IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 78209

SIAOSI VANISI

Appellant,

v.

WILLIAM GITTERE, WARDEN, ELY STATE PRISON, AARON FORD, ATTORNEY GENERAL OF NEVADA,

Respondent.

Amicus Brief of the Clark County Public Defender (CCPD), Clark County Special Public Defender (SPD), Nevada State Public Defender (NSPD), Washoe County Alternate Public Defender (APD), and Washoe County Public Defender (WCPD) Supporting Exemption of Severely Mentally Ill Persons from the Death Penalty

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Clark County Public Defender (CCPD)
2. Clark County Special Public Defender (SPD)
3. Nevada State Public Defender (NSPD)
4. Washoe County Alternate Public Defender (APD)

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5. Washoe County Public Defender (WCPD)

/s/ Sarah K. Hawkins
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I. IDENTITY OF AMICUS CURIAE

A. CLARK COUNTY PUBLIC DEFENDER (CCPD)

The Clark County Public Defender's Office is the largest purveyor of indigent defense services in Nevada. CCPD endeavors to provide high-quality, zealous representation to accused persons in Las Vegas, Henderson, and surrounding areas. The Office has designated a team of passionate, dedicated, and skilled attorneys to represent indigent persons accused of murder. Members of this team work with severely mentally ill persons every day, and are well-acquainted with the challenges of defending them. Because severe mental illness fundamentally alters and unavoidably limits an attorney's ability to protect and defend, CCPD opposes, in the strongest possible terms, the execution of severely mentally ill persons.

B. CLARK COUNTY SPECIAL PUBLIC DEFENDER (SPD)

The Clark County Special Public Defender's Office is appointed to represent indigent clients in criminal cases, which have a potential sentence of life in prison or the death penalty, for which the Public Defender's Office cannot represent the client because of a conflict. The

office includes twenty (20) highly-trained and experienced attorneys, including ten (10) attorneys who are qualified under Nevada Supreme Court Rule 250 to represent defendants in capital cases. The SPD generally represents ten (10) to fifteen (15) clients facing the death penalty at any given time and has extensive experience in working with clients who are severely mentally ill.

C. NEVADA STATE PUBLIC DEFENDER (NSPD)

The mission of the Nevada State Public Defender (NSPD) is to provide quality criminal and juvenile legal defense services to rural indigent clients through a cost-effective, independent, responsible, and efficient public defender system. NSPD provides equal protection under the law in accordance with the Nevada and United States Constitutions by representing indigent adults and juveniles accused of committing crimes in certain rural areas of Nevada or in one of Nevada's prisons. The NSPD whole-heartedly joins the Federal Public Defender in its opposition to the execution of severely mentally ill inmates.

D. WASHOE COUNTY ALTERNATE PUBLIC DEFENDER (APD)

The Alternate Public Defender protects the constitutional rights of the indigent accused through courageous and compassionate advocacy in

Washoe County Courtrooms. This office represents adult and juvenile defendants when conflicts of interest arise at the Washoe County Public Defender's Office. These attorneys also staff all Specialty Courts in Washoe County at both the District and Justice Court levels, including Mental Health Court. Given the unique and challenging issues that contextualize cases involving seriously mentally ill persons—issues with which public defenders grapple every day—the APD here voices its vehement opposition to imposing death upon the severely mentally ill.

E. WASHOE COUNTY PUBLIC DEFENDER (WCPD)

The Washoe County Public Defender's Office is a duly constituted county public defender's office created pursuant to NRS 260.010, et seq. Since its inception on July 1, 1969, it has provided legal representation to indigent persons charged with crimes in Washoe County, Nevada, including capital murder. In this capacity, members of the Washoe County Public Defender's Office work daily with severely mentally ill persons. Based on that collective experience, and based on enlightened legal developments in the area of the defense of the mentally ill, the Washoe County Public Defender's Office joins this amicus brief in opposition to the execution of severely mentally ill persons.

II. COLLECTIVE STATEMENT OF INTEREST

Each day, indigent defense attorneys statewide work to protect and defend the severely mentally ill within a well-intentioned but ill-equipped criminal justice system. Severe mental illness pervades every aspect of the criminal justice process, from arrest to adjudication. Through no fault of an accused or his/her public defender, challenges endemic to representing the severely mentally ill undermine our ability to protect and defend. This is especially true where, as here, a severely mentally ill person faces death.

Severe mental illness's inevitable, detrimental impact on the criminal justice process demands the exemption of severely mentally ill persons from death. Simply stated, our interest is in protecting the severely mentally ill from cruel and unusual punishment. Dispensing death where a person cannot, because of an innate condition, regulate his/her behavior, meaningfully communicate with counsel, comprehend court proceedings and/or effectively negotiate the attorney-client relationship can neither be reliable nor just.

The organizations outlined in Sections I.A. – E., *supra*, collectively oppose the imposition of death upon severely mentally ill persons. These

persons are not only less culpable by virtue of their innate condition, but also cannot, given their immutable limitations, garner the full panoply of fundamental rights and procedural protections to which all criminal defendants are entitled. They face challenges tantamount to those of intellectually disabled persons and juveniles, who are categorically exempt from the death penalty. Roper v. Simmons, 543 U.S. 551, 560 (2005); Atkins v. Virginia, 536 U.S. 304, 311 (2002).

Given the experiential congruency of intellectually disabled persons and juveniles on one hand, and the severely mentally ill on the other, Nevada public defenders urge this Honorable Court to extend categorical exemption from death to severely mentally ill persons. Such a finding not only honors Eighth Amendment jurisprudence, but reflects American notions of human dignity, equity, and justice.

ARGUMENT

I. INTRODUCTION

"The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." Roper, 543 U.S. at 560. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Atkins, 536 U.S. at 311 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)) (internal

quotation marks omitted). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." Roper, 543 U.S. at 560; *accord* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Human dignity demands categorical exemption of the severely mentally ill from the death penalty.

The similarities among severely mentally ill persons, intellectually disabled persons, and juveniles are undeniable. These similarities are evident in the inability of severely mentally ill persons to conceptualize the death penalty's social justifications, and adjust their conduct in accordance therewith, the impotency of entrenched procedural protections in ensuring the death penalty's reliability when imposed upon severely mentally ill persons, and the reduced culpability of persons whose conduct is attributable to severe mental illness, as opposed to premeditation, malice, wantonness, or depravity.

The experiences of public defenders statewide best illustrate the equivalent, unavoidable complications attending capital representation of intellectually disabled persons, juveniles, and the severely mentally ill.

We struggle every day to support and defend the severely mentally ill, and we see so much more than the snippets to which prosecutors, judges, and the public are privy in court proceedings. Our hope is that these experiences lend humanity and practicality to the legal concepts elucidated here.[1]

Because the challenges, complications, and reduced protections pertaining to intellectually disabled persons and juveniles mirror those of the severely mentally ill, the latter group should receive protections on par with the former groups. As such, indigent counsel from all corners of Nevada implore this Honorable Court to categorically exempt severely mentally ill person from the death penalty.

II. IMPOSING DEATH UPON SEVERELY MENTALLY ILL PERSONS IS TANTAMOUNT TO EXECUTING THE INTELLECTUALLY DISABLED.

The imposition of death upon severely mentally ill offenders fails to accomplish capital punishment's dual objectives. Moreover, the reliability of any death sentence imposed upon a severely mentally ill person is suspect, as severely mentally ill persons cannot adequately

[1] The case examples discussed in this brief are based upon the experiences of indigent counsel working in state and county public defender offices. These public defenders possess decades of experience accrued from cases originating in jurisdictions throughout Nevada.

engage procedural protections to which all capital defendants are entitled. As such, the death penalty as applied to the severely mentally ill can only result in "the purposeless and needless imposition of pain and suffering . . . ." Atkins, 536 U.S. at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)) (internal quotation marks omitted).

A. Executing the severely mentally ill fails to achieve the death penalty's dual objectives of retribution and deterrence.

The death penalty's dual purposes are retribution and deterrence Gregg v. Georgia, 428 U.S. 153, 183 (1976). "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." Atkins, 536 U.S. at 320.

As with the intellectually disabled, cognitive and behavioral impairments accompany severe mental illness, making these persons less morally culpable than other offenders insofar as they exhibit "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses." Atkins, 536 U.S. at 320. These impairments "also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.*

As such, executing the severely mentally ill cannot accomplish deterrence.

Consider the case of a severely mentally ill person whose unintelligible ramblings and bizarre mannerisms were evident at arrest, and observable in pretrial detention. This person had decades of mental health records chronicling treatments, medications, and hospitalizations. The family attempted to commit this person for psychiatric stabilization less than twelve (12) hours before arrest. In the hours intervening family contact and arrest, this person experienced a flurry of intense symptoms that precluded rational, logical thought. This person lacked the capacity to consider execution as a potential penalty, much less control behavioral symptoms to avoid the same. *See* Atkins, 536 U.S. at 320. Because severe mental illness prohibits the consideration of death as a legal consequence, the State's attempt to justify the death penalty's use as a "deterrence" disintegrates.

Likewise, executing the severely mentally ill cannot achieve retributive goals, because "the severity of the appropriate punishment necessarily depends on the culpability of the offender." Atkins, 536 U.S. at 319. U.S. Supreme Court jurisprudence confines imposition of the

death penalty to "a narrow category of the most serious crimes." *Id.* Death as retribution, then, is the exception and not the rule. This narrowing jurisprudence "seeks to ensure that only the most deserving of execution are put to death . . . ." *Id.* Those suffering from severe mental illness are categorically less culpable than those who commit the most serious crimes, because the illness contextualizes (and usurps) cognitive and behavioral processes that precipitate criminal conduct.

Take, for example, the case of a severely mentally ill person who, while operating under a fixed delusion of familial sexual abuse, killed a child's parent believing that parent's death would liberate the child. Despite the availability of less extreme alternatives—e.g., calling the police and/or alerting child protective services—this person's severe mental illness prevented consideration of these socially acceptable, intermediate options. If severe mental illness precluded rational consideration of these alternatives, then it almost certainly precluded the consideration of abstract retributive concepts. This delusion not only contextualized the thought processes precipitating action, but compelled the action itself. The death penalty simply cannot achieve retribution where a symptom of severe illness dictates action.

Because severely mentally ill persons cannot grasp abstract concepts like retribution and deterrence, much less relate these concepts to their own behavior, they are impotent justifications for imposing death. Where the death penalty does not "measurably contribute[] to one or both of these goals," it violates the Eighth Amendment prohibition on cruel and unusual punishment. U.S. CONST. AMEND. VIII; Atkins, 536 U.S. at 312 (citing Enmund, 458 U.S. at 798). As such, this Honorable Court should categorically exempt the severely mentally from the death penalty.

B. Severe mental illness unavoidably diminishes procedural protections ensuring reliability and proportionality.

As with intellectually disabled offenders, severe mental illness seriously undermines procedural protections bestowed by decades of capital jurisprudence. *See* Atkins, 536 U.S. at 320-21. Severely mentally ill defendants, like the intellectually disabled, face an amplified risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978).

This amplified risk materializes as (1) increased potential for false confession; (2) diminished ability to present a persuasive mitigation case; (3) comparative difficulty in giving meaningful assistance to counsel; (4)

inability to testify coherently and credibly; (5) enhanced likelihood that an accused's demeanor may unwittingly communicate to the jury a lack of remorse; and (6) a jury's potential use of mental health mitigation information to substantiate prosecutorial claims of future dangerousness. Atkins, 536 U.S. at 320-21 (citations omitted).

1. *Severe mental illness increases the possibility of false confession.*

The possibility of false confessions by the intellectually disabled poses two problems warranting exemption from death: (1) a heightened, correlative risk that false confession may negate mitigating factors; and (2) the "special risk of wrongful execution." Atkins, 536 U.S. at 321; Lockett, 438 U.S. at 605; NRS 200.035(2) ("The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."). The same is true of the severely mentally ill: "Compared to prevalence rates in the general population, persons with serious mental illness are over-represented . . . in the pool of identified false confessors." Allison Redlich, Alicia Summers, and Steven Hoover, *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 81 (2010) (internal citations omitted).

a. Severe mental illness interferes with, or entirely frustrates, knowing and intelligent waiver of *Miranda* rights.

"Waiver of one's Miranda rights must be voluntary, knowing, and intelligent." Colorado v. Connelly, 479 U.S. 157, 168 (1986); United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979)); Miranda v. Arizona, 384 U.S. 436 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). A severely mentally ill person who is actively psychotic at the time of arrest, detention, and interrogation cannot knowingly, intelligently, and voluntarily waive his/her fundamental constitutional rights. In fact, "[m]entally ill defendants, particularly defendants with psychotic disorders, are significantly less likely to understand their interrogation rights than defendants who are not mentally ill." Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 LAW & PSYCH. 1, 19 (2004).

Consider a severely mentally ill person who, immediately after arrest for murder, gave a six (6) hour video-taped confession. Police also recovered surveillance video from this person's home explicitly documenting psychotic symptoms. Both the interrogation and surveillance footage documented this individual's disturbance and

delusion before, during, and shortly after the killing. His/her statement made clear that s/he neither appreciated the surroundings, nor the fact of interrogation: Severe mental illness precluded the same. If severe mental illness impeded this person's basic understanding of the environment, and the objectives of police controlling that environment, then s/he could not realistically invoke—or knowingly, intelligently, and voluntarily waive—his/her fundamental constitutional rights.

Take as another example a severely mentally ill person who, after arrest, gave police a rambling, incoherent version of events. This person's perplexing account derived from a delusion that also contextualized multiple prior statements to police agencies and mental health professionals. The delusion's major theme—child victimization requiring redress—remained fixed; specific details, however, varied wildly within a single statement and among the several statements. Although severe mental illness provoked these inconsistencies, a capital jury could instead derive an unwarranted impression of dishonesty, manipulation, and lack of remorse. This potential for improper conflation of mental health symptoms with mendacity unacceptably increases the risk of death for severely mentally ill persons.

Because severe mental illness, like intellectual disability, substantially interferes with (or entirely frustrates) the knowing and intelligent waiver of a person's fundamental constitutional rights, and because suppression is not a reliable vehicle for inadmissibility of the same, as elucidated in subsection, II.B.1.b., *infra*, this Honorable Court should extend exemption from the death penalty to the severely mentally ill.

b. Severe mental illness unacceptably increases the likelihood of coerced confession.

The relinquishment of a one's fundamental right against self-incrimination must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). "Research suggests that "many contemporary police interrogation tactics implicitly convey threats and promises," and these tactics, subtle as they may be, could be interpreted explicitly by the severely mentally ill. Redlich et al., 34 LAW & HUM. BEHAV. at 81 (2010); *accord* Redlich, 55 LAW & PSYCH. at 19. Because the mentally ill, like the intellectually disabled, are more susceptible to manipulation than the

general population, they deserve additional procedural protections. Redlich et al., 34 LAW & HUM. BEHAV. at 81.

Consider the case of a severely mentally ill person who falsely confessed while committed to an extra-jurisdictional mental institution. Attorneys moved to suppress this person's statements as unreliable, given it was the product of severe mental illness exploited by police investigators. The litigation was unsuccessful, at least in part because Fifth Amendment jurisprudence focuses on the propriety of police conduct rather than on an arrestee's mental infirmity. *See, e.g.*, Connelly, 479 U.S. at 165 ("Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.").

Despite its acknowledgment that "interrogators have turned to more subtle forms of psychological persuasion" and the fact that "more courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus,'" the U.S. Supreme Court concluded that "a defendant's mental condition, by itself and apart from its relation to official coercion, [does not] dispose of the inquiry into

constitutional 'voluntariness.'" Connelly, 479 U.S. at 164 (citing Spano v. New York, 360 U.S. 315 (1959)).

This focus on police conduct ensures that the severely mentally ill defendants will not—at least for now—obtain relief from suppression jurisprudence. Nonetheless, the severely mentally ill must garner some procedural protection from the peril in which unreliable confessions place them. This need for procedural safeguards is most pronounced in the capital context, where a severely mentally ill person faces execution should a jury misuse or misunderstand the context of his or her statement. As such, this Honorable Court should exempt the severely mentally ill from the death penalty.

2. *A severely mentally ill defendant is less able to persuasively combat prosecutorial evidence supporting one or more aggravating factors.*

In Nevada, a capital jury "may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). If death eligible, a jury then weighs mitigating and aggravating factors, ultimately exercising its discretion in determining whether to impose death.

Nunnery v. State, 127 Nev. 749, 772 (2011). No death penalty statute precluding a capital jury's consideration of relevant mitigating factors comports with the Eighth Amendment, as incorporated against the states by the Fourteenth Amendment. Lockett, 438 U.S. at 608. As such, NRS 200.035(7) permits a defendant to present "[a]ny . . . mitigating circumstance" to a capital jury.

Stated plainly: Mitigation evidence is indispensable to saving human life in the capital context. While some of the specifically enumerated mitigating circumstances can be presented without client cooperation—the absence of criminal history and/or youth of the defendant when s/he committed murder, for example—the majority cannot. NRS 200.035(1) & (6). The remaining factors require a defendant to participate in his or her own mitigation investigation by, *inter alia*, identifying supportive family members, designating schools, hospitals, and other facilities with relevant records, describing, in detail, the circumstances surrounding the offense (including the presence and/or involvement of other persons) deciphering motive, if any, articulating past trauma, and communicating state of mind at the time of the offense.

A severely mentally ill person's symptoms frequently interfere with the process of locating, obtaining, vetting, and presenting this kind information. Whether it is the refusal and/or inability to provide information permitting compilation of a complete, accurate mental health history, the refusal and/or inability to cooperate with expert evaluations and testing, or some other complication attributable to mental health symptoms, a severely mentally ill client, through no fault of his or her own, frustrates a process critical to a jury's determination on the question of death.

Consider the case of a severely mentally ill person whose symptoms manifest, in part, as notions of grandiosity, crippling distrust, and a misguided compulsion to control his case and defense. Despite demonstrable intelligence, however, this severe mentally ill person's maximal irrationality threatened to disintegrate his mitigation case from the inside out. This person refused to speak with his attorney about facts and evidence, would not sign release forms or answer questions authorizing the acquisition of mitigation materials, and turned away doctors and other expert evaluators. In competency proceedings, this severely mentally ill individual was hospitalized and, ultimately, deemed

competent to aid and assist his counsel. The same doctors who concluded assistance *could* occur, contemporaneously doubted that this severely mentally ill person *would* cooperate with counsel, citing severe mental illness.

An attorney whose severely mentally ill client will not facilitate the location and development of mitigation evidence for capital trial unwittingly increases the risk of his/her own death. When severe symptoms prevent disclosure of pertinent information, risk of death increases through no fault of the mentally ill client or his/her capital counsel. Moreover, repeated efforts obtain this information can retraumatize and/or agitate a severely mentally ill client. In many cases, then, there is little an attorney can do to compel the provision of life-saving information. As a result, the severely mentally ill, like the intellectually disabled, obviate persuasive presentation of mitigation evidence.

3. *A severely mentally ill person is less able to meaningfully assist his or her counsel in the preparation of a defense.*

As with the intellectually disabled, the severely mentally ill struggle to consistently and thoroughly assist counsel in defense preparation, if they can do so at all. This inevitably and unavoidably

impacts a public defender's meet his/her obligation to provide effective and zealous representation to those facing death. To ensure quality representation in capital cases, this Honorable Court implemented the Nevada Indigent Defense Standards of Performance, in place since April 2009. *See* Nev. Sup. Ct. Admin. Order No. 0411, hereinafter ADKT 411.

Pursuant to these standards, "[c]ounsel at all stages of the case should . . . make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client." ADKT 411 2-7(a)(1). Moreover, "[c]ounsel . . . should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case . . . ." ADKT 411 2-7(b). This includes, *inter alia*, discussion of "factual investigation," "current or potential legal issues," and "development of a defense theory." ADKT 411 2-7(b)(1), (2), (3).

Severe mental illness obstructs a public defender's execution of the standards to which we owe allegiance. It cracks the very foundation of a successful attorney-client relationship by eroding trust and obstructing a client's receptiveness to sage counsel. This, in turn, puts a public defender in a terrible position vis-à-vis minimum standards of

representation: Our severely mentally ill clients' conditions—medical disorders over which they exercise no control—impede the provision of maximally effective counsel. Mitigation work, regardless of effort, is incomplete. Investigation of factual circumstances is limited. Communication of legal options is frustrated. And, as a result, severely mentally ill clients make hopelessly flawed decisions about their legal rights and options.

"[I]nvestigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon guilt is not to be collected or presented." ADKT 411 2-9(a)(2). Counsel has a "continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." ADKT 411 20-15(a) That defense counsel is obliged to "assure that the official record of the proceedings is complete," suggests that mitigation investigations must be thorough and complete. ADKT 411 2-9(c).

Discharging the obligation to investigate and prepare a mitigation case is particularly difficult where severe mental illness manifests as an inaccurate but persistent delusion. The client's preoccupation with that delusion forestalls all meaningful conversation about, *inter alia*, legal

rights and options, mitigation, investigation, and/or trial strategy. Consider the case of a transient, severely mentally ill person charged with killing another homeless person. Police extracted a confession almost immediately. Nonetheless, this severely mentally ill client identified an alternate suspect and fixated on an alternate-suspect defense. His/her public defender conclusively eliminated the alternate suspect with DNA evidence. Nonetheless, this defendant continued to deny his/her own involvement, and simply shifted the focus of his/her delusion to another. Though s/he purportedly met the Dusky standard, this severely mentally ill person was wholly unable to aid and assist his/her counsel. *See generally* Dusky v. United States, 362 U.S. 402 (1960). His/her attorney's efforts to craft and substantiate a defense were intractably limited by the client's severe mental illness.

In preparing for trial, "counsel should formulate a defense theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies." ADKT 411 2-13. "In deciding which witnesses and evidence to prepare concerning penalty… counsel should consider includ[ing] . . . witnesses familiar with and evidence relating to the client's life and development, from conception to

the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death. . . ." ADKT 411 215(f)(1).

Counsel should also consider presenting "experts and law witnesses along with supporting documentation . . . to provide medical, psychological, sociological, cultural, or other insights in to the client's mental and/or emotional state and life history. . . ." ADKT 2-15(f)(2). Counsel should consider calling witnesses during penalty phase "who can testify about the adverse impact of the client's execution on the client's family and loved ones." ADKT 2-15(f)(4). Additionally, counsel should endeavor to present a capital jury with "demonstrative evidence, such as photos, videos, and physical objects (such as trophies, artwork, military medals), and documents that humanize the client or portray him positively. . . ." ADKT 411 2-25(f)(5).

Yet another severely mentally ill client accused of murder refused to acknowledge his/her condition. S/he did not believe s/he was mentally ill, and refused to fully cooperate with mitigation work. Severe, untreated

mental illness permeated this person's interactions with counsel and controlled his/her legal assessments. Compounding these problems, this severely mentally ill client clung to intense and counterproductive religious ideation. S/he believed in the extreme that his/her trials and tribulations were part of God's larger scheme. This belief eclipsed committed piety, instead entering a realm akin to apathy: S/he ceded all case control to his/her deity, believing God knows the truth, whatever happens, happens, and God will take care of me. The symptoms of this client's severe mental illness stymied penalty investigation. This, in turn, limited counsel's ability to prepare the mitigation case and correspondingly increased this severely mentally ill client's risk of death.

The above-described problems often exist regardless of whether a severely mentally ill person is medicated. Strong antipsychotic drugs, which are frequently necessary to maintain competence in the severely mentally ill, can impact clear thinking, amplify apathy, and cause distracting physical side effects, like tremors or extreme fatigue. In addition to blocking productive dialogue, confusion, fatigue, and other side effects can lead a severely mentally ill person to refuse then reinitiate medication cyclically, perpetually. This, too, frustrates the

provision of effective assistance of counsel as the severely mentally ill person swings wildly between cognitive, behavioral, and emotional states.

Put simply, a mind consumed by severe mental illness can neither soundly assess legal options nor intelligently invoke fundamental constitutional rights. Moreover, a severely mentally ill person cannot thoroughly facilitate his/her counsel's preparation of a defense. The resultant limitation on an attorney's effective assistance warrants exemption of the severely mentally ill from death. This is in part because the imposition of a death sentence after an incomplete mitigation presentation cannot be reliable. As defense attorneys, we must endeavor to locate, investigate, and present all available mitigation information to maximize the chances of saving a life—a life that has value regardless of prior criminal conduct.

4. *Severely mentally ill persons are typically poor witnesses.*

Atkins specifically addresses an intellectually disabled accused's diminished ability to present "coherent and credible" testimony to a jury. 536 U.S. at 307. Atkins's mild intellectual disability significantly diminished his ability communicate effectively during both the guilt and

penalty phases of trial. *Id.* at 308-09. This, in turn, led a jury to credit his codefendant's testimony while dismissing his, leading to conviction and imposition of death.

Like Atkins and other intellectually disabled persons, those who suffer from severe mental illness—whether medicated or not—"have substantial limitations not shared by the general population." Atkins v. Commonwealth, 534 S.E.2d 312, 324-25 (2000) (Koontz & Hassel, dissenting), *overruled by* Atkins, 536 U.S. at 310. Severe mental illness impedes measured, rational invocation of a person's right to testify. These substantial limitations—limitations over which severely mentally ill persons exercise no control—render the death penalty unreliable, and therefore unconstitutional, as applied to this vulnerable subset of our population.

Take, for example, the severely mentally ill client who was angry with counsel because s/he could not take the stand and tell his/her story without subjection to cross-examination. This severely mentally ill client clung to a rigid, bizarre, and unrelatable world view s/he was intent upon communicating to the jury. S/he struggled with the concept that others might not accept his/her perspective. Severe mental illness also

precluded this person from maintaining courtroom composure, and effectively delivering a prepared statement. Instead this person made detrimental statements that only increased the risk of death.

Even in cases where a severely mentally ill client's testimony could bolster his/her defense, public defenders must be concerned with that testimony's reliability. Many symptoms of mental illness, such as confusion, delusion, and hallucination make testimony appear dishonest. Confusion and/or auditory hallucination manifests as hesitation in his or her responses. This hesitation may be erroneously construed by a jury as lying. Delusions may impact the believability of lay opinions or factual renditions proffered in testimony. Visual hallucinations may cause a severely mentally ill person's eyes to dart nervously about the courtroom, and a jury to interpret lack of eye contact as mendacious.

Severe mental illness unquestionably reduces a person's ability to meaningfully consider the exercise of his/her right to testify, and to have a jury accord any testimony given the credibility it deserves. The severely mentally ill frequently cannot grasp legal concepts or hypothetical legal scenarios aimed at communicating the implications of either testifying or remaining silent. Moreover, this population often fails to effectively

regulate emotion, remain focused throughout questioning, maintain eye contact, and clearly and coherently communicate. That the severely mentally ill are typically poor witnesses accrues to symptoms beyond their control, as is the case with the intellectually disabled. Exempting the severely mentally ill from death is the only way to ensure that symptoms are not misconstrued in way that unjustifiably imperils a severely mentally ill person's life.

5. *A severely mentally ill person's demeanor may leave a jury with the unwarranted impression that s/he lacks remorse for the crime(s) committed.*

As with the intellectually disabled, the severely mentally ill often exhibit facial expressions and other physical mannerisms that a capital jury may interpret as evil or remorseless. Emotional dysregulation in the severely mentally ill can have the same impact. A common example of this is inappropriate (and invariably ill-timed) smiling or laughter. These compulsive mannerisms and irregularities are symptomatic of severe mental illness, but capital juries do not necessarily treat them as such. This is because severe mental illness is not well understood by most people, and ignorance triggers fear (even hate) in those positioned to dole

out death. Visible manifestations of mental illness, then, make the prospect of an unreliable death sentence too severe to abide.

In one case, a severely mentally ill client facing the death penalty presented with a confrontational demeanor. This involuntary protective mechanism outraged the prosecutor assigned to the case. The erratic emotions observed in the courtroom unquestionably derived from mental illness, as exacerbated by trauma and stress. For this client, mere transport to and presence in court activated agitation, leaving those in a position to observe with the unwarranted impression s/he lacked remorse for his/her offense(s). During fleeting intervals of emotional stability, however, this severely mentally ill person conveyed genuine remorse, and his/her humanity was readily apparent.

This is not uncommon for the severely mentally ill. Prosecutors, judges, and the public—through no fault of their own—have incredibly limited exposure to criminal defendants. They do not see intervals of lucidity, as described above, in which defendants express remorse they cannot in other environments. This can be particularly frustrating for public defenders who spend significant time working with severely mentally ill clients, witness the vacillation between extreme sickness and

intermittent stability, and see genuine emotion, momentary as it may be. Moreover, public defenders' attempts to contextualize offensive mannerisms and emotional dysregulation are often dismissed by other courtroom players, despite their comparative depth of experience with a particular severely mentally ill client.

In the same vein, capital jurors have limited exposure to a criminal defendant. Other than seeing this person in a courtroom, jury members have little context for their courtroom observations. These observations can—even subconsciously—instill anger, activate hate, impress remorselessness, and increase the likelihood of a death sentence. But, the increased likelihood of a death sentence attributable to acute, severe, and misperceived mental health symptoms is as unconscionable for the severely mentally ill as it is for the intellectually disabled. Severely mentally ill persons whose symptoms manifest as offensive conduct or inappropriate demeanor are often incapable of regulating the same. Death cannot be the penalty for the symptoms of an illness. The exemption from death afforded to the intellectually disabled should extend to those who suffer from severe mental illness.

/ / /

6. *Severe mental illness, when offered as mitigating evidence, may amplify a jury's concerns about future dangerousness.*

Prosecutors frequently argue to capital juries that a defendant's severe mental illness makes her/him more susceptible of future dangerousness. After all, symptoms of severe mental illness can manifest quickly, unpredictably, and violently. This forces public defenders to decide whether to present evidence of mental illness at all—even in the most compelling cases—for fear of inadvertently bolstering the prosecution's aggravating evidence. In the words of one public defender, "The more we convince a judge/jury that the client is mentally ill, the more we unavoidably convince them that the client is dangerous."

Consider the case of a severely mentally ill person who suffers from paranoid delusions and intense auditory hallucinations. The voices in his/her head compelled the conduct at issue. These untreated symptoms precipitated the killing with which s/he was ultimately charged. That this person was unmedicated at the time of the incident raised additional concerns: If a jury concluded that severe mental illness made the client more dangerous, the condition's manageability might not assuage this concern. Flawed as the reasoning may be, a jury could treat a defendant's unmedicated state during the offense as evidence of future

noncompliance with treatment. The jury may then double-down on future dangerousness, making the imposition of death more likely.

Jurors may also find a severely mentally ill person more dangerous when s/he *is* medicated. In yet another example, a severely mentally ill person who was unmedicated and acutely psychotic during the offense became medication-compliant while in custody. S/he could think clearly and rationally while medicated, even effectively assisting counsel; but his medication imbued a flat affect. Though compliant with the treatment milieu, s/he presented as cold, apathetic, even calculating. The prosecution used mental health mitigation evidence to argue that this severely mentally ill person was more unpredictable, more difficult to manage, and therefore more dangerous.

As with the intellectually disabled, there is an unacceptable risk that mitigation information submitted on behalf of the severely mentally ill will be employed by the state to substantiate future dangerous, and justify the death penalty. Mental health mitigation evidence is the quintessential double-edged sword. Exempting the severely mentally ill from death is the only way to ensure that a capital jury does not use mitigation evidence to take a severely mentally ill person's life.

III. SEVERELY MENTALLY ILL PERSONS DO NOT ACT WITH THE MORAL CULPABILITY CHARACTERIZING THE MOST SERIOUS CRIMINAL CONDUCT.

"Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them "the most deserving of execution." Roper, 543 U.S. at 568 (quoting Atkins, 536 U.S. at 319) (internal quotation marks omitted). A severely mentally ill person neither chooses his/her condition, nor does s/he exercise control over the timing or intensity of associated symptoms. Moreover, severe mental illness very often disrupts rational thinking and measured action. A person who cannot meaningfully consider the consequences of his or her actions because of an innate characteristic—like age or severe mental illness—is less deserving of execution, not more.

Like juveniles, the severely mentally ill are often "very impulsive," and "very susceptible to being manipulated or influenced." Roper, 543 U.S. at 559. This vulnerability and/or susceptibility to "negative influences and outside pressures, including peer pressure," can contextualize and/or influence a severely mentally ill person's behavior. *See* Roper, 543 U.S. at 569 (citations omitted). Impulsivity in the severely mentally ill can originate in thoughts, words, and/or conduct. In many

criminal cases, this nonvolitional impulsive conduct contextualizes the offense(s) alleged. That impulsive thoughts typically precipitate irresponsible behavior means that a severely mentally ill person's "irresponsible conduct is not as morally reprehensible" as that of a similarly situated mentally healthy defendant. *See* Roper, 543 U.S. at 570 (citations omitted). The same consideration should extend to the severely mentally ill because, as with juvenile offenders, the severely mentally ill can neither readily nor reliably regulate their conduct.

Moreover, the severely mentally ill, like juveniles, are very often "not trusted with the privileges and responsibilities of an adult" and this "explain[s] why their irresponsible conduct is not as morally reprehensible as that of a[mentally healthy] adult." Roper, 543 U.S. at 561 (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (2005)). For example, those who suffer from severe mental health issues often receive social security benefits because their symptom severity precludes employment. Sometimes, severely mentally ill persons are unable to manage their money and a mentally healthy proxy—a "payee"—facilitates responsible administration of funds. Some severely mentally ill persons have symptoms that preclude consistent ingestion of

necessary medications, and family members, for example, take on that responsibility. A person too mentally ill to maintain employment or remember his/her medication cannot be as culpable a similarly-situated, mentally healthy defendant.

The severely mentally ill share other characteristics with juvenile offenders which warrant their exemption from the death penalty. In Roper, the U.S. Supreme Court recognized that juveniles' character "is not as well formed as that of an adult." 543 U.S. at 570. For juveniles this accrues to incomplete brain development, whereas with the severely mentally ill, character's fluid and transitory nature attributes to illness. The difference in genesis, however, does not negate similarity in result. Mental health symptoms make character virtually indecipherable in the severely mentally ill. Character can be masked not only by symptoms, but also by the medication that treats these symptoms.

Given the complex and transitory nature of character in the severely mentally ill, "it is less supportable to conclude that even a heinous crime committed by a [severely mentally ill person] is evidence of irretrievably depraved character." Roper, 543 U.S. at 553. Moreover, the similarities between juvenile and seriously mentally ill offenders

render suspect any conclusion that these groups can be reliably categorized as the worst offenders—offenders deserving of death. Roper, 543 U.S. at 570.

The challenge of elucidating character in a severely mentally ill person suggests that no such person can be reliably identified as irretrievably depraved. Honoring the U.S. Supreme Court's narrowing jurisprudence requires imposition of death only for the most heinous crimes committed by the most culpable and depraved of offenders. *See* Roper, 543 U.S. at 568. If irretrievable depravity cannot be reliably determined in the severely mentally ill, human dignity demands their exemption from capital punishment.

In addition, "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on [mental illness] as a matter of course, even where [a seriously mentally ill person's] objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *See* Roper, 543 U.S. at 573. This makes sense, as psychiatrists, psychologists, and other mental health professionals have difficulty distinguishing between an offender in the throes of unbridled,

acute mental illness and an offender whose crime reflects "irreparable corruption." Roper, 543 U.S. at 573.

If trained psychiatrists with the advantage of clinical testing and observation cannot, despite diagnostic expertise, reliably assess the character and/or depravity of a severely mentally ill person, then Nevada prosecutors cannot be permitted to ask capital jurors to accomplish the same. "When a [seriously mentally ill] offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain [better] understanding of his own humanity." Roper, 543 U.S. at 573-74.

CONCLUSION

Given the foregoing, Public Defenders throughout the state of Nevada collectively urge this Honorable Court to categorically exclude severely mentally ill persons from the death penalty.

Dated this 3rd day of October, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14-point font; or

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2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

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3. Finally, I hereby certify that I have read this brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page

and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 3, 2019. Electronic Service of the foregoing *Amicus* Brief of the Clark County Public Defender (CCPD), Clark County Special Public Defender (SPD), Nevada State Public Defender (NSPD), Washoe County Alternate Public Defender (APD), and Washoe County Public Defender (WCPD) Supporting Exemption of Severely Mentally Ill Persons from the Death Penalty shall be made in accordance with the Master Service List as follows:

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