the opportunity to file a motion to declare that the defendant is intellectually disable so long as the motion is filed not less than 10 days before the start of trial. Mr. Guzman falls within the parameters of NRS 174.098(1) and has a legal right to invoke it.

Trial in this case is set to begin on September 20, 2021. Thus, under NRS 174.098(1), a motion to declare that he is intellectually disabled may be filed by Mr. Guzman no later than September 10, 2021.

The district court's order fixing April 12, 2021 as *the* filing deadline for Mr. Guzman's motion under NRS 174.098 violates the

plain language of the statute. Accordingly, this Court should issue a writ of mandamus directing the district court to vacate that part of its order filed on December 5, 2020.

Respectfully submitted this 14th day of January 2021.

JOHN L. ARRASCADA
Washoe County Public Defender

By: 
JOHN REESE PETTY
Chief Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This petition has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 5,807 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of January 2021.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of January 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows: Jennifer P. Noble, Chief Appellate Deputy and Marilee Cate, Appellate Deputy, Washoe County District Attorney's Office.

I certify that I served a copy of this document by e-mailing a true and correct copy thereof to:

Hon. Connie J. Steinheimer
Second Judicial District Court, Dept. 4

Christopher J. Hicks
Washoe County District Attorney

Mark Jackson
Douglas County District Attorney

John Reese Petty
John Reese Petty
Washoe County Public Defender's Office