IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 82342

REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS

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Docket 82342 Document 2021-08987

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REPLY TO ANSWER

Introduction

This original writ proceeding involves a question of statutory interpretation and, as such, presents a purely legal question. The statute at issue is NRS 174.098(1), which provides in full:

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

By its express terms the statute vests discretion to file a motion to declare that the defendant is intellectually disabled *with the defendant* who is facing the death penalty. It does not grant any other person, agency, or court such discretion. And the only statutory limitation on a defendant's exercise of discretion is that the motion must be filed "not less than 10 days before the date set for trial." This limitation is the product of the legislative process.[1]

As introduced in 2003, subsection 1 provided, "A defendant who is charged with murder of the first degree *may, before his trial*, file a

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[1] For legislative history on Assembly Bill 15, see, https://www.leg.state.nv.us/Session/72nd2003/Reports/history.cfm?ID=44

motion to declare that he is mentally retarded." (Italics added).[2] The intent of that language "was so the issue of mental retardation[3] could be disposed of before, not after, a capital trial." Nev. AB 15, *Minutes of the Assembly Committee on Judiciary*, February 12, 2003, p. 6 (Michael Pescetta, Las Vegas, Nevada). Mr. Pescetta added that he "would not object to having a date added into the language ... but anticipated that the normal rules of court would determine when the motion would be considered timely." *Id.*

Clark A. Peterson, a Chief Deputy Clark County District Attorney, offered an amendment (Exhibit E), which was adopted, that added the "no later than 10 days prior to trial" language to subsection 1 of the statute. *Id.* at 9. Mr. Peterson noted that although he preferred that the issue be resolved "well in advance of trial," he recognized that "certain issues might not be presented until the eve of trial, and it would not be appropriate to disallow defense attorneys and their clients to raise the issue prior to trial." *Id.* Washoe County Chief Deputy

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[2] https://www.leg.state.nv.us/Session/72nd2003/bills/AB/AB15.pdf

[3] From this point forward the term "mental retardation" is replaced with "intellectual disability", which conforms to legislative language changes during the 2013 session (SB 338); and see *Hall v. Florida*, 572 U.S. 701, 704 (2014) (electing to use "the term 'intellectual disability' to describe the identical phenomenon").

District Attorney Kristin Erickson on behalf of the Nevada District Attorney's Association, supported the passage of AB 15 "with the amendment by Mr. Peterson." *Id.* at 11. See also Nev. AB 15, *Minutes of the Assembly Committee on Judiciary*, February 25, 2003, p. 13 (Assemblyman William Horne) (supporting the 10 days before trial timeframe in opposition to Assemblyman John Carpenter's suggested timeframe of 30 days before trial, noting that "30 days was 'far out.'"); *Id.* at 18 (reviewing amendments to be included in AB 15).

Given the plain language of the statute and the statute's legislative background, the question whether under NRS 174.098(1) a district court can force a defendant to file a motion to declare the defendant intellectually disabled well before "10 days before trial" must be answered in the negative. And, consequently, since the district court below did just that, this Court can conclude that the district court manifestly abused its discretion in doing so.

The Real Party disagrees but its factual and legal arguments do not hold up.

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The Real Party's fact-based arguments

The Real Party first argues that the district court did not manifestly abuse its discretion in setting April 12, 2021, as the filing deadline for a motion under NRS 174.098 because "the setting is consistent with Guzman's prior scheduling suggestions." Answer at 3. The Real Party repeats this point throughout its answer.[4] But the point is a meaningless one. Worse yet, in making this argument the Real Party ignores, and invites this Court to elide, the fact that all of Mr. Guzman's prior suggestions to help move the case along were made in 2019 and early 2020 *before the onset of a global pandemic*. Indeed, prior to March 2020, the Guzman team had already arranged for Dr. Antonio Puente, their neuropsychologist, to travel to El Salvador for the purpose of conducting interviews, tests, and information gathering for an anticipated *Atkins* motion. That preparatory work was grounded in a good faith belief that *Atkins* applied in this case; namely, Dr. Mahaffey's report on Mr. Guzman's FSIQ scores.[5] The pandemic

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[4] "A bad argument does not improve with repetition" *Carr v. United States*, 560 U.S. 438, 462 (2010) (Alito, J., dissenting).

[5] In a footnote, Answer at 6 n. 4, the Real Party argues that this Court should not accept Dr. Mahaffey's scoring because it has not yet had the opportunity to traverse her findings. The question whether the Real

changed everything. See 1PA 18 (Motion to Continue Due to Global Pandemic COVID-19 (D-22) (noting counsels' belief that the defense would be ready for "the Atkins hearing in July *if things go as planned.*" But, "[t]hings did not go as planned.") (record citation and some emphasis omitted). Indeed, Dr. Puente was detained at an airport in El Salvador and not allowed entry into the country. Meanwhile back home, on March 16, 2020, the Second Judicial District Court closed the courthouse because of the presence of the coronavirus in Nevada. See Answer at 15-16.[6]

The Real Party's attacks upon the Guzman team's prior statement that were related to working with the district court to establish timelines it knew it could meet do not apply to the instant situation where the district court has set dates *sua-sponte* without consulting with the parties whether its chosen dates could be met by

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Party will be able to disturb Dr. Mahaffey's findings is a trial question to be decided later. For purposes of this writ, Dr. Mahaffey's findings provide sure footing for the Guzman defense team to pursue an *Atkins* inquiry, assessment, and motion under NRS 174.098 on behalf of Mr. Guzman.

[6] Mr. Guzman's trial was vacated by the district court because of COVID-19. Between March 16, 2020 and January 4, 2021, there have been only three jury trials conducted in the Second Judicial District Court. Real Party In Interest's Appendix Volume 2 at 446 ("We have only done three trials in the last ten months, three jury trials.").

the defense and defense experts in light of the global pandemic. Indeed, the Real Party's attempt to now weaponize against Mr. Guzman his pre-pandemic planning, expectations, and efforts to assist the district court in bringing this case to trial should not be countenanced by the Court. First, defense counsels' good faith efforts to try and litigate an *Atkins* motion sooner rather than later does not and cannot bind their present course of conduct, which is still informed by a global pandemic. Second, Mr. Guzman should not be penalized by holding him to an *Atkins* motion filing deadline unilaterally fixed by the district court without participation by the parties in selecting that date.

In an attempt to avoid this Court's review, the Real Party argues that the issue in this writ is not ripe because Mr. Guzman "failed to object" in the district court. Answer at 26. First, the district court unilaterally selected the date and did not seek input from counsel, and thus there was no opportunity to object before the date was selected. Second, there is nothing in the record supporting the notion that the district court would have entertained any objection, after the fact. Finally, third, the issue presented in this writ petition is whether a district court may unilaterally set a date for the filing of a motion under

NRS 174.098(1). This question does not turn on the specific date set by the district court. Rather it is a legal question that would be operative as to any date unilaterally set by the district court.

The Real Party makes a second fact-based argument, this one grounded in the competing views presented at an evidentiary hearing on the efficacy of *Atkins* in-person interviews and testing versus *Atkins* telephonic or audiovisual interviews and testing in El Salvador. See Answer at 19-24.[7] But as noted in the Petition at 17, review of the district court's findings of fact and conclusions of law on the issue of *Atkins* interviews and testing must wait for review in a direct appeal, if necessary. Those findings and conclusions, however, have no bearing on the legal question now before the Court, which involves the interpretation of statutory language.

The Real Party's legal arguments

The Real Party first argues that Mr. Guzman cannot show "harm" caused by the district court's filing deadline, and that Mr. Guzman

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[7] Here the Real Party cheapens its argument by asserting that Dr. Puente's practice of in-person interviewing, and testing is "nothing more than [a] preference for in-person investigations and mistaken assumptions about the technology available to Guzman's family in El Salvador," Answer at 20, rather than his adherence to professional norms.

presents "a hypothetical controversy." Answer at 29, 30. The Real Party's "harm" argument is predicated on the assumption that the district court can set NRS 174.098(1) filing deadlines. "Guzman has not requested relief or otherwise attempted to show the district court why good cause exists to extend his filing deadline[.]" Answer at 29. But that assumption is misplaced. This writ action challenges the very authority that the Real Party assumes to exist. Moreover, Mr. Guzman is not required under NRS 174.098(1) to make a "good cause" showing in order to timely file his *Atkins* motion so long as it is filed "not less than 10 days before the date set for trial." *Cf. State v. Covington*, 433 P.3d 1252 *1 (2019) (unpublished Order of Affirmance) (affirming district court's order allowing defendant's NRS 174.098 motion to be filed *after* trial had begun where good cause existed) (citing NRS 174.125(1)—allowing late filing of motion if based on facts not known for a timely filing of a motion).

Similarly, the Real Party's suggestion that this is a "hypothetical controversy" rests on the idea that "the district court has not denied Guzman the opportunity to litigate his anticipated intellectual disability motion." Answer at 30. But that is not the issue before the

Court. To be sure, if the district court refused to comply with the other directives contained in NRS 174.098 after the timely filing of a motion to declare intellectual disability, a writ would surely lie. See *International Game Technology, Inc. v. Second Judicial Dist.* Court, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006) (stating that the Court may consider writ petitions directed at a district court's failure to act in light of "clear authority under a statute or rule"). A writ also lies here. The scenario tendered by the Real Party does not preclude writ consideration where the very real issue questions the power of the district court to unilaterally set a filing deadline for an intellectual disability motion under NRS 174.098(1). The Real Party argues further that if Mr. Guzman's motion under NRS 174.098(1) is denied by the district court, and he is sentenced to death, his intellectual disability claim will be automatically reviewed on appeal. Answer at 32. That is true. If the motion is denied and if Mr. Guzman is sentenced to death, the substantive merits of the intellectual disability claim, the district court's analysis, and the district court's rulings that framed how the collection of evidence on the claim took place will all be fodder for

appellate review. All that, however, has nothing to do with legal issue of statutory interpretation presented by this writ action.

The Real Party next reargues that the issue isn't ripe because Mr. Guzman did not object below. Continuing, the Real Party resurrects Mr. Guzman's counsels' *pre*-pandemic scheduling suggestions as a reason to deny the writ. And the Real Party reiterates that Mr. Guzman cannot show harm. Answer at 33-37. Briefly, the district court, in this instance and contrary to previously working with counsel to coordinate experts and achieve a mutually acceptable hearing date, entered an order setting a filing deadline for an *Atkins* motion without seeking counsels' input. Thus, there was not an opportunity to object and the record does not support the notion that the district court would have entertained an objection after the fact. NRS 174.098(1) does not authorize a district court to unilaterally set filing deadlines for motions filed pursuant to the statute. Nor does it bind counsel to the kind of aspirational filing deadlines suggested by counsel at a time *before* the world was changed by a global pandemic. Finally, under NRS 174.098(1) Mr. Guzman is not subject to any "good cause" analysis so long as the *Atkins* motion is filed " not less than 10 days before the date set for trial."

Next the Real Party argues that Mr. Guzman has not shown that he has a legal right to have the April 12, 2021 filing deadline date vacated. Answer at 37-46. The Real Party states its thesis like this:

> [T]he plain language of the statute at issue, the legislative history, and other binding precedent compel the conclusion that the district court acted well within its discretion and Guzman does not have a legal right to the relief he requests [to have the April 12, 2021, NRS 174.098(1) motion deadline vacated].

Answer at 37. A review of the Real Party's arguments demonstrates that its thesis is wrong in all three categories.

The statute

As previously noted, NRS 174.098(1) states: "A defendant who is charged with murder of the first degree in a case in which the death penalty is sought may, not less than 10 days before the date set for trial, file a motion to declare that the defendant is intellectually disabled." The Real Party advances this interpretation:

> Trial in this case is presently set for September 20, 2021. The district court ordered Guzman to file his [*Atkins*] motion by April 12, 2021. The district court's order *is consistent with the statute because April 12, 2021 is not less than 10 days set for trial.* In contrast, Guzman's interpretation would require this Court to read

> language into the statute that does not exist. In essence, Guzman's reading would be appropriate if the legislature stated that the filing of such a motion must occur 10 days before the trial, not sooner, not later.

Answer at 40 (italics added).

This passage demonstrates a clear misunderstanding of the statute. According to the Real Party, the district court has the authority to set any filing deadline for a motion under the statute so long as it is not less than 10 days before trial. That authority is not granted by the statute. Instead, the statute places the decision to file, and, importantly, the determination of when to file such a motion in *the defendant*, not the district court. The Real Party's interpretation is additionally flawed because it requires the Court to read into the statute a phrase like "unless otherwise ordered by the court" where no such phrase exists. In other words, it is the Real Party and not Mr. Guzman who seeks to make the Court a super-Legislature by reading language into the statute. Answer at 40 ("... Guzman's interpretation would require this Court to read language into the statute that does not exist.").[8]

[8] The "interpretation" Real Party attributes to Mr. Guzman is not his; it

The Real Party additionally asserts that Mr. Guzman is claiming a motion under NRS 174.098(1) "must occur 10 days before trial, not sooner, not later." No so. That interpretation is also of the Real Party's making, and again, the Real Party is mistaken. A defendant, like Mr. Guzman, who is facing the death penalty may elect to file a motion under NRS 174.098(1) at *any time* so long as it is not less than 10 days before trial. So the motion can be filed "sooner" than 10 days before trial, if he elects, but certainly not "later" than 10 days before trial.[9]

The Real Party complains that its (mistaken) understanding of Mr. Guzan's interpretation of the statute "would only create unreasonable delay and unnecessary litigation costs in every capital case where an intellectual disability motion is pursued." Answer at 40. Yet, Mr. Guzman's actual interpretation of the statute is true to its plain language. If the language of the statute"—as constitutionally mandated by *Atkins v. Virginia*, 536 U.S. 304 (2002)— causes (in the Real Party's view) "unreasonable delay and unnecessary litigation costs", its argument is with the Legislature, not Mr. Guzman *or* this

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is that of the Real Party.

[9] *State v. Covington*, *supra* (affirming district court's allowance of an intellectual disability motion under NRS 197.098 to be filed, and considered, even though filed after the start of the trial).

Court. *Cf. Holiday Retirement Corporation v. State*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) (noting that it "is the prerogative of the Legislature, not this court, to change or rewrite a statute") (citation omitted); *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018) (declining to "rewrite statute").

Finally, the Real Party's argument that subsection 3 of NRS 174.098 supports the proposition that the legislature "intended to give the district court the flexibility to set a schedule that would also satisfy its statutory requirement to hold the motion hearing 'within a reasonable time before trial'", Answer at 41-42, simply misses the mark. The timeframes stated in subsection 3—*i.e.*, defendant must "[p]rovide evidence which demonstrates that the defendant is intellectually disabled not less than 30 days before the date set for a hearing conducted pursuant to subsection 2" and "[u]ndergo an examination by an expert selected by the prosecution on the issue of whether the defendant is intellectually disabled at least 15 days before the date set for a hearing pursuant to subsection 2"—arise only *after* a motion pursuant to subsection 1 has been filed. See NRS 174.098(2)(a) ("If a defendant files a motion pursuant to this section, the court must: [s]tay

the proceedings pending a decision on the issue of intellectual disability"). The "reasonable time before trial" command of subsection 3 refers to the trial date set after the stay required by subsection 2 has been lifted by the district court. Subsection 3 has nothing to say about the timing language in subsection 1.

Legislative history

As for "legislative history" the Real Party merely quotes Mr. Pescetta, Answer at 42-43 and ignores Mr. Peterson (who recognized that "certain issues might not be presented until the eve of trial, and it would not be appropriate to disallow defense attorneys and their clients to raise the issue prior to trial") and Ms. Erickson (supporting AB 15 with Mr. Peterson's amendment on behalf of the Nevada District Attorney's Association). The history of AB 15 supports Mr. Guzman's position on NRS 174.098(1). There is nothing in the history that supports the position being taken by the Real Party.

Other "binding precedent"

Here the Real Party offers that Mr. Guzman "seeks to remove a traditional power vested in the judiciary and to provide it to the legislature and/or capital defendants." Answer at 43. The Real Party

worries that "inherent power of a district court to control the litigation before it" will be "destroy[ed]" if the plain language of NRS 174.098(1) is followed. The Real Party invokes the separation of powers doctrine. *Id.* at 43-44. This Court should not be swayed by such rhetoric.

Generally, under the doctrine of separation of powers the legislature "may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separations of powers." *Berkson v. LePome*, 126 Nev. 492, 499, 245 P.3d 560, 565 (2010). Prior to *Atkins* no rule or procedures existed for determining when a person is intellectually disabled. After *Atkins* was decided, the Nevada legislature enacted NRS 174.098 in direct response. See *Ybarra v. State*, 127 Nev. 47, 53, 247 P.3d 269, 273 (2011) (stating that the United States Supreme Court "did not prescribe a definition of [intellectual disability] or procedures for determining when an individual is [intellectually disabled]"; left it to the states to "develop[] appropriate ways to enforce [this] constitutional restriction upon ... execution[s]"; and that "[t]he Nevada Legislature accomplished that task with the passage of NRS 174.098); *Ybarra v. Filson*, 869 F.3d 1016, 1023 (9th Cir. 2017) (noting that "[t]he Nevada legislature

responded to *Atkins* by enacting [NRS 174.098]"). The enactment of this statute did not violate separation of powers and a district court's compliance with the statute's mandate neither "destroys" nor invades a district court's inherent power to control litigation. The logical end game of the Real Party's position, if taken seriously, is that all statutory criminal procedural provisions "destroy" or "invade" judicial power. Most of Nevada's statutory provisions governing criminal procedure, however, have existed comfortably in one form or another since 1967. It is unimaginable that the Real Party would disrupt that statutory scheme under the guise of separation of powers.

Finally, the Real Party looks to Supreme Court Rule 250. Answer at 44-45. But NRS 174.098 can and should be read harmoniously with the Court's rules governing death penalty cases and nothing in Rule 250 ellipsis the express language of NRS 174.098(1). *Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 315, 236 P.3d 613, 615 (2010) ("this court will interpret a rule or statute in harmony with other rules and statutes, especially where, as here, one provision is silent on specifics included in another") (quoting *Albios v. Horizon Communications, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028, 1030-31 (2006) (internal quotation marks

omitted)); *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 543 (2002) (recognizing this Court's obligation to construe statutory provisions in harmony with each other when possible). Indeed, if the district court ultimately concludes that Mr. Guzman is intellectually disabled, it will be required to "make such a finding in the record and strike the notice of intent to seek the death penalty." NRS 174.098(6).

Mandamus relief is proper

Mr. Guzman, as a defendant facing the death penalty if convicted of first degree murder, and who has established a good faith foundation to pursue an *Atkins* inquiry, as well as, motion practice under NRS 174.098(1), clearly has "a legal right" to particularized action by the district court; namely, compliance with the terms of the statute. NRS 174.098(1) vests discretion to file a motion to declare that the defendant is intellectually disabled with the defendant who is facing the death penalty. It does not grant any other person, agency, or court such discretion. The statute limits the defendant's exercise of this discretion such that any motion must be filed "not less than 10 days before the date set for trial." The statute does not add, and the Court should not

read into it, a further limitation along the lines of "unless otherwise ordered by the court" as proposed by the Real Party.[10]

CONCLUSION

This Court should issue a writ of mandamus directing the district court to vacate the April 12, 2021, filing deadline for Mr. Guzman's

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[10] One last thing. The Real Party asserts that "[t]his is Guzman's third petition for extraordinary relief and one with the thinly veiled purpose of gaining a continuance of his motion deadline and trial without making a factual showing of good cause to the district court." Answer at 47. Such an assertion requires a response. First, nothing in Rule 21 of the Nevada Rules of Appellate Procedure limits the number of writ petitions that may be brought to the Court for review out of a single case. Second, counsel takes his duty and responsibilities to this Court seriously and has never consciously brought a frivolous writ petition to this Court. This is not a frivolous writ petition and it is categorically not an attempt, let alone a "thinly veiled" one, to gain a continuance of the trial date. Granting the writ vacates *only* the motion filing deadline. Mr. Guzman is not seeking to have the September 20, 2021 trial date vacated by way of this writ. Third, Mr. Guzman has up to 10 days before trial to file his motion for a declaration of intellectual disability. Contrary to the Real Party's mistaken belief, Mr. Guzman does not believe that he cannot file his motion sooner than 10 days before trial, nor does the statute command that result. Finally, fourth, under NRS 174.098(1) Mr. Guzman is not required to make a good cause showing for the timely filing of his motion to declare intellectual disability; a good cause standard applies where the motion is late, *i.e.*, filed within 10 days of trial or during the trial itself.

Atkins motion under NRS 174.098(1).

DATED this 29th day of March 2021.

JOHN L. ARRASCADA
Washoe County Public Defender

By: _____
JOHN REESE PETTY
Chief Deputy Public Defender

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this reply complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 4009 words. NRAP 32(a)(7)(A)(i), (ii).

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

DATED this 29th day of March 2021.

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

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of March 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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and

Mark Jackson, Douglas County District Attorney

John Reese Petty
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