IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 89824

ROBERT YBARRA, JR.,

Appellant,

v.

TERRY ROYAL, WARDEN,

Respondent.

Appeal From
The Seventh Judicial District, White Pine County
The Honorable Steve L. Dobrescu, District Judge
Dist. Ct. Case Nos.: CR-0001511, HC-2410004
Capital Case

Amicus Brief of the Clark County Public Defender, Clark County Special Public Defender, Nevada State Public Defender, Washoe County Alternate Public Defender, Washoe County Public Defender, and Elko County Public Defender, in support of Appellant

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NRAP 26.1 DISCLOSURE

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

The entities are as follows: (1) Clark County Public Defender; (2) Clark County Special Public Defender; (3) Nevada State Public Defender; (4) Washoe County Alternate Public Defender; (5) Washoe County Public Defender; and (6) Elko County Public Defender.

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NRAP 29(C)(5) DISCLOSURE

The undersigned counsel of record certifies that no attorney for either party took part in authoring this brief, in whole or in part. In addition, undersigned counsel certifies that no person or entity contributed money or other consideration to fund the preparation or submission of this brief.

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I. CLARK COUNTY PUBLIC DEFENDER

The Clark County Public Defender's Office ("CCPD") is the largest indigent defense office in Nevada. CCPD endeavors to provide high-quality, zealous representation to individuals accused of crimes in Las Vegas, North Las Vegas, Henderson, and the surrounding areas. Further, CCPD has a designated team of dedicated and skilled attorneys to represent indigent clients accused of murder. Members of this team work with severely mentally ill people daily and are well-acquainted with the challenges of defending them. Because severe mental illness fundamentally alters and unavoidably limits an attorney's ability to provide the requisite effective assistance of counsel required in capital cases, CCPD urges this Court to stop the execution of severely mentally ill persons.

II. CLARK COUNTY SPECIAL PUBLIC DEFENDER

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

The SPD office includes highly trained and experienced attorneys, who handle the most severe cases, and has extensive experience in working with clients who are severely mentally ill. The SPD joins this brief to strongly support the Court excluding severely mentally ill persons from those eligible for execution.

III. NEVADA STATE PUBLIC DEFENDER

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

IV. WASHOE COUNTY ALTERNATE PUBLIC DEFENDER

The Alternate Public Defender ("APD") protects the constitutional rights of the indigent accused through courageous and compassionate advocacy in Washoe County Courtrooms. This office represents adult and

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

V. WASHOE COUNTY PUBLIC DEFENDER

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

VI. ELKO COUNTY PUBLIC DEFENDER

The Elko County Public Defender's Office (ECPD) represents indigent defendants in all manner of criminal cases throughout Elko County, from simple misdemeanors up to capital murder cases. Our caseload includes defending people who suffer from a number of severe mental illnesses. Some of those people are so debilitated by their mental illness that imposing the most severe and irreversible punishment, the death penalty, is not appropriate. As scientific research has increased our understanding of mental illness our social and moral consciousness has kept pace and changed to better serve our communities and each other. The law in Nevada, however, has not caught up. For these reasons, The ECPD joins in the opposition to executing some of society's most vulnerable members, the severely mentally ill.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Every day, public defenders across Nevada represent the severely mentally ill people within a well-intentioned but ill-equipped criminal justice system. Our collective experience has shown us that severe mental illness impacts every stage of the criminal justice process, from the initial arrest to the final adjudication. Through no fault of a

defendant or their public defender, challenges endemic to representing severely mentally ill persons, by virtue of their immutable limitations, unacceptably undermines the ability of the severely mentally ill individuals to exercise the full array of constitutional rights and procedural protections to which all criminal defendants are entitled.

It is through our collective experience, that *amici* believes that severely mentally ill people in criminal proceedings face challenges directly analogous to individuals who are intellectually disabled, and juveniles, both of whom are categorically exempt from the death penalty. *See Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). This is especially true where, as here, a severely mentally ill person faces death. Thus, *amici* believes that the concerns identified in *Atkins* and *Roper* apply with equal force to individuals with severe mental illness. Because executing a vulnerable person that cannot, due to an innate condition, regulate their behavior, meaningfully communicate with counsel, comprehend court appearances, or effectively negotiate the attorney-client relationship is neither reliable nor just.

This *Amicus* Brief is filed in accordance with Nevada Rules of Appellate Procedure 29 and 32. Authority to file the brief derives from the motion to file, to which this brief is attached.

ARGUMENT

I. INTRODUCTION

The Eighth Amendment is a mirror for our society, its words are not precise, its scope is not static, and it is shaped by "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). And what the Supreme Court has held is that our norms and our values are implicated when we do things to really fragile, really vulnerable people. *See Atkins*, 536 U.S. 311-12; *see also* Roper, 543 U.S. 568. Severe mental illness is a condition that renders its population frail, bewildered, and vulnerable, in a way that cannot be reconciled with executing them because of their vulnerable innate condition.

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

quotation marks omitted). "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560; *accord Trop*, 356 U.S. at 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

Human dignity and evolving standards of decency now demand a categorical exemption of the severely mentally ill from the death penalty. The similarities between severely mentally ill persons, intellectually disabled persons, and juveniles can no longer be denied. Just like juveniles and the intellectually disabled, severely mentally ill people are unable to conceptualize the death penalty's social justifications and adjust their conduct in accordance therewith. Moreover, their culpability is reduced because their conduct is a product of immutable and severe mental illness, as opposed to cold and calculated premeditation, malice, wantonness, or depravity.

The experiences of public defenders statewide best illustrate the similar and unavoidable complications of representing intellectually disabled persons, juveniles, and the severely mentally ill in capital cases. Public defenders struggle each and every day to support and defend the

severely mentally ill; and we see so much more than the snippets to which prosecutors, judges, and juries are privy to in open court. Our hope is that these case examples lend humanity and practicality into the legal concepts presented herein.[1]

Because the challenges, complications, and reduced protections pertaining to intellectually disabled persons and juveniles mirror those of the severely mentally ill, the severely mentally ill population should be entitled to the exact same protections afforded to their similarly situated counterparts. As such, public defenders from all corners of Nevada implore this Honorable Court to categorically exempt severely mentally ill people from the death penalty.

II. EXECUTING INDIVIDUALS WITH SEVERE MENTAL ILLNESS VIOLATES CONSTITUTIONAL PROTECTIONS PROVIDED BY BOTH THE UNITED STATES CONSTITUTION AND THE NEVADA STATE CONSTITUTION.

The Eighth Amendment to the United States Constitution[2] provides in relevant part that "excessive bail shall not be required, nor

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

[2] The Eighth Amendment applies to states through the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. XIV

excessive fines imposed, nor cruel *and* unusual punishments inflicted. (emphasis added). Similarly, Article 1 §6 of the Nevada Constitution provides that "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). Nonetheless, this Honorable Court remains "free to interpret [our] own constitutional provisions" as it sees fit, regardless of any similarities between the Nevada and United States Constitution. *Mack v. Williams*, 138 Nev. 854, 862, 522 P.3d 434, 444 (2022). This freedom allows this Court to independently interpret the Nevada Constitution to safeguard Nevada's citizens to a greater extent than under federal law. *Id.*; *See also State v. Bayard*, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003).

Although both the United States Constitution and the Nevada Constitution prohibit cruel and unusual punishments, in capital cases this has generally been construed to mean that a death sentence must not be excessive and must serve some penological justification, so as not to result in the "gratuitous infliction of suffering." *Gregg v. Georgia*, 428

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§ 1; *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J. concurring).

U.S. 153, 182-83 (1976). Historically, the penological justifications for the death penalty are "said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Id.* at 183.

However, in interpreting the Eighth Amendment, the United States Supreme Court has recognized categorical constitutional bars on the death penalty for individuals with intellectual disabilities and juveniles, noting the significant mental similarities and rationales between these two vulnerable groups. *See generally Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551. In so holding, the Supreme Court ruled that the execution of the intellectually disabled or a juvenile would be excessive and thus in violation of the Eighth Amendment, nor would such executions advance the dual social purposes of retribution and deterrence. *Id.*

Specifically, in *Atkins*, the U.S. Supreme Court held that "death is not a suitable punishment for [an intellectually disabled] criminal."[3] 536

[3] The Supreme Court used the phrase "mentally retarded" because those were the words our society used at the time. However, just as our society has evolved, much like the Eighth Amendment evolves with standards of decency, we no longer use that word to describe people with intellectual disabilities. Thus, throughout this brief this vulnerable population will be referred to as "intellectually disabled."

U.S. at 321. In so holding, the Court recognized that intellectually disabled people know the difference between right and wrong and may be competent to stand trial; however, they also have significant limitations because of their impairments. *Id.* at 318. Namely, people with intellectual disabilities have diminished capacities to: understand and process information; communicate; abstract from mistakes and learn from experience; engage in logical reasoning; control impulses; and understand others' reactions. *Id.*

Moreover, the *Atkins* Court also found that these limitations make the intellectually disabled population:

(1) More likely to unwittingly confess to crimes they did not commit;

(2) Have a lesser ability to provide meaningful assistance to their counsel;

(3) Be typically poor witnesses;

(4) Have a demeanor that may create the unwarranted impression that they lack remorse for their crimes; and

(5) Be subject to the two-edged sword that presentation of intellectual disability mitigation evidence may instead be used as an aggravating factor for future dangerousness.

Id. at 320-21.

In evaluating all of these vulnerabilities of the intellectually disabled population, the Supreme Court made the death penalty categorically unavailable as to this population because neither retribution nor deterrence would be satisfied by the execution of an intellectually disabled person. *Id*.

Three years after *Atkins*, in *Roper*, the Supreme Court categorically barred children under the age of 18 from being subject to the death penalty. 543 U.S. 551. Using much of the same reasoning from *Atkins*, the *Roper* Court found that juveniles are more susceptible to immature and irresponsible behavior that often results in transient and ill-considered actions and decisions, while also noting that the juvenile population was more vulnerable, more lacking in control of their environment, and less able to escape the negative influences of their environment. *Id*. at 569-70. As a result of these factors, the Court determined that imposing the death penalty on juveniles would also not satisfy the aims of retribution and deterrence. *Id*. at 571.

Because much of the reasoning in *Atkins* and *Roper* can be applied to defendants with severe mental illness, public defenders statewide call

upon this Honorable Court to extend the constitutional bar on execution to the severely mentally ill population.

A. The functioning of an individual with severe mental illness is directly akin to the functioning of an intellectually disabled person for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment.

People suffering from severe mental illness bear undeniable similarities to both people with intellectual disabilities and juveniles. As such, the severely mental ill should be accorded the same constitutional protections as those with intellectual disabilities and juveniles.

1. Just like the intellectually disabled, people with severe mental illness are at an increased risk of falsely confessing.

In *Atkins*, the Supreme Court directly acknowledged that the enhanced possibility of false confessions by the intellectually disabled is a factor warranting a categorical bar exempting this population from the death penalty. 536 U.S. at 321. Even in *Atkins*, the Supreme Court did not ignore "a disturbing number of inmates on death row have been exonerated." *Id*. at 321 n. 25. That was in 2002. Data has now shown us

that *1 in 8* people on death row have been exonerated, which is an appallingly high number.[4] The problem has gotten worse, not better.

Just like the intellectually disabled, "persons with serious mental illness are over-represented both in the criminal justice system and in the pool of identified false confessors." Allison D. Redlich, et. al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 Law & Hum. Behav. 79, 81 (2010) (internal citations omitted). Due to their similar mental and cognitive impairments, the severely mentally ill are at the same unacceptable risk of a false confession as the intellectually disabled, including the resultant increased risk of a wrongful conviction. *See id.*

For an example of how this can happen, this Court need look no further than northern Nevada and the case of Cathy Woods,[5] who was exonerated of the 1976 murder of a 19-year-old UNR nursing student.

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[4] *Innocence*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/policy-issues/policy/innocence (last visited May 13, 2025).

[5] Because Cathy Woods case was well documented in the media, and is now closed, her name was used in this Brief. For other cases used to illustrate cases that public defenders handled with severely mentally ill clients, their names will not be used in order to protect client confidentiality.

Michelle Rindels, *State approves nearly $3 million settlement for Cathy Woods, who was exonerated for 1976 murder*, THE NEVADA INDEPENDENT (Nov. 10, 2020, 12:16 PM).[6] Police interrogated Ms. Woods while she was in a Louisiana psychiatric hospital and claimed she confessed to the murder. *Id*. However, in 2014, DNA evidence exonerated her after she had already spent 33 years in prison. *Id*.

Ms. Woods' case demonstrates, without ambiguity, that severely mentally ill people are at the same unacceptable risk of a false confession and wrongful conviction as the intellectually disabled. Accordingly, this Court should extend the categorical bar of the Eighth Amendment to protect the severely mentally ill.

a. Severe mental illness substantially interferes with a knowing and intelligent waiver of Fifth Amendment rights.

"Waiver of one's *Miranda* rights must be voluntary, knowing, and intelligent." *Colorado v. Connelly*, 479 U.S. 157, 168 (1986); *see also*, *Miranda v. Arizona*, 384 U.S. 436 (1966). However, defendants with mental health disorders have been found to have "limited comprehension

[6] Available at, https://thenevadaindependent.com/article/state-approves-nearly-3-million-settlement-for-cathy-woods-who-was-exonerated-of-1976-murder (last visited May 13, 2025).

of *Miranda* warnings." Richard Rogers et. al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 401, 416 (2007). Thus, a severely mentally ill person who is actively symptomatic at the time of arrest, detention, or interrogation can likely neither appreciate their *Miranda* rights, nor knowingly, intelligently, and voluntarily waive such fundamental constitutional protections. *See id*.

For example, take a case handled by public defenders where a severely mentally ill person who, immediately after arrest for their parent's death, gave a 6-hour videotaped confession. Police also recovered surveillance video from the person's home explicitly documenting symptoms of active psychosis. Both the interrogation and surveillance footage documented this defendant's persistent disturbance and delusion before, during, and shortly after the killing. Moreover, their videotaped "confession" was rife with confusing and nonsensical content. It was readily apparent this severely mentally ill client neither appreciated their surroundings, nor the fact that they were being interrogated in connection with an alleged homicide. Moreover, the client's severe mental illness impeded their basic understanding of their environment and the

objectives of police controlling that environment, such that they could not have realistically appreciated or invoked their right to remain silent. Nor could they have knowingly, intelligently, and voluntarily waived that constitutional right.

Take, as another example, a severely mentally ill person who, after arrest, could only offer police a rambling, incoherent version of events. This person's perplexing account derived from a delusion that contextualized and influenced multiple prior statements to police agencies and mental health professionals. The major theme of this person's delusion was a child victimization that required redress. The person remained fixated on this delusion. However, specific details varied wildly within a single statement and among their several statements. Although severe mental illness caused these inconsistent statements, a capital jury could mistakenly interpret these inconsistencies as dishonest, manipulative, and remorseless. This potential for improper conflation of mental health symptoms with dishonesty, unacceptably increases the risk of a death verdict for severely mentally ill persons.

Because severe mental illness, like intellectual disability, substantially interferes with—or even entirely frustrates—the knowing,

voluntary, and intelligent waiver of a person's Fifth Amendment rights, and because suppression is not a reliable vehicle for inadmissibility of the same, this Honorable Court should extend exemption from death to the severely mentally ill.

2. Just like the intellectually disabled, people with severe mental illness are less able to meaningfully assist their counsel in the preparation of a defense.

As with the intellectually disabled, severely mentally ill clients struggle to meaningfully assist counsel in defense preparation, if they can help at all. *See Atkins*, 536 U.S. at 320. This inevitably and unavoidably prevents public defenders from meeting their obligation to provide constitutionally effective representation to those facing execution. Thus, similar to the protections afforded the intellectually disabled, this Court should extend the categorical bar of execution to the severely mentally ill.

In 2009, this Court enacted the Nevada Indigent Defense Standards of Performance in ADKT 411 (hereafter "ADKT 411"). The purpose of these standards is to ensure constitutionally adequate representation of indigent defendants, to improve the quality of

representation in Nevada, and to provide objective guidelines for practitioners. ADKT 411 Std. 1(a).

Pursuant to these standards, "[c]ounsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client and should maintain close contact with the client." ADKT 411 Std. 2-7(a)(1). Moreover, "[c]ounsel . . . should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case[.]" ADKT Std. 411 2-7(b). These discussions must include "progress of and prospects for the factual investigation, and what assistance the client might provide to it," "current or potential legal issues," and "the development of a defense theory." ADKT 411 Std. 2-7(b)(1)-(3).

This Honorable Court compels public defenders to meet these constitutional standards. But, severe mental illness detrimentally interferes with a public defender's ability to do so to an unacceptable degree.

a. Severe mental illness interferes with the trust necessary between public defenders and their client in order for the client to effectively assist their defense team.

Severe mental illness cracks the very foundation of a successful attorney-client relationship by creating roadblocks to building trust between the client and the public defender and further obstructs a client's ability to accept advice from the very team trying to save their life. Thus, severe mental illness prevents public defenders from meeting our constitutionally required minimum standards of representation. Simply put, our severely mentally ill clients' conditions—medical disorders over which they exercise no control—impede the provision of effective counsel. As a result, mitigation work, regardless of counsel's effort, is left incomplete. Investigation of factual circumstances becomes severely limited. Communication of legal options and advice remains nearly impossible. Consequently, decisions made by severely mentally ill clients pertaining to the exercise of their legal rights and options are beyond repair because the severe mental illness hopelessly interferes with the attorney-client relationship.

Nevertheless, even if severe mental illness makes a client unable to assist their counsel, ADKT 411 still compels public defenders to

undertake the efforts to save their client's life without assistance from the client themselves—the one (and often only) person who can provide the necessary information to help. For example, public defenders are compelled to do a penalty investigation "regardless of any statement by the client that evidence bearing upon guilt is not to be collected or presented." ADKT 411 Std. 2-9(a)(2). Moreover, counsel has a "continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." ADKT 411 Std. 2-15(a). That defense counsel is obliged to "assure that the official record of the proceedings is complete," suggests that mitigation investigations must be thorough and complete. ADKT 411 Std. 2-9(c).

These standards do not exist in a vacuum, and fail to take into account that people do not choose to have a severe mental illness. Thus, people with such severe mental illness are not mentally healthy individuals deliberately refusing to participate in the criminal justice system. Instead, they are much more akin to intellectually disabled people suffering from a condition outside of their control, which prevents them from offering meaningful assistance to their attorney. *See Atkins*,

536 U.S. at 320. Of particular concern, is when severe mental illness manifests as an inaccurate but persistent delusion, because the delusion makes it extremely difficult to investigate and prepare a mitigation case due to the client's preoccupation with that delusion. The client's preoccupation with their delusion thwarts all attempts at meaningful conversations about their legal rights and options, mitigation, investigation, and trial strategy; thereby effectively impacting every stage of the criminal proceedings.

For example, consider the case of an unhoused, severely mentally ill person charged with killing another unhoused person. Police extracted a confession almost immediately. Even after confessing, this severely mentally ill person was fixated on an alternative suspect committing the same crime that they confessed to. After the public defense team properly investigated the client's claim and presented the client with conclusive DNA evidence eliminating an alternate suspect, the client, due to their severe mental illness, still could not stop fixating on their inaccurate but persistent delusion. Therefore, the trust between the client and their defense team could not form because the client's mental illness prevented

them from believing the team about the objective facts and meaningfully assisting in their defense.

This case succinctly illustrates the difficulties public defenders face when working with severely mentally ill clients and the corresponding futility of trying to dispel their delusions when the mental illness keeps the client fixated on the delusion. Even though this client purportedly met the *Dusky* standard and was competent to stand trial, their severe mental illness left them irreparably unable to aid and assist their counsel. *See generally Dusky v. United States*, 362 U.S. 402 (1960). In fact, the same doctors that concluded this severely mentally ill person could assist in their defense, contemporaneously doubted that this person would cooperate with their counsel, citing their severe mental illness as the reason.

In situations like this, which are surprisingly common, public defenders' efforts to craft and substantiate a defense become intractably limited due to the client's severe mental illness. This limitation then prevents the public defender from providing the effective assistance of counsel mandated by the Constitution and this Court's requirements under ADKT 411.

b. An inherent symptom of severe mental illness is the person's belief that they are not mentally ill, which in turn also affects their ability to aid in their defense.

Similar to people with intellectual disabilities who hide or refuse to acknowledge their condition, severely mentally ill people often do the same, thereby creating very similar limitations in that person's ability to aid in their defense.

Consider the case of a severely mentally ill client accused of murder, who refused to acknowledge their condition because they did not believe they were mentally ill. This refusal to recognize their own condition is a typical trait of severe mental illness. This refusal led the client to decline treatment, which in turn resulted in the client's refusal to cooperate with mitigation work, or interact with their public defender; it also, inaccurately shaped their legal assessment of the situation. Compounding these problems, this client's severe mental illness manifested as an intense and counterproductive religious ideation. Specifically, they believed that their trials and tribulations were part of God's larger scheme. This belief eclipsed committed piety, instead entering a realm akin to apathy: the client ceded all case control to their deity, believing that God knows the truth, that whatever happens,

happens, and that God will take care of them throughout the criminal process. Although, these delusions may sound somewhat normal, the abnormality becomes apparent when the client's delusions then prevented their public defense team from conducting a meaningful penalty investigation because the client's severe mental illness prevented them from participating in that investigation. As a result, the public defense team's ability to prepare a mitigation case was severely limited; thereby, unacceptably increasing this severely mentally ill client's risk of death.

It is important to note that the above-described problems from these real case examples often exist regardless of whether a severely mentally ill person is medicated. Strong antipsychotic drugs, which are frequently necessary to maintain competence in the severely mentally ill, can impact clear thinking, amplify apathy, and cause debilitating physical side effects, like insomnia, tremors, or extreme fatigue. In addition, these highly potent drugs also block productive dialogue, and result in confusion, or other side effects that can lead a severely mentally ill person to refuse then reinitiate medication cyclically and perpetually. This, too, frustrates the provision of effective assistance of counsel as the

severely mentally ill client swings wildly between cognitive, behavioral, and emotional states.

In sum, a mind consumed by severe mental illness can neither soundly assess legal options nor meaningfully aid in the preparation of their defense; which, results in an unacceptable limitation on an attorney's effective assistance of counsel. As public defenders, this Court mandates us to locate, investigate, and present all available mitigation information to maximize the chances of saving a life. Severe mental illness prevents us from doing so. Because the imposition of a death sentence after an incomplete mitigation presentation, due to a severely mentally ill person's inability to assist counsel, can in no way be reliable—an exemption of the severely mentally ill from death is warranted under the Eighth Amendment and Nevada's Constitution.

3. Like people with intellectual disabilities, severely mentally ill people are typically poor witnesses.

Atkins specifically addresses an intellectually disabled person's diminished ability to present coherent and credible testimony to a jury and why, as a result, a constitutional bar against the death penalty was necessary to protect this vulnerable population. 536 U.S. at 307, 319-21. In *Atkins*, the defendant's intellectual disability significantly diminished

his ability to communicate effectively during both the guilt and penalty phases of trial. *Id.* at 308-09. This, in turn, led a jury to credit his codefendant's testimony over Atkins' testimony, leading to his conviction and imposition of the death penalty. *Id.* at 307. Which, the Supreme Court overturned after ruling death for the intellectually disabled was categorically excessive. *Id.* at 321.

Like the defendant in *Atkins* and other intellectually disabled people, persons suffering from severe mental illness—whether medicated or not—have substantial limitations not shared by the general population. *See id.* at 320.

For instance, severe mental illness impedes a person's measured and rational invocation or declination of their right to testify in their own defense. These substantial limitations—over which severely mentally ill persons exercise no control—render the death penalty unreliable, and therefore unconstitutional, as applied to this vulnerable subset of Nevada's population.

In one example, a severely mentally ill client was angry with their counsel because the client couldn't understand court procedures. Specifically, the client couldn't understand that they could not testify and

tell their story without being subject to cross-examination. Additionally, the client's severe mental illness manifested in a rigid, bizarre, and unrelatable world view that they were adamantly intent upon communicating to the jury, but the client's severe mental illness prevented them from understanding the concept that jurors might not accept their unique perspective. Moreover, their severe mental illness also precluded the client from maintaining courtroom composure and effectively delivering their testimony. Instead, similar to the defendant in *Atkins*, this client's mental illness led to them being a very poor witness, where they made, confusing, incoherent, and detrimental statements that only resulted in an increased chance of a death verdict.

Even in cases where a severely mentally ill client's testimony could bolster their defense, public defenders must still be concerned with how the mental illness will affect the testimony's reliability. Many symptoms of mental illness, such as confusion, delusions, and hallucinations make honest testimony appear dishonest. Specifically, confusion and/or auditory hallucination can manifest as hesitation in the severely mentally ill person's responses, painting an inaccurate picture to the jurors as to the client's truthfulness. Similarly, the severely mentally ill

person's delusions may impact the believability of lay opinions or factual renditions proffered in their testimony, and visual hallucinations may cause a severely mentally ill person's eyes to dart from place to place. These common manifestations of severe mental illness may then be misconstrued by a jury as avoidance of eye contact, which is considered a hallmark of dishonesty.

Additionally, severe mental illness unquestionably reduces a person's ability to meaningfully consider the exercise of their right to testify, and to have a jury accord any testimony given the credibility it deserves. The severely mentally ill frequently cannot grasp legal concepts or hypothetical legal scenarios aimed at communicating the implications of either testifying or remaining silent. Moreover, this population often fails to effectively regulate emotion, remain focused throughout questioning, maintain eye contact, or clearly and coherently communicate.

Just as the intellectually disabled population are considered poor witnesses deserving of constitutional protection due to symptoms beyond their control, people with severe mental illness are equally poor witnesses due to symptoms beyond their control and thus deserve an

equal measure of constitutional protection. *See Atkins*, 536 U.S. at 320-21. As a result, an exemption for the severely mentally ill from death is the only way to ensure that symptoms of severe mental illness are not misconstrued in a way that unjustifiably imperils a person's life.

4. Just like an intellectually disabled person, a severely mentally ill person's demeanor may convey to a jury the unwarranted impression that the person lacks remorse.

As with the intellectually disabled, the severely mentally ill often exhibit facial expressions and other physical mannerisms that a capital jury may interpret as remorselessness. *See Atkins*, 536 U.S. at 321. Specifically, emotional dysregulation in the severely mentally ill, such as the common example of inappropriate (and invariably ill-timed) smiling or laughter can quickly have the same impact. These compulsive mannerisms and irregularities are symptoms of severe mental illness, but capital juries do not reliably treat them as such, because severe mental illness is not well understood by most lay persons, and ignorance triggers instinctual fear in those positioned to dole out death. Visible manifestations of mental illness, then, make the prospect of an unreliable death sentence too severe to stand by in silent acquiescence.

In one case example, a severely mentally ill client facing the death penalty exhibited a highly confrontational demeanor symptomatic of their mental illness. This involuntary protective mechanism outraged the prosecutor assigned to the case. The erratic emotions observed by both counsel and the general public unquestionably derived from the client's severe mental illness, which was exacerbated by the trauma of incarceration and the stress of the courtroom. For this client, mere transport to, and presence in court triggered their agitation. Therefore, those in a position to observe the client were left with an unwarranted impression that the client lacked remorse for their crimes. However, during fleeting intervals of emotional stability, when the client's mental illness was not triggered, they conveyed genuine remorse, and their humanity was readily apparent. Significantly, public defenders' pretrial attempts to contextualize offensive mannerisms and emotional dysregulation, given their comparative depth of understanding, often get dismissed.

Yet, this is not an uncommon scenario for the severely mentally ill population as a whole. Prosecutors, judges, and the public—through no fault of their own—have incredibly limited exposure to severely mentally

ill criminal defendants compared to their defense counsel. They do not see the intervals of lucidity described above, in which the clients express remorse that they otherwise cannot express or persuasively convey in triggering environments. This can be particularly frustrating for public defenders who spend significant time working with severely mentally ill clients, witnessing their vacillation between extreme mental sickness and intermittent stability, and seeing genuine remorse and emotion, momentary as it may be. Yet, when the stakes are at their highest and decisions are being made as to whether a life will be extinguished, the client is unable to show the people in court what their public defenders have seen.

In the same vein, capital jurors have limited direct exposure to severely mentally ill criminal defendants. Other than seeing this person in a courtroom, jurors have little context for their courtroom observations. These observations can both—consciously and subconsciously—instill anger, activate hate, give the impression of a client being remorseless, and increase the likelihood of rendering a death sentence. But, the increased likelihood of a death sentence attributable to acute, severe, and misperceived mental health symptoms is as

unconscionable for the severely mentally ill as it is for the intellectually disabled. Severely mentally ill persons whose symptoms manifest as socially offensive conduct, or an inappropriate demeanor are often incapable of regulating their behavior—similarly to those with an intellectual disability. *See Atkins*, 540 U.S. at 321. And because death cannot be the consequence for symptoms of illness, the exemption from death afforded the intellectually disabled should likewise extend to those who suffer from severe mental illness.

5. Just like the intellectually disabled, severely mentally ill defendants face a two-edged sword that presentation of their illness as mitigation evidence may increase the likelihood that a jury will find the aggravating factor of future dangerousness.

In *Atkins*, the Supreme Court recognized that presenting evidence of intellectual disability as a mitigating factor "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 504 U.S at 321. Severely mentally ill clients face the same deadly conundrum.

In Nevada, a capital jury "may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating

circumstance or circumstances found." NRS 175.554(3). If death eligible, a jury then weighs mitigating and aggravating factors, ultimately exercising its discretion in determining whether to impose death. *Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 251 (2011). No death penalty statute precluding a capital jury's consideration of relevant mitigating factors comports with the Eighth Amendment, as incorporated against the states by the Fourteenth Amendment. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). As such, NRS 200.035(7) permits a defendant to present any mitigating circumstance to a capital jury.

Although free to argue any mitigating circumstance under the law, severely mentally ill clients and their public defense teams face the two-edged sword of prosecutors using the client's severe mental illness history to argue that the illness makes the defendant more susceptible to being dangerous in the future because symptoms of severe mental illness can manifest quickly, unpredictably, and violently.[7] These types of arguments force public defenders into the two-edged sword choice described in *Atkins* as to whether to present evidence of severe mental

[7] This is the type of two-edged argument the prosecution used in the trial court in *Roper*. 543 U.S. at 558.

illness at all—even in the most compelling of cases—for fear of inadvertently bolstering a prosecutor's aggravating factor for death when it was intended to be a mitigating factor for life. *See Atkins*, 504 U.S at 321. In the words of a respected public defender colleague: "the more we convince a judge or jury that the client is mentally ill, the more we unavoidably also convince them that the client is dangerous."

Consider the case of a severely mentally ill person who suffers from paranoid delusions and intense auditory hallucinations. The voices in their head compelled the conduct at issue and ultimately precipitated the killing with which they were charged. The client was unmedicated at the time of the incident, and their public defense team had to wrestle with this question: if a jury concludes that severe mental illness made the client more dangerous, then the management of that mental illness may not always be possible, and so the client may always be a future danger. This real client's case illustrates the two-edged sword the Supreme Court recognized in *Atkins*, before holding that mitigating evidence of intellectual disability cannot reliably be prevented from being used as an aggravator against an intellectually disabled defendant in favor of execution. *See Atkins*, 536 U.S. at 321. Similarly, mitigating evidence of

severe mental illness should likewise not be used as an aggravator in favor of killing a severely mentally ill defendant. *See id*. As flawed as this reasoning may be, a jury could treat a defendant's unmedicated and unmanaged mental state as evidence of future dangerousness, thereby making the imposition of death more likely.

In contrast, jurors may also find a severely mentally ill person more dangerous when they are medicated. For example, public defenders represented a severely mentally ill client who was unmedicated at the time of the offense but became medication-compliant while in custody. The client was able to think clearly and rationally while medicated. However, the side effects of the medication gave the client an unemotional and flat affect. Thus, the client presented as cold, remorseless, apathetic, and even calculating, which, the prosecution then used to as a basis to argue that this severely mentally ill person was even more unpredictable, more difficult to manage, and more dangerous while medicated. As a consequence, severely mentally ill clients face a damned if you do, damned if you don't situation whether medicated or not.

Under these circumstances, whether medicated or not, severely mentally ill people, just like intellectually disabled people, face the same

unacceptable risk that mitigation evidence submitted on their behalf will be misconstrued by the State to substantiate a future dangerousness aggravator, thereby unacceptably raising the risk of an unwarranted death verdict.

As a result, evidence of severe mental illness becomes a two-edged sword, just like evidence of intellectual disability that was recognized as a two-edged sword. *See id.* Thus, this Court should provide the severely mentally ill with the same constitutional protections as the intellectually disabled because that is the only way to ensure that capital juries and prosecutors do not use intended mitigation evidence as a sword to extinguish the life of a severely mentally ill person.

B. The functioning of an individual with severe mental illness is directly akin to the functioning of a juvenile for whom the death penalty has been held categorically unavailable under the Eighth Amendment.

Three years after *Atkins*, in *Roper v. Simmons*, the U.S. Supreme Court categorically barred juveniles under the age of 18 from being subject to the death penalty. 543 U.S. 551. Using much of the same reasoning from *Atkins*, the *Roper* Court found that juveniles are: (1) more susceptible to immature and irresponsible behavior that often results in

them not being able to consider their actions and weigh decisions in a cost-benefit analysis; (2) more vulnerable and more lacking in control of their environment while being less able to escape the negative influences of their environment than adults; and (3) not fully formed character-wise, making juveniles' personality traits more transitory and less fixed. *Id*. at 569-70. As a result of these factors, the Supreme Court held that imposing the death penalty on juveniles would also not satisfy the aims of retribution and deterrence. *Id*. at 571.

People suffering from severe mental illness bear undeniable similarities to juveniles in this respect. And because much of the reasoning in *Roper* can also be applied to defendants with severe mental illness, this Honorable Court should extend the constitutional prohibition on the execution of juveniles, to the severely mentally ill population as well.

1. Just like juveniles, severely mentally ill defendants are more susceptible to immature and irresponsible behavior that prohibits them from rationally considering their actions.

"Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Id*. at 568

(internal quotation marks omitted). A severely mentally ill person neither chooses their condition, nor exercises control over the timing or intensity of their symptoms. Moreover, severe mental illness very often disrupts rational thinking and measured action; such that, severely mentally ill people, just like juveniles, cannot meaningfully consider the consequences of their actions because of their innate characteristic. Consequently, the inability to control the symptoms and manifestation of their illness makes the severely mentally ill similarly less deserving of death, just like juveniles are less deserving of death. *See id*. at 571.

Like juveniles, the severely mentally ill are often "very impulsive" and "very susceptible to being manipulated or influenced." *See id*. at 559. This vulnerability and susceptibility to "negative influences and outside pressures, including peer pressure" can contextualize and influence a severely mentally ill person's behavior. *See id*. at 569 (citations omitted). Impulsivity in the severely mentally ill can originate in thoughts, words, or conduct. In many criminal cases, this nonvolitional impulsive conduct contextualizes the offense alleged. Just like juveniles, impulsive thoughts typically precipitate irresponsible behavior, which means that similar to juveniles, a severely mentally ill person's "irresponsible conduct is not as

morally reprehensible" as that of a similarly situated mentally healthy individual. *See id.* at 570. As a result, just like juveniles, the severely mentally ill can neither readily nor reliably regulate their conduct. Thus, the same constitutional protections afforded to juveniles should also be extended to the severely mentally ill, including the categorical bar against the death penalty.

2. Just like juveniles, severely mentally ill defendants are more vulnerable and more lacking in control of their environment.

Just as juvenile defendants are more vulnerable and lack control of their lives and their environment, so too do the severely mentally ill suffer from the same vulnerabilities, while additionally lacking the ability to control their mind. *See id.* at 569. And just as juveniles lack the ability to escape from their criminogenic environment, the severely mentally ill lack the ability to escape their damaged mind. *See id.*

Moreover, the severely mentally ill, like juveniles, are very often "not trusted with the privileges and responsibilities of an adult" and this explains why their irresponsible conduct is not as morally reprehensible as that of a mentally healthy adult. *See id.* at 561 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (2005)).

For example, those who suffer from severe mental health issues often receive social security benefits because the severity of their symptoms precludes employment and a normal day-to-day life that mentally healthy adults take for granted. In the most severe cases, these individuals are unable to manage the small amount of money from their social security benefits and so a mentally healthy proxy—often called a "payee"—receives the check and facilitates responsible administration of funds on behalf of the mentally ill person. Additionally, some severely mentally ill people have symptoms that preclude consistent ingestion of necessary medications, and so family members or other caregivers have to take on the responsibility of medication administration.

Accordingly, if a severely mentally ill person is unable to exert control over their environment by maintaining even the most menial of jobs, remembering to take their medication, or even managing their meager finances, then it becomes evident that they are just as vulnerable as juveniles, and lack the level of culpability of attributable to a mentally healthy person who commits a calculated murder.

Therefore, similar to a juvenile who cannot escape their environment, severely mentally ill people cannot escape the confines of

their damaged mind and are oftentimes not trusted with the most limited of life's tasks. As a result, this Court should extend the same constitutional bar that protects juveniles to the severely mentally ill.

3. Just like juveniles' character is not fully formed, the severely mentally ill suffer from the same transitory, less fixed character traits.

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

Given the complex and transitory nature of character in the severely mentally ill that is analogous to the complex and transitory

nature of character in juveniles, it becomes less supportable to conclude that even a heinous crime committed by a severely mentally ill person is a true indication of irretrievably depraved character. *See id.* at 553. Moreover, the similarities in transitory character traits between juveniles and severely mentally ill offenders render suspect any conclusion that these groups can reliably be categorized as the worst offenders—offenders deserving of death. *See id.* at 570.

The challenges of elucidating character in a severely mentally ill person whose mental illness masks and changes that person's character is akin to the challenges of elucidating the character of a juvenile, such that neither population can be reliably identified as irretrievably depraved. *See id.* at 553. Under these conditions, if irretrievable depravity cannot be reliably determined in juveniles because of their youth, then irretrievable depravity also cannot be reliably determined in the severely mentally ill by virtue of their illness subjecting them to suffering from symptoms beyond their control. *See id.* Accordingly, honoring the Supreme Court's narrowing jurisprudence, which requires imposition of death only for the most heinous crimes committed by the most culpable and depraved of offenders means that human dignity

demands that the severely mentally ill—who suffer from symptoms beyond their control affecting their character—be given the same exemption from capital punishment as juveniles. *See id.* at 568.

III. EXECUTING A SEVERELY MENTALLY ILL PERSON ACHIEVES NEITHER DETERRENCE NOR RETRIBUTION.

The death penalty's purported purposes are retribution and deterrence. *Gregg*, 428 U.S. at 183. "The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. However, in respect to deterrence, or the interest in preventing capital crimes by prospective offenders, "it seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." *Id.* at 319 (citing *Enmund v. Florida*, 458 U.S.782, 799 (1982)).

As for the theory of retribution, if the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, then the case for retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished by the frailties of youth or intellectual disability. Roper, 543 U.S. at 571; *Atkins*, 536 U.S. at 319.

A. Executing a severely mentally ill person does not further or satisfy the goal of deterrence.

Similar to the intellectually disabled, cognitive and behavioral impairments also accompany severe mental illness; thereby, making people with severe mental illness less morally culpable than other mentally healthy offenders. Just like those with intellectual disabilities, people with severe mental illness exhibit "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses." *See Atkins*, 536 U.S. at 320. These impairments "also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *See id*.

People with severe mental illness are so akin to people with intellectual disability because they both suffer the same inability to understand and process information, to learn from experience, to engage in logical reasoning, to control impulses, and to process information of the possibility of execution as a penalty and control their conduct. Consequently, execution of the severely mentally ill cannot accomplish deterrence any more than death can accomplish deterrence for the intellectually disabled. Therefore, this Court should hold that the death

penalty is categorically unavailable for the severely mentally ill under the Eighth Amendment and the Nevada Constitution, just as it is categorically unavailable for the intellectually disabled.

Consider the case of a severely mentally ill person whose unintelligible ramblings and bizarre mannerisms were evident at arrest and observable in pretrial detention. Decades of mental health records chronicled cycles of treatments, medications, and hospitalizations. Their family attempted to commit this person for psychiatric stabilization less than 12 hours before their arrest. Then, in the hours between family contact and arrest, this person experienced a flurry of intense symptoms that precluded rational, logical thought. This person could not consider or weigh execution as a potential penalty for their actions, much less control their mental illness-driven behavioral symptoms to avoid the same. *See id.* at 320. With such fundamental shortcomings, this severely mentally ill client was incapable of considering a cost-benefit analysis to previously imposed death sentences on other people.

As with the intellectually disabled, severe mental illness prohibits the consideration of death as a legal consequence stemming from that person's actions. Thus, the attempt to justify the death penalty's use for

"deterrence" when applied to severely mentally ill people does not comport with the Supreme Court's narrowing jurisprudence "which seeks to ensure that only the most deserving of execution are put to death." *See id*. at 319.

B. Executing a severely mentally ill person does not further or satisfy the goal of retribution.

Similarly, executing the severely mentally ill cannot achieve retributive goals either because "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *See id*. at 319. As noted above, Supreme Court jurisprudence confines imposition of the death penalty to "a narrow category of the most serious crimes." *Id*. Death as retribution, then, is the exception rather than the rule. *Id*. People suffering from severe mental illness are categorically less culpable than those who commit the most serious crimes, because their illness contextualizes and usurps the cognitive and behavioral processes that precipitate criminal conduct.

For example, consider the case of a severely mentally ill person who, while operating under a fixed delusion of familial sexual abuse, killed a child's parent believing that the parent's death would liberate the child. Despite the availability of less extreme alternatives—such as

calling the police and/or alerting child protective services—this person's severe mental illness, which manifested as an urgent and desperate delusion, prevented consideration of these socially acceptable alternative options. Thus, if severe mental illness precluded rational consideration of these socially acceptable alternatives to murder, then it stands to reason that the client's severe mental illness almost certainly precluded consideration of abstract retributive concepts. This person's delusion not only interfered with rational thought processes precipitating action, but also compelled the unexplainable action itself. As such, the death penalty simply cannot achieve retribution where a symptom of severe mental illness interferes with rational thought and instead dictates irrational action.

In sum, severely mentally ill people cannot grasp complex and abstract concepts like retribution and deterrence, much less relate these concepts to their own behavior. Thus, retribution and deterrence cannot rationally stand as a justification for imposing death on a fellow human with a severe mental illness. Where the death penalty does not measurably contribute to these goals, then the death penalty is excessive and violates the Eighth Amendment prohibition on cruel and unusual

punishment. *See id*. at 321. Consequently, because people suffering from severe mental illness are so similarly situated to the intellectually disabled and juvenile populations in their diminished culpability, the dual aims of deterrence and retribution are not satisfied, and this Honorable Court should categorically exempt the severely mentally ill from the death penalty.

IV. EVOLVING STANDARDS OF DECENCY COMPEL EXTENDING CONSTITUTIONAL PROTECTIONS TO THE SEVERELY MENTALLY ILL.

The Eighth Amendment's essential commitment to human dignity, as expressed through "evolving standards of decency" requires that states refrain from executing individuals with diminished culpability, whether by intellectual disability or youth—no matter how heinous the crime. *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551. Thus, it is constitutionally permissible for substantive restrictions to be placed on the State's power to take a life. *Atkins*, 536 U.S. at 321.

Today, the same reasoning applied in *Atkins* and *Roper* can and should be extended to individuals with severe mental illness because people with severe mental illness suffer from the same impairments as the intellectually disabled and juveniles such that their personal

culpability is diminished to such an extent that an equal constitutional protection is warranted.

Society has come to recognize that it offends our collective sense of justice and decency to execute those whose impairments outside of their control—severe mental illness, intellectual disability, and youth—because those impairments make them not fully accountable for their actions. *See Atkins*, 536 U.S. 304; *see also Roper*, 543 U.S. 551.

Just like societal values evolved to protect the intellectually disabled and juveniles, there is powerful evidence that our values are also evolving towards exempting the severely mentally ill from capital punishment. In fact, a growing chorus of voices—including mental health experts, legal organizations, and the public at large—agree that executing a person suffering from a severe mental disorder at the time of the crime is fundamentally inconsistent with our notions of culpability and humane treatment. *See* American Bar Association Resolution 122-A (urging jurisdictions that impose capital punishment to exempt defendants suffering from severe mental illness)[8]; *see also* the American

[8] ABA RECOMMENDATION 122-A, 2006 Ann. Mtg. (adopted Aug. 7-8, 2006),https://www.americanbar.org/content/dam/aba/administrative/dea

Psychiatric Association;[9] the American Psychological Association;[10] the National Alliance on Mental Illness;[11] and The United Nations.[12] This consensus of organizations that do not often otherwise agree tells the story of our society's evolving standards. [13]

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th_penalty_representation/dp-policy/2006_am_122a.pdf (last visited May 17, 2025).

[9] *Position Statement on Issues Pertaining to Capital Sentencing and the Death Penalty*, APA (Approved 2020), https://www.psychiatry.org/getattachment/b6a4c514-509a-4725-a6e6-c844aab515fd/Position-Capital-Sentencing-Death-Penalty.pdf (last visited May 17, 2025).

[10] *Report of the Task Force on Mental Disability and the Death Penalty*, AM. PSY. ASSOC., https://www.apa.org/pubs/reports/mental-disability-and-death-penalty.pdf (last visited May 17, 2025).

[11] *Death Penalty*, NAMI, https://www.nami.org/advocacy/policy-priorities/stopping-harmful-practices/death-penalty/ (last visited May 17, 2025).

[12] *Capital punishment and the implementation of safeguards guaranteeing protection of the rights of those facing the death penalty,* 12-13 (Aug. 22, 2017), UN COMMISSION ON HUMAN RIGHTS, https://digitallibrary.un.org/record/1318537?ln=en&v=pdf (last visited May 17, 2025).

[13] In *Roper*, the Court also referenced referring to the laws of other countries and international authorities as instructive, but not, controlling to determine the views of the international community in determining whether a punishment is cruel or unusual. 543 U.S. at 575-76. This makes it important to note that the European Union has reaffirmed "its strong and unequivocal opposition" to the death penalty. *EU Statement on the death penalty* (Aug. 7, 2020), THE DIPLOMATIC SERVICE OF THE EUROPEAN UNION, https://www.eeas.europa.eu/eeas/eu-statement-death-penalty_en#:~:text=The%20EU%20reaffirms%20its%20strong,is%20incompatible%20with%20human%20dignity (Last visited May 17, 2025).

Additionally, Justice Kennedy noted in *Roper* that state's that have decided "to bar the death penalty altogether of necessity demonstrates a judgement that the death penalty is inappropriate for all offenders, including juveniles." 543 U.S. at 574. This reasoning can be directly applied to people with severe mental illness in the 23 states and the District of Columbia, [14] that have already abolished the death penalty. *See id*. Moreover, at least two states, who have the death penalty, Ohio and Kentucky, have recently changed their laws to bar the execution of people with severe mental illness. OHIO REV. STAT. ANN. § 2929.025; KY. REV. STAT. ANN. § 532.140.

The Eighth Amendment does not require that an offender be blameless or legally insane to be ineligible for execution—rather, it asks whether the punishment is grossly disproportionate to the offender's culpability and the evolving standards of decency in our society. In the case of the vulnerable severely mentally ill population, both prongs of that analysis point to extending the same categorical bar against execution that is currently afforded to the intellectually disabled and

[14] *State Summaries*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/resources/high-school/state-by-state-data/state-summaries (Last visited May 17, 2025).

juveniles. In fact, the spirit of the Eighth Amendment and Article 1 § 6 of the Nevada Constitution as elucidated through *Atkins* and *Roper,* encompass those who due to mental incapacity cannot be deemed the worst of the worst and deserving of the most severe and final penalty the law allows. *See Atkins*, 536 U.S. at 319-20; *See also Roper*, 543 U.S. at 553. Indeed, it would be a cruel irony to spare an offender who became insane on death row, but not an offender who was experiencing a similar mental impairment at the very moment of the crime. *See Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (the Eighth amendment precludes executing a prisoner who has "lost his sanity" after sentencing). Accordingly, this Court should extend the same constitutional protections afforded to the intellectually disabled and juveniles to the severely mentally ill, as our State's evolving standards decency compel this result.

CONCLUSION

The Eighth Amendment of the United States Constitution and Article 1 §6 of the Nevada Constitution's societal mirror is now fixed on the great State of Nevada. Their words are not precise, their scope is not static, but they are both shaped by "evolving standards of decency." *See*

Trop v. Dulles, 356 U.S. 86, 100-01 (1958). In light of both Constitutions' prohibitions on cruel and/or unusual punishment, this Honorable Court should hold that the Nevada Constitution categorically bars the execution of individuals who suffer from severe mental illness. The guiding principles from *Atkins* and *Roper* compel this result.

Severe mental illness, like intellectual disability and juvenile status, fundamentally diminishes an offender's culpability, thereby removing them from the class of offenders for whom the death penalty is appropriate. *See Atkins*, 536 U.S. 304; *see also Roper*, 543 U.S. 551. Consequently, executing a person in this category does not measurably further the goals of retribution or deterrence any more than it did in *Atkins* and *Roper*.

Moreover, evolving standards of decency and the moral conscience of our state, informed by medical science, now recognize that condemning to death an individual whose mind was shattered by severe mental illness is a grievous affront to human dignity and justice. To do so would be to ignore the very premises that underly *Atkins* and *Roper*—that the culpability of the offender must be commensurate with the punishment.

In sum, extending constitutional protection to people with severe mental illness is both a logical next step in the law's development and a moral necessity that is compelled by our "evolving standards of decency." Extending this protection upholds the integrity of our justice system that aspires to punish only the truly blameworthy in a manner consistent with our highest values of fairness, decency, and respect for human dignity. Only this Court can determine what we see in the constitutional mirror looking back on our state, and it is with great hope by all public defender agencies, listed as *amici* on this brief, that this Court extends a categorical exemption from the death penalty for individuals with severe mental illness.

Dated this 21st day of May, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14-point font.

2. I further certify that this brief does not comply 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 proportionally spaced, has a typeface of 14 points or more, and contains 10,307 words which exceeds the 7,000 word limit. The appropriate Motion for Leave to File a Amicus Brief In Excess of Word Limitation has been filed with the Amicus Brief.

3. Finally, I hereby certify that I have read this *Amicus* 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,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2025, I electronically filed the foregoing *Amicus* Brief with the Nevada Supreme Court. The following participants in the case will be served by the electronic filing system:

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