

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBER ERNESTO MARTINEZ  
GUZMAN,  
Petitioner,

No.

Electronically Filed  
Jan 14 2021 02:39 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.

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PETITIONER'S APPENDIX VOLUME FOUR

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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

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

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TRANSCRIPT OF PROCEEDINGS  
  
EVIDENTIARY HEARING  
  
TUESDAY, JULY 28, 2020, 10:00 A.M.  
  
Reno, Nevada

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

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## I N D E X

WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

DANA COOK

12

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MARKED

ADMITTED

Defense 7

14

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1 RENO, NEVADA; TUESDAY, JULY 28, 2020; 10:00 A.M.

2 -o0o-

3 THE COURT: Thank you. Please be seated. Let the  
4 record reflect that this session of the court is taking place  
5 on July 28, 2020. It is a continuation of the hearing from  
6 yesterday in CR19-0447. It is being held remotely because of  
7 the closure of the courthouse at 75 Court Street in Reno,  
8 Washoe County, Nevada.

9 The Court and all the participants are appearing  
10 through simultaneous audiovisual transmission. I am  
11 physically located in Reno, Washoe County, Nevada which is the  
12 site of today's court session. The other court personnel will  
13 identify themselves and note where they are appearing from.

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

16 COURT REPORTER: Judy Schonlau, court reporter,  
17 Washoe County, Nevada.

18 THE COURT: We are being assisted by the bailiff  
19 today.

20 THE BAILIFF: Good morning. Deputy Finn appearing  
21 from 911 Parr Boulevard, Washoe County, Nevada.

22 THE COURT: At this time, I would ask the  
23 interpreters to change their mode, and ask the interpreters to  
24 identify themselves, please.

1 THE INTERPRETER: Joseph Miller, Nevada State  
2 certified court interpreter, certificate NVMJ-501 located in  
3 Washoe County.

4 THE COURT: Thank you. We also have a second  
5 interpreter available today.

6 THE INTERPRETER: Good morning, Your Honor. Jessica  
7 Escobar, State certified interpreter for Nevada. My  
8 certificate number is NVEJ-100. And, Your Honor, since my  
9 colleague cannot hear me, may I quickly interpret that into  
10 Spanish as well for Mr. Martinez Guzman?

11 THE COURT: Yes.

12 THE INTERPRETER: Thank you.

13 THE COURT: Good morning, Mr. Guzman.

14 THE INTERPRETER: Your Honor, the defendant has his  
15 microphone muted. The interpreter did not hear his response.

16 THE COURT: Thank you. Deputy Finn, can you un-mute  
17 the microphone? Thank you.

18 THE DEFENDANT: Yes. Good morning.

19 THE COURT: Are you able to hear the interpreter?

20 THE DEFENDANT: Yes.

21 THE COURT: Thank you, sir. We also have counsel  
22 present today. I ask that they identify themselves and their  
23 physical location when they make their announcement of their  
24 appearance. I also ask they indicate that they received

1 notice that this hearing is taking place pursuant to Nevada  
2 Supreme Court Rule Part 9 relating to simultaneous audiovisual  
3 transmission in criminal proceedings, and that they have no  
4 objection to proceeding today in this manner. We will begin  
5 with the State.

6 MR. LUCIA: Good morning, Your Honor, Travis Lucia  
7 on behalf of the State of Nevada. I have received the Notice  
8 the Court referenced and have no objection to proceeding in  
9 this fashion. And, Judge, with the Court's permission, I  
10 would just ask we be allowed to stay seated during any  
11 questioning. We moved our set up here so the Court would have  
12 better visual on our face as that was one of the issues that  
13 came up yesterday. We have got a little bit of a different  
14 setup today.

15 THE COURT: Okay. That is fine.

16 MR. HICKS: Good morning. Chris Hicks on behalf of  
17 the State. As well, I am aware of the aforementioned Order  
18 and have no objection to proceeding in this manner today.

19 THE COURT: You are all appearing from Reno, Washoe  
20 County, Nevada?

21 MR. HICKS: That's correct, Your Honor.

22 THE COURT: Thank you.

23 MR. JACKSON: Good morning. Mark Jackson on behalf  
24 of the State. I am appearing here in Washoe County, Nevada.

1 I have received a copy of the Notice as well as the Order and  
2 have no objection to proceeding in this format.

3 THE COURT: Thank you. Is there anyone else present  
4 for the State?

5 MR. LUCIA: That is all. Thank you.

6 THE COURT: Mr. Arrascada.

7 MR. ARRASCAD: Yes. Good morning. John Arrascada  
8 on behalf of Mr. Martinez Guzman. I reviewed the Order and  
9 have no objection to it and proceeding in this format. I am  
10 appearing from Reno, Nevada.

11 THE COURT: Thank you.

12 MR. GOODNIGHT: Good morning. Joe Goodnight on  
13 behalf of Mr. Martinez Guzman. I received notice. I have no  
14 objection. I am in Washoe County, Nevada.

15 THE COURT: Thank you.

16 MS. VERNES: Good morning. Gianna Verness on behalf  
17 of Mr. Martinez Guzman appearing from Washoe County, Nevada.  
18 I have received the appropriate Notice and have no objection  
19 to proceeding in this format.

20 THE COURT: Thank you.

21 MS. HICKMAN: Good morning. Kate Hickman appearing  
22 on behalf of Mr. Martinez Guzman. I received the appropriate  
23 Notice and I have no objection to proceeding this way, and I  
24 am in Washoe County.

1 THE COURT: Thank you. So it was brought to my  
2 attention by the clerk that the Washoe County Public Defenders  
3 Office was unable to speak with Mr. Guzman this morning.  
4 There appeared to some sort of an issue which I guess was your  
5 connection, Mr. Arrascada?

6 MR. ARRASCADA: That is accurate, Your Honor.  
7 However, we have worked through those complications, and we  
8 will be speaking with our client over the lunch recess.

9 THE COURT: Okay. Are you comfortable with that,  
10 ready to go today?

11 MR. ARRASCADA: We are comfortable moving forward.

12 THE COURT: All right. Then go ahead and call your  
13 next witness.

14 MR. ARRASCADA: Your Honor, before we do that, we  
15 would like to invoke the Rule of Exclusion on all non-expert  
16 witnesses, testifying witnesses.

17 THE COURT: You all have to help the clerk. We will  
18 grant your motion for the Rule of Exclusion to apply in this  
19 case. You are going to have to help the clerk. Because we are  
20 on a Webinar, all counsel can look at the participant list and  
21 determine at any time who is appearing. If you see anyone who  
22 is on the witness list that you want to invoke this rule for,  
23 you must let us know. I do see there is a phone number. Does  
24 anyone know who is appearing via phone?

1 MR. ARRASCADA: Yes. She's one of our witnesses,  
2 Your Honor-- not a witness, Your Honor. I misspoke.

3 THE COURT: The number 1-415 etcetera is with the  
4 defense team?

5 MR. ARRASCADA: Yes. A non-witness.

6 THE COURT: All right. Mr. Lucia.

7 MR. LUCIA: Thank you, Your Honor. I see in the list  
8 of participants there is somebody only identified as Deb,  
9 D-E-B. I suspect it might be Debra Moreno who is one of the  
10 State's witnesses.

11 THE COURT: If the person named Deb is Debra Moreno  
12 raise your hand, please.

13 THE CLERK: Your Honor, that person did not raise  
14 their hand.

15 THE COURT: For purposes of the record, I think we  
16 need to move that person in to determine who they are. If we  
17 are going to do a Rule of Exclusion, we have no know who  
18 everyone is, who is watching this case.

19 While the clerk is doing that, counsel, do you know  
20 who Cynthia is?

21 MR. LUCIA: I do not. The only other person which  
22 the State would anticipate calling today who is a non-expert  
23 is detective Stephanie Brady. In looking at the list of  
24 participants, I don't see anything that would suggest to me



1 she's in that portion of the the Webinar.

2 THE CLERK: This is the court clerk. Could the  
3 person that is logged in as Deb please un-mute their mic and  
4 turn on their camera? Hi.

5 MS. THISTLE: Deborah Thistle. I am viewing on the  
6 D.A.'s side.

7 THE COURT: You don't have to tell us why you are  
8 here. We just have to decide if you are a witness. This  
9 person is not a witness, correct?

10 MR. LUCIA: That's accurate, Your Honor.

11 THE COURT: Thank you. We are going to move you  
12 back to the gallery.

13 MS. THISTLE: Thank you.

14 THE COURT: Pretty awkward here. I hate to ask all  
15 the members of the public to identify their name. Normally  
16 they would just sort of tell the bailiff, but they would have  
17 a better idea.

18 MR. ARRASCADA: Your Honor, I can assure the Court we  
19 have no witnesses that are on the ZOOM camera or in the  
20 waiting room listening. I believe the State has two witnesses  
21 that they are going to call that are non-experts which is  
22 deputy Brady and Deb Moreno, and I believe they are both,  
23 Mr. Lucia represented neither are on the call or they have  
24 logged off the call.

1 THE COURT: Okay. So you are comfortable without  
2 having to inquire of any of the other people who have a first  
3 name only?

4 MR. ARRASCADA: As long as the State will represent  
5 no other witnesses are on the call.

6 MR. LUCIA: Your Honor, to that end, as I mentioned  
7 earlier, I don't see any other witnesses. I just reached out  
8 to detective Brady and told her not to log on until I  
9 communicate with her, let her know. I will send an e-mail  
10 along those same lines to Ms. Moreno.

11 THE COURT: Okay, counsel. Thank you for your  
12 assistance. I am going to ask that you each, someone from the  
13 State's side and someone from the defense side regularly  
14 monitor, kind of look at it every fifteen minutes or so to  
15 make sure someone who is a witness has not logged on. And, of  
16 course, the clerk will be watching for the names you have now  
17 provided us with.

18 MR. ARRASCADA: Thank you, Your Honor. Thank you for  
19 the consideration.

20 THE COURT: Thank you. Anything further? Shall we  
21 go forward with the testimony?

22 MR. LUCIA: State is prepared.

23 MS. HICKMAN: Yes, Your Honor, thank you.

24 THE COURT: Go ahead, Ms. Hickman.

1 MR. HICKMAN: We would call Dana Cook.

2 THE CLERK: Good morning, Ms. Cook. This is Marci the  
3 court clerk. Could you un-mute your mic and turn on the  
4 camera? Thank you very much, Ms. Cook. Can you hear me?

5 THE WITNESS: Yes, I can.

6 THE CLERK: Perfect. Thank you.

7 THE COURT: Ma'am, this is the Judge. Would you  
8 please state your name?

9 THE WITNESS: Dana Cook, C-O-O-K.

10 THE COURT: Thank you. Where are you appearing  
11 from?

12 THE WITNESS: I am appearing from Philadelphia,  
13 Pennsylvania.

14 THE COURT: Ms. Hickman, you may proceed.

15 MS. HICKMAN: Thank you, Your Honor. Good morning,  
16 Ms. Cook.

17 THE CLERK: I am sorry to interrupt. I have not  
18 sworn her in.

19 THE COURT: Oh, I am sorry. Thank you.  
20 You may proceed now, Ms. Hickman.

21 MS. HICKMAN: Thank you.

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DANA COOK

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

DIRECT EXAMINATION

BY MS. HICKMAN:

Q Good morning, Ms. Cook?

A Good morning.

Q I want to start by talking to you a little bit about  
your education and your past work experience?

A Okay.

Q What is your education?

A I have a Bachelor of Science from Middle Tennessee  
State University in Tennessee in criminal justice  
administration with minors in psychology and political  
science. In 2003 I received my Master of Social Work from the  
University of Pennsylvania.

Q After you graduated from the University of  
Pennsylvania, what was your relevant work history?

A Some of my work history was before my MSW, so I am  
going to go back just a little bit. I first started doing  
mitigation work about twenty-five years ago as an investigator  
in the Post Conviction Defenders Office in Nashville,  
Tennessee, and there I worked with defense teams handling post

1 conviction cases across the State of Tennessee. After that, I  
2 moved to Philadelphia, and I was hired as an investigator with  
3 the Capital Habeas Unit here and worked on appellate cases  
4 around the State of Pennsylvania. And then I went and received  
5 my Master in Social Work degree. After that, I worked at the  
6 Public Defenders Office first in the Juvenile Unit as a  
7 mitigation specialist, then for five years in the Homicide  
8 Unit as a mitigation specialist. After that, in 2010, I  
9 co-founded and co-directed for ten years a nonprofit called  
10 the Atlantic Center for Capital Representation. And that lead  
11 up to my current position which is the National Mitigation  
12 Coordinator for the Federal Death Penalty Resource Counsel  
13 Project.

14 Q Thank you. In your role I guess particularly at the  
15 Atlantic Center for Capital representation which is referred  
16 to as ACORN?

17 A ACCR, yes.

18 Q ACCR. I was close. And the Federal Death Penalty  
19 Resource Project, is your main focus on mitigation for death  
20 penalty cases?

21 A Yes.

22 Q For this case, did you provide me a copy of your CV?

23 A I did.

24 Q Is that something that you keep updated for the

1 purposes of having just really an updated CV?

2 A Yes.

3 Q Sorry. I lost my train of thought in the middle of  
4 that question. Is in a fair and accurate representation of  
5 your experience?

6 A Yes.

7 MS. HICKMAN: Judge, I move Exhibit 7 which is her  
8 current Curricula Vitae.

9 MR. LUCIA: I am sorry. State has no objection.

10 THE COURT: Okay. So defense 7, correct?

11 MS. HICKMAN: That is correct.

12 THE COURT: There being no objection, Defendant's 7  
13 is admitted.

14 (Defendant's Exhibit 7 admitted in evidence.)

15 THE COURT: You may proceed.

16 MS. HICKMAN:

17 Q So I want to talk to you a little about your current  
18 position as the National Mitigation Coordinator for the  
19 Federal Death Penalty Resource Counsel Project. What is it  
20 you do?

21 A The National Mitigation Coordinator is a national  
22 position created in 2005. My role is to, within the Federal  
23 capital trial system, I work with defense teams consulting and  
24 training those teams that are handling specifically death

1 penalty cases. My role includes providing expert declarations  
2 or testimony in those cases. I also work with the National  
3 Habeas and Assistance Training Project to develop various  
4 national training programs such as the National Mitigation  
5 Seminar and a Capital Skills Mitigation Workshop amongst  
6 others.

7 Q So if I am understanding right, you are an agency or  
8 part of an agency that provides training to Mitigation  
9 Specialists really in the Federal system, but like you are  
10 doing today, you can also provide assistance to the defense on  
11 the State level?

12 A Yes.

13 Q Is part of your training or what your training is  
14 based on the ABA Guidelines?

15 A Yes.

16 Q And I want to show you a copy of those to make sure  
17 that we are talking about the same thing. They have been  
18 submitted to the Court as Exhibit 1.

19 THE COURT: Do you want the clerk to share screen?

20 MS. HICKMAN: I would, to make sure she recognizes  
21 the same thing I am talking about.

22 THE COURT: Do you want just the first page?

23 MS. HICKMAN: That would be fine.

24 ///

1 BY MS. HICKMAN:

2 Q Can you see the screen the Court is sharing?

3 A Yes, I can.

4 Q Those are the American Bar Association Guidelines  
5 for the appointment and performance of defense counsel in  
6 death penalty cases; is that right?

7 A Yes.

8 Q It was revised in February of 2003?

9 A Yes.

10 Q And looking at that, does that appear to be a fair  
11 and accurate representation of those guidelines that your  
12 training is based on?

13 A Yes.

14 MS. HICKMAN: Judge, I would move for admission of  
15 Exhibit 1.

16 MR. LUCIA: No objection from the State.

17 THE COURT: Okay. Exhibit 1 is admitted.

18 (Exhibit 1 admitted in evidence.)

19 BY MS. HICKMAN:

20 Q I want to talk to you -- Actually, before I talk to  
21 you more about those, I want to talk to you a little bit about  
22 how long you have been at the Federal Death Penalty Resource  
23 Counsel Project?

24 A I began the position in April of this year.



1           Q     And we talked a little bit about your role there.  
2     Prior to that, for ten years you had provided training for  
3     death penalty mitigation experts as well, correct?

4           A     Yes. The Atlantic Center, ACCR was a death penalty  
5     resource formed in 2010 and at that time, we were responsible  
6     for advising, assisting, consulting, training with defense  
7     teams handling capital cases in both Pennsylvania and  
8     Delaware. Delaware got rid of their death penalty several  
9     years later, so we were specifically Pennsylvania. So our job  
10    was to consult with defense teams on their cases. We provided  
11    resources, references, reading materials, that kind of thing.  
12    And I also participated in trainings around the state as well  
13    as ran a yearly Bring Your Own Case Capital Training for  
14    Defense Team.

15               In addition to that, since about 2007, I have been  
16    serving as faculty at various training programs around the  
17    country doing various types of aspects of mitigation  
18    investigation, so for about thirteen years.

19           Q     When we are talking about a Mitigation Specialist in  
20    regard to death penalty cases only, what is the significance  
21    of having a well-trained Mitigation Specialist working with a  
22    defense team?

23           A     A Mitigation Specialist has, you know, for a long  
24    time now been recognized as a core member of the defense team.

1 The guidelines call for two qualified attorneys, a Mitigation  
2 Specialist and investigator. And, you know, the role of the  
3 Mitigation Specialist is very different. Our primary  
4 responsibility is to investigate mitigation evidence, to  
5 conduct these comprehensive investigations into the client's  
6 life and social history and background. And, you know, it  
7 takes the kind of time and takes a very different skill set  
8 that most attorneys don't have, because they spend their days  
9 in court. So, you know, we play a very specific role in terms  
10 of sort of the on the ground investigation that is done, going  
11 out to meet witnesses and interviewing them, track down  
12 records, that kind of thing.

13 Q So in your own experience or as part of the training  
14 that you have personally offered, have you worked or consulted  
15 either with the case or in a case where it was suspected that  
16 the client suffered from intellectual disability?

17 A Yes, both investigated and consulted on them.

18 Q And when you are either personally investigating on  
19 them or consulting with them, when you're deciding how to  
20 proceed or initially what is important to investigate, do the  
21 ABA Guidelines guide what is important for a Mitigation  
22 Specialist to do?

23 A They do. You know, they give us, you know,  
24 guidelines on the type of information that we are supposed to

1 gather, on the type of witnesses we are suppose to interview.  
2 You know, they specifically talk about the importance of  
3 looking for information that would potentially bar the death  
4 penalty in a case. For example, in an Atkins investigation,  
5 we are looking for intellectual disability is usually one of  
6 the first things that you want to do. Not usually, it is the  
7 first thing you want to do, because you want to make sure that  
8 the client is actually eligible for the death penalty.

9 Q I want to ask you a little bit more about the  
10 Guidelines. Obviously, every single thing in the Guidelines  
11 has to be done, correct?

12 A Correct.

13 Q But it is based on certain cases which guide your  
14 responsibility as a Mitigation Specialist, correct?

15 A Yes. I would say the ABA Guidelines are just sort  
16 of one part of what we think about and consider when we are  
17 conducting a mitigation investigation. You know, we also  
18 understand various case law, and what that, you know, what  
19 those cases require in terms of what constitutes a confident  
20 and comprehensive investigation. We rely, you know, on our  
21 own experience and the collective experience of the community,  
22 and the kinds of things that are offered at trainings. It is  
23 a little bit of all of it, not just one piece of it. We rely  
24 on all those different aspects to sort of inform how we

1       conduct our mitigation investigation.

2           Q       That mitigation investigation is separate from what  
3       is referred to as the guilt phase investigation?

4           A       Yes. There may be overlap, but, yes, they are very  
5       different investigations.

6           Q       So I want to focus right now mainly on a case, say a  
7       new case comes in, and it is either noticed the death penalty  
8       is going to be sought or suspected by the defense team, would  
9       one of the first things you as a Mitigation Specialist look  
10      into be the intellectual disability?

11          A       Yes. I would want to look into that, initially. I  
12      would also want to check my client's age. I would want to  
13      look at the two sort of categorical bans, first and foremost.  
14      In terms of an Atkins investigation, you know, look for what  
15      you might see as a red flag to determine if you needed to go  
16      further. But even without sort of, you know, even if you find  
17      that you don't have an Atkins claim, there is a lot of overlap  
18      between what you do in a regular mitigation investigation and  
19      what you do in an Atkins investigation. There is still a lot  
20      of mitigating evidence that you can gather around an  
21      intellectual disability even if it doesn't rise to the level  
22      an Atkins claim.

23          Q       I just want to make sure when we are talking about  
24      regular mitigation, that is not a small part of the case,

1 right?

2 A No. No.

3 Q In fact, if an Atkins investigation doesn't yield  
4 the results that you were looking for, the Court denies the  
5 motion, that is all the evidence that would be provided to the  
6 jury, correct?

7 A Yes.

8 Q Which is incredibly significant, right?

9 A Yes.

10 Q So what would it look like for you to begin  
11 investigating a potential Atkins case?

12 A Well, I would want to start with interviews and  
13 records collection. Sometimes, sometimes observations by the  
14 defense team might give me some kind of sense there might be  
15 an intellectual disability. Often times that is not the case,  
16 so you have to rely on other witnesses, records. You want to  
17 start looking for any previous IQ scores. Was there a  
18 determination of an intellectual disability or not. Are there  
19 IQ scores that are within the range that would be considered  
20 intellectual disability.

21 You want to look at school records to see if there  
22 are learning disabilities or problems in school that might be  
23 a sign of an intellectual disability. You want to look at if  
24 there is a family history of intellectual disability, so are

1       there family members that were diagnosed, assessed or have  
2       intellectual disability.

3               You want to look at other sorts of risk factors such  
4       as things that might have happened in utero during pregnancy,  
5       during the birth process, developmental delays. You know,  
6       family history of trauma or violence or exposure to in utero  
7       toxins. Anything that might affect a developing brain are  
8       things that you want to start looking for to see if there are  
9       significant risk factors or if there are red flags that, you  
10      know, you think warrant further delving into intellectual  
11      disability.

12           Q     You gave us a pretty exhaustive list?

13           A     I probably left stuff out.

14           Q     That leads me to my next question. But that is not  
15      a Cadillac defense. That is the norm of what needs to be done?

16           A     Those are all things you would look into anyway,  
17      yes.

18           Q     And why?

19           A     Because that is where you are going to find  
20      mitigating evidence, the kind of risk factors that we see for  
21      intellectual disability such as in utero exposure to toxins or  
22      developmental delays. Again, even though it may not have  
23      resulted in intellectual disability, it is still something  
24      that might be a part of the type of evidence that we would

1 present in trying to, you know, show the background of the  
2 defendant and his or her life. So they are all things that  
3 are part and parcel of a mitigation investigation anyway.  
4 When you look at Atkins, there is just a little bit of a  
5 different twist on it, I guess, but they are still all the  
6 same things you want to look into, because that is where you  
7 find your mitigating evidence.

8 Q And so we talked a little about regular mitigation  
9 and an Atkins investigation. When we are talking about an  
10 Atkins investigation, obviously, you know that there is a  
11 burden that has to be shown to the Court, right? The defense  
12 has to show something?

13 A Yes.

14 Q What is that?

15 A In terms of an Atkins investigation?

16 Q Let me narrow it as to Prong 2 of an Atkins  
17 investigation?

18 A Yes. I mean the burden is on the defense to show  
19 proof. You know, they are litigating an Atkins claim. The  
20 burden is on them to prove, you know, the three prongs. In  
21 terms of the second prong, you would have to present, you  
22 know, evidence of adaptive functioning, whether usually  
23 through witness testimony, interviews or expert opinions in  
24 the case.

1           Q     So when we are talking about Prong 2, obviously we  
2 are talking about the adaptive behaviors. Then there are  
3 certain skills that we look at, right?

4           A     Uh-huh.

5           Q     What are those?

6           A     We look at, for Prong 2, deficits in adaptive  
7 behaviors are sort of skills in three different areas, social,  
8 conceptual and practical. These are the kinds of skills that  
9 an individual learns in order to sort of function effectively  
10 in our daily lives. This could be anything from understanding  
11 the concept of time, understanding how to manage money,  
12 interpersonal interactions, self-care, being able to get  
13 yourself to a doctor regularly, any of those kinds of things  
14 fall within adaptive behaviors. That is not an exhaustive  
15 list.

16          Q     Does the type of investigation you do depend on the  
17 person, where they may or may not be from, the age of the  
18 client? Are there different factors in terms of where the  
19 investigation will go?

20          A     Yes. I mean, you know, you want to -- Obviously your  
21 client is someone, you know, you see regularly, but you also  
22 have to go to -- and where the client is may not be where the  
23 client grew up, so you go to the client's home. Visiting the  
24 family in the home is a very, you know, standard practice in



1 Mitigation Specialist investigation, because you want to see  
2 where they grew up or other places that they lived for a  
3 significant period of time. So, yes, I mean there are specific  
4 things. You want to look at those things. Age is something  
5 that, you know, also plays a very critical role. Age can be a  
6 very compelling mitigating factor. And, you know, there is  
7 plenty of science that courts have adopted that, you know,  
8 look at age and the developing research around, you know, a  
9 developing brain and what they are capable of and not capable  
10 of.

11 So if you have a younger client, you know, looking  
12 into, you know, how their brain was developing and  
13 investigating that aspect of youth, it can guide you in a very  
14 different direction than if you had say an older client.  
15 Things that happened for an older client when they were a  
16 child, but you know, there is sort of a different, a different  
17 twist on it if the client was on the younger end when the  
18 crime was committed.

19 Q So I want to talk to you about cases where you have  
20 consulted with a person who is a foreign national. So they  
21 spent their years before eighteen in a different country. Are  
22 you familiar with any cases like that?

23 A Yes.

24 Q Can you tell me what the norm is for an Atkins

1 investigation with a client like that?

2 A I think the norm would be the same as it is in the  
3 course of a regular investigation which would be to conduct  
4 the investigation in the home. You know, part of the way you  
5 are supposed to understand and assess adaptive functioning is  
6 how that individual performs these skills or these tasks  
7 within the context of their home life, their culture, their  
8 community, their environment. What that looks like in one  
9 place could look very different than it looks like in another  
10 case. Understanding that context is very important to be able  
11 for an expert to access deficits in adaptive functioning. So  
12 you would go to those places, and you would do the  
13 investigation there on the ground just like you would here.

14 Q Is it uncommon or maybe common, it can go either  
15 way, for all the necessary information, interviews,  
16 relationships, to be built on one visit or two visits with a  
17 family or friends?

18 A I mean my experience, and I think I have the most  
19 common experience in the community is it takes a lot of time  
20 to build the kind of rapport that is necessary to ask the kind  
21 of questions as a Mitigation Specialist we need to ask. They  
22 are highly sensitive. They are not the kind of thing that  
23 people tend to want to share with others, especially with  
24 someone they don't know, especially in the context of a court

1 proceeding. So there are a lot of, you know, sort of barriers  
2 that you have to overcome to establish that kind of  
3 relationship which, you know, from my experience, is best done  
4 in person and over multiple visits. That that is just what it  
5 takes to get to the information that we are trying to get to  
6 that we have to get to.

7 Q I want to follow up on something you just said, and  
8 I heard you say it again. You said it is best practice to be  
9 done in person. When you say that, do you mean it doesn't have  
10 to be done in person, or there is an alternative to doing it  
11 in person?

12 A No. The best practice and the standard of care, you  
13 know, that the community in 2020 and for a long time now has  
14 been sort of following is in-person multiple interviews with  
15 witnesses. It is the best practice. It is the standard of  
16 care.

17 Q Okay. So when we say best practice, I feel like  
18 that sometimes can be a little misleading. We all want to do  
19 the best, but also is it fair to say we can't always do the  
20 best? Can you help me reconcile best practices with what  
21 actually needs to be done?

22 A Yes. I cannot use that term as the social worker in  
23 me, I guess. The standard of care in death penalty mitigation  
24 investigations is in-person interviews multiple times,

1 face-to-face, one-on-one. That is how we come to understand  
2 and get the information in our cases.

3 Q So I want to talk about the role that you as a  
4 Mitigation Specialist have and how it relates to an expert in  
5 an Atkins case. For example, in our case, we hired  
6 Dr. Antonio Puente. So what is the connection between the  
7 Mitigation Specialist and the expert who ultimately will  
8 render the decision, who will testify?

9 A I think in general, not even specific to Atkins, the  
10 Mitigation Specialist's role in developing this comprehensive  
11 social history is what provides context, background,  
12 collateral information that an expert relies on. And what we  
13 have come to understand is that sort of gives us the best  
14 chance at a reliable mental health evaluation when they have  
15 that context and information to rely on. And that is not  
16 something they would have. You know, the time it takes to  
17 gather that information is the time the Mitigation Specialist  
18 has. Our role is developing that information, finding those  
19 witnesses, tracking down those records, identifying what kind  
20 of issues there are and work with the team to identify what  
21 kind of experts are necessary in a particular case, then  
22 working with that expert to make sure that they have that  
23 information.

24 But then, you know, from there, you know, their role

1 is different in the sense of an information gatherer. You  
2 know, I am not a forensic psychologist. You know, I don't have  
3 the same credentials as an expert in whatever the discipline  
4 may be. So their role is to come in and look at my  
5 information and rely on it. But they are the ones that have  
6 to render an opinion in whatever context that might be. The  
7 experts that I have worked with in my own personal experience,  
8 you know, they tend to do their own investigation to a certain  
9 degree as well. They may interview , obviously interview the  
10 client, but they may also interview family members. This is  
11 especially in an Atkins investigation, because the family  
12 members and other collateral witnesses such as teachers and  
13 neighbors and clergy or other people from the community,  
14 friends, those are the people that provide the information  
15 that we need to assess adaptive functioning, you know. So  
16 they are more skilled than even the Mitigation Specialist.  
17 They may rely on our information, but they also have to do  
18 their own due diligence in making sure that they have the most  
19 reliable information possible.

20 I mean the reality is, from my own personal  
21 experience anyway, sometimes I miss things that an expert  
22 picks up on. That is why they are the expert. That is why we  
23 bring them in. We provide all this information that helps give  
24 them context, but at the end of the day, you know, they have

1 an expertise and specialty that far exceeds mine in that  
2 particular subject. And, you know, they often find things  
3 that I, as the Mitigation Specialist might have missed. So it  
4 is critical they have, you know, the same access to the  
5 relevant witnesses or for whatever it is they are an expert  
6 in.

7 Q I want to talk to you a little bit about doing the  
8 actual interviews. So I want to kind of use this case. I know  
9 you are not familiar with our case. In a case like ours where  
10 the relevant information is in El Salvador, correct me if I am  
11 wrong, the Mitigation Specialist would be present to help  
12 facilitate the interviews with the expert?

13 A That usually depends. I mean that would be the kind  
14 of -- I wouldn't say there is a yes or no answer. I think it  
15 would depend on a team, what they felt was necessary. Often  
16 times that is how it happens. If the Mitigation Specialist has  
17 developed a rapport with the family, you know, they might be  
18 there to make the introduction. But depending on what the  
19 interview is or the evaluation is, the expert may want to  
20 conduct that by himself. I think it is the kind of situation  
21 that would depend, you know, on the particulars of the case,  
22 you know, depend on the various situations.

23 Q Could it also depend on the education and  
24 sophistication of the family and being able to get to an

1 interview or figure out a place to have the private interviews  
2 done?

3 A Sure. Absolutely.

4 Q So I want to talk to you about the information that  
5 you could collect and how you are able to determine that that  
6 information is reliable and valid and corroborating so, you  
7 know, it is something that can be presented to the Court. How  
8 do you do that? What is the manner that that information you  
9 collect, I guess collect and synthesize is more the  
10 appropriate question?

11 A Yes. So, you know, we always want to corroborate  
12 things. You talk to a witness. Sometimes things can't be  
13 corroborated. It is a family story. You know, there may be  
14 other witnesses that you can try to corroborate it, you know.  
15 But to the extent that you can validate or corroborate  
16 information you are collecting over the course of the  
17 mitigation investigation, that is always the goal whether it  
18 is, you know, through an interview you learn about a  
19 hospitalization, then you go to the hospital and find the  
20 record and you have that documentation that corroborates that  
21 trip to the hospital or whatever it was. And that is  
22 important for another reason, because, you know, sometimes the  
23 information we get from family members isn't complete. They  
24 may not remember, you know, the doctor who was treating them

1 in the emergency room. Or there may be information missing  
2 that they couldn't possibly know. There is a note from a  
3 social worker that was put in those records that they are not  
4 aware of. And so, you know, the interviews and the records  
5 collection are really sort of a very cyclical process. You  
6 interview somebody. You get records. Those records more  
7 often than not give you additional information, then you have  
8 to go back to the witness and talk about that, because you  
9 didn't get that piece of information, or it identified for you  
10 witnesses that you weren't aware of, and you need to go track  
11 down those witnesses. It is a very cyclical process. But  
12 that process is sort of how we try to validated to the best we  
13 can that our information is reliable. Meeting a witness once  
14 and getting information in my experience doesn't prove as  
15 reliable as meeting with them multiple times and getting to  
16 know them, and by the fourth or fifth time, maybe the second  
17 or third time, whichever on that spectrum, you are getting  
18 more and more information not only because the witness and you  
19 have developed some rapport and some truth, but because you  
20 are coming back to them with information that you found from  
21 other sources to try and corroborate that. So it is sort of a  
22 constant very cyclical process.

23 Q How much of that do you generally do or teach to be  
24 done either via the phone or over ZOOM?



1           A       None. I make it very clear at any lectures or  
2 presentations when we are talking about interviews or even  
3 when we are talking about record collection, you know, to some  
4 degree, you might be able to make a phone call and send a Fax  
5 and request a record, but in reality, you know, we often get  
6 way more if we show up in person. Sometimes it just takes  
7 showing up in person to get what you are looking for, to get  
8 what you need. So even in records collection, we talk about  
9 it is not something that can be done from your desk. It has  
10 to be boots on the ground. That is certainly true with  
11 interviews.

12                You know, we talk about the importance of seeing  
13 them in their home and developing that rapport which is best  
14 done face-to-face and over the course of multiple meetings.  
15 You know, not to mention that if, you know, some evidence that  
16 you're collecting when you conduct an interview it is not  
17 based on what the witness is saying, it is based on how the  
18 witnesses acts or what the witness is doing. One of the  
19 things Mitigation Specialists focus on is and sort of suppose  
20 to do in their role in the case is be able to identify  
21 symptoms of mental health. And so being able to see someone,  
22 you know, full body and be able, you know, to see body  
23 language or things that may be happening with them that might,  
24 you know a light bulb might go off that, you know, something

1 might be going on there. That can't happen, certainly can't  
2 happen, you know, unless you are sitting in a place with them  
3 face-to-face.

4 Q I want to talk to you about a couple of things that  
5 came up yesterday that maybe is relevant. Part of that is for  
6 example you would depend on eye contact, right? So right now  
7 it looks like you and I have eye contact.

8 THE COURT REPORTER: Ms. Hickman, this is Judy. I  
9 am really having difficulty understanding you. You are not  
10 speaking loudly enough for me. I am having difficulty hearing  
11 you. Please focus instead of moving around.

12 MS. HICKMAN: Perfect. Thank you, Judy.

13 BY MS. HICKMAN:

14 Q So we talked yesterday about eye contact, why that  
15 would be important. Is that something that can be lost over  
16 ZOOM?

17 A Oh, sure.

18 Q Because right now does it look like you and I are  
19 making eye contact?

20 A It does to me. I can't tell if that is -- Your are  
21 pretty far away from me right now. I can't tell, but I also  
22 can't see what any of the rest of you is doing.

23 Q Those are body cues or body language as a Mitigation  
24 Specialist you would rely on?

1           A     Very, very much so. Not just to identify, you know,  
2     some type of mental health, but to recognize, you know, what  
3     might be going on in the course of that interview. You know,  
4     they may be starting to show signs they are closing off and  
5     they are getting distant and, you know, they're crossing their  
6     arms and something is happening that has changed how they  
7     perceive our interactions, and that is really critical to how  
8     I interview. If I see that happening, I might want to change.  
9     I might want to change what I am doing, because the witness  
10    seems uncomfortable, and make sure the witness is comfortable.  
11    It is critical to the information I need. So in that moment,  
12    you know, I often have to rely on what I can see and sense  
13    with someone to make sure that they are comfortable with what  
14    we are talking about given the uncomfortable topic we have to  
15    talk about. It is really critical.

16           Q     So then I also want to talk to you about the record  
17    collection for a client that may not have extensive records,  
18    right? They may have lived a transitory life. They may be  
19    raised some place where record keeping isn't of the utmost  
20    importance, lack of stability, poverty. Are you familiar with  
21    those factors?

22           A     Yes.

23           Q     What is the significance in a case like that being  
24    in person wherever it is those record may be?

1           A     Well, like I said before, when you are trying to  
2 track down records, it is, you know, I personally and I know  
3 the experience of most of the community and how we train is  
4 you can get much better records in person to show up  
5 face-to-face or work in direct contact with someone. And I  
6 think, you know, in a foreign country, trying to navigate that  
7 remotely or over the phone would present even more challenge,  
8 language barriers and the sort. It is particularly difficult  
9 during COVID, because you know places aren't staffed right  
10 now. But, you know, being able to go to those places is  
11 critical because, you know, just as an example, you know,  
12 going to a school and finding a teacher that knew your client,  
13 you know, has resulted in records that you wouldn't have  
14 gotten through traditional means of sending a request and  
15 getting the School District to give you the records.

16               You know, I have interviewed numerous teachers who  
17 keep their own records on students. They have handwritten  
18 notes. They have, you know, art work or things they have  
19 collected over the years that, you know, that is information  
20 and potentially good information that an expert might need  
21 depending on what t says. But it also certainly can be very  
22 compelling mitigation evidence. That is the kind of stuff,  
23 you know, you wouldn't find if you weren't talking to them in  
24 person on site and have access to those.

1           You know, the same thing with going into a witness'  
2     home. You are able to collect documentary evidence, you know,  
3     such as childhood photographs or home videos or school  
4     diplomas, or, you know, the kind of things you can only get if  
5     you are in the home with the person.

6           Q     So yesterday when Dr. Puente was testifying, he said  
7     he had experience in a case I think he said it was Mexico  
8     where he got some school records. He saw the client had  
9     scored eight out of ten in school, and he had assumed that was  
10    a decent grade until he finally talked to a principal who said  
11    eight out of ten isn't passing. And he explained to us his  
12    experience being in the school, doing some observation before  
13    he was able to ask that question. I want to talk to you about  
14    your experience with anything similar. Is it as simple as  
15    calling the school and saying, hey, what does a eight out of  
16    ten mean on this report card?

17          A     No. A score is such a good example. Because, you  
18    know, even if you're looking at different school records from  
19    the same place, different school records in Philadelphia from  
20    different periods of time, I find that the information, you  
21    know, changes in terms of how records are kept, how things are  
22    coded, what initials are used, what is in the file versus what  
23    is not in the file, you know. So, you know, when you look at  
24    a school record, especially one from a foreign country you are

1 not familiar with, the first thing you would do is try and  
2 figure out what the stuff means. And in order to figure out  
3 what the stuff means, you would have to understand the  
4 context. And, you know, you could call up the school, you  
5 know, but the likelihood the first person you talk to is going  
6 to be able to give you an answer is very unlikely.

7 Sometimes that means, you know, it is not a person  
8 that is currently working at the school. If your client  
9 attended the school, you know, ten years ago or five years ago  
10 or twenty years ago, the individuals who could understand  
11 those records are no longer at the school. I have often had to  
12 track down retired principals, retired teachers, retired  
13 counselors to help me understand school records, because they  
14 were different back then than they are now, and the current  
15 staff and teachers, you know, didn't always understand those  
16 records either. So it is not an easy thing to sort of, you  
17 know, get those records accurately interpreted from, you know,  
18 the most reliable source. It often takes very different, you  
19 know, a lot of different tries to get information.

20 Q So when you are in person doing these  
21 investigations, and let's talk about meeting a family for the  
22 first time, do you often ask like your most relevant  
23 questions, your most sensitive, embarrassing questions right  
24 away?

1           A       Never. You know, the first interview is very much  
2 spent making introductions, getting to know the individual  
3 answering a lot of questions and explaining, you know, what my  
4 role is. You know, the average person has no idea what I do  
5 for a living. They don't understand what mitigation is. They  
6 don't understand what a Mitigation Specialist does, so a lot  
7 of that first interview is spent explaining why it is I am  
8 coming into their home and trying to gather this information.  
9 They often have a lot of questions about that and what it  
10 entails. What does this mean, you know, what is the process  
11 in a death penalty case? So typically you spend a lot of time  
12 answering those types of questions.

13               The other reality is maybe sometimes when I go to  
14 visit a family member for the first time, if I had sensed  
15 there was a sexual abuse history for example, like maybe I had  
16 seen something or talked to the client that makes me think  
17 that is something I want to explore. But a lot of times I may  
18 not even have that information yet. I may not have the  
19 information to start asking those questions because my  
20 mitigation investigation is just beginning. And at the very  
21 beginning of a mitigation investigation, you don't know what  
22 you don't know. The only way to find out is conducting  
23 interviews. Typically, when I first meet family members, I  
24 know the general questions and type of information I want to

1 get at, but I don't know the specifics to start asking those  
2 questions. That usually comes a little farther down the road  
3 as you conduct your investigation and you start to get records  
4 and talk to witnesses, and you start to learn things. And,  
5 you know, that is the process that sort of takes time in the  
6 beginning and why you have to see people multiple times to  
7 ultimately get all the information.

8 Q The information we are taking about, in your  
9 experience, are families generally very forthcoming about  
10 abuse or sexual abuse or mental health issues?

11 A No, not at all. It is a huge barrier to get  
12 families to open up about that stuff. You know, as an  
13 individual, you know, I can understand that. It is very  
14 difficult to reveal those kinds of things, especially if it  
15 has the potential to, you know, this is information that has  
16 the potential to be used in court. It is not like I am asking  
17 this and it will never see the light of day. So a lot of, you  
18 know, a lot of the questions I get is is this information  
19 going to be used in court? And the reality is it might. And,  
20 you know, knowing that fact, it is one of the biggest barriers  
21 we have to get over is them not wanting to share that  
22 information, because not only do they not want to share it,  
23 they certainly have concerns and fears about how it is going  
24 to be used in this context.



1           Q     So you talked a little bit about barriers. Are there  
2 some common barriers in conducting this kind of investigation?

3           A     Yes. Race, culture, age, socioeconomic status,  
4 gender, ethnicity. All of those things, you know, have an  
5 impact on my ability or anybody's ability to work with the  
6 individuals that we are working with. And, you know, they are  
7 the ones that we spend a lot of time trying to understand and  
8 figure out the best way to break down those barriers and to  
9 develop the kind of trust that we need to get the information  
10 we are are looking for. So, yes, there are those barriers  
11 that exist, and we are constantly, you know, working to be  
12 sure we are recognizing them and trying to overcome them.

13          Q     I want to talk about barriers that can be present in  
14 a case when you are trying to conduct an investigation.

15          A     Did you have another question?

16          Q     I mean that is kind of it. It wasn't a very well-  
17 formed question. There are certain barriers when you are  
18 working like for a client that lives in the United States,  
19 right?

20          A     Yes.

21          Q     Those are pretty common. What are some further  
22 barriers you may encounter when you are working with a client  
23 who is from a foreign country?

24          A     I think all those same barriers exist. First of

1 all, those same barriers exist. There may be additional  
2 language barriers, but you have all the same barriers here you  
3 of race, culture, ethnicity. Those are just exacerbated when  
4 you are in a foreign country. It makes it more difficult,  
5 because there are more differences. You know, I am more  
6 different than a person in El Salvador than I am from a person  
7 in a different state. So those same barriers exist. I think  
8 there are just higher bars to get over. But I think  
9 additional barriers, obviously the language is a huge one, you  
10 know. But in a foreign country, you are literally a foreign  
11 person coming into their home, you know, asking these  
12 sensitive questions. And, you know, there is no one answer to  
13 that I don't think. It is going to depend on where they live,  
14 and not just the country but the community, the region, the  
15 city, the town or wherever that is. You know, it is going to  
16 depend on as well as the family, itself, and what their  
17 experience has been, but, you know, when you are thinking  
18 about countries like El Salvador where there has been a lot of  
19 violence, you know, depending on a family's experience with  
20 that, you know, you could see, you know, barriers such as  
21 there is even more sort of distrust from outsiders than there  
22 might be here for example, you know. I mean it would depend  
23 on the circumstances that you are walking into as to what  
24 those other specific cultural barriers may be. But, you know,

1       you are certainly talking about, you know, going to a place  
2       where, you know, I might step into the house and not know that  
3       the custom is to, you know, do a certain thing. So I stepped  
4       into the house and I have already offended them because I  
5       didn't, you know, maybe I was supposed to take my shoes off,  
6       or I reached out to shake their hand, but that is culturally  
7       inappropriate. Or, you know, things like that walking into  
8       that environment I might do what I would typically do here  
9       which is very acceptable. I walk in, I shake your hand, I  
10      introduce myself. You know, gender can play a much bigger  
11      role in some foreign countries what is acceptable for a woman  
12      to do. All those little things that you just, you know, you  
13      may not know going in could stack the deck against you in  
14      terms of barriers, because you act in a way that is culturally  
15      inappropriate with them.

16           Q     So in terms of going to a country like El Salvador  
17      or some parts of South America, maybe there are countries that  
18      are dangerous to go to, is that fair to say?

19           A     That is fair to say.

20           Q     Is it still the norm to try to go there to do these  
21      interviews?

22           A     Absolutely.

23           Q     What is the danger in not doing the interviews in  
24      person?

1           A     I think the danger is you are not going to get the  
2 most reliable information. That you can't develop the same  
3 rapport any other way that you can in person. At least I  
4 think that is what my experience and what the collective  
5 experience of the community has been. And that is why the  
6 guidelines say what they say about conducting in-person  
7 multiple interviews. And I think, you know, in a situation,  
8 you know, we talked a lot of about reliability of information.  
9 And the reason we want information to be reliable is because  
10 it is going to be scrutinized and used in an adversarial  
11 process. That is why we want it to be as reliable as  
12 possible. So I think it is even more critical when you are  
13 thinking about the reliability of the information that you are  
14 gathering, you know, in the context of that. And, you know,  
15 that is just what experience has told us is how, you know, we  
16 get this most reliable information. I have certainly seen  
17 cases in post conviction, you know, in which mitigation  
18 investigation consisted of phone calls to a couple of family  
19 members. And in post conviction interviews where they were  
20 done by a post conviction team in person multiple times and,  
21 you know, in those cases you see more additional information  
22 that was obtained through that process as opposed to what was  
23 obtained, you know, by a phone call.

24           Q     So I want to talk to you little about the evolution

1 of the Atkins investigation. Over time, obviously, since  
2 Atkins was decided, has it changed as to what the norms and  
3 standards are?

4 A Certainly. You know, since 2002 when that case was  
5 decided, there have been, you know, lots of changes that we  
6 have seen. For example, we are functioning under the DSM-5 now  
7 which just came out a couple of years ago. Before that it was  
8 the DSM-4. So when when changes like that happen in the  
9 medical or psychological community, we have to adapt our  
10 practices to those changes as well. So now we are looking at  
11 the DSM-5 criteria for intellectual disability or other mental  
12 health issues. You know, we are no longer looking at the  
13 DSM-4 because it is obsolete.

14 Now in addition to that, I don't begin to say I am  
15 familiar with all the case law in this area, but there's  
16 certainly been, you know, other case law in the wake of Atkins  
17 that helps to solidify how we have to conduct this  
18 investigation and how courts, you know, have to decide. You  
19 know, when you are litigating an Atkins claim, there is plenty  
20 of case law, you know, that informs how we, you know, approach  
21 an Atkins investigation. So it has certainly changed since  
22 2002 in a lot of ways, you know, and those are some things,  
23 examples, the top examples anyway.

24 Q So obviously you know you are testifying here today

1 because the Court has asked a specific question about  
2 conducting these interviews during the COVID-19 pandemic,  
3 right? Have you had the time to think about the potential  
4 pitfalls of conducting the investigation or interviews which  
5 we have been talking about by a remote platform via telephone  
6 or ZOOM, how that would look for your realm?

7 A Yes. I have actually had a lot of time to think  
8 about it since I started this position in the midst of the  
9 pandemic. You know, I think that a lot of this has been said  
10 before, so I will try not to repeat myself too much, but I  
11 think my biggest concern is I just can't say how reliable that  
12 information would be. There is no way to vet how reliable it  
13 would be. And under the circumstances that such, because of  
14 the stakes now, we are not only talking about the stakes of a  
15 death penalty case, but in this particular case, we are  
16 talking about the stakes of a categorical ban. And if there  
17 is, you know, there is a valid Atkins issue in this case, you  
18 know, that is as significant as it gets in wanting the most  
19 reliable information for the court to ultimately rely upon to  
20 make a decision like that. But I think, you know, I certainly  
21 never conducted an investigation via ZOOM because that is not  
22 the standard of care, but with the pandemic, nobody was  
23 thinking about conducting investigations via ZOOM, because  
24 that is not the standard of care that I have heard of anyway.

1 And, you know, I think that it makes me -- My concerns are  
2 that the information won't be reliable. You know, I mean  
3 there are other issues such as access, bandwidth, that kind of  
4 stuff. Even if that stuff were okay, I think you are not --  
5 you risk not getting all the information you need, not getting  
6 as much information you need or not the most reliable  
7 information you need. I think, in the context of an Atkins  
8 investigation, that is even more critical, because of masking  
9 behaviors that are sort of a barrier that is really unique to,  
10 you can see it in mental health issues as well. They don't  
11 like to admit they have mental health problems, but it is a  
12 very specific component of Atkins investigations in the sense  
13 that way more often than not, because there is such a stigma  
14 and such stereotyping around intellectual disability, there is  
15 this effort on behalf of a client or a family member who you  
16 are relying on to get this information, of masking behavior,  
17 making the person seem like they are more capable than they  
18 might actually be because they are fighting against this  
19 stigma of intellectual disability. That is an extra barrier  
20 that you have to breakdown in investigating and developing an  
21 Atkins claim. And I worry about, you know, how effective that  
22 could be over ZOOM or certainly over the phone as well, you  
23 know. But those are the kinds of things that it takes a lot  
24 of skill and time and energy in working with the person to get

1       them comfortable enough, you know, that they are willing to  
2       break down those types of behaviors and get to the reliable  
3       information that our expert needs in rendering an opinion.

4           Q       The reality is we don't know, right?

5           A       Yes.

6           Q       But to do it via ZOOM or over the phone would go  
7       against the standard of care; is that fair to say?

8           A       Absolutely.

9           Q       And it would go against what you know develops  
10       reliable, valid, corroborating information to present to the  
11       Court?

12          A       Yes.

13          Q       And then I want to go kind of beyond that. If this  
14       were to get to a penalty phase, how do you -- have you thought  
15       about what do jurors like to see in determining whether or not  
16       the death penalty should be imposed on anyone?

17               MR. LUCIA: I'm sorry to interrupt. I interpose an  
18       objection. I think it is beyond the scope of the purpose of  
19       these hearings.

20               I'm sorry, Your Honor, you're muted.

21               THE COURT: Thank you. I was following my own  
22       directive. When I am not talking, I am on mute and I forget.  
23       Sorry. What is the relevance, Ms. Hickman, of this to the  
24       question of whether or not the Court should grant a



1 continuance indefinitely for a vaccine to be developed?

2 MS. HICKMAN: Judge, I think, as the State pointed  
3 out over and over yesterday, we are arguing the motion. The  
4 motion was to continue the trial in an Atkins hearing. And so  
5 the inability to get reliable information for this case  
6 doesn't just affect Atkins, it affects our ability to provide  
7 mitigating evidence if this case gets to a penalty phase where  
8 the jurors would have to decide whether or not to impose life  
9 or death.

10 THE COURT: Okay. I will allow you to inquire into  
11 this area. The objection is overruled.

12 BY MS. HICKMAN:

13 Q Ms. Cook, do you want me to repeat the question or  
14 do you remember it?

15 A I think I can answer it. Let me know if I have not  
16 answered it sufficiently. There have been numerous and  
17 ongoing studies called the Capital Jury Project in which  
18 capital jurors were interviewed to understand the kind of  
19 mitigation evidence they find reliable, credible. One of the  
20 things we learned through that is jurors want to see the  
21 actual real witnesses. They want the lay witnesses. They tend  
22 to question experts. And so putting a lot of information just  
23 through an expert doesn't have the same effect as actually  
24 calling the lay witness. And the individuals that actually

1 can tell that story from their own perspective is far more  
2 effective in persuading jurors than say putting on a historian  
3 who just relays the information or only have that information  
4 come out through an expert, that the best combination of what  
5 jurors respond to is a combination of lay witnesses and expert  
6 testimony.

7 Q So would having the testimony presented to  
8 you or gathered from you --

9 A Say that one more time?

10 COURT REPORTER: I could not hear you either.

11 MS. HICKMAN: Sorry Judy. Was I not close enough?

12 THE REPORTER: That's right.

13 MS. HICKMAN: Sorry Judy.

14 BY MS. HICKMAN:

15 Q So the question to you is: Beyond the information  
16 gathering being done in person or via remote platform, if you  
17 gather the information via a remote platform, how would that  
18 affect the ability to then present that when it comes to  
19 present that, if you know. Obviously, you don't know, but I  
20 guess I am asking you to speculate based on your experience.

21 A I mean I guess what I would say is what I would want  
22 to happen, what the standard of care would be, you know, would  
23 be to actually hear those witnesses, hear it in live  
24 testimony. And that is the most effective way. If the

1 investigation, you know, had to go forward and this  
2 information had been gathered remotely or via ZOOM, you know,  
3 I guess I can't say what that impact would have on the jury.  
4 But I can certainly say that the concern would be how reliable  
5 that information is in terms of meeting our burden in a court  
6 of law. I mean I think all the concerns would be the same. We  
7 couldn't be sure that the information was as accurate or  
8 reliable as we could if we had investigated this case in the  
9 way the standard of care calls for. So the worry would be  
10 that you would have a conviction and a death sentence that  
11 didn't have all the information or didn't have the most  
12 reliable information.

13 Q And I want to ask this question in a way that I  
14 guess makes sense, but is the slower timeline that COVID may  
15 introduce to this a bigger issue for our investigation, the  
16 changing the standard of care in investigating this, does it  
17 hurt us more we may have to wait going to El Salvador, wait to  
18 interview witnesses and information potentially could be lost  
19 versus changing the practice of care to get the information  
20 now?

21 MR. LUCIA: I have to object to that. I don't know  
22 if Ms. Cook has the ability to answer Ms. Hickman for the  
23 defense team how it would impact an investigation she has no  
24 participation in.

1 THE COURT: I think it is speculative.

2 BY MS. HICKMAN:

3 Q Ms. Cook, ultimately who is harmed if the  
4 investigation is not done correctly?

5 A The client.

6 Q In what way?

7 A The client may, you know, if the investigation is  
8 conducted in a way that isn't up to the standard of care, then  
9 that calls into question, you know, if there is a death  
10 sentence, it calls into question the reliability of that death  
11 sentence. I mean, you know, the whole process I think is  
12 harmed as well. You know, our job is to collect the most  
13 reliable information and put that on, and if we're unable to  
14 do that, you know, it is not really good for any of the, you  
15 know, stakeholders that are involved in this process. And,  
16 you know, that is not to say that I don't understand how  
17 difficult this is in terms of what we are supposed to do in  
18 light of this pandemic and, you know, I think trying to  
19 maintain the standard of care is critical in cases with stakes  
20 this high, you know, the death penalty. But I realize there  
21 are other issues, you know, at play here, other stakeholders  
22 that are involved.

23 But, you know, I would hypothetically anyway want to  
24 think about other solutions to resolving the case that don't

1 involve, you know, us having to lower our standard of care,  
2 you know, even in the midst of a pandemic, you know, because  
3 then we re not providing the most competent representation,  
4 and that can come back to haunt us in all kinds of ways, you  
5 know. So I realize there are competing interests here, and  
6 this is really a question to contemplate and try and answer.

7 But professionally and personally, you know, I feel  
8 very strongly that we have to maintain the standard of care in  
9 a death penalty case where the stakes are so high. And this  
10 is how we know we can obtain reliable information, whereas the  
11 other way is an unknown to us right now. That is just a risk  
12 that I would not want to take under these circumstances.

13 MS. HICKMAN: Thank you. I have no further  
14 questions, Your Honor.

15 THE COURT: Thank you. Go ahead, counsel.

16 MR. LUCIA: Thank you, Your Honor.

17  
18 CROSS-EXAMINATION

19 BY MR. LUCIA:

20 Q Good morning -- good afternoon, Mrs. Cook.

21 A Good morning.

22 Q Nice to meet. My name is Travis Lucia. I am  
23 working here with the District Attorney of Washoe County and  
24 Douglas County.

1           A     Nice to meet you, too.

2           Q     Nice to meet you. I want to begin by highlighting  
3 something that you testified to earlier. I guess the umbrella  
4 under which I would put that is recognition of the difference  
5 between your role as a Mitigation Specialist and the role of  
6 somebody like a psychologist, psychiatrist, neuropsychiatrist?

7           A     Okay.

8           Q     Would you agree with me that at least on its face  
9 while you might work toward the same end, you have separate  
10 responsibilities ultimately in the end?

11          A     Yes.

12          Q     Again, I believe you mentioned this, but you are not  
13 necessarily administering psychological tests, psychiatric  
14 tests, things like that, correct? Was that a no?

15          A     No.

16          Q     You are not diagnosing anybody as having  
17 intellectual disability or not, correct?

18          A     No.

19          Q     In fact, I believe the quote that you had is it is  
20 their role to look at your information and rely on it. When  
21 you say "their," are you referring to those professions, the  
22 neuropsychologists, the psychiatrists, things of that sort?

23          A     Yes.

24          Q     One thing you also mentioned along that line of

1 questioning was that "They may interview family members."

2 A Uh-huh.

3 Q When I hear a word like "may," I hear something that  
4 is permissive. May doesn't mean must; is that true?

5 A That is true.

6 Q May doesn't mean always, correct?

7 A Uh-huh.

8 Q In fact, from part of your direct, what I was  
9 impressed about was the familiarity you had with respect to  
10 Prong 2 of the Atkins adaptive functioning of an individual?

11 A Okay.

12 Q It seems to me you have a fair amount of experience  
13 "on the ground," dealing with that kind of an inquiry; is that  
14 true?

15 A Sure. Yes.

16 Q You were able to list with Ms. Hickman sort of a  
17 long list of things you would be looking at and evidence you  
18 would be interested in in arriving at, or at least furthering  
19 the goal of at least arriving at a diagnosis of intellectual  
20 disability under Prong 2, correct?

21 A Yes.

22 Q So am I right in saying you seem to be familiar with  
23 the exact kind of evidence that would be necessary to make  
24 that diagnosis or to assist a psychiatrist in arriving at that

1 conclusion?

2 A Yes, I am pretty familiar with that type of  
3 evidence.

4 Q Right. To make it simple, what I am really talking  
5 about is you know the kind of things that a psychologist or  
6 psychiatrist would need to look at to reach an opinion of  
7 intellectual disability?

8 A Yes.

9 Q Again, this is under Prong 2. I am not talking  
10 about IQ which is Prong 1. I am specifically talking about  
11 interviews with collaterals and things like that?

12 A Yes.

13 Q Isn't it a fact that, in your experience, you have  
14 actually given a lot of this information to a retained expert  
15 for the purpose of arriving at a decision on Prong 2?

16 A Yes. And I think to clarify, you know, what you  
17 were saying about "may," that that would, you know, depend on  
18 the type of expert. You know, an expert who is doing -- you  
19 know, a trauma expert for example is going to interview the  
20 client a lot and, depending on the nature of the trauma, there  
21 might be, you know, other individuals that that trauma expert  
22 wants or needs to interview themselves. You know, there are  
23 some instances, it is very case specific and dependent upon  
24 the type of expert as to how, as well as the expert's personal



1 preference in what they are looking for as to how that -- You  
2 know, there is not one size fits all to what experts do and  
3 don't do in a case. So, you know, but when it comes to  
4 adaptive deficit functioning -- adaptive functioning and  
5 identifying deficits, I think that is one of those categories  
6 where my experience it has been that is when experts do want  
7 to conduct those interviews, because they do have to  
8 administer tests. They do have to use their clinical judgment  
9 in ways that they can't assess from information I might  
10 develop from interviewing them myself. It really depends on  
11 the situation and type of expert as to how that would play  
12 out. There is really no, you know, one size fits all.

13 Q So are you saying in your experience every single  
14 intellectual disability case you ever worked on, that everyone  
15 one of those instances a retained expert conducted interviews  
16 on his or her own?

17 A No, but that would be because those cases actually,  
18 you know, the majority of cases I worked one, especially at  
19 the trial level, we may have had a viable Atkins issue but the  
20 case resolved in terms of the death penalty before it got to  
21 that point. You know, the case may have resolved in a plea.  
22 It may have resolved in taking death off the table for  
23 whatever reason. So the cases I have investigated, you know,  
24 they have just ended at different points.

1           One of the cases I am thinking about where we had an  
2 expert come in from North Carolina, and that actually was a  
3 non-capital case, and we had an individual, the expert come in  
4 and the death penalty was already off the table in that case,  
5 but we still had our expert come in and do the interviews with  
6 the family members for other purposes. So, you know, it is  
7 because my experience has been varied in terms of how those  
8 Atkins investigations have progressed.

9           Q     Okay. I think I understand that. I want to talk  
10 about one of the critical aspects of your function, at least  
11 when I say your function, I am talking about not your current  
12 capacity and the sort of training module that you are in, but  
13 really as a Mitigation Specialist?

14          A     Right.

15          Q     I will try to be more specific about it. Isn't it  
16 true that one of the most critical aspects of the function of  
17 a Mitigation Specialist is to identify and preserve  
18 information? Is that fair?

19          A     Yes, I think that is fair. I would say identify,  
20 develop and preserve.

21          Q     Okay. Right. I guarantee you right now, fair  
22 disclaimer, you are going to be more knowledgeable than I. Am  
23 I making it too simple when I say that really, at its most  
24 boiled down level, the Mitigation Specialist is identifying

1 people that might have information that is of assistance to a  
2 defendant in a case; is that true?

3 A Say that one more time.

4 Q So at its most distilled, the Mitigation Specialist,  
5 one of the core functions, critical functions is to identify  
6 individuals and records that might be relevant in assisting  
7 their client in their case?

8 A Yes.

9 Q It is also true that one of the critical and core  
10 functions of a Mitigation Specialist is developing that  
11 information?

12 A Yes.

13 Q Looking at it, talking to it. Is it true the  
14 purpose of that is to ascertain whether or not that  
15 information will assist in the investigation or whether it has  
16 no relevance whatsoever?

17 A I mean I develop the information, all the  
18 information, all of it, and those are decisions whether or not  
19 that evidence is going to be presented or whether or not that  
20 evidence will be used for, you know, whatever reason, those  
21 aren't determinations I make. Those would be determinations  
22 we would make as a team, you know, and would be considered.  
23 But those are only, decisions about how the evidence gets used  
24 or what evidence we are going to use are ultimately decisions

1 made by counsel.

2 Q I mean that more plainly. I mean if I go to a town  
3 and say hey, how many people know Travis Lucia, what was he  
4 like before he was eighteen, and somebody says I didn't know  
5 him. Part of you being on the ground is identifying people  
6 that would be useful for your investigation or people that  
7 basically have no bearing on the ultimate question while you  
8 were there?

9 A Sure.

10 Q Okay. As a necessary consequences of those two  
11 things being true, it is equally important for you to preserve  
12 that information. Like you said, somebody with the requisite  
13 amount of experience could look at it and figure out what it  
14 means in the context of the Atkins motion, fair?

15 A Yes.

16 Q How much of a concern is it for any Mitigation  
17 Specialist that information might be lost?

18 A It is a pretty significant concern. You know, we see  
19 that happen all the time, you know. You call the hospital, it  
20 is no longer functioning. You call fifteen different  
21 hospitals to try to figure out who has custody of the records  
22 only to find that, you know, they don't exist anymore, you  
23 know, or whatever the case may be, you know. So it is a  
24 concern in the sense that, you know, we don't want to lose

1       that ability to corroborate evidence or records. That is one  
2       example. I also think it is equally important, you know, we,  
3       you know, you know, the standard of care is that you start an  
4       investigation immediately. You want to go out and you want to  
5       find this stuff as soon as possible, you know, because you  
6       don't want to not be able to find this person six months down  
7       the road because for whatever reason you can't find them now  
8       or whatever the case, which is why we talk about how critical  
9       it is to start the mitigation investigation at the very  
10      beginning not six months into the case or a year down the  
11      road.

12           Q     Right. I appreciate that. As I looked at the  
13      exhibit referred to by Ms. Hickman, this is on page 9 line 21  
14      listed in the upper right of the document, itself?

15           A     Okay.

16           Q     I am just going to read a quote to you from that. It  
17      is under the Guideline 1.1. It discusses effective advocacy  
18      early on in the case. The quote I wanted to highlight is:  
19      "In addition to establishing counsel" -- sorry -- "In addition  
20      to enabling counsel to counsel his or her client and to obtain  
21      information regarding the evidence that may later become  
22      unavailable, effective advocacy by defense counsel during this  
23      early period may persuade the prosecution not to seek the  
24      death penalty, thus it is imperative that counsel begin

1 investigating mitigating evidence and assembling the defense  
2 team as early as possible." You would agree with that?

3 A Yes.

4 Q In fact, you just said so?

5 A Yes.

6 Q With respect to the concerns that you have about  
7 evidence being lost so to speak, the corroboration, the  
8 opportunity of it being lost, if a hospital burns down or  
9 documents are destroyed, aren't those same concerns present in  
10 terms of people meaning actual informants, their recollections  
11 of events past, their experiences with an individual, isn't  
12 there a risk of loss in that information as well?

13 A It is possible. That is always possible.

14 Q I mean it is possible people die right?

15 A Especially right now.

16 Q Folks move, time goes on and memories fade. All of  
17 those things aren't possible. All of those things are a  
18 certainty, right?

19 A Yes.

20 Q Because time is important, and because this  
21 information can be critical, and because you need to get the  
22 ball rolling early, I want to talk a little about things that  
23 can, should and must be done, does that make sense?

24 A Okay.

1           Q     So again, in a case like this, you would agree with  
2     me it is important as early as possible to consult with mental  
3     health professionals, psychologists, psychiatrists. Everybody  
4     under that professional umbrella, true?

5           A     Yes.

6           Q     In fact, to go a step further than that, in  
7     consultation with those folks, examine things like  
8     intellectual quotient testing, mental health evaluations, all  
9     those kinds of things, fair?

10          A     Yes.

11          Q     Wouldn't you want to get experts involved that are  
12     specialists in the field of mitigation specialists, what  
13     basically you did, devoted so much of your life to. You want  
14     experts in your team that are doing that work, fair?

15          A     Yes.

16          Q     In fact, would you want as many as you could get  
17     your hands on?

18          A     Are you talking about experts not Mitigation  
19     Specialists?

20          A     Well, I am talking a little bit of both. I am  
21     talking about experts on one hand in the field of, you know,  
22     clinical psychology, clinical psychiatry, neuropsychiatry. I  
23     am also talking about experts like yourself, experts in the  
24     investigation and compilation of mitigation evidence. You

1 would want both those professions on board as early as  
2 possible working for the defense team.

3 A I will say yes. The one caveat I will add to that  
4 is, you know, an Atkins investigation is very different. You  
5 know, you might get an Atkins expert much earlier because of,  
6 you know, that process that has to play out. But most other  
7 experts you don't get involved at the very beginning of the  
8 case simply because you know the Mitigation Specialists are  
9 going out and developing the mitigation evidence and starting  
10 to put together a picture and starting to better understand  
11 what type of experts you need. But, you know, you typically  
12 don't bring on those experts until you have either completed  
13 your social history investigation or have done a significant  
14 bulk of it that you have got, you know, that contextual  
15 information to give to your experts, because you can't  
16 identify, you don't know what kind of expert you need when you  
17 first start out in a mitigation investigation.

18 In terms of those experts, I would say with that  
19 caveat, an Atkins expert you obviously bring in at a different  
20 time because of how things go procedurally.

21 Q Regardless, I mean you don't need a Mitigation  
22 Specialist to have a psychologist administer an IQ test?

23 A You don't need a psychologist to administer an IQ  
24 test?



1           Q     You don't need a Mitigation Specialist to have a  
2 psychologist administer an IQ test?

3           A     Oh. Technically no, I guess.

4           Q     Either way, regardless, of when they come on board,  
5 the more the merrier, the sooner the better?

6           A     Yes.

7           Q     Now I want to get back into the conversation we were  
8 having specifically about Mitigation Specialists and their  
9 area of expertise. Again, in a perfect world, those  
10 Mitigation Specialists would be familiar with intellectual  
11 disability and things like Prong 2 Atkins; isn't that true?

12          A     Yes.

13          Q     Ideally, those same mitigation experts would be  
14 extraordinarily or substantially familiar with the country of  
15 the client's origin, if they are foreign born, fair?

16          A     Ideally, yes.

17          Q     Again, your word, there are exacerbated barriers in  
18 those foreign countries. So in fact and in truth having a  
19 Mitigation Specialist that knows the country's location,  
20 working, all of that, is critical if not the perfect thing to  
21 do on a case like this, right?

22          A     Yes.

23          Q     Again, in this same perfect scenario, those same  
24 experts would be in that country sooner rather than later,

1 right?

2 A Under ideal circumstances, yes.

3 Q They would be there meeting with people personally?

4 A Yes.

5 Q Obtaining information from those people, true?

6 A Yes.

7 Q I am sorry, I didn't hear your answer?

8 A Yes.

9 Q Equally true they would be identifying and obtaining  
10 documents?

11 A Yes.

12 Q Throughout that whole time building rapport and  
13 establishing trust with as few or as many sources of  
14 information that exist on the ground; is that fair?

15 A Yes.

16 Q As part of that work, isn't it critical for the  
17 Mitigation Specialist team, once they have identified a source  
18 of information, in this example perhaps a person, that they  
19 have a means of communication set up with that person so they  
20 can be informed if their circumstances change?

21 A Sure. Yes.

22 Q For example, family members, teachers, anyone, if  
23 you are going to move, here is my number. You need to call me  
24 so we can be in touch with you?

1           A     Yes.

2           THE COURT: Mr. Lucia, I apologize for interrupting.  
3     We are at a time we need to take our lunch recess so we are  
4     going to be in recess for an hour and a half. That will give  
5     time for the defense to interview their client, have a little  
6     break, and we'll be back on the record at 1:30.

7           I would like you to all come back, the witness to  
8     come back no later than 1:20 so the clerk can get it up and  
9     ready to go so we are able to start by 1:30.

10          Is there anything further for right now?

11          MR. LUCIA: Not from the State, Your Honor.

12          MS. HICKMAN: No.

13          THE COURT: Okay. Thank you. Deputy, we are going  
14     to be in recess until 1:20 when you need to be signed in,  
15     okay?

16          THE BAILIFF: Yes, Your Honor.

17          THE COURT: Thank you. We'll be back on the record  
18     at 1:30. Thank you very much. Court is in recess.

19          (Whereupon the Court adjourned for the noon recess.)

20          (Whereupon, the proceedings were concluded.)

21                               --o0o--

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 Tuesday, July 28, 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 CR190447.

12 That the foregoing transcript, consisting of pages  
13 numbered 1-68 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 28th 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

6 Plaintiff,  
7 vs.

Case CR19-0447

8 WILBER ERNESTO MARTINEZ GUZMAN,  
9 Defendant.

10  
11 Pages 1 to 138, inclusive.

12 TRANSCRIPT OF PROCEEDINGS  
13 EVIDENTIARY HEARING -- P.M. SESSION  
14 Tuesday, July 28, 2020

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I N D E X

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EXAMINATION OF DR. SERGIO MARTINEZ:

Direct by Mr. Jackson 46

Cross by Ms. Verness 87

-o0o-

1 RENO, NEVADA - TUESDAY 7/28/20 -- 1:36 P.M.

2 -o0o-

3 DEPUTY FINN: The Second Judicial District  
4 Court of the State of Nevada is now in session. The  
5 Honorable Connie Steinheimer presiding.

6 THE COURT: Thank you. Please be seated.  
7 This is continued hearing in CR19-0447. I'd ask  
8 that the state make their appearance for the record.

9 INTERPRETER ESCOBAR: Your Honor, I'm  
10 sorry. The interpreter doesn't know what channel to  
11 be on. I apologize for the interruption. But can I  
12 ask the deputy at the jail what channel they're on?  
13 Deputy Finn, are you on English channel? Thank you.

14 Thank you, your Honor.

15 THE COURT: Okay. Are we okay, Ms.  
16 Escobar?

17 INTERPRETER ESCOBAR: Yes.

18 THE COURT: State, make their appearance.

19 MR. LUCIA: Good afternoon, your Honor.  
20 Travis Lucia on behalf of the state here in Washoe  
21 County, Nevada.

22 MR. JACKSON: Mark Jackson on behalf of the  
23 state, your Honor.

24 THE COURT: Thank you.

1 MR. HICKS: Chris Hicks on behalf of the  
2 state, your Honor.

3 THE COURT: Thank you.

4 And I note that you're all together there  
5 in Reno, right?

6 MR. LUCIA: That's accurate, Judge.

7 THE COURT: They're all with you, right,  
8 Mr. Lucia?

9 MR. LUCIA: Yes, that's right.

10 THE COURT: Thank you.

11 The defense attorneys will make their  
12 appearance for the record, please.

13 MS. HICKMAN: Your Honor, Kate Hickman on  
14 behalf of Mr. Martinez Guzman. Also present with me  
15 today is Mr. Arrascada, Ms. Verness, and Mr.  
16 Goodnight. We're all present in the same room in  
17 Washoe County.

18 THE COURT: Thank you. I'd like the court  
19 interpreters to make the record that they're  
20 present, please.

21 INTERPRETER ESCOBAR: Good afternoon, your  
22 Honor. Jessica Escobar, Certified Interpreter for  
23 the State of Nevada. My certification number is  
24 NVEJ 100. I'm in Washoe County, Nevada.



1           And if I may just take a moment to also say  
2 that on the Spanish channel very quickly.

3           INTERPRETER MILLER: Good afternoon, your  
4 Honor. Joseph Miller, Court Interpreter, present  
5 here in Washoe County, License NVMJ 501.

6           THE COURT: Thank you. And we have a new  
7 court reporter.

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

10          THE COURT: Thank you.

11          Good afternoon, Mr. Guzman.

12          THE DEFENDANT: Good afternoon.

13          THE COURT: Ms. Escobar, we lost you a  
14 little bit. Would you try that again.

15          INTERPRETER ESCOBAR: My apologies, your  
16 Honor. Mr. Martinez Guzman said "Good afternoon."

17          THE COURT: Thank you.

18          Mr. Guzman, can you hear the interpreter?

19          THE DEFENDANT: Yes.

20          THE COURT: Okay. Thank you. Ms. Cook --

21          MS. COOK: Yes, ma'am?

22          THE COURT: -- I want to remind you you're  
23 still under oath and we will continue your  
24 cross-examination by the state.

1 THE WITNESS: Okay.

2 THE COURT: Mr. Lucia, you may proceed.

3 MR. LUCIA: Thank you, your Honor.

4 CROSS-EXAMINATION (Continued)

5 BY MR. LUCIA:

6 Q. Good afternoon, Ms. Cook.

7 A. Good afternoon.

8 Q. Do you recall where we left off?

9 A. I believe we were talking about some -- the  
10 issue around losing evidence, I think is where we  
11 left off. There were a series of questions that you  
12 were asking me.

13 Q. Yeah. Where we had left off was my asking  
14 you about the importance of gathering information,  
15 and as a result of that, the kinds of folks that you  
16 would want in a case like this for mitigation  
17 specialists up onto psychologists, psychiatrists,  
18 things like that.

19 Does that refresh your recollection a  
20 little bit?

21 A. Yes.

22 Q. Where we had left off I was asking you a  
23 series of questions as it pertained to kind of, once  
24 you identify somebody as a potential source of

1 information, isn't it true that you want to get --  
2 facilitate some method through which you can remain  
3 in communication with those people?

4 A. Yes.

5 Q. All right. Now, we had discussed sort of  
6 in detail and at length kind of what would be  
7 optimum for even sort of the Cadillac standard for  
8 what a mitigation specialist team would be doing in  
9 a case such as an Atkins case, and we only discussed  
10 briefly sort of the psychologists, psychiatrists  
11 aspect of that, so I want to go further in that, if  
12 I may.

13 A. Okay.

14 Q. So, in addition to having, you know,  
15 mitigation specialists, of course, part and parcel  
16 of this inquiry would be to have kind of an  
17 assisting team, so to speak, of psychologists and  
18 psychiatrists to ultimately come to bear on the  
19 ultimate decision on this case in regards to  
20 intellectual disability. Is that true?

21 A. Yes.

22 Q. And, ideally, isn't this a case that you  
23 would want the mitigation specialist -- I don't know  
24 how else to say it -- but collaborating or working

1 together with those retained experts so that, again,  
2 it's efficient, the information that's coming out is  
3 the information that's needed, and all of those  
4 sorts of concerns?

5 A. Yes.

6 Q. Now, you had mentioned earlier -- and I  
7 forgot, I'm sorry -- I believe it was on a question  
8 I'd asked on cross. You had brought up a case as an  
9 example where an expert had been retained from North  
10 Carolina. Do you recall making that remark?

11 A. Yes.

12 Q. Would it be the case that that expert was  
13 actually Antonio Puente himself?

14 A. No. It was a different expert.  
15 Dr. Caroline Etherington.

16 Q. Fair enough. Are you familiar with Antonio  
17 Puente?

18 A. I know who he is but I've never worked with  
19 him personally.

20 Q. All right. Were you present in the gallery  
21 or as an attendee yesterday during Dr. Puente's  
22 testimony?

23 A. No. But I've reviewed at least part of the  
24 transcript. I only got the first half of it from

1 yesterday, so I am familiar with the first part of  
2 his testimony but I wasn't present.

3 Q. Okay. So, then you wouldn't be familiar  
4 with the second part of his testimony from the  
5 afternoon?

6 A. Right, correct.

7 Q. And so then you wouldn't have heard of the  
8 case of Isidro Hernandez Lagunas where Dr. Puente  
9 actually conducted phone interviews and relied on  
10 video interviews that were done by mitigation  
11 specialists in the context of an Atkins claim.

12 A. I did not.

13 Q. And do you have any personal familiarity  
14 with that case that you referenced engaging in those  
15 alternative methods?

16 A. I do not.

17 Q. Okay. How critical is it for the  
18 mitigation specialist to be working with a retained  
19 neuropsychiatrist or psychologist or somebody of  
20 that professional credent?

21 A. It's definitely, you know, part of the  
22 mitigation specialist's role. These cases, you  
23 know, involve a lot of individuals that make up a  
24 team and, you know, it's very much a team effort

1 that we want to try to work together, you know, to  
2 the extent that we can.

3           So, you know, the mitigation specialist  
4 definitely works very closely with, you know, any  
5 experts that are retained on the case, you know, for  
6 whatever particular reason, provide them with  
7 information that we've gathered, you know, whatever  
8 the case may be, provide them with records that they  
9 need to review, and working with them in whatever  
10 ways that we can or that are necessary based on  
11 what's happening in the case.

12           Q. All right. So, we talked about some of the  
13 functions and some of the, sort of, ideals that a  
14 mitigation specialist in a case like this would be  
15 undertaking to perform. And we sort of talked about  
16 the interplay between that specialist and, you know,  
17 someone like Dr. Puente or any sort of retained  
18 neuropsychological or neuropsychiatric expert.

19           A. Yes.

20           Q. In an ideal situation would you have  
21 assistance beyond just those two components, meaning  
22 that would you have other sources of assistance  
23 beyond a neuropsychologist and mitigation  
24 specialist?

1           A. I'm not sure exactly what that would be. I  
2 mean, you might have other experts that there are  
3 overlapping areas where they have to communicate or  
4 you might have consulting experts that are not  
5 testifying experts. But often teams will bring  
6 individuals in in a certain area of expertise just  
7 to consult with them, to get sort of guidance about  
8 what to do in a certain situation or around a  
9 certain issue. Those are different than an expert  
10 who is actually doing testing and potentially  
11 testifying.

12           Q. Let me -- sorry to interrupt you. Let me  
13 -- I kinda let that question go a little bit too  
14 far. Let me try and be more specific.

15                 With respect to, kind of, the dig, so to  
16 speak, the investigation into somebody's past, one  
17 source of information can be a mitigation specialist  
18 or one avenue through which that information is  
19 gathered can be a mitigation specialist, fair?

20           A. Yes.

21           Q. The same can be true with respect to, like,  
22 a retained psychologist or psychiatrist, if they  
23 were conducting their own interview in addition to  
24 what the mitigation specialist had done, correct?

1           A.   Yes.

2           Q.   Would it be of assistance in a  
3 mitigation-type investigation or Atkins  
4 investigation to somehow obtain the assistance from  
5 local governmental agencies?

6           A.   I mean, it would be ideal, you know.  I  
7 don't know under what kind of circumstances that  
8 would be possible.  I'm not sure I know exactly what  
9 you mean.

10          Q.   Okay.  Sorry.  I'm not trying -- I swear  
11 I'm not trying to be confusing.

12          A.   No.  It's okay.

13          Q.   It would be ideal.  And what I'm talking  
14 about specifically, I guess, would be let's take the  
15 hypothetical -- well, let's just take the facts of  
16 this case, actually.

17                You're aware of course that Mr. Martinez  
18 Guzman is from El Salvador.

19          A.   Yes.

20          Q.   So, he's from another country.

21          A.   Yes.

22          Q.   So, in an ideal world the mitigation  
23 specialist or some body of the defense team would  
24 secure some measure of assistance from the El



1 Salvadorean government, for example, with respect to  
2 records and things of that sort.

3 A. With respect to records, with respect to  
4 getting into the country potentially, that kinda  
5 thing, yes.

6 Q. And do you have any personal experience in  
7 a similar situation where you were called upon to do  
8 work out of country and contacts with their local  
9 government assisted you in that work?

10 A. I do not.

11 Q. All right. Hypothetically speaking, would  
12 it be your opinion that such assistance would be  
13 valuable to a team in gathering information  
14 necessary for an intellectual disability claim?

15 A. I mean, I think with a particular caveat.  
16 I mean, to the extent that they could help with  
17 record gathering, that's one thing.

18 But in terms of the other type of  
19 information that we need to gather such as, you  
20 know, from witness interviews, that would be a very  
21 different story. You know, that is something that,  
22 you know, you can't just ask anybody to do that  
23 doesn't understand the type of information that  
24 we're looking for or, you know, the process that we

1 go through to develop a report, to get that  
2 information.

3           So, I think there will be limits to what  
4 that type of assistance could provide. In terms of  
5 records, sure. In terms of the other type of more,  
6 you know, anecdotal information that's gathered  
7 through investigation and mitigation interviews, I  
8 think that's not the case.

9           Q. All right. So, I kinda want to summarize a  
10 little bit of where we've been so far. And we  
11 talked about how it would be ideal to have retained  
12 mitigation specialists almost right out of the gate.

13           Tell me if there's any part of this that  
14 you disagree with. That would be ideal. It would  
15 be exceptional if those individuals were familiar  
16 with the country of origin for a particular client,  
17 if they've had experience dealing with the cultural  
18 norms and individuals that make up the community of  
19 that environment.

20           It would be preferable for those folks to  
21 get into the country early to begin the work of  
22 figuring out this information, as you said,  
23 gathering it, developing it, and retaining it. It  
24 would be crucial for those people to get in there

1 earlier so they could --

2 MS. HICKMAN: Objection to the form of the  
3 question. It's, A, already been asked and answered  
4 and, B, it's a compound question.

5 THE COURT: Okay. I'll sustain as to  
6 compound.

7 MR. LUCIA: I can break it up.

8 BY MR. LUCIA:

9 Q. In your opinion is it ideal to have  
10 mitigation experts retained early in a case?

11 MS. HICKMAN: Objection.

12 THE WITNESS: Yes. I don't know that I  
13 would say "ideal." I would say that's a standard  
14 practic, yeah.

15 THE COURT: Just a minute. I'm sorry, Ms.  
16 Hickman. I couldn't hear your objection.

17 MS. HICKMAN: Asked and answered. We went  
18 over this all before lunch.

19 THE COURT: I think you did, right?

20 MR. LUCIA: I did.

21 MS. HICKMAN: No. The state did.

22 THE INTERPRETER: If you've already asked  
23 her that and she's answered it, why are we asking it  
24 again?

1 MR. LUCIA: Sorry. I can move on.

2 THE COURT: Thank you.

3 BY MR. LUCIA:

4 Q. Everything, Ms. Cook, that we just talked  
5 about leading up into lunch and what we just opened  
6 here after lunch on the topic of retained mitigation  
7 specialists, psychiatrists, government assistance,  
8 are you aware that all of those things have been  
9 done in this case?

10 A. To a certain degree. I am aware that there  
11 are -- there have been trips to El Salvador, that  
12 this information has been gathered and these  
13 witnesses were ready to meet with Dr. Puente, but he  
14 wasn't allowed into the country, so to a certain  
15 degree.

16 You know, I don't know how early they  
17 started in the case, for example. But to the extent  
18 of what you're trying to ask, yes, I understand that  
19 there has been, you know, that type of work done in  
20 the case to date.

21 Q. Okay. And to be specific about exactly  
22 what it is that you understand, do you understand  
23 that the investigation into Mr. Guzman's  
24 intellectual disability has begun more than a year

1 ago?

2 A. I was not aware of when it began, no.

3 Q. Are you aware of how many times mitigation  
4 specialists have been to the country of El Salvador?

5 A. I believe twice. I know they've been  
6 multiple times. I believe twice.

7 Q. Do you know or are you aware of the first  
8 date that mitigation specialists from this case went  
9 to El Salvador --

10 A. I am not aware of that.

11 Q. -- approximately?

12 A. I'm not.

13 Q. All right. Do you know if that occurred in  
14 early September of 2019?

15 A. That sounds right, but they did not tell me  
16 what that date was, or if they did, I have not  
17 remembered.

18 Q. I understand. Are you aware -- I guess I  
19 should say, To what extent are you aware of the  
20 investigation that was undertaken in El Salvador  
21 with regards to records and interviews and the like?

22 A. I'm not aware of the intimate details of  
23 what kinds of records they gathered, who exactly  
24 they've talked to. I'm not aware of those kinds of

1 details, no.

2 I'm aware in a very sort of broad sense in  
3 terms of an Atkins investigation had been conducted  
4 and they were at the point in the case where they  
5 were trying to get Dr. Puente in to do his  
6 assessments.

7 Q. Understood. And, lastly, with respect to  
8 this line of inquiry, are you aware of what type of  
9 assistance the defense team enjoyed with respect to  
10 the governmental officials attached to and within El  
11 Salvador?

12 A. No, I am not.

13 Q. Are you aware that they've been working  
14 with the consul general in Las Vegas for the  
15 country?

16 A. I don't believe so.

17 Q. Are you aware that they've engaged with  
18 local counsel within El Salvador?

19 A. I'm not.

20 Q. Are you aware that they've had discussions  
21 with the El Salvadorean Minister of Foreign Affairs?

22 A. I am not.

23 Q. Finally, their involvement and engagement  
24 with the director general for human rights of the

1 country of El Salvador?

2 A. I'm not.

3 Q. Okay. With respect to those folks -- or  
4 moving to the time frame, are you aware that some of  
5 that engagement began as early as January of 2019?

6 A. I am not.

7 Q. Did I understand correctly on direct,  
8 ma'am, you're not retained in this case to do work  
9 specific to the topic of intellectual disability as  
10 it pertains to Mr. Guzman?

11 A. Correct. I'm not retained at all.

12 Q. Okay. You talked briefly and touched  
13 briefly on the country of El Salvador. And the  
14 direct quote that I wrote down was, quote, Lots of  
15 violence.

16 A. Uh-huh.

17 Q. What do you base that information on?

18 A. That's my own personal knowledge, because I  
19 have a very dear friend who spent ten years there  
20 during the civil war and that's just based on  
21 stories that I've heard personally from him. It has  
22 nothing to do with my professional experience there.  
23 It's just my own personal experience.

24 Q. I understand. One of the things we

1 discussed earlier and what I want to circle back to  
2 for a moment, you know, is the tension that I  
3 understand exists between losing information and not  
4 getting information in a way that fits with the  
5 standard of care that currently exists.

6 Do you understand what I mean when I talk  
7 about that topic generally?

8 A. I do. And I remember that line of  
9 questioning. I mean, I don't know if I would call  
10 it a "tension." I would say that, you know, our job  
11 is to obtain reliable information and we try to do  
12 that to the best of our ability by relying on  
13 standard of care, the guidelines, and the case law  
14 and how we're trained and so forth.

15 And that we certainly have, you know, in  
16 the back of our minds that we don't, you know, want  
17 to lose evidence, but I don't know if I would  
18 consider it a tension. I mean, I think the priority  
19 is on getting the most reliable, you know, evidence  
20 that we can and in as timely a manner as we can.

21 But the reality is these investigations  
22 take a lot of time and that the overall goal is to  
23 conduct these investigations and provide  
24 representation, you know, that falls within, you



1 know, what is required and what the standard of care  
2 asks of us.

3 Q. So, let me ask you a little bit about the  
4 standard of care.

5 To your knowledge was the COVID-19 pandemic  
6 a thing when these standards of care were  
7 promulgated?

8 A. It was not.

9 Q. Were folks free to travel to El Salvador at  
10 the time these standards of care were promulgated,  
11 to your knowledge?

12 A. Yes, they were.

13 Q. Is that the case today?

14 A. It is not.

15 Q. Is it your testimony that the standard of  
16 care should remain constant despite changing --  
17 let's just say the changing global situation?

18 A. Yes. I mean, I think in the wake of COVID,  
19 you know, the answer would be yes. I don't know if  
20 there is another scenario that would qualify under,  
21 you know, what you're asking. I don't know what  
22 that would be.

23 But, yes, you know, the fact that the  
24 stakes remain high and that this is still a death

1 penalty case hasn't changed. And because it's  
2 happening in a pandemic doesn't, you know, mean that  
3 our responsibilities are any different even though,  
4 as I said before, I know that that creates some  
5 issues in these cases. But, you know, from my -- in  
6 my opinion our standard of care has to stay the  
7 same, because nothing has changed about what's on  
8 the line or what's required of us, you know, in  
9 terms of what we have to do.

10 Q. And, I guess, to be fair, I would agree  
11 with that. I mean, you would agree with me insofar  
12 as your role that you undertake is the same,  
13 correct, to get the best information possible.

14 A. Yes.

15 Q. What's changed, in fact, today, is that the  
16 method through which you have to get that  
17 information has become more limited. Is that true?

18 A. Yes, it has.

19 Q. Right. Because you physically cannot go to  
20 the country of El Salvador, right?

21 A. Right.

22 Q. And so do you agree with me in that the  
23 question today isn't about whether or not the  
24 standard should change but whether or not you run

1 the risk of getting no information by adhering to  
2 that former standard of practice.

3 A. I understand that that's a risk, you know,  
4 that -- because you can't travel. If there's no  
5 alternative, that means you can't get the  
6 information and you can't -- and the case can't  
7 proceed. I recognize that that is a tension in  
8 terms of what we're talking about.

9 Q. Well, let me ask you this, Ms. Cook.

10 Who suffers if you can't get information  
11 that could lead to a diagnosis that Mr. Guzman is  
12 intellectual disabled?

13 A. I mean, honestly, the client, obviously,  
14 suffers, you know. But I also think that the  
15 entire, sort of, process suffers, because if we  
16 don't have the reliable information that we need,  
17 you know, your side doesn't have the information to  
18 review and do what you need to do, the Court doesn't  
19 have, you know, reliable information to make a  
20 determination on, and it kinda just throws  
21 everything into a little bit of disarray, I suppose.

22 Q. And I guess I would ask you that same  
23 question, except removing the qualifier about  
24 reliable information.

1           Who suffers if everybody has no  
2 information?

3           A.   Um --

4           Q.   Everybody.

5           A.   The client, I suppose.  And, you know, I'm  
6 not even sure what that would look like, if you had  
7 no information.  But the client would definitely  
8 suffer from not having mitigation evidence  
9 available.

10          Q.   At all, correct?

11          A.   Yes.

12          Q.   I want to pose a question to you against  
13 the backdrop of the climate that we're in regarding  
14 COVID-19.

15                What would you do if there was an informant  
16 that refused to meet with you in person?  So, you've  
17 been retained as a mitigation specialist and you,  
18 through some method, identified a particular  
19 informant that could have valuable information with  
20 respect to prong two of an Atkins claim.

21                But, let's say, because of COVID-19 that  
22 person doesn't want to meet with you in person but  
23 is willing to talk to you about their experiences  
24 with the client over the phone or over the video, a

1 video chat like this.

2           Would you refuse to do that interview  
3 because it violated your standard of care or would  
4 you go forward and do the best you could to get the  
5 best information that you can, given the  
6 circumstances?

7           A. Well, my personal choice would be to  
8 conduct the interview in the way that I would have  
9 traditionally conducted it. But ultimately that  
10 wouldn't be a decision that I make. That would have  
11 to be a decision that the team made as to whether or  
12 not that -- I mean, that's not a decision that I can  
13 make on my own as a member of the team. That's the  
14 kind of decision that ultimately I would have to  
15 confer with counsel about --

16           Q. And --

17           A. -- but my choice would be to do it in the  
18 way that, you know, I'm used to doing it and think  
19 offers me the best chance of getting the best  
20 information.

21           Q. And that would be in person.

22           A. Yes.

23           Q. Again, what would your recommendation be to  
24 the team if that were the scenario that was

1 presented to you?

2 A. That I would want to try and wait, you  
3 know, until we had the opportunity to see them in  
4 person.

5 Q. How long would you wait?

6 A. I don't know. I would want to wait as long  
7 as I can. I don't have any idea what that might  
8 mean, and maybe that might mean that the interview  
9 proceeds a little bit differently, you know. Maybe  
10 there are other ways that our in-person meeting  
11 could happen safely with, you know -- but, you know,  
12 I don't know.

13 I mean, this is uncharted sort of  
14 territory. I don't know how long I would wait. I  
15 would want to wait as long as possible, you know,  
16 but I realize that that isn't always my decision,  
17 but that would be what would be ideal.

18 Q. Again, in a situation that's less than  
19 ideal, what would be the circumstances that would  
20 make you feel compelled to do what you could to get  
21 the information before it was lost?

22 A. To get the information before it was lost.

23 I mean, I guess, if I understand your  
24 question correctly, I mean, I never want to do

1 anything to compromise the standard of care and, you  
2 know, I want to be able to do what I need to do to  
3 make that happen.

4 And I don't foresee that I would want to  
5 compromise the standard of care just to get the  
6 information more quickly. I mean, we run the risk  
7 every day in mitigation investigation that we will  
8 lose evidence and lose information but we can't  
9 conduct the information fast enough to make that,  
10 you know, never a possibility.

11 And that's just inherent risk, given the  
12 time that it takes to conduct these investigations.  
13 But I certainly wouldn't sacrifice the standard of  
14 care to get that information, because if you're  
15 getting the information in a less than reliable way,  
16 you know, it might not be better than no  
17 information. I don't know. It would depend on the  
18 information.

19 Q. That's true. And, again, my hypothetical  
20 assumes that there's been no interviews conducted  
21 with these folks face to face by mitigation  
22 specialists, correct?

23 A. Yeah.

24 Q. There was one last thing I wanted to leave

1 with. Towards the end of your questions with Ms.  
2 Hickman you had mentioned this, and by "this" what I  
3 mean is the world we're sort of living in. You had  
4 mentioned that you had contemplated sort of other  
5 solutions in the midst of a global pandemic to  
6 maintain your standard of care but at the same time  
7 fulfill your function. You've done this more than I  
8 have. What are those other solutions?

9 A. Well, I haven't come up with other  
10 solutions. I think what I've started to contemplate  
11 when I started my job in April in the midst of a  
12 pandemic was, you know, immediately recognize that  
13 mitigation investigations were not going to be able  
14 to continue in the way that they had continued and  
15 how was that going to play out.

16 I had a lot of questions. I don't have a  
17 lot of answers. You know, this is not an easy  
18 question to answer, you know, under these  
19 circumstances. I can only, you know, say that I  
20 know what the standard of care is. I'm intimately  
21 familiar with the fact that it works and we've seen  
22 time and time again that that process and doing  
23 these interviews the way we've been doing them for  
24 years, you know, ensures us that we're getting more



1 reliable information than not. I've seen that play  
2 out many times.

3           You know, that's the stuff that I know and,  
4 you know, trying to balance that with how we move  
5 forward under these situations is, you know, a lot  
6 more people are gonna have to help, you know, figure  
7 that out. But, you know, what hasn't changed -- and  
8 I think I've said this before -- is the stakes that  
9 remain high. That hasn't changed. And if that  
10 doesn't change, our responsibilities can't change.

11           I mean, that's what I, you know, understand  
12 about what we have to do in these cases. And as  
13 long as a case is capital and proceeding capitally,  
14 then this is what we have to try and do in the way  
15 that we, you know, understand is the standard of  
16 care.

17           Q. And I guess what I would leave you with is  
18 this last question: Whether or not you agree with  
19 me that what you have to do given the stakes is to  
20 undertake to dig up the best information you can  
21 with respect to assisting any individual client that  
22 you're retained to represent, fair?

23           A. Yes.

24           MR. LUCIA: Your Honor, can I just have a

1 moment, please?

2 THE COURT: Yes.

3 MR. LUCIA: I didn't mean to walk away from  
4 you, your Honor. The state would pass the witness.  
5 Judge. Thank you for that moment.

6 THE COURT: Okay. You're welcome.

7 Ms. Hickman.

8 MS. HICKMAN: Thank you.

9 REDIRECT EXAMINATION

10 BY MS. HICKMAN:

11 Q. Ms. Cook, I want to start back where the  
12 state ended and we talked about a number of things  
13 that have changed, correct?

14 A. Correct.

15 Q. The global pandemic has changed certain  
16 things, correct?

17 A. Yes.

18 Q. But the one thing that hasn't changed is  
19 the fact that this death penalty case is a choice,  
20 right?

21 A. Yes.

22 Q. And that's the state's choice.

23 A. Yes.

24 Q. And so if death wasn't being sought by the

1 state, it wouldn't matter if we needed to do an  
2 Atkins investigation, right?

3 A. Yes.

4 MR. LUCIA: Your Honor, I would object to  
5 that. I think that mischaracterizes her testimony  
6 where she referred to other cases where she said  
7 she's done these same investigations that were not  
8 capital cases.

9 THE COURT: Yeah. In terms of an Atkins  
10 investigation, that only applies in a death penalty  
11 case. However, I do believe the witness has done  
12 other mitigation investigations and mitigation  
13 applies in all serious cases.

14 So, in that regard I -- and also this is  
15 very leading, so I'll sustain on those grounds and  
16 you can rephrase your question.

17 BY MS. HICKMAN:

18 Q. So, Ms. Cook, why would we have to conduct  
19 an Atkins investigation?

20 A. To determine if the individual does, in  
21 fact, have intellectual disability, which is a  
22 categorical bar to the death penalty.

23 Q. And in what cases do you conduct an Atkins  
24 investigation?

1           A. You -- since 2002, you would conduct it at  
2 the beginning of any case to make sure that your  
3 client is, in fact, eligible for the death penalty.  
4 You don't always pursue it the entire way in every  
5 single case, though. But the information that you  
6 obtain from an Atkins investigation, even before  
7 Atkins we were investigating intellectual disability  
8 and issues like that because they're also still  
9 mitigating. Yes.

10          Q. And so the issue in this case about how the  
11 Atkins investigation can or can't be conducted, is  
12 that because the state is seeking death today in  
13 this case?

14          A. As I understand it, yes.

15          Q. So, when we are talking about why an expert  
16 needs to be involved in these cases, is that because  
17 intellectual disability is not a legal diagnosis, it  
18 is a medical diagnosis?

19          A. Yes.

20          Q. And when we're talking about how you don't  
21 go to -- or you don't diagnose, you don't do tests,  
22 that doesn't necessarily mean that you don't need to  
23 talk to somebody in person, right?

24          A. Yes, right.

1 Q. Would you agree with me that talking to  
2 someone in person may be even more important for a  
3 mitigation specialist?

4 A. Yes, absolutely.

5 Q. Prior to the expert getting involved?

6 A. Yes.

7 Q. Okay. When you were talking about that an  
8 expert may travel or may interview witnesses, do you  
9 remember that line of questioning?

10 A. Yes.

11 Q. When you're talking about "may," you're not  
12 necessarily talking about an Atkins case. You're  
13 talking about all the cases that you work on.

14 A. Yes.

15 Q. And then I want to talk about this issue  
16 about the potential of losing evidence versus  
17 rushing and getting information that's not reliable.

18 Do you remember that whole conversation?

19 A. Yes.

20 Q. How long does an Atkins investigation  
21 generally take in a case where somebody is not from  
22 the United States?

23 A. Um, you know, I always struggle to answer  
24 that question because I don't like to put a time

1 frame on anything because every single case is  
2 different in terms of, you know, somebody from a  
3 foreign country, your access will depend on that  
4 foreign country. It depends on, you know, how  
5 readily available records are and how voluminous  
6 they are. It depends on the number of informants  
7 that you're able to find and track down and  
8 interview.

9           So, all of those things make it really hard  
10 because to -- because it's never gonna be the same  
11 in any two cases because every case looks different,  
12 you know. But it's certainly an investigation that  
13 you would want to spend, you know, six months, eight  
14 months, maybe even a year, you know. I think you  
15 would be hard-pressed to do it on that shorter end.

16           You know, again, it would depend on how  
17 readily available the evidence was and how easily it  
18 came together. You know, but it's certainly the  
19 kinda thing that would take, you know, many, many  
20 months.

21           Q. And is it outside the norm to say that in  
22 these cases the investigation alone can sometimes  
23 take multiple years?

24           A. Yes.

1 Q. So, the state spent a lot of time talking  
2 to you and using words like "Cadillac standard,  
3 ideal, preferred, exceptional."

4 Do you remember all that?

5 A. Yes.

6 Q. Is the investigation we're talking about a  
7 Cadillac standard or ideal, preferred, exceptional,  
8 any of those words?

9 A. That's not how I would characterize them.  
10 I would characterize them as, you know, the --  
11 that's what's required, so the basic standard of  
12 care.

13 Q. And the state asked you a lot about things  
14 that may or may not have already been done in this  
15 case. Do you remember all that?

16 A. Yes.

17 Q. Is it fair to say that as the state laid  
18 that out to you, it appeared as though our team is  
19 following the standard of care?

20 A. Absolutely.

21 Q. And based on what Mr. Lucia was asking you,  
22 particularly that we had a mitigation team with Dr.  
23 Puente in El Salvador at the time that the pandemic  
24 limited our ability to do the investigation, that we

1 were on course to do what needed to be done.

2 A. Yes. That is absolutely what it sounds  
3 like to me.

4 Q. Do you -- and this is sort of the question.  
5 Even if the entire investigation had been done and,  
6 hypothetically, if we had every single record we  
7 needed and all that was left was Dr. Puente's  
8 interviews and report, would it be the standard of  
9 care for that to take place over a remote platform?

10 A. No.

11 Q. I want to talk to you a little bit about  
12 the assistance of government, especially in a  
13 country like El Salvador.

14 Is it possible that the residents of El  
15 Salvador may be reluctant to work with the  
16 government?

17 A. Sure.

18 Q. And is that something you've seen in your  
19 practice, maybe not in El Salvador, but certain  
20 parts of the United States?

21 A. Absolutely. I mean, a lot of clients, a  
22 lot of family members are very skeptical of, you  
23 know -- can be skeptical of the government, of the  
24 criminal justice system. And that has certainly



1 posed a barrier, you know, many a time in my own  
2 personal investigation.

3 Q. And then if the government recommended a  
4 member of the defense team.

5 A. Excuse me. Say that again.

6 Q. Is the government, either the El  
7 Salvadorean government, United States Government,  
8 any type of government, a recommended member of the  
9 defense team?

10 A. No.

11 Q. So, can the defense, essentially, put their  
12 responsibility to conduct an investigation onto the  
13 government?

14 A. No.

15 Q. And in any case that we're working on,  
16 given the amount of information that needs to be  
17 gathered and the time that it needs to take, is it  
18 possible to lose evidence?

19 A. It's always possible to lose evidence.

20 Q. Okay. But does that ever justify lowering  
21 your standard of care?

22 A. No.

23 Q. And so then the state posed the  
24 hypothetical to you of who suffers if the

1 investigation isn't done according to the standard  
2 of care. Do you remember that question?

3 A. Yes.

4 Q. And you said the client or the process,  
5 really. Do you remember?

6 A. Yes.

7 Q. And then he asked you, What happens if we  
8 get no information, right?

9 Would you agree that it's not an either/or?

10 A. Sure.

11 Q. Under one circumstance, do you agree that  
12 we would be violating a known standard of care?

13 A. Yes.

14 Q. Versus no information, there would have to  
15 be a number of things that took place before there  
16 would be zero information available for you in El  
17 Salvador.

18 A. Yeah. It's hard to even imagine what that  
19 would look like but, yes, I -- yeah. Yes.

20 Q. And then we talked about if a person  
21 refused to meet you because they were concerned  
22 about COVID-19. Do you remember that?

23 A. Yes.

24 Q. And you said, you know, I would try to meet

1    them in person. That's the standard of care.

2               Is it possible that you could maintain a  
3    relationship with that person until the pandemic  
4    clears or until it is safe to meet with them?

5           A. I would certainly want to, yes.

6           Q. And that could be anywhere from a couple of  
7    months to six months to a year. It's unknown at  
8    this time, right?

9           A. Yes.

10          Q. But, again, would you agree that the best  
11    practice would be to meet with that person face to  
12    face?

13          A. Yes.

14          Q. I wanted to ask you a little bit about in  
15    your experience does the prosecution's expert or  
16    prosecution's team generally travel to get the same  
17    amount of information?

18          A. That hasn't been my personal experience,  
19    that -- you know, that I've seen prosecution experts  
20    do the same amount of work that the defense experts  
21    do. That hasn't been my own personal experience. I  
22    don't know if there are others that do that  
23    differently than what I've seen in my own practice,  
24    but it's not been my experience, no.

1 Q. And then in your role where you're  
2 currently working or any of your prior employment,  
3 do you know of any defense teams that are currently  
4 conducting Atkins investigations in foreign  
5 countries during the global pandemic?

6 A. I do not.

7 MS. HICKMAN: Thank you, Judge. I have no  
8 further questions.

9 THE COURT: Okay. I had a question before  
10 I let Mr. Lucia inquire again.

11 My question for you, ma'am, is that you  
12 dealt with international investigations before.  
13 Have you dealt with international investigations  
14 where the people from the other country that you  
15 interview, whether or not you can get into the  
16 country, are still precluded from entering the  
17 United States?

18 That's in regard to the question and answer  
19 that you said that standard of care required these  
20 people to come in person to testify on the  
21 mitigation aspect, whether or not you're dealing  
22 with that or not, but for mitigation.

23 Have you dealt with this situation where  
24 immigration will now allow the witness to appear?

1           THE WITNESS: Not in my direct experience.  
2 But I am familiar with cases that I've consulted on  
3 or trained with in which that was a barrier. I am  
4 familiar with that situation happening. I don't  
5 know the kind of details that you might be  
6 interested in and I haven't had it happen to me  
7 personally.

8           THE COURT: So, you don't know what the  
9 resolution to that was?

10          THE WITNESS: I don't, no.

11          THE COURT: If a witness were unavailable  
12 because of immigration issues, would you believe  
13 that it would be appropriate for them to appear as  
14 you are appearing today?

15          THE WITNESS: Well, again, that would not  
16 be my decision to make. That would be defense  
17 counsel's decision to make as to whether or not they  
18 wanted to proceed that way.

19                But I certainly understand under those  
20 circumstances, you know, that you're interested in  
21 getting the information as opposed to not getting  
22 the information when you're trying to get them there  
23 in person.

24                Ideally, though, by the time they're

1 prepared to testify, the information that you've  
2 gotten that's gotten them to that point where  
3 they're ready to provide testimony, that that  
4 information has been, you know, obtained through  
5 person-to-person interviews done face to face, that,  
6 you know, I sort of see that differently than trying  
7 to get the information, you know, through this type  
8 of platform, if that's makes sense.

9 THE COURT: Yes. Thank you.

10 Okay. Does that raise any -- Mr. Lucia, do  
11 you have any other questions?

12 MR. LUCIA: I would just be retreading old  
13 ground, Judge. No. I appreciate it.

14 THE COURT: Okay. And, Ms. Hickman, based  
15 on the Court's questions, do you have any other  
16 questions?

17 MS. HICKMAN: No. Thank you.

18 THE COURT: Thank you. Then, may this  
19 witness be excused?

20 MS. HICKMAN: She may. Thank you very  
21 much.

22 THE COURT: Thank you. Thank you, Ms.  
23 Cook. Appreciate your testimony. You are excused.

24 THE WITNESS: You're very welcome. Thank

1 you.

2 THE COURT: Go ahead and call your next  
3 witness.

4 MS. HICKMAN: Judge, I believe we had two  
5 more witnesses that at this time you precluded from  
6 testifying, so that's our last witness.

7 THE COURT: Okay. So, the only other  
8 witnesses you have are the two university  
9 professors?

10 MS. HICKMAN: That's correct.

11 THE COURT: Okay. Then, the defense has  
12 rested. Mr. Lucia?

13 MR. LUCIA: Your Honor, I'm going to  
14 concede the chair to Mr. Jackson, who will take the  
15 state's first witness.

16 THE COURT: Okay. Thank you.

17 MS. HICKMAN: Can we know who it is so we  
18 can prepare a little bit?

19 THE COURT: I thought they told you. They  
20 didn't tell you?

21 MS. HICKMAN: Just who are they calling  
22 first.

23 THE COURT: Oh. What is the order of your  
24 witnesses, Mr. Jackson?

1 MR. JACKSON: Your Honor, the state's first  
2 witness is Dr. Sergio Martinez, who I believe is  
3 sitting in the waiting room. And then Debbie Moreno  
4 will be the second witness followed by Stefanie  
5 Brady. Those are the only three witnesses that we  
6 anticipate calling at this point.

7 MS. HICKMAN: Thank you. And if we could  
8 have the Court's indulgence for a few minutes to get  
9 set up.

10 THE COURT: Yes. Go ahead.

11 MS. HICKMAN: Thank you, your Honor, for  
12 that additional time. We are prepared to move  
13 forward now.

14 THE COURT: Okay. Thank you.

15 Mr. Jackson, go ahead and call your  
16 witness.

17 MR. JACKSON: The state calls Sergio  
18 Martinez.

19 THE CLERK: Good afternoon, Dr. Martinez.  
20 This is Marci, the court clerk. Can you hear me?

21 Dr. Martinez, can you hear me?

22 DR. MARTINEZ: Yes, I can.

23 THE CLERK: Okay. Dr. Martinez, I don't  
24 think that you have engaged the interpreter mode on



1 your computer. Could you look at the bottom and see  
2 if you have a world icon. If you do, please click  
3 on it and select the English language.

4 DR. MARTINEZ: How is that?

5 THE CLERK: There you go. Thank you very  
6 much.

7 THE WITNESS: You're welcome.

8 THE COURT: The clerk will swear you.

9 (Witness sworn.)

10 THE COURT: Sir, go ahead and state your  
11 name and spell your first and last names.

12 THE WITNESS: My name is Sergio Martinez,  
13 middle initial I. First name is S-e-r-g-i-o,  
14 Martinez, M-a-r-t-i-n-e-z.

15 THE COURT: Would you please tell me the  
16 physical location that you're appearing from.

17 THE WITNESS: Right now I'm in my office  
18 here in Tucson, Arizona, 7624 North La Cholla  
19 Boulevard.

20 THE COURT: Okay. Thank you. Every once  
21 in a while, Mr. Martinez, we're losing a word. I'm  
22 not sure why. But the court reporter will interrupt  
23 you if she isn't getting everything, so don't be  
24 surprised.

1 THE WITNESS: Yes, your Honor.

2 THE COURT: Mr. Jackson, you may inquire.

3 DIRECT EXAMINATION

4 BY MR. JACKSON:

5 Q. What is your occupation?

6 A. I'm a licensed forensic psychologist  
7 practicing in the state of Arizona and also  
8 California.

9 Q. When did you first become licensed in the  
10 state of Arizona?

11 A. That was in 1987 and in California in 2001.

12 Q. So, you've been practicing as a licensed  
13 psychologist for the past 33 years?

14 A. Correct.

15 Q. Are you a past or present member of any  
16 professional associations related to your  
17 profession?

18 A. Yes. Currently I'm a member -- active  
19 member of the APA, American Psychology Association,  
20 and in the past I've been a member of other  
21 organizations that since I have not renewed my  
22 status, the Academy of Neuropsychology.

23 If I may just look at my professional  
24 vitae.

1           Also, the American College of Forensic  
2 Psychology, International Association for  
3 Correctional and Forensic Psychology and also the  
4 Reitan Psychological Society.

5           Q. Can you spell that?

6           A. R-e-i-t, as in Tom -- a-n.

7           Q. Dr. Martinez, I want to talk about your  
8 educational history and only to the extent that it  
9 may be relevant to any languages that you may speak.

10           Where did you first attend school for your  
11 primary and elementary education?

12           A. Well, being a native of Mexico, I started  
13 at first grade in the state of Baja, California.  
14 And I attended from first grade all the way to  
15 approximately halfway through the fifth grade before  
16 we immigrated to Southern California. Obviously, in  
17 Mexico all instruction was conducted in the Spanish  
18 language.

19           Thereafter, I completed my public school  
20 education in the U.S. public school system from  
21 fifth grade all the way up to the 12<sup>th</sup> grade, and  
22 that was graduating from Vista High School in 1970.

23           Thereafter, I attended two years at Palomar  
24 Junior College in general studies and then

1 transferred to San Diego State University for a  
2 couple more years to complete my bachelor's degree  
3 in the fields of Spanish literature and psychology.

4           Thereafter, in '74 I was accepted to the  
5 University of New Mexico Counseling Program in which  
6 I went ahead and completed my master's degree in the  
7 field of counseling, obtaining that degree in 1976.  
8 And then I was accepted into the doctoral program,  
9 which I completed in 1981, also in the field of  
10 counseling.

11           Q. Thank you, Dr. Martinez. You currently  
12 are, obviously, speaking in English, but do you  
13 speak or write any other languages other than  
14 English?

15           A. Yes. I'm fluent in Spanish and English, of  
16 course, in reading, writing, and speaking.

17           Q. Dr. Puente, following your graduation in  
18 obtaining your doctoral degree in 1981, what did you  
19 then do?

20           A. I believe you said "Dr. Puente."

21           Q. Excuse me. Dr. Martinez. I apologize.

22           A. Yes. I'm sorry.

23           What was the question again?

24           Q. What did you do after you obtained your

1    doctorate degree in 1981?

2            A.    After obtaining my degree, I engaged in  
3    different types of work, obviously, in which I would  
4    apply my educational background.

5            If I can just go through my C.V.,  
6    obviously, after conducting or completing the  
7    practicum experiences associated with my education,  
8    in 1977 to '78 I participated in --

9            MS. VERNESS:    Your Honor, I apologize for  
10   interrupting, but the doctor is looking at a  
11   document that I don't believe was noticed as the  
12   state's exhibit and I am not sure what the document  
13   is at this time.

14   BY MR. JACKSON:

15            Q.    Dr. Martinez, are you referring to a  
16   document right now?

17            A.    Yes.    I'm referring to my curriculum vitae.

18            MR. JACKSON:    So, we have not provided that  
19   as an exhibit in this case, so I'm going to ask you  
20   some more general questions about your professional  
21   vitae, just in general.

22            A.    Okay.

23            MS. VERNESS:    And, your Honor, again, I  
24   apologize for interrupting but, actually, I have a

1 curriculum vitae that was filed January 10<sup>th</sup>,  
2 2020, as an exhibit to the state's Notice of  
3 Rebuttal Expert Witnesses. It is dated January of  
4 2019. If I could screen-share, I could show the  
5 doctor the document that I have and confirm it is  
6 the same.

7 THE COURT: You may.

8 BY MS. VERNESS:

9 Q. Thank you, your Honor.

10 Dr. Martinez, are you able to see my  
11 screen?

12 A. Yes, I am.

13 Q. Are you able to see where it has "Exhibit  
14 1"?

15 THE COURT: No, we are not seeing that.  
16 You have to open it.

17 MS. VERNESS: Thank you for that time, your  
18 Honor.

19 THE COURT: Okay.

20 BY MS. VERNESS:

21 Q. So, Doctor, is everyone able to see Exhibit  
22 1?

23 A. Yes.

1 Q. And as I'm scrolling down, I have what was  
2 filed Professional Vitae, January of 2019.

3 A. Correct.

4 Q. And this document is a total of seven  
5 pages, just to confirm. It looks like it's only  
6 five.

7 A. Right.

8 Q. Is that accurate, Doctor?

9 A. I have six pages.

10 Q. Okay. If it's okay, I'll just scroll to  
11 the last page of the document that I have, if you  
12 could confirm.

13 A. Yes. I believe there's an error in the  
14 numbering of the pages.

15 Q. Okay. Does that accurately reflect the  
16 last page you have?

17 A. Yes, it does.

18 MS. VERNESS: Thank you, your Honor. I'm  
19 satisfied that we have the same document at this  
20 time.

21 THE COURT: So, are you withdrawing your  
22 objection to him referring to it?

23 MS. VERNESS: Yes, at this time. Thank  
24 you, your Honor.

1 THE COURT: Okay. So, Doctor, you may  
2 refer to the curriculum vitae.

3 THE WITNESS: Thank you.

4 THE COURT: You may inquire, counsel.

5 BY MR. JACKSON:

6 Q. Dr. Martinez, as far as your professional  
7 vitae is concerned, did you work on a residency in  
8 forensic psychology?

9 A. Yes, I did.

10 Q. And who -- under what supervision or what  
11 doctor supervision did you work that residency?

12 A. That was under the supervision of Dr. Roger  
13 Enfield. He was a board diplomat in neuropsychology  
14 and forensic psychology as well.

15 Q. What did you do while working under  
16 Dr. Enfield's supervision?

17 A. Well, the primary focus of the residency  
18 was to, obviously, under supervision, conduct  
19 psychological evaluations of inmates, individuals  
20 going through the criminal system in order to assess  
21 current psychological status and then to provide  
22 recommendations to the court with regards to  
23 sentencing options and also for treatment  
24 recommendations.



1 Q. Did there come a time where you later  
2 became a staff psychologist at Saint Mary's Hospital  
3 in Tucson, Arizona?

4 A. Yes. That was in 1987 after the move from  
5 New Mexico to Arizona.

6 Q. And what were your chief responsibilities  
7 as a staff psychologist at Saint Mary's Hospital in  
8 Tucson?

9 A. Well, the responsibilities were to, not  
10 only conduct assessments of psychological status,  
11 but also neuropsychological status and then provide  
12 recommendations and feedback to the treating  
13 physician as well as the other staff members, the  
14 other therapists that were involved in the overall  
15 care of the patient.

16 And the patients ranged anywhere from  
17 individuals having suffered amputations, stroke,  
18 individuals with spinal cord injuries, and,  
19 obviously, individuals that had suffered severe head  
20 injuries.

21 Q. Was there any special assignments that you  
22 had while you were a staff psychologist at Saint  
23 Mary's Hospital dealing with the traumatic brain  
24 injury?

1           A. Yes. I became the chief psychologist for  
2 the Traumatic Brain Injury Team, and, again, that  
3 was -- the team was composed of, not only the  
4 psychologists, but also physical therapy,  
5 occupational therapy, speech and language therapy  
6 and the physiatrist who was, obviously, a physical  
7 medicine rehabilitation specialist.

8           Q. Did any of those duties include the  
9 diagnosis or assessment of cognitive impairments?

10          A. Yes. In reference to the assessment of  
11 neuropsychological status, obviously, it always  
12 involved an assessment of intellectual functioning.

13          Q. How long did you work at Saint Mary's  
14 Hospital?

15          A. I worked there for a total of ten years  
16 from 1987 to '97.

17          Q. What did you do professionally after you  
18 left Saint Mary's Hospital in 1997?

19          A. I engaged in full-time private practice in  
20 the field of forensic psychology. I had already  
21 begun a part-time private practice doing some work  
22 for the courts for Child Protective Services and the  
23 like, doing custody evaluations, and, obviously,  
24 competency to stand trial, insanity type of

1 defenses, mental status at the time of the offense.  
2 So, in 1997 I decided to go full-time private  
3 practice.

4 Q. And have you been in full-time private  
5 practice as a forensic psychologist for these past  
6 23 years?

7 A. I have.

8 Q. What are areas of practice that you  
9 primarily are involved in as a forensic psychologist  
10 over the past 23 years?

11 A. The bulk of my work has been conducting  
12 competency-to-stand-trial evaluations, mental state  
13 at the time of the offense. The referrals are made  
14 typically by the court, by superior court, although  
15 there are cases where I'm asked to provide  
16 assessments for the defense as well as the  
17 prosecution, the county attorney's office. Also, a  
18 bulk of the referrals come from the federal public  
19 defender's system.

20 The rest of the work has been with working  
21 for adult probation departments conducting  
22 psychological, psychosexual, and some of those  
23 evaluations also requiring assessment of  
24 intellectual functioning and, obviously, to a lesser

1 degree, conducting Atkins-type cases.

2 Q. Now, when you say "Atkins-type cases," what  
3 are you referring to, Dr. Martinez?

4 A. Capital cases in which the state has filed  
5 a petition for the death penalty for a particular  
6 defendant.

7 Q. And is that where there's a claim of  
8 possible intellectual disability of a defendant  
9 facing a capital offense?

10 A. Yes. Based on the 2002 case of Virginia v.  
11 Atkins where, you know, executing an individual who  
12 has been diagnosed with intellectual disability goes  
13 against the Eighth Amendment of cruel and unusual  
14 punishment.

15 So, yes, the assessment involving,  
16 obviously, an assessment of intellectual ability,  
17 adaptive behavior or adaptive functioning and trying  
18 to determine whether that disability developed prior  
19 to the age of 18.

20 Q. So, what percentage of your practice  
21 currently over the past 23 years -- not currently  
22 but over the past 23 years, what percentage of your  
23 practice is devoted to conducting forensic type of  
24 psychological evaluations?

1       A. I would say it's probably about 95 percent  
2 at this point. In the past I've also provided  
3 therapy-type services, consultations, but in general  
4 the bulk of my work now is forensic psychology.

5       Q. And in all of those types of cases where  
6 you conduct forensic type of psychological  
7 evaluations, how is your practice divided in terms  
8 of professional services to the courts, to  
9 defendants, or for the prosecution?

10      A. It's difficult to place a number, but I can  
11 certainly tell you that the bulk of the referrals  
12 come from the court system, whether it's superior  
13 court or the federal district, U.S. court.

14           I do get referrals from both the public  
15 defender's office and the county attorney's office  
16 in reference to competency-to-stand trial-type  
17 evaluations, mental state at the time of the  
18 offense.

19           In regards to capital cases where the death  
20 penalty is the issue, I've received some referrals  
21 from the public defender's office, but invariably  
22 they don't come to fruition for one reason or  
23 another. They may be canceled. So, the cases that  
24 I've testified on or conducted evaluations, Atkins

1 types of evaluations, have been primarily for the  
2 prosecution.

3 Q. Do you have an estimate as to the number of  
4 cases that you have conducted an Adaptive Behavior  
5 Assessment of a defendant in a capital case for the  
6 prosecution?

7 A. I would say a strong estimate is ten. I  
8 counted about twenty cases in which the death  
9 penalty was an issue but several of those did not  
10 end up including an assessment of adaptive  
11 functioning, so 10 to 15 would be a fair estimate.

12 Q. I'll ask you some questions about how you  
13 conduct Adaptive Behavior Assessments in Atkins  
14 cases, prong two.

15 You're familiar with that, correct?

16 A. Yes.

17 Q. Okay. As part of that assessment or Atkins  
18 investigation, do you collect any records pertaining  
19 to a defendant?

20 A. Yes, I do.

21 Q. Like what type of records would you attempt  
22 to obtain or obtain in conducting an Atkins  
23 investigation?

24 A. Well, I make an effort to follow the

1 guidelines related to -- or stipulated by the  
2 American Association of Intellectual and  
3 Developmental Disabilities, AAIDD, the 11<sup>th</sup>  
4 Edition.

5           And certainly they emphasize the need to  
6 obtain as much information from different sources as  
7 possible so that one can analyze the information  
8 that is gathered and determine whether, you know,  
9 how reliable is the information, how pertinent is  
10 the information, and whether there is consistency in  
11 particular areas addressing the three domains of  
12 adaptive behavior, the conceptual, social, and the  
13 practical aspects.

14           So, definitely in terms of records, if  
15 there are school records, those would be very  
16 important to determine. Usually -- typically an  
17 individual will be assessed during the elementary  
18 school experience.

19           If there are any significant problems that  
20 are detected by teachers and other staff, so an  
21 assessment may be conducted, and so those are a very  
22 good, strong type of reliable information that one  
23 can obtain.

24           But besides school records, certainly a

1 comprehensive social history, family history, if  
2 there are any records available, medical records,  
3 any kind of records that may be available pertinent  
4 to the individual's developmental period.

5 Q. Dr. Martinez, in any of these Atkins  
6 investigations that you've conducted, have any of  
7 the defendants come from another country of origin  
8 than the United States?

9 A. Yes. As a matter of fact, most, if not  
10 all, of the defendants have come from Mexico.

11 Q. Are the 10 to 15 cases you recall, the  
12 majority of those, if I'm understanding your  
13 testimony, the defendant --

14 A. I would say at least two-thirds.

15 Q. And have you experienced difficulties in  
16 obtaining some of these records, such as the school  
17 records, from some of these defendants' countries of  
18 origin, like Mexico?

19 A. Well, even in the best of circumstances, an  
20 assessment of adaptive functioning is quite  
21 challenging. There's so much information that needs  
22 to be gathered. Quite often there are incomplete  
23 records, so the reliability is quite low.

24 Whether one is just following a



1 semi-structured interview format or even via the use  
2 of standardized measures, the measures that are  
3 available in this country are standardized on a  
4 sample of the U.S. population. And so we have to  
5 extrapolate how those -- the information that is  
6 provided in those scales, how does that translate  
7 into an individual who is raised in a totally  
8 different environment.

9           Again, the scales are based -- the  
10 standardization sample is based on an  
11 English-speaking sample, so, again, there are a lot  
12 of situations in which such scales are -- they leave  
13 a lot to be desired, in other words. I'm not  
14 against using them. I have used them in the past  
15 and I will use them in the future because they d  
16 serve as data-gathering instruments. But in terms  
17 of their reliability and in terms of following their  
18 standard administration procedure, that leaves a lot  
19 to be desired.

20           The other component of that is that those  
21 scales are not designed for retrospective type of  
22 analysis. They're most useful when they are  
23 conducted on real time, what is going on at the  
24 current, present time, not what happened 5, 10, 15

1 years ago in which the memory can be questioned of  
2 the particular informants that are using and  
3 completing those forms.

4 So, again, you have to use any method that  
5 is available at the time in gathering as much  
6 information regarding the individual's background in  
7 those domains as possible.

8 Q. Dr. Martinez, throughout your answer you  
9 kept talking about rating scales and I wanted to get  
10 a little bit more specific.

11 When you refer to "rating scales," are you  
12 referring to Adaptive Behavior Assessments such as  
13 the ABAS or the Vineland test tools?

14 A. Yes, I am.

15 Q. So, if I understood your testimony, those  
16 are not to be applied retrospectively, the  
17 administration of either the Vineland or ABAS, for  
18 example.

19 A. Well, in this type of cases -- and, again,  
20 including myself -- we have used them retroactively.  
21 The AAIDD recommends the use of the scales, even in  
22 a retrospective or retroactive analysis.

23 However, they caution that one needs to  
24 include the limitations associated with that

1 approach in the body of the report and in arriving  
2 at final conclusions. So, again, an ideal situation  
3 would be where a third- or fourth-grader is being  
4 assessed and their rating forms are being completed  
5 by a parent, a teacher, and, perhaps, two teachers,  
6 or a second parent, individuals who have daily  
7 contact with the child so that the behaviors can be  
8 assessed in a variety of contexts, not only within  
9 the home, but also within the school setting.

10 Q. You also in your answer to my previous  
11 question, you referred to a semi-structured format.

12 Can you define or explain what you mean  
13 when you refer to a semi-structured format?

14 A. Well, a semi-structured approach,  
15 obviously, there's some degree of structure. But  
16 instead of following item per item and asking  
17 questions in that manner, it takes on more of a  
18 conversational-type approach in which one can ask  
19 open-ended questions, one can expound or try to  
20 clarify a certain response, probe deeper into a  
21 particular answer from an informant.

22 So, they're not structured as, let's say,  
23 an IQ test in which there's only one way to  
24 interpret that particular test -- administer that

1 particular test. With scales, especially the  
2 Vineland, you conduct an interview and the  
3 semi-structured interview approach is best with  
4 that.

5 The ABAS, they use more of a rating scale  
6 that can be completed by the informant. In  
7 situations where the informant may not be able to  
8 understand or have very poor reading comprehension,  
9 the examiner can read the items to the informant.

10 Q. As part of your experience in conducting  
11 Adaptive Behavior Assessments of a defendant in a  
12 Atkins case, in addition to obtaining the records  
13 that you've testified to, do you also interview the  
14 defendant?

15 A. Yes, I do.

16 Q. Do you assess a defendant's academic  
17 achievements during the time that you are conducting  
18 that assessment on the defendant?

19 A. Yes, I do.

20 Q. Do you administer any types of tests,  
21 whether they be structured or semi-structured, to a  
22 defendant?

23 A. Well, in reference to the assessment of  
24 achievement, academic achievement, those are also

1 standardized tests that there's no room for  
2 deviation as opposed to adaptive behavior scales or  
3 a semi-structured type of interview.

4           So, with reference to the adaptive  
5 behavior, again I rely heavily on the available  
6 records, particularly those who may appear to be  
7 more objective that have no stake in the case,  
8 police reports, anything that will give information  
9 as to the individual's problem-solving ability,  
10 ability to relate to others, ability to use adequate  
11 judgment in difficult situations.

12           So, that would include observing the  
13 individual during the interrogation, for instance,  
14 what kind of behaviors are evidenced. Because the  
15 idea is not only to obtain information regarding the  
16 individual's level of adaptive or intellectual  
17 functioning during the developmental period, but  
18 also current status and, more important than that,  
19 whether at or around the time of the alleged offense  
20 the individual was suffering from intellectual  
21 disability.

22           Q. Dr. Martinez, you referred to some of the  
23 collateral information that you rely upon. And does  
24 that include you conducting interviews of people who

1 knew the defendant at different stages of his life  
2 and especially prior to the onset of the  
3 developmental period at the age of 18?

4 A. Yes, I do.

5 Q. And what is the purpose of conducting those  
6 interviews of these individuals that have had  
7 contact with the defendant?

8 A. Well, again, this is the retrospective  
9 aspect of this type of evaluation. I mean, there's  
10 not gonna be any one Atkins case in which the  
11 individual being assessed is going to be under 18.

12 So, therefore, at the very best you might  
13 assess a 19-year-old. But most of the defendants  
14 that I've evaluated are already several years past  
15 the 18-year developmental period cutoff.

16 So, it is important to try to obtain  
17 information regarding, if at all possible, during  
18 the developmental period, but even if not, what was  
19 the individual -- what were the individual's  
20 capacities both intellectually and in terms of  
21 adaptive functioning prior to the alleged offense.

22 So, yes, interviewing past employers,  
23 supervisors, certainly even farther beyond teachers,  
24 parents, family members, again, it's another source

1 of information. We are not to rely on any one  
2 particular source of information. To just conduct  
3 adaptive functioning -- an assessment of adaptive  
4 functioning even using standardized adaptive  
5 behavior scales would not be sufficient. They are  
6 imperfect, and even the AIDD testifies to that. So,  
7 we are to use as many sources of information in  
8 order to arrive at our final conclusions.

9 Q. Dr. Martinez, in conducting interviews of  
10 family members or friends, former coworkers,  
11 supervisors, teachers, for example, is part of that  
12 to obtain anecdotal information about the  
13 defendant's life at those certain stages?

14 A. In my opinion it is, because they are  
15 reconstructions of the individual's recollections of  
16 what that individual -- the defendant was like, what  
17 type of abilities he possessed or lacked, and so  
18 it's very difficult to know exactly how reliable the  
19 information obtained from a particular informant is.

20 Again, with family members there's always  
21 the possibility that, depending on the quality of  
22 the relationship they had with the defendant, they  
23 might either exaggerate deficits or exaggerate  
24 strengths depending on what their take is. If they

1 -- especially if they already understand what the  
2 stakes are, what the defendant is going through,  
3 that he's facing the possibility of a death  
4 sentence.

5           So, we have to take all those factors into  
6 consideration. We don't have to worry about those  
7 factors in doing an assessment of a child or even an  
8 individual who is filing for Social Security  
9 Disability type of services. But in this type of  
10 cases certainly the stakes are high and especially  
11 family members will have some stake at it.

12           Q. Dr. Martinez, with respect to the  
13 interviews of these informants and family members,  
14 teachers, coworkers, do you prefer to conduct those  
15 interviews semi-structured or through the use of  
16 standardized adaptive behavior rating scales?

17           (Technical difficulty.)

18           MS. VERNESS: Your Honor, did we lose him  
19 or did I miss the response?

20           THE WITNESS: I think we lost connection.  
21 Nothing happened for about a minute or so.

22           THE COURT: That's fine. Thank you. Go  
23 ahead and repeat your question, please, Mr. Jackson.



1 BY MR. JACKSON:

2 Q. Dr. Martinez, with respect to the  
3 interviews of informants, people that you've  
4 identified from family members, some friends,  
5 coworkers, supervisors, do you prefer to conduct  
6 those interviews in a semi-structured manner or do  
7 you prefer to use some standardized adaptive  
8 behavior rating scale in that process?

9 A. Well, ideally, the AAIDD does recommend  
10 that standardized measures be employed. Again, I've  
11 already mentioned some of my own concerns with the  
12 use of those scales in a retrospective analysis and  
13 also the way it's standardized on the different  
14 population than most cases the defendant is from.

15 But, nonetheless, that is the -- those are  
16 the guidelines stipulated by the AIDD, so I don't  
17 have any problem with the use of those scales,  
18 rating scales. And I have used both. I have my own  
19 semi-structured approach where I try to address  
20 developmental issues all the way from childhood,  
21 whether there were any complications at birth or  
22 with the pregnancy of the mother, whether there are  
23 any issues associated with alcohol, drug abuse, or  
24 any other type of cerebral insult or any impact on

1 the brain that the child could have suffered, you  
2 know, as a fetus or at the time of birth or even  
3 during the early developmental years.

4 Intellectual disability typically shows  
5 itself within the first few years of birth and is  
6 detected typically in the early years in school.  
7 Now, it can also develop later on, particularly if  
8 there's any kind of traumatic brain injury, as long  
9 as it happens, of course, prior to the age of 18.

10 Q. Dr. Martinez, you've testified several  
11 times that you follow the guidelines set forth under  
12 the AAIDD.

13 And are part of those guidelines associated  
14 with the tests of adaptive behavior that they should  
15 meet the cultural and demographic needs pertinent to  
16 each specific defendant in an Atkins type of  
17 investigation?

18 A. That is emphasized in the AAIDD guidelines  
19 throughout the discussion of adaptive functioning,  
20 adaptive behavior. Very important to compare the  
21 individual's adaptive functioning to other  
22 individuals that were raised or were living within  
23 the same environment and who are the same age group.

24 So, certainly linguistic factors, cultural

1 factors, degree of opportunities available to the  
2 individual in comparison to others must be taken  
3 into consideration.

4 Q. Dr. Martinez, you've kinda set the backup  
5 or the foundation as to how you conduct an Atkins  
6 type of investigation specifically more towards  
7 prong two of Adaptive Behavior Assessments and  
8 information you rely on.

9 I'm gonna kind of change to a different  
10 topic and I'm gonna ask you some questions  
11 pertaining to in-person versus videoconferencing  
12 formats when interviewing informants in an Atkins  
13 type of case.

14 THE COURT: Mr. Jackson, since you're  
15 moving into another area, I think this would be a  
16 good time to take a short afternoon recess. It's a  
17 little after three, so we will be in recess till  
18 about 3:20, 15 minutes or so.

19 Doctor, I'd appreciate if you stay on the  
20 conference call. You can mute your button and turn  
21 off your camera, but rather than trying to get  
22 reconnected, I'd appreciate if you'd stick around  
23 there.

24 THE WITNESS: Yes, your Honor.

1 THE COURT: All right. Thank you. Court's  
2 in recess.

3 (Recess taken.)

4 THE COURT: Thank you. Please be seated.  
5 For purposes of the record, I'd like the defense  
6 attorney to identify who is present.

7 MS. VERNESS: Your Honor, present besides  
8 myself in the same room are Ms. Hickman, Mr.  
9 Arrascada, and Mr. Goodnight. That is all.

10 THE COURT: Thank you. And, Mr. Jackson,  
11 on behalf of the state.

12 MR. JACKSON: Yes, your Honor. Also  
13 present is District Attorney Christopher Hicks and  
14 Deputy District Attorney Travis Lucia.

15 THE COURT: Thank you. We have the same  
16 two interpreters present, Mr. Miller and  
17 Ms. Escobar, and we can proceed at this time.

18 BY MR. JACKSON:

19 Q. Dr. Martinez, in the break you moved to  
20 another different area of my screen, so my eyes may  
21 be directed in another location.

22 Right before the break, I was just getting  
23 ready to ask you some questions about in-person  
24 versus videoconferencing type of formats when

1 interviewing informants.

2           Are you aware of any professional  
3 standards, ethical stands within your field and  
4 profession that requires in-person contact when  
5 conducting interviews of family members or other  
6 informants in an Atkins case?

7           A. That would -- I'm sorry. That you said  
8 that would require?

9           Q. Yes, require it.

10          A. Well, ideally you would want to interview  
11 the informant face to face. That would be the ideal  
12 situation when available.

13          Q. When you're saying "face to face," do you  
14 mean in person?

15          A. In person, yes. I'm sorry.

16          Q. You said "ideally."

17          A. Correct.

18          Q. But in other situations, which occurs in  
19 cases, are there not-so-ideal situations?

20          A. Well, yeah. Certainly there are situations  
21 in which an interview -- particularly during these  
22 times of COVID-19 -- where in-person contact is  
23 essentially at this point pretty rare with any type  
24 of an assessment of this sort.

1           So, with informants the additional problem  
2 is that quite often they're in another country and  
3 so for various reasons in-person interviews may not  
4 be available. And so at that point then one must  
5 adapt and adjust the conditions of the assessment to  
6 whatever other methods, you know, may be available  
7 that are still useful and that can provide some  
8 degree of convergence or consistency in terms of the  
9 quality of adaptive behavior that one's assessing.

10           Q. And in some cases could that include a  
11 telephone interview of an informant?

12           A. Yes. I would venture to say that in my  
13 experience the evaluators, again, if available, they  
14 conduct in-person interviews but quite often if that  
15 is not possible, they will employ -- in the past it  
16 was mostly just the telephone or having the  
17 interview videotaped by someone else and then that  
18 information being provided to the evaluator,  
19 anecdotal type of notes at times in which the  
20 informant may write somewhat of a letter, in a  
21 sense, providing just background information on how  
22 the individual functioned during the time that they  
23 were in contact with them.

24           Q. Telecommunications such as

1 videoconferencing, this Zoom platform or Skype, is  
2 that also another alternative method to in-person  
3 interviews of informants when we are facing some  
4 not-so-ideal circumstance such as COVID-19 global  
5 pandemic?

6 A. Well, yes. I mean, that goes across  
7 different settings, even, you know, what we're doing  
8 now here. I don't know how the reliability of the  
9 validity of this particular hearing is going to be  
10 assessed because we're doing it via Zoom, but  
11 certainly we're able to communicate, we're able to  
12 provide and exchange information, we're able to at  
13 least get an idea of what we look like and maybe  
14 even get an idea of what kind of mood we may be in.

15 But certainly more recently this -- it's  
16 nothing new. I mean, as far as back as 2013 the APA  
17 set a set of guidelines for the practice of  
18 teleconferencing in psychology and those guidelines  
19 addressed the ethical standards, legal issues,  
20 professional issues that one needs to be aware of  
21 when conducting teleconferencing.

22 So, it would apply to interviews with  
23 informants as well. Most of the research -- and  
24 this goes back even as far back as to the '60s when

1 individuals were being contacted via, obviously,  
2 phone primarily. But now with the advent of higher  
3 technological opportunities, we have Zoom, we have  
4 videoconferencing that can be more reliable and can  
5 provide more information than just mere having  
6 someone else interview the informant and then have  
7 that information transferred over to the evaluator.  
8 But, again, even under those circumstances, any type  
9 of information that may be pertinent should be  
10 gathered.

11 Q. Is there a fear about with the passage of  
12 time that some important or pertinent information  
13 may be lost if it is not gathered in a timely  
14 manner?

15 A. Yes. The more time that passes by,  
16 different circumstances may arise in which there  
17 could be an impact, an adverse impact upon the  
18 reliability of that information.

19 As I mentioned before, even at this point,  
20 if you're going to ask somebody what was this  
21 individual like in this particular area during  
22 childhood, well, at five years old, ten years old,  
23 twelve years old, what specific stage of the child's  
24 development would you be assessing.



1           So, again, memory issues, how memory  
2 functions, whether we are actually recollecting the  
3 exact way we perceive a certain individual under  
4 certain circumstances performing a particular  
5 activity or whether it's something that we are  
6 reconstructing from bits and pieces of information  
7 relative to memory.

8           Q. Dr. Martinez, you'd referred in your  
9 testimony to the 2013, the APA ethical standards  
10 being changed in connection with the telepsychology  
11 platform. Do you recall that testimony?

12          A. Yes.

13          Q. And that would be more in the form of  
14 clinical psychology as opposed to forensic  
15 psychology at that time, correct?

16          A. Yes. It's dealing more with providing of  
17 therapeutic services. But they even goes as far to  
18 address -- especially the more current articles are  
19 addressing opportunities to provide testing, which  
20 I, for one, sort of have a question regarding how  
21 would you administer an IQ test, you know, via  
22 teleconferencing? I would have issues with that.

23               But certainly with the assessment of  
24 adaptive behavior, here you're gathering

1 information. You're not necessarily testing the  
2 individual. I believe, you know, Dr. Puente in the  
3 past has administered a particular test to maybe one  
4 member of the family and with, you know, some  
5 question of the validity of the results.

6 But in any case, you know, even a test  
7 being administered over the phone, I would question  
8 that, and I'm talking about a standardized test such  
9 as an IQ test. But for data-gathering purposes, you  
10 follow the approach that is recommended by the  
11 publisher of the test and try to adhere as much as  
12 you can to the standard procedures for  
13 administration.

14 Now, most of these tests have not been  
15 standardized on teleconferencing, so, therefore,  
16 that would be a limitation, but that does not  
17 preclude one from using whatever approach is  
18 available at the time.

19 Q. Is that just as the standards require or  
20 state that tests such as the Vineland or ABAS should  
21 not be applied retrospectively but, nevertheless, it  
22 still is?

23 A. Well, again, yes. You know, that's another  
24 one of the limitations, but that should not preclude

1 one from administering those type of scales if, you  
2 know, that's -- you can do that.

3 Q. I want to try to have you compare the  
4 information gathering in an Atkins type of  
5 investigation where you're trying to obtain as much  
6 information as you can from sources such as  
7 informants, family members, friends, coworkers, for  
8 example, versus the telepsychology and use of  
9 teleconferencing in delivering or rendering clinical  
10 services to a patient.

11 Do you find that one may have a higher  
12 level of scrutiny than the other?

13 A. Well, certainly. If one is going to be  
14 conducting a diagnostic type of interview trying to  
15 assess whether the individual is experiencing some  
16 sort of a serious mental health issue or even in  
17 just the provision of therapeutic services, that  
18 requires a much higher level of clinical judgment,  
19 expertise, experience, and training than conducting  
20 an interview with an informant.

21 This interview with informants do not  
22 necessarily have to be conducted by the expert  
23 himself or herself. They can be conducted, as I  
24 mentioned before in the case that I was involved

1 with Dr. Dr. Puente, those were conducted by members  
2 of the defense team. I'm not quite sure what the  
3 qualifications were, whether they had any training  
4 in psychology or how to conduct that type of an  
5 interview but, nonetheless, the information had some  
6 utility.

7           So, again, information can be exchanged in  
8 a variety of ways and certainly with the advent of  
9 teleconferencing where you can actually also include  
10 video. In the past it was primarily, you know,  
11 audio, just telephone, but now this is a much better  
12 way to conduct those type of interviews where you  
13 can obtain additional information as to what's going  
14 on during the interview.

15           Q. And as far as obtaining information, if a  
16 forensic psychologist or a neuropsychologist decided  
17 that, based upon that interaction with an informant,  
18 that it would be in the best interest to administer  
19 a rating scale such as the ABAS to that individual,  
20 is there any requirement that the ABAS has to be  
21 administered by a psychologist?

22           A. No. The manual stipulates that it can also  
23 be administered by a trained technician, a trained  
24 assistant. They would require, obviously, some

1 education, some direction in terms of how to  
2 administer that test, but it doesn't necessarily  
3 have to be a doctoral or Ph.D, certified licensed  
4 psychologist.

5 Q. Dr. Martinez, are you aware of any research  
6 literature, any scholarly articles or ethics in your  
7 profession that prohibits the use of  
8 videoconferencing with family members, friends,  
9 former coworkers or any associates of a defendant in  
10 an Atkins case?

11 A. No, I'm not aware of that.

12 Q. And in the Atkins types of investigations  
13 that you have been involved with in your career,  
14 have you ever conducted any interviews of family  
15 members or any other informants by using a telephone  
16 or some type of videoconferencing platform?

17 A. Not through -- well, I'm sorry. I have  
18 used indirectly where I've been provided by video  
19 interviews of informants, family members. So, I  
20 have received that type of access to that type of  
21 data, which I would say is in some ways, perhaps,  
22 better than just using the telephone.

23 But I have also conducted telephone  
24 interviews when informants, family members for the

1 defendant are made available to me. I have -- I've  
2 had different levels of success in reaching those  
3 individuals. In one particular case I was given a  
4 list of about seven family members and only one  
5 decided to speak with me, so that's all the limited  
6 information that I obtained.

7 But I was also -- of course, I review the  
8 information that is provided through the defense  
9 witness expert and so I use that as well and  
10 incorporate it into my overall findings.

11 Q. That -- I don't want you to misunderstand  
12 the word I will use, but in the case where you got a  
13 list of family members but only one of those family  
14 members spoke to you and that would be over the  
15 telephone, is that something that you have  
16 experienced in conducting these Atkins types of  
17 investigations when retained by the prosecution, is  
18 the lack of level of cooperation of family members?

19 A. That has been my experience but, then  
20 again, it depends on who the family member is. I  
21 remember one particular case in which the ex-wife of  
22 the defendant was willing to speak with me and,  
23 obviously, because of the history the information  
24 she provided was mostly negative.

1           So, again, it all depends. Some family  
2 members were negative in the sense that it would not  
3 be considered, I guess, a mitigating factor for the  
4 defendant.

5           Q. In those cases where you have testified as  
6 an expert in Atkins cases, you have had an  
7 opportunity to review reports of defense experts,  
8 either forensic psychologists or neuropsychologists,  
9 who have conducted Adaptive Behavior Assessments on  
10 behalf of the defendant.

11           Is that an accurate statement?

12           A. Yes, I have.

13           Q. And with respect to a defense expert,  
14 someone such as Dr. Puente, for example, did you  
15 find in reviewing those reports that the defense  
16 expert had the same difficulty in getting family  
17 members to cooperate and be interviewed?

18           A. In those particular cases it seems that the  
19 family members, sometimes there's actually quite a  
20 few of them, seven, eight, ten twelve different  
21 informants, and they seem to have a willingness to  
22 speak with the defense expert.

23           Q. In those cases where you have used methods  
24 as an alternative to in-person interviews of

1 informants to obtain anecdotal information regarding  
2 a defendant, did you find that those methods were,  
3 in fact, useful to you?

4 A. Well, you have to take it case by case and  
5 then try to get -- use clinical judgment in  
6 assessing how reliable is the information, how does  
7 it coincide with some of the other information that  
8 is available from other informants.

9 Quite often, if you use rating scales there  
10 will be conflicting findings, where some of the  
11 raters rate the individual in a particular domain,  
12 you know, much higher than others, so what do you do  
13 with that information?

14 But, again, you know, it's another method  
15 of information gathering and that, hopefully, will  
16 be useful in the overall picture of the overall  
17 analysis of your final conclusions.

18 Q. Dr. Martinez, with the global pandemic as  
19 it is across the world and with the need to obtain  
20 as much information as you can and with the intent  
21 not to lose information as a result of an ailment or  
22 death or someone moving, would you, in fact, use  
23 alternative methods to in-person interviews in order  
24 to conduct an Atkins investigation?



1       A. Yes, particularly with the advent of the  
2 fact that this scale is Vineland and the ABAS, I  
3 believe they were established in 2015, 2016. Even  
4 at that point, before we even knew that we would be  
5 hit with this pandemic and the need to use  
6 teleconferencing, they were already instituting  
7 methods to use the online type of service in which  
8 individuals could be, you know, evaluated,  
9 interviewed, even provided with therapeutic services  
10 via teleconferencing.

11       Q. And the current version of the Vineland and  
12 ABAS, Vineland-3 and ABAS-3, are those available to  
13 be administered through some form of  
14 telecommunication as opposed to just the question  
15 booklet that preceded those?

16       A. Yes. They both indicate that they can be  
17 administered via teleconferencing. And, again, I  
18 emphasize, you know, that there's the need to  
19 certainly include that in the report as one of the  
20 limitations of the overall findings, that that is  
21 not the way these measures were standardized.

22       Q. And it's ideal in a perfect situation, it's  
23 ideal that that be administered in person, but  
24 there's nothing that prohibits it from being

1 administered through some other alternative means  
2 such as teleconferencing.

3 A. Correct. And at this point there's really  
4 insufficient research to say that the  
5 teleconferencing approach is certainly very limited  
6 in comparison to in person. We need more research  
7 in that area but there's nothing to say that one  
8 approach is better than the other.

9 I think that the idea of conducting these  
10 interviews in person is something that we have  
11 traditionally been accustomed to. And certainly our  
12 guidelines, our standards of practice do push for  
13 the idea that one should make any effort to  
14 interview, whether there's an informant or the  
15 defendant himself or herself person, personally.

16 But they also allow for opportunities where  
17 that cannot be done and so then you have to move to  
18 the next level, always including the fact that,  
19 well, this is the approach I used and it's got some  
20 inherent limitations.

21 MR. JACKSON: Your Honor, I pass the  
22 witness.

23 THE COURT: Thank you. Counsel, you may  
24 inquire.

1 MS. VERNESS: Thank you, your Honor.

2 CROSS-EXAMINATION

3 BY MS. VERNESS:

4 Q. Dr. Martinez, good afternoon. My name is  
5 Gianna Verness. I'm with the Washoe County Public  
6 Defender's Office and I represent Mr. Martinez  
7 Guzman. Pleasure to meet you.

8 A. Good afternoon. Likewise.

9 Q. So, first of all, what items did you have  
10 the opportunity to review in preparation for today's  
11 hearing?

12 A. Essentially items related to what's in the  
13 literature regarding the assessments, AAIDD  
14 guidelines, information related to teleconferencing,  
15 research that's been done in that area over the past  
16 few years, and articles related to the whole issue,  
17 the controversy that is involved in the professional  
18 community right now regarding the reliability and  
19 the challenges that we encounter when conducting  
20 this type of an assessment, particularly as it  
21 relates to adaptive behavior.

22 Q. And when you say the literature as it  
23 relates to the controversy, what controversy are you  
24 referring to?

1       A. Well, the fact that the typical way of  
2 applying this type of scales, the ABAS and the  
3 Vineland, in a retrospective analysis is  
4 questionable.

5       Q. And you described that as a controversy  
6 that exists within your community right now.

7             Is that correct?

8       A. Correct.

9       Q. But this is not a new or novel issue that  
10 has come up like COVID, correct?

11       A. No. There's been questions regarding the  
12 validity of this approach, particularly in a couple  
13 of the articles that I reviewed dated back to, I  
14 believe, 2015, 2016.

15       Q. And so with regards to the controversy,  
16 there are many in the field that believe it is  
17 appropriate and there are others that question the  
18 use of these types of standardized instruments.

19             Is that correct?

20       A. Yes.

21       Q. Now, did you have an opportunity to observe  
22 Dr. Puente's testimony yesterday?

23       A. No, I did not.

24       Q. And were you provided a copy of his

1 testimonial transcript?

2 A. No, I was not.

3 Q. Doctor, before we go any further, I want to  
4 discuss a couple of items in your C.V. You've  
5 indicated that you do have a copy in front of you.

6 Is that correct?

7 THE COURT: I'm going to interrupt you.  
8 Would you remind me where this was originally?

9 MS. VERNESS: Your Honor, I'll share my  
10 screen, but it was the C.V. filed as Exhibit 1 on  
11 January 10<sup>th</sup>, 2020, as an Exhibit to the state's  
12 Notice of Rebuttal Expert Witnesses.

13 THE COURT: Okay. Thank you.

14 BY MS. VERNESS:

15 Q. Just to confirm, Dr. Puente, are you able  
16 to -- Dr. Martinez, My apologies --

17 A. No problem.

18 Q. -- you are able to see my screen with the  
19 C.V. on it?

20 A. Yes, I can see it.

21 Q. Okay. So, directing your attention here to  
22 page three and paragraph two, approximately halfway  
23 down you indicate, "I have also participated in over  
24 15 Atkins capital cases where the question at hand

1 is whether the defendant suffers from intellectual  
2 disability."

3 Can you clarify what you mean by  
4 "participation"?

5 A. Well, in terms of my participation, that  
6 involves, obviously, being asked to conduct an  
7 assessment to determine whether intellectual  
8 disability exists in a particular defendant  
9 employing the best practices and the standards --  
10 standardized measures and approaches that are  
11 applicable to this type of an assessment.

12 Q. And in Atkins cases we commonly use the  
13 vernacular of the prongs or the three parts of the  
14 analysis. Is that correct?

15 A. Correct.

16 Q. So, in the 15 cases that you referenced in  
17 your C.V. and today, I think you clarified and said  
18 10 to 15. Is that correct?

19 A. Yes.

20 Q. Would you participate as to prong one,  
21 prong two, prong three, all three, or a combination?

22 A. I would say I would use, obviously, all  
23 three. When I counted all the cases that I had  
24 listed up, it came closer to a higher number. But

1 then in reviewing that it was only -- some of them  
2 only required the intellectual assessment. So, I  
3 would feel comfortable with saying that at least  
4 between ten and fifteen require all three prongs.

5 Q. And the time frame in which you have  
6 conducted those 10 to 15 cases, how many years going  
7 back is that to the Atkins decision in 2002?

8 A. I believe the oldest one that I could find  
9 was back to 2005, but I believe it might have been  
10 another one a couple years before that, 2003 or so.

11 Q. And the one in 2005 was -- Court's  
12 indulgence -- do you believe that was the State of  
13 Arizona v. David Martinez Ramirez?

14 A. That was one of them. I'm not -- I don't  
15 believe that was the first one, obviously. There  
16 were a couple -- a few more before that one.

17 Q. Okay. And in looking at the 10 to 15 cases  
18 that you've participated in, how many of those  
19 resulted in testimony at an intellectual disability  
20 determination hearing?

21 A. That is difficult to say, but I would  
22 imagine that most of them did.

23 Q. And did you come to an intellectual  
24 disability determination in every single one of

1 those cases that we're talking about, the 10 to 15?

2 A. Yes, I did.

3 Q. And in your recollection did you determine  
4 that the individuals you assessed did not meet the  
5 legal definition and medical definitions of  
6 intellectual disability?

7 A. I don't believe I ever did or recall any  
8 cases.

9 Q. My apologies. If you could repeat that. I  
10 did not mean to cut you off.

11 A. No. That's fine.

12 No, I don't recall having indicated that  
13 the individual defendant suffered -- or met the  
14 criteria for intellectual disability.

15 Q. So, in every single case that you have  
16 participated in with regards to an Atkins claim or  
17 investigation, you made the determination that the  
18 individual did not meet the criteria, medical and  
19 legal, for that finding.

20 A. Well, there might have been one or two but  
21 a very limited number.

22 Q. And the participation that you have had in  
23 Atkins-type cases -- or Atkins cases, not type --  
24 has always been on behalf of the prosecution.



1           Is that correct?

2           A. That is correct, yes.

3           Q. And bearing in mind that you indicate 10 to  
4 15 assessments in the last 16 to 20 years -- well,  
5 that's not true -- 18 years, so you've done less  
6 than one a year. Is that correct?

7           A. That sounds about right. I should qualify  
8 my last statement, if I may.

9           Q. Yes.

10          A. At least -- and I don't remember the exact  
11 number but some of those cases were actually neither  
12 for the defense or the prosecution. They were  
13 ordered by the court.

14          Q. Okay. So -- go ahead.

15          A. Yeah, might have been a couple of them that  
16 were actually ordered by the court.

17          Q. Now, the process in Arizona for determining  
18 an Atkins claim is a bit different than the state of  
19 Nevada. Are you familiar with the state of Nevada,  
20 I should ask?

21          A. Well, I'm familiar with the fact that the  
22 three prongs of, you know, meeting the significant  
23 subaverage in intellectual ability concurrently with  
24 significant or subaverage deficits and adaptive

1 functioning occurring prior to the age of 18, so in  
2 that sense it's similar to what we have here in  
3 Arizona.

4 Q. But the process in Arizona is different in  
5 terms of the appointment of experts. They are  
6 actually appointed by the court to assess an Atkins  
7 claim. Is that correct?

8 A. Well, initially the first evaluator is  
9 appointed by the court.

10 Q. And if there is -- that's for intelligence  
11 testing. Is that correct?

12 A. Correct.

13 Q. And then if there is a finding that the IQ  
14 testing results in a score of 70, then other experts  
15 are then employed. Is that correct?

16 A. Correct.

17 Q. And so when you indicated that you were  
18 appointed by the court in a couple of the cases, in  
19 what fashion were you appointed? For intelligence  
20 testing?

21 A. Yeah. That would have been the first --  
22 the first phase of assessment.

23 Q. And so in those cases would you then -- did  
24 you go on to conduct assessment under prong two?

1       A. There's one particular case I'm thinking  
2 of, and, again, I'm not quite clear as to whether  
3 that one was for some reason the court got involved  
4 and asked me to become, you know, part of the  
5 evaluation process, but most of those first-phase  
6 cases only required the intellectual assessment, not  
7 the adaptive.

8       Q. So, to clarify, the case -- your  
9 involvement in Atkins cases has been for the  
10 prosecution with the exception of, perhaps, one case  
11 where you were appointed by the court for the  
12 purposes of intelligence testing.

13       A. That's -- that's my recollection, yes.

14       Q. And then, Dr. Martinez, have you published  
15 any books or articles related to intellectual  
16 disability?

17       A. No, I have not.

18       Q. Assessing intellectual disability?

19       A. No, I have not.

20       Q. In fact, you actually haven't published  
21 anything in the field of psychology throughout the  
22 course of your career. Is that correct?

23       A. That is correct.

24       Q. Now, I want to move on to the process of

1 evaluating intellectual disability for the purposes  
2 of an Atkins claim. Is that okay?

3 A. Yes.

4 Q. You testified on direct that there are  
5 three prongs, intellectual functioning, adaptive  
6 behavior, and the onset prior to age 18.

7 A. Correct.

8 Q. And you have participated in all three  
9 prongs in the 10 to 15 cases that you discussed --

10 A. That is correct, yes.

11 Q. -- absent the one where you were appointed  
12 by the court?

13 A. Yes. And, again, that's my recollection.

14 Q. Okay. And so starting with IQ tests or  
15 intellectual functioning tests, those are  
16 administered in a very standardized fashion.

17 Is that fair?

18 A. Yes.

19 Q. There are instructions that you follow.

20 A. Correct.

21 Q. There are recommendations for the -- or  
22 there are procedures that you follow for the testing  
23 environment.

24 A. Correct.

1 Q. You don't want anybody else present.

2 A. Right.

3 Q. They are not to be recorded. There is no  
4 assistance from third parties.

5 A. Correct.

6 Q. So, the process of assessing intellectual  
7 functioning is very standardized and not subject to  
8 a lot of variability.

9 A. Correct.

10 Q. So, a pretty straightforward assessment is  
11 done there.

12 A. That is correct. No variability in terms  
13 of the standardized approach to administering the  
14 test. If there is anything that deviates, then we  
15 are to include that in the report, again, as a  
16 limitation but sometimes it's needed.

17 Q. And so you've mentioned that a couple of  
18 times, mentioning limitations and making sure that  
19 they're noted. That is something that you want to  
20 do so that the record is complete and the user of  
21 the information understands limitations.

22 A. That is correct. I mean, the approach is  
23 to try to be as transparent as possible so that the  
24 trier of fact will have as much useful information

1 in making the final decision.

2 Q. And isn't it also true that you strive to  
3 have as valid and reliable information presented as  
4 possible?

5 A. On the part of the expert in the final  
6 report, yes.

7 Q. And meaning what you want to do as you go  
8 through an assessment is to make sure that there is  
9 as little error as possible.

10 A. Well, there's always inherent error in a  
11 variety of ways. But we have to take that into  
12 consideration and provide some sort of a statement  
13 as to what impact that particular type of error  
14 might have had upon the overall findings.

15 Q. But as you do your work you are taking  
16 every precaution, making every effort to insert as  
17 little variability, error, cause for question as  
18 possible.

19 A. That is correct. But there are variables,  
20 not only from the examiner, but also from the  
21 examinee that can distract from that -- in other  
22 words, make the -- confound the findings.

23 Q. Sure. And so when we talk about assessing  
24 adaptive behavior, this is a very different type of

1 assessment than intellectual functioning, correct?

2 A. Yes.

3 Q. It's much less straightforward.

4 Is that correct?

5 A. Well, straightforward in the sense that, I  
6 mean, it's very straightforward in just asking  
7 information about the individual but not as precise,  
8 I would say, as what is expected from an IQ test.

9 Q. Fair enough. "Precise" is probably a much  
10 better term to describe that, because there are a  
11 number of issues that you run into in attempting to  
12 assess adaptive behavior, correct?

13 A. Yes.

14 Q. And so let me back up just a second.

15 The overall purpose of the investigation  
16 and assessment that you're doing is to make a  
17 determination whether or not a person is  
18 intellectually disabled.

19 A. Correct.

20 Q. And if a person is found to be  
21 intellectually disabled, then the Eighth Amendment  
22 of the United States precludes the imposition of the  
23 death penalty.

24 A. Correct.

1 Q. So, you would agree that the work that you  
2 are doing is very serious.

3 A. Definitely.

4 Q. It is high stakes. Is that true?

5 A. Well, yes. It's a matter of life and  
6 death.

7 Q. You took the words right out of my mouth.  
8 So, it's hard to imagine there is anything more  
9 serious.

10 A. Correct.

11 Q. And, ultimately, the goal is for the court  
12 to be able to take the information that you provide  
13 and the opinion that you come to and rely on that in  
14 making its decision.

15 A. Yes.

16 Q. And you keep this high-stakes, ultimate  
17 goal of providing great information to the court in  
18 mind as you work through each step of your  
19 investigation.

20 A. I make every effort to do that, yes.

21 Q. And so when you're asked to conduct an  
22 Adaptive Behavior Assessment, it is ideal, critical,  
23 or imperative to have as much information as  
24 possible.



1           A.   Yes.

2           Q.   And you mentioned on direct that you want  
3 that information collected from as many sources as  
4 possible.

5           A.   Well, when I mentioned as many sources as  
6 possible, I'm including, not only informants --  
7 that's only one piece of the overall puzzle -- but  
8 also available records from a variety of other  
9 sources.

10          Q.   And so that's a great point.

11                When you are reviewing the materials for  
12 this, you're talking about just, not only the  
13 intelligence testing results, but also school  
14 records.

15          A.   Yes.

16          Q.   What about medical records?

17          A.   Yes.  If they're available, certainly.

18          Q.   Employment history?

19          A.   Yes.

20          Q.   And how about work information or work  
21 records?

22          A.   Yes.

23          Q.   You really would like to get your hands on  
24 anything and everything that you can assess because

1 this is life and death.

2 A. Correct.

3 Q. And then you mentioned that it's not just  
4 records but also collateral interviews or interviews  
5 of collateral individuals along with the family.

6 A. Correct.

7 Q. So, we're talking about -- does this  
8 include parents?

9 A. It can include parents, certainly.

10 Q. Grandparents, siblings, extended family?

11 A. Yes.

12 Q. And you mentioned some difficulties that  
13 you perceive with using family members, so you also  
14 want what you said were independent individuals  
15 also?

16 A. I'm not quite sure if that's the correct  
17 word but information that, based on clinical  
18 judgment, may be considered to be less -- to have  
19 less subjectivity in it in which, like as I  
20 mentioned before, the provider of information may  
21 not have necessarily a stake in this whole  
22 situation.

23 Q. You know, I made a note when you were  
24 testifying -- bear with me. You did make the

1 statement in -- or do you recall making the  
2 statement in your discussion with Mr. Jackson on  
3 direct that some family members will have some stake  
4 in it? Do you recall that?

5 A. Yes. I would say yes.

6 Q. And so it sounds like you have already kind  
7 of made a judgment call about the information that  
8 you may obtain from family members in these cases.

9 A. Well, it's not that I've made a judgment  
10 call. It will depend on the information that is  
11 provided and how does it relate to the information  
12 provided by other family members.

13 And this is a fact that, again, is included  
14 in the relevant literature, that we need to be aware  
15 of the fact that family members may not be -- the  
16 reliability may be questionable. Even the AAIDD  
17 addresses that issue.

18 And, I should add, also the rating scales  
19 include that, that one needs to really keep an eye  
20 or a mindset open to the possibility that the  
21 information provided by the informant may lack  
22 sufficient reliability.

23 Q. And so it is necessary for you hear from  
24 people who know the person across community

1 settings.

2 A. Definitely in -- I believe one of the  
3 scales -- I'm not -- I believe it's the Vineland --  
4 stipulates that the research that was done on it  
5 involved essentially one respondent providing the  
6 information on that individual across a variety of  
7 settings, and that's ideal. If that cannot be  
8 accomplished, then you do use multiple informants.  
9 They may be limited to only one of the domains so  
10 they can provide information on.

11 Q. And to find that one individual who knows  
12 the defendant across a variety of settings is a  
13 little bit more difficult.

14 Would you disagree with that?

15 A. Yes, I would.

16 Q. I mean, we're talking about parents who  
17 know them one way, teachers who know them another.  
18 These are individuals who have frequent contact but  
19 see them in a particular setting.

20 A. Correct.

21 Q. When we're talking about interviewing or  
22 using any standardized instruments, we want to try  
23 to get them from people who have varying  
24 relationships with the individual.

1 A. That have -- did you say "ingrained"?

2 Q. "Varying relationships" with the defendant?

3 A. Oh, "varying relationships."

4 Well, ideally you want an individual who  
5 has had daily contact with the defendant over a  
6 period of time in a variety of settings. And,  
7 again, based on the use of this standardized  
8 measures, that it must be current, at the current  
9 time, not what was going on five or ten years ago.

10 Q. Right. And so you've talked about the  
11 concerns with doing a retrospective analysis, and  
12 I'll get to that in just a minute. But that is one  
13 of the things that you're aware of.

14 Is that correct?

15 A. Yes.

16 Q. And so, once you gather the records and the  
17 interviews, then you began to -- begin to compare  
18 the information yourself. Is that correct?

19 A. Well, yes. You try to analyze the  
20 information and try to determine if there are  
21 consistencies in terms of, not only strengths that  
22 the individual might have demonstrated, but also in  
23 terms of the weaknesses, so you try to assess both.

24 And, again, based on the information that

1 is provided, it's gonna be conflicting information  
2 at times so, again, you have to rely on clinical  
3 judgment to decide which type of information you're  
4 gonna place more weight upon.

5 Q. And then the comparison that you conduct  
6 for that individual is to peers of the same age.

7 A. Correct.

8 Q. Same sociocultural background?

9 A. Correct.

10 Q. And same type of community?

11 A. Same type of community and language spoken.

12 Q. And so when you're talking about that,  
13 that's brothers or sisters?

14 A. That can be one comparison, yes, how did  
15 the individual compare to his or her siblings?

16 Q. What about cousins?

17 A. If they're the same age, anybody within  
18 that particular community.

19 Q. And friends also outside the family.

20 A. Peers, yes. Definitely peers.

21 Q. Now, based on the information that you have  
22 about the instant matter with Mr. Martinez Guzman,  
23 are you aware where those type of witnesses are  
24 currently located?

1 A. No, I'm not.

2 Q. Are you aware -- go ahead.

3 A. I'm sorry. I would just, you know,  
4 indicate that most likely in El Salvador.

5 Q. Are you aware that Mr. Martinez is born and  
6 spent at least the first 16 years of his life in El  
7 Salvador?

8 A. I'm aware that he's from El Salvador. I  
9 didn't know long he was there.

10 Q. And as part of your involvement in the  
11 instant matter, are you prepared to travel to El  
12 Salvador yourself for your portion of the assessment  
13 investigation?

14 A. Well, under the circumstances right now,  
15 obviously, I would not be allowed to enter the  
16 country, so I would have to find optional methods of  
17 conducting those interviews.

18 Q. And so you were not brought onto this case  
19 during COVID. Is that correct?

20 A. No. I was -- I was asked to be involved, I  
21 believe it was prior to that. January or so.

22 Q. Well, we have your C.V. that was filed  
23 January 10<sup>th</sup>, so definitely before January 10<sup>th</sup>.

24 A. Yeah. There was a rather large gap where

1 nothing happened so it might have been even longer  
2 than that.

3 Q. And during that time frame did you begin to  
4 make any preparations or investigation into the  
5 potential for traveling to El Salvador?

6 A. No. I did not.

7 Q. So, going back to the process of an  
8 adaptive assessment, it sounds like the work that  
9 you do on your end is pretty extensive and  
10 exhaustive.

11 A. Well, again, it all depends on the  
12 available data, you know, what do I have to work  
13 with. Some cases provide a wealth of information  
14 particularly for those individuals who went to  
15 school here, especially in the local area and we  
16 have access to educational record, medical records  
17 and so forth.

18 In a majority of the cases from out of the  
19 country, from other countries, Mexico in particular,  
20 a lot of that information is -- it's either been  
21 lost or it's just not available.

22 Q. Is one of the big problems in doing this  
23 retrospective analysis access to the records and  
24 information? Is that correct?



1           A. That's one of the big challenges in  
2 conducting this type of assessment, yes.

3           Q. So, by the very nature of an Atkins case  
4 we're talking about adults --

5           A. Yes.

6           Q. -- correct?

7                   And so we have to go back in time in order  
8 to look at the individual's life prior to the age of  
9 18, because prong three requires it.

10          A. Correct.

11          Q. And when we talk about a retrospective  
12 analysis, we're talking about the person as they  
13 existed in childhood and adolescence, not  
14 necessarily as they present today.

15          A. Correct. In order to meet the third prong  
16 of intellectual disability, obviously, the presence  
17 of intellectual disability had to be in existence  
18 prior to the age of 18.

19          Q. So, the very fact of locating and gathering  
20 the records that you would like to see is extremely  
21 challenging in many cases.

22          A. Yes, it is.

23          Q. And not only is the gathering of records  
24 challenging, talking to people about their memories

1 from years ago can present its own issues.

2 A. That's another challenge, so another  
3 limitation of the assessment process.

4 Q. And you mentioned that on direct, you know,  
5 asking people to recall 10 or 15 years ago presents  
6 concerns.

7 A. Correct.

8 Q. And then you're also talking to individuals  
9 that you testified may demonstrate or have some bias  
10 or some stake in the outcome.

11 A. Well, within the field of forensic  
12 psychology, in any type of an assessment that we  
13 conduct the possibility of either exaggeration,  
14 fabrication, or even just diminishing different  
15 deficits or different symptoms must be taken into  
16 consideration because of the nature of the type of  
17 evaluation that it's involving, you know, legal  
18 issues and things of that nature, as opposed to just  
19 conducting an assessment in a school setting, let's  
20 say forensic.

21 Q. And in the 10 to 15 cases that you  
22 participated in, you have experienced that family or  
23 friends may tend to overstate or understate when it  
24 comes to the interview process and assessment.

1       A. Well, as I mentioned before, it depends on  
2 the family member, depending on what kind of a  
3 relationship they had established with the defendant  
4 during that period.

5       I've had informants where, you know, they  
6 will state that he did everything fine, that there  
7 were no problems at all in any area, there were no  
8 support systems needed, that they did fine.

9       Then you interview other family members --  
10 member and they provide the total opposite picture,  
11 that this individual couldn't do anything or, you  
12 know, very limited in a lot of areas.

13       Q. And when you have that type of scenario  
14 come up, you as the investigator then try and figure  
15 out why this inconsistency, correct?

16       A. Well, you take the information and, again,  
17 based on everything else that is in front of you  
18 that you have access to in terms of collaterals,  
19 interviews with the defendant, how is he functioning  
20 at the present time as well, you try to come up with  
21 the most reliable, you know, conclusion based on all  
22 that information, the limitations and the strengths  
23 and then, you know, you make that final decision.

24       Q. And so one of the ways that you can also

1 address these concerns is to have, for example, the  
2 Adaptive Behavioral Assessment done by multiple  
3 informants, correct?

4 A. Yeah, that can be useful to see whether  
5 certain patterns emerge that seem to be stronger  
6 indications one way or the other.

7 Q. Right. You get consistent answers across  
8 multiple raters.

9 A. Correct.

10 Q. And, in fact, that is one of the  
11 methodologies that can be utilized to deal with the  
12 retrospective nature of assessing adaptive behavior,  
13 correct?

14 A. Yes, that is one, one of the methods,  
15 correct.

16 Q. And you indicated on direct testimony that  
17 the AAIDD advocates for that use, the retrospective  
18 adaptive behavior standardized instruments.

19 Is that correct?

20 A. Yes. It does indicate that whenever  
21 possible the standardized scales should be used, but  
22 it also allows one to conduct those assessments in  
23 situations where, for whatever reason, the  
24 standardized measures cannot be employed.

1 Q. So, in conducting an Adaptive Behavior  
2 Assessment utilizing standardized instruments, which  
3 is endorsed by the AAIDD, we're starting out with a  
4 limitation or a caveat already. Is that correct?

5 A. Limitation in what sense?

6 Q. Limitation in that you're using it in a  
7 retrospective manner.

8 A. Well, that is one of the limitations. But  
9 the other limitations is that particular measure was  
10 not standardized on that population that we're gonna  
11 be assessing.

12 Q. Thank you very much. You might be reading  
13 my mind. That's exactly what my next point was,  
14 that we have a second limitation and that it is  
15 standardized on U.S. population. Is that correct?

16 A. Correct.

17 Q. And then in your testimony today you're  
18 advocating that the Court order a third limitation  
19 be imposed. Isn't that correct?

20 A. I'm not sure what you're referring to.

21 Q. Well, you advocated that these instruments,  
22 although they're preferred to be administered face  
23 to face, in person, that it could be done via  
24 telecommunication, correct?

1 A. Correct.

2 Q. And so now you have recommended that the  
3 court place a third limitation -- or order that a  
4 third limitation occur in utilizing that  
5 information.

6 MR. JACKSON: Objection, argumentative.

7 MS. VERNESS: Your Honor?

8 THE COURT: I know. Thank you.

9 I'll sustain the objection.

10 MS. VERNESS: I'll rephrase.

11 BY MS. VERNESS:

12 Q. If the Court were to follow your  
13 recommendation that this instrument -- these  
14 instruments could be administered through  
15 telecommunication, that would add a third limitation  
16 to the use and gathering of that information.

17 A. It would in the sense that that is not the  
18 standardized manner of administering these tools.

19 Q. And in an Atkins claim who bears the burden  
20 of proof?

21 A. The defense.

22 MS. VERNESS: Court's indulgence.

23 BY MS. VERNESS:

24 Q. Now, in addition to having multiple raters

1 assess a defendant, there are additional ways that  
2 you can ensure validity, aren't there?

3 A. Well, again, you know, the validity, the  
4 reliability of these instruments are in question  
5 because there's no way to assess the quality of the  
6 information, the quality or the validity of the  
7 information being provided by the informant. It's  
8 just hearsay, whatever the informant recalls  
9 reconstructs from the past, provides that  
10 information, there is no way to assess the accuracy  
11 of that unless you begin to see patterns evolving  
12 from all the accumulated information and, you know,  
13 hoping that the family members have not had any kind  
14 of conversations with each other as to what might  
15 be, you know, the information that needs to be  
16 provided. We don't have any control of that.

17 Q. Well, what about -- let me back up.

18 You are a psychologist with two-plus --  
19 three decades of experience, correct?

20 A. Correct.

21 Q. And part of what you do when you meet with  
22 a -- with someone in person is you are watching that  
23 person, correct?

24 A. Yes.

1 Q. You are watching their mannerisms, their  
2 eye contact.

3 A. Correct.

4 Q. You're measuring their verbal responses?

5 A. Correct.

6 Q. So, in a situation where you are  
7 administering a standardized Adaptive Behavior  
8 Assessment, isn't one of the things you're also  
9 looking for is that they're answering  
10 authoritatively?

11 A. Well, it's not an assessment of the  
12 individual, although that information would be  
13 useful. But, again, as in the past, even just  
14 through telephone interviews you can get at least a  
15 clinical impression of whether the individual may be  
16 anxious or in a normal mood, friendly, certainly the  
17 ability to establish rapport.

18 Whether it's with the defendant or any  
19 informant it's extremely important to make them feel  
20 comfortable, to explain to them exactly what the  
21 nature of the assessment is. And the fact that, you  
22 know, who are you being retained by, the prosecution  
23 or the defense, they need to know that as well and  
24 how the results will be used, certainly the whole



1 idea of informed consent and limitations of  
2 confidentiality and so forth.

3 Q. And also as part of that process, are you  
4 looking for someone who may be guessing at the  
5 answers?

6 A. Yes. As a matter of fact, one of the  
7 measures, I believe, is the ABAS even allows -- at  
8 least on the second edition, it allowed individuals,  
9 if they didn't know whether the individual could  
10 perform a certain activity, to guess so, you know,  
11 again, that's one of the limitations of those tools.

12 Q. So, it's your testimony today that you  
13 believe that you could conduct a standardized  
14 Adaptive Behavior Assessment over the telephone and  
15 gauge anxiety, comfort level, guessing, authority of  
16 the answers. You could make all of those  
17 determinations over the telephone?

18 MR. JACKSON: Objection, misstates his  
19 testimony as to the "telephone."

20 THE COURT: I don't think he said that, but  
21 he can answer it. If he said it, he'll say he did.

22 Sir, you may answer the question.

23 THE WITNESS: The degree of accuracy, of  
24 course, or the validity of what you just mentioned

1 would be limited. But the idea would be to at least  
2 get some -- some -- engage in some clinical judgment  
3 as to whether this individual -- I mean, what if an  
4 individual is providing the information and the  
5 individual may be intoxicated and you're able to, at  
6 least because of the things that are being said or  
7 the manner in which it's being said, that there's a  
8 problem here.

9           So, then you can qualify it and you can  
10 say, I don't think this information is that  
11 reliable, as opposed to somebody who may come across  
12 as, you know, more confident, more comfortable in  
13 that sort of a scenario.

14           So, again, the bottom line is what  
15 information am I obtaining? I'm not gonna go in  
16 there to try to assess the individual's status,  
17 mental status, which, you know, again, may be  
18 important, but that's not part of the administration  
19 of -- standard administration procedures. They  
20 don't say, Make sure that you do an assessment of  
21 this individual's memory ability, intellectual  
22 ability and so forth.

23           So, you know, ideally, as we mentioned, if  
24 you can do an in-person assessment, great. But,

1 again, it does not preclude us as professionals from  
2 being able to gather meaningful information data  
3 through the methods that we have available at this  
4 point.

5 BY MS. VERNES:

6 Q. So, you raise a great point there, that you  
7 may be able to.

8 Let's focus now on your specific experience  
9 and involvement in Atkins cases, so is that okay?

10 A. Sure.

11 Q. Okay. So, you've participated in 10 to 15  
12 for the prosecution. Is that correct?

13 A. Correct.

14 Q. And since you in those cases are hired by  
15 the prosecution, much of the investigation, if not  
16 all, has already been undertaken by the defense in  
17 those cases, correct?

18 A. At times, yes. Most of the time it is.

19 Q. So, you are receiving reports that have  
20 been prepared by defense experts regarding  
21 intellectual functioning.

22 A. Correct.

23 Q. Do you also receive reports prepared by the  
24 defense experts regarding their adaptive functioning

1 assessments?

2 A. Yes, I do.

3 Q. And you've received all of the supporting  
4 data, the questions that were asked at times?

5 A. Correct.

6 Q. You receive the standardized Adaptive  
7 Behavior Assessments?

8 A. Raw data, yes.

9 Q. You receive police reports, interviews of  
10 the defendant?

11 A. Correct.

12 Q. School records, medical records, employment  
13 records?

14 A. When available, yes.

15 Q. Interviews that were conducted of the  
16 collateral witnesses, the family members, employers,  
17 teachers?

18 A. Yes.

19 Q. So, your role historically has been to  
20 review this information that is provided to you.

21 A. In some cases I mentioned before, I've also  
22 had the opportunity to interview family members.

23 Q. Okay. And out of the 10 to 15 cases, how  
24 many of them would you say that you interviewed

1 family members?

2 A. I don't have an exact number but I would  
3 venture to say that in a small number of those  
4 cases.

5 Q. It's true that in the large majority of  
6 your cases the only person you've actually  
7 interviewed and done any testing on is the  
8 defendant, correct?

9 A. Yes.

10 Q. And do you have an idea of approximately  
11 how many?

12 A. No, I don't at this point.

13 Q. But certainly a majority of the 10 to 15  
14 cases.

15 A. Yes, I would say so.

16 Q. So, the perspective that you're testifying  
17 from today is not one who has conducted an  
18 investigation and participated from the very  
19 beginning, correct?

20 A. Correct.

21 Q. So, you don't know -- well, strike that.  
22 Previously you testified that you have  
23 received recorded interviews of numerous family  
24 members who seemed very willing to speak with the

1 defense. Is that correct?

2 A. Yes.

3 Q. But since you didn't participate from the  
4 beginning, you have no idea how contact was  
5 established with those family members.

6 A. Well, at times that is included in the  
7 report, that, you know, the interviews were  
8 conducted by so-and-so. The expert was not able to  
9 either get into the country because of a variety of  
10 reasons, so the interviews were conducted via  
11 telephone, maybe seven, eight interviews. Others  
12 were conducted by videotaping the interview and  
13 conducted by members of the defense team.

14 Q. Thank you. I don't think that you maybe  
15 understood my question.

16 Prior to the interviews that you receive,  
17 you don't know how many times the interviewer made  
18 contact with the interviewee.

19 A. Sometimes it will include that in the  
20 report, how many, the dates that they met with the  
21 informant.

22 Q. And you don't know how many questions they  
23 may have had to answer.

24 A. Well, depending on the -- if they're using

1 a rating scale, obviously, you know, whether it's  
2 200, 300, 400 items, you would know at least, you  
3 know, how many questions were asked, but certainly  
4 when I get the raw data, I'm privy to that  
5 information.

6 Q. Fair enough. What about how many questions  
7 the interviewer had to answer about the process for  
8 the interviewee? You don't know those questions,  
9 correct?

10 A. I'm not sure I understand your question.

11 Q. Fair enough. I will rephrase.

12 You don't know what went into building the  
13 rapport with that interviewee to get the answers  
14 that you're reviewing in the recorded interview.

15 A. Only to the extent that, if it's been  
16 either an audio recording or a videotaped interview,  
17 then at least I have some information on the degree  
18 of rapport that was established.

19 Q. And that is not the case with every  
20 interviewee that you receive information on.

21 A. Correct. It may be just a statement, This  
22 informant was interviewed via the telephone, and  
23 then maybe three or four lines in terms of what  
24 information they provided.

1 Q. And you also can't say how many individuals  
2 were contacted that may have refused to provide  
3 information in a case.

4 A. At times there may be information  
5 indicating that so-and-so was contacted but for  
6 whatever reason they never went through the  
7 interview.

8 Q. And you don't know how many individuals may  
9 have been ruled out as not reliant historians or not  
10 having the close relationships that are required.

11 A. Correct. I would not have that  
12 information.

13 Q. The fact is that the perspective that you  
14 have for your testimony today is for that of an  
15 individual who has received the information on a  
16 silver platter for your review.

17 A. Well, I don't know if I would say "a silver  
18 platter" but certainly is the same information that  
19 the other expert has access to so ...

20 Q. So, you testified that two-thirds of the  
21 cases that you participated in involved individuals  
22 who were not native or born in the United States.

23 Is that correct?

24 A. I would say so and maybe even, you know,



1 higher than that group. I don't have an exact  
2 number. But most of them have been Spanish-speaking  
3 individuals mostly from Mexico.

4 Q. And in those cases -- in how many of those  
5 cases did you attempt to travel to meet with  
6 interviewees to do your assessment investigation?

7 A. None. Again, those were, obviously, you  
8 know, decisions made by the -- both the defense and  
9 the prosecution. At times I have access to a list  
10 of names and phone numbers, contact information and  
11 other times I don't.

12 Q. Well, did you try and travel?

13 A. No.

14 Q. Did you tell the attorneys who hired you  
15 that in your professional opinion face-to-face  
16 contact is the best way to conduct this type of  
17 investigation and information gathering?

18 A. I don't recall whether I provided that  
19 information or not.

20 Q. Did you ever say, If I can't interview  
21 these people myself, I don't feel comfortable  
22 offering an opinion?

23 A. No, I don't recall saying that.

24 Q. And yet you found each and every one of

1 them did not meet the statutory and medical  
2 requirements of intellectual disability.

3 A. Based on the three prongs, that is correct.

4 MS. VERNESS: Court's indulgence for just a  
5 moment.

6 THE COURT: Okay.

7 BY MS. VERNESS:

8 Q. Thank you, Doctor. I apologize for the  
9 delay. Just a couple other areas.

10 I want to move on to the concern with  
11 telecommunication. You testified that at this point  
12 in time conducting an Atkins assessment or  
13 investigation via telecommunication would be what  
14 you recommend. Is that fair?

15 A. The administration of the semi-structured  
16 interview or even using one of the standardized  
17 rating scales, that's what I'm alluding to, but not,  
18 obviously -- I don't know what other test would be  
19 administered to the informants.

20 So, IQ testing would be out of the  
21 question, of course, but my recommendation is that  
22 as a profession and the materials that I've  
23 reviewed, we are not to be dogmatic about the fact  
24 that this is the only way to do it is in person. It

1 is not. I mean, there is plenty of research to show  
2 that other means of obtaining that information can  
3 be useful.

4 Q. And you are basing that opinion on your  
5 experience, which has been for the state, never  
6 traveling in maybe 10 to 15 cases.

7 A. I do have access to that information that  
8 has been already obtained by the opposing expert.  
9 Again, the whole weight of the evaluation does not  
10 rely solely on administration of those adaptive  
11 behavior scales in person. That's only one portion  
12 of the overall examination.

13 Q. Right. And I don't mean to narrow the  
14 focus to just the adaptive behavior -- the standard  
15 Adaptive Behavior assessments. We're also talking  
16 about the interview gathering, correct?

17 A. The interviewing gathering? You mean the  
18 information?

19 Q. The interviewing process.

20 A. Yes, which, in my opinion, can be  
21 accomplished via a teleconferencing.

22 Q. Based on your experience of never having  
23 done an Atkins investigation from the ground up.

24 A. Well, I have done it from the ground up

1 once it comes to my opportunity to evaluate the  
2 defendant and review all the available information.  
3 So, I don't know -- I mean, am I the first one on  
4 the scene to begin this evaluation process? No,  
5 obviously, because I, you know -- that's usually  
6 begun by the defense.

7 But my part is to do it from the ground up  
8 and certainly whatever -- you know, the information  
9 that is in police records, well, that's information  
10 that the other expert is gonna be obtaining as well,  
11 that he wasn't there to interview the police  
12 officers, I wouldn't be there as well, you know.

13 So, again, it's relying on information that  
14 can be acquired either through in person or  
15 teleconferencing. That information is -- again, the  
16 nature of the questions that are being asked are  
17 fairly easy to understand for most informants. It's  
18 not a patient-doctor type of relationship that needs  
19 to be established and that is why it doesn't  
20 necessarily need the expert himself or herself to  
21 conduct that interview.

22 I myself, if I'm gonna conduct an  
23 interview, I rather do it myself, score all the  
24 testing myself and not use assistants to rely upon.

1 Q. And so when you say that you do the  
2 interview and testing yourself, you're referring to  
3 the testing of the defendant and the interview of  
4 the defendant, correct?

5 A. In any available informants for a  
6 particular case.

7 Q. Okay.

8 A. In this case I'm not certain if I am going  
9 to be given that opportunity. And if the  
10 opportunity's given, I will certainly use whatever  
11 means I can to obtain that information, whether it's  
12 through a semi-structured interview or an  
13 administration of one of the standard rating scales.  
14 I'm not sure at this point whether it's up to the  
15 prosecution or the defense to say, yes, you have  
16 access to these informants.

17 Q. And so based on your testimony that you  
18 received the information, you review the  
19 information, and that is your investigation from the  
20 ground up.

21 A. That's only one part of it. There's many  
22 components to the overall evaluation.

23 Q. What did I miss? Just a moment ago you  
24 said you do it from the ground up because you

1 receive the information, you review the interviews,  
2 you review the testing. What did I miss?

3 A. Well, I guess when you say "from the ground  
4 up," it's not like I -- I might come in halfway  
5 through whatever the other expert's already done.  
6 They might have even completed their overall  
7 assessments, they're done, and then I come into the  
8 picture, but that's from the ground up from myself  
9 beginning with --

10 Q. But the bottom line is you've never been  
11 the first person of contact for any of the witnesses  
12 in any of the Atkins cases that you have  
13 participated in.

14 A. In most cases I would agree with you. I'm  
15 thinking there might have been a couple of  
16 situations where, for whatever reason, the defense  
17 decided not to interview particular witnesses that I  
18 was given access to them.

19 Q. And so in the vast majority of the cases,  
20 you receive the information from the defense and you  
21 base your opinion off of that information that you  
22 have received.

23 A. I receive information from both, also from  
24 the prosecution.

1 Q. And so the reality is that the quality of  
2 your opinion rests on the quality of the information  
3 that the defense is providing.

4 A. Well, it's on the quality of the overall  
5 information that is available to me.

6 Q. And what we're talking about here is  
7 deviating from preferred practices, best practices  
8 of getting this information in person and moving to  
9 telecommunication to gather it.

10 A. Well, again, the literature indicates that  
11 there are no significant or major obstacles, major  
12 problems to conducting this type of an assessment  
13 or, even more, you know, situations that require a  
14 higher level of critical judgment in providing  
15 psychotherapy and so forth, making diagnosis,  
16 whether you have a doctor/patient relationship.

17 But, yet, we can't just say there are no  
18 differences. This has been done for many years now  
19 where there's this provision of psychological  
20 services, and particularly now it's going to become  
21 more prevalent, I believe, under the circumstances.  
22 But certainly even thirty, forty years ago  
23 individuals in very remote rural areas were  
24 receiving services over the phone.

1 Q. When you talk about services, as you just  
2 did, you're referring to healthcare services,  
3 correct?

4 A. Yes.

5 Q. And all the literature and articles that  
6 you are relying upon and have reviewed are specific  
7 to healthcare, correct?

8 A. Healthcare, which includes clinical  
9 interviews with the patient and maybe family members  
10 as well. So, I mean, there's a component of that  
11 whole idea of interviewing to do an assessment and  
12 in this particular case it's more of a  
13 semi-structured approach of certain areas that you  
14 want to address in obtaining information that would  
15 be relevant to either significant deficits in that  
16 particular area or significant strengths.

17 Q. And which of those articles contemplated  
18 this use of telecommunication in a death penalty  
19 case?

20 A. At this point I don't believe I have -- I  
21 have not come across any articles specifically  
22 dealing with an Atkins case or situation.

23 Q. Because they don't exist, right?

24 A. I don't believe so at this point.



1 Q. Because we are in unchartered waters.

2 A. Well, I take that back. In terms of  
3 obtaining information, as I already mentioned, the  
4 professionals that I work with, opposing experts and  
5 so forth including Dr. Puente, we have all used  
6 these methods even before this COVID-19 came into  
7 the picture. So, we have used the telephone, we  
8 have used videotaping, maybe even just individuals  
9 writing anecdotal, you know, letters, information as  
10 to how did this individual come across to them back  
11 in -- during the developmental period.

12 So, we've used these methods before, and so  
13 particularly now in the situation we find ourselves  
14 in, we need to be more aware of how these tools can  
15 be used appropriately and also in consideration with  
16 some of the limitations involved and, again, the  
17 standardization of the particular instrument that is  
18 being used.

19 Q. And it's your opinion that this death  
20 penalty case is a good case to try this new approach  
21 on.

22 A. Well, it's not a new approach. I mean, I  
23 would say that this approach of teleconferences with  
24 the methods, the technology that we have available

1 to us now is more appealing. It seems like it  
2 provides more information than a mere telephone  
3 call.

4 Q. So, you're saying that, despite the fact  
5 that there is no peer review, there are no studies,  
6 and there is no literature supporting the use of  
7 exclusively telecommunication in an Atkins  
8 investigation, we should go ahead and do it today.

9 A. Well, the measures that we're looking at,  
10 the Vineland and ABAS recommend this is an approach  
11 and if you're going to evaluate intellectual  
12 disability, that this approach is -- can be used.  
13 They even instruct you on what online programs to  
14 use and so forth.

15 Q. In an Atkins case?

16 A. Well, the whole issue here is whether the  
17 individual is suffering from intellectual  
18 disability. For me, that is the question. That's  
19 what the Court is interested in knowing.

20 And so if you add in Atkins cases, then I  
21 would say, yeah, I'm not aware of any research in  
22 that area but there's plenty research in the use of  
23 these approaches for the assessment of intellectual  
24 disability.

1 THE COURT: I'm going to stop you there.  
2 It's time to quit for the evening.

3 Doctor, are you available tomorrow morning  
4 at 10:00 a.m. Pacific time?

5 THE WITNESS: Yes, I believe so. Yes, your  
6 Honor, I'll be available.

7 THE COURT: Okay. So, then we'll continue  
8 your testimony over until tomorrow at 10:00. I'd  
9 ask that you check in with the clerk ten minutes  
10 before so she can make sure your equipment is  
11 working.

12 THE WITNESS: Yes, your Honor.

13 THE COURT: Okay. Thank you, sir.

14 Counsel, I think we're scheduled for 10:00  
15 tomorrow. Is there anything you need to discuss  
16 with me tonight before we recess?

17 MR. JACKSON: Nothing from the state, your  
18 Honor.

19 MS. VERNESS: No, your Honor, nothing at  
20 this time.

21 THE COURT: Okay. I'm going to ask the  
22 witness one question and then -- I'm going to ask  
23 the question and then you all can follow up if you  
24 have followup questions tomorrow.

1 Dr. Martinez, you were using the term  
2 "telecommunication," and I wasn't sure -- or  
3 "teleconferencing." I wasn't sure what you meant by  
4 that term and how you define that.

5 THE WITNESS: Well, at the very minimum,  
6 the use of a telephone, if there's nothing -- if  
7 there's no other available, you know, method.

8 But certainly the type of situation that  
9 we're engaged in right now, teleconferencing,  
10 televideo, where you can, not only see the  
11 individual, but also be able to, obviously,  
12 exchange, you know, verbally.

13 So, the approach that I'm mostly referring  
14 to as being more ideal would be this same approach  
15 that we're using right now for this hearing.

16 THE COURT: We call that "simultaneous  
17 audio-visual transmission."

18 THE WITNESS: Okay.

19 THE COURT: The platform is called "Zoom"  
20 but there's lots of platforms.

21 Is that what you're talking about, though?

22 THE WITNESS: Yes, your Honor.

23 THE COURT: They're at the same time?

24 THE WITNESS: Yes.

1           THE COURT: Okay. All right. So, I don't  
2 know if that's gonna add some questions for you,  
3 Counsel, tomorrow, but we will have lots of time to  
4 go into it tomorrow.

5           And so at this time do we need to let the  
6 bailiff know we're going into recess?

7           INTERPRETER ESCOBAR: And I did, your  
8 Honor, but I will repeat it on the Spanish channel  
9 for him again.

10          THE COURT: All right. Thank you.

11          We will be in recess until 10:00 a.m.

12                       (Proceedings adjourned at 4:54  
13 p.m.)

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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 transmission in Department No. 4 of the  
9 above court on Tuesday, July 28, 2020, at the hour  
10 of 1:36 p.m. of said day, and I then and there took  
11 verbatim stenotype notes of the proceedings had and  
12 testimony given therein in the case of State of  
13 Nevada, Plaintiff, v. Wilber Ernesto Martinez  
14 Guzman, 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 29th 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

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