In the Supreme Court of the State of Nevada

Case No. 89824

ROBERT YBARRA, JR.,
Appellant,

v.

TERRY ROYAL, WARDEN, ELY STATE PRISON,
Respondent.

Appeal from Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Seventh Judicial District, White Pine County
The Honorable Steve L. Dobrescu

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

William R. Bay
President
AMERICAN BAR ASSOCIATION
321 N. Clark Street
Chicago, Illinois 60610
(312) 988-5000
amicusbriefs@americanbar.org

Daniel Woofter
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue NW
Suite 200
Washington, DC 20006
(202) 240-8433
dhwoofter@russellwoofter.com

Kyle E. N. George
Counsel of Record
Nevada State Bar No. 13489
3909 S Maryland Pkwy
Suite 314
Las Vegas, NV 89119
(512) 653-5623
kgeorge@kylegeorgelaw.com

Counsel for Amicus Curiae

Case No. 89824

ROBERT YBARRA, JR.,
Appellant,

v.

TERRY ROYAL, WARDEN, ELY STATE PRISON,
Respondent.

NRAP 26.1 DISCLOSURE

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

Amicus, the American Bar Association, is a non-profit organization with no parent corporation and no publicly held company owns ten percent (10%) or more of its stock.

The following non-governmental organizations and law firms have appeared or are expected to appear in this Court:

1. The American Bar Association, as amicus curiae.
2. Attorney Kyle E. N. George, as counsel of record for amicus curiae American Bar Association.
3. The Nevada State Public Defender represented Ybarra during trial and direct appeal, specifically the following attorneys:

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

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

5. 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.

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

Respectfully submitted,

/s/ Kyle E. N. George
Kyle E. N. George
Counsel of Record
Nevada State Bar No. 13489
3909 S Maryland Pkwy
Suite 314
Las Vegas, NV 89119
(512) 653-5623
kgeorge@kylegeorgelaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Proposed Legislation

Rules

Other Authorities

ABOUT THE BRIEF AND AMICUS CURIAE[1]

The American Bar Association (ABA)—the largest voluntary association of attorneys and legal professionals in the world—includes prosecutors, public defenders, private defense counsel, attorneys in law firms, corporations, nonprofit organizations, and government agencies. Its membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to improve the justice system. Although the ABA takes no position on the death penalty, it has long insisted that capital punishment be administered fairly, with robust substantive and procedural protections. The ABA has conducted extensive studies and adopted numerous policies on the application of the

---

[1] This brief is filed with written consent of the parties. *See* Addendum (written consent of the parties by email); NRAP 29(a) ("Any other amicus curiae may file a brief ... if accompanied by written consent of all parties."). No party or party's counsel authored the brief in whole or in part. *See* NRAP 29(c)(5)(A). No person other than the amicus curiae, its members, or its counsel contributed money or other consideration intended to fund preparing or submitting this brief. *See* NRAP 29(c)(5)(B).

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions here. This brief was not circulated to the Judicial Division Council before filing.

death penalty to vulnerable populations. *See* ABA Death Penalty Representation Project, *Death Penalty Representation Policy*, Am. Bar. Ass'n, https://tinyurl.com/y4xawkwr (last visited Apr. 10, 2025) (collecting ABA policy positions related to the death penalty).

In 1986, the ABA founded the Death Penalty Representation Project to provide training, technical assistance, and guidelines to help judges and lawyers in death-penalty jurisdictions understand the requirements for effective representation. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003), *available at* https://ambar.org/2003guidelines (last visited Apr. 10, 2025). In 2001, the ABA Section of Individual Rights & Responsibilities recommended protocols to improve death penalty administration. *See* ABA Section of Individual Rights & Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (2001). These protocols recognize that "mental illness," like intellectual disability, "affects every stage of a capital trial"—it "is relevant to the defendant's competence to stand trial; it may provide a defense to the

murder charge; and it can be the centerpiece of the mitigation case." *Id.* at 56-64.

In the early 2000s, the ABA recognized that the factors that led the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), to bar execution of intellectually disabled persons might apply equally to individuals with severe mental illness. To examine this issue thoroughly, the ABA established the Task Force on Mental Disability and the Death Penalty, comprising 24 lawyers, mental-health practitioners, and academics. After nearly two years of deliberation, the ABA concluded that the death penalty should not be imposed on defendants "if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law." ABA Resolution 06A122A (Aug. 7-8, 2006), https://tinyurl.com/3xj5xdrx.[3] The position stemmed from the ABA's

[3] The policy also opposed the death penalty for those who "at the time of the offense ... had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury." ABA Resolution 06A122A, at 1.

conclusion that defendants with severe mental disorders at the time of the offense should not be executed if they meet the criteria enumerated above, separate and apart from any determinations of competency to stand trial.

The ABA has continued to work on these issues. In 2016, the ABA's Death Penalty Due Process Review Project published a white paper for states to use in developing laws that establish clear standards to prevent the execution of those with severe mental illness. *See* ABA, Death Penalty Due Process Review Project, *Severe Mental Illness and the Death Penalty* (2016) (ABA Mental Illness White Paper) (available for direct download at https://tinyurl.com/mwarxkf5). The white paper reviewed legal and medical literature, existing legal mechanisms, case law, and public policy concerns related to executing such vulnerable individuals.

Having conducted this extensive work, the ABA submits this brief to assist the Court's consideration of whether executing individuals with severe mental illness at the time of their crime comports with the United States and Nevada Constitutions.

SUMMARY OF THE ARGUMENT

United States Supreme Court precedent compels the conclusion that individuals suffering from severe mental illness at the time of their crimes should not face execution. *Infra* I. The Court has already categorically exempted both the intellectually disabled and juveniles from execution based on their diminished culpability and the heightened risk of unfair proceedings. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005). No principled distinction exists for treating those with severe mental illness differently.

This conclusion is further supported by three compelling policy considerations. *Infra* II. First, neither retribution nor deterrence—the twin pillars justifying capital punishment—applies when a defendant's perception of reality, logical reasoning, and ability to exercise rational judgment were significantly impaired at the time of the crime. *Infra* II.A. Second, capital proceedings are inherently less reliable and fair for the severely mentally ill; these defendants are more likely to falsely confess, less capable of presenting effective mitigation, and less able to help counsel mount a defense. *Infra* II.B. Third, a growing consensus—reflected in professional standards, emerging state legislation, and

evolving public opinion—recognizes that executing the severely mentally ill is wrong. *Infra* II.C.

Existing procedural and substantive protections fail to address these fundamental concerns. The only adequate solution is a categorical prohibition against executing individuals who suffered from severe mental illness at the time of their crimes. *Infra* II.D.

ARGUMENT

Exempting from execution individuals who were suffering from severe mental illness at the time of their crimes is both (I) legally compelled by existing Supreme Court precedent and (II) strongly supported by sound policy.

I. U.S. SUPREME COURT PRECEDENT REQUIRES REVERSAL.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court categorically barred execution of intellectually disabled persons and juveniles for reasons that apply with equal force to those suffering from severe mental illness at the time of their crimes. *See* ABA Resolution 06A122A, at 6-8 (Report to House of Delegates). "[A] careful comparison of the language used in *Atkins* to describe the characteristics of intellectual disability

that lower a defendant's culpability and the symptoms characteristic of severe mental illness shows how much the reasoning of the Court applies with equal force to defendants with mental illness." ABA Mental Illness White Paper, at 29.

In *Atkins*, the Court held that "death is not a suitable punishment for a[n intellectually disabled] criminal," 536 U.S. at 321, mainly because their moral culpability falls below the threshold required for capital punishment. "[B]y definition," people with intellectual disabilities have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," all of which diminish their moral culpability. *Id.* at 318; *see also Roper*, 543 U.S. at 570 (juveniles are less culpable due to their "vulnerability and comparative lack of control over their immediate surroundings"). Given that "the culpability of the average murderer is insufficient to justify" the death penalty, it naturally follows that "the lesser culpability of" an intellectually disabled defendant "does not merit that form of retribution." *Atkins*, 536 U.S. at 319.

The same impairments render capital punishment ineffective as deterrence. Individuals with intellectual disabilities are less able to "process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320; *see also Roper*, 543 U.S. at 571 ("[I]t is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles ... [because] the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

The Court also identified a "second," independent justification for categorically exempting people with intellectual disabilities: Their impairments jeopardize the reliability and fairness of capital proceedings. *Atkins*, 536 U.S. at 320-21. This results not only from their heightened vulnerability to false confessions but also from their "lesser ability" to "make a persuasive showing of mitigation" and to "give meaningful assistance to their counsel." *Id.* at 320. And intellectually disabled defendants make "typically poor witnesses," often giving an "unwarranted impression of lack of remorse." *Id.* at 320-21. Consequently, evidence of intellectual disability can act as a "two-edged sword" that

juries may wrongly treat as aggravating rather than mitigating. *Id.* at 321.

Recognizing the public consensus against executing people with intellectual disabilities, *Atkins*, 536 U.S. at 314-16, the Court concluded that such executions constitute "cruel and unusual punishment[]" prohibited by the Eighth Amendment. *Id.* at 307, 321.

As demonstrated below, every consideration that drove the Court's decisions in *Atkins* and *Roper* applies with equal force to defendants with severe mental illness. Their cognitive and volitional impairments parallel those with intellectual disabilities in all relevant respects, rendering the retribution and deterrence rationales for capital punishment inapplicable. *See infra* II.A. Their inability to participate effectively in their own defense fundamentally undermines the fairness of capital proceedings. *See infra* II.B. And a national consensus has emerged against executing individuals with severe mental illness. *See infra* II.C.

Individuals with severe mental illness "should be tried and punished when they commit crimes," just like the intellectually disabled. *See Atkins*, 536 U.S. at 306; *see also infra* II.D. But the correct approach "rests on the traditional understanding that significant cognitive or

volitional impairment attributable to a severe disorder or disability often renders the death penalty disproportionate to the defendant's culpability, even though the offender may still be held accountable for the crime." ABA Resolution 06A122A, at 10 (Report to House of Delegates). This approach recognizes that severe mental illness both diminishes culpability and compromises the reliability of capital proceedings. It strikes the appropriate balance and should be adopted by this Court.

II. THOSE SUFFERING FROM SEVERE MENTAL ILLNESS AT THE TIME OF THEIR CRIMES SHOULD NOT BE EXECUTED.

A. Executing the severely mentally ill serves neither retribution nor deterrence.

Capital punishment rests on twin justifications: retribution and deterrence. *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002). The underlying logic is straightforward—the worst crimes deserve the harshest punishment, and imposing this penalty will deter similar crimes. This logic collapses when applied to defendants with severe mental illness. These individuals lack the culpability necessary for retribution, and their impaired rational capacity renders them largely immune to deterrence.

For retribution to justify capital punishment, execution must be limited to "those offenders who commit a narrow category of the most

serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Individuals with severe mental illness fundamentally lack this extreme culpability. Severe mental disorders, in "their acute state," typically manifest through "delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment." ABA Resolution 06A122A, at 6 (Report to House of Delegates). Those suffering from severe mental illness possess substantially impaired capacity to understand others' reactions, respond appropriately to them, and even recognize their own illness. ABA Mental Illness White Paper, at 29; *see* Nat'l All. on Mental Illness, *Schizophrenia*, http://bit.ly/2ydBq6k (last visited Apr. 8, 2025).

These symptoms directly diminish moral culpability. A person cannot possess the extreme culpability necessary for capital punishment when his illness impairs his ability to accurately interpret reality, fully comprehend the consequences of his actions, or control those actions. *See* ABA Resolution 06A122A, at 5-6 (Report to House of Delegates); ABA Mental Illness White Paper, at 25. The U.S. Constitution does not permit

the death penalty based on "the culpability of the average murder," which is "insufficient to justify" the ultimate punishment. *Atkins*, 536 U.S. at 319; *see, e.g.*, *Canape v. State*, 2016 WL 2957130, at *3 (Nev. May 19, 2016) ("[M]urder, while reprehensible, does not qualify as the worst of the worst.") (quotation marks omitted). The death penalty is therefore off limits as a punishment for crimes committed while the defendant was suffering from severe mental illness; it defies logic and common sense that "a person belonging to a more vulnerable group in society, would also, at the same time, be among the most culpable individuals who possess the highest level of culpability." ABA Mental Illness White Paper, at 25.

Contrary to popular misconception, individuals with severe mental illness are not inherently more violent. The evidence shows they contribute minimally to violent crime rates and are far more likely to be victims of violence than perpetrators. Multiple studies confirm that "severe mental illness alone d[oes] not predict future violence." Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 Arch. Gen. Psychiatry 152, 152 (2009) (noting historical, clinical, dispositional, and contextual factors that, in

conjunction with severe mental illness, may correlate with violent behavior). In fact, less than 5% of U.S. crimes involve people with mental illness. Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 Am. J. Pub. Health 240, 241 (2015) (citing Paul S. Appelbaum, *Violence and Mental Disorders: Data and Public Policy*, 163 Am. J. Psychiatry 1319, 1319-21 (2006)). When people with mental illness do act violently, these acts typically result "from lack of needed mental health services," not from an unusually culpable state of mind. Nat'l All. on Mental Illness, *Violence and Gun Reporting Laws*, http://bit.ly/426swXc (last visited Apr. 8, 2025).

The same deficiencies that reduce culpability also render deterrence ineffective. Schizophrenia—one diagnosis at issue here—illustrates how severe mental illness fundamentally undermines the deterrence rationale. Symptoms include delusions, trouble with logical reasoning, problems with attention, and declining cognitive performance. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 99-101 (5th ed. Text Revision 2022) (DSM-5-TR). Many have impaired communication capacity, including diminished ability to initiate plans, speak, express emotion, or understand the intention of others. *Id.*

at 99, 101. In some cases—as Mr. Ybarra's counsel describes as occurring from the earliest stages of these proceedings and continuing even after treatment—defendants with schizophrenia refuse to discuss their illness entirely, even with counsel or close family and may lack awareness of their disorder. *Id.* at 101.

These individuals frequently exhibit delusional or paranoid thinking, severely limiting their ability to analyze past experiences logically or draw appropriate conclusions. *See* DSM-5-TR at 100. They may be overwhelmed by feelings of hopelessness and worthlessness, further hindering logical reasoning. *See id.* at 101. And like many with severe mental illness, those with schizophrenia often lack impulse control, displaying bizarre behavior or abnormal movements that can lead to increased risk-taking. *Id.* at 100-02.

Capital punishment "can serve as a deterrent only when murder is the result of premeditation and deliberation." *Atkins*, 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 799 (1982)). To "justify the [death] penalty on grounds of deterrence," one must assume "the offender behaves in a rational way." *Kennedy v. Louisiana*, 554 U.S. 407, 445 (2008). People suffering from severe mental illness have a "diminished

ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," *Atkins*, 536 U.S. at 320, making them far less likely to engage in the rational calculation that forms the basis of deterrence theory. Exempting from execution those suffering from severe mental illness at their crime's commission would have no meaningful impact on deterrence—either for those without severe mental illness, who would still face capital punishment, or for those with such illness, who cannot make the rational calculus that deters criminal behavior.

B. Severe mental illness jeopardizes the reliability and fairness of capital proceedings.

Severe mental illness fundamentally undermines the reliability and fairness of capital proceedings. Our criminal justice system depends on robust adversarial testing to ensure that death sentences befall only the worst offenders. Yet the same characteristics that diminish the culpability of individuals with severe mental illness also cripple the procedural protections our capital jurisprudence vigilantly safeguards. ABA Mental Illness White Paper, at 31-33; *see Atkins*, 536 U.S. at 317. This creates an unacceptable risk that death sentences for these defendants will be unreliable and unjust.

First, severe mental illness dramatically elevates the risk of wrongful execution. As the Supreme Court has recognized, "the possibility of false confessions" heightens the "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S. at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Studies consistently show that defendants with mental illness are particularly prone to false confessions. *See, e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 973-74 (2004) (finding that persons with mental illness are particularly vulnerable to giving false confessions); *see also* Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 L. & Hum. Behav. 79, 87 (2010) (finding that 22% of those with mental illness report giving false confessions). These defendants also have diminished understanding of their *Miranda* rights—another factor driving false confessions. *See* Richard Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 L. & Hum. Behav. 401, 408 (2007) (only 10% of defendants with mental illness adequately understand *Miranda* rights).

Second, severely mentally ill defendants face a profoundly unjust paradox in capital sentencing: although their illness should mitigate punishment, jurors routinely treat it as an aggravating factor. *See* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 57-58 (2000); Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 299 (1989); *see also* Marla Sandys et al., *Aggravation and Mitigation: Findings and Implications*, 37 J. Psychiatry & L. 189 (2009) (finding that jurors' sentencing decisions are often based on their assessment of future dangerousness and lack of remorse, while mitigation evidence is ignored). Research shows that insanity or incompetence claims strongly correlate with death sentences. *See generally* David Baldus et al., *Equal Justice and the Death Penalty* (1990).

This bias stems largely from how mental illness affects courtroom presentation and juror perception. "Severe mental illness may create an unwarranted impression of lack of remorse due to the defendant's psychotic behavior and/or the side effects of psychotropic medication." ABA Mental Illness White Paper, at 32 (quotation marks omitted); *compare Atkins*, 536 U.S. at 320-21 (intellectually disabled defendants

"are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes"). During psychotic episodes, a severely mentally ill defendant may become agitated, make inappropriate comments, and struggle to control movements—behaviors jurors often interpret as reflecting dangerousness or impulsivity. *See* ABA Mental Illness White Paper, at 23. Yet when heavily medicated, these defendants may display a flat affect or even doze off during trial or the sentencing phase, creating the devastating impression of remorselessness. *See* Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illness*, 54 Cath. U. L. Rev. 1153, 1164 (2005). Mental illness thus becomes "a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Cf. Atkins*, 536 U.S. at 321 (so reasoning as to intellectual disability). Indeed, the stigma sometimes leads defendants to refuse presentation of any mental illness evidence in mitigation. *See* ABA Mental Illness White Paper, at 23; *see, e.g.*, Brief for ABA as Amicus Curiae Supporting Appellant and Reversal, *Vanisi v. Gittere*, No. 78209 (Nev. Oct. 3, 2019), at 13 (describing how "the stigma of mental illness" led Mr. Vanisi, who suffered from schizoaffective

disorder, "to refuse any mitigating evidence to be presented about [his] illness at all").

Third, severe mental illness profoundly impairs a defendant's ability to assist in his own defense. For capital proceedings to function fairly, defendants must be able to work effectively with counsel. Yet severe mental illness directly interferes with this critical relationship. Defendants may forget or confuse exculpatory evidence and struggle to communicate with counsel, complicating an attorney's already challenging task of securing acquittal or presenting effective mitigation evidence. ABA Mental Illness White Paper, at 23, 33-34; *see* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1007 (2003) ("Many capital defendants are severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality.") (Guideline 10.5 (Commentary)). And paranoid delusions can make defendants suspicious of their attorneys' motives, ABA Mental Illness White Paper, at 23, as Mr. Ybarra's counsel argues was a feature of every stage of the proceedings in this case. Ultimately,

"the very characteristic that diminishes the mentally ill defendant's culpability jeopardizes his attorney's ability to prepare and present the case that would persuade the jury to return a life sentence." Scott 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, 514 (2014).

For these reasons, severely mentally ill defendants "face a special risk of wrongful execution," *cf. Atkins*, 536 U.S. at 321, because they cannot either prove their innocence or persuade the jury that their illness mitigates, rather than aggravates, their punishment.

C. The emerging professional and legislative consensus is that executing the severely mentally ill is wrong.

A powerful professional and legislative consensus has emerged against executing those who suffered from severe mental illness when committing their crimes.

The consensus among legal and mental health organizations is particularly strong. The ABA adopted this position nearly 20 years ago after exhaustive study and deliberation. *See* ABA Resolution 06A122A. The American Psychiatric Association, American Psychological Association, and National Alliance on Mental Health collaborated with

the ABA to develop this position and adopted nearly identical policies. Am. Psychological Ass'n, *Associations Concur on Mental Disability and Death Penalty Policy*, 38 Monitor on Psychology 14 (Jan. 2007), https://tinyurl.com/snu6nju2 (last visited Apr. 10, 2025); *see* Am. Psychological Ass'n Council of Representatives, Council Policy Manual, ch. IV, *Mental Disability and the Death Penalty* (2006), https://tinyurl.com/3mxfcw82 (last visited Apr. 10, 2025); Nat'l All. on Mental Illness, *Death Penalty*, https://tinyurl.com/2dyrvz7u (last visited Apr. 8, 2025). Mental Health America subsequently adopted a similar stance. Mental Health Am., *Position Statement 54: Death Penalty and People with Mental Illness* (June 14, 2016), https://tinyurl.com/yf67fmhk (last visited Apr. 8, 2025). These policies reflect an overwhelming consensus among legal and mental health professionals that executing defendants with severe mental illness is categorically wrong.

This consensus is increasingly reflected in state legislation within jurisdictions that still impose capital punishment. Both Ohio and Kentucky enacted severe mental illness exclusions from capital

punishment within the last few years.[4] Other States are trending in the same direction. The Texas House passed comparable legislation in both 2019 and 2023. Tex. H.B. 727, 88th Leg., Reg. Sess. (2023) (passed Texas House on Apr. 5, 2023); Tex. H.B. 1936, 86th Leg., Reg. Sess. (2019) (passed Texas House on May 9, 2019). Arizona proposed similar legislation in 2023. *See* Ariz. S.B. 1474, 56th Leg., 1st Reg. Sess. (2023) (adding the specific language "or to have had a serious mental illness at the time of the commission of the offense" to exclusions). Others have also recently begun to consider such legislation. *See generally* Death Penalty Info. Ctr., *Recent Legislative Activity*, https://tinyurl.com/2s3mhmzm (last visited Apr. 8, 2025) (providing state surveys of proposed legislation by year).

This legislative momentum is significant; "it is not so much the number of these States that is significant, but the consistency of the

[4] *See* Ohio Rev. Code § 2929.025 (2021) (barring death penalty if at the time of the offense the offender had schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder that significantly impaired his judgment, capacity, or understanding); Ky. Rev. Stat. §§ 532.130 et seq., as amended by 2022 Ky. Acts ch. 130 (H.B. 269) (excluding defendants with a documented diagnosis of schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder from capital punishment, if active symptoms were present at the time of the offense).

direction of change." *Atkins*, 536 U.S. at 314-15 (noting the importance of trends in state legislation, rather than absolute numbers). Indeed, Virginia considered such legislation in 2019. *See* Va. S.B. 1137, 2019 Reg. Sess. (Va. 2019). Rather than pass such legislation, Virginia ultimately decided to abolish the death penalty altogether in 2021. *See* 2021 Va. Acts chs. 344–345 (Spec. Sess. I).

D. Existing procedural and substantive protections are inadequate to address these concerns.

Current legal mechanisms—including competency standards and the insanity defense—fail to adequately protect defendants with severe mental illness from execution. *See* ABA Mental Illness White Paper, at 19-25. Competency rules focus on a defendant's mental state at either trial or execution—not at the time of the crime—and therefore do not address culpability or the appropriateness of capital punishment. *See* Haleigh Reisman, Note, *Competency of the Mentally Ill and Intellectually Disabled in the Courts*, 11 J. Health & Biomedical L. 199, 212 (2015).

The insanity defense, while focused on the defendant's mental state when committing the crime, is simultaneously too narrow and too sweeping: It applies only to a handful of cases involving specific manifestations of mental illness, and in those cases eliminates criminal

liability entirely. ABA Mental Illness White Paper, at 20-21. It appears in merely 1% of criminal cases nationally and succeeds in only a quarter of those instances. *Id.* at 21. In practice, it has proven woefully inadequate at protecting the severely mentally ill from execution. *See, e.g.*, *id.* at 22 (citing Baldus, *supra*); Brooke Butler & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. Applied Soc. Psychol. 1744, 1744, 1753 (2006).

That is because most jurisdictions, including this jurisdiction, employ the restrictive *M'Naghten* "right from wrong" standard, which requires defendants to demonstrate that they were completely unable to appreciate that what they were doing was wrong when they committed their crimes. *See Finger v. State*, 117 Nev. 548, 576-77 (2001). "This is a very narrow standard," and this Court "understand[s] that few people will qualify as legally insane under the M'Naghten rule." *See id.* at 577. As this Court has explained the rule's limitations: "Persons suffering from a delusion that someone is shooting at them, so they shot back in self-defense are insane under *M'Naghten*. Persons who are paranoid and believe that the victim is going to get them some time in the future, so they hunt down the victim first, are not." *Id.* at 576. The insanity defense

in this State thus excludes people "who have a mood disorder with psychotic features [and who] might understand the wrongfulness of their acts, but nonetheless feel impervious to punishment because of delusion-inspired grandiosity." *See* ABA Mental Illness White Paper, at 21 & n.103 (quoting ABA Resolution 06A122A, at 8 (Report to House of Delegates, discussing inadequacy of *M'Naghten* rule)) (alteration in original).

So too, death-qualified jurors (those willing to impose the death penalty) are "more likely to endorse certain insanity myths," including misconceptions that the defense is frequently used, that the insanity defense is a "legal loophole," and that defendants found not guilty by reason of insanity are immediately released back into society. ABA Mental Illness White Paper, at 21 & nn.105-06 (quoting Butler, *supra*, 36 J. Applied Soc. Psychol. at 1744, 1752). These prejudices make jurors inherently skeptical of the insanity defense even when it is legitimately raised. *Ibid.* Because of the *M'Naghten* legal definition's narrowness and jurors' inherent skepticism, many defendants with severe mental illness and their lawyers elect not to assert the defense at trial, knowing it is either inapplicable or unlikely to succeed. *See ibid.*

The case of Scott Panetti provides a striking example of the insanity defense's failure. *See* ABA Mental Illness White Paper, at 20-21. Despite his documented history of schizophrenia, including multiple hospitalizations and severe hallucinations, Mr. Panetti was found competent to stand trial and allowed to represent himself. *See id.* at 20. Although he attempted to assert the insanity defense amid his bizarre trial behavior—including dressing in a cowboy costume and trying "to subpoena the Pope, John F. Kennedy, and Jesus Christ"—the jury rejected his insanity defense and sentenced to death. *See ibid.*

Exempting from execution (but not from liability) defendants with severe mental illness, as the ABA has endorsed, "provides a middle ground protection for individuals who do not fit the extremely narrow insanity defense requirements, but who have significant mental impairments that make them undeserving of the death penalty." ABA Mental Illness White Paper, at 2, 21. This approach strikes the proper balance between accountability and justice.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

/s/ Kyle E. N. George

Kyle E. N. George
Counsel of Record
Nevada State Bar No. 13489
3909 S Maryland Pkwy
Suite 314
Las Vegas, NV 89119
(512) 653-5623
kgeorge@kylegeorgelaw.com

William R. Bay
President
AMERICAN BAR ASSOCIATION
321 N. Clark Street
Chicago, Illinois 60610
(312) 988-5000
amicusbriefs@americanbar.org

Daniel Woofter
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue NW
Suite 200
Washington, DC 20006
(202) 240-8433
dhwoofter@russellwoofter.com

Counsel for Amicus Curiae

May 21, 2025

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. 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 Office 365 Word in NewCenturySchlbk LT Std 14-point.

2. This brief complies with the page- or type-volume limitations of NRAP 29(d), NRAP 32(a)(5), and NRPA (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 4,960 words.

3. 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 21st day of May, 2025

Respectfully submitted,

/s/ Kyle E. N. George
Kyle E. N. George
Counsel of Record
Nevada State Bar No. 13489
3909 S Maryland Pkwy
Suite 314
Las Vegas, NV 89119
(512) 653-5623
kgeorge@kylegeorgelaw.com

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on May 21, 2025. The following participants in the case will be served by the electronic filing system:

Randolph M. Fiedler
Assistant Federal Public Defender
randolph_fiedler@fd.org

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

Respectfully submitted,

/s/ Kyle E. N. George

Kyle E. N. George
Counsel of Record
Nevada State Bar No. 13489
3909 S Maryland Pkwy
Suite 314
Las Vegas, NV 89119
(512) 653-5623
kgeorge@kylegeorgelaw.com

ADDENDUM

Daniel Woofter

From: Melissa A. Brown <MABROWN@whitepinecountynv.gov>
Sent: Thursday, May 15, 2025 1:44 PM
To: Randolph Fiedler; marcpickerlaw@gmail.com; kgeorge@kylegeorgelaw.com; Daniel Woofter; Chris Peterson; navid@ztlawgroup.com; Lisa Rasmussen; john.piro@clarkcountynv.gov
Subject: RE: Ybarra v. Warden, No. 89824; Amicus Briefs

I do not oppose the filing of amicus briefs.

Melissa

Melissa A. Brown
White Pine County District Attorney
1786 Great Basin Boulevard, Suite 4
Ely, Nevada 89301
775-293-6565
mabrown@whitepinecountynv.gov

From: Randolph Fiedler <Randolph_Fiedler@fd.org>
Sent: Wednesday, May 14, 2025 2:38 PM
To: marcpickerlaw@gmail.com; kgeorge@kylegeorgelaw.com; Daniel Woofter <dhwoofter@russellwoofter.com>; Chris Peterson <peterson@aclunv.org>; navid@ztlawgroup.com; Lisa Rasmussen <Lisa@nvlitigation.com>; john.piro@clarkcountynv.gov
Cc: Melissa A. Brown <MABROWN@whitepinecountynv.gov>
Subject: Ybarra v. Warden, No. 89824; Amicus Briefs

All:

I understand the following organizations are interested in filing an amicus brief in this case:
AAIDD & NV-Arc (Marc Picker)
American Bar Association (Kyle George & Daniel Woofter)
ACLU & ACLU of Nevada (Chris Peterson)
Boyd Law Professors (Navid Afshar)
NACJ (Lisa Rasmussen)
Public Defender Offices in Nevada (John Piro)

Counsel for Ybarra consents to the filing of these amicus briefs.

I have cc'd opposing counsel, White Pine District Attorney Melissa Brown, so she can take a position on these briefs if she would like to.

Best,

-Randy

Randolph M. Fiedler
Assistant Federal Public Defender
District of Nevada
411 E. Bonneville Ave., #250
Las Vegas, Nevada 89101
P. 702.388.6577
F. 702.388.6261
randolph_fiedler@fd.org