

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBER ERNESTO MARTINEZ  
GUZMAN,  
Petitioner,

No.

Electronically Filed  
Jan 14 2021 02:38 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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.

---

PETITIONER'S APPENDIX VOLUME THREE

---

JOHN L. ARRASCADA  
Washoe County Public Defender  
Nevada State Bar Number 4517

JOHN REESE PETTY

Chief Deputy

Nevada State Bar Number 10

350 South Center Street, 5th Floor

Reno, Nevada 89501

(775) 337-4827

[jpetty@washoecounty.us](mailto:jpetty@washoecounty.us)

KATHERYN HICKMAN

Chief Deputy

Nevada State Bar Number 11460

GIANNA VERNES

Chief Deputy

Nevada State Bar Number 7084

JOSEPH W. GOODNIGHT

Chief Deputy

Nevada State Bar Number 8472

Attorneys for Petitioner

## TABLE OF CONTENTS

1.	Argument in Support of Request to Continue Trial and Potential <i>Atkins</i> Motion Filing Deadline Until an Investigation that Complies with Reasonable Standards of Care can be Completed <u>filed</u> on August 17, 2020 .....	1PA 72
2.	Errata to Motion to Continue Due to Global Pandemic Covid-19 (D-22) <u>filed</u> on March 13, 2020 .....	1PA 28
3.	Indictment <u>filed</u> on March 13, 2019 .....	1PA 1
4.	Motion to Continue Due to Global Pandemic Covid-19 (D-22) <u>filed</u> on March 13, 2020 .....	1PA 15
5.	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 In the State's Argument (D-28) .....	2PA 162
6.	Notice of Intent to Seek Death Penalty <u>filed</u> on March 14, 2019 .....	1PA 9
7.	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 Material Misrepresentations Presented in the State's Argument (D-28) and (2) Motion to Continue Trial for Investigation of Potential Atkins Motion (D-23) .....	2PA 295
8.	Order Regarding Defendant's Motion for Order Shortening Time (D-26) and Defendant's Request to File (D-27) <u>filed</u> on October 15, 2020 .....	1PA 158

9. Opposition to Motion to Continue Due to Global  
Pandemic Covid-19 (D-23) filed on March 19, 2020 ..... 1PA 32
  
10. 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 (D-28) ..... 2PA 179
  
11. Reply in Support of Argument in Support of Request to  
Continue Trial and Potential *Atkins* Motion Filing  
Deadline Until an Investigation that Complies with  
Reasonable Standards of Care can be Completed filed on  
September 1, 2020 ..... 1PA 128
  
12. Reply to Opposition to Motion to Continue Due to  
Global Pandemic Covid-19 (D-23) filed on March 26, 2020 . 1PA 38
  
13. Request to File (D-27) 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) filed on  
October 14, 2020 ..... 1PA 155
  
14. 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-18) ..... 2PA 287
  
15. State's Argument in Opposition to Motion to Continue  
Due to Global Pandemic Covid-19 (D-23) filed on  
August 37, 2020 ..... 1PA 88

16.	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 (D-28) .....	2PA 220
17.	Transcript of Proceedings: Evidentiary Hearing <i>held</i> on July 27, 2020 .....	3PA 324
18.	Transcript of Proceedings: Evidentiary Hearing <i>held</i> on July 28, 2020 .....	4PA 536
19.	Transcript of Proceedings: Evidentiary Hearing <i>held</i> on July 29, 2020 .....	5PA 742
20.	Transcript of Proceedings: Oral Arguments/Motion to Continue <i>held</i> on June 22, 2020 .....	1PA 44
21.	Transcript of Proceedings: Status Hearing <i>held</i> on November 23, 2020 .....	2PA 268



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

4185  
  
JUDITH ANN SCHONLAU  
  
CCR #18  
  
75 COURT STREET  
  
RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
  
IN AND FOR THE COUNTY OF WASHOE  
  
BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

THE STATE OF NEVADA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. CR19-0447
	)	DEPARTMENT NO. 4
WILBER ERNESTO MARTINEZ	)	
GUZMAN,	)	
	)	
Defendant.	)	

---

TRANSCRIPT OF PROCEEDINGS  
  
EVIDENTIARY HEARING  
  
MONDAY, JULY 27, 2020, 10:00 A.M.  
  
Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18  
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER  
Computer-aided Transcription

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
ANTONIO PUENTE	18	55		

1 RENO, NEVADA; MONDAY, JULY 27, 2020; 10:00 A.M.

2 -oOo-

3 THE COURT: Thank you. Please be seated. Let the  
4 record reflect today's court session is taking place on July  
5 27, 2020. It is being held remotely because of the closure of  
6 the courthouse at 75 Court Street due to the national and  
7 local emergency of COVID-19. The Court and all the  
8 participants are appearing through simultaneous audiovisual  
9 transmission. I am physically located in Reno, Washoe County,  
10 Nevada, which is the site of today's court hearing. The other  
11 court personnel who are present will identify themselves and  
12 what county and state they are appearing from.

13 THE CLERK: Good morning. My name is Marci Stone.  
14 I am the court clerk. I am appearing from Washoe County,  
15 Nevada.

16 COURT REPORTER: Judy Schonlau, Court Reporter,  
17 Washoe County, Nevada.

18 THE COURT: We also have the interpreters assisting  
19 us today in our court who are court employees. I ask you  
20 identify yourself.

21 THE INTERPRETER: Good morning, Your Honor.  
22 Jessica Escobar, State certified court interpreter,  
23 certification number NVEJ-100.

24 THE INTERPRETER: Joseph Miller, court interpreter.

1 Certificate number NVMJ-501 Washoe County, Nevada.

2 THE COURT: Thank you.

3 Also assisting us today is the bailiff.

4 THE BAILIFF: Deputy Finn appearing from 911 Parr  
5 Boulevard, Washoe County, Nevada.

6 THE COURT: Thank you.

7 THE INTERPRETER: Your Honor, if I may take a moment.

8 THE COURT: He's changing it now.

9 THE INTERPRETER: May I confirm they can hear me on  
10 the Spanish channel, Your Honor?

11 THE COURT: Deputy Finn, would you put Mr. Guzman at  
12 the iPad, please? Good morning, Mr. Guzman.

13 THE DEFENDANT: Good morning.

14 THE COURT: Are you able to hear me okay?

15 THE DEFENDANT: Yes.

16 THE COURT: The Court will proceed noting you are  
17 appearing from 911 Parr Boulevard, Reno, Washoe County,  
18 Nevada.

19 In addition, the record should reflect that this  
20 session of the Court is open to the public for viewing and  
21 listening to the proceedings through the video-audio link  
22 found at the washoecourts.com website.

23 If anyone in this hearing cannot see or hear the  
24 other participants in the hearing, you are to notify the

1 Court.

2 I ask that all participants identify their physical  
3 location as well as their names when they make their first  
4 appearance. Counsel, I also ask that you acknowledge you  
5 received notice that this hearing is taking place pursuant to  
6 Nevada Supreme Court Rule Part 9 relating to simultaneous  
7 audiovisual transmission in criminal proceedings and the  
8 Second Judicial District Court Administrative Order entered in  
9 2020, and also tell me if you have any objection to proceeding  
10 in this manner.

11 We will begin with the appearances from the State.

12 MR. JACKSON: Good morning, Your Honor, Mark Jackson  
13 on behalf of the State. I am appearing here in Washoe County,  
14 Nevada. I have received a copy of the Notice and have no  
15 objection to proceeding through this audiovisual transmission  
16 pursuant to Supreme Court Rule Part 9.

17 THE COURT: Thank you.

18 MR. HICKS: Good morning, Your Honor. Chris Hicks on  
19 behalf of the State. I am in Washoe County. I am aware of  
20 the Order and Notice you spoke of. I have no objection.

21 MR. LUCIA: Travis Lucia also on behalf of the State  
22 appearing from Washoe County, Nevada. I received the  
23 aforementioned Notice. I have no objection to proceeding in  
24 this fashion.

1           THE REPORTER: Your Honor, this is Judy. Are you  
2 getting any feedback? I am getting constant feedback from  
3 somebody.

4           THE COURT: I am, too.

5           THE INTERPRETER: Your--

6           THE COURT: Excuse me?

7           THE INTERPRETER: I'm so sorry, Your Honor. I  
8 didn't mean to cut you off. I was about to answer at the same  
9 time as you. I think maybe if the jail is muted, there is a  
10 lot of sound that is echoing back from there maybe.

11          THE COURT: Let's see. Now I see the State's muted.  
12 We will go with the appearances of the defense without muting  
13 the jail until we can identify where it is coming.  
14 Mr. Arrascada.

15          MR. ARRASCADA: Good morning, Your Honor.  
16 John Arrascada, Washoe County Public Defender on behalf of  
17 Mr. Guzman. We are in receipt of the Court order regarding  
18 this hearing will be done by simultaneous audiovisual process.  
19 We have no objection across the board to that. I am located  
20 here in Reno, Washoe County, Nevada.

21          THE COURT: I am still getting that feedback. Thank  
22 you, Mr. Arrascada. Deputy Finn can you --

23          THE INTERPRETER: Deputy Finn, can you please put  
24 the iPad on mute, please? The Judge is asking.

1 THE COURT: We'll see if that helps. Okay. Go  
2 ahead, Ms. Hickman.

3 MS. HICKMAN: Kate Hickman on behalf Mr. Martinez  
4 Guzman. I am located in Washoe County. I have all the  
5 relevant Notices, and I have no objection to proceeding in  
6 this manner.

7 THE COURT: Thank you.

8 MR. GOODNIGHT: Good morning, Your Honor,  
9 Joe Goodnight for Mr. Martinez Guzman. I am in Washoe County.  
10 I received the Notice and have no objection.

11 THE COURT: Okay.

12 MS. VERNESS: Good morning, Your Honor,  
13 Gianna Verness on behalf of Mr. Martinez Guzman. I received  
14 the Notice and have no objection to proceeding in this manner  
15 this morning.

16 THE COURT: Are you the last Public Defender to  
17 introduce yourself?

18 MS. VERNESS: That's correct. For these purposes, I  
19 am rounding out the team today.

20 THE COURT: All right. Thank you. I want to make  
21 sure everyone else has been able to hear the Public Defenders  
22 and the State introduce themselves. Is the Court Reporter  
23 having any issues?

24 COURT REPORTER: No issues.

1           THE COURT:   Okay. Ms. Escobar and Mr. Miller? Great.  
2   Ms. Clerk, you can hear everyone?   Okay.   Mr. Guzman, I know  
3   that we turned off your microphone because there was a  
4   background noise we were getting, but if you want to be heard,  
5   just lift your hand, we'll all be watching, and I will make  
6   sure the microphone is turned back on so you can speak if you  
7   wish to do so.   In addition, I know there is a method for you  
8   to talk to your attorney if you need to, and we can work on  
9   that if you raise your hand and you can have a private  
10   conversation. If you understand, just go ahead and give me a  
11   thumbs up.

12           THE DEFENDANT:   (Indicating.)

13           THE COURT:   Thank up, sir.   The record will reflect  
14   I did get a thumbs up.   We'll now begin with the proceedings  
15   here today.   The purpose of today's hearing is to determine  
16   the reasonableness, necessary and appropriate form of  
17   interviews and testing for a proposed Atkins motion and  
18   evaluation.   I understand this was a very broad topic area  
19   that we were talking about.   And I have seen there is lots of  
20   proposed exhibits filed today in accordance to the audiovisual  
21   notice.   However I want to remind everyone nothing is admitted  
22   before the Court, so if you want something admitted, you must  
23   move for it to be admitted, and then I will consider it. I  
24   have not received any pleadings with argument in them from



1       either the State or the defense. Is there anyone -- Does the  
2       defense believe you did file some sort of pleading in this  
3       case?

4               MS. VERNES: No, we have not, Your Honor.

5               THE COURT: Mr. Jackson, has the State filed any  
6       pleadings?

7               MR. JACKSON: Your Honor, the State has not filed any  
8       pleadings for this case, but there is an issue the State would  
9       like to address before we proceed this morning.

10              THE COURT: Okay. Go ahead.

11              MR. JACKSON: Thank you, Your Honor. As the Court is  
12       well aware, there was the Index of Exhibits that was filed by  
13       the defense on Thursday evening of which the State was  
14       electronically served on Friday morning. There are nine  
15       exhibits that are listed. The first two exhibits relate to  
16       the performance of defense counsel, Exhibit 1 are the ABA  
17       Guidelines, 178 pages, and Exhibit 2 is the Nevada Supreme  
18       Court ADKT 411, 122 pages, and that is in connection with the  
19       delivery of defense services here in the State of Nevada.

20              Your Honor, with respect to those first two  
21       exhibits, Exhibits 1 and 2, the State acknowledges that  
22       certain guidelines have been adopted by the ABA and the Nevada  
23       Supreme Court regarding the rendering of the defense services,  
24       but those are guidelines. They are aspirational. They are

1 not rules. They are not the law. As the Court well knows,  
2 the Constitutional standards for assistance of counsel were  
3 set forth in the 1984 landmark decision of Strickland versus  
4 Washington and its progeny. In fact, just nine years ago which  
5 would have been twenty-seven years after the Strickland  
6 Opinion was issued, the United States Supreme Court revisited  
7 Strickland in a case called Cullen, C-U-L-L-E-N versus  
8 Pinholster, P-I-N-H-O-L-S-T-E-R, 563 U.S. 170, and I'll be  
9 referencing page 189 of that Opinion. But that was a death  
10 penalty case, and the Supreme Court reminded us, the Court  
11 made clear that: "The purpose of the effective assistance  
12 guarantee of the Sixth Amendment is not to improve the quality  
13 of legal representation but simply to ensure that criminal  
14 defendants receive a fair trial." And according to that court  
15 in Cullen, relying upon specific guidelines to establish  
16 reasonable performance is not appropriate. The ABA guidelines  
17 do not establish reasonable performance. It is the State's  
18 position, Your Honor, that the defendant's Notice of proposed  
19 exhibits attempts to set the table for the potential  
20 testimony, but that does exceed the scope of the State's  
21 understanding of the purpose of this hearing.

22 It is the State's understanding that at the June  
23 22nd hearing, that you had informed the parties that what you  
24 wanted to hear from was Dr. Puente, and why he can't do

1 anything via teleconferencing. That you wanted to hear from  
2 him why and which particular things he would be unable to  
3 conduct given the pandemic we are in, and that you had stated,  
4 as the the State recalls, that if Dr. Puente were to state for  
5 example all forms of the evaluation and the assessment,  
6 including interviews of informants or any testing that may be  
7 administered to an informant, that that had to be done in  
8 person as opposed to through some alternative method such as  
9 telecommunication. And it appears, from Dr. Mahaffey's  
10 Affidavit in Exhibit 4, that that is what Dr. Puente will  
11 testify to, because Dr. Mahaffey states that within her  
12 Affidavit that she concurs with Dr. Puente's testimony on that  
13 particular matter. But if you were to do that, you wanted  
14 then to hear from the State as to why the State believes that  
15 is not accurate, and whether or not another expert is  
16 available or that will tell you something different.

17 So the State objects to Exhibits 4 through 8 as well  
18 as any proffered testimony of those individuals whose  
19 Curricula Vitae are listed in Exhibits, 5 through 8. As to  
20 Exhibit 4, Your Honor, the Affidavit of Martha Mahaffey Ph.D,  
21 she's a local psychologist. She's an expert that the defense  
22 has already provided an evaluation that she completed back in  
23 2018. But the State is in the untenable position that the  
24 State cannot traverse Dr. Mahaffey's statements within that

1 particular Affidavit. And there are numerous provisions or  
2 paragraphs within that Affidavit, specifically paragraphs 7, 8  
3 and 10 that are legal conclusions. These are opinions or  
4 argument to be made by defense counsel and is far outside the  
5 area of expertise of Dr. Mahaffey as the State understands her  
6 credentials.

7 At the minimum, Your Honor, the State would  
8 respectfully request that the Court require the defendant to  
9 make an offer of proof as to the proper testimony of those  
10 individuals listed in Exhibits 5 through 8 as relevant to the  
11 narrow scope, truly, of this hearing and why Dr. Mahaffey's  
12 Affidavit should be admissible for the purposes of this  
13 hearing. Thank you, Your Honor.

14 THE COURT: Okay. Thank you. Ms. Verness.

15 MS. VERNESS: Thank you, Your Honor. We are  
16 prepared to proceed with the hearing what I would say is  
17 argument for the State, but we are prepared to proceed with  
18 our first witness unless the Court wishes additional comment  
19 at this time.

20 THE COURT: I would like to know who your witnesses  
21 are. I expected to get a notice of witnesses, and I didn't  
22 get that. Who you do intend to call?

23 MS. VERNESS: This morning, I am prepared to move  
24 forward with our first witness, Dr. Antonio Puente. In

1 addition to that, we have the Notice of CVs which we'll refer  
2 to as Exhibits 4 through, I believe 4 through 8 that include  
3 several additional witnesses who are experts with regards to  
4 this subject matter. Does the Court want me to go through  
5 them individually?

6 THE COURT: So you plan on calling Dr. Puente.

7 MS. VERNES: Correct.

8 THE COURT: Do you plan on calling Dr. Mahaffey?

9 MS. VERNES: No, Your Honor, we do not. Dr. Leany  
10 is also provided as an expert. Dana Cook. John Blume. The  
11 fourth is Bradley Wendel.

12 THE COURT: So it is interesting that you would be  
13 calling a professor of law to explain to me why Dr. Puente  
14 can't conduct a particular kind of interview. That isn't  
15 argument necessarily on the part of the State. I think it is  
16 a legitimate question.

17 MS. VERNES: At your convenience, if I could switch  
18 out to Ms. Hickman who is prepared to address those concerns  
19 of the Court.

20 THE COURT: Let's not take time to do that right  
21 now. First off, I want to remind everyone, nothing is  
22 admitted in this case unless I admit it. You have to make a  
23 showing why I should admit it. I think a lot of Mr. Jackson's  
24 comments relate to the inadmissibility of me considering an

1 Affidavit when the witness is local and could testify. I  
2 think it is a very good objection. It may well resonate with  
3 me after I hear from the defense. But at this point, I don't  
4 want to take the time to do that. I would like to get  
5 Dr. Puente on, get his testimony in, get cross-examination.  
6 Let's do that. Then as we move forward, I assume the order  
7 you gave me is the order you intend to call these witnesses,  
8 Ms. Verness?

9 MS. VERNESS: I believe that is largely accurate.  
10 One of the witnesses did have a medical emergency in their  
11 family that may cause us to have to switch up the order a tiny  
12 bit, but, yes, as for today's hearing, we are prepared to move  
13 forward with Dr. Puente and Dr. Leany. Depending on the  
14 timing at that point, we'll have to make a decision.

15 THE COURT: Let's go with that. And, Mr. Jackson,  
16 are you the person who will be cross-examining Dr. Puente?

17 MR. JACKSON: I am, Your Honor.

18 THE COURT: Ms. Verness, you will be making the  
19 inquiry of Dr. Puente?

20 MS. VERNESS: That is correct, Your Honor.

21 THE COURT: All right. Let's get started and proceed  
22 with the testimony. I don't think there is any debate  
23 Dr. Puente is necessary for today's hearing. Is Dr. Puente in  
24 the audience?

1 THE CLERK: He is, Your Honor.

2 COURT REPORTER: Ms. Verness, can you get closer to  
3 your mic? All of you in that room need to get closer to the  
4 mic.

5 MS. VERNESS: We are working on adjusting the sound  
6 right now before we proceed.

7 MS. HICKMAN: Judy, is that better?

8 THE REPORTER: Not much.

9 MS. HICKMAN: Let's see if I can turn it up even  
10 more. Judy is that better?

11 THE REPORTER: Yes. Thank you very much.

12 THE COURT: Okay. Ms. Clerk, I think we have the  
13 witness; is that correct?

14 THE CLERK: We do. Dr. Puente. I now promoted him  
15 in as a panelist. Dr. Puente, can you hear me? It looks like I  
16 lost Dr. Puente. For some reason, Dr. Puente has signed off.  
17 He may have been having difficulty with his computer and  
18 should sign back on, hopefully.

19 THE COURT: Ms. Verness, do you have a methodology  
20 to communicate with Dr. Puente?

21 MS. VERNESS: We are reaching out right now.

22 THE CLERK: He has yet to log back in.

23 MS. VERNESS: We are working on it right now, Your  
24 Honor. Dr. Puente is indicating he believes he has rejoined.

1           THE CLERK: Did he rejoin under a different name? I  
2     have someone that has their hand raised, and it is moving on  
3     me, but if you will look in participants, Ms. Verness, at the  
4     very bottom there is someone locked in as a "y" whereas  
5     earlier I had somebody else logged in as Puente.

6           MS. VERNESS: Other participants, I do see his name.

7           THE CLERK: He just came on to my screen. Sorry  
8     about that.

9           Dr. Puente, this the court clerk, Marci. Can you  
10    hear me? Dr. Puente, could you please turn on your camera and  
11    un-mute your mic, please?

12          Your Honor, I am sorry. It appears he's left the  
13    screen again.

14          THE COURT: I do see that.

15          MS. VERNESS: We are still working, Your Honor.

16          THE COURT: Okay.

17          MS. VERNESS: Your Honor, we are working with him.

18          MS. HICKMAN: That's him.

19          THE CLERK: I'm sorry, what was that? You are on  
20    mute.

21          MS. VERNESS: Dr. Puente is indicating the individual  
22    with the raised hand is his.

23          THE CLERK: Your Honor, would you like me to promote  
24    that person in?



1 THE COURT: Yes. Let's go ahead and see who it is.

2 THE CLERK: Okay. Great. Thank you. Dr. Puente,  
3 this is Marci the court clerk. Can you hear me?

4 THE WITNESS: There we go.

5 THE CLERK: Hi, Dr. Puente.

6 THE WITNESS: I think we are now in.

7 THE CLERK: This is Marci the court clerk. Can you  
8 hear me?

9 THE WITNESS: Yes, I can hear you now, and I am  
10 un-muted, and I have the video on.

11 THE CLERK: Perfect. Can you see us?

12 THE WITNESS: Yes. I think there is eight panels or  
13 seven panels beside myself.

14 THE CLERK: That is correct. Thank you.

15 THE COURT: Counsel, go ahead and officially call  
16 your witness.

17 MS. VERNES: Thank you. Our first witness would be  
18 doctor Antonio Puente.

19 THE COURT: The clerk will swear the witness.

20 THE CLERK: Please raise your right hand.

21 THE COURT: Dr. Puente, I would ask that you state  
22 your physical location as well as your name at this time.

23 THE WITNESS: Certainly, Your Honor. My name is  
24 Antonio Puente. I am in Wilmington, North Carolina in the

1 County of New Hanover.

2 THE COURT: Thank you. I will now allow the defense  
3 to inquire. If you cannot see or hear the other participants,  
4 Doctor, notify me or your attorney as soon as possible.

5 THE WITNESS: Thank you.

6 THE COURT: Go ahead, counsel.

7 MS. VERNESS: Thank you.

8  
9 ANTONIO PUENTE

10 called as a witness, having been first duly sworn,  
11 took the witness stand and testified as follows:

12  
13 DIRECT EXAMINATION

14 BY MS. VERNESS:

15 Q First of all, Dr. Puente, do you recall testifying  
16 in this matter of Mr. Martinez Guzman in February of this  
17 year?

18 A Yes, I do.

19 Q At that time, do you recall providing the Court  
20 testimony with regards to your qualifications and experience?

21 A Yes, I did.

22 MS. VERNESS: Your Honor, unless there is an  
23 objection, at this time, I would ask we incorporate by  
24 reference the testimony that was previously provided by

1 Dr. Puente at the February 24, 2020 hearing with regards to  
2 his training and experience.

3 THE COURT: Any objection, Mr. Jackson?

4 MR. JACKSON: No objection, Your Honor.

5 MS. VERNES: Thank you. Your Honor, I would note  
6 that his Curricula Vitae was also admitted at Exhibit 194.

7 BY MS. VERNES:

8 Q Dr. Puente, today I would like to focus your  
9 testimony with regard to intellectual disability, what is  
10 commonly referred to as an Atkins investigation; okay?

11 A Yes.

12 Q First of all what is, just briefly, your  
13 understanding of an Atkins investigation?

14 A An Atkins investigation involves the assessment of  
15 the intellectual disability of an individual who has been  
16 charged or convicted of a capital murder. Essentially, it  
17 involves both Prong 1, Prong 2, as well as Prong 3. I was  
18 primarily asked to address Prong 2 or the adaptive deficits of  
19 the diagnosis of intellectual disability.

20 Q So you mentioned there is Prong 1. Is that the  
21 typical intellectual functioning or IQ?

22 A It is not typically, it is the intellectual  
23 functioning and IQ, intellectual quotient, in essence a  
24 psychometrically developed, scientifically validated test of

1 intelligence.

2 Q Skipping to Prong 3, what do you mean by that?

3 A That the information that applies to Prong 1 and  
4 Prong 2 have to occur before the age of eighteen.

5 Q So today, I would like to focus on the second aspect  
6 that you indicated you have been focusing on; is that correct?

7 A Yes.

8 Q And can you describe what you mean when you talk  
9 about adaptive functioning?

10 A Adaptive functioning involves the assessment of an  
11 individual's built to perform or to express intellectual  
12 ability in an ecological, valid, free-ranging environment.

13 Q Over the course of your career, do you have an  
14 estimate of the number of death penalty cases in which you  
15 have been requested to address intellectual disability and  
16 adaptive functioning?

17 A I believe it is approximately one hundred, something  
18 like that.

19 Q Focusing on the last five to ten years, can you give  
20 us an idea of about how many of those specific death penalty,  
21 Atkins type cases you have participated in?

22 A Boy, it is hard to say. I know I testified in  
23 approximately two or three a year, and probably have done five  
24 or ten cases approximately a year, something in that vicinity.

1           Q     So do you testify in every case that you consult or  
2 do work in?

3           A     Oh, no, no, not at all.

4           Q     And why is that?

5           A     I don't know. I provide the information to the  
6 attorneys and the court, and sometimes they inquire further  
7 and sometimes they don't. I honestly don't know why they  
8 don't.

9           Q     Fair enough. That was a poorly worded question. Do  
10 you find that there are adaptive deficits or that a person  
11 meets the definition of intellectual disability in every case  
12 that you consult on?

13          A     Oh, no, not at all. Both forensic or legal cases as  
14 well as clinical cases, sometimes you will have ability to  
15 meet Prong 1. Sometimes they meet Prong 2. Sometimes they  
16 don't meet any of them. Sometimes they meet both.

17          Q     So just to clarify, the total number of cases in  
18 which you offered testimony in the last several years you  
19 indicated was approximately two to three per year?

20          A     I think that is the latest count, correct.

21          Q     Of those cases in which you have provided that  
22 testimony, how many of those individuals were native Spanish  
23 speakers who were the subject of the investigation?

24          A     I would say most of them are native Spanish

1 speakers. Maybe about five or ten percent may have been  
2 English speaking. Those tend to come from North Carolina.

3 Q Focusing on those cases again, how many of those  
4 cases were you retained by the defense?

5 A I don't know when I was retained by the defense. But  
6 I would say maybe about five of those cases the case was for  
7 the prosecution, and the other cases for the defense. I am  
8 trying to estimate in my mind when it is I last testified on  
9 behalf of the prosecution. I think it was maybe a decade ago  
10 in a Federal court in Virginia.

11 Q So outside the last ten years would it be fair to  
12 say?

13 A Yes. I can't recall for sure, but that is my  
14 estimate.

15 Q In thinking of those cases that we have been  
16 discussing in the last decade or so, approximately how many of  
17 them involved native Spanish speakers who were born outside  
18 the United States?

19 A I don't have the statistics, but my estimate is the  
20 vast majority of those individuals were native speakers that  
21 were not born in the United States. The minority would be  
22 Spanish speakers born in the United States.

23 Q And would there be an area internationally they  
24 typically hailed from?

1           A     I would say most hail from Central America. Some  
2     from the Caribbean, namely Cuba and Puerto Rico.

3           Q     And in those cases that we are talking about, was  
4     part of your function to be assessing intellectual  
5     functioning?

6           A     Yes. I think I have done very few, if any just on  
7     Prong 1.

8           Q     In looking at adaptive functioning, can you tell me,  
9     please describe what information you are looking at in  
10    conducting that type of investigation?

11          A     Certainly. I'm looking at three or four things. For  
12    starters, I am trying to get an assessment or an understanding  
13    of the life of the individual prior to the age of eighteen,  
14    namely by understanding their social, historical and cultural  
15    contact. Appreciating the community, the church, the school,  
16    the neighborhood that this individual may have lived in. It is  
17    a first-hand assessment of the circumstances that would be  
18    very difficult to obtain using secondary sources, for example  
19    books, videos and documentaries.

20                The second thing is if I have the opportunity, and  
21    sometimes I am able to and sometimes I don't, obtain any kind  
22    of records, military, medical, educational, and if at all  
23    possible, legal records. That would be also extremely useful.

24                The third thing I would like to be able to do is to

1 obtain information from sources such as the family, siblings,  
2 significant other, and other informants including but not  
3 limited to school teachers, the clergy, friends, neighbors,  
4 individuals who would have known and interacted with the  
5 defendant prior to the age of eighteen. If at all possible,  
6 it would be best to obtain this information first hand and  
7 face to face as a means of getting the greatest validity of  
8 the information if the opportunity arises. Then in addition  
9 to that, go deeper by understanding not only what these  
10 individuals know about this person, but in addition to that,  
11 measure their for example intellectual abilities as in the  
12 case, for example, of the siblings and/or the parents as well  
13 as any either aside from intellectual, any neuropsychological  
14 and/or emotional problems to establish, if you will, a  
15 genealogy, an intellectual genealogy or mental health  
16 genealogy of the individual.

17 So to summarize, one, to obtain an understanding of  
18 the community that the person lived in. The ecological, valid,  
19 free-ranging environment. Two, obtain information from  
20 records, whatever records may be available, sometimes obtained  
21 directly, sometimes indirectly. Third, obtain information  
22 about the defendant from others, any informant that has data  
23 that is valid that was present before the age of eighteen.

24 And, finally, address any kind of genealogy that may



1 be present that may help to understand the purported diagnosis  
2 of the individual's in this particular case, intellectual  
3 deficiency.

4 Q What you described sounds like a fairly exhaustive  
5 process that you conduct?

6 A Well, of course, and that is the purpose. The stakes  
7 are high. The questions are huge. And there is nothing but a  
8 thorough examination and evaluation of the circumstances.  
9 Prong 2 demands in many ways even more exhaustive analysis of  
10 the individual and their community prior to the age of  
11 eighteen. That's Prong 1.

12 Q Is this an opinion that you hold personally or have  
13 you been guided by any manuals or associations in determining  
14 the type of investigation that you conduct?

15 A Certainly. The information that I borrow or use to  
16 obtain include the following: The American Bar Association  
17 Guidelines. And particularly, I am referring to the chapter  
18 on investigation. Number two, my own training, especially  
19 having the opportunity to have studied and studied with the  
20 founders of clinical, modern clinical neuropsychologist  
21 Alexander Luria who explains you can't understand the brain  
22 unless you understand the person, and you can't understand the  
23 person unless you understand the community. This is something  
24 I learned many years ago having been to his laboratory and

1       having his students attend mine, as well.

2               Three, this is, if you will, the standard of care in  
3       assessing Prong 2 in both clinical cases as well as forensic  
4       cases. Sometimes we don't have that opportunity in clinical  
5       cases, but also the stakes are not as substantial as they are  
6       in death penalty cases. So if you will, it is a standard of  
7       care and what we might call the appreciation of mitigating  
8       factors that may relate to Prong 2.

9               Q       Now in order to gather this information, do you  
10       typically-- Do you travel?

11              A       Well these days, no. These days, I think these days  
12       most of us are not traveling. But in reality, if I could just  
13       take a moment and give you my own chronology of how I've come  
14       to where I am these days on how to gather this information.

15              Q       If you could, I apologize to interrupt, I will get  
16       to that in one second, but with regards to the instant matter  
17       involving Mr. Martinez Guzman, the information that you  
18       described, the three part process that you described, where  
19       would the vast majority of that information be located with  
20       your understanding of the facts of this case?

21              A       It would be found in El Salvador.

22              Q       And so now I would like you to address traveling.  
23       Have you always traveled in conducting these types of  
24       assessments?

1           A     No, ma'am. I did attempt to travel in this case, and  
2 I was unsuccessful. I am more than happy to explain to you  
3 and to the Court as to what happened, but, historically, no.

4           Q     What has changed about the process that caused you  
5 to travel now? If you could explain that?

6           A     What has happened is over time, it appeared to me  
7 that the demand being placed on determining the value and  
8 validity of Prong 2, the information becomes extremely  
9 important. I was involved in a case many years ago, as was  
10 typical back in the late '90's and soon after the Atkins  
11 occurred in the early 2000's, I would rely on the mitigating  
12 experts. I was involved in a case where the mitigating expert  
13 apparently falsified some of the information that was provided  
14 to me, so I was removed from the case, and my testimony was  
15 barred from further consideration. And it was at that time I  
16 began to question the validity of the mitigation data that was  
17 provided.

18                     In addition to that, as time went on, I started  
19 providing direction to the mitigating experts of what kind of  
20 things I was interested in. In other words, initially, I would  
21 just receive data. Subsequently, I started asking for specific  
22 kinds of data. For example, the different types of adaptive  
23 abilities of an individual prior to the age of eighteen in  
24 their community. And then subsequently, I was given the

1 opportunity, and I went and realized how different it was when  
2 you saw it with your own eyes. It was one thing to get the  
3 data from a third party. It was another to get it by  
4 yourself. Sometimes you just don't know what you can get. You  
5 don't know how to get it, and you're not even sure that you  
6 can get it. So just jumping into it hand and feet, putting  
7 your hiking boots on and literally pounding the pavement or  
8 the sand or the pebbles to gather the information really  
9 brings alive the information in such a way that you begin to  
10 fully understand an individual's life before the age of  
11 eighteen. After all, we are doing a retrospective analysis.  
12 This means I have to, if you could imagine, I have to not only  
13 travel there, but I have to travel back in time. I have to not  
14 live their life now. I have to live their life before the age  
15 of eighteen which means that we have to dig deep with  
16 teachers. Maybe interview two or three different teachers  
17 before we settle on someone that really understood him in  
18 third grade or fifth grade at the San Onesio school, and,  
19 therefore, you really don't know that until you begin to  
20 evaluate the data on your own. There is only so much that I  
21 have discovered over the time, the twenty-five years I have  
22 been doing death penalty cases, it really, it's all up to you  
23 to do the discovery. The other people can start to dig about,  
24 but you're the one that has to eventually finish it. And you

1 are the one that has to interpret it. And there is nothing  
2 like your own eyes for this kind of work.

3 Q Along those lines, do you also have to defend the  
4 conclusions that you reach?

5 A Well, after all, the goal is to have that smallest  
6 amount of error possible, and to have the error reducible to  
7 an insignificant fraction that you have to basically conclude  
8 this data, based on your own findings. As I tell my students,  
9 if you want to know the truth, go find it yourself.

10 Q So how, if at all, have you noticed an impact on the  
11 final product since you began traveling versus getting  
12 information prior?

13 A Oh, it is night and day. It is nothing like seeing  
14 where these people are born and raised, where they went to  
15 school, where they played, who they played with. You get to  
16 ask questions about how did he do in school. Like the one  
17 time I was in Mexico, the grades were eight out of ten. I  
18 said, well, that seems pretty good. Then I asked the  
19 principal what is an eight out of ten. He said that is good  
20 enough. I said hold on a second. He didn't pass. How come  
21 he didn't pass with a eight? Well, eight is good, but not  
22 really passable. How would I know that unless I went down  
23 there and explained to him that I needed to figure out how  
24 were the grades in that particular school developed. So

1 sometimes, just the records themselves, just talking to  
2 people, especially on the phone, it is just insufficient. It  
3 may be more than insufficient, it is just outright erroneous.

4 Q So are there times where, with regard to records,  
5 you need additional information in order to interpret the  
6 records you have?

7 A Yes. Just because someone has eight out of ten  
8 doesn't mean, you know, that is theoretically, theoretically  
9 good but not enough to pass. Well, I would have never known  
10 that. In this case, he seems to have gotten a fair amount of  
11 sixes and sevens. What does that mean? What does a six or  
12 seven mean? I need to find that out. I need to find out how  
13 other kids in his grade did that year. If I could get someone  
14 to explain to me what was it that he did to earn those grades,  
15 then those grades become alive. It is just not a number now,  
16 it becomes meaningful.

17 Q So on that vein, when you are conducting the  
18 assessment, to whom are you comparing the individual that you  
19 are investigating? Someone in the U.S., is that appropriate?

20 A Well, you could do that, and in some cases we do do  
21 that, especially if the information is available before the  
22 age of eighteen. What you really want to do is to make that  
23 comparison to other individuals that come from the same  
24 community. So in this case, how are people in his

1 neighborhood and his school, how is that fair to the overall  
2 larger village, and how does that village compare to different  
3 states in El Salvador, and for that matter how does that  
4 compare to for example the main capital, San Salvador, and  
5 from there you can begin to extrapolate how does that compare  
6 to central America and the U.S. But you cannot make a  
7 comparison unless you start at the bottom.

8 Q Now returning to your experience in the Martinez  
9 Guzman case, did you attempt to travel or did you travel to El  
10 Salvador earlier this year?

11 A I think the answer is I did travel to El Salvador  
12 and attempted to go into El Salvador, but I was unsuccessful  
13 in gaining try into the country.

14 Q Had you been able to again access to El Salvador,  
15 what was your plan or purpose in going there?

16 A My plan and purpose was very simple, to gather data  
17 for Prong 2. Two of the trips had been held by the defense  
18 team and the last one, some additional information had been  
19 obtained as to potential informants that proved to be valid  
20 and reliable and knowledgeable of who he was prior to the age  
21 of eighteen. And things had been set up. A team was actually  
22 in place waiting for me in the country of El Salvador. And as  
23 you may or may not know, I had, unfortunately, been speaking  
24 in Spain 23 days before, and the night before I arrived in El

1 Salvador from Washington, D.C. the President had put on  
2 Facebook a decree that if you had been to certain countries in  
3 Europe, that you could not enter the country without a  
4 fourteen-day guarantee if you had been to those countries at  
5 least thirty days prior. It turns out, I was the first person  
6 in arriving in El Salvador that had been to Europe prior to 30  
7 days. It caused a tremendous amount of disruption, because the  
8 decree was put on Facebook and was not known to the  
9 immigration officials until that morning of my arrival, and  
10 they went ahead and took all kinds of pains to try to figure  
11 out how to interpret the presidential decree. Despite the best  
12 efforts of multiple efforts including the team, specifically  
13 John Arrascada, the Minister of Human Rights in the country,  
14 the Minister of Health, I was unsuccessful. I was detained  
15 that night and eventually was deported the following morning.

16 Q So, ultimately, you were unable to conduct any of  
17 the investigation you had planned; is that correct?

18 A Yes. I had taken with me pads, paper, pens, pencils  
19 and multiple tests to attempt to address the issue of Prong 2  
20 and the origin of the disability involving this individual as  
21 well.

22 Q So the process that you have just previously  
23 described, extensive records, interviewing, seeing first hand  
24 where Mr. Martinez is from, you were prepared to do that and



1       unable to?

2           A       I was more than prepared and more than unable, and  
3       God knows we tried. I certainly tried to try to get into the  
4       country. I was utterly unsuccessful. I was told the President  
5       had gone on record saying, nope, he was not going to be let  
6       in. From that point forward, no other foreigner was going to  
7       be let into the country. So from that day, March 13, 2020,  
8       the country went under complete lockdown to individuals from  
9       other countries.

10          Q       So, Dr. Puente, I want to direct your attention now  
11       to the process that you go through in an adaptive functioning  
12       assessment. First, in meeting with family and friends of the  
13       subject, what are some of the first things you're attempting  
14       to do with that family or friend?

15          A       Oh --

16          Q       Can you please describe that?

17          A       Well, first of all, you have got to make sure these  
18       individuals are reliable and valid and an able source of  
19       information of this individual's life prior to the age of  
20       eighteen. This is the first step. Some of this could be done  
21       by others, but certainly eventually you have to make your own  
22       assessment whether there is a useful source of data.

23                 Secondly, if you conclude that is a good source of  
24       information, the second thing is you have to then establish a

1        rapport. In the United States and North American countries,  
2        specifically, we get to business right away. Here is the  
3        question, here is what we need. We can accomplish what we  
4        need in a more time efficient way. These people, they don't  
5        know who you are. You are not from their country. You're  
6        certainly not from their village. And you wear a different  
7        kind of clothes. And your job is to establish a good, strong  
8        relationship that allows this person to really come to  
9        appreciate that you are here to help, you are here as an  
10       unbiased source of data gathering and, hopefully, they will  
11       finally come to trust and share with you some really important  
12       things.

13                As history has shown, when you are talking about a  
14       person's family or maybe their friend requesting information  
15       such as maladaptive behavior, mental illness, intellectual  
16       disability, sexual misconduct or abuse, those kinds of things  
17       are very, very, very personal. So you are asking a stranger to  
18       trust you, also a stranger, with information that is very  
19       often only privy to very, very few people. It is a very  
20       difficult task. You want to make sure they trust you, I trust  
21       them, and that takes time. You just have to take it easy.  
22       Sometimes it may require more than one visit. You establish  
23       that rapport one day, return another day to then seek the  
24       information that is in question.

1           Q     And how would the process of having to establish  
2     this rapport via a remote device, specifically telephone, in  
3     your opinion, how would that affect that process?

4           A     Well, it is not the same thing, obviously.  
5     Gathering data through electronic means turned out to be  
6     highly problematic. We discovered that in the last few months  
7     of COVID. You may or may not know, I was in the original group  
8     that developed the guidelines for what we call tele testing  
9     telediagnostic work for the American Psychological Association  
10    over the first two months or so for COVID-19. We put together  
11    a small work group and came with ideas how is it we could  
12    achieve this. Then we went to the Federal government and  
13    obtained their support to allow us to be able to gather data  
14    electronically. We discovered over time how complicated, how  
15    difficult and how incomplete that is. In other words, the  
16    bottom line is the promise we were all hoping for  
17    unfortunately was not delivered.

18          Q     Now that is with regards to tele testing; is that  
19    correct?

20          A     Tele testing, also tele interviewing.

21          Q     What are some of the road blocks or issues that you  
22    ran into as you went through this process?

23          A     Well, first of all, we discovered, despite the fact,  
24    honestly we should have known that, no diagnostic work had

1     been validated scientifically using electronic means of  
2     communication. So in other words, the different kinds of  
3     diagnostic approaches to interviewing, that has been always  
4     developed face-to-face. So there has really been very little  
5     research to support, how is it that once you do this  
6     electronically, and, even more important, how valid is that.  
7     We have not been able to discover the data supports that.

8             Then it turns out testing, itself, proved more  
9     problematic. We have discovered, after a great deal of effort  
10    including from our own laboratory team as well as the group  
11    that is in charge of the Psychological Association that no, no  
12    psychological test has been validated scientifically using  
13    electronic means. We discovered maybe one or two sorts of  
14    interviews like the Montreal test, part of the assessment that  
15    President Trump has been talking about in the media  
16    significantly, that is the only one that we can honestly say  
17    has been validated fairly well. But most tests have not  
18    really gone down this road. So essentially, we are  
19    introducing potential for error, and more importantly, we  
20    probably would be in violation of the standards for  
21    educational psychological tests that were developed in 2014.  
22    Just for conflict of interest reasons, I should say I was on  
23    the committee that helped develop that. Essentially, no test  
24    really would stand up to the scrutiny of a significant Daubert

1 challenge. It is just not there. The science is unclear and  
2 the standards at the present time have yet to be developed for  
3 our profession.

4           Sadly enough, the pandemic showed us the need for  
5 this kind of thing and the inability for us to be able to do  
6 it successfully.

7           Q     So in looking retrospectively to your trip to  
8 El Salvador, were you prepared to conduct this type of testing  
9 you were discussing in addition to interviews?

10          A     Oh, yes. Yes. I had a big suitcase full of tests.

11          Q     Who were you looking, hopeful, or prepared to test?

12          A     I was particularly interested in testing the family,  
13 namely the parents and the siblings. If I had the opportunity,  
14 I would have talked to them and administered some IQ tests. In  
15 addition to that, a very, very limited neuropsychological  
16 battery to get an idea if, if the intellectual deficits that  
17 appear to be present as has been discovered from the Prong 1  
18 assessment by Dr. Macaffey, Mahaffey, excuse me, really  
19 matched the Prong 2, and if indeed there was a Prong 2, could  
20 one estimate that what we are seeing here is not due to  
21 cultural variations. In other words, he's just got a low IQ  
22 very simply because he didn't know the culture or is this  
23 really an organic intellectual deficit. If indeed that is the  
24 case, as the ABA, as the Standard of Care and others have

1 suggested historically, then we now can place the disability  
2 in a much, much more comprehensive social, historical and  
3 cultural context, not just simply he had a low IQ, therefore,  
4 that IQ could be due simply to the fact he didn't understand  
5 the cultural morays of this country.

6 Q So was any of the testing you were prepared to do  
7 going to be assessing or looking at Mr. Martinez Guzman  
8 retrospectively?

9 A Yes. Correct.

10 Q And the fact that this is a retrospective analysis,  
11 how is that relevant to your assessment?

12 A Well, here is the challenge: The challenge is that  
13 Prong 2 begs the question of are the adaptive deficits present  
14 before the age of eighteen. Here we have an individual who is  
15 well past the age of eighteen, so we didn't have the  
16 opportunity to assess him for I.D. or intellectual disability  
17 prior to the age of eighteen when he was in El Salvador. So  
18 the law requires us, the diagnosis requires us to go backwards  
19 and ask that question retrospectively. So what I was planning  
20 on doing is to do so quantitatively and qualitatively. Let me  
21 explain to you what I mean by quantitatively. I was going to  
22 use the standards that are in the field at the present time,  
23 either the Adaptive Behavior Assessment Scale, ABAS or for  
24 that matter the Vinland Scale which are both translated into

1 Spanish, and I would have administered those if I could have  
2 to informants such as for example the mother or maybe a  
3 teacher. That would give me information quantitatively this is  
4 a scientific validated test. Now I realize that these tests  
5 were not meant to be administered retrospectively. However,  
6 the developer of the Vinland has gone on record saying it is  
7 acceptable to retrospectively use this test to make that  
8 assessment. There are challenges. There are challenges  
9 however in sometimes administering these tests to people whom  
10 themselves may be intellectually deficient. So in an effort to  
11 make sure that you are on the right track, you also want to  
12 obtain qualitative information which means you would go out  
13 and find out about this individual's adaptive ability prior to  
14 the age of eighteen from multiple sources in multiple ways. I  
15 could argue that maybe the family would want to share  
16 information that would be, I don't know, helpful to his case  
17 assuming, assuming they understand the concept of intellectual  
18 disability themselves, and they would understand Atkins,  
19 which, of course is beyond, but beyond that, just to be  
20 careful, to make sure they are not trying to sway the  
21 information, you also gather from other sources, teachers,  
22 clergy, neighbors so forth and so on.

23 Although I would like to tell you that if I had any  
24 problem with families swaying, in my personal opinion, in all

1 the years I have been doing this and obtaining the information  
2 myself basically the last approximately five to ten years, the  
3 biggest problem I have is the family wants to bury mental  
4 illness and intellectual disability. To them, their  
5 assessment is one of character. They do not understand the  
6 concept of intellectual disability and adaptive deficits one  
7 bit. All they are trying to do is make the individual look  
8 like they are much better than they are. And when I.D. is a  
9 problem with family, the biggest error in terms of bias is  
10 burying the intellectual deficit rather than magnifying it.

11 Q So how do you address that issue that you  
12 encountered with family and friends?

13 A We will obtain data from multiple sources. You  
14 can't talk to a couple, see what they say and call it a day.  
15 The stakes are too high. The demands are too overwhelming.  
16 You have to be careful we don't commit error Type One or Type  
17 Two so if you will magnify the problem or in the alternative  
18 minimize the problem. So you gather data from this source,  
19 that source. A good informant, maybe not so good informant, a  
20 family member that is concerned about his welfare, the teacher  
21 that has taught him for a number of years. And then you get  
22 all this and you put ridges from one tiny island to the other  
23 to put together an entire country. One piece of data does not  
24 make a conclusion, especially when we are talking about Prong



1       2. This is the most demanding of the prongs in terms of  
2 gathering multiple sources of information from multiple  
3 parties in multiple ways to develop a cohesive interpretation  
4 of the circumstances. Mind you, if things don't fit, your job  
5 is to figure out why they don't fit, not to make them fit. You  
6 don't put a square to a round peg, a round peg in a square  
7 hole. You just don't do it. You have to figure out why is it  
8 not fitting, then you provide information to the Court as to  
9 why is it that these discrepancies in the pieces of the  
10 information don't fit together.

11           Q     Thank you, Doctor. I want to go back to a couple of  
12 the tests that you mentioned, the ABAS or the Vineland. You  
13 noted that you would give those for quantitative data, then  
14 you look for confirming information besides the test, did I  
15 understand that correct?

16           A     Yes. Or any information, not necessarily -- You are  
17 not engaging in confirmatory bias, to be frank with you. You  
18 are there just to gather data. Is the information there going  
19 to help you come to a conclusion. So you gather numbers  
20 whenever that is possible, and you gather information that is  
21 qualitative whenever that is possible and put it altogether  
22 and see how it fits.

23           Q     You noticed those tests were not necessarily or have  
24 not been standardized to be used retrospectively; is that

1 correct?

2 A That is correct.

3 Q So why are these -- Why are you continuing to use  
4 these tests?

5 A That is the standard of care in death penalty cases.  
6 That is the standard of care in intellectual disability  
7 diagnostic work when you deal with an adult. I have been doing  
8 Social Security work for a number of years. If the question is  
9 does the individual have intellectual deficits, you can't just  
10 give them an IQ score. You have to figure how they functioned  
11 prior to the age eighteen. So you're having to apply these  
12 other tests. But just to make sure, just to make sure  
13 especially since we have some question before us about whether  
14 they can or should be used retrospectively, fine, let's get a  
15 qualitative information. The challenge that is the case is  
16 that the qualitative information is just a series of words.  
17 So then what you try to do is get words, get ideas, get  
18 phrases from multiple sources to see whether they match,  
19 whether that information in turn matches to the quantitative  
20 data.

21 Q So it sounds like the tests are useful but have  
22 limitation; is that a fair characterization?

23 A All tests have limitations. Even COVID-19 has  
24 limitations.

1           Q     Would you note, with regards to ABAS or Vineland,  
2     would you note a caveat or disclaimer as part of your report?

3           A     Yeah. You would probably want to say that this  
4     information is gathered retrospectively, you know, so many  
5     years after the person had known him. Some people knew him  
6     when he was five. Some people knew him when he was fifteen.  
7     It could be a number of years that they are having to dig  
8     deep. And you obviously want to emphasize that point, make it  
9     clear. That is why you need multiple sources of information  
10    in multiple ways and first hand, in ways that are clear and  
11    not electronically limited.

12          Q     Now, Doctor, I would like to direct your attention  
13    to current practices. Have you had to adapt due to the  
14    pandemic any work-arounds in your day-to-day practice?

15          A     My life thee days is a big -- Yes. I just--

16          Q     Can you describe some of the changes that you have  
17    had to make in your practice?

18          A     Oh, for sure. For sure. All right. Let me give  
19    you two examples. We established a clinic for indigents  
20    approximately twenty years ago. We are still working at it.  
21    I work it every other Wednesday, and others work it a little  
22    more frequently than I. We started with the idea that we are  
23    going to go ahead and see all our patients using Doxy which is  
24    a platform and video. I haven't been able to get a single

1 patient, a single patient that can work a computer or has a  
2 computer who has a bandwidth to be able to handle the  
3 Internet, so none of those people, zero, I've done zero  
4 contact with my indigent patients with video. It has been all  
5 audio. And, thankfully, almost everybody I have seen so far  
6 are people I know, so I know they are who they say they are.  
7 But it is a big challenge when you get a new patient. You  
8 don't have a clear understanding that this is the person you  
9 are talking to. In terms of the practice, the average, the  
10 average testing amount of time for a neuropsychological  
11 examination is about eight hours. We are at best able to do  
12 about two hours. And even then, we have all kinds of  
13 limitations as to validity or what we discover. So to put it  
14 in simple terms, we are doing at best one quarter of what we  
15 have historically done, and we do it with a tremendous amount  
16 of doubt. And in fact, I will tell you that in my practice,  
17 which, of course involves non-death penalty, forensic, Workers  
18 Compensation and so forth and some high stakes cases such as  
19 the implementation of what we call a D-brain stimulation  
20 device for people with Parkinsons disease, we have chosen not  
21 to do any of those. So since March 12th of this year, we have  
22 done no tele testing forensic cases. And anything that is  
23 significant in terms of clinical, we are referring it to for  
24 example Lake Forest University which is doing tele testing

1 face-to-face. We believe, when we have high stakes clinical or  
2 for that matter any form of forensic legal types of cases, we  
3 have found there is too much error, too many questions and we  
4 have chosen not to pursue those at the present time. And that  
5 happens to be the standard of care across the United States at  
6 the present time.

7 Q Just for tele testing or does that include  
8 therapeutic interventions?

9 A Less so for therapeutic. Most of us find we might  
10 want to do something with regard to teletherapy that is  
11 minimal and that is by telephone, but then, again, the stakes  
12 are not, in most circumstances, not as high as in death  
13 penalty cases.

14 Q And the difficulties you described with access to  
15 the technology, bandwidth, knowing who is on the other end of  
16 the line, those are difficulties you have experienced with  
17 your patients in the United States?

18 A Yes. We don't do any clinical work outside of the  
19 United States, so it is the United State. Because of  
20 licensing requirements, we are doing clinical work only in the  
21 State of North Carolina.

22 Q Based on your prior training and experience working  
23 in what we talked about earlier, Latin American countries, are  
24 there any our issues or concerns that you have with moving to

1 remote investigation?

2 A Well, the other thing, let's put ourselves in their  
3 shoes. We tried to find out what was the availability of the  
4 Internet in El Salvador, and we discovered it was very spotty.  
5 The bandwidth was very low, especially outside of San  
6 Salvador. And we are asking the individuals who historically  
7 don't have access to computers, some cases telephone and in  
8 other cases electricity, to be able, if you will, do the kinds  
9 of things we are doing in this particular courtroom. This is  
10 first world country problems that we had today in terms of  
11 sort of figuring out what we can do to solve it. I don't know  
12 if you remember, just a little while ago I was calling  
13 somebody on my iPhone on Face Time to try and figure out how  
14 is it we could solve this problem. We put our heads together  
15 and were able to do that. This is a first world problem. I  
16 just don't know how you do this outside of the United States,  
17 and for that matter in cases you might remember, I haven't  
18 been able to do my own indigent cases in the United States.

19 Q Does the country of El Salvador, does it present any  
20 additional concerns for you with regards to doing the  
21 telehealth or tele testing?

22 A Well, I just don't know, again, if there is a  
23 bandwidth. I don't know if there is Internet. I don't know  
24 if they would have to travel, if they did how I would do this,

1     how do I establish a rapport with people I have never met  
2     about a situation this complex. As far as you might recall,  
3     that I was interested in not just interviewing and not just  
4     testing, I really want to know his community, how was it prior  
5     to the age of eighteen. I want to get a flavor for what was  
6     happening. Do I get someone to walk around with a camera and  
7     me asking them to take a left, take a right? I have never  
8     done that. I don't know how do that. I know no  
9     neuropsychologists or doctor level psychologists in El  
10    Salvador. The rule of thumb is we don't need a doctor degree  
11    to call yourself a psychologist, so most people have what you  
12    and I have have which is a college degree. If we were to find  
13    someone, I am not sure they exist, how do we train them? I'm  
14    just, I am just thinking out loud how I could handle a Dauber  
15    challenge from either side of the aisle here if I was to do  
16    this. I think this is just, if I was to do something like  
17    that -- Well first of all, I am not sure I would. I think I  
18    would decline. You would have to find someone else. If I was  
19    forced for legal purposes, I am not sure how those things  
20    work, if I was forced for legal purposes, I would just be  
21    worried, like what? This is an appeal waiting to happen and  
22    my reputation is being challenged. So I don't want to put the  
23    law or psychology at risk. Why can't we just wait and get a  
24    vaccine?

1           Q     I appreciate that. Thank you. With regards to the  
2 work that you have to do, what about the time commitment that  
3 would be expected from your subjects in El Salvador?

4           A     Well, I would hope that in the case for example the  
5 family, I am talking about three, four, five, six hours per  
6 person. In terms of informants like teachers, clergy,  
7 neighbors, friends and so forth, you know, maybe half hour,  
8 maybe an hour, something like that. Most of that would  
9 probably be taken up with simply establishing a rapport. Once  
10 that was done, really get down to business. For example, I  
11 would be so interested in asking the teacher how they played  
12 in the playground as much as what they did in the classroom.  
13 So it would be a very targeted sort of questions depending on  
14 the informant's information that was available.

15          Q     For those conversations, what is the-- what does the  
16 call look like? Do they need to be alone or can they be with  
17 us? Can you describe that?

18          A     Well, actually we at APA and the National Academy of  
19 Neuropsychology put together a statement several years ago. I  
20 was part of those statements which believe no third party  
21 should be present. The presence of a third party, or for that  
22 matter, the reporting of information from any source whether  
23 audio or video influences the outcome of this kind of data  
24 gathering. This is the work my long-time colleague, Bob



1 McCaffery in Suny Albany discovered that the presence of a  
2 third party or the recording of information biases the data  
3 gathering. So that's not the goal. The goal is to get good  
4 data.

5 Q Over the phone are you able to ensure the person you  
6 are talking to is in a private location?

7 A How would I know that?

8 Q Can you judge their facial expressions?

9 A No. No. No. No. The further we get away from  
10 face-to-face the more error in communication becomes. No, we  
11 don't want to go down that road. I wouldn't know the veracity  
12 of the caller. I wouldn't know who was present. I wouldn't  
13 know if someone was close by providing answers. None of that  
14 would be known to me which, of course, presents all kinds of  
15 issues.

16 Q Can you tell over the phone if someone is guessing?

17 A Well, you know, you might be able to look at things  
18 like latency of response. All things being equal, you would  
19 be missing all kinds of factual information which would reduce  
20 the ability to really come to a good understanding of what is  
21 going on. If you will think of it like this: A lot of error  
22 comes from no information. A fair amount of error, quite a  
23 bit of error with only telephone. A good bit of error that is  
24 scientifically questionable from video. You want the real

1 deal that stands up to science and stands up to any kind of  
2 legal challenge, then it is all face-to-face.

3 Q And then you are aware of the Order in this case  
4 that was previously issued that any clinical interviews that  
5 are conducted are to be recorded while any testing is not  
6 subject to recording. Do you recall that?

7 A Yes, I recall that.

8 Q How could that Order be impacted or affected by  
9 moving to tele or remote communication?

10 A Honestly, I hadn't thought about that. That puts  
11 all kinds of challenges beyond the reasonable, honestly. Who  
12 is on the other line? Are they getting information from other  
13 parties? How valid is this data? How do you report it?

14 Q What about informed consent, does that create any  
15 issues in obtaining an informed consent?

16 A I guess you could ask them by reading out a form,  
17 but you are pushing me to places I have never thought about or  
18 for that matter that my science has never thought about.

19 Q What is the concern that you have when you are  
20 pushed to the limits like this in a death penalty intellectual  
21 disability case?

22 A You just roll the dice. This is not, this is not  
23 how you do this. This is high stakes. This should be as error  
24 free as humanly possible. The goal is to make sure that we do

1       this correctly so justice is done for all parties involved.  
2       This is not just to support a particular conclusion. This is  
3       to support truth, and truth is best obtained by doing the best  
4       science possible.

5           Q       With regards to the testing you were prepared to do  
6       in March 2020, could any of those tests be done remotely?

7           A       I don't know. I don't think so. I think some of the  
8       neuro psyche tests I might be able to do. As far as IQ, let me  
9       put it this way, I have not done an IQ test electronically  
10      ever. So it would be a first time. And the tests were never  
11      intended to be administered electronically. They were never  
12      validated. I am not sure they would stand up to any scientific  
13      scrutiny.

14          Q       Are you aware if you have anyone in your field who  
15      is doing tele testing or tele investigation in death penalty  
16      cases?

17          A       No.

18          Q       So, based, upon your experience of the last  
19      twenty-five years of doing these Atkins cases, should the move  
20      be made to a remote investigation in light of COVID-19  
21      pandemic?

22          A       So just to clarify, I haven't been doing Atkins  
23      cases for twenty-five years.

24          Q       Correct. Thank you.

1           A     I have done intellectual disability cases or mental  
2     retardation cases involving death penalty approximately  
3     twenty-five years. No. I think you would be challenging  
4     legal standards. Certainly you would be challenging scientific  
5     standards, and you would be beyond challenging as applied to  
6     us in psychology and neuropsychology.

7           Q     At this point in time, in order to move forward with  
8     the investigation that you have outlined, what needs to occur?

9           A     Well, I think practically, I think two things need  
10    to occur for me. One is we need a vaccine. Two, I need to let  
11    El Salvador let me in. Once that is done, I am ready to go  
12    and spend my five days which was scheduled to go previously,  
13    dig deep as I indicated in the testimony every day I have. I  
14    am willing to gather information about where was this place  
15    that he lived in. What did the records say I did not get so  
16    far. What did the family, friends, informants, school  
17    teachers, clergy have to say about him. And, finally, what  
18    about this intellectual disability or mental illness this  
19    individual has. Is this a genetic disorder. Is this something  
20    that is shareable with the family, or is this something  
21    isolated just to him.

22           MS. VERNESS: Thank you, Dr. Puente. I have no  
23    additional questions at this time.

24           THE COURT: Okay, before I let the State inquire,

1 Dr. Puente, when you are saying you need a vaccine, are you  
2 saying you need to take a vaccine, or you believe a vaccine  
3 has to be available worldwide so people in El Salvador have  
4 access to that?

5 THE WITNESS: No, just me. Just me.

6 THE COURT: Have you received any information from  
7 El Salvador, and contact or from the State Department to say  
8 when and if they will let you back into the country since you  
9 were, you said, deported? Is that going to affect your  
10 ability to get back into the country?

11 THE WITNESS: Considering I was deported based upon  
12 I had been to Spain 23 days prior, I would think, if that was  
13 rescinded, that particular Presidential decree was rescinded,  
14 I would be let in. In other words, it was not a criminal act I  
15 engaged in and so forth, so I would hope I would be given the  
16 opportunity to return. If the opportunity was given I would  
17 certainly go as quickly as I could.

18 THE COURT: Okay. And you indicated you believed  
19 the defendant was a long way away from eighteen.

20 THE WITNESS: No, no. In terms not like he was  
21 nineteen or twenty. We are not talking not just months. We  
22 are talking about years

23 THE COURT: Because he's twenty-one.

24 THE WITNESS: In other words, I think if we want to

1 address this at the age of nineteen, one could argue we were  
2 talking about weeks or months and therefore not that far away.  
3 Twenty-one starts looking like a significant difference, and  
4 maybe a quantitative difference that would be measurable based  
5 on how the brain is. I am not sure there is a lot of  
6 difference between seventeen, eighteen, nineteen. But between  
7 eighteen and twenty-one, it is more substantial.

8 THE COURT: Today he's twenty-one. The original  
9 assessment he was twenty.

10 THE WITNESS: Right.

11 THE COURT: You think that is a significant  
12 separation from eighteen psychologically?

13 THE WITNESS: Well, significant enough you need to  
14 gather information more clearly how life was before the age of  
15 eighteen and how it is now. Plus, I don't have a lot of  
16 information about life before the age of eighteen. I have  
17 some about life after.

18 THE COURT: All right. With those questions in  
19 mind, Mr. Jackson, you may cross-examine, then I will allow  
20 the State a chance to -- or the defense a chance to  
21 re-inquire. It is is 11:38. We'll be breaking today at 11:53.  
22 Mr. Jackson.

23 MR. JACKSON: Thank you.

24 ///

CROSS-EXAMINATION

BY MR. JACKSON:

Q Dr. Puente, my name is Mark Jackson, one of the prosecutor for the State of Nevada. I want to start off, at the beginning of your testimony on direct you talked about Prong 2, the adaptive functioning assessment. Do you recall that?

A Yes.

Q Throughout your testimony, you kept referring to it as the adaptive functioning assessment, correct?

A Adaptive functioning assessment, yes. Adaptive deficits, yes.

Q You also heard of adaptive behavior assessment, correct?

A Yes.

Q Is that the same thing as the adaptive functioning assessment?

A I think those words are interchangeable, adaptive behavior assessment, adaptive functioning assessment.

Q The DSM-5 refers to one and the AAIDD refers to the other. So those are used interchangeably, adaptive functioning assessment and adaptive behavior assessment; isn't that true?

A Yes.

1           Q     In fact, the Vineland test you referred to, that is  
2     called the adaptive behavior assessment; isn't that accurate?

3           A     Yes.

4           Q     So if I understand your testimony correctly on  
5     direct, Dr. Puente, it is your opinion that an Atkins  
6     investigation that conducts interviews of informants, family  
7     members, co-workers, teachers, any person who would have  
8     information about the defendant prior to age eighteen, those  
9     interviews need to be conducted in person as opposed to some  
10    alternative method such as telehealth, correct?

11          A     Yes.

12          Q     And when I say telehealth, I only heard it come up  
13    once or twice during your direct, telehealth, as I understand  
14    that term as defined by the American Psychological Association  
15    includes all telecommunication technologies from telephones,  
16    mobile devices as well as interactive video conferencing much  
17    like this hearing is being conducted now; is that a fair and  
18    accurate definition of telehealth the way you used that term?

19          A     Yes.

20          Q     During your direct testimony, you stated and  
21    emphasized the importance of conducting these in person. You  
22    used the term face-to-face. Do you recall that question, sir?

23          A     I do.

24          Q     Dr. Puente, can you see my face right now?



1           A     Yes.  Very handsome face.

2           Q     Thank you.  If I was to tell you that I could see  
3     your face right now as I looked on the screen, would you  
4     believe me?

5           A     Yes.  I think I would believe you as a prosecutor.

6           Q     So are we not having a face-to-face discussion right  
7     now, albeit through an interactive telecommunication platform?

8           A     It does not meet the definition of what face-to-face  
9     is according to what the American Medical Association  
10    procedures.

11          Q     I'll get to that.  I'll get to that in a minute,  
12    Dr. Puente.  So is it also your testimony, as I understood it,  
13    that you deem it also necessary and appropriate under what you  
14    refer to as the current standards, that any type of testing  
15    that is conducted for an Atkins investigation and specifically  
16    any type of adaptive behavior assessment or adaptive  
17    functioning assessment, that that too needs to be done in  
18    person as opposed to through some interactive teleconferencing  
19    platform?

20          A     Yes.  I would answer -- The answer is yes.  For that  
21    matter, I would extend it to Prong 1 as well.

22          Q     Now I know you talked about standards.  I kind of  
23    want to walk through some of those, because would you agree at  
24    the outset there are some guidelines and policies or even some

1 law that exists that is contrary to your opinion that you just  
2 rendered?

3 A I am not so familiar with the law, obviously, but I  
4 am familiar with the psychological standards. I don't know  
5 which ones you are referring to.

6 Q Would you agree with me that your opinion that you  
7 have provided to the Court in this case as to the interviews  
8 from informants and the testing of any informant, those need  
9 to be done in person, that that is contrary to some of your  
10 own past practices in death penalty cases?

11 A I am not sure I follow.

12 Q I will get back to that, too. Dr. Puente, let's  
13 start talking about the APA guidelines for the practice of  
14 tele psychology that were adopted in 2013. Are you familiar  
15 with the APA guidelines for the practice of tele psychology?

16 A I am not so familiar with the 2013. I am more  
17 familiar with the ones from 2020.

18 Q Are you aware of any major change between the 2020  
19 and 2013 guidelines?

20 A Honestly, I don't recall actually comparing both of  
21 those, so I apologize. I don't know the answer to your  
22 question.

23 Q So there are eight specific guidelines according to  
24 the APA on the practice of tele psychology, correct?

1 A Yes.

2 Q Guideline seven deals specifically with testing and  
3 assessment, would you agree with that?

4 A Yes.

5 Q Now you testified earlier on direct examination as  
6 to the tests that you took with you to El Salvador in March,  
7 you referred to the ABAS as well as the Vineland; is that  
8 correct?

9 A Yes.

10 Q Which version of the ABAS did you take with you?

11 A I think I took the last one that was in Spanish.  
12 The same thing with the Vineland. It would be the fourth.

13 Q Is there a Vineland fourth now?

14 A I don't remember the Vineland. I tend to use the  
15 ABAS. I don't remember which version of the Vineland I took.

16 Q When you say you took pads of paper, pencils, pens  
17 and a lot of these tests, what you are referring to on those  
18 tests are actually questionnaire booklets; isn't that true?

19 A Well, for the adaptive assessment, adaptive  
20 functioning, adaptive behavior test, that is correct for the  
21 Vineland and ABAS.

22 Q You took those questionnaire booklets, correct?

23 A Yes.

24 Q Do you recall if you took, because there is two

1 different versions of the Vineland, There is the longer  
2 version, the comprehensive, and then there is the shorter  
3 version, the Domain, did you take both the comprehensive and  
4 the Domain with you to El Salvador?

5 A I don't recall for sure what I packed. My usual  
6 practice is to try to do both, because sometimes if I can't do  
7 the long version, there are limits that allow me to only do  
8 the short version. Typically, I would take both. I would  
9 take whatever I had just because I don't know what  
10 circumstances that might arise once I get there.

11 Q And there's different interview forms or  
12 administration forms, excuse me, three separate ones of the  
13 Vineland, correct?

14 A Right.

15 Q You took all of those three different forms?

16 A Whatever I could I took. I don't remember exactly  
17 what I packed, but typically that is what I would have done.  
18 That is typically what I would have done in this particular  
19 case.

20 Q So the ABAS, you can't recall which version, and the  
21 Vineland, you can't recall which version, that you took with  
22 you to El Salvador in March of 2020, were both of those tests  
23 and in a different administration forms that you took, were  
24 those scaled to Latin American norms?

1           A     Well, first of all, I didn't say I don't know what I  
2     took. I explained to you I don't remember if it was the third  
3     or fourth, but it was the last version of each one. I think  
4     ABAS just came out with a one. That is why it is a bit of a  
5     challenge for me to remember. And I don't recall exactly what  
6     I packed earlier this year in March. But typically, I am  
7     almost sure in this case I would have done the same thing, I  
8     would have taken them all. But to answer your question  
9     specifically, the norms are not from Central America.

10          Q     They were not scaled, you took tests that were not  
11     scaled to Latin American norms?

12          A     That is correct.

13          Q     That can affect the results of any of those adaptive  
14     behavior or as you call it, adaptive functioning assessments  
15     that would be administered to any informant?

16          A     Yes. That is why you want information from a  
17     variety of sources, to make sure a cohesive story fits. If it  
18     doesn't fit, why does it not fit.

19          Q     So even though those are not to be applied  
20     retrospectively, you stated that on direct, that is okay,  
21     correct?

22          A     You are not supposed to according to the standards  
23     of the actual manual, but the standards of the practice is  
24     very typical to do so retrospectively.

1           Q     Standards can change to benefit what your ultimate  
2 goal is, am I understanding your testimony correctly?

3           A     Well, the goal is to get good data, to be able to  
4 provide the best information to the Court to make a decision.  
5 At this particular stage, the tests were really not intended  
6 for this, but are frequently if not exclusively used in this  
7 fashion. Essentially, it is what most everyone I know in the  
8 field would do.

9           Q     So going back to guideline seven, the APA guidelines  
10 for neuropsychology, beginning in 2017, seven years ago, is it  
11 true those guidelines actually encouraged the administration  
12 of testing to telecommunication, and they are consistent with  
13 the standards that have been set forth by the APA, correct?

14          A     Those standards were revised in 2014.

15          Q     And those are still consistent with those standards  
16 in 2014 just as they are with the standards in 2020, correct?

17          A     No. It turns out they are not. I think they are  
18 aspirational, but it turns out a lot has been learned since  
19 2013, but it is a good aspiration, and I still think it is a  
20 good idea to try to get that accomplished and achieved, but it  
21 turns out it is a lot more complicated than we ever imagined.

22          Q     But guidelines are aspirational, would you agree?

23          A     I was involved with the standards of 2014 --

24          Q     Dr. Puente, I didn't ask you about what you were

1 involved in. Please just answer the question. Thank you.

2 There was no mention whatsoever in the 2013 guidelines for the  
3 paragraph tele psychology specific to Atkins investigations in  
4 death penalty cases; isn't that true?

5 A Yes. I think now that you mention it, I think that  
6 the guidelines for 2013 were really intended for clinical work  
7 rather than forensic work.

8 Q So you do recognize that in this case, the State of  
9 Nevada versus Wilber Ernesto Martinez Guzman, this case is  
10 being prosecuted in the State of Nevada?

11 A Yes.

12 Q And we are acknowledging you are testifying remotely  
13 through ZOOM video conferencing platform. You are currently  
14 sitting I believe in your office in North Carolina, correct?

15 A That is correct.

16 Q In this case, are you aware, Dr. Puente, that in  
17 2015 the Nevada legislature introduced and enacted a law,  
18 Assembly Bill 292 that authorized and encourages the use of  
19 telehealth services in the State of Nevada? Are you aware  
20 that is the current law in the State of Nevada?

21 A No, I'm not aware of that at all.

22 Q I am going to discuss some the findings of the  
23 Nevada legislature. I want to ask you if you agree with these  
24 findings, even though you are not aware of that particular

1 law. The testimony that was provided to the legislature in  
2 Nevada, we have two chambers, we have an Assembly, the lower  
3 house, and then the Senate. And the finding of the legislature  
4 is: "Telehealth is a mode of delivering health care and  
5 public health services using information and audio-visual  
6 communication technology to enable diagnosis, consultation,  
7 treatment, care management and provision of information to  
8 patients from providers of health at other locations." Would  
9 you agree with that finding by the legislature in 2015 here in  
10 Nevada?

11 A I would agree telehealth is a very good addition to  
12 as we say face-to-face in health care decisions and diagnoses.

13 Q When we are talking about healthcare and diagnoses,  
14 let's say the treatment of someone for schizophrenia, are you  
15 trying to say the standard and method of delivering services  
16 to that individual should be a lower standard in interviewing  
17 someone that may have known a defendant in a capital murder  
18 case?

19 A I think healthcare has a different standard than the  
20 standard for, if you will, forensic or legal proceedings.

21 THE COURT: This is the Judge speaking. I am going  
22 to stop you. We are going to break for our lunch recess.  
23 During this break, the Court will be leaving this meeting. I  
24 will not be on the meeting during the recess. But if counsel



1 wants to stay on the link, they may do so by just muting their  
2 microphone and/or turning off their camera.

3 Mr. Jackson, in this break, if you all could get  
4 your camera that you are using at a higher level, I am not  
5 seeing your eyes, and I do like to see the person's eyes when  
6 they are talking. You are kind of looking down. If you can  
7 set that up during the break, that would be great. If you  
8 can't, I understand.

9 We will be in recess until 1:30, but I want everyone  
10 back with the clerk no later than 1:20 so she can troubleshoot  
11 if there are any issues with you so we can actually start with  
12 testimony again at 1:30.

13 Now, Dr. Puente, we will need you back here. If you  
14 exit the platform, make sure you get back on it quickly.

15 THE WITNESS: I am not going to exit. I am just  
16 going to go mute.

17 THE COURT: You can mute, turn off your camera and  
18 go on about your business. Just be sure to be back at 1:20 so  
19 the clerk can check everyone in.

20 Anything further, Ms. Clerk, we need to tell  
21 everyone?

22 THE CLERK: No. We are good.

23 THE COURT: Okay. Deputy Finn, I think the  
24 interpreter has to say deputy Finn for me in English.

1 THE BAILIFF: Yes, go ahead.

2 THE COURT: I just wanted to let you know that we  
3 are going into recess. We will be back on the record at 1:30.  
4 Everyone is to check in with the clerk no later than 1:20. If  
5 you want to leave us connected through what you are doing, you  
6 can do so. But the clerk and I are going to be in recess. I  
7 am going to be off. Any questions, deputy Finn?

8 THE BAILIFF: No, Your Honor.

9 THE COURT: Thank you. Court's in recess.

10 (Whereupon, the Court adjourned for the noon recess.)

11 --o0o--

12

13

14

15

16

17

18

19

20

21

22

23

24

1 STATE OF NEVADA, )  
2 COUNTY OF WASHOE. ) ss.

3 I, Judith Ann Schonlau, Official Reporter of the  
4 Second Judicial District Court of the State of Nevada, in and  
5 for the County of Washoe, DO HEREBY CERTIFY:

6 That as such reporter I was present in Department  
7 No. 4 of the above-entitled court on Monday, July 27, 2020, at  
8 the hour of 10:00 a.m. of said day and that I then and there  
9 took verbatim stenotype notes of the proceedings had in the  
10 matter of THE STATE OF NEVADA vs. WILBER ERNESTO MARTINEZ  
11 GUZMAN, Case Number CR19-0447.

12 That the foregoing transcript, consisting of pages  
13 numbered 1-67 inclusive, is a full, true and correct  
14 transcription of my said stenotypy notes, so taken as  
15 aforesaid, and is a full, true and correct statement of the  
16 proceedings had and testimony given upon the trial of the  
17 above-entitled action to the best of my knowledge, skill and  
18 ability.

19 DATED: At Reno, Nevada this 27th day of July, 2020.

20  
21  
22 /s/ Judith Ann Schonlau  
23 JUDITH ANN SCHONLAU CSR #18  
24

1 4185

2  
3 IN THE SECOND JUDICIAL DISTRICT COURT  
4 STATE OF NEVADA, COUNTY OF WASHOE  
5 THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

6 STATE OF NEVADA,

Dept. No. 4

7 Plaintiff,

Case CR19-0447

8 vs.

9 WILBER ERNESTO MARTINEZ GUZMAN,

10 Defendant.

11 Pages 1 to 145, inclusive.

12 TRANSCRIPT OF PROCEEDINGS  
13 EVIDENTIARY HEARING -- P.M. SESSION  
14 Monday, July 27, 2020

15 A P P E A R A N C E S:

16 FOR THE PLAINTIFF: CHRISTOPHER HICKS, D.A.  
17 TRAVIS LUCIA, D.D.A.  
18 1 So. Sierra St., So. Tower  
19 Reno, NV 89502  
20 MARK B. JACKSON, D.A. DOUGLAS CO  
21 1038 Buckeye Road, Minden, NV

22 FOR THE DEFENDANT: JOHN ARRASCADA, P.D.  
23 KATHERYN HICKMAN, D.P.D.  
24 JOSEPH GOODNIGHT, D.P.D.  
GIANNA VERNES, D.P.D.  
350 So. Center Street, #6  
Reno, NV 89501

25 REPORTED via Zoom BY: Christina Amundson, CCR #641  
Litigation Services, 323.3411

I N D E X

EXAMINATION OF DR. ANTONIO PUENTE: PAGE

Cross by Mr. Jackson 4  
Redirect by Ms. Verness 38  
Recross by Mr. Jackson 51

EXAMINATION OF DR. BRIAN LEANY:

Direct by Mr. Goodnight 56  
Cross by Mr. Jackson 94  
Redirect by Mr. Goodnight 104

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ADMITTED</u>
5	Curriculum Vitae	59

1 RENO, NEVADA - MONDAY 7/27/20 -- 1:30 P.M.

2 -o0o-

3 THE BAILIFF: All rise.

4 THE COURT: Thank you. Please be seated.  
5 I'd like everyone to make their appearances for the  
6 record starting with the court reporter.

7 THE REPORTER: Tina Amundson, Washoe  
8 County, Nevada.

9 THE COURT: Thank you. And our bailiff.

10 THE CLERK: My name is Marci Stone.

11 DEPUTY FINN: Yes, your Honor. Deputy Finn  
12 appearing from 911 Parr Boulevard, Washoe County,  
13 Nevada.

14 THE COURT: Thank you. Okay. I will go  
15 forward with the witness.

16 Dr. Puente, can you hear me?

17 THE WITNESS: Yes, I can hear you, your  
18 Honor.

19 THE COURT: I don't think you're on the  
20 right interpreter mode. You're very quiet for us,  
21 so I'm going to have the clerk give you some  
22 instructions.

23 THE CLERK: Dr. Puente, do you have a  
24 little world icon at the bottom of your Zoom?

1 THE WITNESS: Yes, I do.

2 THE CLERK: Click on that.

3 THE COURT: Thank you, sir. You're still  
4 under oath. I'll allow Mr. Jackson to continue his  
5 cross-examination of you. The record should also  
6 reflect that Mr. Guzman is present.

7 And good afternoon, Mr. Guzman. Can you  
8 give me a thumb's up if everything is okay and you  
9 can hear the interpreter.

10 THE DEFENDANT: (Defendant complies.)

11 THE COURT: Thank you, sir.

12 Go ahead, Mr. Jackson.

13 CROSS-EXAMINATION

14 BY MR. JACKSON:

15 Q. Dr. Puente, before the break I had just  
16 started asking you some questions about certain  
17 findings by the Nevada Legislature in connection  
18 with the law that was enacted in 2015.

19 Do you recall that?

20 A. Yes.

21 Q. And before I continue with that, that line  
22 of questioning, I wanted to go back and ask you,  
23 Over the break did you take an opportunity to look  
24 at what the latest version of the Vineland as well

1 as the ABAS tests were?

2 A. No, I did not.

3 Q. If I was to tell you that the latest  
4 version of the Vineland is the Vineland-3, would you  
5 have any reason to disagree with me on that?

6 A. No. That's my recollection as well.

7 Q. And with respect to the Vineland-3, that  
8 Adaptive Behavior Assessment, that Vineland-3 is put  
9 out by a company known as Pearson, P-e-a-r-s-o-n,  
10 correct?

11 A. Yes.

12 Q. On your direct you testified to the fact  
13 that the Vineland-3 and even the ABAS, that those  
14 need to be administered through the paper  
15 questionnaire booklets, correct?

16 A. That is the preferred mode.

17 Q. Were you aware that Pearson has, in fact,  
18 put out information on telepractice and the  
19 Vineland-3?

20 A. Yes.

21 Q. And, in fact, within what Pearson  
22 advertises for practitioners such as yourself is,  
23 "Computer-based test administration means fewer or  
24 no administration materials and less time spent



1 scoring. Completing the Vineland-3 on a mobile  
2 device makes it just as portable as questionnaire  
3 booklets and digital administration allows these  
4 advantages."

5 Are you familiar with that information that  
6 is put out by the company that produces the  
7 Vineland-3 Adaptive Behavior Assessment?

8 A. Yes.

9 Q. And the same with the ABAS-3, similarly,  
10 that is also available and is able to be tested and  
11 administered through some form of telecommunication.

12 Isn't that correct?

13 A. Yes.

14 Q. Going back to the certain findings of the  
15 Nevada Legislature dealing with telepsychology, the  
16 -- if I was to tell you that the Nevada  
17 Legislature's findings also included "Telehealth can  
18 reduce the cost of providing healthcare and increase  
19 the quality of and access to healthcare," would you  
20 agree with that finding about the Nevada  
21 Legislature?

22 A. I'm not sure it's a finding because they  
23 don't quote research but -- and I'm not familiar  
24 with the law, obviously. But I think the

1 possibility exists that it could extend healthcare  
2 and it might also be valuable, valuable and  
3 reliable. Unfortunately, there's no research to  
4 support that at the present time.

5 Q. And increase the quality of that health  
6 care --

7 A. It could.

8 Q. -- that's provided through telehealth,  
9 correct?

10 A. It could.

11 Q. The law itself, Section 2 of the law reads,  
12 "Healthcare services provided through telehealth are  
13 often as effective as healthcare services provided  
14 in person."

15 Would you agree with that law here in the  
16 state of Nevada?

17 A. Well, I agree with that law. I don't think  
18 that I know that -- I don't know any research that  
19 supports that law, but I agree with the law.

20 Q. The law sets forth the policy here in the  
21 state of Nevada in Section 3 of Assembly Bill 292  
22 "It is the public policy of the state to encourage  
23 and facilitate the provision of services through  
24 telehealth."

1 Did you encourage, Dr. Puente, the  
2 provision of psychological services through  
3 telehealth?

4 A. Yes. As much as scientifically valid, yes.

5 Q. The testimony in support of that AB 292  
6 included the chief medical officer for the State of  
7 Nevada Department of Health and Human Services, the  
8 Nevada Board of Medical Examiners, the Nevada State  
9 Medical Association, and the Nevada Psychological  
10 Association.

11 Would you agree that those are important  
12 organizations to hear from for a legislative body to  
13 hear from before enacting a law encouraging  
14 telepsychology?

15 A. Yes.

16 MS. VERNESS: Objection, that assumes facts  
17 that are not in evidence. Dr. Puente has indicated  
18 he is unfamiliar with the law.

19 THE COURT: For purposes of today's hearing  
20 and for the court to analyze the opinion of Dr.  
21 Puente, it's important for me to understand the  
22 other points of view and his relationship to those  
23 points of view. Therefore, I'll deny your  
24 objection.

1 BY MR. JACKSON:

2 Q. Dr. Puente, if I was to tell you that the  
3 Nevada Psychological Association also submitted a  
4 letter in support of that bill, would you have any  
5 reason to disbelieve me?

6 A. No.

7 Q. In a letter that was submitted on behalf of  
8 the Nevada Psychological Association, it refers to  
9 some studies -- and I'm going to read this to you  
10 and ask if you're aware of these studies.

11 So, in the letter discussing telehealth  
12 versus in-person services, it states, "A 2008 meta  
13 analysis of 92 studies found that the differences  
14 between Internet-based therapy and face-to-face  
15 therapy were not statistically significant," citing  
16 to the Journal of Technology In Human Services,  
17 Volume 26, No. 2.

18 First of all, are you familiar with the  
19 Journal of Technology In Human Services  
20 Publications?

21 A. No.

22 Q. Are you familiar with a 2008 meta analysis  
23 of 92 studies that found that there was no  
24 statistically significant difference between

1 Internet-based therapy and face-to-face therapy?

2 A. No.

3 Q. Do you have any reason to disagree with  
4 those studies, if, in fact, those studies do state  
5 that there is no statistically significant  
6 difference between Internet-based therapy and  
7 face-to-face therapy?

8 A. Not having read the study, obviously, it's  
9 hard for me to give you a very confident answer.  
10 But I'm not familiar with the research literature on  
11 therapy but not surprised for a study from 2008 to  
12 have that kind of information available at the time.

13 Q. And the letter that was submitted in  
14 support of that bill by the Nevada Psychological  
15 Association refers to a 2009 review of 148  
16 peer-reviewed publications examining the use of  
17 videoconferencing which showed high patient  
18 satisfaction, moderate to high clinician  
19 satisfaction, and positive clinical outcomes citing  
20 Clinical Psychology: Science and Practice, Volume  
21 16, No. 3.

22 First of all, Dr. Puente, are you familiar  
23 with Clinical Psychology Science and Practice?

24 A. No, I'm not familiar with that journal.

1 Q. Are you familiar with a 2009 review of  
2 those 148 peer-reviewed publications examining the  
3 videoconferencing and the delivery of services to  
4 patients related to that?

5 A. What kind of service?

6 Q. Deliver patient intervention services?

7 A. I'm mostly a diagnostician as, honestly,  
8 I'm not familiar with the literature involving  
9 teletherapy but it sounds reasonable.

10 Q. Well, let's talk about something that I  
11 think you are very much aware of. You have stated  
12 and testified previously back in February that, not  
13 only are you a member of the American Psychological  
14 Association, but you are also a past president,  
15 correct?

16 A. Yes.

17 Q. And you currently serve on some committees  
18 within the APA, correct?

19 A. Yes.

20 Q. Now, in reading through multiple articles  
21 on delivering any kind of psychological service,  
22 whether it be in person or through some form of  
23 telecommunications, the APA has not only looked at  
24 guidelines, but also wanted to make sure that those

1 practitioners would be compensated for their  
2 services, correct?

3 A. Yes.

4 Q. And wouldn't you agree with me that the  
5 COVID-19 pandemic has increased the demand for  
6 mental and behavioral health services?

7 A. Yes.

8 Q. If I was to tell you, for example, that  
9 here in Northern Nevada we've seen an increase in  
10 mental health as well as an increase in suicides,  
11 would you have any reason to disbelieve that?

12 A. No. It mirrors the national averages as  
13 well.

14 Q. So, you're aware that the national averages  
15 have increased in the last several months as a  
16 result of the COVID-19 pandemic?

17 A. Yes.

18 Q. So, practitioners are very eager in trying  
19 to look for alternative means and methods in order  
20 to deliver services, whether it be therapy,  
21 consultations, interviews, and even testing of  
22 patients, correct?

23 A. They're eager, correct.

24 Q. And the APA has been pushing education

1 within your ranks to ensure that psychologists are  
2 prepared to provide telepsychology services.

3 Isn't that true?

4 A. That is true.

5 Q. And the APA has been campaigning to make  
6 sure that psychologists who render these  
7 telepsychology services are familiar with the proper  
8 means and methods, aware of certain issues that do  
9 need to be looked at and addressed and also that  
10 they're properly paid or reimbursed for those  
11 services, correct?

12 A. Correct.

13 Q. And the APA over the last several months  
14 has been lobbying for interface practice and policy  
15 and advocacy for telepsychology services.

16 Isn't that true?

17 A. That is correct.

18 Q. In fact, in March of this year, the APA  
19 members and staff conducted more than 250  
20 congressional visits by phone and in person lobbying  
21 for the support of telehealth services, true?

22 A. True.

23 Q. And which includes, not only consulting and  
24 interviews, but psychological and neuropsychological



1 testing through telehealth services.

2 Isn't that accurate?

3 A. Correct. For healthcare, correct.

4 Q. And, in fact, you participated in those  
5 lobbying efforts, haven't you?

6 A. That is correct.

7 Q. The APA puts out a publication that's  
8 called the "Monitor On Psychology."

9 Isn't that accurate?

10 A. Yes.

11 Q. And you're familiar with that publication,  
12 are you not?

13 A. Yes.

14 Q. I don't know that it's published every  
15 month, because I believe the current edition is a  
16 July-August. So, is it 11 times a month that it's  
17 published?

18 A. Eleven times a year, correct.

19 Q. Excuse me. Eleven times a year.

20 A. Yes.

21 Q. So, did you have an opportunity to read the  
22 June edition of the "Monitor On Psychology"?

23 A. I didn't read it carefully.

24 Q. You did read it carefully?

1           A. No, I did not.

2           Q. Do you know that there's an article  
3 entitled "Telepsychology Expands to Meet Demand"  
4 that is included in the June 2020 "Monitor On  
5 Psychology"?

6           A. I saw the headline but I did not read the  
7 article, for that matter, any article from the June  
8 -- or for that matter July or August issue.

9           Q. In the June 2020 edition of the  
10 publication, I'm going to read a quote to you. I'll  
11 ask you if you recognize this quote.

12                   And this is following a campaign that began  
13 in full force on March 10<sup>th</sup>, according to the  
14 article, regarding telehealth services.

15           A. Right.

16           Q. "Three weeks later in the thick of a public  
17 health emergency, a group of APA staff and leaders  
18 in the field delivered a method and payment policy  
19 that allows for the provision of telepsychology  
20 services. From an idea to a reality in three weeks  
21 is a miracle and it is a bright light that interface  
22 practice, policy, and advocacy."

23                   Do you recognize that quote, Dr. Puente?

24           A. Yes. I believe that may be mine. I

1 haven't seen it in print but I believe that may be  
2 mine.

3 Q. So, until I asked you this question, you  
4 were not aware that you were quoted in the June 2020  
5 edition of the Monitor On Psychology in an article  
6 entitled "Telepsychology Expands to Meet Demand"?

7 A. I don't -- I recall talking to reporters  
8 but I don't recall that particular article. I  
9 didn't read it. But thank you for alerting me to  
10 that.

11 Q. So, that was important to the APA --

12 A. Yes.

13 Q. -- of pushing for telepsychology services  
14 during this COVID-19 pandemic, correct?

15 A. Right. Yes.

16 Q. I did not hear an audible.

17 A. Yes.

18 Q. And, obviously, it was important to you so  
19 much that you, obviously, spoke to somebody who  
20 penned this article, correct?

21 A. Yes.

22 Q. Now, continuing with that article, because  
23 it's just as important that practitioners be paid,  
24 you testified to that. You agree that that was an

1 important part of the lobbying efforts that you  
2 helped engage in, correct?

3 A. Correct.

4 Q. So, the services through the APA and  
5 through -- that are allowed via phone and  
6 traditional telehealth, according to the article,  
7 include psychiatric diagnostic interview,  
8 psychotherapy including individual group and family,  
9 psychological and neuropsychological testing, health  
10 behavior assessments, psychoanalysis, neuro  
11 behavioral status examinations, and behavioral  
12 screening, to name a few.

13 Are you aware that those are the services  
14 that are allowed and something that you lobbied for  
15 yourself that can be conducted via telephone or  
16 traditional telehealth?

17 A. Yes -- actually, you meant video.

18 Q. "Telehealth" meaning -- I'm sorry. Yes, so  
19 videoconferencing.

20 A. Yes.

21 Q. And services that aren't allowed by  
22 telephone, but can only be done by traditional  
23 telehealth, such as videoconferencing, such as we're  
24 engaged right now, are Adaptive Behavior

1 Assessments. Isn't that true, Dr. Puente?

2 A. That is true. Let me just sort of point a  
3 clarification --

4 Q. I'm just asking if that was true and you  
5 answered "yes".

6 A. Yes.

7 Q. So, isn't it true that -- again, going back  
8 to your earlier testimony on direct -- that you were  
9 retained by the defendant in this case to conduct an  
10 Adaptive Behavior Assessment of him?

11 Isn't that true?

12 A. That is true.

13 Q. And as part of that Adaptive Behavior  
14 Assessment you talked about the importance of  
15 interviewing informants who, many of which, reside  
16 currently in the country of El Salvador, correct?

17 A. Yes.

18 Q. And do you know APA's CEO, Dr. Arthur C.  
19 Evans, Jr.?

20 A. I hired him.

21 Q. So, Dr. Evans is quoted in the same article  
22 that you're quoted in, Dr. Puente. And in relation  
23 to the spread of Coronavirus and talking about the  
24 importance of providing those types of services,

1 everything from Behavioral Health Assessments to  
2 psychological and neuropsychological testing and all  
3 types of interviews, he says, "We cannot leave any  
4 of our neighbors without access to videoconferencing  
5 technology behind."

6 Do you agree with Dr. Evans', a person that  
7 you hired?

8 A. I agree that this is very useful for  
9 healthcare, correct.

10 Q. So, it is your testimony, as I understand  
11 it, that, although you lobbied and pushed for  
12 interviews, psychological and neuropsychological  
13 testing as well as Adaptive Behavior Assessments to  
14 be conducted through alternative means, specifically  
15 teleconferencing for the Adaptive Behavioral  
16 Assessment, but the others by either telephone or  
17 telephone conferencing, that now you flip-flopped  
18 your position and you're saying, well, in this case,  
19 because it's beneficial to you, that those methods  
20 should not be used.

21 Am I understanding your testimony correct?

22 A. No.

23 MS. VERNESS: Objection, your Honor,  
24 argumentative.

1 THE COURT: As to the side comment, Mr.  
2 Jackson, you can ask the question but you can't  
3 answer it.

4 MR. JACKSON: I'll remove that between the  
5 commas.

6 BY MR. JACKSON:

7 Q. Have you changed your position on this from  
8 when you lobbied a few months ago to now?

9 A. No. The position then and now continues to  
10 be that I support the use of telehealth both for  
11 diagnostic and for therapeutic purposes for health  
12 care.

13 I did not lobby and do not advocate for the  
14 use of telehealth testing for anything involving  
15 forensic or legal things. I did not go to Congress  
16 for that. I did not push for that. The guidelines  
17 that we published don't involve anything involving  
18 forensic or legal activity.

19 Q. But the Vineland-3 and the ABAS-3 are  
20 Adaptive Behavior Assessments, correct?

21 A. Yes.

22 Q. And as that article relates, the Adaptive  
23 Behavior Assessments is something that the APA  
24 stands behind for being able to be conducted through

1 teleconferencing. Would you agree with that?

2 A. The teleconferencing and healthcare  
3 circumstances, yes. We're silent on educational  
4 applications and we're also silent on forensic or  
5 legal cases.

6 Q. So, going back to your direct examination,  
7 you were asked a question regarding travel and  
8 whether you always traveled and you stated no, that  
9 historically you did not always travel.

10 And you referenced a case that occurred in  
11 the 1990s wherein you received information from a  
12 mitigation specialist that was later found to be  
13 either false or wrong, which then affected your  
14 ultimate opinion, and as a result of that, it's been  
15 your policy and practice since then to travel,  
16 correct?

17 A. No. It was in the 1990s and that did not  
18 change from start to finish. It was an evolution.  
19 Subsequently, I started asking the mitigation  
20 specialist for specific information.

21 And then subsequently, about five to ten  
22 years ago, I began slowly but surely switching to,  
23 as we mentioned earlier, a face-to-face instead of a  
24 direct contact with the informants as a way of



1 gathering information, if the opportunity arises.  
2 Sometimes it's impossible but if the opportunity  
3 arises, you certainly do it.

4 Q. Such as now, right, with the COVID-19  
5 pandemic? You talked about, unless it's impossible,  
6 would this be one of those occasions?

7 A. No. Because I consider this to be a  
8 temporary, so I'm assuming that sooner or later  
9 there will be a vaccine and I'll be in a position to  
10 travel.

11 In the case I'm particularly referring to,  
12 the informants were in an unstable section of  
13 Central America and controlled by the cartel. And I  
14 was told by the government that they would not allow  
15 me to go and they would not come after me if I went.

16 That seemed to me that that would  
17 jeopardize my life as well as the life of the  
18 informants, so that was an impossible task. In this  
19 case it's impossible today, but I hope it will be  
20 possible soon.

21 Q. Dr. Puente, are you familiar with a person  
22 by the name of Isidro, I-s-i-d-r-o Hernandez,  
23 H-e-r-n-a-n-d-e-z, Lagunas, L-a-g-u-n-a-s?

24 A. Yes.

1 Q. And, Mr. Lagunas, he's a defendant who is  
2 charged with capital murder in the state of Arizona.

3 Isn't that correct?

4 A. Oh, I don't remember where.

5 Q. Maricopa County, Arizona.

6 Does that help refresh your recollection?

7 A. Yes.

8 Q. And you were retained by the defense in  
9 that case to conduct an Atkins Adaptive Behavior  
10 Assessment. Isn't that true?

11 A. I just don't recall when that was, to be  
12 frank with you. Do you recall when that one was?

13 Q. I'll go ahead and ask the questions, Dr.  
14 Puente.

15 A. Yeah. I just -- I just can't recall when  
16 it was. That's my problem.

17 Q. Isn't it true that there were several  
18 instances in that case where you conducted  
19 phone-only interviews of family members of Mr.  
20 Lagunas?

21 A. Yes.

22 Q. And isn't it true that you also relied on  
23 video interviews that were conducted by defense  
24 counsel in that case?

1           A. Yes.

2           Q. And you also relied on video interviews  
3 that were conducted by the mitigation specialist or  
4 specialists in that case.

5           A. I don't recall, but it seems that way.

6           Q. And because at the time there was reported  
7 by you a high number of kidnapping in this region in  
8 Mexico, you refused to travel to Mexico to interview  
9 any of the family members, coworkers, teachers, or  
10 anyone along those lines. Isn't that correct?

11          A. I don't think I refused. That was the case  
12 I was referring to that the government had said they  
13 would not allow me to go and would not send an  
14 escort. If I was kidnapped, they would not search  
15 or retrieve me. It seemed like it was a dangerous  
16 situation and it also seemed like a dangerous  
17 situation for the family as well.

18          Q. But you, in fact, conducted phone  
19 interviews and relied upon videos and, in fact,  
20 didn't even conduct a majority of these interviews  
21 to obtain anecdotal information that would assist  
22 you in doing an Adaptive Behavior Assessment,  
23 correct?

24          A. Yes. Again, I don't know when that was,

1    though.

2           Q.   Dr. Puente, would it be fair to say that  
3   your position on cases will change if you believe it  
4   will assist the defendant who you've been retained  
5   to do an Adaptive Behavior Assessment on?

6           A.   No.  I don't work that way.  That's not me.

7           Q.   Well, Dr. Puente, is it true that you've  
8   been criticized by other courts across this country  
9   for rendering opinions based on false premises,  
10  relying on invalid information, for lacking  
11  credibility, for disregarding testing scores that  
12  were not beneficial to your ultimate conclusion, and  
13  for rendering unreliable diagnoses?

14           Isn't that true?

15           A.   I'm not sure I've heard that but,  
16  obviously, it could have been said about me.

17           Q.   Do you know Juan Lizcano?

18           A.   Yes.

19           Q.   And Juan Lizcano was a defendant who was  
20  capital murder -- facing a capital murder  
21  prosecution in Texas.  Isn't that correct?

22           A.   Yes, yes, yes.

23           Q.   You were retained by the defense to conduct  
24  an Adaptive Behavior Assessment on Mr. Lizcano.

1           Isn't that true?

2           A.   It's been a while.   I don't recall the  
3 details but it's been a while.   Yes.

4           Q.   Do you recall testifying as to Mr.  
5 Lizcano's adaptive deficits?

6           A.   It's been a while.   I'll be honest.   I  
7 don't recall the details.

8           Q.   Do you recall that in that case that you  
9 did not administer any instruments for assessing  
10 adaptive deficits; specifically, you did not  
11 administer the Vineland to anybody or the ABAS test  
12 to anybody, correct?

13          A.   In the early days of my thinking, I was not  
14 sure about the adaptability of those for a variety  
15 of reasons.

16               As time went on I began to change my views,  
17 just like Dr. Fauci did, that I should try and do  
18 both, if I can do both.   So, that's an evolution of  
19 thinking and that's where I stand today.   If I can  
20 do both, do both.

21          Q.   Going back to Mr. Lizcano, that was a case  
22 that you testified that and offered the opinion that  
23 he was mentally retarded.

24          A.   I'm not sure if I used ID or mental

1 retardation. Again, I don't recall when that -- it  
2 seems like a decade or so ago, maybe.

3 Q. So, let's talk just briefly for the record  
4 to establish a record.

5 You would agree with me that Atkins v.  
6 Virginia was decided by our supreme court in 2002,  
7 correct?

8 A. Yes, that's correct.

9 Q. And within that opinion they used the  
10 terminology "mentally retarded."

11 Isn't that also correct?

12 A. Yeah, that is correct.

13 Q. And would it be fair to say that over the  
14 course of almost the last ten years that states have  
15 moved away from the "mentally retarded" and instead  
16 have replaced it with the term "intellectual  
17 disability"?

18 A. Well, this is a big problem, because  
19 technically speaking, we're using the "International  
20 Classification of Diseases, the 10th Edition," which  
21 puts the diagnosis of mental retardation. But the  
22 DSM and most individuals prefer the use of the word  
23 or phrase "intellectual disability."

24 So, technically the ICD-10 is a diagnostic

1 nomenclature used but most of us tend to use  
2 "intellectual disability" because it's less  
3 pejorative and problematic.

4 Q. So, if I was to tell you that in Nevada ten  
5 years ago that it was referred to "mental  
6 retardation" and within the last ten years our  
7 Nevada Legislature removed "mental retardation" out  
8 of that statute and replaced it with "intellectual  
9 disability," would you have any reason to disbelieve  
10 me?

11 A. No. It sounds like a good idea.

12 Q. So, in that Mr. Lizcano case, although you  
13 didn't conduct any testing whatsoever, you also  
14 based your opinion on reports, just like in the  
15 previous case that you testified to, but you relied  
16 on information from a mitigation investigator,  
17 correct?

18 A. Yes. I used to a lot in the early days.  
19 Less so as time went on. Just seems like a long  
20 time ago.

21 Q. Dr. Puente, do you know Desmond Rollinson,  
22 R-o-l-l-i-n-s-o-n?

23 A. Hmm. I can't say I recall the name.

24 Q. Dr. Puente, do you recall being retained to

1 conduct a psychological testing on Desmond Rollinson  
2 in North Carolina related to his denial of  
3 disability benefits because his application for  
4 Supplemental Security Income, known as S.S.I., was  
5 denied by the administrative law judge and the  
6 Appeals Council?

7 A. I can't recall the case. I apologize.

8 Q. Do you recall in that particular case -- if  
9 this will help refresh your recollection -- that you  
10 conducted a neuro behavioral status examination of  
11 Mr. Rollinson and ultimately opined that he suffered  
12 from an organic mental disorder secondary to being  
13 poisoned when he was three years old?

14 A. I don't recall that. But I think the last  
15 time I was involved in a case with Social Security  
16 was 10, 15 years ago, 20 years ago, so don't recall  
17 that but ...

18 Q. Do you recall the administrative law judge  
19 or the Appeals Council rejecting your opinion in  
20 that case reviewing the medical records and saying  
21 that your opinion, "was not consistent with the  
22 record as a whole because it is based on a false  
23 premise that the claimant experienced poisoning as a  
24 child which caused organic brain damage"?



1           A. I don't recall the case and, as a rule, I  
2 don't usually read judges' rulings on cases that  
3 I've testified on. So, it's an unlikely scenario  
4 for me to recall something that I usually don't have  
5 access to or request, so I apologize. My memory and  
6 my practices don't stir up information necessary to  
7 answer your questions. Apologies.

8           Q. Do you remember Joel, J-o-e-l, Diaz,  
9 D-i-a-z, a defendant in a capital murder case in  
10 Florida?

11          A. That's also been a while.

12          Q. That's a 2013 case out of Florida?

13          A. Correct.

14          Q. Do you recall you were retained, in fact,  
15 to conduct an Atkins investigation and an Adaptive  
16 Behavior Assessment on Mr. Diaz?

17          A. Yes.

18          Q. Do you recall hearing the testimony of the  
19 state's expert, Dr. Michael Gamache, G-a-m-a-c-h-e?

20          A. I don't recall that I heard his testimony.

21          Q. Do you recall that the court found that his  
22 testimony was more credible than your testimony?

23          A. I don't recall the outcome of whether they  
24 thought it was more credible than mine. I

1 apologize.

2 Q. Well, are you aware that the court found  
3 that your reliance on the ABAS test that you  
4 administered to Mr. Diaz's siblings was, quote,  
5 invalid, end quote?

6 A. I don't recall that. Apologies.

7 Q. How about Ramiro, R-a-m-i-r-o, Hernandez,  
8 H-e-r-n-a-n-d-e-z-

9 A. That one I honestly don't recall.

10 Q. A capital murder case in Texas in 2013.

11 A. I don't recall the specifics.

12 Q. If I was to tell you that in that case the  
13 trial court, quote, declined to find Dr. Puente's  
14 explanations to be credible, end quote, does that  
15 help refresh your recollection as to that case?

16 A. No, not necessarily. Apologies.

17 Q. Or if the trial court stated, "The opinions  
18 offered by Dr. Puente as to adaptive behavior are  
19 not supported by the evidence"? How about that?  
20 Does that help refresh your recollection in that  
21 case?

22 A. No, unfortunately not.

23 Q. How about a more recent case, 2019, State  
24 of California, Juan, Perez, P-e-r-e-z?

1 Do you recall Juan Perez?

2 A. Yes.

3 Q. And that also was a First Circuit murder  
4 case in California and you were retained to evaluate  
5 Mr. Perez to determine whether he was competent to  
6 stand trial. Is that correct?

7 A. Yes.

8 Q. And in that case you opined that he was  
9 mildly mentally retarded, that he had a mild brain  
10 injury, had a learning disability, and was not  
11 competent to stand trial. Isn't that true?

12 A. Yes, I recall that finding.

13 Q. And then you found out that Mr. Perez was  
14 transferred to Patton State Hospital in California  
15 where he was assessed and evaluated by staff at  
16 Patton State Hospital, correct?

17 A. Yes. I think it was English, if I recall  
18 correctly.

19 Q. The doctors at Patton State Hospital found  
20 that he was competent and they, "Detected repeatedly  
21 a deliberate intention by Mr. Perez to feign  
22 cognitive impairment." You recall that, correct?

23 A. Yes, I remember that.

24 Q. And as a result of that, you penned a

1 letter opining that Mr. Perez was "intellectually,  
2 neurologically, neuropsychologically impaired" and  
3 was not competent to stand trial. Isn't that true?

4 A. Yes, correct.

5 Q. And the California Court of Appeals  
6 ultimately upheld the trial court's findings that  
7 the evidence showed, "Perez never was mentally  
8 retarded, never had a cognitive deficit, and simply  
9 faked his confusion about legal proceedings  
10 eviscerating the defense expert's conclusions."

11 Are you aware of those findings?

12 A. No, I'm not aware of those findings.

13 Q. And for purposes of today's hearing, only  
14 the last case is, perhaps, the most recent.  
15 Information came from an opinion out of the 11<sup>th</sup>  
16 Circuit dealing with Richard Sealy, S-e-a-l-y, and  
17 the opinion was issued on March 31<sup>st</sup> of this year,  
18 2020. This was another death penalty case.

19 Isn't that correct?

20 A. Yes.

21 Q. And you were retained by the defendant to  
22 conduct an Adaptive Behavior Assessment of Mr. Sealy  
23 in that case. Isn't that true?

24 A. Yes.

1 Q. And do you recall the state's expert, Glenn  
2 Payne, who is a forensic psychologist, not a  
3 neuropsychologist, a forensic psychologist, that he  
4 was critical of your investigation and testimony as  
5 to Mr. Sealy's upbringing, correct?

6 A. Yes.

7 Q. And you had testified in that case that Mr.  
8 Sealy had a, quote, chaotic upbringing, end quote.

9 Do you recall that?

10 A. I recall saying that, yes.

11 Q. And you testified that Mr. Sealy's life  
12 was, quote, a series of traumas, end quote, correct?

13 A. Yes.

14 Q. And the state's expert testified that he  
15 interviewed both the father and the mother. He also  
16 interviewed Mr. Sealy and Mr. Sealy said his father  
17 was very loving, although his mother was strict, he  
18 was never physically abused, and his childhood was  
19 not chaotic. Do you recall that?

20 A. I don't recall his findings. I apologize.

21 Q. Do you recall the state's expert, Dr.  
22 Payne, also challenging your administration of the  
23 WAIS?

24 MR. JACKSON: W-A-I-S, for the reporter.

1 THE WITNESS: I don't recall, honestly.

2 BY MR. JACKSON:

3 Q. Do you recall Dr. Payne, again, the  
4 forensic psychologist, talking about the followup  
5 questions when necessary were not asked and that you  
6 discontinued testing too early?

7 A. I think I did that on two items, something,  
8 three items, something like that.

9 Q. Are you aware that in the published opinion  
10 that came out on March 31<sup>st</sup>, 2020, that the state  
11 court found that your test results were quote,  
12 unreliable, end quote, and your diagnoses were,  
13 quote, the product of errant analysis, closed quote?

14 A. No, I have not seen those findings.

15 Q. Dr. Puente, is your testimony today any  
16 less credible because you testified via  
17 teleconferencing using the Zoom platform as opposed  
18 to testifying in person?

19 A. No. I'm not an expert in testifying in  
20 person in terms of the validity of in-person or  
21 Zoom. I'll leave it to your -- you folks to  
22 determine the ability of that. It's not my area of  
23 expertise. I apologize.

24 Q. And on direct examination you gave as an

1 example that in one case there was a report card of  
2 an individual who had an eight out of ten and you  
3 thought that was good, correct?

4 A. Yeah. I assumed that eight out of ten was  
5 good, correct.

6 Q. So, Doctor, is there anything that would  
7 have prevented you from calling up and saying to  
8 that principal, saying, "Hey, Mr. Principal. I have  
9 this report card on John Doe and it says that he had  
10 an eight out of ten. Can you explain to me what the  
11 eight out of ten means?

12 Is there anything that would have prevented  
13 that from taking place over a telephone?

14 A. I spent an afternoon -- more than an  
15 afternoon, but certainly an afternoon, watching a  
16 show at the school and then talking to him in a more  
17 relaxed personal fashion before we got the  
18 opportunity to sit down in his office.

19 It's that kind of rapport-building that  
20 would be so difficult to do by way of Zoom. And in  
21 that case, of course, it's been a few years ago, and  
22 I don't recall how many -- the school did not own a  
23 computer, so it would be difficult to have done  
24 that.

1           Q. I think you misunderstood my question. I  
2 didn't even ask about videoconferencing. I  
3 understand what you're discussing about rapport,  
4 but, again, this is somebody who would have known  
5 this individual, that, obviously, would be  
6 cooperative with you, you determined that.

7           But to just simply ask a question, Is there  
8 anything that would have prohibited you from dialing  
9 the number on the telephone to that principal and  
10 asking the principal the exact same question that  
11 you asked in person as to what an eight out of ten  
12 was on the report card?

13           The answer is there's nothing that prevents  
14 that, correct?

15           A. Well --

16           MS. VERNES: Objection. Is there a  
17 question or an argument?

18           THE COURT: Sustained. You can ask the  
19 question, Mr. Jackson. You can't answer the  
20 question.

21           MR. JACKSON: Thank you, your Honor.

22           BY MR. JACKSON:

23           Q. Is there anything that would prevent you  
24 from asking that question over the telephone?



1           A. I don't want to be the guinea pig that  
2 makes that first attempt to do an ABAS or any test  
3 internationally in a death penalty case. This is  
4 way, way too high stakes. This is much more  
5 complicated, much more different than a standard  
6 telehealth in a clinical situation.

7           MR. JACKSON: May I have a moment, your  
8 Honor, just one second?

9           THE COURT: Yes.

10          MR. JACKSON: Thank you, your Honor.  
11 Nothing further.

12          THE COURT: Okay. Thank you.

13          Ms. Verness, redirect?

14          MS. VERNESS: Thank you, your Honor.

15                       REDIRECT EXAMINATION

16 BY MS. VERNESS:

17          Q. Dr. Puente, just towards the end of the  
18 cross-examination, you were being asked about the  
19 experience you had with getting additional  
20 information regarding grades.

21               Do you recall that testimony?

22          A. Yes.

23          Q. And the prosecutor was asking if there was  
24 anything that prevented you from making the phone

1 call to the principal of that school.

2 Do you recall?

3 A. Yes.

4 Q. In your experience over the last many years  
5 in doing these investigations, is gaining that type  
6 of information as easy as making a simple phone  
7 call?

8 A. No, no. I emphasized a couple of times  
9 this afternoon that any complicated clinical cases I  
10 won't do by telehealth and I don't do any forensic  
11 cases by telehealth. And the APA and all societies  
12 involving forensic psychology have been silent on  
13 that topic as well.

14 Q. So, when you're talking about asking for  
15 explanation of, specifically in that scenario,  
16 school records, why did you spend an afternoon  
17 observing at the school?

18 A. I just didn't understand how grades were  
19 obtained or delivered at that school. And it seemed  
20 to me that I needed to spend some time to get to  
21 understand how the school worked, who the principal  
22 was, and as a consequence, that gave me the  
23 information that was necessary to achieve the goal  
24 of understanding what an eight was. It was a good

1 grade but not good enough to pass.

2 Q. Now, during cross-examination you were  
3 asked about -- I made note of eight specific cases  
4 that you participated in somewhere -- let's say less  
5 than ten. Does that sound about accurate?

6 A. I don't think I heard the question  
7 completely.

8 Q. During cross-examination Mr. Jackson asked  
9 you about somewhere around eight cases that you've  
10 previously been involved in. Do you recall that?

11 A. I didn't count how many, but it seemed like  
12 a single digit. I apologize to you and I'll  
13 apologize to him. Some were so long ago that I  
14 don't recall the specifics and that makes it  
15 difficult.

16 Q. So, this is potentially less than ten cases  
17 out of your total career. Is that correct?

18 A. I hadn't thought of it like that. Yes.

19 Q. And you testified previously that you  
20 you've been participating in and testifying in  
21 approximately two to three cases for the last five  
22 to ten years. Do you recall that?

23 A. Well, I think I said I testified, but as  
24 far as number of cases, it could be more.

1 Q. So, in the last ten years conservatively 30  
2 or more cases?

3 A. Yes. I think at least that. Yes.

4 Q. And several of the cases you were unable to  
5 recall due to the age of them. Is that correct?

6 A. I just don't recall them. Could be that  
7 they're older or could be that I just don't recall  
8 for some other reason, but yes.

9 Q. Well, specifically with regards to Mr.  
10 Rollinson, the denial of the S.S.I., you began to  
11 speak on how long it's been since you had done any  
12 cases with regard to Social Security.

13 A. I don't think --

14 Q. Do you have an idea?

15 A. Yeah. I don't think I've actually  
16 evaluated any patients for Social Security directly.  
17 Maybe for 30 years or 25 years. And I don't think  
18 I've testified on a Social Security case since the  
19 '90s, if I had to remember. It's been a long time.

20 Q. Now, when, if you recall, approximately was  
21 the shift made between using the term "mental  
22 retardation" towards "intellectual disability"?

23 A. Probably with the DSM. Technically  
24 speaking, we're still with the ICD-10, which uses

1 the term "mental retardation." Eleven will probably  
2 come out soon and that will shift to "intellectual  
3 disability."

4 As far as the courts and DSM, of course,  
5 DSM-V has a different take. As far as the courts, I  
6 honestly don't know when they shifted from MR to ID,  
7 maybe, you know, roughly ten years ago or so.

8 Q. And in listening to that recitation of the  
9 varying court opinions as they related by Mr.  
10 Jackson, is it fair to say that the court doesn't  
11 always agree with your opinion?

12 A. Yes. It's -- they sometimes don't agree  
13 with my opinion but, honestly, I also just provide  
14 opinions and I don't follow up on the cases.

15 Sometimes attorneys share with me the  
16 outcome either way, but as a rule, I don't follow up  
17 the outcome of cases. That's one reason I don't  
18 know what judges or juries have said about my  
19 information.

20 Q. And so in regards to the total number of  
21 cases that you've been involved in and testified in,  
22 is this number of cases a majority? A minority?  
23 How would you characterize this number of cases  
24 compared to your experience?

1       A. Well, since I've never really tabulated  
2 carefully which cases my testimony was supportive  
3 of, a conclusion that the attorneys hired me, how  
4 many of those were, quote, positive and how many  
5 were negative, I really cannot tell you with any  
6 degree of confidence.

7               But if we use this example today as  
8 exhaustive and if I use my estimate of, I don't  
9 know, maybe a hundred cases, maybe less, maybe more,  
10 maybe 80, maybe 120, this would be, I don't know,  
11 10 percent or something like that.

12              But, again, if you're asking me what  
13 percentage of the cases that I've provided  
14 information, whether it's Social Security or death  
15 penalty, it would be really hard because I've been  
16 doing Social Security since 1981 and death penalty  
17 since 1990, '92, so it's hard to say.

18       Q. Thank you. The next area that Mr. Jackson  
19 talked to you about that I want to touch on is in  
20 regards to telehealth. There was a lot of  
21 discussion about telehealth.

22              So, first of all, in looking at your role  
23 in Mr. Martinez Guzman's case, have you been  
24 requested to provide any telehealth services with

1 regards to Mr. Martinez Guzman?

2 A. No. Washoe County Jail has not  
3 requested -- or wherever he's at -- requested any  
4 telehealth. In fact, I'll be honest. I've never  
5 done any telehealth for a prisoner or someone in  
6 jail.

7 Q. So, are you providing therapeutic services,  
8 diagnostic services, or interview services under the  
9 guise of telehealth that you were discussing with  
10 Mr. Jackson?

11 A. I'm not doing telehealth here at all. And  
12 it's really important to note that telehealth is one  
13 thing and forensic teletesting is an entirely  
14 different thing.

15 Q. So, thank you. That was going to be my  
16 next question. Why is that distinction important?

17 A. Well, not to take away from the importance  
18 of providing therapy, for example, for someone who  
19 is depressed or making an assessment of someone who  
20 might have neurocognitive problems to establish  
21 whether they should take a medicine or not, the  
22 stakes here are so, so, so high. This is not about  
23 flip-flopping my position. It's just providing the  
24 Court the best information possible to make the best

1 decision possible. This is not about flip-flopping.  
2 It's just doing due diligence.

3 Q. Is comparing telehealth and the work that  
4 you do in death penalty investigations, is it  
5 comparing apples to apples or apples to oranges?  
6 How would you characterize that?

7 A. Maybe fruits to meats.

8 Q. Okay.

9 A. It's even further than, just two different  
10 kinds of fruits. But if you want to go with fruits,  
11 I would go with apple and mangoes, because those are  
12 two different cultures.

13 Q. Now, another area that was discussed had to  
14 do with the American Psychology Association's  
15 guidelines that came out in 2013, 2014, and you  
16 mentioned 2020.

17 First of all, with regards to 2020, it may  
18 be obvious that those are the most recent.

19 Is that correct?

20 A. Yes.

21 Q. And have those guidelines evolved or  
22 changed in any way over the years?

23 A. Yes. And so has the literature. There was  
24 about a recent literature review by University of



1 Florida, which we just got ahold of. About a  
2 quarter of the teletesting articles were before the  
3 2013 guidelines and three-quarters were after the  
4 2013 guidelines.

5 So, it's quite a -- you know, it's a  
6 process of significant evolution and I suspect even  
7 more evolution, and, hopefully, science will occur  
8 as a function of this pandemic. We have a long ways  
9 to go.

10 Q. And with regards to the 2020 guidelines  
11 that we're discussing specifically with teletesting  
12 and telehealth, how are they applicable, if at all,  
13 to an Atkins investigation?

14 A. Oh, they're not applicable at all.

15 Q. Why?

16 A. The 2013 are really about telehealth and  
17 2020 are about telehealth. I was on that committee.  
18 I was on The Hill. I did not lobby for Atkins.  
19 Nothing. Nothing involving any of this was intended  
20 to apply to forensic or certainly death penalty  
21 cases.

22 And there's no statement by APA or any  
23 society that I'm familiar with about the use of  
24 teletesting for death penalty cases at this

1     junction.

2             Q.   Thank you, Doctor.

3             And, finally, one of the additional areas  
4     that you discussed had to do with the ABAS and  
5     Vineland.  Do you recall that testimony on cross?

6             A.   Yes.

7             Q.   Now, there was some discussion with regards  
8     to the Vineland being recently approved for  
9     administration through -- is it videoconferencing?

10            A.   It's not approved, per se.  It's marketed  
11    as such.  So, in other words, you can purchase it  
12    and it would be downloaded, could be downloaded in  
13    the patient's box as part of a fuller evaluation  
14    that would involve interviews and so forth and so  
15    on.

16            Q.   Are you aware if the Vineland interview  
17    form has been standardized for telepractice in the  
18    telepractice format?

19            A.   No.  Almost no test has.

20            Q.   So, is that a caveat, a disclaimer, a  
21    limitation that you would note if you were to  
22    administer the test in that way?

23            A.   Oh, yes.  If you were to do that, you would  
24    say, This was done outside the standardization

1 process of the original test and caution should be  
2 given or taken in terms of the interpretation of  
3 these findings.

4 Q. And doesn't -- does the producer of the  
5 Vineland recommend also noting that limitation?

6 A. Yes.

7 Q. Then, finally, with regards to the use of  
8 Adaptive Behavior Assessments retrospectively, is  
9 that endorsed by any organizations that focus on  
10 intellectual disability?

11 A. There was a book on the AIDD and death  
12 penalty that was published not long ago that  
13 suggested the ABAS and the Vineland could be used in  
14 death penalty cases.

15 I'm trying to search my mind for the  
16 specific sentence or sentences regarding its  
17 application retrospectively and it leaves me at the  
18 present time, but it was indirectly endorsed in that  
19 edited book, if I recall.

20 Q. And are you aware if the AIDD has taken a  
21 position with regards to it?

22 A. The AIDD, yeah, has taken a position on the  
23 use of those tests in its latest version. It's one  
24 of the chapters on the Adaptive Behavior Assessment.

1 It includes those two and I think maybe another one  
2 as well.

3 MS. VERNESS: Court's indulgence.

4 THE COURT: Yes.

5 BY MS. VERNESS:

6 Q. And then, finally, Dr. Puente, with regards  
7 to a face-to-face interaction --

8 A. Yes.

9 Q. -- when you are discussing face to face in  
10 your practice, what is face to face to you?

11 A. Well, it's necessarily what's to me, but  
12 the guidelines are from the American Medical  
13 Association and the Current Procedural Terminology  
14 Panel which decides how to engage in healthcare  
15 practice. And, again, for the purposes of conflict  
16 of interest, I was on the AMA CPT panel and this was  
17 something that we debated during my tenure.

18 Face to face means the person is in front  
19 of you, physically touchable, so to speak. It's not  
20 the -- what we're doing this afternoon is not face  
21 to face. This is electronic communication, not  
22 face-to-face communication.

23 Q. And then with regards to the articles that  
24 Mr. Jackson was quoting from during your

1 cross-examination, based on the titles presented and  
2 the subject matter that was read by Mr. Jackson, did  
3 any of those have to do with any death penalty cases  
4 or an Atkins investigation?

5 A. No, they did not, including the one that I  
6 think that Nevada cited in the meta analysis. It  
7 was clear to state that it involved the use of  
8 electronic communication for the purposes of  
9 therapy. There were some hundred-something  
10 articles, so it seemed like a good meta analysis,  
11 but that was for therapy.

12 And the other one implied but did not say  
13 -- and since I'm not familiar with that study, I  
14 can't tell you -- how many articles involved  
15 testing. I will tell you that the recent article  
16 that just came across my desk as an unpublished  
17 version and includes 20 articles involving  
18 teletesting and none of them involve the ABAS or the  
19 Vineland.

20 MS. VERNESS: Thank you. I have no  
21 additional questions at this time.

22 THE COURT: Okay. Thank you.

23 Did you have anything further, Mr. Jackson?

24 MR. JACKSON: Yes. Real briefly, your

1 Honor, if I may.

2 THE COURT: Okay.

3 RECROSS-EXAMINATION

4 BY MR. JACKSON:

5 Q. Dr. Puente, perhaps you can help me out,  
6 then. Because I searched and I tried to find a  
7 single scholarly article that says that any form of  
8 telecommunications cannot be used in conducting an  
9 Atkins investigation, an Atkins type of Adaptive  
10 Behavior Assessment, and I couldn't find a single  
11 article that says that that cannot be done.

12 Can you help me and show me an article, a  
13 scholarly article, that your peers rely upon and  
14 that supports your opinion today?

15 A. And that's exactly the point. The point is  
16 there's no one who's done any research, no one has  
17 made a public statement, no society has made a  
18 comment on this issue. And it seems like a  
19 particularly heavy load to take on at this juncture.  
20 I don't want to be the guinea pig in case law  
21 involving a death penalty case.

22 Q. So, you made an apples-and-mangoes  
23 comparison today as well as during your  
24 February 2020 testimony. And in this connection the

1 telehealth versus the forensic evaluation, if I  
2 understood your testimony on redirect, is it the  
3 stakes are so high when we're talking about forensic  
4 psychology or we're talking about a death penalty  
5 case, they're so high that that's why there is no  
6 comparison to any type of services that are provided  
7 through telehealth, correct?

8 A. No, I didn't say there was no comparison.  
9 I did say it was more like comparing meats with  
10 fruit or, if you choose, maybe apples and mangoes.  
11 But it's just so novel that I have -- we've attended  
12 four workshops recently and everybody's punted on  
13 this particular issue. Nobody's willing to be the  
14 first one.

15 Q. Some of the articles and information that  
16 we talked about and guidelines just goes back beyond  
17 ten years, at least with respect to telehealth,  
18 which is the majority of the practice for  
19 psychologists across this country, correct?

20 A. At the present time. Many, including  
21 myself, at the present time.

22 Q. So, would it not be high stakes in  
23 considering the delivery of psychological services  
24 through telehealth for someone who is suicidal, who

1 suffers from severe depression, literally a matter  
2 of life or death as to the type of therapy that's  
3 provided, is your testimony that is not high stakes?

4 A. No, I didn't talk about suicide. And I'm  
5 not sure what the literature says on telehealth and  
6 suicide. I apologize. I don't know the research in  
7 that area, but that is -- I would definitely put  
8 that as high stakes.

9 But in my case during a neuropsych  
10 evaluation on somebody on whether they should get  
11 medicine to help their memory or not, I think that's  
12 quite a different stakes than death penalty.

13 Q. So, your response to my first question on  
14 my re-cross, you said it was exactly the point, is  
15 that there is no scholarly article. There is no  
16 peer-review, there's no written standard that  
17 supports your testimony that says you cannot conduct  
18 an interview over the telephone, you cannot conduct  
19 neuropsychological testing of an individual in a  
20 remote location in connection with an Atkins  
21 investigation, correct?

22 MS. VERNESS: Objection, mischaracterizes  
23 prior testimony. He did not say "cannot." He said  
24 it would not be best practice. It would be fraught



1 with potential error but he never said "cannot."

2 THE COURT: I think that goes to argument,  
3 though. If you want to ask -- he can certainly  
4 clarify it. The witness can clarify it. Mr.  
5 Jackson, you can ask the question.

6 MR. JACKSON: Thank you.

7 BY MR. JACKSON:

8 Q. Dr. Puente, you previously testified that  
9 there is no such article or peer review or standard  
10 out there that is published by the APA or otherwise  
11 regarding -- that would prohibit the administration  
12 of a neuropsychological test to an individual who  
13 was an informant in an active type investigation,  
14 correct?

15 A. I'm not familiar with one.

16 MR. JACKSON: Thank you. Nothing further,  
17 your Honor.

18 THE COURT: Thank you.

19 May this witness be excused?

20 MS. VERNESS: Yes, your Honor. Thank you.

21 THE COURT: Thank you, Doctor. We  
22 appreciate your testimony.

23 THE WITNESS: Thank you, your Honor.

24 THE COURT: We will, I'm sure, see and hear

1 from you again. Thank you.

2 THE WITNESS: All right. Best of luck.

3 Thank you.

4 THE COURT: Counsel, go ahead and call your  
5 next witness.

6 MR. GOODNIGHT: Your Honor, the defense  
7 would call Dr. Brian Leany.

8 THE COURT: The record should reflect that  
9 that's Joseph Goodnight of the Washoe County Public  
10 Defender's Office speaking. I'd like to make the  
11 record that earlier when this testimony began, I  
12 observed Mr. Arrascada also present.

13 And is there anyone else present on the  
14 defense team, Mr. Goodnight, other than you, Ms.  
15 Verness, and Mr. Arrascada?

16 MR. GOODNIGHT: Ms. Hickman is in the room  
17 as well.

18 THE COURT: And she's been present  
19 throughout this afternoon?

20 MR. GOODNIGHT: Yes, she has.

21 THE COURT: Ms. Clerk, the witness has been  
22 called. Please swear him in.

23 THE CLERK: The interpreter mode has been  
24 activated. If you look at the bottom of your

1 screen, you will find a world. You need to click on  
2 that. Have you done so?

3 WITNESS LEANY: I have.

4 THE CLERK: Thank you. You are speaking a  
5 little bit low. You might have to speak up a bit,  
6 okay?

7 WITNESS LEANY: Okay.

8 THE CLERK: That's better. Thank you.

9 (Witness sworn.)

10 THE COURT: Sir, would you please state  
11 your name and spell your last name for the court  
12 reporter.

13 THE WITNESS: Brian Leany, L-e-a-n-y, and  
14 I'm currently present in Reno, Nevada, Washoe  
15 County.

16 THE COURT: Thank you.

17 Mr. Goodnight, you may proceed.

18 MR. GOODNIGHT: Thank you, your Honor.

19 DIRECT EXAMINATION

20 BY MR. GOODNIGHT:

21 Q. Dr. Leany, prior to today's hearing you  
22 emailed me your curriculum vitae.

23 Do you remember doing that?

24 A. Yes, I do.

1 Q. Okay. And to establish your, I guess,  
2 credential, as an expert, can you go through your  
3 education, schooling, current profession on what you  
4 do for a job now?

5 A. I earned a Doctoral Degree in Psychology at  
6 the University of Nevada, Las Vegas in 2010. I  
7 practice for the California Department of  
8 Corrections and Rehabilitation as a clinical  
9 psychologist as well as the State of Nevada state  
10 hospital as a clinical psychologist, where I also  
11 worked at the same time in private practice  
12 providing cognitive evaluations, neuropsychological  
13 evaluations, and forensic evaluations.

14 I'm licensed in both the State of Nevada  
15 and the State of California and I'm a certified  
16 evaluator of competency for the State of Nevada.

17 Q. You also conduct evaluations concerning  
18 adaptive functioning and intellectual disability?

19 A. I do.

20 Q. In what context?

21 A. I provided them as part of disability  
22 appeals. I've provided them in the context of  
23 evaluations of competency, risk, dangerousness for  
24 the state. In the California Department of

1 Corrections there's a requirement to classify  
2 inmates according to intellectual functioning and  
3 disability to make sure they're appropriately housed  
4 and cared for as well as to provide training to  
5 correctional officers about intellectual  
6 disabilities and the potential risks of having those  
7 inmates in those settings.

8 Q. Are you familiar with the practice and use  
9 of telehealth?

10 A. I am.

11 Q. Have you used it in your practice?

12 A. I have used telehealth in my practice.

13 MR. GOODNIGHT: Your Honor, Defense Exhibit  
14 45 is a C.V. of Dr. Brian Leany. At this point I'd  
15 move for its admission.

16 THE COURT: Any objection?

17 MR. JACKSON: Your Honor, this goes back to  
18 the earlier objections I made at the beginning of  
19 the proceedings. Obviously, there's no proffer, so  
20 I will not object to the admission of C.V. on  
21 Dr. Leany.

22 THE COURT: Okay. Thank you.

23 Exhibit 5 is admitted.

24 (Exhibit 5 admitted.)

1 MR. GOODNIGHT: Thank you, your Honor.

2 BY MR. GOODNIGHT:

3 Q. Dr. Leany, do you regularly, I guess,  
4 maintain your C.V.? Are you updating it with  
5 publications, or how do you care for it?

6 A. I would say on an interim basis I go  
7 through it and update it as publications are  
8 accepted or when my wife reminds me that a  
9 publication has been accepted and I should add them,  
10 I like to approximately every few months or so, time  
11 permitting.

12 Q. And so is the version that you sent to us  
13 the most current version?

14 A. I believe so.

15 Q. Thank you. Dr. Leany, just kind of an  
16 initial question. As a psychologist, do  
17 psychologists swear to an ethical code similar to  
18 that of a medical doctor?

19 A. We don't necessarily swear to a code. But  
20 when we apply for licensure and obtain a license  
21 clearly in the respective states, it generally  
22 includes a provision that we'll adhere to the APA's  
23 code of ethics and practice.

24 Even in training we agree to adhere to the

1 code, so as doctoral students we're bound to adhere  
2 to that as part of our continued inclusion in the  
3 program and training.

4 Q. So, is there, I guess, a similar clause  
5 that would kind of mirror the Do-no-harm clause in  
6 medical context?

7 A. Yes. So, the initial principal, principle  
8 A specifically spells out that we are to provide  
9 beneficence to the client and non-maleficence, and  
10 that's the first principle of our code of ethics.

11 Q. You testified earlier that you have  
12 experience in adaptive functioning and intellectual  
13 disability.

14 What's the typical process for conducting  
15 an assessment of that nature?

16 A. Usually it begins with clarifying why the  
17 individual is presenting for an evaluation, what led  
18 them to seek out this evaluation for intellectual  
19 disability. It involves a psychosocial history, so  
20 we interview the individual to collect important  
21 historical and developmental information that may  
22 inform what tests we choose to utilize and things --  
23 other things that we may want to look at, such as  
24 alternative diagnoses, potential areas to examine

1 areas such as adaptive functioning.

2 We'll assess intellectual quotient or what  
3 we believe is sort of what we're congenitally born  
4 with in terms of our intellectual capacity. I  
5 mentioned just a second ago adaptive ability, our  
6 functional ability, so how do we perform at work, at  
7 school, self-care, home care.

8 Also is assessing oftentimes memory  
9 abilities and other neurocognitive domains, so,  
10 perhaps, what we're seeing is not necessarily an  
11 intellectual disability, but it may be an executive  
12 functioning deficit. It could be something like a  
13 traumatic brain injury or some sort of acquired  
14 deficit that's not necessarily an intellectual  
15 disability that occurred.

16 And then we'll conduct interviews of  
17 collateral individuals, so we'll interview parents,  
18 close family members, friends, teachers, employers  
19 as possible.

20 Q. Are those interviews done in person?

21 A. Yes.

22 Q. Are they ever done over the phone or video?

23 A. Depending on the setting or the referral  
24 question, they may be done over video or telephone.



1 Q. You talked a little bit about testing of a  
2 subject. Why are you testing? Can you elaborate on  
3 that?

4 A. In this instance of intellectual  
5 disability?

6 Q. Right.

7 A. So, in terms of intellectual disability,  
8 what we're trying to establish is that this  
9 individual has an innate cognitive capacity that's  
10 below what we would expect. And the current DSM-V  
11 refers to generally accepted two standard deviations  
12 of performance on the standardized test as well as  
13 deficits in adaptive functioning and activities of  
14 daily living.

15 So, we're looking to see how this  
16 individual performs, because we would expect that  
17 they would not function or have the normal  
18 capacities of your average individual or what we  
19 typically think of 66 percent of the population  
20 overall.

21 Q. You talked about the population overall.  
22 We're talking about the U.S. population?

23 A. That's correct.

24 Q. Do you have experience or expertise in

1 assessing the nondominant population -- well, what  
2 is the nondominant population?

3 A. Yes. So, I'll answer that last question  
4 first. Nondominant population would be anybody  
5 that's not of the Caucasian population,  
6 non-English-speaking as their native language  
7 generally constitutes that. African person, Latin X  
8 population, Asian American, Asian immigrants, so  
9 people that are not of the majority culture.

10 Q. So, when you're assessing a nondominant  
11 person from a nondominant population, what are some  
12 of the special considerations that are important to  
13 take into account?

14 A. First and foremost is the language of  
15 administration. And so you want to understand and  
16 have an appraisal of what the individual's language  
17 abilities are.

18 And we're considering this to be English  
19 language abilities, whether they're native English  
20 speakers when they began speaking English. Other  
21 issues would be acculturation, so how well do they  
22 identify or how much do they identify with cultural  
23 values of the United States. So, we have some  
24 measures that assess what we consider to be

1 traditional cultural values of the United States.

2 We also look at socioeconomic status  
3 factors such as education level, educational  
4 attainment, financial circumstances so, basically,  
5 how wealthy they are, what sort of occupational  
6 positions they've held and their occupational status  
7 would be some of those factors that you consider.

8 Q. Why do you consider acculturation,  
9 socioeconomics, whether they're affluent or not?  
10 Why do you consider those things?

11 A. The validity of the tests that we utilize  
12 are based on the normative sample of the United  
13 States and so those factors figure into the  
14 normative sample that we use to make a comparison.

15 So, earlier when you were asking, you know,  
16 how do we determine intellect disability, in order  
17 to determine whether they're different from that  
18 66 percent, we want to know how different they were  
19 from that overall group of people that we're  
20 comparing them against. Does that individual match  
21 the group that the test was developed with.

22 If they do not, if they have lower  
23 socioeconomic status, lesser education, they're  
24 non-English speakers, then the comparison won't be

1 appropriate and it would invalidate the test.

2 Q. So, we talked a lot about fruit. It sounds  
3 like we're trying to get to an apples-to-apples  
4 comparison.

5 A. That would be the goal of a valid test.

6 Q. Okay. So, one of the Court's questions  
7 today is whether an Atkins-type investigation to be  
8 conducted remotely using phone technology,  
9 videoconferencing in place of in-person interviews,  
10 you testified earlier that you have some experience  
11 in telehealth medicine and video assessments.

12 In that context what are some of the  
13 concerns that arise when you're conducting  
14 assessments remotely or over video?

15 A. I think a video assessment would be a bit  
16 of a misnomer. I don't have any standardized  
17 assessments or tests that I administer via video.

18 I do provide some questions or structured  
19 questions via video interview to assess more  
20 simplistic healthcare-related issues such as  
21 depression, anxiety, and those kinds of things.

22 Q. So, you're using telehealth to do some of  
23 those simpler functions, it sounds like. But what  
24 are some of the concerns that come up when you're

1 using the video format?

2 A. A primary concern would be the severity of  
3 the potential diagnosis and the severity of symptom  
4 presentation that's being reported by the  
5 individual.

6 So, early on in the initial referral, if  
7 the person is not an existing client, for example, I  
8 would be more reluctant to take them on as a new  
9 client strictly into, you know, the video telehealth  
10 setting.

11 I would want to have some sense or  
12 appraisal of what the symptom severity and  
13 presentation was at the outset. Ultimately, the  
14 concern from a therapy presentation would be  
15 suicidality or potential to harm others because of a  
16 mental health condition.

17 Q. One of those more severe cases that was  
18 discussed with Dr. Puente.

19 A. That's correct.

20 Q. What about just the logistics of it, the  
21 ability to control the setting or any distractors or  
22 influencers? What do you say about those types of  
23 issues?

24 A. I think that it's very problematic. And

1 especially in dealing with the Spanish-speaking  
2 clients that I provide therapy to, there's an  
3 inability to access the technology that's available  
4 or a limited availability of the technology.

5           So, they may be trying to access it via  
6 cell phone and using a video chat sort of  
7 presentation on an IOS, for example, and they have  
8 limited minutes. They've been, you know -- they  
9 have telephones and data that's provided through  
10 Social Services.

11           There's limited visual information, so  
12 oftentimes I get very little body information that's  
13 being presented. Occasionally, I'll have  
14 individuals that refuse to turn on the video camera  
15 component. In those cases, depending on the  
16 diagnosis, it could be concerning because I'm  
17 wondering what is not being presented on the video  
18 screen and why they're choosing not to turn on the  
19 video camera and what's happening outside of that  
20 screen, are they distracted or are they fully  
21 engaged in the process that's happening.

22           Q. So, that's some of the, I guess, aspects  
23 that you lose, that ability to observe the person  
24 you're interviewing, right?

1           A.   (Witness nods.)

2           Q.   I guess the gist of my question is really  
3 about the setting in itself.

4                   What about those unknowns? For the person  
5 on the other end, you're sitting in your office and  
6 interviewing someone, wherever they are, what kind  
7 of issues arise for that person on that end or  
8 potential issues?

9           A.   So, some of the concerns might be so, for  
10 example, if it's an individual that's experienced  
11 trauma or has been engaging in therapy because  
12 they've been a victim of domestic violence, I'm  
13 unaware whether or not there's privacy in the room  
14 and that individual is being observed by potentially  
15 the person who has been victimizing them. That  
16 would be a concern, I think a pretty good example of  
17 a concern.

18          Q.   So a third-party influence?

19          A.   Exactly.

20          Q.   What about other, I guess, distractors or  
21 influencers?

22          A.   The environment itself, there could be  
23 demands placed by children, by other parties. In  
24 this instance that we're discussing, I would be very

1 concerned about the sociopolitical circumstances  
2 that are surrounding any televideo diagnosis or  
3 interview.

4 Q. You're talking about the circumstance with  
5 El Salvador?

6 A. That's correct.

7 Q. Let's go back to what you were discussing  
8 earlier, just that inability to observe the person.

9 You talked a little bit about body posture.  
10 What about olfactory dynamics, body language, those  
11 nonverbals cues? What's the potential for loss  
12 there?

13 A. It's almost nonexistent. As I look around  
14 the panels here, I see just shoulders and heads, for  
15 the most part. Occasionally I'll see some hands.

16 A lot of the motor movements that are  
17 happening, such as hands tapping, feet tapping can  
18 indicate some varying degrees of anxiety. In  
19 treatment of anxiety that's an indicator of  
20 treatment progress or indicates a specific  
21 intervention. Posture is really important to  
22 possible neurocognitive issues, so is there  
23 lateralized -- sort of posture difficulties are  
24 issues.



1           The other thing is a lot of my observations  
2 will begin before the individual even enters the  
3 room. If I'm providing an assessment, for example,  
4 of a personal injury claim, I'm watching out my  
5 parking lot before the individual comes into my  
6 appointment, waiting to see how they get out of the  
7 car, walk into my office and see if there's any sort  
8 of changes that come through the threshold of the  
9 door to my office to see whether it's congruent with  
10 the information that they're presenting during the  
11 interview and if there's a change when they think  
12 that they're being observed versus not being  
13 observed.

14           Q. I imagine if someone had been drinking, if  
15 you were there in person, you would be able to smell  
16 that.

17           A. Exactly. Things like personal hygiene are  
18 not readily parent, so they may have on clothing  
19 that's clean or not. It's not as easy for me to  
20 tell when I'm only seeing from the shoulders up. I  
21 can't get the olfactory component of that and assess  
22 whether or not they took a shower, used deodorant  
23 during that interview occurring via video.

24           Q. Did you have an opportunity to watch Dr.

1 Puente's testimony?

2 A. I did.

3 Q. So, you saw the portion of the hearing  
4 where the Court asked the state to correct their, I  
5 guess, camera position to see Mr. Jackson's face a  
6 little better.

7 A. I did, and I'm hopeful that I got mine on  
8 my eyes.

9 Q. In my opinion, it's still a little dark.  
10 Still can't see Mr. Jackson.

11 But how is that important on the  
12 assessment? How can that, I guess, change the  
13 input?

14 A. Well, the eyes for myself are important as  
15 well. Gaze can be very important. It can tell me  
16 whether or not they're possibly engaging in some  
17 thought blocking or if there's some interpersonal  
18 issues, such as Autism Spectrum Disorder, things --  
19 they may have psychotic experiences happening.

20 A lot of that information we gather through  
21 looking at the eyes, not to say that it's  
22 definitive, but it helps us to ask the appropriate  
23 questions or determine whether or not we should be  
24 following up on that information. So, an inability

1 to see the eyes can be critical and it's come to my  
2 attention -- and I wasn't aware of this until  
3 recently -- that many of the videoconferencing apps  
4 are creating circumstances where it forces the  
5 appearance of eye contact through videoconferencing.

6 Q. So, it may improve eye contact.

7 Is that what you're saying?

8 A. The purpose is to improve the intersocial  
9 engagement by creating the appearance of eye contact  
10 among the users.

11 Q. Because just in this example, I can see  
12 myself on the screen. The camera is down here and  
13 I'm looking at it now. If I want to make what I  
14 think is eye contact with you, I have to look at the  
15 screen that I'm viewing.

16 So, I'm not actually looking you in the  
17 eye, am I?

18 A. Right. I am not certain. Sometimes it  
19 looks like you may be looking me in the eye by  
20 looking at the camera, but it's unclear to me.

21 Q. As an actor I shouldn't look in the camera,  
22 right?

23 A. I'm not certain.

24 Q. What about how an examinee approaches a

1 test or an assessment? Can you lose elements of  
2 observation over video?

3 A. I think that the primary concern of video  
4 are this issue that in Dr. Puente brought this up --  
5 third party observer and the notion of recording  
6 with an artificial nature of the assessment.

7 So, anything that occurs outside of the  
8 normal administration or typical administration that  
9 suggests the presence of a third-party observer,  
10 whether it be via recording or direct observation  
11 through, you know, standing to the side of the  
12 person being interviewed or standing outside the  
13 room, has a potential to influence the performance  
14 on these tests.

15 And this dates back to really early  
16 research, things like fear-based responses, anxiety,  
17 academic performance, athletic performance. The  
18 presence or perceived presence of other people  
19 changes performance.

20 BY MR. GOODNIGHT:

21 Q. And then what about the ability to observe,  
22 I guess, psychomotor or medical symptoms?

23 A. It becomes very problematic. As I  
24 mentioned, I'm very attuned to wanting to see how an

1 individual moves within a room, within an  
2 environment, so I'm looking at gait. Like, is there  
3 a normal distance between their steps? Is there  
4 consistent posture as they're walking? Are they  
5 stumbling? Do they run into the side of the doors  
6 as they come in and out of it? All those things can  
7 be indicative of intoxication or other neurological  
8 disorders.

9 Q. I want to talk about the limitations on  
10 just the range of information available when  
11 assessing someone over video.

12 Do aspects like the angle of the camera or  
13 the size of the screen the person's on or the  
14 characteristics of the room they're in or the  
15 setting they're in, do those have the -- an affect  
16 on the assessment?

17 A. They do. And oftentimes when you look on  
18 our protocol administration forms for testing, they  
19 ask questions about the testing environment. So,  
20 what was the noise level in the environment? What  
21 were the circumstances of the administration? You  
22 know, so we're asked to make those observations and  
23 include that information because they can impact the  
24 testing.

1           Things like just what we saw earlier that  
2 it was stated that I was unable to be heard. I'm  
3 not speaking at my normal volume. I feel like I'm  
4 shouting right now to be sure that I can be heard.  
5 Somebody who shouts, that would be, you know,  
6 possibly indicative of a mental health problem to me  
7 and I wouldn't be able to tact that via video.

8           So, some of the things I'm also attending  
9 to in addition to posture and olfactory and  
10 composition is their speech. What's their prosody?  
11 So, what's the speed? Is it normal? Does it sound  
12 like speech should sound? What's their intonation?  
13 Are they really loud or are they really soft? Do  
14 they trail off on answers and assume that I'm gonna  
15 continue? Is there stilted speech or telegraphic  
16 speech. Those things can all be influenced by  
17 technology.

18           Q. How so? Can you elaborate on that? We  
19 talked about the technical factors and bandwidth.

20           Can you give examples?

21           A. Well, we talked about the volume earlier.  
22 So, again, I'm shouting at you in my room and,  
23 hopefully, my neighbors are far enough away in this  
24 building not to suffer from it.

1 THE COURT: Doctor, I'm going to stop you  
2 there. This is the judge speaking.

3 Did you try turning your microphone up so  
4 you don't have to shout?

5 THE WITNESS: It's maximum up.

6 THE COURT: Oh, okay.

7 THE WITNESS: I just had a meeting  
8 yesterday evening and it was not a problem, so it's  
9 even different across the same platform.

10 THE COURT: Okay. Well, we can hear you.  
11 But I don't want you feeling like you're going to  
12 get hoarse. It doesn't sound like you're shouting.

13 THE WITNESS: Well, I am, and I'll consider  
14 it a risk of the job.

15 THE COURT: Okay. Continue.

16 THE WITNESS: So, in this issue, such as  
17 like telegraphic speech, the bandwidth can directly  
18 impact the prosody of speech. So, you can get  
19 stuttering when stuttering is not actually occurring  
20 and you wouldn't be able to delineate that within  
21 the interview. It could be a simple bandwidth issue  
22 and that occurs even within systems where there's  
23 good bandwidth.

24 You know, environmental factors such as the

1 storms that we're having right now, the hurricanes  
2 and things like that can directly impact bandwidth  
3 or the time of day. How many users are utilizing  
4 the system can impact that.

5 BY MR. GOODNIGHT:

6 Q. And then my understanding is those issues  
7 go both ways, right? So, one concern may be that  
8 you can't understand the subject or you're also  
9 worried about whether the subject can understand  
10 you.

11 A. That's correct. And that could directly  
12 impact the rapport that was being discussed earlier.

13 So, if the individual that I'm trying to  
14 assess can't understand me because of the bandwidth  
15 or communication issue, it's gonna create a lot of  
16 ill will and frustration on the part of the person  
17 being interviewed.

18 I'm sure we've all experienced that  
19 difficulty of trying to have communication that's  
20 consistently chopped up by technology. It's  
21 frustrating.

22 Q. For both parties.

23 A. Exactly.

24 Q. Are there concerns about whether the lack



1 of physical presence in itself may influence the  
2 subject's clinical presentation?

3 A. Yes, I think so. I think that one of the  
4 concerns is getting information in -- the thing we  
5 were discussing earlier of rapport is really  
6 something that happens in a person-to-person  
7 interaction.

8 So, being able to develop that rapport --  
9 and I think Dr. Puente really accurately talked  
10 about that within the Latin X population it's very  
11 important this notion of rapport, this belief that  
12 somebody is acting in their best interest or at  
13 least has a modest understanding of their culture  
14 and experiences in order to engage. There's an  
15 initial sort of distrust.

16 But there has to be this rapport-building  
17 and communication. I spent a lot of time teaching  
18 my children while we were in Mexico, like, it's not  
19 just like, Hey, can I order a sandwich. You have to  
20 say, Hello, how are you doing, how's the day, you  
21 know. And we make small talk in the U.S. but it's  
22 much more important in the Latin X community to do  
23 that because it's expected. If you do something  
24 where the interest is just all business and it's

1 chip-chop, I don't care, I'm not invested in this  
2 information, I would be concerned about the trust  
3 and their willingness to disclose that information.

4 Q. What message does the use of video in  
5 itself send to that population?

6 A. Frankly, my concern would be that it's,  
7 well, it's not important enough that I be there in  
8 person. I'm gonna do something that's more  
9 convenient.

10 Q. I imagine you could, you know, explain the  
11 situation, the pandemic. Are you still concerned  
12 about a bad message being sent?

13 A. I think so. I think that we're talking  
14 about a capital case and then the community -- the  
15 potential message that's being sent to these  
16 individuals is that it's not really important enough  
17 for us to be there in person.

18 I understand that this is happening but  
19 you're not willing to take the time to come here and  
20 figure out a way to come here and to wait until it's  
21 possible for you to come here to collect this  
22 information. You're just going through the motions  
23 would be my concern.

24 Q. So, we've been talking about some of the

1 cultural issues with doing these interviews over  
2 Zoom. Does age play a factor at all on the subject?

3 A. Right. So, there was a recent paper in  
4 2020 from the APA about technology and some of the  
5 considerations.

6 In addition to cultural considerations, age  
7 and familiarity with technology was a really  
8 critical factor. It was an important consideration.  
9 Somebody who's less familiar with technology is  
10 gonna be more reluctant to use it. Even in my own  
11 in-person practice, the testing has shifted to use  
12 of electronic devices and that can be very  
13 challenging for older adults.

14 Oftentimes, I'll find myself saying, like,  
15 what if this person's age is going to create  
16 obstacles for me in using technology for testing.  
17 And even though it's been normed and validated using  
18 this technology, I'll switch to a more familiar form  
19 of pencil and paper and the books rather than  
20 utilizing the iPads that are now available for use.

21 Q. Is there any way to overcome that?

22 A. In terms of increasing familiarity or the  
23 age issue? I think you would have to engage them  
24 and give them experience of practice repeatedly with

1 that, but I don't know that there's any research  
2 that directly assesses how well that works.

3 Q. Let's pivot a little bit to ethical  
4 concerns when conducting psychological assessments  
5 over Zoom. Are there any?

6 A. The primary one is the issue of validity.  
7 Especially in the area of cognitive assessment and  
8 intellectual functioning there's very little  
9 research that I'm aware of that validates our tests  
10 for administration on -- via Zoom.

11 Q. Can you talk a little bit about that  
12 validity and reliability?

13 A. Yeah. So, validity is the extent to which  
14 a test measures what it says it measures, so is this  
15 actually a measure of intelligence when you're first  
16 learning this concept.

17 Oftentimes, we'll talk about, you know, the  
18 physical driving test in order to get your license.  
19 I think all of us who hold a driver's license at one  
20 point had to actually get in a car with somebody  
21 from the DMV and actually show them that we could  
22 drive within a vehicle to demonstrate that, you  
23 know, we're able to drive. That would be an example  
24 of a valid assessment of driving abilities.

1 Reliability is the extent to how  
2 consistently something is measured across people and  
3 across times. So, if I provide an IQ score what's  
4 the likelihood that another psychologist will find a  
5 similar score? What's the likelihood that my score  
6 today will be the same in five years or ten years,  
7 so how consistent is that score?

8 Q. It sounds like we're trying to establish a  
9 baseline for some of these tests, right?

10 A. That's correct.

11 Q. And it doesn't sound like we have that for  
12 these tests in the Zoom setting or video setting.

13 A. No. We've started this process of  
14 telehealth as the technology has emerged. COVID has  
15 really pushed all healthcare fields to move into the  
16 teleservices field, but we still know very little  
17 about the practice of telemedicine and the issue of  
18 tele-assessment is just almost nonexistent.

19 As soon as COVID came and it was clear that  
20 things were gonna be shut down and restricted, I  
21 invested a lot of effort trying to identify tests  
22 that I could administer remotely that were valid so  
23 that my practice wouldn't stop. You know, just from  
24 an earnings perspective as a private practitioner, I

1 don't collect unemployment or the other Paycheck  
2 Protection. I want to be able to provide these  
3 services and continue to do that as a practical  
4 measure. But I couldn't find anything that was  
5 shown to be consistently valid from a remote  
6 setting.

7 Q. So, you heard the cross-examination of Dr.  
8 Puente and discussion of the Nevada Legislature and  
9 the encouragement of the use of telehealth and the  
10 benefits on the community.

11 In your understanding as a practitioner,  
12 what was the context of that bill?

13 A. So, one, in Nevada we're a rural state so  
14 the primary challenge is we don't have physicians  
15 located where physicians are needed. And when we  
16 talk about telehealth, we're talking about the  
17 broader field of healthcare services.

18 So, it can be anything from, you know,  
19 nursing, physical therapy, primary care, psychiatric  
20 care, so there's a broad scope of what constitutes  
21 healthcare services. Additionally, most of these  
22 healthcare services aren't just provided from the  
23 practitioners's office directly to an individual  
24 over their cell phone, telephone, or home.

1           What was generally discussed was the  
2 provision of telehealth services to remote sites  
3 that were supported within a healthcare facility,  
4 maybe a satellite setting or rural service clinics  
5 or within a satellite practitioner's office.

6           So, even though you're providing remote  
7 healthcare services, there's a healthcare  
8 practitioner within that setting that is directly in  
9 front of the patient to assist should something not  
10 be able to be accomplished within that setting and  
11 really just kind of orienting an individual towards  
12 the utilization of services.

13           In 2013 or 2014 we tried to engage rural  
14 health services because there was a grant available  
15 to provide telehealth services for mental health  
16 care. And their primary concern in the regions that  
17 they rejected it was concerns about suicidality.  
18 And even though there was a practitioner in the  
19 room, they were unclear about who would be  
20 responsible for that person that was being provided  
21 telehealth services.

22           Q. So, how have you been able to, I guess,  
23 utilize telehealth since COVID?

24           A. Primarily with existing patients I've been

1 able to provide intermittent therapeutic  
2 intervention. It's not the same quality of  
3 intervention. I would say half my clients don't  
4 even participate and it's unclear why.

5 I would suspect that they don't have access  
6 to the technology to engage in telehealth or they  
7 just don't want to engage in telehealth services. I  
8 don't know. That's a question I haven't been able  
9 to answer yet.

10 Also, from a forensic practice, the only  
11 thing I've been able to do is make contact with  
12 individuals that I've been asked to evaluate to let  
13 them know that their attorney had asked me to  
14 interview them and that things were basically on  
15 hold because of the COVID situation and that,  
16 hopefully, we'll be able to get things restarted  
17 once access is granted again.

18 Q. Have you been able to do any assessments?

19 A. I have. I've had some intermittent success  
20 with evaluation in the Southern Detention Center,  
21 the Federal Detention Center in Southern Nevada in  
22 Pahrump. They allowed me access to their facility  
23 in a contact room. And it's my understanding that  
24 the individual then was placed into quarantine after



1 that, so they have to go through a process of  
2 quarantine after having contact made.

3 And then I was able to meet with somebody  
4 in the federal public defender's office who was out  
5 of custody and inside a conference room with, you  
6 know, safeguards such as distance.

7 And I still have a question there as to  
8 whether or not that's really a valid assessment, and  
9 I would have to make this disclosure of, you know,  
10 we were engaging in things like social distancing  
11 and frequent cleaning that are not part of the  
12 typical protocol.

13 Q. In what instance would you feel comfortable  
14 standing behind an assessment done over video?

15 A. I think for mild healthcare-related issues,  
16 so somebody who maybe lost their job over COVID and  
17 they were indicating mild issues of depression, they  
18 were not indicating substance abuse or suicidality,  
19 I may be inclined. But I would be reluctant if they  
20 were not a prior patient that I didn't have  
21 familiarity with.

22 Q. And so it sounds like a lower-stakes  
23 inquiry.

24 A. Yes.

1 Q. And then what about examples where you  
2 really don't think it's appropriate to conduct  
3 assessments over Zoom or telehealth -- and, you  
4 know, the death penalty, we'll save that for other  
5 questioning -- but are there things in between an  
6 Atkins assessment and a depression assessment that  
7 you would be comfortable with?

8 A. We have been referring back to depression.  
9 You know, somebody who is saying they're  
10 experiencing mild bouts of depression and they  
11 describe mild alterations in their routine would be  
12 different from an assessment of depression where the  
13 individual may be receiving interferon to treat  
14 Hepatitis C.

15 I wouldn't want to conduct that interview  
16 via telehealth because the potential for  
17 administering interferon with somebody who is  
18 depressed or has premorbid depression is potentially  
19 suicide. And so in that instance, if the question  
20 was, you know, is this person appropriate for the  
21 use of interferon to treat Hepatitis C, I wouldn't  
22 want to evaluate them. I would deny it, even though  
23 it's a similar disorder to what I was describing  
24 earlier.

1 Q. And then what about assessments in this  
2 Atkins context?

3 A. I don't see a context where that is  
4 something I would want to engage in. It would seem  
5 to violate that Principle A of our ethical code.

6 Q. So, can you expand on that a little bit,  
7 why you wouldn't use telehealth or Zoom?

8 MR. JACKSON: Objection, foundation as to  
9 knowledge and practice in conducting Atkins  
10 evaluations.

11 THE COURT: You can ask a clarifying  
12 question, Mr. Goodnight, about what the witness  
13 thinks you're asking him about with regard to an  
14 Atkins evaluation.

15 BY MR. GOODNIGHT:

16 Q. Dr. Leany, you understand what I'm asking  
17 you?

18 A. You're asking whether or not I would  
19 conduct an Atkins evaluation via videoconference.

20 Q. Okay.

21 THE COURT: I think the question is what  
22 portion of the Atkins evaluation are we talking  
23 about? Are we talking about an IQ test or are we  
24 talking about emotional adaptability? What are we

1 talking about?

2 MR. GOODNIGHT: I'm really talking about  
3 the ethical concerns, your Honor. I think he  
4 already answered the question and I'm happy to move  
5 on at this point.

6 THE COURT: Okay. Go ahead.

7 BY MR. GOODNIGHT:

8 Q. So, Dr. Leany, are you familiar with Dr.  
9 Puente?

10 A. I am.

11 Q. How are you familiar with him?

12 A. As he discussed, he was a past president of  
13 the American Psychology Association. He was also a  
14 past president of an organization that I'm a member  
15 of, the National Academy of Neuropsychology, and  
16 he's generally a very supportive mentor within the  
17 field of psychology.

18 Q. You observed his testimony this morning.

19 Is that right?

20 A. I did.

21 Q. And you heard his best-practice approach to  
22 interviewing both multigenerational family members  
23 and being, I guess, on scene to do this assessment.

24 Do you disagree with that or do you agree

1 with that?

2 A. I agree with that.

3 Q. Why is that?

4 A. He discussed very important factors, such  
5 as sociocultural variables, so the context within  
6 which the individual functions. So, there's a  
7 difference of asking questions about what the  
8 individual was capable of or not capable of, but  
9 also understanding what those capabilities or lack  
10 of abilities are within the context of the culture  
11 in which it's being assessed.

12 In this case this town within El Salvador,  
13 how does he compare to other individuals within  
14 that, and then the issue of multigenerational  
15 assessment. He discussed the issue of assessing  
16 cognitive abilities. We know that there's a  
17 heritability factor.

18 Again, we believe that IQ or intellectual  
19 capacity has this innate component to it and so we  
20 discussed assessing direct immediate family members  
21 for IQ. And so, in order to accomplish that, he  
22 would have to physically be present to administer  
23 those test items to assess IQ of those individuals.

24 Q. So, do you see a way to conduct that

1 investigation and those assessments that we talked  
2 about given the current circumstances we're under?

3 A. Not one that I'd be willing to engage in.

4 Q. Can you elaborate on that?

5 A. I think it would violate my beliefs about  
6 our ethical code in administering or trying to  
7 assess those abilities without being present.

8 Q. What about your confidence in the  
9 assessment that was done over Zoom or telephone?

10 A. I would have little confidence in that  
11 assessment.

12 Q. And so it sounds like you agree with the  
13 position that in person is the best practice and,  
14 really, the only alternative in this case.

15 A. Especially in this circumstance where,  
16 again, it seems like there was an initial effort to  
17 go and a belief that this could be accomplished and  
18 it does merely seem to be delayed.

19 Q. There was a little bit of cross-examination  
20 of Dr. Puente by Mr. Jackson about whether there  
21 were any publications or papers on, I guess,  
22 condemning the use of Zoom to perform an Atkins  
23 investigation.

24 What did you think about that line of

1 questioning?

2       A. I thought of the things that I used to say  
3 to doctoral students that were trying to do their  
4 dissertation. It goes back to the philosophical  
5 principle of the absence of evidence doesn't provide  
6 evidence of the absence of something. So, just  
7 because we don't have papers that show that it's  
8 detrimental, there's just a global lack of evidence  
9 that also shows that it's appropriate and should be  
10 done.

11           I think it's something that needs to be  
12 developed and developed with the scientific rigor  
13 that we approach all test development and creation  
14 of normative data, and I don't think that an Atkins  
15 case is the place to develop those normative  
16 standards.

17       Q. Thank you, Dr. Leany.

18           MR. GOODNIGHT: Your Honor, can I have the  
19 Court's indulgence?

20           THE COURT: Yes.

21           MR. GOODNIGHT: I'll pass the witness, your  
22 Honor.

23           THE COURT: Okay. We're gonna take a  
24 15-minute recess now.

1           During this recess I ask everyone to mute  
2 their microphones and turn off their cameras. The  
3 clerk will call us and get ahold of everyone when  
4 it's time to get back on the record. Thank you.  
5 Court's in recess.

6                               (Recess taken.)

7           DEPUTY FINN: All rise. This court is  
8 again in session.

9           THE COURT: Thank you. Please be seated.  
10 We're again in session. It's my understanding that  
11 Dr. Leany -- is that correct?

12           THE WITNESS: "Leany."

13           THE COURT: -- is on the stand. Sir,  
14 you're still under oath.

15           Mr. Goodnight, who is present with you in  
16 the defense team?

17           MR. GOODNIGHT: Your Honor, Joe Goodnight,  
18 and with me is Kate Hickman, Gianna Verness, and  
19 John Arrascada.

20           THE COURT: Thank you. And we still have  
21 the same two court interpreters. Thank you.

22           Good afternoon, Mr. Guzman.

23           DEFENDANT: (Indicating).

24           THE COURT: Okay. I see a thumb's up like



1 everything is fine. We will proceed with the  
2 cross-examination. Mr. Jackson.

3 MR. JACKSON: Thank you, your Honor.

4 CROSS-EXAMINATION

5 BY MR. JACKSON:

6 Q. Dr. Leany, during the break your screen  
7 moved from the left of my computer to the right  
8 side, so I don't know if you can see my eyes. I  
9 might be looking in a different area.

10 Dr. Leany, your C.V., I went through that  
11 and I'm looking at your personal statement and  
12 philosophy. Your relevant clinical experience  
13 inclusive of private practice, which includes your  
14 current private practice, work at Lakes Crossing,  
15 and also your post-doctoral scholar in psychology in  
16 2010, your clinical psychology intern in 2009  
17 through 2010, and your clinical psychology practicum  
18 training in 2008 to 2009.

19 Is this a pretty extensive synopsis or  
20 accurate synopsis of your work over the last 12  
21 years?

22 A. I think it represents a breadth of my work.  
23 I don't know that it's exhaustive of the work that I  
24 did.

1 Q. So, what I didn't see in here at all -- and  
2 I know you testified that you have, in fact,  
3 conducted some intellectual disability assessments  
4 as that pertains to other issues, whether it would  
5 be a competency or otherwise -- but I didn't see  
6 anything in your C.V. that you have ever conducted  
7 Atkins type of investigations.

8 A. I have not directly conducted an evaluation  
9 of an individual for Atkins.

10 Q. Have you done any of the prong one under  
11 the Atkins, the intellectual functioning? Have you  
12 done that?

13 A. Not in an Atkins case.

14 Q. And in a death penalty case have you --  
15 you're inexperienced at all in conducting  
16 behavioral -- Adaptive Behavior Assessments.

17 A. I've conducted Intellectual Disability  
18 Assessments for individuals that were ultimately  
19 subject to the death penalty or were in cases that  
20 had death penalty as a consequence, but those were  
21 within the context of the competency prior to any  
22 evaluation for Atkins, and I've also provided  
23 consultation on Atkins cases.

24 Q. If I understand your testimony correctly on

1 direct, those assessments, the Adaptive Behavior  
2 Assessments that you have conducted as part of the  
3 intellectual disability work that you've performed,  
4 that was specific to that person or that defendant,  
5 correct?

6 A. I'm not sure what you're asking me.

7 Q. Let me ask it a different way. I didn't  
8 hear anything in your testimony on direct as to  
9 interviews of informants, individuals that are  
10 either family members, coworkers, teachers, former  
11 teachers of an individual that you were performing  
12 an Intellectual Disability Assessment on.

13 A. Adaptive Functioning Assessment typically  
14 includes people other than the individual. While it  
15 can include the individual, they're considered --  
16 you know, the primary question of an intellectual  
17 disability makes their participation in that process  
18 suspect, I guess -- or I should say, or it makes it  
19 problematic and, thus, provides the reason why you  
20 need to ask additional collateral interviews.

21 So, when I'm doing an Assessment of  
22 Adaptive Functioning, whenever possible I'm asking  
23 teachers and employers, family members about the  
24 adaptive functioning of that individual.

1 Q. Thank you for clarifying that for me.

2 You also testified on direct examination as  
3 to the assessment over video as it relates to minor  
4 mental health issues. In other words, it's your  
5 opinion or you would not conduct, probably, a large  
6 number of assessments over video.

7 Am I correct in saying that?

8 A. I think for my field of testing, yes. I  
9 think "minor" may be a misnomer, because depression  
10 could easily, as I described, not be a minor issue.

11 Q. Well, do you recall, since you observed Dr.  
12 Puente's testimony, I asked him about the Monitor On  
13 Psychology, a publication that's put out by the APA?

14 A. I do recall that.

15 Q. And I asked him about a specific article  
16 that was in the June 2020 edition of the Monitor On  
17 Psychology.

18 A. I do recall you asking that question.

19 Q. Did you receive a copy of the June 2020  
20 edition of the Monitor On Psychology?

21 A. I did not.

22 Q. There's another article in that same  
23 edition that is entitled -- or titled "As the U.S.  
24 Stays Home, Psychology Moves Online."

1           And the reason I wanted to ask you about  
2 this article is that the article tells us a story  
3 about a psychologist who moved her practice prior to  
4 the COVID-19 from about 10 percent through  
5 videoconferencing to now 100 percent and it says  
6 that thousands of psychologists across the United  
7 States have made that same pivot.

8           Would you agree with that article?

9           A. I'm unaware of that article.

10          Q. In other words, I wanted to make sure  
11 between you and Dr. Puente, unless I misunderstood  
12 you, you're trying to make it sound like your  
13 viewpoints are the norm and are the standard, when,  
14 in fact, there's a lot of psychologists that are  
15 conducting assessments and providing therapy,  
16 clinical therapy, now 100 percent online.

17          A. I think that that statement confuses the  
18 issue of therapy with assessment. I'm sure that  
19 there are many more people conducting therapy. I'm  
20 unaware of very many people conducting assessments  
21 online.

22           MR. GOODNIGHT: Your Honor, can I  
23 interrupt? I don't mean to interrupt Mr. Jackson.  
24 But he's coming through muffled on our end and I

1 didn't know if that was the same for the Court.

2 THE COURT: No. I can hear him. Mr.  
3 Goodnight, what is your speaker adjusted at? Am I  
4 breaking up at all as I speak?

5 MR. GOODNIGHT: No, your Honor. You sound  
6 good. My speaker is about three-fifths the way up.  
7 I'll try and turn him up.

8 THE COURT: Mr. Jackson, would you check  
9 your volume.

10 (Discussion regarding Zoom  
11 technical functions.).

12 THE COURT: Go ahead, Mr. Jackson.

13 MR. JACKSON: Thank you, your Honor.

14 BY MR. JACKSON:

15 Q. Dr. Leany, you discussed some ethical  
16 concerns that you had regarding the psychological  
17 assessments. I think the way that the question was  
18 asked via Zoom, but that would apply to any form of  
19 videoconferencing, correct?

20 A. I'm not sure. My primary concern is that  
21 there's a lot of confusion about -- or interchanging  
22 of the use of "telehealth" and "therapy" and  
23 "assessment," and for me those are very distinct  
24 things.

1 Q. Let's just go back to your ethical concerns  
2 as you testified on direct. And you raised a  
3 concern that went to the validity.

4 And as I understood that, it was specific  
5 to conducting a test or assessment through  
6 videoconferencing, correct?

7 A. Can you refresh my memory about what that  
8 question was?

9 Q. Well, I'll start in a different place.

10 A. Okay.

11 Q. So, one of the difficulties -- and,  
12 perhaps, you can explain it to me -- but there was  
13 testimony earlier that the Vineland-3, which is an  
14 Adaptive Behavior Assessment that is put out by the  
15 company Pearson, that that is not scaled to the  
16 Latin America norm, correct?

17 A. To my understanding, that's correct.

18 Q. But, nevertheless, it was gonna be used by  
19 Dr. Puente in Latin America, correct?

20 A. That's what he stated.

21 Q. Right. And so that would be one of those  
22 ethical issues that potentially could go to the  
23 validity. But as I understood Dr. Puente,  
24 nevertheless, it's somewhat a practice and it is

1 being done, not just by him, but by other  
2 practitioners, correct?

3 A. I have heard of other practitioners using  
4 that, yes.

5 Q. And so another issue that goes towards the  
6 ethical concern and the validity is that the  
7 Vineland as well as the ABAS are not to be used  
8 retrospectively, but because of the third prong  
9 under Atkins that goes to the onset prior to the age  
10 of 18, it is being used retroactively, correct?

11 A. That is correct.

12 Q. So, if we have the company Pearson that  
13 produces the Vineland-3 and puts out information  
14 that it is acceptable to be administered through  
15 telepractice, and this is a company that, obviously,  
16 you know, they're looking at a bottom line but  
17 they're putting this out, that this test can be  
18 performed on a smart phone, just a simple mobile  
19 device, and while that may raise an ethical concern  
20 with you, nevertheless, the company stands behind  
21 it.

22 Should we look at all of these deviations  
23 potentially from what the standards are and give it  
24 whatever weight it deems at the time of the report



1 and then the judge can weigh that information in  
2 rendering a decision?

3 A. I'm unaware of any statement by Pearson  
4 with regard to the Vineland about its use in Atkins  
5 cases and I would be curious if they actually would  
6 support using this in an Atkin case via telehealth.

7 Q. Well, if I told you that I have in front of  
8 me literature that's on Pearson's website that says  
9 the Vineland-3 can be administered in a telepractice  
10 context utilizing Pearson's Q-global software  
11 system, would you have any reason to disbelieve  
12 that?

13 MR. GOODNIGHT: Objection, your Honor. We  
14 don't have this exhibit. I'm not sure what he's  
15 using to cross-examine Dr. Leany.

16 THE COURT: Okay. Counsel, do you have  
17 something that you were looking at?

18 MR. JACKSON: I do, your Honor. And it was  
19 for impeachment purposes. It's not an exhibit that  
20 was submitted by the state. I was asking if he had  
21 specific knowledge or any reason to disbelieve that  
22 information. And if he doesn't have any knowledge  
23 of it, then that's fine.

24 THE COURT: I think when you want to ask a

1 witness if they have any objection to a treatise or  
2 a book or a publication, you have to show it to them  
3 to see whether or not they even are familiar with  
4 that or want to talk about it.

5 We -- I understand you didn't have to do it  
6 in advance because it is cross-examination. But in  
7 the courtroom you would have approached and shown  
8 them the article and said, Do you quibble with this,  
9 or your question, which was, Do you accept it.

10 So, in this environment it's incumbent upon  
11 you to make sure you have it scanned and up on your  
12 screen and do a share-screen so the witness can see  
13 it, if you want to use it for cross.

14 MR. JACKSON: Thank you, your Honor.

15 THE COURT: I'll sustain the objection  
16 until and unless you can go ahead and show the  
17 witness what you're referring to.

18 BY MR. JACKSON:

19 Q. Dr. Leany, even though you've not conducted  
20 the Atkins investigation, you, nevertheless, stated  
21 that in conducting Intellectual Disability  
22 Assessments that you have conducted some interviews  
23 over the phone, correct?

24 A. Not necessarily specific to intellectual

1 disability. I've talked about providing telehealth  
2 services or teletherapy as well as meeting clients  
3 that are awaiting interview within the jail. And  
4 that was a videoconference, not via telephone.

5 Q. It was videoconference and not via  
6 telephone.

7 MR. JACKSON: I have nothing further, your  
8 Honor.

9 THE COURT: Thank you.

10 Mr. Goodnight, anything further for this  
11 witness?

12 MR. GOODNIGHT: I'm sorry, your Honor. I  
13 minimized you for a second. Can I have the Court's  
14 indulgence?

15 THE COURT: Certainly. I don't know if I  
16 like this being able to minimize the court.

17 MR. GOODNIGHT: It was entirely  
18 unintentional. Thank you, your Honor.

19 REDIRECT EXAMINATION

20 BY MR. GOODNIGHT:

21 Q. Dr. Leany, can you un-mute.

22 On cross-examination Mr. Jackson was  
23 talking to you and you got into this distinction  
24 between therapy and assessment in regards to use of

1 video technology.

2 Can you expand on that a little bit more  
3 and what the differences are, I guess, the different  
4 issues that arise between therapy and assessment?

5 A. Sure. Therapy is usually an ongoing  
6 process that occurs at regular intervals after a  
7 diagnosis has been made. So, someone who has  
8 depression we use manualized treatment that says in  
9 week two this is the process that we go through,  
10 week three this is something that we do, this is  
11 what happens when therapy or treatment gets  
12 derailed.

13 And A lot of times, and especially from my  
14 theoretical orientation for therapy, I'm providing  
15 them with coping mechanisms, skills, tools, for  
16 example, behavioral activation, like what were some  
17 activities that you used to do that you're no longer  
18 engaging in, why did you stop doing them? Are these  
19 things that you want to resume?

20 We have evidence that that shows that it  
21 helps people alleviate depression. I can provide  
22 that therapeutic recommendation via Zoom during --  
23 just as well -- well, I shouldn't say "just as  
24 well," but I could provide it with some equivalency

1 via Zoom that I could in person, absent all the body  
2 language, and the costs are relatively low with an  
3 ongoing patient.

4 Q. What do you mean by "costs"?

5 A. So, if I pursue them with a therapeutic  
6 intervention to go out and engage in a walk -- you  
7 know, that they used to walk a mile a day and I tell  
8 them, Walk around your block -- assuming that it's  
9 less than a mile a day -- today and plan to do that  
10 on consecutive days, the cost to them is maybe some  
11 physical fatigue. But the cost of getting that  
12 wrong is relatively low and they'll get -- again,  
13 like fatigue is the potential cost there.

14 Q. So, do you mean consequence?

15 A. Exactly.

16 Q. Okay. And so you talked about the  
17 therapeutic setting, and then how is that different  
18 from assessment?

19 A. So, an assessment, especially from my  
20 perspective, I am evaluating criteria to make a  
21 diagnosis. Most often in my practice it's relative  
22 to either some psycho-legal question, such as  
23 competency, which may involve specific psychological  
24 constructs like their intellectual capacity, their

1 knowledge, you know, of the legal system, based on  
2 the Dusky standard. You know, do they have that  
3 information relatively available? It could involve  
4 things like Executive Functioning Tests, like do  
5 they have a poor ability to disinhibit?

6           So, that would be a formal test that I  
7 would have to administer in person because they're  
8 actually manipulating things within my office. So,  
9 for example, the intellectual testing, they're  
10 touching or selecting items physically in front of  
11 me, they're moving objects within the room to  
12 recreate things that I show them. It's just not  
13 possible via telehealth in this setting.

14           Q. Do you have any current cases that are on  
15 hold right now because of this?

16           A. So, currently I have six cases that are not  
17 moving at all because I'm either unable to gain  
18 access to them within a correctional facility and  
19 the institution is unwilling to transport them to  
20 me, or I recently had a case where the correctional  
21 facility was willing to grant me access to the  
22 individual but they wanted a deputy present in the  
23 room and they were unwilling to unshackle the  
24 individual so that he could manipulate the objects

1 within the room.

2 Q. And so were you comfortable going forward  
3 with the assessment?

4 A. No. They're currently at a standstill.

5 MR. GOODNIGHT: Court's indulgence, your  
6 Honor.

7 THE COURT: Yes.

8 MR. GOODNIGHT: I'll pass the witness.

9 THE COURT: Okay. Thank you.

10 Mr. Jackson, anything further?

11 MR. JACKSON: Nothing further, your Honor.

12 THE COURT: Okay. You have to speak up.

13 MR. JACKSON: Nothing further, your Honor.

14 Thank you.

15 THE COURT: Okay. Thank you.

16 Sir, you are excused. Thank you very much.

17 THE WITNESS: Thank you, your Honor.

18 THE COURT: You're welcome.

19 Go ahead and call your next witness.

20 MR. GOODNIGHT: Your Honor, Mr. Arrascada  
21 is approaching our podium right now. My  
22 understanding is that the remainder of our witnesses  
23 are scheduled for tomorrow. He has more  
24 information. We thought we would have a witness

1 available today and there was an emergency in that  
2 witness' family. I'll pass it over to Mr.  
3 Arrascada.

4 THE COURT: Okay. Thank you.

5 MR. ARRASCADA: Our next witness was going  
6 to be Professor Bradley Wendel. Professor Wendel  
7 contacted me yesterday morning that he had a family  
8 emergency. His father was in the ICU in Florida and  
9 he would be traveling to Florida today. He will be  
10 available to testify tomorrow.

11 And just wanted me to let you know that  
12 he's a professor at law and has great respect for  
13 the Court, but he probably wasn't traveling with a  
14 suit because he was traveling on such an emergent  
15 basis that he may not be in a suit tomorrow while  
16 testifying, your Honor, but he is unavailable until  
17 tomorrow.

18 THE COURT: Okay. Mr. Jackson had made an  
19 objection to his testifying. Will you make an offer  
20 of proof of what he'll testify to?

21 MR. ARRASCADA: Your Honor, are you asking  
22 Mr. Jackson to make an offer of proof or for me to  
23 make an offer of proof?

24 THE COURT: No. I was asking you to make



1 the offer of proof. I don't think Mr. Jackson knows  
2 what your witness will testify to.

3 MR. ARRASCADA: Yes. Court's indulgence.

4 Your Honor, as an offer of proof, Professor  
5 Wendel is a professor at Cornell Law School. He is  
6 primarily an ethicist with litigious professional  
7 responsibility. He also wrote an article, "The ABA  
8 Guidelines and the Norms of Capital Defense  
9 Representation."

10 Part of the issue of this hearing is, I  
11 think as the Court called it, what's good enough as  
12 far as representation. And Professor Wendel will be  
13 providing expert opinion and testimony regarding the  
14 representation and quality of representation for  
15 somebody facing capital punishment in the United  
16 States under these circumstances.

17 THE COURT: Okay. Mr. Jackson.

18 MR. JACKSON: Your Honor, and I apologize.  
19 I don't recall that you specifically asked about the  
20 ABA standards or the effective assistance of  
21 counsel, that it was about what Dr. Puente was  
22 willing to do or not willing to do, what he could do  
23 or what he couldn't do, and if there was another  
24 expert who may contradict Dr. Puente as to whether

1 or not an Atkins investigation can be conducted by  
2 some other means than in-person interviews of  
3 informants or testing of informants.

4 And so, again, the state acknowledges what  
5 the ABA guidelines are. The state acknowledges ADKT  
6 411 so -- and I'm sure the Court's well aware of  
7 those. So we do continue with our objection on both  
8 of the law professors.

9 THE COURT: Mr. Arrascada, I don't see any  
10 relevance for this testimony in this hearing.  
11 Nobody's alleging that you're ineffective.

12 MR. ARRASCADA: Actually, your Honor, it's  
13 quite relevant. As you said on the June 22<sup>nd</sup>  
14 hearing, pages 20 and 21, you said, "I need more  
15 evidence before I actually can make a decision as to  
16 what to do about compelling the defense to either  
17 conduct the investigation in the matter that is  
18 reasonably necessary and reasonably appropriate  
19 based upon what the experts tell me or allow for an  
20 unending continuance."

21 You said, "I don't have any expert  
22 testimony as to why it couldn't be conducted." You  
23 understood the state's position and you wanted to  
24 hear from Dr. Puente regarding Zoom, but you also

1 said that you would weigh all the evidence that you  
2 would receive and make a decision as to what's  
3 appropriate in the environment we're currently in.

4 And Professor Wendel as an ethicist can  
5 provide expert opinion testimony regarding the  
6 situation, the environment that we're in, and going  
7 forward or being forced to go forward with the  
8 Atkins hearing.

9 Also, your Honor, on page 22 of the same  
10 transcript, you stated that -- Court's indulgence --

11 THE COURT: Yes.

12 MR. ARRASCADA: -- further, you also asked,  
13 you said, "In the interim what I'm considering doing  
14 is considering continuing the jury trial, which I've  
15 done, and vacate that to a time." And then you  
16 stated that on today's date that there'd be "a  
17 hearing with experts to tell me why the information  
18 needed to gather to provide a report to the defense  
19 cannot be done and what thresholds have to be met  
20 before it can be done."

21 Professor Wendel is one of the lead  
22 publishers regarding the ABA guidelines and the  
23 norms of capital defense representation. And we  
24 feel it's significant to make that record regarding

1 our ethical duties, what the bar is, so to speak.  
2 As I said, the Court at one point -- I don't have it  
3 in front of me -- said, "What's good enough" and  
4 Professor Wendel will provide his opinions as to  
5 that quote/unquote, What is good enough.

6 So, it's very important from an ethical  
7 standpoint under these COVID times to make a record  
8 regarding that information.

9 THE COURT: Mr. Jackson, do you have  
10 anything further?

11 MR. JACKSON: I do, your Honor. Thank you  
12 very much.

13 As I stated at the beginning of this  
14 hearing, guidelines are just that. They are  
15 aspirational only. And if the standard is set forth  
16 according to Strickland v. Washington as part of the  
17 constitution -- and I cited also that Cullen case,  
18 C-u-l-l-e-n, for the proposition that the ABA  
19 guidelines are not -- do not have to be followed  
20 when we're talking about what is the standard for  
21 assistance of counsel.

22 But the other aspect of this, your Honor,  
23 is that it's the state's understanding that when  
24 we're talking about effective assistance of counsel,

1 that is something that the courts look at after the  
2 fact. It's not something that will be looked at at  
3 this particular time.

4 And while there's several pages within that  
5 transcript from the June 22<sup>nd</sup> hearing, again, it's  
6 the state's understanding that, truly, the position  
7 we're trying to get into because of the delay that  
8 we're having right now is the defense's motion to  
9 continue the trial due to the COVID-19 pandemic was  
10 all based upon what Dr. Puente could or could not  
11 do.

12 And this is just a continuation of that and  
13 so if Dr. Puente was going to say, I cannot do it --  
14 and now he's testified so we know what his opinion  
15 is -- that that is really the purpose of this  
16 hearing and not to talk about what ABA standards are  
17 at this time. So, again, the state believes it is  
18 not relevant.

19 MR. ARRASCADA: Your Honor, I would just  
20 also add that Professor Wendel and Professor Blume,  
21 I believe, will be talking about they've written  
22 quite extensively regarding the ABA guidelines as  
23 they apply to mitigation experts. And that  
24 mitigation experts also morph into Atkins

1 investigation-type experts in mitigation.

2 And I think it's very important from an  
3 ethical standpoint for the Court to hear where those  
4 bars should be set and what should or should not be  
5 done.

6 THE COURT: Okay. Mr. Arrascada, I think  
7 you're taking my comments out of context when you  
8 refer to the transcript. There was no indication by  
9 me that I intended to have an ethical discussion  
10 about whether or not you were currently meeting your  
11 ethical obligations in your defense or what you had  
12 to do in the future to meet your ethical  
13 obligations.

14 To try to do that at this stage in the  
15 proceedings is improper and I think it's creating a  
16 situation where I cannot guesstimate whether or not  
17 you do it right. So, for me to sit here and say,  
18 Oh, as of July 2020 your ethical standards based on  
19 a law professor's testimony to me are for you to do  
20 A, B, and C and then have us do A, B, and C, that  
21 would not preclude a later attack that maybe you  
22 hadn't fulfilled your ethical obligation.

23 So, the issue with regard to effective  
24 assistance of counsel and the ethical obligations of

1 an attorney in a death penalty case must be  
2 evaluated in the context of the entire  
3 representation at the end and it can't be done  
4 midway. Otherwise, we're going to have a hearing on  
5 whether or not you're fulfilling your ethical  
6 obligations every few months. Every time there's a  
7 new issue, you will bring up to me, Oh, wait. Our  
8 ethical obligations require us to do this and so,  
9 Judge, you have to let me do that.

10 I'm not going to go down that road, Mr.  
11 Arrascada.

12 MR. ARRASCADA: Your Honor, with all due  
13 respect --

14 THE COURT: Mr. Arrascada, I'm in the  
15 middle of talking. Thank you.

16 So, I'll sustain the objection. I do not  
17 think it's relevant to today's hearing and to what  
18 we'll get to this week. It doesn't mean it isn't  
19 relevant sometime in the future, but at this stage  
20 in the proceeding I am not finding it relevant.

21 MR. ARRASCADA: Your Honor, if I may --

22 THE COURT: With regard to what we are  
23 supposed to be hearing today, I have to make a  
24 decision about whether or not I believe that the

1 representation of the defense has been established  
2 sufficiently to continue this matter. At the time  
3 that you made your motion, it was to continue it for  
4 a period of time that was unknown.

5 I have now heard your expert say that he  
6 wants me to continue this matter to approximately 6  
7 to 12 months after a vaccine is available because  
8 you've told me that you need 6 to 12 months after he  
9 conducted his evaluations to present a motion to the  
10 court with regard to the case known as Atkins and  
11 for the court to make that ruling prior to you going  
12 to trial.

13 So, we're talking about a vaccine and then  
14 plus 12 months, so now I know what you're asking  
15 for. And I want to hear from your experts to  
16 describe why I have to do that, but I do not believe  
17 that a law professor telling me what your ethical  
18 obligations as a defense attorney are or what the  
19 ABA standards are will do that. I don't think  
20 that's relevant to the determination that I have to  
21 make.

22 So, I am going to sustain the state's  
23 objection and do not find Mr. Wendel's testimony  
24 relevant for today's hearing -- this week's hearing.



1 It may come up in the future.

2 MR. ARRASCADA: Your Honor, his testimony  
3 will also have to do with the proper time to conduct  
4 the Atkins type of hearing, which is part of the  
5 subject matter. I'd ask that he be heard regarding  
6 that.

7 THE COURT: I don't understand what you  
8 mean, "the proper time" for that.

9 MR. ARRASCADA: Well, that's what this  
10 whole hearing has been about, your Honor, you know,  
11 when can an Atkins hearing be conducted and when can  
12 it be conducted properly, and Professor Wendel can  
13 testify regarding that.

14 THE COURT: We've already determined that  
15 the Atkins hearing cannot take place until you file  
16 your motion, and you've told me that you can't file  
17 your motion until the investigation is conducted.  
18 That's when it can take place.

19 What more do you want me to know that you  
20 haven't told me before?

21 MR. ARRASCADA: I think it's important for  
22 you to know what the legal standards are for an  
23 attorney and for their investigators in order to  
24 meet their obligations under Atkins under these

1 COVID times.

2 THE COURT: I don't need an expert to tell  
3 me that. You can certainly argue it. I can read  
4 the ABA standards. I can read case law. I don't  
5 need a law professor to give me a lecture on it.  
6 Unless there's something specific that he knows that  
7 nobody else can see, you've already told me what you  
8 have to do and the court has granted you that time.

9 This is the second continuance. I mean, we  
10 certainly acknowledge that you have to have the  
11 evidence before you can file a report -- your  
12 motion, and then there had to be a period of time  
13 after you filed your motion before we have a hearing  
14 and then we have to conduct an evidentiary hearing,  
15 and then you need a ruling before you can even  
16 continue with your representation. We're all aware  
17 of that.

18 MR. ARRASCADA: Okay. Your Honor, he's  
19 unavailable today. We have our witnesses for  
20 tomorrow and we'll be prepared to go at 10:00  
21 tomorrow morning.

22 THE COURT: Okay. Is there anything else?  
23 Any special thing that he is going to tell me other  
24 than what you've told me before about the timing of

1 an Atkins motion?

2 MR. ARRASCADA: Court's indulgence.

3 Your Honor, I would just add that Professor  
4 Wendel could add -- I guess, really put in  
5 perspective the pitfalls that we're facing with  
6 going forward on an Atkins hearing without it able  
7 to be complete or properly performed. And it's  
8 important, I think, for the Court and for those  
9 standards to be known and to be laid out. And also  
10 it shows an acknowledgment that the guidelines  
11 aren't a check-the-box-type situation, which we've  
12 never approached them that way.

13 What it's going to do, though, is put a  
14 legal, ethical perspective into the Atkins  
15 investigation and what we're doing and how  
16 everything we do moving forward is impacted and  
17 affected by the decision the Court makes based on  
18 the hearings this week.

19 Your Honor, you say I'm misquoting what you  
20 said from the transcript but --

21 THE COURT: I said you took it out of  
22 context, not that you misquoted it. I did not  
23 intend to hear from anybody except for those people  
24 that you wanted to call that would explain to me why

1 the Atkins investigation could not take place.

2 MR. ARRASCADA: And the witnesses will be  
3 able to explain that in more detail and put a  
4 greater legal perspective to it. Right now, your  
5 Honor, we're putting a timeline perspective to  
6 something that has broad and long-lasting legal  
7 implications on whether or not someone is eligible  
8 for the death penalty and how this is going to be  
9 going forward.

10 And by not hearing from these professors,  
11 these learned people who have been involved in  
12 Atkins proceedings and who have provided advice in  
13 Atkins proceedings, who have written about the  
14 guidelines and how they apply, without all that  
15 information, the Court's calculus is really left to  
16 -- it's like an Abacus, move one over, move one  
17 over, move one over, move one back.

18 We need to have this in a complete legal  
19 and ethical framework in order for the Court to make  
20 an informed, legal, and just decision as to what  
21 timeline we're going to have moving forward in these  
22 unprecedented COVID times.

23 THE COURT: I still don't think that I  
24 expected to hear from law professors in these

1 hearings. I don't think it is appropriate and I'm  
2 sustaining the state's objection.

3 I'm not saying that you can't present  
4 argument with regard to why you think these  
5 witnesses are supportive of your position, but I do  
6 not want to prospectively determine what is ethical  
7 and whether or not you fulfilled your obligation as  
8 an attorney under the ABA standards. I don't think  
9 it's proper for me to do that prospectively. I have  
10 to do it after the fact and so will the appellate  
11 court.

12 MR. ARRASCADA: If I may, your Honor,  
13 that's the exact point that I'm trying to make.  
14 You're saying, I'm not going to do something  
15 prospectively, but it's right now at this point in  
16 time where your decisions are going to affect  
17 prospectively what we can and cannot do. And so to  
18 have it in a proper legal, ethical framework is  
19 significant and important. If not, you're just  
20 moving numbers around, your Honor.

21 I think it's important for you to hear from  
22 the standpoint of legal professors with an Atkins  
23 experience, with a guidelines experience that  
24 understand the timelines, the work that goes into

1 and the work that has to go into the preparation  
2 that would be in support of what Dr. Puente said.

3 That is all very significant and important  
4 for this Court to hear now, or else you're going to  
5 be in that prospective position that you don't want  
6 to be in, that none of us want to be in, which is  
7 why we want to present this information and evidence  
8 now.

9 THE COURT: Did you have anything further  
10 on behalf of the state, Mr. Jackson?

11 MR. JACKSON: I was trying to un-mute.  
12 Thank you, your Honor.

13 Your Honor, the state understands that you  
14 have sustained the state's objection to the  
15 testimony of Professor Wendel and Professor Blume,  
16 and that would be Exhibit 6 and Exhibit 8 of the  
17 Notice of Proposed Exhibits that was filed by the  
18 defendant in this case.

19 The state would also ask that there be an  
20 offer of proof as to Exhibit 7, the curriculum vitae  
21 of Dana Cook, who, according to that C.V., is her  
22 current position is the Federal Death Penalty  
23 Resource Counsel Project, and the state believes  
24 that that testimony is gonna be along the same lines

1 as Professor Wendel and Professor Blume.

2 We'd also ask that that not be admissible  
3 as it is irrelevant pursuant to the motion to  
4 continue due to global pandemic COVID-19,  
5 Defendant's motion D22 that was filed March 13<sup>th</sup>,  
6 2020.

7 MR. ARRASCADA: Your Honor, with all due  
8 respect to Mr. Jackson, you've not ruled regarding  
9 Professor Blume. That is Ms. Hickman's witness and  
10 she'll address Professor Blume.

11 I'd also ask if Professor Wendel is not  
12 allowed to testify tomorrow, that I be allowed to  
13 make an offer of proof to the Court in more detail  
14 and depth tomorrow.

15 THE COURT: I'll think about it. Thank  
16 you, Mr. Arrascada.

17 MS. HICKMAN: Thank you, your Honor.

18 So, I guess I'll actually start with  
19 Ms. Cook, just because she comes before Mr. Blume.

20 The Court heard from Dr. Puente and  
21 Dr. Leany today about how they conduct an Atkins  
22 investigation. And you heard a lot of questioning  
23 of Dr. Puente and a little bit of Dr. Leany about  
24 different methods that can be used to get the

1 information to interview witnesses, can you do it on  
2 the phone, can you do it via camera, can you just  
3 pick up the phone and give information.

4 But what's missing from what was presented  
5 today and what Ms. Cook would present to you is all  
6 the work that has to go in before those interviews  
7 take place. She is a mitigation specialist. As the  
8 Court knows, we've hired a mitigation team, really.  
9 We've established that we've got a team that has  
10 gone to El Salvador with us now twice.

11 And when we went to El Salvador the first  
12 time, it was to start finding witnesses, to start  
13 building rapport, to start identifying the people  
14 that Dr. Puente could interview. When we went back,  
15 as the Court knows, Dr. Puente didn't go alone. Mr.  
16 Arrascada and that team went as well so that the  
17 time that he spent in El Salvador could be used most  
18 effectively.

19 And the person who could tell you about how  
20 that time must be used and how to facilitate those  
21 interviews is a mitigation specialist. Ms. Cook can  
22 provide very relevant information about different  
23 cases where alternate methods have been tried to be  
24 used, what that looks like. Because what we want to



1 present to the Court is how to get the most  
2 reliable, accurate, valid information to the Court  
3 in order to make the decision, as you've heard here  
4 today, that is a huge decision. It is one of the  
5 most weighty decisions that this Court will have to  
6 make, whether or not Mr. Guzman is categorically  
7 ineligible for the death penalty.

8           In order for you to make that  
9 determination, we have to be able to provide you  
10 information, and so Ms. Cook will testify about what  
11 that looks like, what gathering that information  
12 looks like, what they are able to do on the ground  
13 to make sure that the information is valid, not just  
14 so that it's valid, but also so that they can verify  
15 it. And there's a word I'm thinking of and for some  
16 reason it's right on the tip of my tongue. Not  
17 "credible." But they can, like, make sure that it's  
18 right through other sources -- corroborated. And so  
19 that's what Ms. Cook would testify to.

20           And then I don't know if you want to deal  
21 with her right now and the state wants to present  
22 and then we can move on to Mr. Blume.

23           THE COURT: So, are you saying that her  
24 testimony would go to what has to happen before the

1 specialist, the psychologist who is going to do the  
2 Atkins evaluation, can actually complete their  
3 investigation? Is that what you're talking about?

4 MS. HICKMAN: Before they can complete it,  
5 yes, and also while they complete it.

6 THE COURT: Is it to tell me timing, how  
7 long it takes?

8 MS. HICKMAN: No, it's not necessarily  
9 about timing. It's about the process. The  
10 mitigation specialist on the ground is the one who  
11 actually can facilitate the interview taking place.

12 So, I think too, she can talk about some of  
13 the issues that have come up. Because I want to be  
14 able to brainstorm and kinda troubleshoot anything  
15 that we're talking about, is if we were expecting to  
16 do these assessments via Zoom what that would have  
17 to look like.

18 Because even when we are on the ground,  
19 even when Mr. Arrascada and our mitigation experts  
20 and Dr. Puente are in El Salvador, it's not just Dr.  
21 Puente doing the work. It's a mitigation specialist  
22 helping people get to where they need to be,  
23 arranging the interview, making sure there's a  
24 private space, making sure that everything is how it

1 needs to be.

2 And so if, for example, we wanted to look  
3 at doing it via Zoom, we would still need a  
4 mitigation specialist on the ground in El Salvador,  
5 and I think that is what Mr. Blume can testify to.

6 THE COURT: Okay. Thank you. Mr. Jackson?

7 MR. JACKSON: Your Honor, I don't know if  
8 Ms. Blume will be part of that team that was on the  
9 ground that Dr. Puente testified to that when him  
10 and Mr. Arrascada landed at the airport in El  
11 Salvador in March of this year, he said he had a  
12 full team waiting for him. I anticipate that would  
13 be -- include mitigation specialists and, perhaps,  
14 even local people.

15 But in connection, again, it goes back to  
16 this case or the purpose of this and the relevance  
17 of this is Dr. Puente testified that he stopped  
18 relying upon information that was gathered by  
19 mitigation specialists as far as conducting  
20 interviews of informants.

21 So, if it's just setting up, the state  
22 acknowledges that in order to conduct these types of  
23 interviews other than in person, that it is gonna  
24 require additional bodies that would have to be

1 present to make sure that certain things can be met.  
2 But those things can, in fact, be met. There can be  
3 a secure room, not a third-party observer but  
4 somebody who can assist an individual with the  
5 technology associated with this, and we'll learn  
6 more about it when the state's able to put on some  
7 more witnesses and produce evidence during this  
8 hearing, which you'll see is the ability to  
9 effectively communicate through videoconferencing.

10 In fact, it has been done in this  
11 particular case already down there so, again, the  
12 state believes that her testimony, after hearing the  
13 offer of proof from Ms. Hickman, is not relevant and  
14 we would ask that she also be excluded from  
15 testifying in this matter.

16 THE COURT: Okay. Your objection's  
17 overruled. I am going to find it relevant. I think  
18 it goes part and parcel with the request for a  
19 continuance and how long that continuance needs to  
20 be made. I do want to hear from this witness, and  
21 based on your offer of proof, I'll allow testimony  
22 in those areas.

23 MS. HICKMAN: Thank you, your Honor. And  
24 is it okay for me to talk about Mr. Blume?

1 THE COURT: Yes.

2 MS. HICKMAN: Yes. So, Judge, Mr. Blume  
3 goes very closely hand in hand with Ms. Cook. I  
4 think the Court can look at his C.V. that was filed  
5 and see that he is a death penalty litigator.

6 The reason it's important for the Court to  
7 hear from him is not to tell the Court what should  
8 be done, not to tell the Court what he's been doing,  
9 but to help the Court understand -- and the state,  
10 quite frankly, based on some of the statements from  
11 Mr. Jackson today -- what the burden that we have to  
12 sustain at the hearing is and what information the  
13 Court is gonna have to sort through as you make your  
14 determination in this case.

15 Mr. Blume has done a number of Atkins cases  
16 personally. He's written on it very extensively,  
17 and so what he can tell the Court is -- he can do it  
18 much more eloquently than I can -- but he can tell  
19 the Court very succinctly what the attack looks  
20 like, right? What it is that the defense has to be  
21 able to present to the Court.

22 Because the reality of it is, Judge, we're  
23 going to come into court, hopefully after Dr. Puente  
24 is able to go to El Salvador and we filed our

1 motion, and we'll say Mr. Martinez Guzman is  
2 categorically ineligible for the death penalty. And  
3 we've come to that conclusion based on testing by  
4 Dr. Mahaffey, testing by Dr. Puente, and then this  
5 Adaptive Functional Assessment that has to be done.

6 And that is a very difficult prong to  
7 present to the Court because of the very nature of  
8 the information and your decision can only be as  
9 good as the information that we are able to present  
10 to you. And Mr. Blume can explain to the Court why  
11 defense counsel has to be able to present the best  
12 information, what -- and I feel like now I'm arguing  
13 a little bit.

14 But to a certain extent the state isn't  
15 going to say, Well, Judge, we agree not to challenge  
16 the methodologies, we agree to not challenge the  
17 information, we agree to not challenge the fact that  
18 they were unable to corroborate their own  
19 information because they weren't on the ground.

20 They're going to challenge everything we do  
21 because that is their job, because they want to go  
22 forward with their notice of their intent to seek  
23 the death penalty against Mr. Martinez Guzman. So,  
24 as long as they want to challenge what we want --

1 what we are going to present to the Court, we have  
2 to be able to present that information to the Court.  
3 And Mr. Blume really is, if not the, one of the most  
4 premiere experts on what death penalty litigation  
5 looks like.

6           The fact that, you know, the ABA standards,  
7 the fact that Mr. Jackson says those are  
8 aspirational, that is wrong. That's just flat-out  
9 wrong. And so maybe he needs some time to listen to  
10 these experts and he needs to understand what our  
11 burden is. We're not asking to be able to put on a  
12 Cadillac defense. We're asking to be able to meet  
13 the minimum standards.

14           And that's what Mr. Blume can tell the  
15 Court and Mr. Jackson and the state, is what the  
16 minimum standards are. I know that the Court can  
17 read case law and the Court has read the ABA  
18 standards and the Court is one of the most  
19 knowledgeable judges on the death penalty because  
20 you've done the majority of them, so I don't, by any  
21 means, say that we're educating you about something  
22 you don't know, because, obviously, you do.

23           But in making the record about what effect,  
24 really, hamstringing our investigation would have on

1 an Atkins case is the record that we would like to  
2 be able to make.

3 THE COURT: Mr. Jackson.

4 MR. JACKSON: Thank you, your Honor.

5 It appeared as Ms. Hickman continued  
6 through her argument, she got back to the standards  
7 and, basically, it sounds like it would be the same  
8 type of testimony as Professor Wendel.

9 It seems like there's an attempt to put the  
10 cart before the horse. And we've heard from when  
11 Mr. Arrascada first brought it up in June of last  
12 year at a hearing about an IQ test that was  
13 performed by Dr. Mahaffey on Mr. Guzman that they  
14 would be filing an Atkins motion pursuant to NRS  
15 174.098.

16 There's a lot of issues that have gone on  
17 in this past year, there's no doubt, but these  
18 issues as to what Professor Wendel or to what  
19 Professor Blume would be talking about going to the  
20 standards would be better considered, if there is an  
21 argument as to irrelevance, once the motion is  
22 actually filed.

23 Again, the specific purpose of this hearing  
24 is what can be done. Can there be any types of the



1 interviews? It's a simple question. Can an  
2 informant in El Salvador be contacted by telephone  
3 or videoconferencing and asked questions to obtain  
4 anecdotal information to help the defendant? Can  
5 that, in fact, occur?

6 And that's really what I think what the  
7 state heard that the Court wants to hear. And  
8 that's the way that we would ask the Court to  
9 proceed and to sustain our objection as to Exhibit  
10 8, the C.V. of John Blume.

11 THE COURT: Ms. Hickman, anything more?

12 MS. HICKMAN: Just very briefly.

13 I think it is a very narrow question, what  
14 can be done, but it has a very broad answer and it  
15 has very broad implications. And I'm standing in  
16 front of the Court today saying I've never done an  
17 Atkins hearing, I've never done a death penalty  
18 case, but I've learned quite a bit as we've gone  
19 forward with this about what it means to present the  
20 information to the Court.

21 And so when we're saying what can be done,  
22 it's not as simple as picking up the phone and  
23 calling the principal of the school and saying, What  
24 does an eight out of ten mean? Right? And I think

1 you can see that through Dr. Puente. What is  
2 important is not what can be done. Can you just  
3 pick up the phone, can you get on Skype and do these  
4 interviews?

5           What's important is not just what these  
6 interviews are going to look like if forced to go  
7 forward during a pandemic, but then how does our  
8 case suffer? How does our ability to sustain our  
9 burden at the hearing suffer? How does the Court  
10 then suffer in trying to come to a conclusion? How  
11 does Mr. Martinez Guzman suffer if he is not able to  
12 sustain his burden? How does society as a whole  
13 suffer when we've determined that someone who is  
14 intellectual disabled is categorically ineligible  
15 for the death penalty? It's bigger than can you  
16 pick up the phone and ask, What does eight out of  
17 ten on a report card mean?

18           And that's what, I think, we were really  
19 trying to convey for the Court, that it's not a  
20 simple answer. It is a simple question and it has a  
21 very broad answer.

22           THE COURT: Okay. I'm not convinced that  
23 Mr. Blume has anything to offer in the determination  
24 today of what I have to decide this week.

1           I think he's a wonderful resource for the  
2 defense team and I'm sure he will continue to be  
3 that resource for the defense team, but in terms of  
4 making a record, I don't see what he's making a  
5 record of.

6           Perhaps after the state has presented  
7 evidence, it might be possible that there would be a  
8 rebuttal based on something that someone has  
9 presented. Because of Mr. Blume's experience, you  
10 say he's got lots of experience in death penalty.  
11 Maybe depending on what's presented by the state, he  
12 would be available for rebuttal.

13           But just in the determination of the  
14 continuance and how long that continuance has to be,  
15 he doesn't have any more experience with COVID than  
16 the rest of us and so we're all dealing with this  
17 new environment that we're in each day.

18           So, I don't see what you've offered as  
19 proof as relevant to my determination here at this  
20 time. Maybe there would be something later or in  
21 rebuttal. We'll see. I don't know what the state's  
22 going to present, so we'll have to see if maybe  
23 later in the week it would be more appropriate.

24           So, tomorrow we'll hear from Ms. Cook,

1 correct?

2 MS. HICKMAN: Yes, that's correct. I have  
3 her ready to go at 10:00 a.m. tomorrow morning.

4 THE COURT: That's fine. And so we'll do  
5 her at 10:00.

6 And then, I guess, at that point we're down  
7 to the state presenting evidence and then I think  
8 the rest of your exhibits go to argument.

9 Is that correct?

10 MR. JACKSON: That is the state's  
11 understanding now, your Honor.

12 MS. HICKMAN: Correct, your Honor. And  
13 then as the Court just stated, potential rebuttal  
14 depending on what is presented by the state.

15 THE COURT: Right. And I can see where  
16 there might be something that these become more  
17 relevant to the argument once I hear from the state  
18 or the state's expert, if I'm going to hear from the  
19 state's expert.

20 So, that means that we should be prepared  
21 to keep going like we did today, so I would think --  
22 I'm not sure how long Ms. Cook will take. If she's  
23 completed in two hours, then the state would have to  
24 be prepared to go with whatever they want to present

1 by 1:30 tomorrow afternoon. We'll kinda keep that  
2 as a possibility for now.

3 Anything further for this evening?

4 MR. JACKSON: Nothing further from the  
5 state, your Honor.

6 THE COURT: Anything?

7 MS. HICKMAN: Before we go forward  
8 tomorrow -- and I think this may be something we can  
9 deal with tomorrow once we're done with Ms. Cook --  
10 is a very similar offer of proof as to the state's  
11 witnesses --

12 THE COURT: Okay.

13 MS. HICKMAN: -- particularly Dr. Martinez,  
14 who has never done an Atkins investigation from the  
15 defense point of view, and Detective Brady. I don't  
16 know what the relevance to her testimony would be.  
17 We can do it now or we can do it tomorrow.

18 THE COURT: It's a quarter to five, so it's  
19 a good idea to do it -- let's get your case finished  
20 and then, of course, at your request there will be  
21 an offer of proof from the state.

22 MS. HICKMAN: Thank you.

23 THE COURT: You're welcome.

24 Mr. Guzman, we are going to finish up today

1 and we'll be back on the record at 10:00 tomorrow  
2 morning.

3 MS. HICKMAN: Judge, can we have a breakout  
4 room with Mr. Martinez Guzman with the interpreter  
5 just to go over the --

6 THE COURT: We would have to give you a  
7 whole new link to do that. We don't do breakout  
8 rooms on webinars.

9 MS. HICKMAN: We haven't been able to  
10 consult with him and I'd like the opportunity while  
11 we have an interpreter.

12 THE COURT: It was my understanding that  
13 the sheriff would provide a phone for private  
14 conversation.

15 MS. HICKMAN: But we need the interpreter  
16 available as well. .

17 THE COURT: I see. Okay. So, what we will  
18 do is, I guess, we'll have to do a whole new link.  
19 Ms. Clerk, you'll have to develop a whole new link  
20 for the communication, I think.

21 THE CLERK: Your Honor, I just wanted to  
22 make sure you weren't going to have any other  
23 meetings during this time, because I can only -- you  
24 can only have one meeting at a time.

1 THE COURT: Right. I know that.

2 THE CLERK: Does the defense have their --  
3 and this is entirely up to Jessica -- ability to set  
4 up their own Zoom link and breakout rooms and  
5 Jessica could log in with them?

6 MS. HICKMAN: We could. Who would we send  
7 the invitation to up at the jail?

8 THE CLERK: Unfortunately, Deputy Finn  
9 can't understand right now because it's all in  
10 Spanish.

11 THE INTERPRETER: I can stop talking, your  
12 Honor, if you wish to just communicate with him  
13 directly right now.

14 THE COURT: I think the problem is that he  
15 won't be able to hear the English. It's too quiet.

16 So, will the interpreter please say in  
17 English that the deputy needs to turn off the  
18 Spanish.

19 DEPUTY FINN: Yes, your Honor?

20 THE COURT: The defense requested the  
21 ability to talk to their client. If they create a  
22 Zoom link, can you go onto a separate Zoom link with  
23 the client present?

24 THE BAILIFF: Right now, simultaneous?

1 THE COURT: Right. Or, you know, maybe the  
2 best thing to do, Mr. Guzman, is we'll work this out  
3 for tomorrow, but maybe you all could send the link  
4 and the interpreter could be available to talk with  
5 you and the defendant at 9:00.

6 I can't give you my link because I'm going  
7 to be doing court at 9:00. But if you could send  
8 that link, then we could get the defendant on with  
9 you before our hearing starts.

10 MS. HICKMAN: That would be great. Maybe  
11 we could do it at 9:30 with the interpreter. I  
12 don't know what Ms. Escobar has tomorrow.

13 THE INTERPRETER: This is one of the  
14 interpreters speaking. I know I'm personally  
15 available at 9:30.

16 MS. HICKMAN: We'll email the link to -- do  
17 you have Ms. Escobar's email? And we'll send it to  
18 Ms. Stone and she'll get it to whomever needs it at  
19 the jail for us to meet with him at 9:30 tomorrow.

20 THE COURT: Okay. We'll try to work that  
21 out. And, Deputy Finn, if you can try to work out  
22 how they can communicate -- maybe the concept of the  
23 cell phone is what we had talked about before -- so  
24 they can communicate prior to the hearing.



1 THE CLERK: I think the contemplation was  
2 that they would set -- a conference call would be  
3 set up with him with the interpreter.

4 THE COURT: Okay. So, you all can work on  
5 that tomorrow. And Deputy, yes?

6 DEPUTY FINN: Yes, your Honor. There is a  
7 phone here, so a conference call, I would assume,  
8 would work.

9 THE COURT: Okay. Do you know what the  
10 phone number is?

11 DEPUTY FINN: I will have to work on that,  
12 your Honor.

13 THE COURT: Okay.

14 MS. HICKMAN: Your Honor, what I would  
15 prefer is we can have some face-to-face contact with  
16 our client tomorrow morning at 9:30. We haven't  
17 been able to talk to him today and I appreciate the  
18 Court's effort in working on that.

19 So, we'll figure out -- we'll send a link  
20 to Ms. Escobar, to Ms. Stone, or I can send it to  
21 Deputy Finn, if you prefer, to be able to log onto  
22 Zoom tomorrow.

23 MR. ARRASCADA: We'll have our own Zoom  
24 link, if the jail can then join in with us and

1 Ms. Escobar.

2 THE COURT: Right. So, Deputy, will you be  
3 the bailiff tomorrow?

4 THE BAILIFF: I believe so. I don't know  
5 that I will do your crim calendar tomorrow, but I  
6 will be here for this. I will be here at 8:00  
7 tomorrow morning.

8 THE COURT: Okay. Well, go ahead and email  
9 it to Ms. Stone and then she will work with Deputy  
10 Finn and try to get the jail on for you by 9:30.

11 MS. HICKMAN: Thank you.

12 THE COURT: Go ahead and join the web  
13 meeting that they send to you by 9:30. These are  
14 not court hearings. These are private conversations  
15 between counsel and will require the court  
16 interpreter, so the court will not be present.

17 THE INTERPRETER: May the interpreter have  
18 a moment to summarize for Mr. Martinez Guzman. I'm  
19 not sure if we're on the record, but I'd like him to  
20 know what we've been talking about this whole time  
21 as I've been unable to interpret.

22 THE COURT: Yes, we are on the record.

23 THE INTERPRETER: Okay. Then, all the more  
24 reason.

1 (Translation to defendant.)

2 THE DEFENDANT: Yes, I do understand.

3 THE COURT: Okay. Then, thank you. That  
4 will conclude today's hearing and we'll be back on  
5 the record in this case at 10:00 a.m. tomorrow  
6 morning.

7 THE CLERK: I wanted to make one more  
8 statement.

9 The Zoom link for tomorrow is the same one  
10 as this. This is the recurring Zoom link for the  
11 whole five days.

12 THE COURT: Thank you, everyone. Court's  
13 in recess. (End of proceedings at 4:53 p.m.)

14 -o0o-

15

16

17

18

19

20

21

22

23

24

1 STATE OF NEVADA                    )  
2 COUNTY OF WASHOE                 )       SS.

3       I, CHRISTINA MARIE AMUNDSON, official reporter  
4 of the Second Judicial District Court of the State  
5 of Nevada, in and for the County of Washoe, do  
6 hereby certify:

7       That as such reporter, I was present via Zoom  
8 audio-visual in Department No. 4 of the above court  
9 on Monday, July 27, 2020, at the hour of 1:30 p.m.  
10 of said day, and I then and there took verbatim  
11 stenotype notes of the proceedings had and testimony  
12 given therein in the case of State of Nevada,  
13 Plaintiff, v. Wilber Ernesto Martinez Guzman,  
14 Defendant, Case No. CR19-0447.

15       That the foregoing transcript is a true and  
16 correct transcript of my said stenotype notes so  
17 taken as aforesaid, and is a true and correct  
18 statement of the proceedings had and testimony given  
19 in the above-entitled action to the best of my  
20 knowledge, skill and ability.

21 DATED: At Reno, Nevada, this 28th day of July 2020.  
22

23       /S/ Christina Marie Amundson, CCR #641

24       Christina Marie Amundson, CCR #641

## 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