IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
May 14 2025 01:45 PM
Elizabeth A. Brown
Clerk of Supreme Court

Robert Ybarra, Jr.,

Appellant,

vs.

Terry Royal, Warden[1],

Appellee.

Supreme Court No. 89824

District Court Case Nos.
CR-0001511, HC-2410004

DEATH PENALTY CASE

Appeal from the Seventh Judicial District Court

Appellant's Opening Brief

Rene L. Valladares
Federal Public Defender
Randolph M. Fiedler
Assistant Federal Public Defender
Nevada State Bar No. 12577
Hannah D. Nelson
Assistant Federal Public Defender
Nevada State Bar No. 15972
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577
Counsel for Appellant

[1] Because Mr. Ybarra has been transferred to Ely State Prison, Warden Terry Royal is "automatically substituted as a party." NRAP 43(c)(1).

IN THE SUPREME COURT OF THE STATE OF NEVADA

Robert Ybarra, Jr., Appellant, vs. Terry Royal, Warden[2], Appellee.	Supreme Court No. 89824 District Court Case Nos. CR-0001511, HC-2410004 DEATH PENALTY CASE

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 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. The Nevada State Public Defender represented Ybarra during trial and direct appeal, specifically the following attorneys:

[2] Because Mr. Ybarra has been transferred to Ely State Prison, Warden Terry Royal is "automatically substituted as a party." NRAP 43(c)(1).

Thomas Perkins, Martin H. Wiener, Steven G. McGuire, Norman Herring, Gregory Damm, Laura Fitzsimmons, Robert A. Bork.

2. The firm of Crowell, Crowell, Crowell, and Susich represented Ybarra during state and federal post-conviction proceedings, and specifically the following attorneys: William J. Crowell and Thomas J. Susich.

3. During subsequent federal and state post-conviction proceedings, Ybarra was represented by co-counsel Glynn Cartledge of the firm Robison, Belaustegui, Robb & Sharp, and solo practitioners Clifton J. Young, Annabelle Whiting Hall, Robert Russell Bryan, and Edward Horn.

4. The Federal Public Defender, District of Nevada, represented Ybarra during all subsequent proceedings.

/s/ Randolph M. Fiedler
Randolph M. Fiedler
Attorney of record for Robert Ybarra, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

Statutes

Rules

Other

CASE BACKGROUND

A. Jurisdictional Statement

This appeal is from the district court's final judgment denying Robert Ybarra's petition for post-conviction relief. 20AA4928–43. This Court has jurisdiction under NRS 34.575(1), NRS 34.830, NRS 177.015(1)(b), 177.015(3). The district court entered its order denying relief on December 17, 2024. 20AA4928–43. Ybarra filed a notice of appeal on December 18, 2024. 20AA4944–52. That same day, the district court issued a notice of entry of order, followed by a corrected notice of entry of order. 20AA4970–86; 20AA4953–69.[3] Ybarra filed an amended notice of appeal on January 16, 2025. 20AA4987–95.

B. Routing Statement

This appeal is retained by the Supreme Court because it is death penalty. NRAP 17(a)(1).

C. Statement of the Issues Presented for Review

(1) Whether Robert Ybarra, Jr.—who is wheelchair bound and has schizophrenia, neurocognitive disorder due to dementia,

---

[3] The corrected version corrected the number of days to file a notice of appeal.

intellectual disability, catatonia, and depressive disorder—is ineligible for the death penalty under the Nevada Constitution because of his severe mental illness.

(2) Whether Ybarra is ineligible for the death penalty because he is intellectually disabled.

(3) Whether Ybarra is incompetent to be executed.

(4) Whether Ybarra's execution violates the Constitution.

(5) Whether the district court erred by denying Ybarra's petition without ordering the State to respond or ordering an evidentiary hearing.

D. Statement of the Case

After nearly two years of proceedings delayed by Ybarra's competency challenges, Ybarra was convicted and sentenced to death in the Seventh Judicial District Court in 1981. 6AA1319–20. This Court affirmed the conviction and sentence in 1984. *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984). Ybarra filed a post-conviction petition; this Court affirmed the denial of that petition. *See Ybarra v. State*, 103 Nev. 8, 731 P.2d 353 (1987). In 1989 and 1999, this Court also affirmed the

denial of two subsequent post-conviction petitions. *See* Case Nos. 19705, 32762.

In 2003, Ybarra filed a post-conviction petition with the Seventh Judicial District Court that, among other claims, raised his ineligibility to be executed because of his intellectual disability. *See* 9AA2010–98. The district court denied relief. 9AA2157–70. This Court reversed and remanded for an evidentiary hearing. *See Ybarra v. Warden*, No. 43981, Order (Nev. Nov. 28, 2005). The district court again denied relief; this Court affirmed. *Ybarra v. State*, 127 Nev. 47, 247 P.3d 269 (2011). This Court also affirmed the denial of a subsequent post-conviction petition. *See Ybarra v. Filson*, No. 72942, 2019 WL 4447242 (Nev. Sept. 13, 2019).

In October of 2024, Ybarra filed the instant post-conviction petition. 20AA4764–18. The district court denied the petition without ordering the State to respond. 20AA4928–43.

This appeal follows.

E. Nevada Constitutional Provisions

Article 1, Section 6 of the Nevada Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, *nor shall cruel or unusual*

> *punishments be inflicted*, nor shall witnesses be unreasonably detained.

(emphasis added).

INTRODUCTION

"[M]ental illness or mental disorder of the defendant should be a consideration in mitigation of penalty."[4] There are, however, six reasons that severe mental illness is not reliably considered in mitigation of penalty. First, individuals who suffer from severe mental illness have a compromised ability to cooperate with counsel. Second, their illness makes them poor witnesses—both because of how they appear and because their illness affects their perception. Third, severe mental illness causes distortions in cognition that result in poor decision-making. Fourth, though severe mental illness should be mitigating, jurors are at great risk of considering it aggravating. Fifth, state and defense experts are likely to disagree about the severity of mental illness, creating a risk that jurors will not understand the evidence.

---

[4] Larry Hicks, District Attorney of Washoe County and President of the Nevada Association of District Attorneys, S.B. 220, *Joint Assembly & Senate Jud. Comm. Hr'g*, Meeting Minutes, at 3, (Mar. 10, 1977).

Finally, cases where the defendant suffers severe mental illness are often cases where the brutality of the offense might cause the jury to select a sentence infected with passion and prejudice.

Ybarra has severe mental illness. His case demonstrates these problems.

The United States Supreme Court has recognized that these problems required a categorical exemption from the death penalty for intellectually disabled offenders and juvenile offenders. Ybarra's intellectual disability is, by itself, reason to grant relief here. But so is his severe mental illness. This Court, construing the Nevada Constitution, should apply the same factors to hold that individuals with severe mental illness are exempt from the death penalty. Alternatively, his intellectual disability and his incompetence to be executed prohibit his execution.

STATEMENT OF FACTS

This capital case arises from the uncommonly gruesome murder of teenager Nancy Griffith on September 29, 1979, the facts of which are recounted at length by this Court on direct appeal. *See Ybarra v. State*, 100 Nev. 167, 170–71, 679 P.2d 797, 798–99 (1984). Ybarra was

arrested shortly after; on the day that was supposed to be his arraignment, defense counsel moved for a psychiatric evaluation to determine whether Ybarra could assist counsel. 1AA0003–04. For effectively the rest of the proceedings in this case, Ybarra's mental condition has presented an intractable problem for his lawyers, the experts appointed to evaluate him, the district court, and the Department of Corrections.

A. Ybarra's mental illness and challenges at the Nevada State Public Defender required defense counsel to go to trial despite being unready.

1. Before trial, Ybarra was twice referred for competency evaluations.

Before arraignment could occur, both the defense and the State agreed to close the courtroom so that the defense could make "a preliminary motion they feel that the nature of the motion may constitute prejudice to the defendant if the nature is known to anyone." 1AA0003–04. The request was for an evaluation of whether Ybarra was "able to assist counsel in preparing his defense and whether he is otherwise competent to stand trial." 1AA0004. Ybarra was engaging in self-harm, and appeared to be preparing a suicide attempt. 1AA0005.

Defense counsel explained, "And in addition to these problems[,] his depression has to some extent interfered with his communication with me." 1AA0005. The State agreed an evaluation was necessary: "[T]he State would have made the motion had defense counsel not made it. And we would not object to that at all." 1AA0006. Neither side was prepared to name an expert during this hearing. 1AA0007–08. About a month later, the Court appointed two experts and then scheduled the evaluations to occur. 1AA0017–18.

Although one of the experts opined that Ybarra's "depression limits his ability to cooperate with counsel in defense of the offense charged," and that Ybarra "needs to be treated for his severe depression," both experts concluded that Ybarra could proceed. 9AA2151; 12AA2906. In late January of 1980, Ybarra was arraigned. 1AA0019–31.

Beginning in late March, jury selection began. *See* 1AA0032–2AA0448; 2AA0449–4AA0852. However, at the end of jury selection, the court denied the defense's change of venue motion; the defense immediately filed a notice of appeal, halting the trial court proceedings. *See* 4AA0778, 0845–52.

While this appeal was pending, Ybarra's competency again became an issue. In late July, Ybarra wrote a letter to counsel explaining that "SATAN SAYS IF I DONT KILL MYSELF HE WILL START KILLING MY FAMILY AN LOVED ONES. SATAN SAYS HE WILL START WITH MY GRANMA FIRST. ANOTHER VOICE TELLS ME DON'T EAT BECAUSE THE PEOPLE HERE ARE POISONING ME," among other descriptions of what the voices were saying. 4AA0863–66 (typos and capitalization in the original). Defense counsel provided this letter to the experts from the first competency evaluation: one wrote back, "In my opinion a brief inpatient evaluation at Lake's Crossing facility would be of value." 4AA0858. The other expert explained that the letter "indicates that there has been a substantial deterioration in his mental condition since I saw him last," noting "paranoid delusions," "auditory and visual hallucinations," and "schizoid fantasies." 4AA0859. This expert concluded Ybarra "may have developed a full blown paranoid schizophrenia." 4AA0860. A third expert noted concerns related to "gross delusional ideas regarding [Satan], and these were associated with auditory hallucinations" and

explaining "he may be suffering from chronic paranoid schizophrenia . . . ." 4AA0861.

In August, counsel moved for another competency evaluation. 4AA0857. The following month, in September, Ybarra wrote the district judge, informing him that trial counsel "IS WORKING WITH COPS TO CONVICT ME" and that counsel "CONSTANTLY LIES TO ME AN MY FAMILY." 4AA0867 (typos and capitalization in original). This letter also informed the court that Satan was instructing Ybarra not to eat the food because it was being poisoned. 4AA0868.

Less than a week later, the trial court ordered Ybarra evaluated. 4AA0880–81; 4AA0882.

In October, while Ybarra was still being evaluated, this Court denied Ybarra's venue appeal. In November, the court held a competency hearing. Dr. John Chappel, a psychiatrist, explained that Ybarra's behavior was "abnormal," and his "physical appearance had deteriorated." 4AA0890–91. Dr. Chappel added that Ybarra's "delusions had extended . . . and I think were much more serious as I recall with regard to the prosecution . . . ." 4AA0891.

Dr. Chappel diagnosed Ybarra as "psychotic," and "that he has a severe mental illness where his perception of reality is severely impaired by the internal reality which he experiences, and that this psychosis is either schizophrenic and of a paranoid type or is depressive." 4AA0897. He added, "his current mental status so severely impairs his ability to cooperate with counsel that I don't believe that it would be possible." 4AA0897. At the conclusion of his evaluation, Dr. Chappel spoke to the officer escorting Ybarra "and told him that . . . Mr. Ybarra was seriously mentally ill, needed to be hospitalized, and I thought he ought to be taken directly to Lake's Crossing for the Mentally Disordered Defendant for treatment." 4AA0899. Dr. Chappel explained the stakes:

> It's my opinion that Mr. Ybarra, if he continues without treatment, will continue to deteriorate. I would expect that in the near future his health will be seriously jeopardized, either by specific action on his part to hurt himself, which he's done several times in the past, or through refusal to eat.

4AA0900–01.[5]

---

[5] Notably, as Ybarra's recent mental status has deteriorated related to his current incompetency challenges, Ybarra has stopped eating on the basis that his food is poisoned.

Dr. William Gorman testified that, based on his evaluation of Ybarra, "further hospitalization" was needed "in order to determine more accurately the general status of [Ybarra's] mental as well as physical and neurological facilities." 4AA0971. Dr. Gorman did not believe that Ybarra could consult with his lawyers, and he explained that Ybarra referred to his trial counsel as "McGuire, the liar," that his trial counsel had been "paid to lie about him." 4AA0971–72.

Following the testimony, the Court ordered that Ybarra "be transported forthwith immediately . . . he needs to be treated immediately to the end that he may be able, if he is able at some point in the future, to assist his counsel to assist in his defense of this case." 4AA0980; *see also* 4AA0982–86.

By February, a consensus of the Lake's Crossing experts believed Ybarra was competent. 4AA0987.

In early March, the Court ordered Ybarra returned so that the proceedings could continue. 4AA0987. One of the first issues to resolve was letters Ybarra had sent while his competency issues from the previous year were flaring up. One letter complained that defense counsel Steve McGuire "doesn't care anything that happens to me," and

another complained that Ybarra could not tell McGuire anything "because he will tell them," and that "McGuire is secretly working with these people." 4AA0989–90. Ybarra did not recall writing either letter. 4AA0990. The court then summarized the letters, and asked Ybarra, "Have you a present position to take with respect to representation by Mr. McGuire and the Public Defender's Office that you would like to advise the Court of?" 4AA0991.

Ybarra responded, "I don't understand what you're saying." 4AA0991.

Upon further inquiry, Ybarra agreed that he was satisfied with continuing to have McGuire represent him. 4AA0991. When asked if defense counsel had anything to represent, McGuire stated, "Your Honor, I think I am satisfied that the record reflects that the delusions that Mr. Ybarra was suffering from had cleared up now . . . ." 4AA0992. The court set trial to begin on May 4, 1981. 4AA0994–95.

Two days after McGuire said that the delusions were "cleared up," he filed a motion to place Ybarra at Lake's Crossing or the Nevada State Prison. 4AA0997–5AA1003. Ybarra had informed McGuire "that he was seeing lights, hearing bells, hearing cars crashing, and hearing

voices." 4AA0998. The State agreed that placement in the psychiatric unit at the State Prison was appropriate, and the court so ordered. 5AA1012–13.

Five days before trial, defense counsel moved for a continuance.

2. On the eve of trial, counsel moved for a continuance on the basis that they could not effectively represent Ybarra.

In late April, defense counsel moved to continue the trial 5AA1040–54. There were two reasons the continuance was necessary: staffing issues and Ybarra's mental illness.

The Nevada State Public Defender had ongoing issues providing counsel to Ybarra.[6] McGuire, the only attorney to consistently stay on

---

[6] As the Ninth Circuit recently noted, "Institutional Obstacles" affected the provision of capital defense representation by the Nevada State Public Defender, which faced "staffing and funding" issues. *Rogers v. Dzurenda*, 25 F.4th 1171, 1196–97 (9th Cir. 2022). In *Rogers*, another rural capital trial that happened in 1981—also involving a defendant with serious mental illness—the Ninth Circuit noted that the Nevada State Public Defender was "overburdened and understaffed." *Id.* at 1196. The Ninth Circuit added:

> Given these systemic obstacles, it is clear that we should not resolve this case merely by pointing out that counsel have fallen on their own sword in

Ybarra's case, had been barred only two years when he began representing Ybarra, and "had not engaged in the practice of criminal defense prior to August 14, 1979." 5AA1038.

McGuire began working as a contracting Public Defender on August 14, 1979, less than seven weeks before Ybarra's crime occurred. 7AA1566. During that time, he received no formal training. 7AA1566.

> admitting inadequate performance, but rather should note a caution to the state government that should have adequately trained and staffed the case . . . . We are troubled by the adequacy of the representation in Rogers's case due at least in part to factors outside of trial counsel's personal control. If, as we believe, the right-to-counsel guarantee is meant to ensure that our adversarial system reliably tests the prosecution's case before subjecting a defendant to incarceration—and here, death—states and municipalities providing defense in serious criminal cases should ensure that advocates have the means to do so.

Id. at 1197. In a separate, unanimous, concurrence, the Ninth Circuit noted, "the difficult issues we confront today might have been avoided had Nevada paid sufficient attention to the appointment of qualified counsel." *Id.* at 1198 (Hurwitz, J., concurring). As Judge Hurwitz put it, "capital defense is not simply routine criminal defense with higher stakes." *Id.* at 1199. Here, as in *Rogers*, Ybarra "went on trial for his life defended by two relatively inexperienced and overworked lawyers." *Id.*

He was almost immediately assigned to three capital cases, including Ybarra's. *See* 5AA1038. He had never tried a major felony case involving insanity. 5AA1085. Ybarra's preliminary hearing was the first preliminary hearing he conducted. 7AA1571. He later testified that it "appeared" to him the State had shown sufficient evidence as to each of the four charges. 7AA1572. However, he subsequently filed a motion to dismiss two of the charges on the basis that insufficient evidence had been shown at the preliminary hearing, after discussing the matter with Norm Herring. 7AA1572–73; 5AA1034–39.

"Due to lack of extensive criminal defense experience and the pressure of three simultaneous capital murder cases, [McGuire] requested and received the assistance of co-counsel from the Nevada State Public Defender." 5AA1038–39. However, no one stuck around. *See* 5AA1039. Thomas Perkins, who briefly worked as an attorney on Ybarra's case pre-trial, indicated that at the time Ybarra's case commenced, he was unsure if there was an attorney in the office with five years of experience. 6AA1500–7AA1501.

First, McGuire was paired with Gregory Damm, "just" for the preliminary hearing; then McGuire was paired with Martin Wiener,

who handled the case through jury selection and the interlocutory appeal, but then left the State Public Defender; then no second attorney was assigned; at one point Thomas Perkins was co-counsel; when, in March 1981, the trial was set for May 1981, Herring assigned himself as co-counsel. 5AA1062–66, 1072; *see also* 5AA1042. Herring, like McGuire, had only been licensed in 1977. 5AA1068. Like McGuire, his criminal defense experience began in 1979 when he joined the Nevada State Public Defender. 5AA1068. While Herring was preparing for Ybarra's trial he was also preparing another death penalty case, in addition to his other cases and supervision of the office. 7AA1698.

This situation was particularly dire because of how the Nevada State Public Defender staffed serious cases in the rural counties. The practice was to staff cases like this with one local, relatively inexperienced, part-time lawyer and one more experienced, full-time, public defender from Carson City. 5AA1074. As Herring explained, "I believe from my own experience and training that it would be incompetent of counsel to put a person who has relatively minor experience in major felony cases, in charge of those types of cases, when they're only part-time." 5AA1074.

In addition to the attorney staffing issues, the Public Defender's office had no full-time investigator. Martin Wiener recalled that the office "would contract with the State to do investigations . . . ." 6AA1400.

So, here, McGuire was "not a full-time Public Defender," and the state public defender was "not able to pay him a lot of money." 5AA1074. But, the thinking went, his inexperience would be counterbalanced by the steady hand of an experienced attorney. This, of course, could not happen where no experienced attorney remained on the case.

The result was that they were unprepared for trial. Herring explained that since January of that year, he had "personally handled 50 felony cases in Churchill County and 11 other adult cases in Churchill County and 16 juvenile case," in addition to preparing and three times presenting to the legislature on the "biennial budget of the Nevada State Public Defender," and associated meetings with legislators and the State Budget Division. 5AA1043. He also supervised attorneys on four other murder cases, argued two cases before this Court and briefed three appeals. 5AA1043.

So, other than "an occasional conversation," he did not do anything on the case until mid-April, when he read the preliminary hearing transcript for the first time. 5AA1072. As he put it: "There was no review of the file. There was no review of written statements. There was no review of any substantial portion of the case because of the other pending matters." 5AA1072. At the end of the hearing, Herring reflected that the resource and staffing problems at the Nevada State Public Defender were the reason he was leaving the office. 5AA1099. Co-counsel McGuire was also busy, splitting his time between Ybarra and two other capital cases. 5AA1078.

And none of the attorneys who had previously left the team had done work that Herring and McGuire could build on. For example, Martin Wiener did not prepare for trial with "intensity" because he assumed the change of venue issue would necessitate a delay no matter the Court's ruling. 6AA1396.

The other reason a continuance was required was that Ybarra's mental illness continued to pose challenges. McGuire explained that before Ybarra's return from Lake's Crossing, Ybarra "was very unreceptive to any sort of defense based on his mental condition," and

that McGuire was "having some difficulty keeping communications open with him." 5AA1083. As Herring explained, since the Court set the trial date two months earlier, Herring had twice spoken to Ybarra and "on both of those occasions, Mr. Ybarra was delusional and uncooperative to counsel's attempt to elicit information." 5AA1043. In addition, a previous EEG examination of Ybarra suggested abnormality, but the reliability of the EEG was suspect because the "EEG may have been altered by the current medication which Mr. Ybarra is taking, namely Lithium, 300 mg. per day, and stelazine 20 mg. per day." 5AA1044. Thus, a continuance was necessary so that Ybarra could halt medication and additional EEGs could be conducted. 5AA1044–45.

The court asked Herring directly if he was advising "the Court that you have had insufficient time yourself to properly prepare to present the Defendant's case." 5AA1074. Herring answered, "That is correct, Your Honor." 5AA1074.

Before granting the continuance, the judge noted the challenges of the case:

> Well, let me state for the record that this case presents as it has from the beginning, just a difficult problem that is most unique and unusual. The case is unique and unusual and in many

> categories now it is becoming more and more unique and unusual.

5AA1099. The court explained how "[e]very effort was made to move this case along," but "Mr. Ybarra became ill" requiring a continuance. 5AA1099. While Ybarra's competency was an issue, the court could not resolve whether to allow the Nevada State Public Defender to continue representation. 5AA1100.[7] And then, as the court emphasized, despite trying to "move[] forward again in what [the court] thought was appropriate procedure," "Ybarra was under the influence of a drug called Lithium" during the evaluation, so the parties and the court were "at this point with an examination that could very likely be completely invalid." 5AA1100. Additionally, the court noted, Ybarra's recent change of plea to not guilty by reason of insanity "added completely new dimension and greater dimension to the case." 5AA1100–01. Finally, the court emphasized the problems posed by the public defender's office:

> I also think that I would be remiss if I did not say something on the record concerning the problems of counsel. I am well aware that there

---

[7] The court's implication appeared to be that it was understandable if counsel ceased working on the case while Ybarra's competency was being resolved because Ybarra might terminate the representation after being restored. 5AA1100.

have been several Public Defenders involved in this case. I know that that creates a difficult and impossible problem. Unfortunately, I am not the legislature. I cannot fund that office properly to see that they have an adequate number of people available, nor can I make those people that are there stay employed with that office. I know that they move on to better opportunities.

Even in your closing statement, Mr. Herring, you said yourself there is so much pressure in that office on an individual, so much unhappy pressure, that it is very difficult to find any gentleman who is willing to stay there for any period of time under the abuse that is apparently heaped upon the individuals there and it is very unfortunate.

Now, that has contributed to counsel change after counsel change out of the Public Defender's Office in this case going back to the beginning. And now we have come clearly to April and we have now an additional change. Mr. Ybarra has about this third or fourth counsel in this case. And this happened just less than a month ago and that is an important consideration.

I read the Affidavit of yourself, Mr. Herring, and I know that your caseload is very heavy. I know that you are handling cases everywhere and you have a lot of problems and a lot of responsibilities and I know it is tough to devote yourself to any one case. This isn't the only capital case. There are numerous capital cases coming down out of every jurisdiction unfortunately for everybody because it puts so much pressure and so much time on everybody.

. . . .

> Mr. McGuire's real experience has probably been one or two very small cases, felony cases not of great significance. None of those cases have involved the defense of insanity. None of them have involved the problems of organic brain syndrome or any of those areas. And I recognize that these are difficult problems for anyone to try to understand and handle.

5AA1101–03. The court granted the continuance, and set trial for June 9. 5AA1114–15.

B. During the guilt phase, none of the defense or prosecution experts agreed about anything—including whether it was even possible to do a retrospective evaluation.

The defense theory was not guilty by reason of insanity. *See, e.g.*, 15AA3610. In the defense presentation, counsel presented three experts, Dr. Patrick Weyl, Dr. Louis Richnak, and Dr. John Chappel. But the presentation had problems.

Dr. Richnak testified that Ybarra was "in a psychotic condition at the time of the killing." 17AA4244. Specifically, "Robert appeared to be responding to the delusional belief that if he killed the girl his wife would come back to him." 17AA4244. This was based on Dr. Richnak's diagnoses that Ybarra had mixed organic brain syndrome with

"elements of an organic brain hallucinatory syndrome, an organic personality disorder, and organic delusional syndrome." 17AA4240.

But this testimony had effectively been pre-rebutted by the defense's first expert, Dr. Weyl, who had already testified (on cross-examination), that "During the process of administering the test and on the basis of his answers [he] saw no evidence of thought disorder." 17AA4204–05. Neither expert provided testimony that would reconcile the inconsistent observations between the two experts. In addition: Dr. Weyl's testimony was that Ybarra had mild impairment based on deficiencies found in giving the Luria Nebraska Neurological Battery, a test developed to assess brain damage. 17A4174–75. This contrasted Dr. Richnak's significantly more serious diagnosis of Ybarra's mental health challenges. 17AA4240.

Moreover, Dr. Richnak conflated part of the *M'Naughten* rule, which did apply, with the irresistible impulse rule, which did not apply. *See* 18AA4309–10; *see also Finger v. State*, 117 Nev. 548, 562–64, 27 P.3d 66, 75–77 (2001) (describing history of insanity defense in Nevada, the *M'Naughten* test, and how the irresistible impulse test was not

adopted in Nevada).[8] Dr. Weyl, meanwhile, did not testify about the insanity standard at all.

On rebuttal, the State presented Dr. Gutride, who questioned whether Ybarra was hallucinating at all. 18AA4406–07, 4436–37. He testified that there was no evidence of organic brain dysfunction or "evidence of any psychotic disorganization." 18AA4428–29. Dr. Gutride also explained that he did not do a retrospective assessment as to the night of the crime because he "felt that so much time had intervened in between that crime and the time [he] first saw Robert . . . ." 18AA4445. He added:

> My reason for not coming to an opinion is because I thought that too much time had elapsed and too many things had taken place that could affect Robert's functioning, in between the events of that day and my first seeing him. I didn't feel that I could justifiably try and hypothesize based on what I saw today whether he was lying two years

---

[8] Although, Dr. Richnak's conclusion rested on the part of the *M'Naughten* test that he recited correctly. *See* 18AA4310; *see generally* Wayne R. LaFave, *Substantive Criminal Law* § 7.2 (3d ed Oct. 2024 Update) ("Under *M'Naughten*, an accused is not criminally responsible if, at the time of committing the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong.").

> earlier and given everything that happened in between.

18AA4446. Dr. Gutride's testimony that retrospective assessment was not possible contradicted Dr. Richnak's testimony, which presumed retrospective assessment was possible.

It also contradicted the State's rebuttal expert, Dr. Molde, who did a retrospective assessment, and concluded that Ybarra could distinguish between right and wrong, appreciate the nature and quality of his acts, and that Ybarra was in control of his acts at the time of the homicide. 18AA4495–96. Dr. Molde testified that he did not talk to any of Ybarra's family members. 19AA4509.

Dr. Chappel, a defense expert, sided more with Dr. Gutride on the question of retrospective assessment, testifying, "I cannot get a clear picture of his mental state at that time." 19AA4601. He stated one condition that could explain Ybarra's situation was "toxic psychosis," but stopped short of testifying that Ybarra had toxic psychosis such that Ybarra would not know the difference between right and wrong. 19AA4603–04. When defense counsel asked if Ybarra had a mental disorder on the night of the offense, Dr. Chappel answered that Ybarra

had two "mild" conditions: organic personality syndrome and depression. 19AA4604. On cross-examination, Dr. Chappel emphasized the challenges related to a retrospective analysis: "It is almost impossible for us to tell what a person's state was at the time something occurred," although he added an opinion full of ifs: "If what Mr. Ybarra told me was accurate, and with the other information I have, it is my opinion that there is a reasonable medical probability that he was suffering from a toxic psychosis that evening. If he was, and if he had the delusions which he described to me, then he was under the delusion that the way to get back his wife was to sacrifice another person . . . ." 19AA4614. When pressed he added, "I'm not clear on what criminal responsibility is," and "It's my personal opinion that everybody is responsible for what they do." 19AA4617. The State then asked if Dr. Chappel believed that Ybarra's toxic psychosis meant "no criminal responsibility or possibly no criminal responsibility?" 19AA4619. Dr. Chappel answered, "Possibility." *Id.* He stated that for insanity, there would need to be delirium, but he did not believe there was delirium in Ybarra's case. *Id.*

Dr. Chapel could not identify the elements of the *M'Naughten* test, and never testified that Ybarra was insane under *M'Naughten*. *See* 19AA4612.

Finally, the State presented Dr. Gerow as a rebuttal expert. Dr. Gerow testified that he concluded Ybarra had no major mental illness, and thus, under *M'Naughten*, Ybarra was criminally responsible. 19AA4656.

The jury found Ybarra guilty on all counts.

C. During the penalty phase, the defense presented two lay witnesses.

During the penalty phase, the defense presentation spanned 13 pages, and consisted of two witnesses: a reverend who testified that he counseled Ybarra and Ybarra's mother who testified for two pages of transcript.

No expert witnesses testified during the penalty phase.

The jury imposed death. 6AA1319–20.

D. Staffing issues continued to plague the Nevada State Public Defender's Office during Ybarra's direct appeal.

Before the court conducted sentencing, the Nevada State Public Defender moved to withdraw as counsel on Ybarra's case due to staffing and budget shortages. 6AA1317–18 (affidavit of Norman Herring); 6AA1321–49 (motion to disqualify counsel transcript); 6AA1377–82 (order denying motion to withdraw). The district court held a hearing on the motion to withdraw. 6AA1321–49. There, the court questioned McGuire, asking whether the motion to withdraw was based on a "new policy determination of your office not to handle appeals," to which McGuire testified that it was "not an intention not to handle appeals at all" but that the Nevada State Public Defender was unable to handle "this particular appeal." 6AA1335.

The district court denied the motion, holding, "The Public Defender's Office indicated they do not want to represent the Defendant in the future in this particular case, however, they will represent other Defendants in other cases on appeal. Apparently, they will selectively decide which appeals they will handle in the future." 6AA1377. While the court was not "unsympathetic to the problems of the Public

Defender's Office," it denied the motion to withdraw, citing the "substantial increase in funds and people in the State Public Defender's Office this year, the fact that appeals, capital and otherwise, now are being handed by that Office, and have been for many years, the selective nature of this request and the time when it was presented[.]" 6AA1381–82.

One year later, Laura Fitzsimmons was assigned to Ybarra's case, which was by then already fully submitted. 8AA1833, 1835. She did not review the case until this Court set it for oral argument. 8AA1835. "I looked through the Briefs, or—I'm sorry—the Opening Brief and the State's Answering Brief. There was no Reply Brief." 8AA1835. Fitzsimmons did not know why no reply brief was filed. 8AA1836.

Her review of the opening brief did not inspire confidence: she had "an impression that the majority of that Brief was dedicated to an argument which would, in essence, request the Supreme Court to expand the insanity defense in the State of Nevada. And I was aware that with the assassination of the President, the Nevada State Legislature had in fact attempted, or did actually do away with that defense." 8AA1836. Fitzsimmons felt this argument "would clearly not

fly" and was inadequate given the state of the insanity defense in Nevada at that time. 8AA1836–37. Fitzsimmons asked the Court to re-open briefing—which this Court granted—and she subsequently filed a supplemental opening brief raising three additional issues. 8AA1837; 6AA1493. Following briefing and argument, this Court affirmed. *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984).

E. After initial post-conviction counsel presented only record-based claims, Ybarra's subsequent petitions were mostly procedurally defaulted.

Ybarra's first post-conviction petition, which raised only record-based claims, was denied and affirmed by this Court. *See* 8AA1871–28; *Ybarra v. State*, 103 Nev. 8, 731 P.2d 353 (1987). The only penalty phase claim was as to the State's closing argument; the almost non-existent mitigation presentation was not raised as a claim of ineffective assistance. *See id.* A subsequent petition, challenging the *M'Naughten* rule—another record-based claim—was also denied and affirmed by this Court. 8AA1929–47; *see also Ybarra v. Director*, Case No. 19705.

In October 1993, for his next post-conviction petition, Ybarra's counsel, Glynn Cartledge filed an affidavit before the Seventh Judicial District Court requesting appointment of a second attorney. 8AA1948–

51. She acknowledged her "lack [of] experience in the area of state capital litigation" and belief that Ybarra would "receive inadequate representation from me without the input of a second attorney." 8AA1949. Cartledge also noted the case contained "many complicated issues," including Ybarra's "mental state at the time of the killing, during trial and at present." 8AA1950.

In response to Cartledge's affidavit, the district court declined to appoint a second attorney finding it was "not justified." 8AA1953. And, instead, vacated its prior order appointing Cartledge to appoint Ybarra and appointed Edward Horn as her replacement. 8AA1953–54. Ybarra protested this change in counsel, citing his belief that Horn was previously employed by the Nevada Attorney General. 8AA1955.

In a February 1994 letter from the district court's law clerk to Ybarra, the law clerk acknowledged receipt of a letter from Ybarra in which Ybarra stated he would "not accept another attorney in place of Ms. Cartledge" and that he did not want Horn to represent him. 8AA1955. The law clerk explained that Ybarra's "concern that Mr. Horn was previously employed by the Nevada Attorney General has been denied by Mr. Horn." 8AA1955.

That same day, the district court's law clerk wrote a letter to Horn acknowledging Horn's December 1993 letter to the court in which he "requested advice on how to proceed." 8AA1954. The law clerk's letter advised Horn to continue to represent Ybarra "with or without his cooperation" and noted Ybarra's only options were to "cooperate with you, elect not to cooperate with you, or choose to represent himself." 8AA1954.

One month later, Horn filed a motion to be relieved as Ybarra's attorney, explaining that Ybarra expressed he did "not trust" Horn and that he had received letters from Ybarra indicating that Ybarra "would no longer communicate" with Horn. 8AA1958–63. The district court denied Horn's motion finding that Ybarra was "not entitled to a meaningful relationship with his Court appointed attorney" and that Horn could "ably represent" Ybarra in his habeas proceedings "without even visiting him." 8AA1964–66. This petition proffered new evidence, but the district court denied it, finding it procedurally defaulted. 8AA1967–9AA2009.

On March 6, 2003, Ybarra filed a state post-conviction petition, now represented by the Federal Public Defender, Ybarra's current

counsel. 9AA2010–98. The following year, the district court granted the State's motion to dismiss, concluding the petition was procedurally barred, ordered the State to file a "verified statement of costs and attorney fees incurred in this action with sufficient detail to enable to the Court to consider an award of attorney fees," and directed Ybarra's counsel to show cause why some of the exhibits filed in support of the petition should not be stricken because they were not cited in the petition. 9AA2157–70.

This Court reversed, remanded, and ordered the district court to conduct an evidentiary hearing on Ybarra's claim of intellectual disability. *See Ybarra v. Warden*, No. 43981, Order (Nev. Nov. 28, 2005). On remand, Ybarra presented two experts who both testified that Ybarra met all three prongs for intellectual disability. 9AA2178–10AA2375. The State presented one expert, who testified only as to the first prong, and only as to his conclusion that Ybarra was malingering. 10AA2448–97. The district court denied relief on all three prongs, notwithstanding that the State's expert did not testify about two of the

three prongs. 11AA2611–56 This Court affirmed. *Ybarra v. State*, 127 Nev. 47, 247 P.3d 269 (2011).[9]

In 2017, Ybarra filed a petition, as did nearly all of the death row clients of the Federal Public Defender, asserting he was entitled to relief under *Hurst v. Florida*, 577 U.S. 92 (2016). *See Ybarra v. Filson*, No. 72942, 2019 WL 4447242, at *1 (Nev. Sept. 13, 2019). The district court dismissed Ybarra's petition for writ habeas corpus without ordering an answer and ordered counsel to show cause as to why the court should not find the filing of the petition to be a violation NRCP Rule 11(b)(1) or (b)(2). 11AA2657–68. This Court affirmed the dismissal. *Ybarra*, 2019 WL 4447242.

Meanwhile, Ybarra's federal habeas petition, filed in 2000, was proceeding. *See Ybarra v. McDaniel*, 656 F.3d 984, 989 (9th Cir. 2011). The federal district court denied relief; the Ninth Circuit affirmed. *Id.* at 989, 1002. However, while Ybarra appealed his federal habeas

---

[9] As described below, the reasonableness of this opinion was the subject of significant concern during Ybarra's federal habeas proceedings notwithstanding that the federal courts ultimately concluded that the opinion as to Prong 1 was not unreasonable. *See* § B(2) below.

petition, this Court issued its decision on Ybarra's intellectual disability, allowing Ybarra to seek federal habeas relief on that claim. *Ybarra v. Filson*, 869 F.3d 1016, 1021 (9th Cir. 2017). Here, too, the federal district court denied relief. *Id.* The Ninth Circuit reversed, noting "Ybarra plausibly argues that the Nevada Supreme Court made an unreasonable determination of fact" and emphasizing "troubling" statements on adaptive deficits and age of onset, given that "the only clinical experts to testify on Prongs 2 and 3 opined that the prongs were satisfied." *Id.* at 1025–26.

On remand, the federal district court held that this Court's determination of adaptive deficits was unreasonable, but denied relief based on this Court's intellectual functioning finding. 12AA2915–41. The Ninth Circuit affirmed. *Ybarra v. Gittere*, 69 F.4th 1077 (9th Cir. 2023). The U.S. Supreme Court denied certiorari in May 2024. *Ybarra v. Gittere*, No. 23-6755, 144 S. Ct. 2582 (May 28, 2024).

F. The district court denied this petition without ordering an answer.

In September 2024, the Seventh Judicial District Court issued an order inviting points and authorities why an execution should not enter.

Shortly after, Ybarra filed the instant petition for writ of habeas corpus in the Seventh Judicial District Court, which is the subject of this appeal.[10] The district court denied relief without ordering the State to answer. 20AA4933.

G. Challenges posed by Ybarra's mental illness continue to be present.

Ybarra's lengthy and complex mental health history includes schizophrenia and unspecified depressive disorder diagnoses. 12AA2837. For over a decade, Ybarra has been suffering from dementia. 12AA2771–72 (2012 report diagnosing Ybarra with "Dementia due to Head Trauma"); 12AA2843–44 (2024 report diagnosing Ybarra with "Mild Neurocognitive Disorder Due to Dementia"). He can "recall moments of his 80s trial" but be unable "to tell you what he had for breakfast." Ex. 19 at 611.[11]

---

[10] Initially, the case was assigned to Department 2, which was presided over by the Honorable Gary D. Fairman. *See* 20AA4923. Before taking the bench, Judge Fairman acted as one of the prosecutors in Ybarra's case. *See id.* Ybarra moved to disqualify. *See* 20AA4919. Judge Fairman granted the motion. 20AA4925.

[11] "Ex." citations refer to the exhibits filed in support of Ybarra's Motion to Stay Second Supp. Warrant of Execution Pending Appeal

In November 2024, Dr. David Price wrote a report of his evaluation of Ybarra while Ybarra was at High Desert State Prison. Ex. 19 at 609–10. In his report, Dr. Price concluded that Ybarra's mental illness "absolutely impairs his ability to work with his attorneys." Ex. 19 at 633. Not only does Ybarra "not have sufficient capacity or ability to rationally communicate with his legal counsel," but his "paranoia, suspiciousness, and delusions of being persecuted by the criminal system" impact "the information that he discloses to his attorneys, that could be crucial to his case." Ex. 19 at 633–34.

After Dr. Price's evaluation, Ybarra was transferred from High Desert to Ely State Prison—the location of the execution chamber.[12]

(filed Mar. 28, 2025). These documents were not part of the district court record in this case because they postdate the district court's denial. Ybarra proffers them in support of evidence he would anticipate presenting in support of his severe mental illness and incompetency to be executed claims.

[12] Hours before a January 3, 2025 hearing before the Seventh Judicial District Court, the White Pine County District Attorney filed a motion to transport Ybarra from High Desert to Ely State Prison. Ex. 20 at 257–64. At this hearing, the district court declined to sign the motion to transport. Still, five days later, the Department of Corrections independently transported Ybarra to Ely State Prison where he remains. Ybarra was transported ostensibly pursuant to the

Following this unnecessary transfer, Ybarra's already fragile mental state has continued to deteriorate. He has "evidenced confusion, disorientation, anomia, agitation, disorganized thought processes, paranoia, hallucinations and memory impairment." Ex. 20 at 662. Dr. Price opined that Ybarra's removal from "a stable prison, prison routine, [and] known fellow inmates. . . precipitate[d] an emotional and mental decline." Ex. 20 at 662. His transfer "adversely affected his pre-existing Major Neurocognitive Disorder Due to Probably Alzheimer's Disease; Schizophrenia; Intellectual Disability; and Depression[.]" Ex. 20 at 662.

On March 15, 2025, Ybarra, who is wheelchair bound and cannot use his legs to walk, was found "scoot[ing]" around his prison cell floor with old feces and urine and without underwear or pants. Ex. 50 at 1277. He had an "altered mental status," and staff concluded he needed

---

Department of Corrections' Execution Manual (EM) 109.01(A), which provides that an inmate shall be transferred to Ely State Prison after an Order of Execution is received by the Department and the Director has set the date and time of the execution. The Department of Corrections unilaterally transferred Ybarra even though the execution warrant was moot in light of the stipulation staying the execution until February 11, 2025. 15AA3552.

to go to the hospital. Ex. 50 at 1277; Ex. 49 at 1253–69. After returning from the hospital, Ybarra "continued [his] altered mental status," and was "jerking." Ex. 50 at 1276. Two days later, staff observed Ybarra "out of [wheelchair] on floor crawling to cell door" and he "did not have any clothes on." Ex. 50 at 1275. When medical staff informed shift command about the need to put Ybarra back in his wheelchair, "shift command stated they did not have extra people to assist at that time." Ex. 50 at 1275.

These records "illustrate a complete break with reality and his understanding of his life circumstances." Ex. 56 at 1411. Ybarra's declining mental health, including a worsening of his depression and Schizophrenia, have contributed to his "inability to remember, and profit from, his conversations with his legal counsel[.]" Ex. 56 at 1411.

SUMMARY OF THE ARGUMENT

Robert Ybarra, Jr., is 71 years old, wheelchair bound, and forgets what he is doing in the middle of tasks. *See* 12AA2844. He "fluctuate[s] between periods of lucidity and unconsciousness," and has difficulty understanding. 12AA2844.

He is intellectually disabled, and he has dementia. He also has schizophrenia, which is a severe mental illness.

He is ineligible to be executed. This Court, construing the Nevada Constitution, should hold that individuals with severe mental illness are categorically exempt from the death penalty. Ybarra, thus, is exempt and his death sentence should be permanently set aside.

He is also ineligible to be executed because he has intellectual disability.

Finally, he cannot be executed because there is no apparent legal mechanism by which his competency to be executed can be evaluated. And, assuming there were, he is incompetent to be executed.

ARGUMENT

I. The district court erred by denying Ybarra's petition without ordering the State to respond.

The district court denied Ybarra's petition without requiring the State to file a response. 20AA4933. This was error.

In *Chappell v. State*, 137 Nev. 780, 787, 501 P.3d 935, 949 (2021), this Court took the opportunity to remind petitioners of the pleading requirements found in Chapter 34 of the Nevada Revised Statutes. Of

particular importance here, Chapter 34 contemplates that if a petition survives an initial screening, the district court *must* order the State to respond, NRS 34.745(3); and, if the petition survives a second initial screening, the court *must* order an evidentiary hearing, NRS 34.770.

Specifically, district courts engage in two screening determinations before a petition is considered on its merits: first, a determination under NRS 34.745(3) that it does not "plainly appear[]" that NRS 34.810(3) bars relief; and, second, a determination that "petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Both steps are necessarily preliminary in nature. After a petition is presented to a judge, it "must be examined expeditiously by the judge or justice to whom it is assigned." NRS 34.740. Generally, the "judge or justice *shall* order the prosecuting agency" to file a response. *See* NRS 34.745(1). There is an exception to this general rule, which is the first required screening step: if the petition is second or successive, then the court looks to what "plainly appears from the face of the petition," documents attached to the petition, and the records of the court, to

determine if "the petitioner is not entitled to relief" under NRS 34.810(3). *See* NRS 34.745(3). If so, the judge "shall enter an order for its summary dismissal." NRS 34.745(3).

NRS 34.810(3) requires a judge to dismiss a petition if one of two circumstances applies: (1) if the judge determines that the petition fails to allege new or different grounds for relief and the prior determine was on the merits; or (2) if the petition alleges new or different grounds for relief, the judge finds the failure to assert those grounds in a prior petition constituted an abuse of the writ. NRS 34.810(3). Of particular importance to this case: establishing a miscarriage of justice excuses any default under NRS 34.810. *See, e.g.*, *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015) (recognizing miscarriage of justice excuses application of NRS 34.810).[13] And only a "colorable showing" is required. *Rippo v. State*, 134 Nev. 411, 444, 423 P.3d 1084, 1112 (2018) (quoting *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 527 (2001)).

---

[13] In 2023, the Legislature amended NRS 34.810, inserting a new paragraph 2, and renumbering the previous paragraph 2 as paragraph 3. 2023 Nev. Stat. 1631–32. Thus, in the cases predating July 2, 2023, references to NRS 34.810(2) are, in effect referring to what is currently NRS 34.810(3).

Thus, at this first preliminary screening, a district court has, in effect, two options: (1) order the State to respond or (2) determine that, on the face of the petition, it plainly appears that dismissal is required under NRS 34.810(3).

Here, the district court erred by going beyond what NRS 34.745(3) allows. For example, the district court applied NRS 34.726(1), notwithstanding that NRS 34.745(3) only allows inquiry as to NRS 34.810(3). *Compare* 20AA4934 *with* NRS 34.745(3). The court also dismissed two claims on the basis of cognizability—which, again, is beyond the preliminary application of NRS 34.810(3) that is allowed under NRS 34.745(3). 20AA4937–38. In addition, the district court held Ybarra to "proving 'specific facts' showing good cause and actual prejudice," which is inconsistent with NRS 34.745(3)'s clear intent that petitioners only be held to their pleading and the statute's admonition that the court look only at what "plainly appears from the face of the petition." *Compare* 20AA4934 *with* NRS 34.745(3).

Moreover, the district court engaged in merits analysis of Ybarra's claims. As to Ybarra's intellectual disability claim, the district court distinguished cases cited by Ybarra and refused to consider new

evidence provided with the petition and then concluded "[n]o fundamental miscarriage of justice will occur because this claim is procedurally barred." 20AA4934–36. As to Ybarra's severe mental illness claim, the district court cited this Court's holding that it has not previously "suggested that the severely mentally ill are ineligible for the death penalty," and then concluded Ybarra failed to show cause or prejudice in support of the claim. 20AA4936–37. Finally, as to Ybarra's claim that he is incompetent to be executed, the district court disregarded the relevance of Ybarra's many mental health diagnoses and concluded, "The fact that Ybarra may or may not suffer from dementia, delusions or other mental illnesses, in and of itself does not show he lacks a rational understanding of the State's rationale for his execution." 20AA4939. The district court, making a passing reference to the fact that the claim was previously raised over twenty years earlier—but not acknowledging that the previous claim was an unripe placeholder claim—did not purport to procedurally default this claim.

And the district court's merits-denial of Ybarra's incompetency to be executed claim was, in effect, a merits ruling on Ybarra's claim that the competency to be executed statute found at NRS 176.425 is

unconstitutional, which Ybarra raised as Claim Three of his petition. In ruling on Ybarra's competency to be executed, the district court assumed that habeas is an available mechanism to challenge competency determinations. *See* 20AA4938–39. Notably, the State took the opposite position in its second opposition to motion to stay in this court; and this issue has at least survived a motion to dismiss in Ybarra's Eighth Judicial District Court lawsuit challenging the constitutionality of NRS 176.425. *See* Opp. to Second Mot. Stay (Nev. Apr. 4, 2025).[14] As discussed in more detail below, this Court has suggested the opposite: that a competency to be executed issue must be litigated under NRS 176.425. *See Chappell*, 137 Nev. 780, 804 n.13, 501 P.3d at 960 n.13; *see also Mulder v. State*, No. 69490, 2018 WL 3628963, at *3 n.3 (July 26, 2018).

In denying the petition without the benefit of adversarial briefing, the district court committed a number of basic legal errors, which presumably would have been avoided if the State had answered and

[14] *See In re Ybarra*, No. A-24-903549-P, Order Denying Motion to Dismiss without Prejudice (8th Jud. D. Ct. Nev. Apr. 24, 2025).

Ybarra had replied.[15] And the relatively undeveloped state of the record affects this Court's ability to reach a reliable determination: as it currently stands, Ybarra's expert reports are unrebutted, to take one example. More fundamentally, by dismissing without the benefit of an answer, the district court was not required to make the second preliminary determination required: determining that "an evidentiary hearing is required" or determining that "the petitioner is not entitled to relief and an evidentiary hearing is not required." NRS 34.770(1), (2). As will be discussed below, Ybarra was entitled to an evidentiary hearing on his claims. *See* § V below.

II. Ybarra is ineligible for the death penalty.

Ybarra is ineligible to be executed under the Nevada and Federal Constitutions because he has severe mental illness and because he is intellectually disabled.

---

[15] *See, e.g.*, § II(B)(3) below (discussing district court's conflating of distinct state and federal standards).

A. Ybarra has severe mental illness.

Claim Two asserts that Ybarra has severe mental illness and is ineligible for the death penalty. 20AA4825–53. This claim is not barred by procedural defects because it establishes a miscarriage of justice.

1. Robert Ybarra has severe mental illness and is ineligible for the death penalty.

Ybarra has severe mental illness. In April 2024, Ybarra was diagnosed with "Schizophrenia, Continuous," but his lengthy and complex mental health history dates back decades and has been consistent. 12AA2837; 12AA2845 (diagnosing Ybarra with schizophrenia and noting that "the symptoms of psychosis" endorsed and reported by Ybarra during this evaluation were "consistent with previous records and evaluations"). One month ago, Ybarra, who is wheelchair bound and cannot use his legs to walk, was found "scoot[ing]" around his prison cell floor, which was covered in old feces and urine, while he was without underwear or pants. Ex. 50 at 1277. He had an "altered mental status," and prison staff concluded he needed to go to the hospital. Ex. 50 at 1277.

Ybarra's severe mental illness has caused a plethora of problems for his case, his counsel, and courts. His mental illness has presented the problem of incompetence and, at times, strained his relationship with counsel. In light of Ybarra's severe mental illness, it would be "cruel or unusual" to execute him. *See* Nev. Const. art. 1, § 6.

a) Executing someone who suffers from severe mental illness is cruel or unusual under the Nevada Constitution.

The Declaration of Rights is prominently placed as Article 1 of Nevada's Constitution. This article, declaring the "inalienable rights" of men, comes before the articles declaring the right to vote, the separation of powers, and the three branches of Nevada's government. Its placement conveys the convention's commitment to protecting those rights in the formation of its new government.

Section 6 of this article commands that "cruel or unusual punishments" shall not be inflicted. In interpreting the Nevada Constitution, this Court is guided by the principle that it "was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

Strickland v. Waymire, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)).

Analyzing a provision of the Constitution begins with its text. *Miller v. Burk*, 124 Nev. 579, 590–591, 188 P.3d 1112, 1119–20 (2008). This Court "will apply the plain meaning of a [constitutional provision] unless it is ambiguous." *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011). A provision is ambiguous if it is susceptible to two or more reasonable but inconsistent interpretations. *Strickland*, 126 Nev. at 234, 235 P.3d at 608.

Here, the Nevada Constitution's prohibition against cruel or unusual punishment—as to the question of executing the severely mentally ill—is susceptible to two interpretations: the provision prohibits the practice, or the provision does not. The phrase is ambiguous.[16] Resort to dictionary definitions does not decide the better reading. *See Cruel, Webster's 3d New International Dictionary* (1993) ("disposed to inflict pain esp. in a wanton, insensate, or vindictive

---

[16] Indeed, in *Mickle v. Henrichs*, 262 F. 687, 689 (D. Nev. 1918), a U.S. District Judge, analyzing the Nevada Constitution's prohibition against cruel or unusual punishment, noted that decisions from other jurisdictions on similar provisions were "not altogether harmonious."

manner . . . ."); *see Unusual, Webster's 3d New International Dictionary* (1993) ("being out of the ordinary . . . .").[17]

---

[17] Dictionaries more contemporaneous with the adoption of the Nevada Constitution do not resolve this ambiguity. *See, e.g.*, Joseph Worcester, *A Comprehensive Dictionary of the English Language* 134 (Rev. 1860) (Cruel: "Inhuman; hard-hearted; savage."); *id.* at 455 (Unusual: "Not usual; rare."); *id.* at 456 (Usual: "Common; occurring often; customary; *ordinary*; general." (italics in original)); *see also* Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries* [hereinafter Scalia & Garner, *Dictionaries*], in Scalia & Garner, *Reading Law*, 415, 421 (offering Worcester as an exemplary dictionary for the time).

Law dictionaries are also unhelpful. Several contemporaneous law dictionaries did not define cruel, unusual, or the phrase. *See, e.g.*, Alexander Burrill, *A Law Dictionary and Glossary*, v.1, 403 (2d ed. 1867) (providing no entry for "cruel" but defining "cruelty" as "In the law of divorce. Such conduct on the part of a husband towards his wife as affords a reasonable apprehension of bodily hurt"); *id.* at v.2, 563 (containing no entry for "unusual"); *see also* J.J.S. Wharton, *Law Lexicon*, or *Dictionary of Jurisprudence* 199 (160) (containing no entry for "cruel"); *id.* at 757–58 (containing no entry for "unusual"); John Bouvier, *A Law Dictionary* 355 (6th ed. 1856) (providing no entry for "cruel" but definition of "cruelty": "This word has different meanings as it applied [sic] to different things. Cruelty may be, 1. From husband towards the wife, or vice versa. 2. From superior towards inferior. 3. From master towards slave. 4. To animals."); *id.* at v.II, 614 (containing no entry for "unusual"); Henry Campbell Black, *A Dictionary of Law* 305 (1st ed. 1891) (defining "cruelty": "The intentional and malicious infliction of physical suffering upon living creatures, particularly human beings; or, as applied to the latter, the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity; outrage."); *id.* at 1203

Where a constitutional provision is ambiguous, this Court looks to the provision's history, public policy, and reason to determine what the voters intended. *See Miller v. Burk*, 124 Nev. 579, 590, 188 P.3d at 1112, 1120 (2008).

(1) The history of the provision shows that it offers special protection for children, the intellectually disabled, and the mentally ill.

The Nevada constitutional convention adopted Section 6 with almost no discussion of its meaning. *See* Andrew J. Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada*, 59, 782 (July 4, 1864) [hereinafter *Debates and Proceedings*].[18] Although contemporary scholars are not in complete agreement regarding the meaning of the phrase "cruel or unusual,"

(containing no definition for "unusual"); *see also* Scalia & Garner, *Dictionaries* 421 (offering Burill, Wharton, Bouvier, and Black as authors of exemplary law dictionaries for the time).

[18] The only substantive discussion of the section was to change the language from "nor shall cruel *nor* unusual punishment be inflicted" to "nor shall cruel *or* unusual. . . ." *Debates and Proceedings* at 782. This amendment was "agreed to by unanimous consent" without discussion. *Id.*

there is agreement that it was a phrase understood under common law.[19]

This phrase encompassed two concepts. First, the phrase curtailed arbitrary imposition of punishment. *See* John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L. J. 441, 475 (Jan. 2017) ("One of the arbitrary practices Parliament wished to forbid was the imposition of what it variously called 'cruell and illegall' or 'cruell and unusuall' punishments"); *see also*, John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill Rts. J. 989, 1038 (May 2019) [hereinafter Bessler, *A Century in the Making*] ("The . . . 'cruel and unusual punishments' prohibition in the English Bill of Rights were, consequently, seen from a very early date—as Blackstone made clear—as restricting the *arbitrary or discretionary* sentencing authority of abusive judges." (emphasis in original)).

---

[19] Scalia & Garner, *Reading Law* 320 ("The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common-law meanings."); *see also* John D. Bessler, *Lost and Found: The Forgotten Origins of the "Cruel and Unusual Punishments" Prohibition* (forthcoming in the British Journal of American Legal Studies).

Second, the clause prohibited any punishment contrary to long or immemorial usage. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW U. L. Rev. 1739, 1745 (Fall 2008); *see also id.* at 1814 ("Courts of the first half of the nineteenth century shared the Framers' understanding that the word 'unusual' in the Cruel and Unusual Punishments Clause meant 'contrary to long usage.' They generally upheld punishments that were consonant with common law precedent and were willing to strike down those that were not. . . .").

Members of the Nevada convention were familiar with and regularly referred to the common law in their deliberations. *See, e.g.*, *Debates and Proceedings*, at 681, 701, 719. Indeed, the Nevada Constitution, by reference, adopted Nevada's territorial law, which stated that "the common law of England, so far as not repugnant to, or inconsistent with, the constitution or the laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory." *See Van Sickle v. Haines*, 7 Nev. 249 (1872)

(citing Nev. Stats. 1861 at 1); *see also* Nev. Const. Art. 17 § 2.[20] Thus, when the convention adopted Article 1, Section 6, they must have understood the prohibition against "cruel or unusual" punishment to incorporate common law protections.

That the common law informed the meaning of Nevada law is confirmed by the early Nevada Supreme Court, which noted it was "established doctrine that [the common law] is adopted as amended or altered by English statutes in force at the time of the emigration of our colonial ancestors." *Hamilton v. Kneeland*, 1 Nev. 40, 55 (1865); *Bullring v. Goodman*, 1 Nev. 314, 318 ("We have in this state adopted the common law. . . ."); *see also State v. Sales*, 2 Nev. 268, 271 (1866) (recognizing that under Nevada law, "all offenses recognized by the common law as crimes, and not herein enumerated shall be punished. . . .").

Thus, this Court, in construing the meaning of the prohibition against cruel or unusual punishment, must start with the common law.

---

[20] The contemporary counterpart to this statute was adopted in 1911. *See* NRS 1.030; *see also* 1911 Nev. Stat. 100 (Chapter 84); Rev. Laws of Nev. § 5474 (1912).

And one component of the common law is the prohibition against punishing infants, the intellectually disabled, and the mentally ill.

(a) The common law prohibited punishing infants for crimes

"[A]t common law, a child under seven years of age is conclusively presumed incapable of committing any crime of any sort." Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 461 (Little Brown 1865). But this rule did not protect all "infants"—defined as a person under the age of twenty-one, *see id.* § 460—from punishment. For children between the ages of seven and fourteen, the common law presumed the child incapable, but this presumption could be overcome; for children over fourteen, there was a presumption that a child was capable. *Id.*; *see also* Matthew Hale*, The History of the Pleas of the Crown*, ch.2 at 15 (1736 ed.); *see also* 4 William Blackstone, *Commentaries* *23. Thus, the common law acknowledged the reduced moral culpability of children.

(b) The common law prohibited punishing the intellectually disabled and the mentally ill for crimes.

Similarly, at common law, it would have been considered cruel to execute the intellectually disabled or the mentally ill.[21] *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2756 (June 2015) [hereinafter Clemente]; *see also* 2 *The Reports of Edward Coke* 572 (Joseph Butterworth & Son 1826) (editor's note (c): "The law is now settled that idiots and lunatics are not punishable by any criminal prosecution whatsoever, for acts committed under these incapacities."); *see also* 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 4 (1786 ed.); *id.* at 38 ("for whether the party that is supposed to commit a capital offense be thus found an idiot, madman, or lunatic, or not, yet if really he be such, he shall have the privilege of his idiocy, lunacy, or madness to excuse him in capitals."); Bishop, *Commentaries on the Criminal Law* § 468 ("A person may have

---

[21] As Clemente notes, the distinction between the intellectually disabled and the mentally ill under the common law was somewhat amorphous, as the terms tended to be listed together under the umbrella term *non compos mentis*, and were both raised as an "insanity" defense. *See* Clemente, 124 Yale L.J. at 2771.

arrived at mature years, but from causes temporary or permanent, natural or supervening, be destitute of the capacity essential to the exercise of that criminal intent, without which, we have seen, no offence can exist. . . . This reply is termed a plea of insanity; the word insanity being understood in its larger sense, as including idiocy and lunacy, with all other kindred forms of mental infirmity."). This Court recognized this principle in *Finger v. State*, 117 Nev. 548, 555, 27 P.3d 66, 71 (2001), acknowledging that "[f]or hundreds of years" societies have recognized the insanity defense.

As with infancy, this rule was constrained. In asking about a person's ability to form intent, the protection applied only to defendants suffering insanity at the time of the offense. *See e.g.*, 4 William Blackstone, *Commentaries* *24 ("In criminal cases, therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities."). But the common law also protected a defendant from execution if he became insane. *See Ford v. Wainwright*, 477 U.S. 399, 406–08 (1986) (describing common law protections for one who became insane before execution, and noting, "The bar against executing

a prisoner who has lost his sanity bears impressive historical credentials. . . .").

This rule reflected the then-prevailing understanding of mental illness. However, as noted in a treatise close in time to the adoption of the Nevada Constitution, this understanding was still rudimentary. Bishop, *Commentaries on the Criminal Law* § 470 (noting "the disease and imperfections of the mind were little understood by the medical faculty, still less by the community at large, as indeed there yet remains much to be learned" and further noting the common law "is so often imperfectly developed in [insanity] adjudications, that the principles which are immutable are not in them easily distinguishable from views of the facts of insanity. . . ."); *see also Finger*, 117 Nev. at 556–57, 27 P.3d at 72–73 (discussing historical debate about definitions of insanity)

Nonetheless, the protections for infants, the intellectually disabled, and the mentally ill—however constrained or limited in understanding—recognized the general principle that the less capable are less culpable. And in adopting the prohibition against "cruel or

unusual punishments," the Nevada Constitutional convention must have understood that Nevada law would recognize this principle too.

(2) Public policy—namely preventing arbitrary punishment and protecting the less capable—requires expanding common law protections for children, the intellectually disabled, and the mentally ill.

As noted above, under common law, the phrase "cruel or unusual" encompassed two concepts: arbitrary imposition of punishment and protecting the less capable. These two points were relevant when the Supreme Court construed the federal "cruel and unusual" clause to determine that the intellectually disabled and juveniles should be categorically exempt from the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005). [22] And both points apply with equal, if not greater, force to the severely mentally ill.

The Supreme Court's 1972 moratorium occurred because states were imposing capital punishment with too much randomness. *See*

---

[22] Ybarra cites United States Supreme Court cases for two purposes: first as persuasive authority as to the meaning of the "cruel or unusual" clause under the Nevada Constitution and second, as binding authority for the requirements of federal law, which this Court should consider in construing the Nevada constitution.

Furman v. Georgia, 408 U.S. 238, 242 (1972) (noting discrimination), 277 (noting arbitrary infliction), 309 (noting death penalty as random as being struck by lightning), 313 (noting inability to distinguish cases where death imposed versus not), 364–65 (noting discrimination). The Court later reversed itself once states had crafted new death penalty statues with sufficient guarantees of reliability. *See Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976).

After *Gregg*, the death penalty could be imposed only with protections against arbitrariness. Thus, the factfinder must consider aggravating and mitigating circumstances, must make an individualized decision, and must consider any relevant mitigating evidence. *See Gregg*, 428 U.S. at 196, 198; *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality) (Burger, C.J, Stewart, Powell, Stevens, JJ.); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). Nevada's scheme reflects this process. *See e.g.*, NRS 175.552, 200.033.

But for juveniles and the intellectually disabled, the Supreme Court recognized that these protections are insufficient, and that the

reliability of the death penalty is undermined. *Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Roper v. Simmons*, 543 U.S. 551 (2005).

In *Atkins,* 536 U.S. 320, the Supreme Court held that it is cruel and unusual to execute the intellectually disabled. Two aspects of the *Atkins* opinion are helpful in construing the words "cruel" and "unusual." First the Supreme Court recognized that intellectually disabled defendants presented a "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id.* at 320 (quoting *Lockett*, 438 U.S. at 605). The Court listed several reasons why this risk was enhanced for the intellectually disabled:

- The "possibility of false confessions," *id.*;
- The "lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors," *id.*;
- The lesser ability "to give meaningful assistance to counsel," *id.*;
- The intellectually disabled "are typically poor witnesses," *id.* at 321;
- "[T]heir demeanor may create an unwarranted impression of lack of remorse for the crimes," *id.*; and
- Intellectual disability "as a mitigating factor can be a two-edged sword that may enhance the likelihood" that the jury worries about future dangerousness. *Id.*

In light of this "special risk of wrongful execution," the Supreme Court concluded that executing an intellectually disabled person would be "cruel and unusual" under the federal constitution. *Id.*

The *Atkins* court also recognized that the two justifications for execution—retribution and deterrence—were not served by executing the intellectually disabled. *See id.* at 318–19.[23] Specifically—and consistent with the common law's view—the intellectually disabled are less culpable, thus there is no retributive purpose. *Id.* at 319. And the "same cognitive and behavioral impairments that make these defendants less morally culpable" also "make it less likely that they can process the information of the possibility of execution as a penalty. . . ." *Id.* at 320. So deterrence is also not served.

These same two points emerged again when the Supreme Court analyzed whether it is "cruel and unusual" to execute juveniles. *Roper v.*

---

[23] Traditional theories of punishment refer to four justifications: incapacitation, deterrence, retribution, or rehabilitation. *See Ewing v. California*, 538 U.S. 11, 25 (2003). But incapacitation and rehabilitation are served just as well by the death penalty as by life without the possibility of parole, so the Supreme Court looks only to deterrence and retribution as factors justifying death. *See, e.g.*, *Glossip v. Gross*, 576 U.S. 863, 929–30 (2015) (Breyer, J., dissenting).

Simmons, 543 U.S. 551 (2005). First, the Court again expressed concerns about the ability to reliably determine whether juveniles were, in fact, the worst of the worst, as required by the Eighth Amendment. Specifically, it noted that youthful offenders present three risk factors that undermine reliability:

- Their immaturity and "underdeveloped sense of responsibility" are qualities that "often result in impetuous and ill-considered actions and behavior," *id.* at 569;
- "[T]he brutality or cold-blooded nature of any particular crime might overpower mitigation arguments," *id.* at 573; and
- The difficulty for experts to distinguish between "transient immaturity" and "irreparable corruption," *id.*

The Court concluded that "juvenile offenders cannot with reliability be classified amongst the worst offenders." *Id.* at 569. And, repeating its analysis of penological purposes for execution, concluded that executing juveniles was not justified. *Id.* at 571.

Thus, *Atkins* and *Roper* designate six factors to consider in determining whether a defendant of a particular status can be reliably sentenced to death: (1) whether the status impairs the defendant's ability to cooperate with counsel, *Atkins*, 536 U.S. at 320–21; (2) whether the status renders the defendant a poor witness, *id.* at 321; (3)

whether the status causes distortions in the defendant's thinking that increases the chances of poor-decision making, *Roper*, 543 U.S. at 569 (4) whether the status has a double-edged nature as mitigation, *id.* at 573, *Atkins*, 536 U.S. at 321 (5) whether the complexity and conflicting views of experts are likely to generate confusion and misunderstanding among jurors, *Roper*, 543 U.S. at 573; and (6) whether the status increases the likelihood of brutality in the offense, which in turn might preclude jurors from considering the mitigation. *Id.*[24]

The application of these six factors demonstrates that someone who suffers from severe mental illness should be exempt from the death penalty. This Court should recognize that it is cruel or unusual to execute someone who suffers from severe mental illness.

Indeed, this Court has recognized that creatures of the common law are not static. *See Bullion Monarch v. Barrick Goldstrike*, 131 Nev. 99, 102, 345 P.3d 1040, 1041 (2015) (en banc). And further, even where "[o]ur Constitution may have adopted the common-law rule," the

---

[24] *See also*, Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 511 (Dec. 2014) (identifying these six factors).

Nevada Constitution "did not freeze the rule's application." *Id.* Common law rules—even if adopted by the Nevada Constitution—are "subject to amendment, modification and abrogation by the courts if current conditions so dictate." *Id.* at 103 (quoting *Ruper v. Stienne*, 90 Nev. 397, 399, 528 P.2d 1013, 1014 (1974)).

Construing Art. 1, § 6, and in light of what current conditions dictate, this Court should modify the common law protection for the insane: recognizing the challenges to reliability posed by someone suffering from severe mental illness, this Court should hold that a person suffering from severe mental illness is categorically exempt from the death penalty.

The common law protections do not reflect contemporary needs for reliability in capital cases. Just like the common law protections for children and the intellectually disabled did not ensure reliable death sentences, the common law protections for the mentally ill do not ensure reliable death sentences. Indeed, the six factors flowing from *Atkins* and *Roper* demonstrate how severe mental illness—like intellectual disability and being a juvenile—prevents a reliable

adjudication. And for severe mental illness, the case for a categorical exemption is stronger.

The six factors also suggest different approaches to defining the term "severe mental illness." This Court could adopt the narrowest definition of severe mental illness recognized by the American Bar Association and the American Psychological Association. American Bar Association, Death Penalty Due Process Review Project, *Severe Mental Illness and the Death Penalty* (Dec. 2016) [hereinafter ABA, *Severe Mental Illness*].[25] Under this definition, severe mental illness "refers to a narrower set of diagnoses than mental illness," specifically, "mental disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (e.g., lasting at least a year); and that result in comparatively severe impairment in major areas of functioning." *Id.* at 9 (quoting American Psychological Association, *Assessment and Treatment of Serious*

---

[25] ABA, *Severe Mental Illness* is available at https://www.prisonpolicy.org/scans/aba/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last accessed on Apr. 25, 2025).

Mental Illness, at 5 (Aug. 2009)).[26] This definition provides three elements: one of the enumerated diagnoses (schizophrenia; bipolar I disorder; and major depression), that is relatively persistent, and that results in comparatively severe impairment in major areas of functioning. *Id.* at 9, 11–12.

As a second option, this Court could adopt the six factors identified by Professor Sundby and hold that a mental illness qualifies as severe mental illness if, applying those six factors, it poses too high a risk of an unreliable sentence. Under either approach, Ybarra's mental illness qualifies as a "severe mental illness."

---

[26] American Psychological Association, *Assessment and Treatment of Serious Mental Illness* (Aug. 2009) is available at: https://www.apa.org/practice/resources/smi-proficiency.pdf (last accessed on Apr. 25, 2025). The American Psychological Association recognizes that the "lack of appropriate resources for people with serious mental illness is increasingly recognized as a systemic problem." *See* American Psychological Association Assessment and Treatment of Serious Mental Illness, https://www.apa.org/practice/resources/treatment-mental (last accessed on Apr. 25, 2025).

(a) Ybarra's severe mental illness impairs his ability to work with his attorneys.

Atkins recognizes that a defendant's intellectual disability undermines counsel's ability to represent them, in turn undermining the reliability of sentencing determinations. *See Atkins*, 536 U.S. at 320–21. This concern applies with equal force to those suffering severe mental illness.

Ybarra's trial attorneys had difficulties working with him. Ybarra was found incompetent to stand trial and sent to Lake's Crossing Center for the Mentally Disordered Offender because he was suffering from "extremely disturbing delusions" that "disturbed the progress of this case." 15AA3629. Notably, these delusions impaired Ybarra's ability to work with his attorneys because Ybarra "began to believe that [one of his attorney's] was Satan's brother and that the District Attorney was Satan's son." 15AA3629. He also believed that one of his attorney's "was being paid by members of the community to work against his interests." 15AA3629. In addition to these beliefs, Ybarra "had a number of other troubling beliefs," all of which "prevented him

from communicating with [his attorneys], with some other members of the Public Defender's Office" and things "became difficult." 15AA3629

Furthermore, Ybarra's mental illness severely inhibited his ability to discuss the facts of the case with his attorneys. "For a long time Robert could not give an account to his attorneys . . . of the events of that evening." 15AA3626–37. And Ybarra's delusions not only inhibited his ability to discuss things with his attorneys, but his delusions also inhibited his attorneys' ability to discuss things with him. "Mr. Ybarra was very unreceptive to any sort of defense based on mental condition. I was having some difficulty keeping communications open with him and. . . I was concerned about jeopardizing those communications. So I didn't pursue that line." 5AA1083.

Ybarra's delusions cloaked the attorney-client relationship in mistrust. At one point, Ybarra began referring to his trial attorney, Steven McGuire, as "McGuire, the liar." 4AA0972. One psychiatrist testified that Ybarra discussed that he could "maybe trust" one of his attorneys, but no one else and that these feelings were "different from his suspicions and mistrust of McGuire." 4AA0932. This trust was oftentimes short-lived. One of the major bases of Ybarra's delusions is

that he stops talking to defense counsel when he perceives them to be part of the delusion. 4AA0938. As a result of Ybarra's mental illness and these delusions, the trial court found Ybarra "was incompetent to stand trial because he was unable to cooperate and communicate with his counsel." 4AA0983.

Ybarra's psychological issues continue to impair his ability to work with his attorneys. In 2024, Ybarra was evaluated by Dr. David Price, a clinical psychologist. Ex. 19 at 609–35. In his report, Dr. Price concluded that Ybarra's mental illness "absolutely impairs his ability to work with his attorneys" and that Ybarra's "paranoia would affect the information that he discloses to his attorneys, that could be crucial to his case." Ex. 19 at 633. As a result of his mental illness, Ybarra "does not have sufficient capacity or ability to rationally communicate with his legal counsel." Ex. 19 at 634. He cannot maintain a conversation due to being highly distractable and because "he gets lost." Ex. 19 at 634. During conversations, his responses to questions are often unrelated to the question, and in the process of responding to the question, he tangentially goes off on another topic. Ex. 19 at 634. Dr. Price explained that Ybarra's "paranoia, suspiciousness, and delusions of being

persecuted by the criminal system" all impact his ability to interact with counsel. Ex. 19 at 634.

(b) Ybarra's severe mental illness renders him a poor witness.

Atkins acknowledged that intellectually disabled "defendants are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." 536 U.S. at 320–21. The mentally ill are prone to outbursts, making inappropriate comments, or engaging in disruptive behavior. Jurors who witness such outbursts "are likely to interpret the defendant's actions as demonstrating a lack of remorse and an impulsivity that is dangerous." Sundby, 23 Wm. & Mary Bill Rts. J. at 515 (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538, 1563, & n.22 (1998).

Ybarra lacks self-awareness of his mental illness, rendering him an unreliable narrator. Ybarra was unable to provide his trial attorneys with an account of what happened on the night of the crime for some time. 15AA3626–27. Ultimately, Ybarra's account of what happened on the night in question further illustrates that his mental illness renders

him a poor witness. Ybarra's account of what happened came to him while he was sitting in a jail cell. 18AA4498. While in his cell, a "visual experience. . . occurred, much like a movie, in that he saw projected on the wall of his jail cell the events of that evening." 18AA4498. He was then able to describe what happened that evening. 18AA4498.

Ybarra's counsel commented on Ybarra's unreliability as a witness to the jury. During opening statement, counsel relayed Ybarra's account of events to the jury before commenting that Ybarra's account was "a bizarre account" and that "some of it does not jive with what was found on the ground. Some of it does not correspond with all the evidence we have from other sources." 15AA3628. Trial counsel acknowledged that Ybarra's mental illness renders him a poor witness, noting that it would be "very strange" if Ybarra "could observe and recall and relate the way we observe, recall, and relate, those of us who are fortunate not to be afflicted this way." 15AA3628.

(c) Ybarra's severe mental illness causes distortions in his thinking process that are likely to produce bad decisions.

Roper recognized that juveniles' immaturity could "often result in impetuous and ill-considered actions and behaviors." 543 U.S. at 569. Severe mental illness, by definition, increases the chances of bad decision-making. "[T]he reliability of the penalty phase can be jeopardized because of the necessity of relying on a mentally ill defendant to make key strategic decisions involving constitutional rights." Sundby, 23 Wm. & Mary Bill Rts. J. at 516. The offense itself was caused by distortions in thinking processes. 15AA3627–28. Another example are the ill-considered letters Ybarra sent to counsel and the court during the trial proceedings, which, in part, motivated counsel to not work on his case because their representation might be terminated. *See* Statement of Facts § A above.

(d) Ybarra's severe mental illness has a double-edged nature.

Atkins recognized intellectual disability was a double-edged sword as mitigating evidence because it may "enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."

536 U.S. at 321. *Roper* also noted that youth could be viewed against a juvenile defendant. 543 U.S. at 573.

Severe mental illness as a mitigating circumstance raises the same difficulty as jurors may view it as aggravating. This consideration is stronger with severe mental illness, in a case like Ybarra's where he pleaded not guilty by reason of insanity. According to trial counsel, Ybarra "heard a voice that said you will get [your wife] back if you sacrifice somebody. In his despair and delusions and psychosis, he heeded that voice, perhaps not recognizing or perhaps in-spite of recognizing it as the voice that he took to be a voice of Satan." 15AA3627; *see also* 12AA2837 (diagnosing Ybarra with "Schizophrenia, Continuous"); 12AA0844–45 (noting that the DSM-5-TR defines schizophrenia "as the presence of perpetual abnormalities (e.g., delusions and hallucinations)" and explaining that the symptoms of psychosis endorsed by Ybarra "are consistent with previous records and evaluations"). This evidence—that is, the evidence in support of his not guilty by reason of insanity defense—invited jurors to speculate about the danger his insanity might continue to pose after conviction.

(e) The complexity and conflicting views of experts who have evaluated Ybarra were likely to confuse jurors.

Severe mental illness also poses a risk that experts might disagree, confusing the issues for jurors. *See Roper*, 543 U.S. at 573. This problem is particularly difficult because of jurors' tendency to discount defense experts, while not similarly discounting prosecution experts. Sundby, 23 Wm. & Mary Bill Rts. J. at 520. "The question. . . is not whether experts' diagnoses may sometimes be incorrect, but whether jurors are capable of sifting through the competing psychiatric testimony to determine which testimony is reliable and which is not." *Id.* at 521.

A number of expert witnesses testified at Ybarra's trial. The State presented three experts: Dr. Martin Gutride, Dr. Donald Molde, and Dr Lynn Gerow. And defense counsel presented three experts: Dr. Patrick Weyl, Dr. Louis Richnak, and Dr. John Chappel. The testimony of these experts presented conflicting views to the jury and confused the issues of competency to stand trial, sanity on the night of the offense, and

serious mental illness. Everyone disagreed about what diagnoses applied.

For example, defense expert, Dr. Richnak, testified that Ybarra had a major mental illness and was psychotic at the time of the killing. 17AA4244. He diagnosed Ybarra with mixed organic brain syndrome, explaining Ybarra "has elements of an organic brain hallucinatory syndrome, an organic personality disorder, and organic delusional syndrome." 17AA4240. He further noted impairments "of social control, poor social judgment, suspiciousness, paranoid ideation, disturbance in moods, in other words depression or Bipolar depression, eyes and nose, recurring hallucinating, and delusional behavior with evidence of organic factors." 17AA4240. In contrast, Dr. Weyl testified that "During the process of administering the test and on the basis of his answers [he] saw no evidence of thought disorder." 17AA4205. And, on rebuttal, the State presented testimony from Dr. Gutride, who questioned whether Ybarra was hallucinating at all and testified that there was no evidence of organic brain dysfunction or "evidence of any psychotic disorganization." 18AA4434; 18AA4429.

Similarly, Dr. Gutride explained that he did not conduct a retrospective assessment as to the night of the crime because he "felt that so much time had intervened in between that crime and the time [he] first saw Robert . . . ." 18AA4445. But this testimony contradicted Dr. Richnak's testimony, which presumed a retrospective assessment was possible. And it contradicted the State's rebuttal expert, Dr. Molde, who did a retrospective assessment and concluded that Ybarra could distinguish between right and wrong, appreciate the nature and quality of his acts, and that Ybarra was in control of his acts at the time of the homicide. 18AA4495–96.

There were also times where the court stepped in and disagreed with the expert, adding another layer of information jurors needed to sift through to determine credibility. For example, on cross-examination, Dr. Gerow testified that while he found Ybarra competent to stand trial, the court ultimately disagreed and found Ybarra incompetent to stand trial. 19AA4664–65.

Ybarra's case demonstrates the fundamental truth about severe mental illness: the task of understanding mental illness, even among experts, invites disagreement. Lay jurors cannot be expected to weigh

and understand something that even diagnosticians disagree with, especially in a case like this where multiple issues and time periods are intermingled.

The complexity of expert opinions surrounding Ybarra's mental health and his competency to stand trial were further complicated by his medications. For approximately eight months prior to and during trial, Ybarra was medicated using high doses of sedatives, including 3000 mg. of lithium per day, the "highest dose" with which Dr. Chappel had ever personally had experience. 19AA4549

(f) The brutality of the crime could preclude jurors form properly considering Ybarra's severe mental illness.

Roper recognized that the "brutality or cold-blooded nature" of a particular crime posed a problem to the consideration of youth as a mitigating circumstance. 543 U.S. at 573. Severe mental illness also poses this problem. Murders committed by those suffering severe mental illness are likely to reflect the severity of the mental illness. There can be no question that the facts of the instant offense weighed heavily in jurors' minds. *See Ybarra v. State*, 100 Nev. 167, 170–71, 679

P.2d 797, 798–99 (1984 (describing offense). In fact, Ybarra's attorneys commented on these facts at trial. 15AA3610 (noting that there were "a number of factors" that demonstrated Ybarra's insanity on the night of the crime and the "most striking one is the nature of the act").

(3) Reason dictates that Nevada's Constitution affords to the severely mentally ill the protections already afforded to juveniles and the intellectually disabled.

Finally, reason requires reading the cruel-or-unusual provision as prohibiting the execution of the severely mentally ill. Reason cannot justify drawing a line between the severely mentally ill on one side and the intellectually disabled and juvenile offenders on the other. All the reasons identified in *Atkins* and *Roper* apply with equal or greater force to the severely mentally ill. A consistent reading of the prohibition against cruel or unusual punishment, thus, requires finding an exemption for those suffering from severe mental illness.

History, public policy, and reason show that the Nevada Constitution's prohibition against "cruel or unusual" punishment includes an exemption from the death penalty for those suffering from severe mental illness.

b) It is cruel or unusual to execute someone who suffers from severe mental illness.

In his 1881 book, *The Common Law*, Oliver Wendell Holmes explains that "[t]he life of the law has not been logic: it has been experience." *Id.* at 1. He adds, "In order to know what [the law] is, we must know what has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage." *Id.*

In construing the Nevada Constitution's prohibition against "cruel or unusual" punishment, this Court must acknowledge what the common law has been: a source of protection for juveniles, the intellectually disabled, and the mentally ill. And, consulting history and theories of punishment, this Court must acknowledge what the law has tended to become: added protection for juveniles and the intellectually disabled in the form of a categorical exemption against the death penalty.

This Court faces now that "most difficult labor," combining what has been with what the law tends to become: added protection for the

severely mentally ill, namely categorical exemption from the death penalty. Those suffering from severe mental illness face too great risk—a risk realized here—of an unreliable death sentence. Thus, the Nevada constitution exempts them from death.

2. Procedural defects do not bar consideration of this claim.

This Court has held that procedural default will be excused to prevent a "fundamental miscarriage of justice." *See, e.g.*, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). One way to establish a fundamental miscarriage of justice is to show that someone is "ineligible for the death penalty." *Id.* This Court applies this exception to procedural default where there is a "reasonable probability" that a petitioner is actually innocent of the death penalty. *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).

Because Ybarra's severe mental illness renders him ineligible for the death penalty, the fundamental miscarriage of justice exception applies to overcome any applicable procedural default.

3. The district court erred in denying this claim.

The district court rejected this claim relying on *Chappell v. State*, 137 Nev. 780, 501 P.3d 935 (2021). There, this Court concluded Chappell's claim that he was ineligible for the death penalty based on severe mental illness was unavailing, noting that "neither this court nor the United States Supreme Court has recognized such a categorical exemption." *See id.* at 790, 803, 501 P.3d at 951, 960. *Chappell* is distinguishable: Ybarra's mental illnesses, which include schizophrenia and psychosis, are significantly more serious than Chappell's FASD diagnosis. *Compare* 12AA2837, 2844–45. *with Chappell*, 137 Nev. at 790, 501 P.3d at 960. Moreover, this Court criticized Chappell's argument for citing "no authority holding that the mentally ill are also categorically ineligible for the death penalty." *Chappell*, 137 Nev. at 790, 501 P.3d at 960. Here, in contrast, Ybarra has provided significant persuasive authority for the proposition that this Court should recognize those with severe mental illness are categorically exempt. *Compare* § II(A) *with Chappell v. State*, No. 77002, Opening Br. at 178–79 (May 2, 2019) (devoting only two pages to severe mental illness argument near end of brief).

In any case, this Court should revisit the holding in *Chappell*. This Court has recognized that it will overturn precedent where there are "compelling reasons for so doing." *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008). "Mere disagreement does not suffice," and there must be "weighty and conclusive" reasons. *Id.* Importantly, this Court does not adhere to the doctrine of *stare decisis* "so stridently that the law is forever encased in a straight jacket." *Armenta-Carpio v. State*, 129 Nev. 531, 535–36, 306 P.3d 395, 398 (2013) (cleaned up). And, "[a] prior holding that has proven 'badly reasoned' or 'unworkable' should be overruled." *Whitfield v. Nev. State Pers. Comm'n*, 137 Nev. 345, 348, 492 P.3d 571, 574–75 (2021) (quoting *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013)).

Chappell was badly reasoned because it was not reasoned at all. The entire analysis runs three sentences and a footnote, reading:

> Equally unavailing is Chappell's claim that he is ineligible for the death penalty based on his severe mental illness. Although he cites caselaw recognizing that juveniles and intellectually disabled persons are ineligible for the death penalty, *see* [*Roper* & *Atkins*], he cites no authority holding that the mentally ill are also categorically ineligible for the death penalty. And neither this court nor the United States Supreme Court has recognized such a categorical exemption.[13]

. . .

> [13] We note there are mechanisms by which a person sentenced to death may challenge the execution of the sentence based on his or her current mental status. NRS 176.425; NRS 176.455.

Chappell, 137 Nev. at 803, 501 P.3d at 960. Though it is true that neither this Court nor the United States Supreme Court has recognized such a categorical exemption, this Court did not address whether the logic of *Roper* and *Atkins*—and their common law roots—supported an exemption for those with severe mental illness. And so, this Court did not address the reasoning compelling a categorical exemption here. Until one jurisdiction exempted the intellectually disabled, none had; so, too, with juveniles. And so, too, with severe mental illness. Nor is the availability of an incompetency-to-be-executed claim an answer. *See id.* at n.13. Individuals with severe mental illness might be competent; and if not, their competency is subject to restoration. But competency

does not wash away the reliability problems posed by a someone with severe mental illness.[27]

Chappell also did not consider the evolving standards of decency, which have continued to evolve since the decision. These evolving standards of decency can be seen internationally, within the United States, and in Nevada specifically.

The international community disfavors the execution of those with severe mental illness. ABA, *Severe Mental Illness and the Death Penalty*, at 35. The International Covenant on Civil and Political rights prohibits the arbitrary deprivation of life and restricts the imposition of the death penalty in countries that have not abolished it to "only the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provision of the present Covenant. . . ." Art. 6, § 2. The Covenant further prohibits torture and "cruel and inhuman or degrading treatment or punishment" and guarantees a fair and public hearing by a competent, independent,

---

[27] And, as discussed in more detail below, whether competency to be executed proceedings are in fact available in Nevada is subject to reasonable dispute. *See* § III below.

and impartial tribunal. Arts. 7, 14. These provisions prohibit the execution of someone who suffers from severe mental illness. *See* Richard J. Wilson, *The Death Penalty & Mental Illness in International Human Rights Law: Toward Abolition*, 73 Wash. Lee L. Rev. 1469, 1485–98 (2016); *see also* ABA, *Severe Mental Illness and the Death Penalty* at 35–36.

The United States has seen "recent advocacy for categorial bans on executing individuals with specific mental illnesses." Su, I.-A., Blume, J.H., & Ceci, S.J. (2025). Analyzing the Successful Incompetent to Be Executed Cases in the United States: A First Pass. *Behavioral Sciences, 15*(3), 325 at 27.[28] Ohio and Kentucky—in 2021 and 2022, respectively, passed laws barring the execution of people with a serious mental illness at the time of their crime. Ohio's law designates a series of disorders as severe mental illnesses, including schizophrenia, and prohibits imposing the death penalty on or carrying it out against individuals whose severe mental illness at the time of the offense significantly impaired their judgment, capacity, or ability to appreciate

[28] Available at https://doi.org/10.3390/bs15030325.

the nature of their conduct. Ohio Revised Code § 2929.025; *see also* Death Penalty Information Center (DPIC), *Ohio Bars Death Penalty for People with Severe Mental Illness*, online at https://deathpenaltyinfo.org/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness. The following year, Kentucky passed a law prohibiting the death penalty for defendants with a prior diagnosis of four serious mental health disorders, including schizophrenia. DPIC, *Kentucky Becomes Second State to Bar Imposing Death Penalty on Those Diagnosed as Seriously Mentally Ill*, online at https://deathpenaltyinfo.org/kentucky-becomes-second-state-to-bar-imposing-death-penalty-on-those-diagnosed-as-seriously-mentally-ill. Similar bills have been introduced in at least ten other death penalty states since 2017. *Id.*

Nevada's standards have evolved too. In 2024 Nevada voters approved a ballot measure that replaced language in the Nevada Constitution referring to "the Insane" with "persons with significant mental illness." Secretary of State, Statewide Ballot Questions, Question No. 2, p. 13–16 (2024). https://www.nvsos.gov/sos/home/showpublisheddocument/14396/638627

638627843143. This change reflects shifting attitudes and increasing protections for individuals with severe mental illness. Thus, *Chappell* is not determinative because standards have evolved since 2021.

B. Ybarra has intellectual disability.

Claim One asserts that Ybarra is intellectually disabled and, thus, ineligible for the death penalty. 20AA4791–24. This claim is not barred by procedural defects because it establishes a miscarriage of justice and exceptions to the law of the case doctrine apply.

1. Robert Ybarra is categorically ineligible for the death penalty because he is intellectually disabled.

Mark Ybarra explains his brother in high school:

> Bob didn't do well in school. His whole school career was nothing but problems. In junior high school he always had problems and we never knew if he was going to pass whatever grade it was. He was like a retard. I know he struggled in class and so he had a reputation of mainly being a retard. When Bob left James Marshall High School, he went to retard school. That's what they called continuation school; it was actually called Yolo Alternative High School . . . . Some of my classmates would say things like, "you know your brother is a retard."

12AA2943. In 1969, when Ybarra was 15, the school psychiatrist wrote a letter to the vice principal: "Would agree that Robert should receive a medical exclusion from school. He has come as far as he can within limits of his intellectual and emotional capacities. To continue school now would only expose him to more pressure than he can comfortably tolerate." 14AA3332.

Robert Ybarra is intellectually disabled.[29] 12AA2837–43. Under the federal and state constitutions, and under the Nevada Revised Statutes, he is ineligible for execution. *See Atkins v. Virginia*, 536 U.S. 304 (2002); NRS 175.554(5), NRS 174.098. And as discussed in more detail below, procedural default does not block consideration of this claim because: failing to consider this claim will result in a miscarriage of justice; there is substantially new or different evidence; and new Supreme Court decisions are intervening controlling law.

---

[29] The term at the time of the *Atkins* decision was "mental retardation," but because that term has fallen out of favor, Ybarra will use the current term, "intellectual disability" unless quoting a source.

a) Individuals with intellectual disability are categorically ineligible for the death penalty.

In *Atkins v. Virginia*, the Supreme Court concluded that the Eighth Amendment's prohibition of cruel and unusual punishment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321. The Nevada Legislature codified this protection in NRS 174.098 and NRS 200.030(4)(a). As this Court explained in Ybarra's earlier appeal, "The statutory definition conforms to the clinical definitions espoused by two professional associations that are concerned with mental retardation—the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA)." *Ybarra v. State*, 127 Nev. 47, 54, 247 P.3d 269, 273 (2011).[30] The statutory definition and the two clinical sources "share three concepts: (1) significant limitations in intellectual

---

[30] *See* American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) [hereinafter AAMR-10 Manual]; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 41–48 (4th ed. Text Rev. 2000) [hereinafter DSM-IV-TR].

functioning, (2) significant limitations in adaptive functioning, and (3) age of onset." *Id.* at 54, 247 P.3d. at 274.

The protection in *Atkins* and Nevada law takes its guidance from the clinical sources of intellectual disability. In *Atkins*, the Supreme Court referred to the clinical definitions found in the AAMR-10 Manual and the DSM-IV-TR. *Atkins*, 536 U.S. at 308 n.3, 317 n.22. Later, in *Hall v. Florida*, the clinical definitions of intellectual disability continued to play a crucial role: "That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising." 572 U.S. 701, 710 (2014). "In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Id*. Then in *Moore v. Texas*, the Supreme Court rejected the idea that Texas, or any state, had "unfettered discretion" to define intellectual disability, and emphasized that the "medical community's current standards supply one constraint on States' leeway in this area." 581 U.S. 1, 20 (2017). "Reflecting improved understanding over time, current manuals offer

'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id.*[31]

So, applying current clinical standards, if Ybarra has intellectual disability, he is ineligible for execution. He does, so he is.

b) Robert Ybarra is intellectually disabled.

The current definition from the American Association on Intellectual and Developmental Disabilities reads:

> Intellectual disability (ID) is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.
>
> The following five assumptions are essential to the application of this definition:
>
> 1. Limitations in present functioning must be considered within the context of community environments typical of the individuals' age peers and culture.
>
> 2. Valid assessment considers cultural and linguistic diversity as well as difference in

[31] Quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, at xli, (5th ed. 2013) [hereinafter DSM-5].

communication, sensory, motor, and behavioral factors.

3. Within an individual, limitations often coexist with strengths.

4. An important purpose of describing limitations is to develop a profile of needed supports.

5. With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve.

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* 1 (12th ed. 2021) [hereinafter AAIDD-12 Manual].

The current definition from the American Psychiatric Association reads:

> Intellectual developmental disorder (intellectual disability) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

> B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
>
> C. Onset of intellectual and adaptive deficits during the developmental period.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. Text Rev. 2022) [hereinafter DSM-5-TR].

Ybarra meets all three qualifications.

(1) Robert Ybarra has significant subaverage intellectual functioning.

Intellectual functioning refers to three concepts: (1) common characteristics associated with intelligence; (2) abilities assessed by standardized intelligence assessment tests, and (3) "the consensus view that intellectual functioning is influenced by other human functioning dimensions and by systems of supports." AAIDD-12 Manual at 25. These are functions related to "reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience,

and practical understanding." DSM-5-TR at 38. "For a diagnosis of ID, the 'significant limitations in intellectual functioning' criterion is a full-scale IQ score that is approximately 2 standard deviations or more below the mean, considering the standard error of measurement of the specific, individually administered instrument used." AAIDD-12 Manual at 29. This effectively means someone with a full-scale IQ score of 75 or lower qualifies as having significant subaverage intellectual functioning. DSM-5-TR at 38; AAIDD-12 Manual at 35–36; *Hall*, 572 U.S. at 712–13 (2014).[32]

On April 23, 2024, Simone Viljoen, Ph.D. administered a WAIS-IV to Ybarra and received a full-scale IQ score of 63. 12AA2834. This qualifies as significant subaverage intellectual functioning for the first requirement of intellectual disability. 12AA2838. "Effort testing (i.e., the TOMM and RDS) showed this is an accurate representation of his intellectual functioning as he put forth good effort . . . ." 12AA2838.

---

[32] *See also* Marc J. Tassé & John Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies*, 90 (2018) [hereinafter Tassé & Blume] (explaining standard error of measurement).

There is substantial evidence supporting that a 63 is Ybarra's IQ score. First, this score is consistent with his scores over the last 20+ years. In 2002, Ybarra received a full-scale score of 60; in 2008, a full-scale score of 66[33]; and a score of 63 in 2010. *See* 11AA2690; 11AA2706; 12AA2758. In addition to the full-scale scores, Ybarra's composite scores have been consistent, reflecting that "his verbal skills are more developed: present evaluation, VCI = 85 (Low Average range); 2012, Dr. Mack's evaluation, VCI=81 (Low Average range); 2008, Dr. Young's evaluation, VIQ = 73 (borderline range); and 2002, Dr. Schmidt's evaluation, VIQ = 68 (Extremely Low range) and VCI = 76 (Borderline range)." 12AA2838; 12AA2758; 11AA2706; 11AA2690–91.

Ybarra's scores also reflect consistency related to perceptual reasoning: "present evaluation, PRI = 58; Dr. Mack's evaluation, PRI = 65; Dr. T. Young's evaluation, PIQ = 61; and Dr. Schmidt's evaluation, PIQ = 56 and Perceptual Organization Index (POI) = 60." 12AA2838; 12AA2758; 11AA2706; 11AA2690–91."All of these scores are in the

---

[33] As will be discussed below, the administrator of the 2008 test, Dr. Ted Young, concluded that Ybarra was malingering on the 2008 testing, and thus was also malingering on the 2002 testing.

Extremely Low Range, showing consistent evidence that his perceptual reasoning abilities are significantly impaired." 12A2838. Both the 2024 evaluation and Dr. Mack found Ybarra's processing speed to be in the extremely low range, with a PSI = 59 currently and a PSI = 50 from Dr. Mack. 12AA2838; 12AA2758. The one exception, working memory, which was at 71 for Dr. Mack but 58 for the 2024 evaluation, reflected that "Mr. Ybarra's working memory abilities have decreased over the past decade due to the progression of his dementia." 12AA2838.

Here is the same information in a table:

Area of Testing	Schmidt (2002)	T. Young (2008)	Mack (2012)	Millspaugh/Viljoen (2024)
Full-Scale	60	66	63	63
Perceptual Reasoning	PIQ = 56 POI = 60	PIQ = 61	PRI = 65	PRI = 58
Verbal Skills	VCI = 76 VIQ = 68	VIQ = 73	VCI = 81	VCI = 85
Memory			WMI = 71	WMI = 58

"Taken together, standardized intelligence testing conducted over the past 20 years has been consistent and demonstrated Mr. Ybarra's

intellectual functioning is significantly impaired and in the range for a diagnosis of ID." 12AA2838.

The consistency of these scores also resolves any questions about malingering. "Due to the nature of the [2024] evaluation and because he has been diagnosed with malingering previously, the possibility Mr. Ybarra was feigning or exaggerating his symptoms was considered." 12AA2847. Related to the Test of Memory Malingering—which Dr. T. Young relied on for his malingering conclusion—the 2024 evaluation notes that "Mr. Ybarra's TOMM scores have never been in the below-chance range and have remained around the cut-off ranges for individuals with ID (i.e., cut-off score of 30) and for the normed population." 12AA2848. Moreover, Drs. Millspaugh and Viljoen explain, "Mr. Ybarra's scores on the TOMM and other PVTs during the present evaluation are consistent with a diagnosis of dementia, exemplified [by] the fact that he performed better on the TOMM when he was more lucid and coherent (i.e., had a good day in relation to his dementia)." 12AAA2848. That is, all indications were that Ybarra was not malingering in the 2024 evaluation.

But the consistency of his test and subtest scores also shows that the current testing accurately reflects Ybarra's intelligence. "[T]he previous and present testing scores can be seen as accurate reflections of Mr. Ybarra's abilities and demonstrative of diagnoses of ID and dementia." 12AA2848. Most importantly, "it would be extremely difficult, if not impossible, for an individual with low cognitive functioning to malinger cognitive impairments and psychotic symptoms in such a consistent manner for several decades (e.g., to achieve very similar scores on intelligence tests over time)." 12AA2848. This also shows why Dr. Gutride's evaluation from 1981 should not be relied on. As noted by Drs. Warnick and Mack (and concurred by Drs. Millspaugh & Viljoen), Dr. Gutride's testing relied on 26-year-old norms and was administered by an intern. 12AA2824.[34] Dr. Warnick, in 2011, noted

---

[34] Additionally, the AAIDD-12 Manual explicitly acknowledges that "[c]urrent best practice guidelines recommend that in cases in which an IQ test with aged norms is used as part of a diagnosis of ID, a correction of the full-scale IQ score of 0.3 points per year since the test norms were collected is warranted." AAIDD-12 Manual at 42. Taking that adjustment, the 1981 IQ score would be reduced by 8 points, bringing it down to a score of 78. (i.e., 26 x 0.3 = 7.8; 86 – 7.8 = 78.2); *see also* 12AA2824. The 1981 score, thus, is not far from 75, which would be the cutoff score considering the standard error of measurement. *See* AAIDD-12 Manual at 35–36.

that the 1981 results were "anomalous with respect to both the overall score and the pattern of test scores." 11AA2718. This conclusion was made without the benefit of the 2024 evaluation, which further demonstrates how anomalous the 1981 test results were.

Thus, without regard to prior adjudications, the information available today shows significant subaverage intellectual functioning.

(2) Robert Ybarra has deficits in adaptive behaviors.

"Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." AAIDD-12 Manual at 29. To put it another way: "Adaptive behavior is defined as behavior that has been learned and is performed to meet society's expectations across settings, including the home, school, work, and other community-based settings in our respective culture and for one's chronological age." Tassé & Blume at 109. It is "(a) developmental and increases with age; (b) composed of conceptual, social, and practical skills; (c) related to the expectations of age and demands of particular contexts; (d) assessed based on the individual's typical performance at home, school, work, and leisure, not

their maximum performance; and (e) assessed in reference to the community settings that are typical for age peers." AAIDD-12 Manual at 29. "Limitations in adaptive skills reduce the ability of an individual to adapt successfully to contextual demands." *Id.*

For purposes of intellectual disability, three adaptive behavior domains are relevant. First, "[c]onceptual skills," which "consist of communication skills, functional academics, and self-direction." Tassé & Blume at 109. Second, "social skills," which "consist of interpersonal skills, social responsibility, following rules, self-esteem, gullibility, naivete, and avoiding victimization." *Id.* And third, "practical skills," which "consist of basic personal care skills, such as hygiene, domestic skills, health and safety, as well as work skills." *Id.*[35] To diagnose

---

[35] The DSM-5-TR describes them this way:

> The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and

intellectual disability, there should be adaptive scores "approximately 2 standard deviations or more below the mean in at least one of the three adaptive behavior domains." AAIDD-12 Manual at 31.

Dr. Millspaugh administered the Vineland Adaptive Behavior Scales, Third Edition, to Marty Ybarra, Ybarra's paternal cousin. 12AA2835. This test is recognized by the AAIDD-12 Manual as a standardized adaptive behavior scale. *See* AAIDD-12 Manual at 31. "For a diagnosis of ID, the 'significant limitations in adaptive behavior' criterion is an adaptive behavior score that is approximately 2 standard deviations or more below the mean in at least one of the three adaptive behavior domains: conceptual, social, or practical, considering the standard error of measurement for the specific, individually administered instrument used." *Id*. Ybarra's scores qualify under all

---

> social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

DSM-5-TR at 42.

three domains. His composite score (27), communication score (38), daily living score (21), and socialization score (20), are all below the first percentile. 12AA2835. "For the [2024] evaluation, all of the scores on the Vineland-3 administered to Marty were in the Extremely Low range," which is consistent with the scores that Dr. Greenspan received when he administered the Adaptive Behavior Assessment Scale 2d edition in 2011. *See* 12AA2840; *see also* 12AA2778, 2783–84. The Vineland scores from 2024 meet this criterion for the AAIDD-12 Manual and the DSM-5-TR. *See* AAIDD-12 Manual at 31; *see also* DSM-5-TR at 42.

Additionally, Drs. Millspaugh and Viljoen noted corroboration of Ybarra's deficits in adaptive behaviors. Ybarra self-reported difficulties in "following instructions involving two or more steps, following directions to get to a destination and giving direction to others, ordering at a restaurant, obtaining proper medical care (e.g., even as an adult, he asked his parents about what treatment he should obtain), and keeping track of and taking his medications." 12AA2840. Marty described that Ybarra could not manage money, follow directions, keep appointments, or learn from mistakes. 12AA2841. Marty confirmed that Ybarra

struggled to follow instructions involving two or more steps. 12AA2841. Ybarra struggled to stay employed. 12AA2841. Ybarra was regularly called a "retard" by peers. 12AA2841–42.

(3) The onset of Ybarra's disability was during the developmental period.

The final requirement is that the disability originated "during the developmental period, which is defined operationally as before the individual attains age 22." AAIDD-12 Manual at 1.[36] The DSM-5-TR does not specify an age cutoff for the developmental period.[37] DSM-5-TR at 37. This final prong does not require that someone receive a diagnosis of intellectual disability during the developmental period, or that they were formally assessed with testing instruments. *See* James W. Ellis, Caroline Everington, Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 Hofstra L. Rev. 1305, 1338 (2018) [hereinafter *Evaluating Intellectual Disability*]. Rather, "[i]f a defendant currently meets the first two criteria, and

---

[36] Beginning with the AAIDD-12 Manual, the on Intellectual and Developmental Disabilities started defining the developmental period as ending at age 22. *See* AAIDD-12 Manual at 16.

[37] This began with the DSM-5. *See* DSM-5 at 33; *see also* DSM-IV-TR at 49 (specifying age 18 as the cutoff).

there are indications of impairment, delayed developments, etc., from childhood, and if there is no indication that the impairment resulted from causes that occurred in adulthood, a diagnosis of intellectual disability is appropriate, and constitutionally compelled." *Id.* at 1339.[38]

Drs. Millspaugh and Viljoen explain that Ybarra "has had intellectual functioning deficits since childhood (i.e., around age nine)." 12AA2839. This is "most prominent in regard to his academic

---

[38] *See also* Stephen Greenspan, George W. Woods, Harvey N. Switzky, *Age of Onset and the Developmental Period Criterion*, in *The Death Penalty and Intellectual Disability* 77, 79 (2015) [hereinafter Greenspan, Woods, & Switzky] ("The most useful and valid approach to establishing whether ID manifested during the developmental period is to see if there is evidence of what has been termed a 'continuity of concern.' This means that various people, both professionals (such as educators) and nonprofessionals (such as family members or neighbors), describe the defendant from a relatively early age as 'slow' and as needing help (formal or informal) in mastering or carrying out various life tasks that individuals of the same age and cultural background are expected to master or carry out without assistance."); Tassé & Blume, supra n.32, at 135 ("An important point to be made here is that a 'diagnosis' of intellectual disability does not necessarily need to be made during this period but rather that it must be established that the deficits in intellectual functioning and adaptive behavior were present during the developmental period.").

functioning." 12AA2839. Ybarra's father[39] explained how he had built a swing set from timber; the swing set collapsed on Robert's head. 17AA4037–38. Robert's grades started dropping, and his teachers began sending him home. 17AA4039–40. Robert would "sit in his bedroom or on the table and he used to sit and cry because he couldn't do" his schoolwork. 17AA4040. Robert's mother, Colleen, recalled Robert's difficulties in school. 17AA4111. "He just couldn't do the school work." 17AA4111. "Sometimes the teachers would send him home with his school work and he wouldn't get to go back to school until the work was done." 17AA4112. "Other times they would just put him out in the hallway and let him stay out in the hallway." 17AA4112. He eventually was taken out of high school and sent to continuation school. 17AA4112. Continuation school, Colleen explained, was for students "that can't do their work or they're called problem children and they just send them over there so they can finish their school." 17AA4137. In 1980, Dr. Louis Richnak offered further insight, explaining that the "continuation

---

[39] Ybarra's father was also named Robert Ybarra. *See, e.g.*, 17AA4034–35. For clarity, and to distinguish the Ybarra family members in this section, first names will be used; Ybarra's father will be referred to as Senior; Petitioner Ybarra will be referred to as Robert.

school" Robert attended was "a school for children with learning disabilities." 14AA3271. Robert enrolled in this school after dropping out of high school "because of learning frustrations." 14AA3271.

Robert also "couldn't get along with the kids" at school. 177AA4042. Robert's younger brother, Mark, explained how Robert would get picked on:

> I have seen him picked on a couple of times. The reputation that I went through high school with was he was not there; when he was out there then it was that he had not many friends.
>
> The reputation that he had was that no one liked him. They picked on him. They called him names. They called him dummy. They called him a retard. And I went my four years through high school with this.
>
> I actually seen him one time get in a fight at the house just because they didn't like him.

17AA4076. Another younger brother, Greg, recalled Robert being taunted or harassed by schoolmates. 17AA4099. "Well, I seen a couple incidents I can recall where kids just went up and jumped on him and beat him up for no reason at all. There's a lot of other instances that I know that I wasn't there and never seen them but I know of them." 17AA4099. They would call him "retard," "stupid," and other names "of

that nature." 17AA4099. Robert's mother, too, recalled that Robert's classmates would pick on him "because they thought he was dumb." 17AA4118.

Thus, substantial evidence shows that the onset of Ybarra's intellectual disability was during the developmental period.

2. Procedural default does not bar consideration of this claim.

Procedural default does not bar this claim because Ybarra's intellectual disability renders him actually innocent of the death penalty; thus, executing him would be a miscarriage of justice. Additionally, new factual and legal bases support Ybarra's claim here. Finally, the law of the case doctrine does not bar consideration of this claim.

a) Executing Ybarra would be a miscarriage of justice because his intellectual disability renders him actually innocent of the death penalty.

This Court excuses procedural default if the failure to consider a claim will result in a "fundamental miscarriage of justice." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "[T]his standard can be met where the petitioner makes a colorable showing he is actually

innocent of the crime or he is ineligible for the death penalty." *Id*. Under this exception to procedural default, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Id.*; *see also Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002) (finding actual innocence where there was a reasonable probability that petitioner was actually innocent of the death penalty). Ybarra's intellectual disability renders him ineligible for the death penalty, so denying his claim on the basis of procedural default would "work a manifest injustice." *Leslie*, 118 Nev. at 780, 59 P.3d at 445.

b) A factual basis not reasonably available before supports Ybarra's intellectual disability claim.

This Court has also recognized that showing "an impediment external to the defense prevented their compliance with the applicable procedural rules" establishes good cause. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003). Specifically, "[a] qualifying impediment might be shown where the . . . factual basis for a claim was not reasonably available at the time of any default." *Id.* Here, this Court's prior ruling (and the district court's prior ruling) rested largely on a

conclusion that Ybarra had malingered on intellectual functioning assessments. 11AA2611–56; *Ybarra v. State*, 127 Nev. 47, 247 P.3d 269 (2011). However more recent testing shows that Ybarra was not malingering.

Specifically, four expert reports subsequent to the 2008 evidentiary hearing show that Ybarra is intellectually disabled. In 2010, Dr. Jonathan Mack conducted a neuropsychological evaluation of Ybarra. 11AA2722–12AA2774. Dr. Mack administered a Test of Memory Malingering and received a score consistent with good effort. 12AA2757. He also administered a WAIS-IV, and received a full-scale IQ score of 63, as discussed above. 12AA2758; *see also* § II(B)(1)(b)(1) above. Dr. Mack noted the consistency in subtest score patterns between his testing, Dr. Schmidt's testing, and Dr. T. Young's testing: "Considering that all three of us used different instruments, namely the WAIS-III, the WASI and the WAIS-IV, these findings are markedly similar in terms of the disparity between verbal and non-verbal intellectual functioning." 12AA2771. Dr. Mack also concluded that Dr. Gutride's 1981 IQ test results "were invalid due to the qualifications of the administrator, the inconsistency with other test results, and the fact

that an extreme length of time existed between the test administration and the date when the test was normed, which was 26 years . . . ." 12AA2773.

In 2011, Dr. Erin Warnick, who had assisted Dr. Schmidt with his 2002 report, reviewed documentary evidence in Ybarra's case "for the purpose of rendering an opinion concerning adaptive behavior deficits." 11AA2708. Dr. Warnick summarized Ybarra's difficulties in academics and social behavior, and concluded that Ybarra "appears to have significant adaptive behavior deficits in the areas of functional academics and social/interpersonal skills." 11AA2719–20. In reviewing Dr. T. Young's concerns that, based on the Test of Memory Malingering, Ybarra was malingering, Dr. Warnick noted that Dr. Mack's WAIS-IV was coupled with a Test of Memory Malingering that showed good performance. 11AA2718–19. Thus, Dr. Warnick explained, Dr. T. Young's concerns do "not appear to be an issue at this point." 11AA2718–19.

In 2012, Dr. Stephen Greenspan reviewed documents in this case, including prior expert reports, and interviewed family members. 12AA2776–88. Dr. Greenspan discounted the testing of Dr. Gutride for

the reasons cited by Dr. Mack and Dr. Warnick and, relying on the testing of Dr. Schmidt, Dr. T. Young, and Dr. Mack, concluded that Ybarra has significant subaverage intellectual functioning. 12AA2781–82. Dr. Greenspan acknowledged Dr. T. Young's concerns about Ybarra's IQ score related to Dr. T. Young's administration of the Test of Memory Malingering. 12AA2782. However, because of questions related to the validity of the Test of Memory Malingering for intellectually disabled populations, and the fact that Dr. Mack received results suggesting good effort, Dr. Greenspan concluded, "there is significant evidence to support the conclusion of Dr. Mack when he noted the high degree of confluence across the three qualified psychological examiners . . . ." 12AA2782.

Dr. Greenspan also administered the Adaptive Behavior Assessment Scale, 2d Edition, to Ybarra's cousin Marty. 12AA2783. The results showed deficits in all three subdomains of conceptual, practical, and social behavior, and on the composite adaptive behavior. 12AA2784. Any of these scores individually would qualify for Prong 2, but Ybarra has qualifying scores in all domains and the composite. Based on these scores, and Dr. Greenspan's interview of Marty and Ybarra, Dr.

Greenspan concluded that Ybarra has deficits in adaptive behavior. Finally, because Ybarra has documented challenges in school and cognitive challenges following his head injury, Dr. Greenspan concluded Ybarra met the final prong for intellectual disability, and further diagnosed Ybarra with intellectual disability. 12AA2787–88,

Finally, this year, Drs. Millspaugh and Viljoen evaluated Ybarra and concluded he has intellectual disability. As explained above, a particularly important aspect of their evaluation is that their intelligence testing also shows consistency: that is, the 2024, 2010, 2008, and 2002 testing all reflect consistent full-scale scores and subtest scores. *See* § II(B)(1)(b)(1) above. As they explain, it would be nearly impossible for someone to malinger with such consistency over so long a period. 12AA2848. They also administered a formalized adaptive behavior instrument (also to Marty) and received scores reflecting deficits in all areas of adaptive behavior and in composite. 12AA2835. Finally, they, too, concluded that Ybarra's onset was during the developmental period, and so diagnosed intellectual disability. 12AA2838–43.

Collectively, this new evidence shows that Ybarra is intellectually disabled.

c) Recent Supreme Court decisions provide good cause and prejudice to excuse any procedural default.

Supreme Court decisions post-dating this Court's adjudication of this claim provide a legal basis not reasonably available before: namely, that the Eighth Amendment requires adherence to the clinical guidelines. *See Clem*, 119 Nev. at 621, 81 P.3d at 526.

Intervening changes in law warrant reconsideration of Ybarra's intellectual disability claim. When this Court previously adjudicated Ybarra's claim, *Atkins v. Virginia*, 536 U.S. 304 (2002), cited the clinical definitions of intellectual disability, but left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id*. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). In the time since, and post-dating this Court's adjudication of Ybarra's *Atkins* claim, the Supreme Court has dramatically expanded on the importance of the clinical guidelines of intellectual disability. In *Hall v. Florida*, 572 U.S. 701, 719 (2014), the Supreme Court explained that "*Atkins* did not give the

States unfettered discretion to define the full scope of the constitutional protection." Specifically, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Id.* at 721. Florida had adopted a strict IQ score cutoff of 70, notwithstanding the clinical consensus that the standard error of measurement should be considered. *Id.* at 712. This, the Court held, was unconstitutional. *Id.* at 704.

The Supreme Court again emphasized the importance of clinical standards in *Brumfield v. Cain*, 576 U.S. 305 (2015). There, applying the deferential federal habeas standard for state determinations under 28 U.S.C. § 2254(d)(2), the Supreme Court held that the Louisiana courts' decisions resulted in an unreasonable determination of the facts by purporting to apply the clinical guidelines, but doing so incorrectly. *See id.* at 315–16, 317–21.

Finally, in the twin *Moore v. Texas* cases, the Supreme Court erased any doubt about the primacy of the clinical guidelines in determining intellectual disability under *Atkins*. *See Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*); *Moore v. Texas*, 586 U.S. 133 (2019) (*Moore*

II). In *Moore I*, the Supreme Court rejected Texas's use of the Briseno factors to determine if someone qualified as intellectually disabled, explaining that "the several factors Briseno set out as indicators of intellectual disability are an invention of the [Texas Court of Criminal Appeals] untied to any acknowledged source." *Moore I*, 581 U.S. at 5–6 (referring to *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)). This, the Court held, violated *Hall v. Florida*'s instruction that "adjudications of intellectual disability should be 'informed by the views of medical experts.'" *Moore I*, 581 U.S. at 5. Use of these non-medical factors created an unacceptable risk that someone with intellectual disability would be executed. *Id*. at 6. Specifically, the Court reiterated Hall's conclusion that the standard error of measurement should be considered. *Id*. at 14.

The Court went farther than it did in *Hall* and addressed adaptive deficits, and identified five problems with the Texas court's determinations: First, Texas had focused on Moore's strengths, even though "the medical community focuses the adaptive-functioning inquiry on adaptive deficits." *Id*. at 15 (emphasis in original). Second, following the lead of clinicians, the Court rejected Texas's emphasis on

"Moore's improved behavior in prison" because "Clinicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as prison surely is." *Id.* at 16. Third, the Court rejected Texas's attempts to explain away Moore's intellectual and adaptive deficits by attributing them to "Moore's record of academic failure, along with the childhood abuse and suffering he endured;" clinicians, the Court noted, "rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Id.* at 16–17. Similarly, and fourth, the Court rejected Texas's attempt to discount Moore's adaptive deficits by labeling them "personality disorder." *Id.* at 17. Fifth, the Court rejected Texas's reliance on the *Briseno* factors, which the Court of Criminal Appeals adopted because it viewed the clinical standards as "exceedingly subjective." *Id.* at 18 (quoting *Briseno*, 135 S.W.3d at 8). As the Court noted, these factors, based on "lay perceptions of intellectual disability" were contrary to how "the medical profession has endeavored to counter lay stereotypes of the intellectually disabled." *Moore I*, 581 U.S. at 18.

On remand, the Texas Court of Criminal Appeals again denied *Atkins* relief. *See Ex Parte Moore*, 548 S.W.3d 552 (Tex. Crim. App.

2018). Again, the Supreme Court reversed. *Moore II*, 586 U.S. at 670. Again, the Court emphasized that an adaptive deficits analysis should be based on deficits (not strengths); again, the Court emphasized that clinicians do not rely on prison behavior as evidence; again, the Court emphasized that reliance on emotional problems does not disprove intellectual disability; finally, the Court emphasized that reliance on the Briseno factors was unconstitutional. *Id*. at 670–72.

These changes in the Supreme Court's *Atkins* jurisprudence are significant and show that adherence to the clinical guidelines of intellectual disability are not optional, but constitutionally mandated. Adhering to these cases, Ybarra is intellectually disabled, as discussed above.

But, in addition, because this Court's prior determination deviated from clinical guidelines, that determination was erroneous, which is discussed in the next section.

d) Law of the case does not bar consideration of this claim.

"Under the law-of-the-case doctrine, 'a legal decision made at one stage of a criminal or civil proceeding should remain the law of that

case throughout the litigation, unless and until the decision is modified or overruled by a higher court.'" *Litchfield v. Tucson Ridge Homeowners Assoc.*, 140 Nev. Adv. Op. 57, 555 P.3d 267, 269 (2024) (quoting *Negrón-Almeda v. Santiago*, 579 F.3d 45, 50 (1st Cir. 2009)). But "[t]he law-of-the-case doctrine is not unlimited." *Id.* Specifically, this Court has recognized three exceptions to the doctrine: (1) where subsequent proceedings produce substantially new or different evidence, (2) where there has been an intervening change in controlling law, or (3) where the prior decision was clearly erroneous and would result in a manifest injustice. *Id.* at 270.

In the context of the death penalty, this Court will excuse the law of the case doctrine if "failure to do so 'would amount to a fundamental miscarriage of justice.'" *Hsu v. Cty of Clark*, 123 Nev. 625, 631–32, 173 P.3d 724, 729 (quoting *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002)); *see also Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003) (noting court will depart from law of the case only where "continued adherence [to prior decision] would work a manifest injustice"). The fundamental miscarriage of justice standard "can be met where the petitioner makes a colorable showing he . . . is ineligible

for the death penalty." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001)[40]; *accord Lisle v. State*, 131 Nev. 356, 367–68, 351 P.3d 725, 733–34 (2015).

All these exceptions apply here.

Three of these exceptions bear directly on the discussion above related to procedural default: First, these proceedings have produced substantially new or different evidence. Specifically, as discussed above, new testing corroborates that Ybarra meets all three prongs for intellectual disability. *See* § II(B)(1)(b)(1) above. Second, there has been an intervening change of law: new Supreme Court decisions have clarified the centrality of clinical guidelines to an *Atkins* determination. *See* § II(B)(2)(c) above. Third, failure to consider Ybarra's intellectual disability claim would amount to a fundamental miscarriage of justice because his intellectual disability renders him actually innocent of the death penalty. *See* II(B)(2) above.

---

[40] *Pellegrini* was abrogated on unrelated grounds in *Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

In addition, this Court's prior decision was clearly erroneous. Specifically, this Court misconstrued the age of onset prong, resulting in misapplication of the other two prongs.

This Court's prior determination misunderstood the developmental period prong (Prong 3) as allowing *only* pre-18 evidence to be relevant. Five times this Court's opinion expressed this misunderstanding:

- After holding the "developmental period" "is the period before a person reaches 18 years of age," this Court wrote, "the district court found that the developmental period was childhood to age 18 but *nevertheless* considered evidence of mental retardation between the ages of 18 and 25." *Ybarra v. State*, 127 Nev. 47, 58, 58 n.8, 247 P.3d 269, 276, 276 n.8 (2011) (emphasis added).
- As to the 1981 IQ test, administered when Ybarra was 27: "we need not decide the relevance, if any, of the Flynn effect and the necessity of adjust the 1981 IQ score because the 1981 IQ test, *as with all of Ybarra's tests*, was administered well after he turned 18 years of age. Therefore, this issue has

little value in evaluating whether Ybarra presented sufficient evidence to establish mental retardation . . . ." *Id.* at 68, 247 P.3d at 282–83 (emphasis added).

- Footnoting the above point: "This is true even had we accepted Dr. Schmidt's characterization of the developmental period as being up to age 25 years," *Ybarra*, *Id.* at 68 n.17, 247 P.3d at 283 n.17.
- Regarding the Test of Memory Malingering (TOMM): "as with the 1981 IQ score, the TOMM score is of *little value* in determining whether Ybarra met his burden of proving significant subaverage intellectual functioning, as the TOMM was administered well after Ybarra reached 18 years of age." *Id.* at 69, 247 P.3d at 283 (emphasis added).
- Finally, footnoting the adaptive behavior discussion, "Although the district court considered the evidence of adaptive behavior deficits from Ybarra's childhood to age 18 and age 18 to 25, the developmental period as we have defined it makes evidence related to the former primarily relevant." *Id.* at 285 n.20.

This is contrary to the clinical guidelines for intellectual disability, and has the effect of making *Atkins* relief available only to those with the fortuity of a pre-18 intellectual disability diagnosis. *See Evaluating Intellectual Disability*, 46 Hofstra L. Rev. at 1338–39. Both the Ninth Circuit and the U.S. District Court acknowledged that such reasoning would be antithetical to intellectual disability assessments. *See Ybarra v. Filson*, 869 F.3d 1016, 1026 n.10 (9th Cir. 2017); *see also* 12AA2939 ("Plainly, petitioners raising an *Atkins* claim may rely on scores from tests conducted after their developmental period to demonstrate intellectual functioning within the period.").

During the 2016 argument before the Ninth Circuit, Judge Clifton explained:

> [W]hen I read that opinion it struck me too, I did a real double take. It basically appears to say, well, we don't have to pay attention to the IQ test 'cause they were all given after he turned 18 so they're of little value . . . . Is that the position, is that the reasoning of the Nevada Supreme Court because I got to say it struck me as a howler. There are lots

> of people that don't have IQ tests before 18, are they just out of luck?[41]

Not only is this wrong as a matter of the age of onset prong, this is wrong as it relates to the other prongs because this Court disregarded relevant evidence on the basis of its misunderstanding of this prong.[42]

Specifically, this Court cast aside all of the IQ tests in this case as being "of little value," and then upheld the district court's conclusion that Ybarra had not presented sufficient evidence of significant subaverage intellectual functioning. *See Ybarra*, 127 Nev. at 65–68, 247 P.3d at 281–83. Ybarra complained that the district court over-emphasized the 1981 IQ test, and failed to adjust the score for norm obsolescence. *See id.* at 65–66, 247 P.3d at 281.[43] This Court noted that

---

[41] Oral Argument at 37:40–39:11, *Ybarra v. Filson* (Nos. 13-17326, 17-15793, 17-71465), https://www.youtube.com/watch?v=KaKFjpJBKeM (June 21, 2016); 2016 WL 3996724 (unofficial transcript).

[42] Ultimately, applying the "daunting standard" of federal habeas review to state court adjudications, the Ninth Circuit concluded this Court's decision was not unreasonable, although it did not rule on whether this Court misapplied the age of onset prong. *See Ybarra v. Gittere*, 69 F.4th 1077, 1089–91 (9th Cir. 2023).

[43] This is commonly referred to as the "Flynn effect," and clinicians understand that scores need to be adjusted to account for it depending on how old norms are at the time an intelligence test is

jurisdictions were split on whether score adjustments were necessary, but then held that it did not need to "take sides in the dispute" because (1) adjusting the 1981 score still resulted in a score above the cutoff; (2) the district court relied on records to conclude that "[t]he record as a whole (irrespective of the various IQ test scores) portrays Robert Ybarra as a person who does not have significant subaverage intellectual functioning"; and (3) because all of the IQ tests were administered outside the developmental period. *Id.* at 67–68, 247 P.3d at 282–84. This reasoning had the effect of disregarding *all* of the IQ tests, and then affirming the district court based on its perception of how an intellectually disabled person is supposed to look.[44]

---

administered. *See generally* Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect in The Death Penalty and Intellectual Disability* 155 (Edward A. Polloway ed. 2015).

[44] *See, e.g.*, Special Olympics, *Changing Attitudes Changing the World: Media's Portrayal of People with Intellectual Disabilities* (2005) ("Popular media portrayals of people with intellectual disabilities are often unrealistic and limiting. The one-dimensional victim often portrayed in popular media accounts bears little resemblance to the actual lives of individuals with intellectual disabilities."), available at https://media.specialolympics.org/resources/research/attitudes/Special-Olympics-Research-Attitude-Policy-Paper-Media-Portrayal.pdf.

This Court repeated this misunderstanding as to deficits in adaptive behaviors.[45] In rejecting Ybarra's argument that the district court improperly relied on malingering evidence to deny adaptive behavior deficits, this Court noted that that was so only as to "adaptive behavior deficits between the ages of 18 and 25"; but that evidence was not relevant to the analysis, this Court reasoned, because it is the pre-18 evidence that was "primarily relevant." *Id.* at 71 n.20, 247 P.3d at 285 n.20.[46]

---

[45] The Court also repeated this misunderstanding as to the Test of Memory Malingering, holding that issues related to the TOMM were of "little value," because the test was administered after the developmental period. *See id.* at 68–69, 247 P.3d at 283. Notably, the TOMM was the State expert's basis for concluding that Ybarra was malingering. 10AA2464–68. Notwithstanding this Court's rejection of post-developmental period evidence for subaverage intellectual functioning and adaptive behavior deficits, this Court accepted post-18 evidence in support of malingering, creating the circumstance that the Court rejected all clinical evidence—that is evidence that the testifying experts relied on—and relied on evidence for which the courts had no expert context. This is especially so with regard to adaptive behaviors and age of onset because the State's expert offered no testimony at all about these prongs. 10AA2468, 2497–98.

[46] The federal district court, for different reasons, found that this Court and the district court's determinations as to adaptive behavior deficits were unreasonable because the district court explicitly rejected the clinical guidelines' reliance on "gullibility" and inability to resist victimization as evidencing deficits in adaptive behavior. *See Ybarra*, 2020 WL 5731793 at *6–7; *see also* 12AA2927; AAMR-10 Manual at 42.

3. The district court erred in denying this claim.

The district court committed a number of factual and legal errors in denying this claim:

a) Ybarra raised miscarriage of justice, new legal bases, and new factual bases in support of excusing the procedural default on this claim. The district court only addressed the new legal bases and the new factual bases. 20AA4934–36.

b) The court created bases for procedural default that are not supported by law. 20AA4934–36.

c) The court conflated the federal doctrine of "clearly established federal law" under 28 U.S.C. § 2254(d)(1) with retroactivity. 20AA4935–36.

d) The court conflated federal habeas review of state convictions with state post-conviction review of state convictions. 20AA4935.

e) The court conflated miscarriage of justice with good cause and actual prejudice. 20AA4936.

f) The court misread the *Atkins* line of cases. 20AA4934–36.

These errors are addressed in turn.

a) The district court failed to separately address that executing Ybarra notwithstanding his intellectual disability would result in a miscarriage of justice.

The district court only analyzed Ybarra's arguments that new legal and factual bases provided good cause and prejudice to overcome procedural default. The court did not analyze miscarriage of justice—with the exception of a single sentence identified as error (6) above. This was error: if Ybarra is intellectually disabled, then executing him would result in a miscarriage of justice. *See Leslie*, 118 Nev. at 780, 59 P.3d at 445.Thus, to determine if procedural default may apply to Ybarra, the court needed to evaluate whether he is intellectually disabled. The court did not analyze this question at all. *See* 20AA4934–36.

b) The district court created bases for procedural default that are not supported by law.

The district court created bases for procedural default that are not supported by law. For example, the court held that even if *Hall v. Florida*, 572 U.S. 701 (2014), provided some support to Ybarra, "there is no explanation as to why Ybarra did not raise this claim in his 2017 petition brought in this Court." 20AA4934–35. The district court failed

to cite any source suggesting Ybarra had an obligation to cite *Hall* in his 2017 petition—which did not raise an intellectual disability claim. Nor could it: the miscarriage of justice exception does not ask if information could have been presented earlier.

c) The district court conflated the federal habeas doctrine of "clearly established federal law" with the doctrine of retroactivity.

The district court conflated two different doctrines: retroactivity and "clearly established federal law" under the Anti-Terrorism and Effective Death Penalty Act (the AEDPA). 28 U.S.C. § 2254(d)(1); 20AA4935–36. Retroactivity refers to the question of whether new constitutional rules apply to cases in post-conviction proceedings. *See generally Teague v. Lane*, 489 U.S. 288, 310–11 (1989). "Clearly established federal law," is a doctrine of federal habeas law, under which federal courts are prohibited from granting habeas relief unless a state court decision was contrary to, or an unreasonable application of, "clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). These doctrines are not the same. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) ("the AEDPA and

Teague inquiries are distinct"); *see also Greene v. Fisher*, 565 U.S. 34, 39 (2011) ("We have explained that AEDPA did not codify *Teague*.").

The district court wrote that *Moore v. Texas*, 581 U.S. 1 (2017), "is specifically not retroactive," citing *Shoop v. Hill*, 586 U.S. 45 (2019). 20AA4935. *Shoop* is a decision about clearly established federal law; it says nothing about retroactivity. *See Shoop*, 586 U.S. at 48. The doctrine of clearly established federal law has no analogue or rationale in state law: deference under the AEDPA is required so that federal courts respect comity and federalism towards state courts. *See generally Shinn v. Ramirez*, 596 U.S. 366, 375–79 (2022). Moreover, recognizing the different considerations required by this Court and federal habeas courts, this Court has adopted a different retroactivity standard than federal courts. *See Colwell v. State*, 118 Nev. 807, 816–20, 59 P.3d 463, 469–72 (2002).[47] So, even if *Shoop* had opined on the retroactivity of

---

[47] For more on the importance of retroactivity doctrines in state post-conviction proceedings, *see* Josiah Rutledge, *With Great (Writ) Power Comes Great (Writ) Responsibility: A Modified* Teague *Framework for State Courts*, 59 Crim. L. Bulletin No. 4, at 508 n.210 ((Summer 2023); *see also Tatum v. Comm'r of Corr.*, 349 Conn. 733, 744–56, 322 A.3d 299, 305–12 (2024) (discussing Connecticut's broader

Moore—which it did not—then *Shoop* would not be binding precedent under Nevada law for the retroactivity of *Moore*. Moreover, *Hall*, *Moore I*, and *Moore II* are retroactive under federal law: the cases prohibit "a certain category of punishment for a class of defendants because of their status or offense" by defining who is in the class. *See Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). And, being substantive rules, they are retroactive. *Montgomery*, 577 U.S. at 206.[48] Indeed, the Supreme Court has applied the rulings to cases presuming retroactivity. *See, e.g.*, *Moore II*, 586 U.S. at 667 (applying *Moore I* retroactively); *Hamm v. Smith*, 604 U.S. 1, 2 (2024) (relying on *Hall* and *Moore*); *see also Smith v.*

---

retroactivity doctrine); *id.* at 754, 322 A.3d at 311 ("Just because a petitioner was ahead of . . . advancements that now call into question the fundamental principles underlying judicial procedures and the accuracy of a criminal conviction does not mean that the petitioner should be precluded from the application of that new rule.").

[48] *But see Fulks v. Watson*, F.4th 586, 592 (7th Cir. 2021); *Smith v. Comm'r, Ala. Dept. of Corr.*, 924 F.3d 1330, 1338–40 (11th Cir. 2019); *Williams v. Kelley*, 858 F.3d 464, 473–75 (8th Cir. 2017) ("The observation by Chief Justice Roberts that the Court had crafted 'a constitutional holding,' may presage an eventual ruling by the Court that *Moore* will be given *Montgomery*-like effect . . . ." (internal citation omitted)).

Comm'r, Ala. Dept. of Corr., 67 F.4th 1335, 1340 (11th Cir. 2023) (Alabama Supreme Court denying Smith's *Atkins* claim in 2008).

But most important of all: applying the correct retroactivity doctrine—that is, this Court's—*Hall*, *Moore I*, and *Moore II* are retroactive. First, these cases do not qualify as "new rules" for retroactivity purposes because "[w]hen a decision merely interprets and clarifies an existing rule . . . and does not announce an altogether new rule of law, the court's interpretation is merely a restatement of existing law." *Buffington v. State*, 110 Nev. 124, 127, 868 P.2d 643, 645 (1994); *accord Colwell*, 118 Nev. at 819, 59 P.3d at 472. Here *Hall* and the twin *Moore* decisions merely clarified the proper scope of clinical guidelines for an *Atkins* determination. But, even if these decisions announced a new rule, "accuracy is seriously diminished without the rule," and thus, the "rule" announced in these cases "is significant enough to warrant retroactive application." *Colwell*, 118 Nev. at 820, 59 P.3d at 472. And, as discussed above, if they are a new rule, they define the scope of individuals protected. *See Montgomery*, 577 U.S. at 206.

d) The district court conflated federal habeas review of state convictions with state post-conviction review of state convictions.

The district court also held that "in 2008 (when this issue was decided) it was not apparent that states were required to strictly adhere to clinical guidelines," adding, "[s]imply put, Ybarra does not get to apply new clinical standards to an issue that was decided over 15 years ago," relying on *Pizzuto v. Yordy*, 947 F.3d 510 (9th Cir. 2019). 20AA4935.[49] Here, again, the district court erred by relying on an inapplicable federal habeas doctrine in a state post-conviction proceeding.

In *Pizzuto*, the Ninth Circuit considered whether an Idaho Supreme Court decision resulted in an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). *See Pizzuto*, 947 F.3d at 525–29. The Idaho Supreme Court's decision, in part, was "contrary to the clinical definitions in place at the time." *Id.* at 526. Nonetheless, the Ninth Circuit denied relief because—applying the highly deferential

---

[49] The district court did not include a pin citation, but the relevant passage is at 526–27.

standard of review federal courts afford state courts—the Idaho decision was reasonable because "[i]t was not apparent in 2008 . . . that state were required to adhere strictly to the AAMR's and American Psychiatric Association's clinical standards." *Id.* at 527. But state courts do not apply 28 U.S.C. § 2254(d)(2) to state post-conviction review. Thus, *Pizzuto*'s reasoning has no place in a Nevada courts' post-conviction review.[50]

The district court repeated this error in rejecting Ybarra's argument that the new testing provided a new factual basis. 20AA4936. Specifically, the district court held: "This argument provides no basis to change the law of the case or re-litigate the matter." 20AA4936. The law in existence at the time was applied to the evidence presented." 20AA4936 (citing *Shoop*). But, again, *Shoop* is a decision under 28 U.S.C. § 2254(d)(1). It is inapplicable to Nevada's law of the case doctrine.

---

[50] Moreover, as discussed above, the federal courts acknowledged serious issues with the prior state determinations of Ybarra's intellectual disability, including that the prior determination of deficits in adaptive behaviors was unreasonable. *See* § B(2) above.

The effect of these errors is significant. Federal habeas review is backward looking, reviewing the reasonableness of an earlier state court decision based on the facts and law available to that state court. *See* 28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Review under the miscarriage of justice exception looks to the petitioner's actual innocence; the reasonableness of prior determinations is irrelevant.

e) The district court conflated miscarriage of justice with good cause and actual prejudice.

Finally, and relevant to the other errors, the district court's conclusion showed confusion over the miscarriage of justice exception:

> Overall, Ybarra has not shown good cause to re-litigate this claim, nor has he shown actual prejudice to himself. The matter has been litigated and spent the last twelve years in the quagmire of the Ninth Circuit. No fundamental miscarriage of justice will occur because this claim is procedurally defaulted.

20AA4936. This reasoning is circular. All claims relying on the miscarriage of justice exception are (otherwise) procedurally defaulted. The district court appears to have conflated good cause and prejudice with the miscarriage of justice exception; and, finding the new factual

and legal bases insufficient to show good cause and prejudice, the court concluded there was no miscarriage of justice. *See* 20AA4936. For all the reasons discussed above, the district court erred in rejecting Ybarra's new legal and factual bases. *See* § (a)–(d) above.

But the district court's error in conflating miscarriage of justice with good cause and prejudice was particularly prejudicial as the court failed to consider Ybarra's actual innocence of the death penalty as an independent basis to set aside the procedural default.

f) The district court misread the *Atkins* line of cases.

The district court held *Hall* provides "no support to petitioner" and that "[n]othing in *Moore* supports Ybarra." 20AA4934–35. However, both decisions (and *Moore II*, which the district court does not cite) support the proposition that courts reviewing intellectual disability claims need to adhere to the clinical guidelines. *Hall*, 572 U.S. at 710 ("That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising"); *Moore I*, 581 U.S. at 20 ("Reflecting improved understanding over time, current manuals offer 'the best

available description of how mental disorders are expressed and can be recognized by trained clinicians'"); *Moore II*, 586 U.S. at 137 (criticizing the *Briseno* factors "because they had no grounding in prevailing medical practice" inviting "lay perceptions" and "lay stereotypes" and noting that emphasizing these factors "over clinical factors" creates "an unacceptable risk that persons with intellectual disability will be executed"). These decisions support Ybarra because, in emphasizing the importance of the clinical guidelines, they are new legal authority contradicting this Court's and the district court's prior determination. Specifically, as the U.S. District Court held, the state district court rejected that Ybarra has adaptive behavior deficits because the state district court disagreed with clinical guidance that avoiding victimization is an example of a deficit. 12AA2927. *Hall*, *Moore I*, and *Moore II* all demonstrate that reasoning is wrong as a matter of law. The *Moore* decisions also show that reliance on stereotypes of how intellectually disabled people function or act is legally improper, *see Moore I*, 581 U.S. at 18l; *Moore II*, 586 U.S. at 137; this Court affirmed the district court's reasoning that the record portrayed Ybarra "as a person who does not have a significant subaverage intellectual

functioning" and that Ybarra could "play scrabble, backgammon, racquetball and volleyball." *Ybarra*, 127 Nev. at 68, 69, 247 P.3d at 282, 283.[51] Thus, the district court was wrong to disregard the importance of these cases.

III. Ybarra is incompetent.

Claim Three asserts that Nevada's death penalty statute is unconstitutional because Ybarra cannot raise his own competency to be executed. 20AA4854–58. Claim Four asserts that Robert Ybarra is incompetent to be executed. 20AA4859–64. These claims are not barred by procedural defects because competency related claims were not ripe until execution was imminent and failure to consider the claims would result in a fundamental miscarriage of justice. The district court incorrectly determined that Ybarra's evidentiary proffer was not sufficient to warrant a hearing to ascertain his competency and declined

---

[51] Individuals with intellectual disability can play sports. *See generally*, Special Olympics, *Changing Attitudes, Changing the World: Changing Lives through Sport—A Report Card on the Impact of Special Olympics* (2005), available at https://media.specialolympics.org/resources/research/sports/Special-Olympics-Research-Attitudes-Policy-Paper-Sports.pdf.

to address the constitutionality claim because it determined it was not cognizable in habeas. 20AA4937–39.

A. Nevada's death penalty statutes are unconstitutional because Ybarra cannot raise his own incompetency to be executed.

Claim Three asserts that Nevada's death penalty statute is unconstitutional because there is no mechanism for Ybarra to raise the issue of his incompetency. 20AA4854–58. This claim is not procedurally barred because it was not previously ripe and failure to address the claim would result in a miscarriage of justice.

This claim was not previously presented and is being presented more than one year after the filing of a decision on direct appeal[52] because it was not previously ripe. *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (acknowledging competency to be executed claim cannot be resolved until execution is imminent); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998); *Brown v. Muniz*, 889 F.3d 661, 668–69 (9th Cir. 2018).

---

[52] The closely related claim that Ybarra is incompetent—raised here in Section III(B)—has been raised before, as discussed below.

The district court denied this claim reasoning that the scope of a post-conviction petition under NRS 34.720 is limited and because this claim did not implicate the validity of Ybarra's death sentence it was not cognizable in habeas. 20AA4937.

1. NRS 176.425 is unconstitutional.

Nevada law does not appear to provide a mechanism for which someone who is incompetent to be executed can raise his incompetency. Rather, the law unconstitutionally permits only the Director of the Nevada Department of Corrections to raise incompetency. *See* NRS 176.425 ("If . . . there is a good reason to believe that the defendant has become insane, the Director . . . may by a petition in writing . . . petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person[.]") Allowing the Director sole authority to raise a competency claim creates obvious concern, most notably, how the Director—who presumably does not interact with inmates on Nevada's death row—would come to learn of an inmate's incompetency to be executed. And the statute is silent on any provision requiring the Director to avail himself of any such

knowledge or information that would cause him to become aware of an inmate's incompetence.

Compounding the issue of limiting the authority to initiate a competency proceeding is the permissive structure of the statute. As demonstrated by the plain language of the statute, the Director has discretion in determining whether to initiate competency proceedings. *See* NRS 176.425(1) (noting that the Director "may" petition a district judge alleging insanity). Moreover, medical staff are prohibited from participating in a competency to be executed evaluation. 20AA4762–63.

This Court has previously highlighted the discretionary nature of the statute, noting that "NRS 176.425(1) provides that the Director 'may' petition the district court to allege that the convicted person is insane." *Calambro ex rel. Calambro v. Second Jud. Dist. Ct. (State)*, 114 Nev. 961, 973, 964 P.2d 794, 801 (1998). It continued, acknowledging that "[a]rguably . . . even if an inmate was clearly insane, the Director would have the discretion not to petition the court." *Id.* And, in dicta, this Court alluded to the unconstitutionality of NRS 176.425, noting that Calambro argued "with some force that interpreting the statute to

allow the Director such unfettered discretion would render it unconstitutional." *Id.*

2. The district court erred in denying this claim.

The district court denied this claim on the basis that the claim is not cognizable in habeas, the claim was procedurally defaulted, and "to the extent the claim implies he has no mechanism to raise the incompetency issue, the claim is belied by the fact that he raises the issue of incompetency in Claim Four of his petition." 20AA4938. The district court, as will be discussed below, denied Claim Four on the merits. 20AA4938–39.

This was error. As to cognizability: the district court's exercise of jurisdiction over Claim Four necessarily ruled on the merits of Claim Three: for, if habeas is a proper legal mechanism to raise incompetency to be executed, then the unconstitutionality of NRS 176.425 is moot. (Put differently, the director's unilateral discretion would not matter if a petitioner could raise his own incompetency to be executed).

Nor is the fact that Ybarra raised his incompetency to be executed, in Claim Four, the final word on the matter. Ybarra also filed a complaint before the Eighth Judicial District Court asserting the

unconstitutionality of NRS 176.425.[53] That is: Ybarra filed challenges to his competency in both of the seeming methods available: under habeas and under a complaint in the court with jurisdiction over the prison where he was housed. It is not obvious that the Seventh Judicial District Court had jurisdiction to rule on Ybarra's incompetency to be executed in habeas.[54]

Finally, the district court is plainly wrong about ripeness. 20AA4937–38. For Ybarra to have standing, he must "suffer a personal injury." *Nevada Policy Research Institute v. Cannizzaro*, 138 Nev. 259, 261–62, 507 P.3d 1203, 1207 (2022). Until he faced an imminent execution, the constitutionality of NRS 176.425 did not present an injury to Ybarra.

3. Litigants—and particularly the parties here—would benefit from this Court's guidance regarding claims of incompetence to be executed.

Ybarra, the district attorney, the attorney general, and the district court are hopelessly in conflict about how, in which court, and when an

---

[53] Ybarra was housed at High Desert State Prison, in Clark County, at the time he filed the complaint.

[54] This is addressed in more detail in the next section.

incompetency to be executed claim may be asserted. As referenced above, Ybarra sought relief on this issue by filing the instant habeas petition, but also by filing a complaint in the Eighth Judicial District Court challenging the constitutionality of NRS 176.425. Litigation in both cases shows that guidance from this Court is necessary. Specifically, guidance is needed on the following questions: (1) what legal mechanism governs incompetency to be executed claims; (2) which court is the appropriate venue; (3) when does such a claim become ripe; (4) what standard applies to incompetency-to-be-executed claims, and (5) if NRS 176.425 is unconstitutional, what process is to be employed. However, it should be apparent that answering these questions asks too much of this Court: it is enough that NRS 176.425 is unconstitutional and that no execution can take place until the Legislature fixes the statute.

First, it is unclear whether an incompetency to be executed claim must be raised pursuant to NRS 176.425 or whether it may be raised in a habeas petition. This Court has twice suggested that NRS 176.425 is the sole available legal mechanism. *See Chappell*, 137 Nev. at 804 n.13 ("We note there are mechanisms by which a person sentenced to death

may challenge the execution of the sentence based on his or her current mental status." (citing NRS 176.425; NRS 176.455); *see also Mulder v. State*, No. 69490, 2018 WL 3628963, at *3 n.3 (July 26, 2018) ("To the extent Mulder argues that he is incompetent to be executed, this claim is wholly separate from his claim that incompetency provided good cause to file an untimely and successive petition. We do not address Mulder's competency to be executed as there are other mechanisms by which a capital defendant may challenge the execution of his sentence based on his current mental status." (citing NRS 176.425; NRS 176.455)). This is consistent with legislative design: NRS 176.425 is a specific statute governing incompetence to be executed; the statutes governing habeas are general in nature and do not address incompetence to be executed. *See* NRS 34.360–34.830; *see generally State, Tax Comm'n ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 388, 254 P.3d 601, 605 (2011) ("A specific statute controls over a general statute."). NRS 176.425 and NRS 176.435 provide specific processes for determining a person's competency; the habeas statutes provide no guidance. And an incompetency to be executed claim "does not challenge the validity of

the prisoner's conviction or sentence." *Coe v. Bell*, 209 F.3d 815, 819 (6th Cir. 2000). So, these claims are ostensibly outside the ambit of NRS 34.724. Of course, as discussed above, a problem with NRS 176.425 is that it is unconstitutional: under it, Ybarra may not raise his own incompetency to be executed.

Second, this Court should provide clarity on which court is the appropriate venue. This issue arose in Ybarra's Eighth Judicial District Court case: counsel from the Attorney General's Office argued that venue should be in the court of conviction or in the court where the execution is to take place. Ybarra's position is that venue is proper in the court for the prison where the person is housed (at the time of initiating the proceedings). Otherwise, to take a hypothetical example: an incompetent client housed in Clark County might have competency proceedings in Washoe County for an execution to take place in White Pine County.[55]

Third, this Court should also clarify when a competency to be executed claim is ripe. The district court here denied Ybarra's claim for

---

[55] If these claims are to be brought under habeas, the venue is unambiguously in the court of conviction. *See* NRS 34.738(1).

failing to make a stronger showing of incompetence. However, at the time that Ybarra filed his habeas petition, there was no warrant and no indication of when a warrant might issue (or how long Ybarra's habeas petition would take to litigate). That is, there was no indication that an execution was imminent, and thus no indication that Ybarra's incompetence to be executed claim was ripe.

This was highly prejudicial as Ybarra did not know when to have a competency evaluation conducted and so was left to speculate on the timing. Additionally, counsel has a continuing obligation to protect their client's confidentiality, even in seeking competency review. *See generally* American Bar Association, *Criminal Justice Standards on Mental Health*, Standard 7-4.3(f) (2016) ("In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications protected by the attorney-client privilege."). And, in this case, his habeas petition was denied before he was given an opportunity to provide an updated expert report. Clarity from this Court on when such a claim becomes ripe would be helpful; as part of its consideration, this

Court should weigh how little time passes between a warrant's issuance and an execution date. *See* NRS 176.495(2).

Fourth, this Court should clarify what standard governs incompetency to be executed. The federal standard is a floor, not a ceiling; having never construed competency to be executed in the modern era, this Court should take this opportunity to explain what standard governs under Nevada law. *See State v. Kincade*, 129 Nev. 953, 956, 317 P.3d 206, 208 (2013) ("states are permitted to provide broader protections and rights than provided by the U.S. Constitution."). Here, in addition to the federal standard, which asks whether a prisoner "lacks a 'rational understanding' of 'the State's rational for [his] execution,'" *Madison*, 586 U.S. at 268–69, this Court should hold that a prisoner is also incompetent if he cannot assist counsel because he lacks "sufficient capacity or ability to rationally communicate with counsel." *Singleton v. State*, 437 S.E.2d 53, 58 (S.C. 1993); *see also State v. Harris*, 789 P.2d 60, 66 (Wash. 1990) (en banc) ("What is required is that they understand they have been sentenced to death for murder *and be able to communicate rationally with counsel*."). This assistance prong is consistent with the common law. *See Singleton*,

437 S.E.2d at 56–58 (canvassing common law roots). As discussed above, the framers of the Nevada Constitution understood and incorporated the common law into their understanding of the Declaration of Rights. *See* § II(A)(1) above. Thus, the reasoning adopted by the South Carolina Supreme Court, and other jurisdictions taking this approach, applies with equal force in Nevada.

Finally, if the legal mechanism is not NRS 176.425, this Court should provide guidance on the procedures to be employed. Of note, Ybarra's report in support of his incompetency tracked the language of NRS 176.425; the district court held this was insufficient. 20AA4939. If "good reason to believe the Defendant is insane," per NRS 176.425, is not the standard, this Court should explain what the standard is. As a matter of federal law, if "sufficient doubt" exists then a competency hearing is required. *Pate v. Robinson*, 383 U.S. 375, 387 (1966). The state statutory standard tracks the federal law standard in *Pate*. And, if NRS 176.425 is not the procedure to be employed, this Court should elucidate what procedure district courts are to follow.

B. Ybarra is incompetent to be executed.

Ybarra is incompetent to be executed due to dementia and serious mental illness. 12AA2843–46, 2771; 14AA3274

1. Incompetent individuals may not be executed.

The Eighth Amendment's ban on cruel and unusual punishment precludes executing a person who has "lost his sanity" after sentencing. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). And it prohibits the execution of someone whose mental illness prevents him from "'rational[ly] understanding' why the State seeks to impose that punishment." *Madison v. Alabama*, 586 U.S. 265, 267 (2019) (citing *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). The reasons underlying this prohibition is that "'killing one who has no capacity' to understand his crime or punishment 'simply offends humanity.'" *Ford*, 477 U.S. at 407, 409.

In determining whether an individual is incompetent to be executed, the Supreme Court has explained that the "critical question is whether a 'prisoner's mental state is so distorted by a mental illness' that he lacks a 'rational understanding of the State's rationale for [his] execution.'" *Madison*, 586 U.S. at 269 (quoting *Panetti*, 551 U.S. at

958–59). Put differently, "the issue is whether a 'prisoner's concept of reality' is 'so impair[ed]' that he cannot grasp the execution's 'meaning and purpose' or the 'link between [his] crime and its punishment.'" *Madison*, 586 U.S. at 269 (quoting *Panetti*, 551 U.S. at 958, 960).

In *Madison*, the petitioner was diagnosed with dementia. 586 U.S. at 269. The Supreme Court explained that a person lacking memory of his crime may still rationally understand why the State seeks to execute him, so executing an individual solely because he cannot remember committing his crime does not run afoul of the Eighth Amendment. *Id.* at 274–75. But "a person suffering from dementia may be unable to rationally understand the reasons for his sentence" and, if so, "the Eighth Amendment does not allow his execution." *Id.* at 275.

2. Robert Ybarra is incompetent.

Ybarra is incompetent to be executed due to dementia and serious mental illness.[56]

---

[56] As stated above, Ybarra filed a complaint seeking a sanity investigation in the Eighth Judicial District. At the time the case commenced he was housed at High Desert State Prison, located in Clark County. Ybarra will keep this Court apprised of the progress of that case.

Ybarra is intellectually disabled. *See supra* Section II(A), (B). And he suffers from a slew of mental health challenges including mild neurocognitive disorder due to dementia, schizophrenia, catatonia associated with another mental and/or medical disorder, and unspecified depressive disorder.

In 2012, Dr. Mack diagnosed Ybarra with dementia due to head trauma (TBI). 12AA2772. Most recently, in May 2024 he was diagnosed with mild neurocognitive disorder due to dementia. 12AA2837, 2843–44. According to the National Institute of Aging, signs and symptoms of dementia include memory loss, poor judgment, confusion, difficulty with expressive and receptive communication, and difficulties understanding things. 12AA2843. And incarceration is a substantive risk factor for the development of dementia and can even lead to an earlier onset of dementia. 12AA2844. During his May 2024 evaluation, Ybarra "displayed significant cognitive impairments that impacted his ability to complete the evaluation procedures[.]" 12AA2844. Signs of dementia present during the evaluation included forgetting what he was doing in the middle of the task, difficulties understanding the tasks asked of him, and confusion. 12AA2844.

Ybarra was also diagnosed with schizophrenia, which is the "presence of perpetual abnormalities (e.g., delusions and hallucinations), disorganized speech, grossly disorganized or catatonic behavior, and/or negative symptoms that are present for at least a month." 12AA2837, 2844. Ybarra experiences auditory and visual hallucinations and delusions, including hearing negative voices that command him to engage in behaviors that he does not want to do, tell him he is stupid, or tell him that they will kill his family. 12AA2845. His delusions of paranoia and grandiosity cause him to believe that officers listen to his conversations through outlets in a wall. 12AA2845. As noted by Drs. Millspaugh and Viljoen, Ybarra's symptoms of psychosis were "consistent with previous records and evaluations" as well as by family members both at trial and more recently. 12AA2845.

Upon reviewing records in this case, Dr. Price concluded, "Upon review of these documents, there is a good reason to believe that the defendant, Robert Ybarra, is insane." 14AA3274. Following his evaluation, and after receiving more information about Ybarra's deteriorating condition, Dr. Price confirmed that Ybarra is currently incompetent. *See* Ex. 20 at 660–63.

3. Procedural default does not bar this claim.

A version of this claim was previously raised[57] and is being presented more than one year after the filing of the direct appeal. *See* Statement of Add'l Claims, *Ybarra v. Godinez*, No. CV-N-89-529-ECR, at 9 (D. Nev. May 14, 1990); Am. Pet. For Writ of Habeas Corpus by a Person in State Custody, *Ybarra v. McDaniel*, No. CV-N-00-233-ECR (RAM), at 84 (D. Nev. Sept. 20, 2002); Petition for Writ of Habeas Corpus, *Ybarra v. McDaniel*, HC-0303001, at 86 (7th Jud. D. Ct. Nev. Mar. 6, 2003).

The U.S. Supreme Court has recognized that a claim that a petitioner is incompetent to be executed is not ripe until an execution is imminent. *See Panetti*, 551 U.S. 946. This is so because the claim was premature and could not be raised in prior state proceedings. *See id.* at 943; *see also Martinez-Villareal*, 523 U.S. at 644–45 (noting "because his execution was not imminent" "his competency to be executed could not be determined"); *see generally Brown*, 889 F.3d at 668–69 ("Because a claim ripens only at the time the factual predicate supporting a

---

[57] The prior version of this claim was raised in summary fashion in order to avoid any implication of waiver. 9AA2080.

habeas claim accrues, *Panetti* explained that '*Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition'—and oftentimes not until execution is imminent.").

Nevada courts must also excuse procedural default if the failure to consider a claim will result in a "fundamental miscarriage of justice." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "[T]his standard can be met where the petitioner makes a colorable showing he is actually innocent of the crime or he is ineligible for the death penalty." *Id.* Under this exception to procedural default, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Id.*; *see also Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002) (finding actual innocence where there was a reasonable probability that petitioner was actually innocent of the death penalty.

4. The district court erred in denying this claim.

The district court found that Ybarra's proffer was not sufficient to warrant a hearing. 20AA4938–39. The court also stated, "[t]he fact that

Ybarra may or may not suffer from dementia, delusions or other mental illness" is not sufficient to show he is not competent. 12AA1939.

In the context of pretrial competency, this Court has stated that "evidence is 'substantial' if it 'raises a reasonable doubt about the defendant's competency . . . Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence.'" *Olivares v.* State, 124 Nev. 1142, 1148 195 P.3d 864, 868 (2008).

In addition to the information above, Ybarra's petition in the district court was supported by a declaration from Dr. Price, a licensed clinical psychologist, who opined that based on his review of relevant records, there "is good reason to believe . . . Ybarra, is insane." 14AA3274. After the petition was filed Dr. Price had the opportunity to evaluate Ybarra in person and submit a report of his findings. Ex. 19 at

609–35.[58] He has also submitted two supplements[59] to his original report detailing Ybarra's deterioration following his transfer to Ely State Prison. Ex. 20 at 363–663; Ex. 56 at 1384–1411.

In discussing the standard an individual is required to meet to trigger a competency hearing, this Court has noted that meaningful evidence is necessary, and "whether it is sufficient for such a showing will depend on its strength." *Calambro*, 114 Nev. at 970. Here, Ybarra submitted a declaration from an expert, which was later confirmed in a report, as well as two supplements, stating his opinion that Ybarra is not competent to be executed. This was sufficient to raise a reasonable doubt about Ybarra's competence to be executed.

Moreover, since Dr. Price evaluated Ybarra on October 16 and 17, 2024, Ybarra's mental status has declined. The Department of Corrections' removal of Ybarra from "a stable prison, prison routine,

---

[58] As discussed above, these supplemental reports are not part of the lower court record, but Ybarra offers them here to proffer the evidence and testimony he anticipates presenting in support of his incompetence.

[59] The opinions expressed in the supplements are based on Dr. Price's review of declarations from an investigator assigned to the case who has regularly visited and spoken with Ybarra on the phone.

known fellow inmates and a prison staff that he was familiar with; did precipitate an emotional and mental decline . . . [.]" Ex. 20 at 662. This information is sufficient to warrant a hearing on the issue of Ybarra's competence to be executed. *Cf. Pate v. Robinson*, 383 U.S. 375, 387 (1966); NRS 176.425. Thus, it was error for the district court to deny this claim without directing the State to respond.

IV. Ybarra's execution violates the constitution.

Ybarra's execution violates the constitution. First, his lack of access to the clemency process is a denial of his due process and equal protection rights to a legislatively-created system that serves as an important check against the arbitrary imposition of the death penalty. Second, his execution will result in cruel and unusual punishment when representatives of the Nevada Department of Corrections have admitted an inability to carry out any execution in a manner that comports with the Nevada and federal constitutions. Finally, the sentencing scheme requiring a jury to "walk back" a sentence of death is unconstitutionally vague. Each of these claims is cognizable in a habeas petition and this Court should grant relief.

A. The unavailability of clemency is unconstitutional.

Claim Five asserts that the practical unavailability of clemency and the vagueness of clemency procedures violates Ybarra's due process rights. Procedural default does not bar this claim because it did not become ripe until an execution became imminent. The district court erred by denying this claim as meritless and not cognizable.

1. The district court's denial of Ybarra's claims that he impermissibly lacks meaningful access to Nevada's clemency process relies on the very gaps in the procedures that Ybarra unearthed.

Due process and equal protection require that death row inmates like Ybarra have meaningful access to a legislatively-created process, especially a process that has been recognized as a safeguard in death penalty proceedings. Robert Ybarra and Nevada's death row inmates have no meaningful access to the legislatively-created clemency process because there is no way to ensure that a death row inmate's petition will be heard by the Board, there is no way to determine when a death row inmate may file a clemency petition, and there is no notice from the Board to advise the death row inmate that his petition has been

selected (or denied) for review. These gaps make Nevada's clemency statute unconstitutionally vague.

The Legislature has passed statutes regarding death row inmates and the ability to seek commutation of their death sentence, meaning that the clemency process must be administered in accordance with due process. *See* NRS 213.030, 213.080, 213.085, 213.1099. And the Pardons Board has adopted Nevada Administrative Codes regarding death row inmates. *See e.g.*, NAC 213.120. Due process requires meaningful access to any legislatively-created process, yet because the NRS and NAC are missing key definitions, death row inmates like Ybarra are unable to meaningfully access this process. *See Goldsworthy v. Hannifin*, 86 Nev. 252, 256, 468 P.2d 350, 353 (1970) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)*, see also Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292, (1998)(O'Conner, J., concurring) (finding that if a state adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause). This includes a requirement for a meaningful opportunity to participate in the process and be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Nevada's clemency

process lacks these clear procedures, depriving Ybarra and others on Nevada's death row access to clemency.

Nevada's clemency and commutation process is unconstitutionally vague because it lacks key definitions, directives, and timelines that would give Ybarra and other death row inmates like him fair access to the process. *See* NRS 213.030, 213.080, 213.085, 213.1099. Specifically, the clemency statutes are missing key definitions and timelines to clearly guide users through the process. For example, the terms "judicial appeals" and "judicial remedies" are vague. *See* 20AA4869–72. These terms do not definitively or accurately advise death row inmates whether they are required to forego all litigation—including potentially life-saving civil litigation related to the selected execution protocol—or, whether they are required to complete only appeals of the underlying conviction and sentence. *See* 20AA4873.

Another example of vagueness relates to stays of execution related to commutation proceedings. NRS 176.415(1) provides that the Board has the authority to stay an execution. *See* 20AA4876–77. However, the accompanying regulations, such as Nevada Administrative Code (NAC) 213 and the Board's rules are silent as to this power and the process by

which a death row inmate can request the Board invoke it. *Id.* Nor does the statute or regulations contain any mechanisms to ensure that an inmate has had any notice of the receipt of any stay requests or the status of his application. *Id.* at 108.

Creating more confusion, the governing rules are applied to clemency applications arbitrarily. For example, although NAC 213.055 does allow the rules and the requirements in NAC 213.120 to be suspended, the provision only makes the problem of arbitrariness worse. NAC 213.055 suggests that any Board member, so long as the governor does not object, can override the rules set forth in the NAC and the Board's rules. NAC 213.120 and NAC 213.055 provide no meaningful way for a death row inmate to be heard during the clemency process.

Given all that the Nevada clemency and commutations process is missing, a person of ordinary intelligence would struggle to comply. The district court further overlooked the fact that the members of Nevada's death row, including Ybarra, suffer from a number of cognitive defects. It cannot be reasonably expected that Ybarra and the individuals in his

position would be able to follow such a process. Nevada's commutations and clemency procedure are vague and must be corrected.

2. This claim is cognizable in a habeas petition.

The district court denied Ybarra's claim that he was impermissibly denied access to the clemency process when it determined that this claim was incognizable on a postconviction petition because it did not implicate the validity of Ybarra's sentence. *See* 20AA4939–40. However, the district court overlooked that the availability of clemency proceedings is firmly rooted in the validity of the death penalty—the sentence imposed on Ybarra. In affirming the constitutionality of the death penalty, the United States Supreme Court acknowledged the essential role of executive clemency as a safeguard to the then-newly-written state statutes re-adopting the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 199 (1976). It follows that an individual's ability to access such a statutory process is inherent within the recognition of the necessity of the clemency process. It is the presence of this protection, in part, that validates the constitutionality of the death penalty. Thus, Ybarra's lack of access to this essential statutory process implicates the validity of his sentence and is

cognizable in a habeas petition. And so the district court erred in denying this claim.

Ybarra acknowledges that recently this Court has rejected a version of this argument in an unpublished decision. *See Floyd v. Gittere*, No. 83436, 2024 WL 4865438, at *2 (Nov. 21, 2024). Although this decision is not binding here, Ybarra asks this Court to reconsider its conclusion for the reasons stated above.

B. Ybarra's execution would result in cruel and unusual punishment.

Claim Six asserts that the execution protocol poses a substantial and unjustified risk of causing cruel pain and suffering in violation of the proscription against cruel or unusual punishment. 20AA4895–98. This claim is not procedurally defaulted because it did not become ripe until an execution became imminent. The district court denied this claim on the basis that it is not cognizable in a habeas proceeding because "it challenges the method in which the execution will occur, not a challenge to the validity of the judgment or sentence." 20AA4941 (citing *McConnell v. State*, 125 Nev. 243, 212 P.3d 307 (2009)). Insofar

as *McConnell* renders this claim incognizable, Ybarra requests that this Court revisit *McConnell*'s reasoning.

C. Nevada's capital sentencing scheme is unconstitutional.

Claim Seven asserts that this Court's decision in *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019), violates fair-notice requirements of the Due Process Clause and renders Nevada's capital sentencing scheme unconstitutionally vague. 20AA4899–4915. It also violates the Sixth Amendment right to a jury verdict. This claim is not procedurally defaulted because it did not become available until this Court issued the decision in *Castillo*.

For more than three decades, this Court's opinions were aligned with the plain language of the capital sentencing statute, which requires jurors to (1) find at least one statutory aggravating factor, and (2) determine that no mitigating circumstances outweigh that aggravating factor or factors. *See* NRS 175.554; 200.030(4)(a). Only after the jurors complete these two preliminary steps can they move to the third step, where they for the first time consider non-statutory aggravation and other-matter evidence relating to the victim and the

individual characteristics of the defendant. *See* NRS 175.552(3); *Burnside v. State*, 131 Nev. 371, 398, 352 P.3d 627, 646 (2015); *Butler v. State*, 120 Nev. 879, 895, 102 P.3d 71, 82–83 (2004).

However, in 2015, this Court first departed from its precedents and the statutory sentencing scheme in *Lisle v. State*. 131 Nev. 356, 351 P.3d 725 (2015) (characterizing the outweighing determination in Nevada as one of selection rather than eligibility). Only a few years later, this Court doubled down on its statement from *Lisle*. *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018). "[A] defendant is death-eligible," the Court newly held, "so long as the jury finds the elements of first-degree murder and the existence of one or more aggravating circumstances." *Id*. at 59, 412 P.3d at 54. Finally, in *Castillo*, the court read the outweighing step out of existence. This Court insisted that "the weighing of aggravating and mitigating circumstances is not part of the death-eligibility under [Nevada's] statutory scheme." *Castillo v. State*, 135 Nev. 126, 130, 442 P.3d 558, 561 (2019).

This unforeseeable expansion of narrow and precise statutory language defining death eligibility under *Castillo* cannot be applied retroactively to cases on collateral review, such as Ybarra's. *Bouie v.*

City of Columbia, 378 U.S. 347, 354 (1964) ("If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."); *see also Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) ("Due process prohibits the retroactive application of judicial interpretations of criminal statutes that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'"). Similarly, in Ybarra's case, this Court's change in the law announced in *Lisle* cannot be applied retroactively to cases that became final prior to 2015. Petitioners like Ybarra did not have fair notice at the time of their convictions that the finding of an aggravator alone was sufficient to make them eligible for the death penalty. *See*, *e.g.*, *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (internal citations omitted)); *Marks v. United States*, 430 U.S. 188, 191–92 (1977) (explaining due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties);

Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam) (holding trial court's interpretation of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); *Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam) (reversing conviction under state obscenity law because it did "not giv[e] fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

This Court's unforeseeable expansion of the narrow and precise statutory language defining death eligibility has rendered the statute unconstitutionally vague by creating two problems. First, the differing interpretations make the statute unconstitutionally vague under the Eighth Amendment. Because the Court has taken two opposite positions on the meaning of Nevada's death penalty statute, lay jurors could not be adequately informed of what facts they needed to find in order to consider or impose the death penalty. *See* 20AA4909–10. Some jurors likely interpreted weighing as an eligibility finding, while others likely interpreted weighing as a selection finding. 20AA4909–10. This necessarily leads to the arbitrary imposition of a death sentence, which

is constitutionally impermissible. 20AA4911. Second, the statute violates the Fourteenth Amendment's requirement that criminal statutes are sufficiently clear: that the statutes define prohibited criminal conduct with definiteness that can be understood by ordinary people without encouraging arbitrary or discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). With this Court's change in interpretation of the death penalty statute, an ordinary Nevadan will have difficulty knowing when a capital defendant is death-eligible, making the statute impermissibly vague.

This Court's reinterpretation of the capital sentencing scheme violates Ybarra's right to a jury trial as jurors make findings—jurors do not "walk back" findings. This Court's new interpretation of Nevada's death penalty statute requires a jury to "walk-back" a death-eligibility finding to a life sentence, rather than determining whether the mitigating evidence outweighs the aggravating evidence as a threshold question for considering eligibility for death. *See* 20AA4912. This "walk-back" interpretation is in direct conflict with the United State's Supreme Court's Sixth Amendment jurisprudence. *See Andres v. United States*, 333 U.S. 740, 748-49 (1948) (rejecting the interpretation of the

then-federal death penalty statute that required jurors to "walk-back" a death sentence); *Mullaney v. Wilbur*, 421 U.S. 684, 684–85 (1975) (rejecting a Maryland statute that required a jury to "walk-back" a homicide to manslaughter by finding that the defense, rather than the State, had proven an affirmative defense). Because this "walk-back" interpretation of the Nevada death penalty statute violates Ybarra's constitutional rights, this error is structural and not harmless. Ybarra is entitled to relief.

The district court erred in denying this claim. The court ruled that the claim is not cognizable because the claim "does not implicate the validity of his conviction or sentence." 20AA4941. However, the unconstitutional sentencing scheme does implicate the validity of his sentence: Ybarra was entitled to have the finding that the aggravating circumstances did not outweigh the mitigating circumstances submitted to the jury and proven beyond a reasonable doubt. *Castillo*, which rejects this argument, does so by ignoring the law as it was at the time of Ybarra's conviction and by creating a walk-back regime. The district court also held that "Ybarra's conviction was over 40 years ago and followed the law he favors." 20AA4941. This is not so. At the time of

Ybarra's conviction, outweighing was a prerequisite to death-eligibility, but this issue was not submitted to the jury as requiring a finding beyond a reasonable doubt. *See Ybarra v. State*, 100 Nev. 167, 174, 679 P.2d 797, 801 (1984).

V. Ybarra is entitled to an evidentiary hearing.

As discussed above, the district court denied Ybarra's petition without requiring the State to respond; this was error. *See* § I above. Because of this error, the district court did not rule on whether Ybarra is entitled to an evidentiary hearing. He is.

This Court has "long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (citing *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984)). This right applies to an argument in support of excusing procedural default. *See Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 254 (1997).

As detailed above, Ybarra has provided extensive evidence in support of his mental illness and intellectual disability. This evidence

shows that executing Ybarra would result in a miscarriage of justice because he is actually innocent of the death penalty: specifically, he has severe mental illness, which Ybarra asks this Court to recognize as a categorical exemption, § II(A) above; he has intellectual disability, which renders him ineligible for the death penalty, § II(B) above; and he is incompetent to be executed, § III above.

Thus, Ybarra is entitled to an evidentiary hearing so that he may present evidence in support of his actual innocence of the death penalty.

CONCLUSION

For the foregoing, Ybarra respectfully requests that this Court reverse the Seventh Judicial District Court, hold that Ybarra is ineligible for execution because he has severe mental illness and intellectual disability. In the alternative, this Court should remand for an evidentiary hearing.

Additionally, this Court should hold the NRS 176.425 is unconstitutional, and that no execution may proceed because there is no legal mechanism for Ybarra to have his competency to be executed evaluated. In the alternative, this Court should hold that Ybarra is

incompetent to be executed, or remand for competency evaluation and an evidentiary hearing.

Finally, this Court should hold that Ybarra's execution would violate the state and federal constitutions, for the reasons stated above.

Dated this 14th day of May, 2025.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Randolph M. Fiedler
Randolph M. Fiedler
Assistant Federal Public Defender

/s/ Hannah D. Nelson
Hannah D. Nelson
Assistant Federal Public Defender

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook.

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 proportionately spaced, has a typeface of 14 points or more and contains 32,816 words.

3. Finally, I hereby certify that I have read this appellate 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.

Dated this 14th day of May, 2025.

/s/ Randolph M. Fiedler

Randolph M. Fiedler
Nevada State Bar No. 12577
Assistant Federal Public Defender
Federal Public Defender, District of Nevada
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2025, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Aaron Ford
Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701
jconner@ag.nv.gov

Melissa A. Brown,
White Pine County District Attorney
White Pine County Courthouse
1786 Great Basin Blvd., Suite 4
Ely, NV 89301
mabrown@whitepinecountynv.gov

/s/ Lisa Keller
An Employee of the
Federal Public Defender