Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2015-103569-001 DT 07/03/2019

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT
A. Moore
Deputy

STATE OF ARIZONA

KRISTIN LARISH
MATTHEW H ELIAS

v.

APOLINAR ALTAMIRANO (001)

JOEL T BROWN
STEVE WARREN MCCARTHY
GREGORY J KUYKENDALL

COLLEEN CLASE

CAPITAL CASE MANAGER
JUDGE KEMP

UNDER ADVISEMENT RULING

The Court has taken under advisement the issue of whether Defendant Apolinar Altamirano is ineligible for the death penalty due to an alleged intellectual disability ("ID") pursuant to A.R.S. §13-753 and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). The Court has considered all of the testimony and exhibits presented on November 26, 27, 28, 29 and 30, December 19 of 2018; January 11, February 1, March 11, 12, 13 and 14, and May 22 and 23 of 2019. Defendant is charged in Count 1 with First Degree Murder and the State has filed a notice of its intent to seek the death penalty.

The Court has also received and considered the various pleadings filed by counsel prior to and throughout the proceedings, as well as the final briefs filed simultaneously on June 10, 2019.

Legal Standards and Definitions

A person with an intellectual disability cannot be sentenced to death. A.R.S. §13-753; *Atkins*, 536 U.S. at 321. If the court finds that the defendant has an intellectual disability, it must dismiss the notice of intent to seek the death penalty. A.R.S. §13-753(H).

A.R.S. §13-753(K)(3) defines intellectual disability as a "condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen."

A.R.S. §13-753(K)(3) requires a threshold inquiry in determining whether Defendant is intellectually disabled, namely:

(1) Defendant has significantly subaverage intellectual functioning; and
(2) Defendant has significant impairment in adaptive behavior; and
(3) The onset of both of these conditions occurred before Defendant reached age 18

The burden is on the defendant to prove intellectual disability by clear and convincing evidence. A.R.S. §13-753(G); *State v. Grell (Grell II)*, 212 Ariz. 516, 525, 135 P.3d 696, 705 (2006). Clear and convincing evidence is evidence that persuades a fact finder "that the truth of the contention is highly probable." *In re: Neville*, 147 Ariz. 106, 111, 708 P.2d 1297, 1302 (1985).

PRONG ONE

Defendant's Intellectual Functioning

"Significantly subaverage general intellectual functioning" means a full scale intelligence quotient ("IQ") of seventy or lower. A.R.S. §13-753(K)(5). In determining the intelligence quotient, the Court shall take into account the margin of error for the test administered. *Id.* If an IQ score is close to, but above 70, courts must account for the test's "standard error of measurement." *Hall v. Florida*, 572 U.S. 701, 724 134 S.Ct 1986 (2014). The standard error of measurement ("SEM") is a reflection of the inherent imprecision of the test itself, and an individual's score is best understood as a range of scores on either side of the recorded score where the true IQ score lies. *Id.* at 712-13. This also reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. *Id.* at 713. If the lower end of Defendant's IQ score range falls at or below 70 (including the SEM), Defendant's adaptive behavior must be considered. *Id*. at 723.

The Eighth Amendment mandates that ID determinations adhere to current medical standards, such as the current versions of the leading diagnostic manuals discussed below. *Moore v. Texas*, (Moore I), 137 S.Ct. 1039, 1049 (2017) (quoting *Hall*, 134 S.Ct. at 1995)(held that Florida law violated the Eighth Amendment by "disregard[ing] established medical practice"). While being informed by the medical community does not demand adherence to

everything stated in the latest medical guide, disregard for current medical standards is also not warranted. *Id.*

This Court is relying upon the American Association on Intellectual and Developmental Disabilities diagnostic manual, the Intellectual Disability: Definition, Classification and System of Supports (11th Edition) ("AAIDD-11"), on the American Psychological Association's diagnostic manual, the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), and on the opinions of and medical authorities cited by the experts who testified. The Court is basing its findings and is informed by the medical community's current diagnostic framework.

Dr. Stephen Greenspan

Dr. Stephen Greenspan was the first witness and he testified regarding IQ scores and adaptive behavior. He is a leading expert in the field of ID and is often cited as authority, in particular the ID section of the DSM-5. He has no information regarding the facts of this case and did not evaluate Defendant. His testimony carries considerable weight with the Court.

He testified that DSM-5 does not emphasize test scores. His primary focus is on adaptive behavior, and he opined that ID is a functional diagnosis. ID must manifest itself in childhood or adolescence. ID is not a disorder but must be determined by three domains relating to adaptive behavior, namely conceptual, practical and social domains. (Adaptive behavior will be discussed below).

Dr. Greenspan opined that IQ tests and scores are outdated. IQ scores must have a range due to standard errors of measurement. He did opine that the Weschler Adult Intelligence Scale, Fourth Edition ("WAIS-IV") is the gold standard for IQ tests. He also opined that the research and literature has found that the Mexican WAIS-III is problematic.

He also opined that he does find the Flynn Effect to be a credible concern and that it needs to be part of the IQ calculation. Most experts accept the Flynn Effect theory. It is recognized in both the DSM-5 and the AAIDD-11. The Court will take into account the Flynn Effect as to each IQ test in a manner described below.

Both the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychological Association (APA) consider the Flynn Effect as a factor in examining IQ scores. *United States v. Roland*, 281 F.Supp.3d 470, 502 (D.N.J. 2017)(citing AAIDD-11 at 37; DSM-5 at 37). The AAIDD recommends correcting for the age of norms in outdated tests. *Smith v. Ryan*, 813 F.3d 1175, 1185 (9th Cir. 2016); *see also Roland*, at 502 (citing AAIDD-11 at 95-96 ("B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms used in the assessment or

interpretation of an IQ score."); and DSM-5 at 37 (recognized the Flynn Effect as one of the factors that may affect IQ test score").

In the course of these hearings, results of the following IQ tests were presented.

Dr. Jon Van Doren

First, Dr. Jon Van Doren, a neuropsychologist appointed by the court, conducted a prescreening evaluation to determine Defendant's IQ pursuant to A.R.S. §13-753(B) on July 17, 2017. Dr. Van Doren administered the test at the Fourth Avenue Jail. He first tested Defendant regarding his language skills and found Defendant had adequate English language skills. He administered the WAIS-IV which he also testified was the gold standard for IQ tests, in English using U.S. norms. He also tested for malingering and found Defendant was giving good effort.

Dr. Van Doren found a full scale IQ of 71 with a 90% confidence interval of 68-75 and 95% confidence interval of 68-76. He testified that application of the Flynn Effect resulted in an IQ score of 68. However, he also testified that the Flynn Effect results in a very small difference and he usually does not include scores with the Flynn Effect. He used and heavily relied upon U.S. norms and all test scores were determined in accordance with the WAIS-IV manual.

The Court has heard testimony regarding the Flynn Effect and the controversy surrounding it. As stated above, most experts agree it should be taken into account. The Court will calculate the Flynn Effect with a more conservative reduction. Rather than reducing IQ by 3 points due to the Flynn Effect, the Court will reduce Dr. Van Doren's results by 2 points. Therefore, the Court finds, per Dr. Van Doren's testing, that Defendant has an overall IQ of 69 with a range of 66-74.

Dr. Ricardo Weinstein

An IQ evaluation was conducted by defense expert Dr. Ricardo Weinstein on June 8, 2016. He administered both the WAIS-III and a Comprehensive Test of Nonverbal Intelligence ("CTONI 2"). He also administered a third IQ test, the WAIS-IV, in Spanish. All three tests were administered in Spanish which Dr. Weinstein testified was Defendant's preferred language. He first tested Defendant for effort and found his effort was within the normal range.

The WAIS-III in Spanish resulted in a composite score of 67. Dr. Weinstein used U.S. norms in scoring the test. Consistent with Dr. Greenspan's testimony, Dr. Weinstein's opinion is that Mexican norms should not be used for this test. He gave Defendant a score of 67 with a

range of 62-72 without the Flynn Effect and 56-66 with the Flynn Effect. Dr. Weinstein gave 6 points for the Flynn Effect. The test was administered in 2016 and normed in 1995. (See Exh. 17). Best practices do require recognition of a potential Flynn Effect, but 6 points does not appear to be justified based upon the literature and expert testimony presented. An overall score of 65 with a range of 60-70 is a more reasonable finding. (Two points for the Flynn Effect.)

The second test administered by Dr. Weinstein was the CTONI 2 test. Dr. Weinstein testified this is an evaluation of Defendant's nonverbal intelligence and gave an overall score of 68 with a range of 63-73. With a Flynn Effect of 3 points, the overall score of 65 with a range of 60-70. The reduction of 3 points again appears excessive and the Court finds a reduction of 2 points resulting in an overall score of 66 and a range of 61-71 is appropriate.

The third IQ test administered by Dr. Weinstein was the WAIS-IV in Spanish. He scored Defendant a 68 overall and a range of 65-73. With the Flynn Effect, he reduced the score by 3 points for an overall of 65 and a range of 60-70. The Court again finds this a bit excessive and will find an overall score of 66 and a range of 61-71.

Dr. Weinstein testified that all three tests were very similar in their results and therefore validated one another. On cross-examination, Dr. Weinstein conceded that he did not write a formal report but submitted two letters (Exhs. 13 and 30). Neither letter referred to the DSM-5 or the AAIDD-11, and did not formally analyze the three prongs in A.R.S. §13-753(K)(3).

Dr. Martinez reviewed Dr. Weinstein's letters and raw data. Dr. Martinez had an issue with using U.S. norms on a WAIS-III test administered in Spanish, and stated the results of this test were contaminated.

Dr. Sergio Martinez

Dr. Sergio Martinez testified on behalf of the State. He administered two IQ tests and interviewed Defendant on May 29, 2018. The tests administered were the Pruebas de Habilldades Cognitivas Standard Battery ("Bateria III") and the WAIS-IV. He also gave a preliminary test before administering the first test to see if Defendant had appropriate mental and short term recall. He found Defendant had average mental health and his short term recall was mildly deficient.

The Bateria III was administered to Defendant as testified to by Dr. Martinez, because it is an IQ assessment translated/adapted from the English language into Spanish for Spanish-language speaking test subjects. He testified that this test is the most appropriate and valid test to measure Defendant's General Intellectual Abilities ("GIA"). The results for the GIA were an 83 with a range of 80-85, 76-81 with the Flynn Effect. (Exh. 68, p.17). This is borderline to low

average range. Dr. Weinstein was critical of the fact that the first three tests of the Bateria III were not scored. Dr. Martinez explained this was due to Defendant's second grade education. The Court finds, to be consistent, that the Flynn Effect results in an overall IQ score of 81 with a range of 78-83.

Dr. Weinstein was also critical of Dr. Martinez finding a result for concept formation which was substantially higher than all other scores. (Exh. 19). Dr. Weinstein called this an outlier since the test result was consistent with someone in post-graduate college (the eighteenth grade), much higher than Defendant's other scores. Dr. Martinez testified this was not an outlier and the score should be included. Dr. Weinstein rescored the test in three ways (Exh. 30), first by throwing the score out completely (GIA of 68 with 95% confidence range of 64-72); second using a score of 2 rather than Dr. Martinez's score based on a scoring process according to Dr. Martinez's raw data (GIA 70 with 95% confidence range of 67-74); and finally by averaging the other tests of Cognitive Abilities in the Bateria III (GIA of 77 with 95% confidence range of 75-80). Dr. Martinez testified that he has never seen a score completely thrown out by an expert rescoring a test as Dr. Weinstein did in the first scenario.

The second test was the WAIS-IV administered in English. The result was a 72 (borderline) and a 69 with the Flynn Effect. (95% confidence range of 65-74, an extremely low to borderline range). The Court again finds that the Flynn Effect reduces the score by 2 points for a 70 overall IQ and a range of 66-75.

The substantial difference between the scores in the two tests was explained by Dr. Martinez as a language issue. He opined that Defendant's primary language is Spanish and the WAIS-IV scores were lower due to being administered in English.

Dr. Martinez produced a second report (Exh. 70) to analyze the WAIS-IV tests administered by himself, Dr. Van Doren and Dr. Weinstein. Dr. Weinstein's scores were the highest because he administered this test in Spanish, according to Dr. Martinez. The language used in the administration of the WAIS-IV was a major point of emphasis in Dr. Martinez's testimony and report. It is difficult for the Court to determine the effect of administering the tests in Spanish and English, as well as the use of Mexican or U.S. norms, in light of conflicting opinions and findings in the medical community's diagnostic framework. There simply is no clear guidance in determining the effects of both administering the tests in English or Spanish, and the use of Mexican or U.S. norms.

Conclusions Regarding Defendant's Intellectual Functioning

The Court has determined that Defendant's overall IQ score per Dr. Van Doren's testing is 69 with a range of 66-74 (with a 95% confidence interval) taking into account the Flynn Effect. Dr. Van Doren was appointed by the court and administered the WAIS-IV in English.

Dr. Weinstein administered three tests, the last being a WAIS-IV in Spanish with a result of 66 overall and a range of 61-71. The WAIS-IV is the most reliable test in the Court's view since it is considered by most experts as the gold standard. The other two tests by Dr. Weinstein do not carry as much weight but do support his findings on the WAIS-IV in light of the consistent results.

Finally, Dr. Martinez administered two IQ tests. The WAIS-IV, administered in English, resulted in a 70 with the Flynn Effect and a range of 65-75. The Bateria III resulted in an overall score of 81 with a range of 78-83.

The WAIS-IV results by all three experts were consistent and inter-rated. Those scores carry weight for the Court's determination of the first prong of 13-753(K)(3). Dr. Weinstein's other two IQ tests were almost identical, further supporting a finding that Defendant's intellectual functioning is clearly in the subaverage range. Even if the court did not take the Flynn Effect into account, the low end of the ranges are subaverage. The Bateria III test administered by Dr. Martinez appears to be significantly inconsistent with the other IQ tests and carries little weight with the Court. The Court finds that the first prong has been met by Defendant.

Of note, the Court is aware that the WAIS-IV administered by Dr. Weinstein was in Spanish (which Dr. Weinstein said was Defendant's primary language) and in English by Dr. Martinez and Dr. Van Doren. The import of administering the test in different languages is again difficult for the Court to weigh. It appears Defendant speaks both languages fairly well and the testing results on the Spanish language and English versions of the WAIS-IV were consistent. Both Dr. Weinstein and Dr. Martinez (Exh. 68 at p.6) agreed that Spanish was Defendant's primary language and that he clearly had a better command of Spanish than English.

PRONG TWO

Defendant's Adaptive Behavior

The second prong in A.R.S. §13-753(K)(3) relates to adaptive behavior. A.R.S. §13-753(K)(1) defines adaptive behavior as "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age

and cultural group." This definition requires an "overall assessment of the defendant's ability to meet society's expectations of him" and differs from a clinical definition, which bases an impairment in adaptive functioning on deficits without considering strengths. *State v. Boyston,* 231 Ariz. 539, 547, 298 P.3d 887, 895 (2013); see also *State v. Escalante-Orozco,* 241 Ariz. 254, 386 P.3d 798 (2017).

The medical community focuses the adaptive function inquiry on adaptive deficits. Significant limitations in conceptual, social or practical adaptive skills are not outweighed by the potential strengths in some adaptive skills. AAIDD-11 at 47. The Supreme Court has also stated disapproval of overemphasizing a defendant's adaptive functioning strengths and thus deviating from prevailing medical standards. *Moore* (*Moore* I) 137 S.Ct. at 1050. The inquiry should focus on deficits in adaptive functioning, and deficits in only one of the adaptive skills domains suffice to show adaptive deficits in conformance with medical standards. DSM-5 at 33, 38; *Moore (Moore* I*),* 137 S.Ct. at 1050. A comprehensive assessment of adaptive behaviors will likely include a systematic review of the individual's family history, medical history, school records, employment records, other relevant records and information as well as clinical interviews with a person or persons who know the individual well. AAIDD-11 at 45.

Dr. Greenspan's focus is on adaptive behavior in determining ID. Individuals with ID may or may not have maladaptive behaviors. He did not interview Defendant or any of the informants in this case. He stated that there is no direct measure for adaptive behavior. The evaluation process involves interviewing percipient witnesses such as family members, co-workers and neighbors. ID is a functional diagnosis.

In evaluating adaptive behavior, Dr. Greenspan outlined three domains that are relevant, and deficiencies in at least one of the three must be present for a finding of ID. (DSM-5 at 37-38). First, there is the conceptual domain. This deals with memory, language, reading, writing, math, practical knowledge, problem solving and use of judgment in practical situations. Dr. Greenspan testified that this domain involves more than just a school setting and includes things such as telling time and counting change. Lack of education is a risk factor.

The second domain is the social domain. This involves awareness of interpersonal situations, including thoughts, feelings, empathy, communication skills, friendships and application of social judgment. This concerns how an individual deals with people in the world, including peers, relationships and co-workers.

Finally, the practical domain is the ability to function independently in areas of personal care, work responsibilities, money management, recreation, self-regulation of behavior, school and work task organization. Dr. Greenspan opined that individuals with ID can often do many things like be a productive worker, have romantic relationships, or operate a motor vehicle. He

also opined, and the medical community agrees, that Defendant's behavior in a jail or prison setting is not a reliable source in determining ID since the setting is highly structured. (DSM-5 at 38). An individual who is incarcerated has very few choices or decisions. Dr. Martinez opined that Defendant could tell the jail his medical needs and knew his conditions in seeking treatment which supports a finding of normal adaptive behavior. The Court is not persuaded and puts no weight on the Defendant's behavior in jail. *Moore* (Moore I) 137 S.Ct. at 1050.

Lay Witnesses and Adaptive Behavior

Maria Amelia Diaz Contreras

Ms. Contreras is a teacher and principal in San Luis, Mexico. She was Defendant's second grade elementary school teacher.

She testified that Defendant had difficulties in school. Reading and writing were especially challenging for him. He did poorly in school, ranking in the lower 5 percent range. He received low grades and had difficulty listening to directions and following instructions. He stood out as a difficult student. If special education were available at that time, he would have qualified for special education programs. She also ranked him in the lower 5 percent for behavior. He was restless and mischievous. She observed on some occasions that Defendant would be teased and rejected by the other students during recesses. She had to intervene almost on a daily basis for altercations between Defendant and other students. She intervened in some physical fights but most confrontations were verbal.

Grades at the school were on a 10 point scale. A grade of 5 was failing and most students received 8, 9 or 10. Only students who did not attend received a 5. All of Defendant's final grades were 7 or higher. This is a low grade and Ms. Contreras testified that it was rare to score below 8. Defendant did pass second grade and went on to finish the fifth grade.

The Court finds significant credibility for this witness. She has no bias, was well spoken and consistent in her testimony. The limited school records also supported her testimony. As his teacher, she had daily contact with Defendant for one full school year.

Marilu Carranza Mireles Velasquez

Ms. Velasquez is Defendant's mother.

She was married at age 13 and her husband (Defendant's father) was an alcoholic who beat her on a regular basis. He beat her often when she was pregnant, including when she was carrying Defendant. She stated he hit and kicked her in the stomach when pregnant with

Defendant. She gave birth to five children with Defendant being the fourth in line. He was full term and a healthy size when born.

Defendant was born at home with the assistance of a mid-wife. This is common in rural Mexico. Defendant's birth was difficult. She testified that she was given an injection by the mid-wife to give her strength. He came out with the umbilical cord around his neck. She now regrets having the mid-wife inject her with a chemical to induce labor. Defendant was not crying when born and did not cry for a time after birth. There are no records to support these claims. However, this is expected given Defendant's place of birth in a rural area in Mexico. She testified that Defendant was delayed in walking, talking and toilet training. He continued to wet the bed and defecate in his clothes until age 5.

Ms. Velasquez was impeached in several areas. She interviewed previously with the mitigation specialist. (Exh. 24). She said at that time, January 14, 2016, that there were no complications with Defendant's birth, said nothing regarding the umbilical cord being wrapped around his neck, and stated Defendant met all of his milestones including walking (age 1) and talking (age 1-1 ½).

She testified Defendant's father beat him often and that Defendant did not understand why he was being punished. He would misbehave because he did not understand rules and directions. Defendant did not interact with other children before the age of 6, often misbehaved in school, was hyperactive and threw lots of temper tantrums. Many tantrums were due to him not getting the amount or kind of food he wanted. At school he had a nickname roughly translated as "mute."

In her previous statement to the mitigation specialist, she said he was helpful to the family, never got into any fights with siblings or other kids at school, loved working with his father and was very smart. She denied saying all of the inconsistencies outlined above on cross-examination.

Defendant worked as a child starting when he was 4 at his father's butcher shop. He worked for his aunt selling tacos at age 12. At age 14, he came to the United States for the first time. She saw him drink alcohol on one occasion and was not aware of any marijuana use.

When he was 18, he married Carmen who was 8 years older. They were inseparable. Carmen had a son from another relationship and two daughters with Defendant. She had previously stated that Defendant sent her money from America. She denied this under oath.

Maria de Lourdes Rodriguez Nieto

Ms. Rodriguez Nieto is a general medical doctor in Mexico and Defendant's aunt by marriage.

Defendant lived with her for 8-10 months when he was about 6 years old. She confirmed that he threw a lot of tantrums, especially regarding food. He would also eat with his hands rather than use utensils. He was withdrawn and isolated, and urinated in bed every night and sometimes defecated in the bed. Defendant loved his father and was upset when his father left the family. She also saw Defendant drinking around the age of 11.

Mariciela Carranza Velasquez

Ms. Velasquez is Defendant's aunt, the younger sister of his mother.

She testified that Defendant's mother had a difficult pregnancy with him, including often being nauseous. However, she was unaware of any problems with Defendant's delivery. She personally witnessed Defendant's father physically abuse Defendant's mother, including hitting her, knocking her down and kicking her. She often saw bruises on her face.

She testified that Defendant was delayed with both walking (2 years old) and speaking (2-3 years old). Defendant would stutter and struggle to pronounce words. He had a nickname which translated to "stutterer." Defendant was very quiet and shy and would almost always isolate himself from others. He was often made fun of and called names due to his poor speech and being overweight. He was not in many family photos due to his isolation. His father would beat him and call him dumb.

On cross-examination, she testified that Defendant's mother had difficult pregnancies with all of her children, that his father abused and beat his mother during all the pregnancies, and that he physically abused all of the children.

Yosio Altamirano

Mr. Altamirano is Defendant's younger brother by 5 years. He owns a grocery store and lives in San Luis.

As a boy, Defendant isolated himself. Defendant had no friends other than Yosio. He was not in any family photos. He came to the U.S. when he was 22 and lived with Defendant, his wife Carmen, and their 5 year old twin daughters. Carmen was already very sick at this time

with cancer. Carmen would tell Defendant what to do with regard to buying food, paying bills, and caring for the twins. Carmen was clearly in charge of the relationship.

There were a number of things Defendant could not do well or at all. He could not cook, prepare food, or use kitchen appliances. He could not withdraw money from an ATM and would have to go inside the bank for assistance. He also struggled to take care of Carmen who needed home medical treatment. He eventually did call the hospital for an ambulance when Carmen became very ill. Defendant owned two rental properties but could not make any repairs. Any repair work was done by someone Defendant hired.

Everything changed when Carmen died. Defendant stopped collecting rent and paying bills. He could not accept her death and was deeply depressed. He started drinking heavily, using drugs (marijuana and methamphetamine) and spending lots of money carelessly. He went to strip clubs and loaned his stepson, Augustine, money. He had never seen Defendant spend money like this. Yosio had to loan him money.

On cross-examination, Yosio conceded that Defendant would remind Carmen to take medicine, that he did run errands and that he was hardworking. Yosio also testified that Defendant's methamphetamine use had become a problem, that he would become paranoid and angry, and that he became afraid of Defendant. Defendant would get upset with customer service in convenience stores and restaurants.

San Juana Anita Altamirano Mireles

Ms. Mireles is Defendant's older sister.

Defendant would isolate himself at school and at home. He was not in very many family photos. Defendant was easily angered and threw tantrums on a regular basis. He was mad all the time. He was always in trouble at school and would never do his homework. He could read at a very basic level.

She testified that Defendant was very upset when their father left the family and felt the father had abandoned him. She testified that Defendant worked at the family business at a young age and was capable of adding and subtracting to make change for customers.

Augustine Daniel

Mr. Daniel is Defendant's stepson and Carmen's oldest child. He met Defendant when he was 7 and Defendant was 14. It appears from the record that Defendant and Carmen became romantically involved when Defendant was 15 and Carmen was 23.

He testified that Defendant was a hard worker (he worked for several landscaping businesses) and a good role model. He did everything you would expect of a father. He taught Augustine to work hard, not let anyone take advantage of you and took him to church. Defendant had his own landscaping business with business cards. Defendant built two studios and rented them out. He taught Augustine things like landscaping and how to build things. However, Defendant would hire others to work on his studios, and he did not build them by himself. He did state that Defendant enrolled at Mesa Community College.

He testified that Defendant did send money to Mexico and that his male siblings were jealous of this. He went to Defendant to ask for financial advice. Defendant was successful on probation and had almost completed probation when the murder occurred. Defendant also discussed entering a plea agreement for a life sentence and showed him how to look up information on the Department of Corrections website.

His mother was the brains and Defendant the muscle in their relationship. Defendant dramatically changed after her death.

Paulino Gomez

Mr. Gomez is a construction worker who was referred to Defendant to do some construction work. Defendant hired him to do 10-15 projects on three structures, including electrical, flooring and plumbing. He also worked on enclosing a porch and trimming a door. Defendant was always with his wife. Defendant did not direct him as to what to do on the projects.

Detective Amy Johnson

Detective Johnson is the case agent in this case. The facts surrounding the murder are not in question. The murder is on videotape. (Exh 78). It is clear from the tape that the murder was not planned or premeditated. Defendant lays out some change on the counter and becomes upset when the victim will not count it. It is unclear whether Defendant was capable of counting the change himself. Shortly after the murder, Defendant is stopped by Mesa PD. He then flees and there is a lengthy car chase at high speeds on surface streets.

Defendant's driver's license was in the name of Emelio Jose Garcia Leon, a name he also used in numerous contacts with police, to enroll in Mesa Community College, and for other legal documentation. As outlined in the literature from the medical community, the facts surrounding the crime should be given little or no weight.

Al Richard

Mr. Richard is an investigator with the County Attorney's Office. He reviewed Defendant's jail calls which were in Spanish and English. In conversations with his mother, Defendant would advise her regarding property, bank accounts and how to move money. He also discussed with her the exchange rates for currency in the U.S. and Mexico. Also while in jail, Defendant was disciplined several times, mostly for making alcohol and exchanging the alcohol for food with other detainees. The alcohol is made by putting orange peels in bottles with warm water and fermenting the liquid for a time.

He also testified regarding Defendant's criminal history and compliance with probation. Defendant was compliant, paid monthly fees and finished drug counseling. Defendant and Carmen had the same probation officer and would go to appointments together. Defendant's criminal history, until this case, is unremarkable and has no weight in the Court's decision.

Both Detective Johnson and Mr. Richard testified regarding Defendant's bank accounts. It appears he had 4 bank accounts during the period of 2011-2015. There was conflicting testimony regarding negative balances in the accounts. It is clear that there were negative balances both when Carmen was alive and after her death. It is likely, based upon the testimony, that Carmen was in charge of the bank accounts while she was alive. The bank records are not conclusive due to the conflicting evidence, and the records do not persuade the Court's opinion in any way.

Expert Witnesses and Adaptive Behavior

Dr. Weinstein Adaptive Behavior

Dr. Weinstein reviewed a number of documents including Defendant's school records, police records and jail records. He also interviewed Defendant's mother and grandmother. He also administered an Adaptive Behavior Assessment System, third edition ("ABAS-3") test to Defendant's mother and grandmother regarding Defendant's abilities in 3 separate areas, namely conceptual, social and practical. He then determined a composite score. He opined that the results showed intra-rater reliability since he obtained similar results from 2 different people. The results revealed severe deficits in the conceptual domain and serious deficits in the social and practical domains. He also concluded that prong 2 of §13-753(K)(3) was met and that

Defendant was ID under the definition in the Arizona statute, DSM-5 and AAIDD-11. The results of the IQ tests are likewise consistent which strengthens his findings.

His interviews with informants revealed that Defendant's mother had a difficult birth. The umbilical cord was wrapped around Defendant's head. Lack of oxygen to the brain is certainly possible. Defendant's mother had no prenatal care and there was no medical intervention. Defendant was born at home with the assistance of a mid-wife.

Defendant had difficulties in school. He used alcohol at a very young age which can cause damage and developmental delays. Defendant isolated himself. He needed special education services but received none. The records revealed he passed the fifth grade but never went on to sixth grade. He was not sensitive to his own personal hygiene as a child and had no appropriate peers.

Defendant has always relied upon others to assist him. He was deported after his first entry to the U.S. but came back to the U.S. with assistance from his brother. Dr. Weinstein opined that many ID individuals have crossed the border, almost always with assistance. Defendant was very dependent on his wife to pay bills and manage money. He also opined that Defendant is quite gullible and gave two examples. Per Defendant's brother, Defendant spent some $30,000.00 on an exotic dancer that he considered his girlfriend. This was not clearly supported by any documentation (i.e. bank records). Defendant also was swindled out of $10,000.00 in a deal to sell his vehicle. There is not corroborating evidence to support this.

After Defendant's wife died, he fell apart. He could not control his behavior, manage money, collect rent or pay bills. He started using drugs heavily. The two examples of gullibility outlined above occurred after Carmen died. Any accomplishments by Defendant were significantly aided by his wife.

Dr. Weinstein opined that ID is not inconsistent with speaking two languages, obtaining a driver's license, crossing the border illegally, having romantic relationships, or having a job.

Dr. Sergio Martinez Adaptive Behavior

Dr. Martinez testified that he evaluated Defendant at Fourth Avenue Jail for a total of seven hours and fifteen minutes. He reviewed voluminous records including school records, Defendant's employment history, court documents and witness/informant statements. He also reviewed statements from other family members, in particular his stepson Augustine.

He testified that he gave Defendant an initial examination consisting of 30 questions to determine if he could be properly evaluated. Defendant had average mental health and mild

deficits with regard to time and short term recall. Defendant's verbal skills are fairly good given his education level.

Dr. Martinez testified Defendant learned how to drive a vehicle at age 11 or 12. His education experience was kindergarten to fifth grade and was never held back. He testified Defendant was smoking marijuana at age 12. Defendant reportedly told him that he looked after his younger siblings.

Defendant started dating Carmen when he was 15 and she was 23. His employment as an adult was primarily landscaping and construction work. He bought a house at a good price. Regarding Defendant's behavior while in jail, he noted that Defendant was able to make homemade hooch and exchange it for food, and that he was able to tell the jail authorities what his medical needs were. He cautioned, and the literature supports this, that behavior in a jail setting should be considered with caution and evaluation of adaptive functioning outside the jail is preferable. (Exh. 68 at p.21).

With regard to the three domains, he found Defendant to be low average to average in the conceptual domain. He found no evidence to support a finding of significant impairment. His conceptual skills break down to the borderline range when assessed in English, including his math skills. Reading and writing in Spanish results in the average and low average, respectively. (Exh. 68 at p.21).

In the social domain, he pointed out Defendant's maintaining a romantic relationship for almost 15 years and that he was able to establish personal relationships throughout his life. He also pointed to the fact he was able to find his way back to Mesa after being deported. He noted that Defendant was appropriate with interpersonal skills during his examination with regard to maturity in his communication, conversation or language skills. Again he found no significant impairment in this domain. (Exh. 68 at pp. 21-22).

Finally, in the practical domain, he highlighted Defendant's participation in his family's business-owned activities (apparently his father's butcher shops as a child), his being the sole provider for his family, his investment in rental properties and maintaining personal and business bank accounts. He was able to buy a vehicle and travel streets and freeways in Maricopa County. He obtained a driver's license on his own. He worked with attorneys after being charged with crimes, regaining custody of his daughters, and removal proceedings with U.S. Immigration. He was successful on probation and terminated early. Again he found no significant impairment (Exh. 68 at p.22).

Dr. Martinez pointed to other factors that may have impacted adaptive behavior including Defendant's lack of educational opportunities (which he cites the AAIDD-11 to caution about

this because it could result in deficiencies unrelated to ID); an impoverished sociocultural experience which denied Defendant exposure to educational and sociocultural opportunities available to children in the U.S.; and problem behavior such as drug abuse. Drug use is maladaptive behavior that adversely impacted his level of adaptive functioning. This abuse caused problems with personal relationships, the legal system, and parental responsibilities.

Dr. Martinez's overall conclusion was Defendant is not ID with regard to IQ or adaptive behavior as set forth in A.R.S. §13-753(K)(1), (3) or (5). (Exh. 68 at p. 25). He also testified that he focused on Defendant's strengths in adaptive behavior and was not aware of case law holding that weaknesses should be the focus although he testified he considered both weaknesses and strengths. He did concede that an individual can be ID and display many strengths. Defendant's self-reporting must be assessed with caution, and ID individuals often overstate their strengths to "mask" deficits. They often do not want to be perceived with the stigma of having low intelligence. He also acknowledged the findings in Exh. 14 which outlines the fact that ID individuals can do many acts including obtaining a driver's license (39%) or registering to vote (62%). (Exh. 14).

Other Considerations

Dr. Andres Lugo

Dr. Lugo testified as an expert in medical toxicology, the exposure of humans to chemicals. He follows all EPA guidelines in making his assessment. He did not interview Defendant nor did he review any medical records, school records or mental health records. He did interview Defendant's mother and two aunts as well as a school teacher and a farmer. He also did not review any MRIs or CAT scans of Defendant. There was no evidence that Defendant has brain damage. Defendant's relatives told him that Defendant had a normal upbringing and hit all of his milestones.

Dr. Lugo went to San Luis where Defendant was born and raised. Defendant's home was in the middle of three sugarcane refineries. There are significant levels of toxins in the area, including three that are neurotoxins which can affect neurological development. Defendant was exposed to various pesticides.

Defendant's house was within 100 yards of one of the sugar refineries. The house was poorly built with leaves, palm trees and pieces of wood leaving Defendant and his family exposed to particles in the air. There was no plumbing or running water, so water was obtained from rivers or wells which have chemicals in the water. Children are more vulnerable to exposure since they do not wash their hands and are closer to the ground (which is

contaminated). The risk of exposure is increased if an individual works with cows and pigs. Chemicals are ingested when meat is eaten and stored in fat throughout the body.

His conclusion was that Defendant clearly was exposed to a number of neurotoxins and pesticides, but he cannot say this exposure caused neurological damage. All of Defendant's family members were exposed to the toxins in the same ways and ate the same food. The Court does not put any weight to this testimony since it is very speculative. The Court concedes that the science and research relating to the dangers of exposure to chemicals is sound. However, given that there is no hard evidence to support a finding of neurological damage, and the fact that members of his family were subject to the same exposure, the Court does not find that exposure to these chemicals is a factor in the Court's decision.

Dr. Janeen De Marte

Dr. De Marte is a clinical psychologist. She was asked to do a psychological evaluation and render a psychological diagnostic opinion. (Exh. 74). She interviewed Defendant four times for a total of almost 12 hours. She administered six psychological tests. She was not asked, and did not render, an opinion regarding ID.

Dr. De Marte determined that Defendant has a third grade reading level based upon the Wide Range Achievement Test, Fourth Edition (WRAT-4). She also opined that his answers on the Minnesota Multiphasic Personality Inventory, Second Edition (MMPI-2) produced a profile suggesting he is over-reporting psychopathology and exaggerating existing problems. This test also indicated that he presented himself in an overly positive light and tended to minimize his shortcomings. She also administered a Structured Interview of Reported Symptoms, Second Edition (SIRS-2) test to assess his feigning of mental disorders. She concluded Defendant's results were indicative of genuine responding.

She opined that she had serious concerns regarding his ability to provide accurate information, and she pointed to a number of inconsistencies in his reporting. (Exh. 74, pp 18-19). She also emphasized that his daughter-in-law, Anna Chavez, reported that Defendant would pretend to be "slow" or "handicapped" when contacted by law enforcement for criminal conduct. The Court puts little to no weight on Chavez's statement since she did not testify.

Dr. De Marte testified that Defendant told her that he was close to his mother and that his basic needs were met. Defendant told her he did not need special education, that he did well in school (although other pupils did his homework), and that he was able to develop friendships. She stated Defendant showed some level of maturity by smoking marijuana with older kids. She, like Dr. Martinez, pointed out that Defendant was able to express his medical needs to staff in jail. His spelling and grammar were poor.

Dr. De Marte did not give any tests for an ID assessment despite considering information regarding adaptive deficits. She agreed that many individuals with ID prefer to endorse psychological symptoms rather than be uncovered as someone with ID. This often leads to an unreliable or incorrect assessment of malingering.

Rebuttal Dr. Weinstein

Dr. Weinstein was called in rebuttal to the State's case. He opined that Dr. De Marte's testimony, for which he was present, did not change his opinion regarding ID. He stated that the PAI (Personality Assessment Inventory) and MMPI both require a reading level above third grade and are therefore invalid. He questioned how Dr. De Marte could opine she found no evidence of ID when she did not assess ID.

Dr. Weinstein also rebutted the testimony of Dr. Martinez. He criticized Dr. Martinez for only interviewing Defendant, relying upon interviews by others of informants, and opining that family members are not reliable. He testified that the DSM-5 and AAIDD-11 both say family members are reliable. He also pointed to Dr. Martinez's failure to acknowledge the outlier result in his testing for concept formation in the Bateria III IQ test, and pointed to Dr. Greenspan who agrees that an outlier score should be discarded. He was also critical of Dr. Martinez's emphasizing adaptive behavior strengths in diagnosing ID over weaknesses which is in contrast to the current literature. He also pointed to Dr. Martinez relying on Defendant's behavior in jail in contrast to Dr. Greenspan's position that it has no relevance. Finally, he testified that obtaining a driver's license and completing probation are not inconsistent with ID.

Analysis of Adaptive Behavior

The Court will now consider and evaluate Defendant's adaptive strengths and weaknesses.

Conceptual Weaknesses. Defendant clearly has some adaptive weaknesses in this area. First, the evidence supports a finding that Defendant did poorly in school, especially with regard to reading and writing. The school records and testimony of his second grade teacher clearly support this finding. His teacher also testified that he had considerable problems following instructions. She was constantly explaining directions to Defendant and he rarely followed them. Significantly, she testified that Defendant should have been placed in special education (which was not available). She ranked him in the lower 5 percent of his peers academically. She spent considerable time working with Defendant one-on-one. Defendant's older sister also confirmed

difficulties in school and poor academic performance. This is a substantial weakness and carries much weight.

Second, there was evidence that Defendant was developmentally delayed with regard to walking and talking. This conceptual weakness is not clearly supported by the record since Defendant's mother made inconsistent statements regarding this issue. Ms. Velasquez did testify that Defendant had developmental delays supporting this conceptual weakness. Testimony from Defendant's aunt, Mr. Rodriguez Lourdes, also supported the delayed development weakness. Further, the testimony was consistent that Defendant was quite delayed in "potty training" wherein he would defecate in his pants and wet his bed until he was five years old. This weakness is significant despite conflicting statements by Defendant's mother.

Conceptual Strengths. Defendant has shown strengths in a few areas. First, it appears from the record that Defendant was capable of holding down a job, collecting rent, and even directing contractors and other workers in constructing "studios" that later were used as rental properties. Testimony was conflicting regarding his level of construction skills. His stepson Augustine reported a relatively higher level of skill whereas Paulino Gomez, hired by Defendant to do 10-15 various construction projects, testified Defendant did not direct him or appear to have any skills regarding plumbing, electrical work and flooring.

Second, Defendant speaks two languages fluently. There is a dispute as to whether English or Spanish is his preferred language. There is some dispute over the level of sophistication of his verbal skills. He clearly has limitations with reading and writing. He lived in Mexico until age 14 or 15, and the balance of his life in the U.S.

Third, there is evidence pointing to his ability to count change, serve customers at a taco stand, butcher animals, and do landscaping and construction work. Again, his level of skill with construction work is not clear from the records. At the taco stand he was supervised by his aunt, and in the butcher shop by his father.

Finally, Defendant's allegedly selling drugs is not material to the Court's decision. Low level drug dealing, if true, is not a sophisticated endeavor. Nor does the Court find his ability in jail to make alcohol and sell or trade alcohol for food persuasive. These are not sophisticated activities and were done in a jail setting.

Social Weaknesses. The testimony supports a finding that Defendant was isolated as a child, both at school and as a member of his own family. This was a consistent theme in witness testimony. He was teased and rejected by other students. He was a troublemaker at school. Ms. Contreras said he was in the bottom 5% with regard to behavior. He would not follow instructions. He would throw tantrums when he did not get enough food. He was not in family

photos. He had very few, if any, friends as a child and as an adult. This isolation is a significant weakness.

He appears to have loved his twin daughters, but struggled to care for them in terms of food, clothes, and basic necessities. He was a good provider financially but his parenting skills were a bit lacking. Carmen would have to tell him what to do and buy for the twins. After Carmen died, he struggled more as a parent. He needed help with basic parenting skills such as bathing, feeding and caring for his girls.

Social Strengths. It is clear that Defendant had a strong, loving relationship with his wife. He adored her and his life fell apart after she died. He had two twin girls that he apparently loved and had a positive parent/child relationship. He was a good provider financially for his family.

Defendant raised his stepson as his own. Mr. Daniel lived with Defendant for 15 years. Mr. Daniel testified that Defendant was a great role model and had a solid work ethic that he taught Mr. Daniel. He looked to Defendant for advice and stated Defendant taught him everything he knows.

Practical Weaknesses. Testimony was consistent that Defendant heavily relied upon Carmen. She was in charge ("she was the brains and he was the muscle") and directed Defendant in terms of money, paying bills, taking care of the girls and other everyday tasks. When Carmen was sick, he struggled to take care of her and fell apart when she died. He struggled to care for Carmen when she was ill.

Defendant never learned how to cook or prepare food, nor could he use kitchen appliances. When he went to the bank, he was unable to use the ATM machine. He would ask for assistance from bank employees. There was substantial consistent testimony that Defendant was inappropriate eating food, using his hands instead of a fork, smearing food on his clothes and generally making a mess. There is also evidence in the record that, at least as a child, Defendant had issues with personal hygiene and his physical appearance.

There is also some evidence, in testimony from Defendant's brother, that he threw away large sums of money on a stripper, recklessly gave his stepsons and his wife large sums of money, and that he was swindled for $10,000.00 in a vehicle deal gone bad. The evidence here is thin and does not carry great weight.

Practical Strengths. Defendant worked consistently and provided solid financial support for his family throughout his adulthood. He was hard working. Mr. Daniel testified that Defendant sent money to Mexico. Defendant's mother denies this although jail calls are

consistent with him sending money. He worked at two family businesses as a child, his father's butcher shop and his aunt's taco stand.

Defendant worked in construction and landscaping as an adult. He apparently ran two businesses although the evidence was unclear as to how much Carmen was involved. He was in the process of getting a license to be a contractor when he was arrested. Carmen owned two rental properties. It is unclear how much Defendant was involved in the construction and maintenance of those properties. He apparently collected rent but this is not a difficult task and he appears to have done this at Carmen's direction.

Defendant successfully completed probation although he and Carmen had the same probation officer and went to appointments together. He obtained a driver's license and enrolled at Mesa Community College. He used a false name in both situations.

It appears he had as many as four bank accounts. However, it is not clear how much Carmen directed any bank transactions. It is also unclear as to how much money was lost after Carmen died. Bank records show losses and savings both before Carmen died and after.

Although the Court is not considering any of Defendant's behavior while in jail, the content of his jail calls with his mother shows some level of sophistication. He discussed with her things such as how to move money, exchange rates and property issues.

The Court is directed that the focus in adaptive behavior analysis is Defendant's adaptive deficits. *Moore v. Texas (*Moore II), 139 S.Ct, 666, 668-669 (2019) (disagreeing with analysis that "overemphasized [defendant's] perceived adaptive strengths, and noting that "[i]n determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical)(citing *Moore I,* 137 S.Ct. at 1046; and AAIDD-11 at 43). The Court does not interpret this to mean that adaptive strengths cannot be considered at all. Only one of the three adaptive skills domains needs to be proven for a finding of significant impairment in adaptive behavior. *Moore I,* 137 S.Ct. at 1050; *Moore II,* 139 S.Ct. at 668; and (DSM-5 at 37-38).

The Court finds by clear and convincing evidence that Defendant has significant impairment in the conceptual and social domains. The practical domain is a closer call. Defendant proved impairment with the practical domain by a preponderance of the evidence, but clear and convincing is a bit of a stretch.

In light of the analysis above, Defendant has met his burden regarding adaptive behavior in the conceptual and social domains.

Risk Factors. Defendant experienced a number of risk factors. Exposure to risk factors can corroborate a finding of ID. The Court finds that a number of risk factors apply to Defendant and have been considered in evaluating ID. "Clinicians rely on [risk] factors as cause to explore intellectual disability further, not to counter the case for a disability determination." *Moore I*, 137 S.Ct. at 1051 (citing AAIDD-11 at 60 ("[A]t least one or more of the risk factors [described in the manual] will be found in every case of intellectual disability).

There is no question Defendant lacked educational opportunities. The education offered in the rural area of Mexico was lacking to say the least. Special education was not an option. Education was not a priority for him as well as most other children in the area. The extreme poverty and need to work at a very early age prevents a commitment to education.

His socioeconomic upbringing was bleak. He grew up in abject poverty. Career and educational opportunities are extremely limited or non-existent.

His early use of drugs and alcohol probably contributed to his limitations. He started smoking marijuana (age 12) and drinking alcohol (age 11) at a very early age. This could not have helped the development of his brain.

Defendant's drug use as an adult was a continuation of his early childhood although his drug use became more problematic after Carmen's death. As the literature directs, his drug use has little to no weight because maladaptive behavior is separate from and unrelated to the assessment of adaptive behavior deficits. "[T]he diagnosis of [intellectual disability] is not based on the person's street smarts, behavior in jail or prison, or criminal adaptive functioning." *See* AAIDD *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* 18, 20 (2012) (advising clinicians to "[d]istinguish between adaptive behavior and problem behavior(s). They are independent constructs and not opposite poles of a continuum. Information regarding problem behavior does not inform the clinician regarding the person's adaptive behavior").

He suffered, and observed, severe emotional and physical abuse by his father. He and his mother were beaten often. He also experienced rejection by his peers and his family. He was called names and belittled.

Finally, although unclear from the record, he may have suffered a traumatic birth. His mother testified as to the umbilical cord around his neck and difficult delivery. If true, this would obviously be a significant risk factor.

PRONG THREE

Onset Before Age 18

Defendant clearly had manifested subaverage intellectual functioning and impairments in adaptive behavior before he turned 18. When he turned 18, he was in the United States until being incarcerated in 2015. It is clear from the record that he was a poor student with significant deficits in reading and writing. He reads at a third grade level. He only finished the fifth grade. There are no psychoeducational testing records. There is no evidence he was ever tested. He was clearly in need of special education for which no services were available in the rural Mexico area he lived in. It does not appear that his IQ was ever tested before his incarceration in this case.

He was isolated socially from peers and family at a very young age. He was called names like "mute" and "stutterer." His father called him dumb. He may have suffered some brain damage due to complications at birth but as outlined above, the Court is cautious to make this finding due to conflicting testimony. As one would expect, there are no medical records available. There is substantial evidence of being developmentally delayed with regard to walking, talking and toilet training in his very early years.

Defendant misbehaved at school and at home. He had difficulty following directions at school and at home. His hygiene and personal appearance were lacking. He ate with his hands and smeared food on his clothes. He would throw tantrums and get into trouble on a daily basis in school.

All of Defendant's risk factors occurred before age 18. He grew up in extreme poverty, had no real educational opportunities, experienced traumas when his father beat him or his mother, and began using drugs and alcohol at a very early age (11 or 12).

The Court finds Defendant has proven by clear and convincing evidence that he has significantly subaverage general intellectual functioning and significant adaptive behavior impairments that began before he reached the age of 18.

Based on the above,

The Court finds by clear and convincing evidence Defendant is intellectually disabled pursuant to A.R.S. §13-753(H).

IT IS ORDERED dismissing the State's Notice of Intent to Seek the Death Penalty.