IN THE SUPREME COURT OF THE STATE OF NEVADA

Robert Ybarra, Jr.,

Appellant,

vs.

Terry Royal, Warden[1],

Appellee.

Supreme Court No. 89824

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

DEATH PENALTY CASE

Appeal from the Seventh Judicial District Court

Appellant's Reply Brief

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

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INTRODUCTION

Robert Ybarra, Jr., is a 71-year-old, wheel-chair bound, schizophrenic, intellectually disabled man with dementia. These conditions present a host of reasons that his execution would result in a miscarriage of justice. He is severely mentally ill, intellectually disabled, and incompetent. Executing him would be wrong, and the law recognizes as much.

So should this Court.

ARGUMENT

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

The district court denied Ybarra's petition without ordering the State to respond. *See* 20AA4933. This was error because NRS 34.745(3) contemplates that, so long as a petition survives a preliminary screening, the court should order the State to respond. NRS 34.745(1)(a). And this screening merely requires that it does not "plainly appear[]" that the petition is barred by NRS 34.810(3).

The State nowhere asserts that it "plainly appears" Ybarra's petition is barred by NRS 34.810(3).[2] This, by itself, reflects that the district court should have ordered a response.

The State raises a number of cursory arguments along the lines that Ybarra's petition was insufficient. *See, e.g.*, Ans Br. at 39–41. For example, the State implies—without explicitly stating—that Ybarra's claims are "belied by the record" because "Ybarra failed to meet the burden for an evidentiary hearing." Ans. Br. at 40 (citing *Berry v. State*, 131 Nev. 957, 363 P.3d 1148 (2015)). But a claim is "belied by the record," only when "it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Berry*, 131 Nev. at 969, 363 P.3d at 1156. This is not so for Ybarra's claims. To take intellectual disability as an example: the State does not dispute that based on the "record as it existed at the time" Ybarra filed this petition, he is intellectually disabled. Nor does the State seriously dispute that Ybarra

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[2] The State cites NRS 34.726 and 34.800, but because NRS 34.745(3) only contemplates review under NRS 34.810(3), whether Ybarra's claims are untimely or laches bar is irrelevant to whether the district court was required to order a response. Even if these defaults were relevant under NRS 34.745(3), failing to consider these claims, as with NRS 34.810(3), would result in a miscarriage of justice.

has severe mental illness or that history, public policy, and reason support holding severely mentally ill individuals categorically exempt from the death penalty. And, though the State does dispute Ybarra's competency, dismissing the petition outright was error because resolution of that issue requires factual determinations.

The State's resort to NRS 34.745 is unhelpful. Specifically, the State argues that the NRS 34.745 "contemplate[s] that the court may take action other than ordering a response . . . ." Ans. Br. at 39. This, ostensibly, is a reference to NRS 34.745(1), which requires "the prosecuting agency" to file an answer *or* "[t]ake other action that the judge or justice deems appropriate." This provision, however, does not contemplate outright dismissal. The plain text shows that the court has two options: (a) order the prosecuting agency to file a response or answer or (b) order the prosecuting agency to take other action. This language forecloses the State's reading that the statute allows the "court" to "take action."

In any case, even reading the words "order the prosecuting agency" out of NRS 34.745(1), the State's reading is foreclosed. "Other action" cannot include dismissing the petition because NRS 34.745(3)

governs dismissal. Reading NRS 34.745(1)(b) to allow dismissal for any reason would read NRS 34.745(3) out of the statute. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) [hereinafter Scalia & Garner, *Reading the Law*] (Surplusage Canon: "If possible, . . . every provision is to be given effect. None should be ignored. None should be needlessly given an interpretation that causes it to duplicate another provision or to have no consequence." (Latin omitted)). Moreover, the expression of one basis to dismiss the petition under NRS 34.745(3) implies the exclusion of other bases. *Id.* at 107 (Negative-implication Canon: "The expression of one thing implies the exclusion of others.").

The State also cites the model order found in NRS 34.745 as support. *See* Ans. Br. at 39. But the State misreads the model order, which provides, "*Respondents* shall, within 45 days after the date of this order, answer *or otherwise respond* . . . ." NRS 34.745(2). Here, the subject taking "other action" is not the district court, but the prosecuting agency. The State quotes a different portion of the order: "The court has reviewed the petition and has determined that a response would assist the court . . . ." Ans. Br. at 40 (quoting NRS

34.745(2)). The apparent thrust of the State's argument is that if a court determines a response would not assist the court, the court may dismiss without ordering a response. *See* Ans. Br. at 40. But this is belied by the plain text of NRS 34.745(1) and (3), which *require* the district court to order the prosecuting agency to take an action (whether filing an answer or "other action"), and specifies only one basis for dismissing a petition without an answer.

II. Ybarra is ineligible for the death penalty.

Ybarra is categorically ineligible for execution for two reasons: (A) he has severe mental illness and (B) he has intellectual disability.

A. Ybarra has severe mental illness.

In 1913, this Court, looking to the common law and precedent, answered a legal question about insanity. *See State v. Nelson*, 36 Nev. 403, 136 P. 377 (1913). In doing so, this Court explained that the science of mental illness was improving:

> The darkness in which. . . the world condemned the acts of the individual for the breach of the law, and especially for the abnormalities that appear prevalent in him, is being cleared away by the hand of science, and with the light of knowledge there comes the ever-increasing ray of human sympathy and a persistent study and research as to how this sympathy should best be applied.

Id. at 415, 136 P. at 382. The law, in turn, would adapt: "The courts of the land, in dealing with this great subject, cannot stand by and hold a deaf ear to the march of science." *Id.* Rather, "[t]he rules which once governed, according to the standards best considered, must not remain rigid; but their elasticity must be made commensurate and proportionate to human achievement and the definite results of scientific investigation." *Id.*

For intellectual disability and children, the law has found such elasticity. Both the intellectually disabled and children are categorically exempt from a sentence of death. But the law has left out one group who, at common law, had the same protections of the intellectually disabled and children: the severely mentally ill.

This Court, construing the Nevada Constitution, should provide to the severely mentally ill what has already been provided to the intellectually disabled and to children: a categorical exemption from a sentence of death.

In answering, the State disputes little: it does not dispute Ybarra's severe mental illness, the difficulties that Ybarra's severe mental illness has presented to his counsel, that Ybarra's severe mental illness

has prevented him from receiving a reliable sentencing determination, or even the need for a categorical exemption for the severely mentally ill. Rather than engaging with Ybarra's arguments that executing someone who suffers from severe mental illness is cruel or unusual under the Nevada Constitution, the State chose, instead, to recharacterize this claim as an argument that Nevada's death penalty scheme is unconstitutional. Ans. Br. at 47–51.

1. The State does not dispute that Ybarra is severely mentally ill.

Claim Two asserts that Ybarra suffers from severe mental illness and is ineligible for the death penalty. 20AA4825–53. Ybarra, beyond any reasonable disagreement, suffers from severe mental illness. His severe mental illness afflicted him before, during, and after the offense in this case.

Ybarra first began experiencing hallucinations[3] and delusions[4] following a significant head injury he sustained when he was a little boy—long before the offense in this case. When he was only 9 years old, a timber beam from a homemade swing set struck Ybarra in the head when the swing set collapsed. 17AA4037–38; 17AA4110. He began having headaches daily and, soon after, began hearing voices. 17AA4111; 11AA2710. Ybarra's brother testified at trial that he witnessed Ybarra, who was approximately 18 or 19 years old at the time, talking "to people that weren't there" on multiple occasions. 17AA4077–78. Similarly, Ybarra's cousin described seeing Ybarra "just staring like a statue and moving his head, lips, and hands as if he were talking to someone, though no one was there." 9AA2136.

Ybarra's hallucinations and delusions continued, and he experienced both on the night of the offense. Specifically, Ybarra "heard

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[3] Hallucinations are "perception-like experiences that occur without an external stimulus" and are vivid, clear, and not under voluntary control. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 102 (5th ed. Text Rev. 2022) [hereinafter DSM-5-TR]; 12AA2844.

[4] Delusions are "fixed beliefs that are not amenable to change in light of conflicting evidence." DSM-5-TR at 101; 12AA2844.

a voice that said you will get [your wife] back if you sacrifice somebody. In his despair and delusions and psychosis, he heeded that voice, perhaps not recognizing or perhaps in-spite of recognizing it as the voice that he took to be the voice of Satan." 15AA3627.

Ybarra's hallucinations and delusions did not stop on the night of the offense. They persisted. For decades now, Ybarra has suffered from "extremely disturbing delusions" that "disturbed the progress of this case." 15AA3629. Notably, these delusions have impaired Ybarra's ability to work with his attorneys during all stages of his case.

Prior to Ybarra's arraignment, defense counsel moved for a mental examination to determine whether Ybarra was "able to assist counsel in preparing his defense and whether he is otherwise competent to stand trial." 1AA0004. The State agreed, informing the court, "the State would have made the motion had defense counsel not made it." 1AA0006. Over the next two years, Ybarra was repeatedly seen by various doctors, and he was sent to Lake's Crossing Center for the Mentally Disordered Offender ("Lake's Crossing").

Shortly after his arrest, Ybarra "began to believe that [one of his attorneys] was Satan's brother and that the District Attorney was

Satan's son." 15AA3629. He also believed that one of his attorneys was being paid by members of the Ely community to work against his interests. 15AA3629. He wrote letters to counsel explaining that, among other things, Satan was telling him to kill himself and that another voice was telling him not to eat because the correctional officers were poisoning him. 4AA0863–66.

When these letters were provided to experts from a prior competency evaluation, one responded, "In my opinion a brief inpatient evaluation at Lake's Crossing facility would be of value." 4AA0858. Another explained that the letter "indicates that there has been a substantial deterioration in his mental condition since I saw him last," noting "paranoid delusions," "auditory and visual hallucinations," and "schizoid fantasies." 4AA0859. This expert concluded Ybarra "may have developed a full blown paranoid schizophrenia." 4AA0860. A third expert noted concerns related to "gross delusional ideas regarding [Satan], and these were associated with auditory hallucinations" and explained Ybarra "may be suffering from chronic paranoid schizophrenia. . . ." 4AA0861.

As a result of Ybarra's mental illness and these hallucinations and delusions, the trial court ordered that Ybarra "be transported forthwith immediately. . . he needs to be treated immediately to the end that he be able, if he is able at some point in the future, to assist his counsel to assist in his defense in this case." 4AA0980; *see also* 4AA0982–86.

Soon after his return from Lake's Crossing, counsel filed a motion to place Ybarra back at Lake's Crossing or the Nevada State Prison after Ybarra informed counsel "that he was seeing lights, hearing bells, hearing cars crashing, and hearing voices." 4AA0997–5AA1003. The State agreed that placement in the psychiatric unit at the State Prison was appropriate, and the court so ordered. 5AA1012–13.

Ybarra's severe mental illness inhibited his ability to discuss the facts of the case with his attorneys. "For a long time [Ybarra] could not give an account to his attorneys. . . of the events of that evening." Months later, when he was finally able to provide his attorneys with an account of what happened the night of the offense, that account illustrated that his mental illness rendered him a poor witness. Ybarra's account of what happened came to him while he was sitting in a jail cell. 18AA4498. While in his cell, a "visual experience . . .

occurred, much like a movie in that he saw projected on the wall of his jail cell the events of that evening" 18AA4498. Notably, Ybarra's trial counsel described Ybarra's account as "bizarre." 15AA3628. Counsel further acknowledged that Ybarra's mental illness renders him a poor witness, noting that it would be "very strange" if Ybarra "could observe and recall and relate the way we observe, recall, and relate, those of us who are fortunate not to be afflicted this way." 15AA3628.

Not only did Ybarra's delusions inhibit his ability to discuss his case with his attorneys, but his delusions inhibited his attorneys' ability to discuss it with him. "Mr. Ybarra was very unreceptive to any sort of defense based on his mental condition. I was having some difficulty keeping communications open with him and. . . I was concerned about jeopardizing those communications. So, I didn't pursue that line." 5AA1083.

His delusions cloaked the attorney-client relationship in one of mistrust. One psychiatrist testified that Ybarra discussed that he could "maybe trust" one of his attorneys, but no one else. 4AA0932. But this trust was oftentimes short-lived, as one of the major bases of Ybarra's delusions is that he stops talking to defense counsel when he perceives

them to be part of the delusion. 4AA0938. He quickly began referring to Steve McGuire, one of his trial attorneys, as "McGuire, the liar." 4AA0971.

Ybarra's delusions did not stop following his trial and conviction. For example, one of Ybarra's post-conviction attorneys, Glynn Cartledge, filed an affidavit before the Seventh Judicial District Court requesting the appointment of a second attorney because, among other reasons, the case contained "many complicated issues," including Ybarra's "mental state at the time of the killing and during trial and at present." 8AA1948–51. Rather than appointing a second attorney, the district court instead vacated its prior order appointing Cartledge to represent Ybarra and appointed Edward Horn as her replacement. 8AA1953–54. Ybarra's delusions resulted in him protesting this change in counsel, as he believed that Horn was previously employed by the Nevada Attorney General. 8AA1955. Ybarra remained steadfast in this belief, despite letters from Horn and the district court denying this assertion. 8AA1955. Like he did with prior attorneys, Ybarra expressed his distrust for Horn and indicated that he "would no longer communicate" with Horn. 8AA1958–63.

Still, Ybarra's delusions and mental health issues remain. Challenges posed by Ybarra's severe mental illness continue to be present and his lengthy and complex mental health history includes diagnoses of psychosis, schizophrenia, and unspecified depressive disorder. 12AA2771; 12AA2837.

In 2012, Dr. Jonathan Mack noted that Ybarra had "been for a long period of time, on relatively high doses of psychotropic medications," including various antipsychotics. 12 AA2771. Dr. Mack diagnosed Ybarra with, among other things, "Psychotic Disorder NOS related to Traumatic Brain Injury." 12AA2772. He acknowledged that Ybarra's psychotic disorder had "been variously labeled by different clinicians, including the label of Paranoid Schizophrenia" and that it appeared to have commenced shortly after Ybarra's traumatic brain injury. 12AA2772. Importantly, Dr. Mack commented on the consistency of Ybarra's symptoms and reporting over time: "there appears to be a consistency in his report of symptoms over time and to different examiners." 12AA2773.

Just last year, in 2024, Drs. Millspaugh and Viljoen diagnosed Ybarra with "Schizophrenia, Continuous," which the DSM-5-TR defines

"as the presence of perpetual abnormalities (e.g., delusions and hallucinations)". 12AA2837; 12AA2844. In diagnosing Ybarra, Drs. Millspaugh and Viljoen explained that traumatic brain injuries—such as getting hit in the head with a timber beam— can cause schizophrenia and that Ybarra "meets criteria for the specifier of continuous, as it appears acute symptoms have been present since around age 10[.]" 12AA2844. Like Dr. Mack, they too commented on the consistency of Ybarra's symptoms, noting "the symptoms of psychosis endorsed and reported by [] Ybarra are consistent with previous records and evaluations." 12AA2845. These records and evaluations—and Ybarra's consistent symptoms—date back decades.

The State does not dispute that Ybarra suffers from mental illness. *See* Ans. Br. at 47–51. Notably, the State fails to even acknowledge any post-trial psychological evaluations, including Ybarra's most recent 2024 evaluation. *See generally* 12AA2790–49. The State also does not dispute that, by any definition, this mental illness is severe. *Id.*

The closest the State comes to disputing Ybarra's severe mental illness is in two sentences buried in the middle of its three-and-a-half-

page discussion of this claim arguing, "Ybarra's claim of severe mental illness was factually presented at trial and rejected by the jury. He was subjected to multiple evaluations by psychiatrists and psychologists many of whom testified at trial." *Id.* at 49. The State then directs this Court to revisit its Statement of Facts—where it implies that Ybarra is malingering his delusions—before noting that the jury rejected Ybarra's not guilty by reason of insanity defense. *Id.* at 49–50; 18–20.

These conclusory sentences not only fail to dispute the reality of Ybarra's mental illness, but they conflate distinct concepts: the legal defense of not-guilty-by-reason-of-insanity and the categorical exemption from death urged here, for severe mental illness. Furthermore, in implying that Ybarra has malingered symptoms of his severe mental illness, the State chooses to ignore evidence that Ybarra's delusions began long before the offense in this case—and, thus, long before he had any apparent motive to malinger symptoms of his delusions—and the consistency of Ybarra's reporting and symptoms which were observed by multiple evaluators over several decades.

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

The first article of the Nevada Constitution is the Declaration of Rights. Section 6 commands, "Excessive bail shall not be required, nor excessive fines imposed, *nor shall cruel or unusual punishments be inflicted*, nor shall witnesses be unreasonably detained." Nev. Const. art. 1, § 6 (emphasis added). This language departs from the Eighth Amendment, which protects against "cruel *and* unusual punishment" to "reach punishments that are either cruel *or* unusual." Br. of Amicus Curiae American Civil Liberties Union (ACLU) [hereinafter ACLU Br.] at 3 (emphasis in original); *see also id.* at 5 (noting that the Eighth Amendment predates Article 1, Section 6 of the Nevada Constitution by 73 years).

This Court has long recognized its ability to find greater constitutional protections under the state constitution than under the federal constitution. *See, e.g.*, *State v. Kincade*, 129 Nev. 953, 956, 317 P.3d 206, 208 (2013) ("States are permitted to provide broader

protections and rights than provided by the U.S. Constitution.").[5] In the context of Article 1, Section 6, amicus curiae ACLU stresses the importance of this departure from the Eighth Amendment, underscoring that the federal constitution "serves as a floor upon which the state may build in providing its citizens even greater protection." ACLU Br. at 3. Nevada intentionally built upon that floor when its drafters selected "the disjunctive 'or' rather than the conjunctive 'and.'" *Id.* at 5. The natural and intended consequence of this departure is a clause that—unlike the Eighth Amendment, which requires a challenge be "deemed *both* cruel *and* unusual,"—prohibits punishment that is "*either* cruel or unusual." *Id.* (emphasis in original).

Such a reading is consistent with this Court's precedent. *Id.* at 5–6 (collecting cases where this Court has read the word "or" to have a plain, disjunctive meaning). And it is consistent with other states that

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[5] *See also Thomas v. Eighth Jud. Dist. Ct.*, 133 Nev. 468, 469, 402 P.3d 619, 622 (2017); *Wilson v. State*, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007); *State v. Bayard*, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003); *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 414, 23 P.3d 243, 250 (2001); *State v. Harnisch*, 114 Nev. 225, 228–29, 954 P.2d 1180, 1182–83 (1998); *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 Nev. 483, 501–02, 396 P.2d 683, 691 (1964).

have interpreted a "cruel *or* unusual" punishment provision. *See id.* at 9–10 (collecting cases).

A plain reading of the text of Article 1, Section 6—and adherence to this Court's decades of precedence—demonstrate that the Nevada Constitution is more protective than the Eighth Amendment. And the Nevada Constitution's prohibition against cruel or unusual punishment includes a categorical exemption against the death penalty for individuals suffering from severe mental illness.

a) The State does not dispute that history, public policy, and reason of the cruel or unusual punishment clause support a categorical exemption from the death penalty for those with severe mental illness.

History, public policy, and reason show that the Nevada Constitution's prohibition against "cruel or unusual" punishment includes an exemption from the death penalty for those suffering from severe mental illness. The State does not dispute this. The State offers no position regarding the provision's history, public policy, or reason. This is, perhaps, because no answer is helpful to the State.

(1) The State does not dispute that the history of the clause shows that it offers special protection for children, the intellectually disabled, and the mentally ill.

"It is a mistake to divorce the meaning of words from their context." *Strickland v. Waymire*, 126 Nev. 230, 235, 235 P.3d 605, 609 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)). Here, the clause's history provides that context: "Cruel or unusual" was a phrase known at common law.[6] It encompassed two concepts.

First, the phrase curtailed arbitrary imposition of punishment. *See, e.g.*, John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 N.W. J. L. & Soc. Pol'y 307, 334 (2018) ("That the English prohibition against cruel and unusual punishments was seen as a constraint on disproportionate penalties, arbitrary

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[6] Scalia & Garner, *Reading the Law* at 320("The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common-law meanings.").

judicial power and otherwise boundless common-law judicial discretion is clear.").[7]

Second, the clause prohibited any punishment contrary to long or immemorial usage.[8] Here, three protections are particularly informative: the prohibitions against punishment of infants, the intellectually disabled, and the mentally ill. Under the protection for infants, someone under the age of seven was incapable of committing a crime; for someone between seven and fourteen, there was a presumption the infant was capable.[9] Under the protections for the

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[7] *See also* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 37 Wm. & Mary Bill Rts. J. 989, 996 (2019); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L. J. 441, 475 (2017).

[8] John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1745 (2008). The clause also prohibited excessive punishment. *See, e.g.*, John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 978 (2011) ("The Cruel and Unusual Punishments Clause was meant to prohibit excessive punishments as well as barbaric ones.").

[9] Joel Prentiss Bishop, *Commentaries on the Criminal Law*, § 461 (Little Brown 1865) [hereinafter Bishop, *Commentaries on the Criminal Law*]; *see also* 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 2 at 15 (1736 ed.); 4 William Blackstone, *Commentaries on the Laws of England* *23.

intellectually disabled and the mentally ill, a person suffering these conditions at the time of the offense could not be prosecuted.[10] The common law also protected people from prosecution and execution while they were afflicted by mental illness.[11] Executing anyone entitled to these protections would have been contrary to long usage, and thus cruel or unusual.

Both understandings—that the provision outlawed arbitrary imposition of punishment and that the less capable are less culpable—would have been appreciated by the framers in adopting the language prohibiting "cruel or unusual" punishment.

The State does not dispute this. Instead of engaging with these arguments, the State merely comments that Ybarra's Opening Brief "engages in lengthy discussions on the constitutional prohibition against cruel and unusual punishment; children, infants and the age of

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[10] Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2756 (2015); 2 *The Reports of Edward Coke* 572 (Joseph Butterworth & Son 1826); 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 4, 33 (1736 ed); 4 William Blackstone, *Commentaries on the Laws of England* *24; Bishop, *Commentaries on the Criminal Law*, § 468.

[11] *See, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England*, *24–25.

culpability; suppositions on the common law; various dictionary definitions; [and] history going all the way back to Sir Matthew Hale" before asserting that the "constitutionality of Nevada's death penalty has been litigated for decades upon decades." Ans. Br. at 48. But this mischaracterizes Ybarra's claim. This claim argues that executing someone who suffers from severe mental illness is cruel or unusual under the Nevada Constitution, not that Nevada's death penalty scheme is unconstitutional or that it fails to narrow the class of persons eligible for the death penalty. Ans. Br. at 48–49.

(2) The State does not dispute that public policy requires expanding the common law protections for the severely mentally ill.

Public policy—namely preventing arbitrary punishment and protecting the less culpable—requires expanding common law protections for children, the intellectually disabled, and the mentally ill. These two points—arbitrary imposition of punishment and protecting the less capable—were relevant when the Supreme Court construed the federal "cruel and unusual" clause to determine that the intellectually disabled and juveniles should be categorically exempt from the death

penalty. And both points apply with equal, if not greater, force to the severely mentally ill.

The State does not dispute either point.

(a) Preventing arbitrary imposition of death sentences requires an exemption for juvenile offenders, the intellectually disabled, and the severely mentally ill.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), arbitrary imposition of the death penalty was the Supreme Court's motivating concern. *See, e.g.*, *Furman*, 408 U.S. at 277 (death penalty unconstitutional because imposed arbitrarily); *Gregg*, 428 U.S. at 195 (acknowledging concerns that "the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance").

After *Gregg*, the death penalty could be imposed only with protections against arbitrariness. Thus, the factfinder must consider aggravating and mitigating circumstances, must make an individualized decision, and must consider any relevant mitigating evidence. *Gregg*, 428 U.S. at 196, 198; *Lockett v. Ohio*, 438 U.S. 586,

605 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *accord Ybarra v. State*, 100 Nev. 167, 175, 679 P.2d 797, 802 (describing *Gregg* line of cases: "This balancing process causes the sentence to focus on the circumstances of the crime and the character of the individual defendant, and to follow capital-sentencing procedures *which are designed to preclude imposition of the death penalty in an arbitrary or capricious manner*." (emphasis added)).

But for juveniles and the intellectually disabled, the High Court recognized, these protections are insufficient. Being a juvenile or suffering from intellectual disability creates too great a risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Atkins v. Virginia*, 536 U.S. 304, 320 (2002); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005). For the intellectually disabled, this is so because of the heightened possibility of false confessions; a reduced ability to prove mitigation, to aid counsel, or act as a witness; a demeanor that might wrongly imply lack of remorse; and the double-edged nature of intellectual disability as a mitigating circumstance. *Atkins*, 536 U.S. at 320–21. For juveniles, the risk of

arbitrary punishment is similar: their immaturity causes "impetuous and ill-considered actions and behavior"; the brutality of a juvenile offense might overpower mitigation; and experts cannot distinguish between temporary immaturity and "irreparable corruption." *Roper*, 543 U.S. at 569, 573.

From these two exemptions, six considerations inform whether someone suffering from severe mental illness can be reliably sentenced to death: (1) whether the status impairs the defendant's ability to cooperate with counsel, *Atkins*, 536 U.S. at 320–21; (2) whether the status renders the defendant a poor witness, *id.* at 321; (3) whether the status causes distortions in the defendant's thinking that increases the chances of poor decision-making, *Roper*, 543 U.S. at 569; (4) whether the status has a double-edged nature as mitigation, *id.* at 573; *Atkins*, 536 U.S. at 321; (5) whether the complexity and conflicting views of experts are likely to generate confusion and misunderstanding among jurors, *Roper*, 543 U.S. at 573; and (6) whether the status increases the likelihood of brutality in the offense, which in turn might preclude jurors from properly considering the mitigation. *Id.*; *see also*, Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability*

Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling, 23 Wm. & Mary Bill Rts. J. 487, 511 (2014) [hereinafter Sundby, *Unreliability Principle*] (identifying these six factors).

All six factors indicate those suffering from severe mental illness cannot, reliably, be sentenced to death. As defined by the American Bar Association and the American Psychological Association, severe mental illness "refers to a narrower set of diagnoses than mental illness," specifically, "mental disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (e.g., lasting at least a year); and that result in comparatively severe impairment in major areas of functioning." American Bar Association, Death Penalty Due Process Review Project, *Severe Mental Illness and the Death Penalty*, at 9, (Dec. 2016); *see also* American Psychological Association, *Assessment and Treatment of Severe Mental Illness*, at 5 (Aug. 2009).

More than intellectual disability or youth, severe mental illness impairs a defendant's ability to cooperate with or assist counsel, to act

as a witness,[12] and to make rational decisions.[13] More than intellectual disability or youth, severe mental illness has a double-edged nature that jurors could construe as aggravating.[14] Severe mental illness is more likely to generate conflicting—and confusing to jurors—views from experts.[15] And, finally, more than intellectual disability or youth, where the defendant suffers from severe mental illness, the offense's brutality will inflame the passions and prejudices of the jurors. Thus,

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[12] Brief of Amicus Curiae 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 [hereinafter Nev. Pub. Def. Br.] at 27–28; ACLU Br. at 26; Brief of Amicus Curiae American Bar Association [hereinafter ABA Br.] at 18.

[13] Nev. Pub. Def. Br. at 26.

[14] ACLU Br. at 26; ABA Br. at 17; Nev. Pub. Def. Br. at 36.

[15] Brief of Amicus Curiae Nevada Attorneys for Criminal Justice at 4–5; Sundby, *Unreliability Principle*, 23 Wm. & Mary Bill Rts. J. at 521 (citing Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 477 (1980) ("The factfinder is likely to view with considerable skepticism the defendant's claim that he did not function as would a normal person under the circumstances."); *see also* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1125 (describing capital juror criticism of expert witnesses). Indeed, it is telling that no mental health evidence was presented during Ybarra's penalty phase. *See* 1Reply App. 1–128.

severe mental illness, more than intellectual disability or youth, creates an intolerable risk of unreliable death sentences.

Ybarra's case, in particular, shows the need for a categorical exemption for these very reasons and the State does not dispute that Ybarra's case demonstrates an exemption is necessary for those suffering from severe mental illness. From the moment of his arrest up to the instant proceedings, Ybarra's mental health has posed a fatal problem to the reliability of his death sentence, exemplifying the problems discussed by *Atkins* and *Roper*. *See* Sundby, *Unreliability Principle*, 23 Wm. & Mary Bill Rts. J. at 511. Ybarra, beyond any reasonable disagreement, suffers from severe mental illness, namely schizophrenia. 12AA2837.

Ybarra's severe mental illness (1) has impaired his ability to work with his attorneys; (2) has rendered him a poor witness; (3) has caused distortions in his thinking processes, leading to poor decision-making; (4) has a double-edged nature as far as mitigation; (5) has led to disagreement among the experts to evaluate him; and (6) is evidenced by the brutality of the offense in this case. The State disputes none of these points.

First, the State does not dispute that Ybarra's severe mental illness has interfered with his ability to assist counsel, infecting these proceedings:

- Before trial, Ybarra began to believe that one of his attorneys was Satan's brother and was being paid by members of the Ely community to work against his interests. 15AA3629. This sowed seeds of mistrust in the attorney-client relationship.
- Ybarra's severe mental illness inhibited his ability to discuss the facts of the case with his attorneys. 15AA3626–2 ("For a long time [Ybarra] could not give an account to his attorneys. . . of the events of that evening.").
- Ybarra's delusions inhibited his attorneys' ability to discuss things with him. His attorneys had "difficulty keeping communications open with him." 5AA1083. Rather than jeopardize communications, his attorneys opted not to pursue certain lines of communications, specifically those surrounding Ybarra's mental health issues. 5AA1083.

- Ybarra often stopped talking to defense counsel when he perceived them to be part of the delusion. 4AA0938. He began calling one attorney "McGuire, the liar" as a result of his distrust. 4AA0971.
- Even in post-conviction, Ybarra expressed distrust for his attorney and indicated that he "would no longer communicate" with his lawyer due to Ybarra's incorrect belief that his attorney was previously employed by the Nevada Attorney General. 8AA1955; 8AA1958–63.

Second, the State does not dispute that Ybarra's severe mental illness renders him a poor witness. For a period of time, Ybarra was unable to provide his trial attorneys with an account of what happened on the night of the crime. 15AA3626–27. Ultimately, his account of what happened further illustrates that his mental illness renders him a poor witness as that account came to him in the form of a "visual experience. . . much like a movie. . . that he saw projected on the wall of his jail cell." 18AA4498. This after-the-fact memory—itself a hallucination—put trial counsel in the uncomfortable position of having

to decide whether the hallucination was reliable enough to plan a defense around.

Ybarra's counsel commented on Ybarra's unreliability as a witness to the jury in opening statement, calling his account of what happened "a bizarre account," and noting that it did not "jive" with the evidence. 15AA3628. Trial counsel emphasized the point, adding how it would be "very strange" if Ybarra "could observe and recall and relate the way we observe, recall, and relate, those of us who are fortunate not to be afflicted this way." 15AA3628.

Third, the State does not dispute that Ybarra's severe mental illness has caused poor decision-making. The offense itself was caused by distortions in Ybarra's thinking processes. Specifically, on the night of the offense, Ybarra "heard a voice that said you will get [your wife] back if you sacrifice somebody. In his despair and delusions and psychosis, he heeded that voice, perhaps not recognizing or perhaps in-spite of recognizing it as the voice that he took to be the voice of Satan." 15AA3627. And his poor decision making is reflected in the various letters Ybarra sent to counsel and the court throughout the course of his case, which, in part, motivated counsel not to work on his case because

their representation might be terminated. *See* Opening Br. at 6–13; 30–32.

Fourth, the State does not dispute that Ybarra's severe mental illness has a double-edged nature as mitigation. Severe mental illness as a mitigating factor is double-edged, as jurors may view it as aggravating. This consideration is stronger in a case like Ybarra's, where he pleaded not guilty by reason of insanity.

Fifth, the State does not dispute that Ybarra's case reflects the complexity of mental health assessment, and how that complexity is likely to confuse jurors. *See* Ans. Br. at 47–50. Throughout the hundreds of pages of testimony, the litany of experts presented conflicting views to the jury and confused the distinct, yet sometimes overlapping, issues of competency to stand trial, sanity on the night of the offense, and severe mental illness. *See* Opening Br. at 22–27, 75–78 (summarizing testimony). Everyone disagreed about what diagnoses applied.

The complexity of expert opinions surrounding Ybarra's mental health and his competency to stand trial were further complicated by his medications. For approximately eight months prior to and during

trial, Ybarra was medicated using high doses of sedatives, including 3000 mg. of lithium per day, the "highest dose" with which Dr. Chappel had ever personally had experience. 19AA4549.

The State's own brief demonstrates this complexity, as it too conflates the concept of insanity with severe mental illness. In what appears to be the State's attempt to dispute Ybarra's severe mental illness, it argues that "Ybarra's claim of severe mental illness was factually presented at trial and rejected by the jury." Ans. Br. at 49. To support this proposition, it relies exclusively on the fact that Ybarra presented a defense of not guilty by reason of insanity at trial and that the jury rejected this defense by finding Ybarra guilty. Ans. Br. at 49–50. But Ybarra's sanity at the time of the crime, and the jury's ultimate rejection of his insanity defense does little, if anything, to offer insight into whether Ybarra was suffering from a severe mental illness on the night of the offense, at the time of trial, or even today. This is because legal insanity and severe mental illness are not synonymous.

The task of understanding severe mental illness is complex and Ybarra's case exemplifies the need for a categorical exemption. Lay jurors cannot be expected to understand and weigh something that

experts disagree about, and that the legal profession itself does not understand.

Sixth, and finally, the State does not dispute the brutality of offenses committed by the severely mentally ill. In fact, the State referenced the brutality of this offense on the second page of its brief. Ans. Br. at 2 ("Ybarra was sentenced to death for the grisly murder of a sixteen-year-old girl in White Pine County, Nevada."). The State subsequently devoted an additional two pages to recounting this "grisly murder." Ans. Br. at 12–13.

All of these factors, which the Supreme Court relied on to exempt children and the intellectually disabled, are present and exemplified here. Ybarra's case demonstrates why death sentences cannot be reliably imposed on those with severe mental illness.

(b) Theories of punishment do not support executing juvenile offenders, the intellectually disabled, or the severely mentally ill.

Additionally, the execution of the intellectually disabled and juveniles cannot be justified by penological theories. Of the four justifications for punishment—incapacitation, deterrence, retribution,

and rehabilitation—two do not apply in the context of the death penalty. *See Ewing v. California*, 538 U.S. 11, 25 (2003); *Gregg*, 428 U.S. at 183 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."). Neither retribution nor deterrence support execution of the intellectually disabled or juveniles.[16]

Nor do retribution or deterrence support the execution of the severely mentally ill. Retribution is not served by executing someone who suffers from severe mental illness because retribution recognizes that culpability is directly tied to capability. *See, e.g.*, *Atkins*, 536 U.S. at 319; *Roper*, 543 U.S. at 571.[17] Similarly, deterrence is not served

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[16] *Atkins*, 536 U.S. at 319 ("the lesser culpability of the mentally retarded offender surely does not merit that form of retribution"); *id.* at 320 ("the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information"); *Roper*, 543 U.S. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability and blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

[17] ABA Br. at 11; Nev. Pub. Def. Br. at 47; ACLU Br. at 22; Brief of Amicus Curiae Nevada Law Professors [hereinafter Nev. Law Prof. Br.].

because mental illness interferes with rational decision-making, thus the death penalty cannot deter. *See, e.g.*, *Atkins*, 536 U.S. at 320; *Roper*, 543 U.S. at 571.[18] The State does not argue otherwise.

(3) The State does not dispute that reason dictates that the severely mentally ill should have the same protections already afforded to juveniles and the intellectually disabled.

Finally, reason requires reading the cruel or unusual provision as prohibiting the execution of the severely mentally ill. Reason cannot justify drawing a line between the severely mentally ill on one side and the intellectually disabled and juvenile offenders on the other. All the reasons identified in *Atkins* and *Roper* apply with equal or greater force to the severely mentally ill.[19] A consistent reading of the prohibition against cruel or unusual punishment, thus, requires finding an exemption for those suffering from severe mental illness. The State does not argue otherwise.

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[18] ABA Br. at 15; Nev. Pub. Def. Br. at 46.
[19] *See* ACLU Br. at 22–23; Nev. Pub. Def. Br. at 7.

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

The common law recognized the reduced culpability of infants, the intellectually disabled, and the mentally ill. Contemporary death penalty jurisprudence has already recognized the need for special protections for juveniles and the intellectually disabled. Both groups are less culpable because of their status.

This Court should recognize that, just as the federal Constitution prohibits the execution of juvenile offenders and the intellectually disabled, the Nevada Constitution prohibits the execution of the severely mentally ill.

3. The State's arguments against granting relief are wrong.

The State argues that: (1) Nevada's death penalty scheme is constitutional; (2) *Chappell v. State*, 137 Nev. 780, 501 P.3d 935 (2021), prevents the grant of relief; and (3) procedural default bars consideration of this claim. Ans. Br. at 47–51. The State is wrong on all three grounds.

First, as discussed above, the State mischaracterizes Ybarra's argument that executing someone who suffers from severe mental illness is cruel or unusual under the Nevada Constitution as an argument that Nevada's death penalty scheme is unconstitutional. Ans. Br. at 48–49. Contrary to the State's brief, this claim does not make issue of, let alone address, Nevada's death penalty statute and whether it properly narrows the class of persons eligible for the death penalty. Thus, any such arguments made by the State concerning Nevada's death penalty scheme are irrelevant.

Second, the State argues that the district court properly rejected this claim under this Court's precedent in *Chappell*. Ans. Br. at 50–51. In arguing that the district court properly applied procedural bars to this claim, the State simply repeats the district court's order. *Compare* 20AA4936 (district court's order rejecting this claim) *with* Ans. Br. at 50–51. And it conclusorily states that, in *Chappell*, "the specific claim regarding the severe mental illness was addressed and relief rejected." Ans. Br. at 51.

The State fails to engage with any of Ybarra's *Chappell* arguments:

- The State fails to address Ybarra's argument distinguishing *Chappell*, which concerned a FASD diagnosis, with Ybarra's significantly more serious schizophrenia and psychosis diagnoses. Opening Br. at 82.
- The State fails to address Ybarra's argument that—in contrast to this Court's description that Chappell failed to cite authority holding that the mentally ill are categorically exempt from the death penalty—Ybarra provided significant persuasive authority to support the proposition that this court should recognize a categorically exemption for those with severe mental illness. Opening Br. at 82.
- The State fails to meaningfully address Ybarra's arguments that this Court should revisit its holding in *Chappell* and, instead, conclusory states that this Court should not do so because the only issue before it is whether the denial of an evidentiary hearing was proper. Opening Br. at 81–88; Ans. Br. at 51. But this is incorrect. There are multiple issues before this Court, including both whether the district court erred by denying Ybarra's petition without ordering the

State to respond or ordering an evidentiary hearing and whether Ybarra is ineligible for the death penalty under the Nevada Constitution because of this severe mental illness. Opening Br. at 1–2. Moreover, the district court's denial of an evidentiary hearing was, in part, because it viewed this claim as lacking merit. *See* 20AA4936.

Third, the State argues that laches bars relief because the "State is prejudiced as forty years have passed since remittitur" and that no miscarriage of justice will result from denying relief because neither federal law nor state law support a categorical exemption for those suffering from severe mental illness. Ans. Br. at 47–51. This Court has held that procedural default will be excused to prevent a "fundamental miscarriage of justice." *See, e.g.*, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). One way to establish a fundamental miscarriage of justice is to show that someone is "ineligible for the death penalty." *Id.* Because Ybarra's severe mental illness renders him ineligible for the death penalty, the fundamental miscarriage of justice exception applies to overcome any applicable procedural default.

B. Ybarra has intellectual disability.

Claim One asserts that Ybarra is intellectually disabled and, thus, ineligible for the death penalty. 20AA4791–24. His claim relies on new evidence that both supports the conclusion he has intellectual disability and undermines the factual basis for this Court's previous adjudication of this claim. In responding, the State does not dispute this new evidence, that it shows Ybarra is intellectually disabled, or that it shows the Court's prior adjudication was clearly erroneous. Rather the State invokes procedural default and law of the case and relies on the previous adjudication as if no new evidence were presented now. This is particularly telling because the State notably fails to summarize the testimony from the prior hearing, instead relying on the district court's order. *See* Ans. Br. at 28–35. This leaves out a crucial fact: the State's expert at that prior hearing provided narrow testimony, focusing only on significant subaverage intellectual functioning, and giving conclusive weight to only one test (the Test of Memory Malingering ["TOMM"]), which this Court later held to be of "little value". *See* 10AA2463–68; 10AA2492; *Ybarra v. State*, 127 Nev. 47, 69, 247 P.3d 269, 283 (2011). Ybarra's expert's were otherwise unrebutted at the hearing. That is,

Ybarra's experts were the only ones to opine about the clinical guidelines, deficits in adaptive behavior, and the developmental period. *See* 9AA2193–95; 9AA2238; 9AA2212–32; 10AA2367–68.[20] The district court order, in reaching its conclusions, effectively conducted its own clinical analysis of the evidence, reflected in the fact that the court barely cited to the state expert's testimony. *See* 11AA2611–2656 (out of 189 citations, only eight to Dr. Dr. T. Young's testimony).[21]

First, the State's failure to engage with this new evidence is a concession that the evidence establishes Ybarra has intellectual disability. § (1) below.

Second, Ybarra's intellectual disability, new evidence supporting that diagnosis, and new law supporting his claim, all excuse any procedural defaults. Thus, procedural default does not bar this claim. § (2) below.

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[20] The State's expert expressed a shocking level of ignorance about the clinical guidelines. *See* 11AA2514–16 (acknowledging he had not read "the current one," i.e., the 2002 manual, but had read the parts quoted in the *Atkins* opinion, and had read "probably three quarters" of the 1992 version "in the early 90's"); *see also* 10AA2401 (date of Dr. T. Young's testimony: Apr. 30, 2008).

[21] These citations are: 11AA2622 n.53; 11AA2628 n.81; 11AA2644–45 nn.147–52.

Third, and finally, the State does not dispute that the district court committed a number of errors in its analysis. § (3) below.

1. The State does not dispute—based on the evidence now available—that Robert Ybarra is intellectually disabled; he is, thus, ineligible for execution.

In support of his intellectual disability, Ybarra provided a report by Drs. Millspaugh and Viljoen. 12AA2790. Ybarra cited this report extensively. *See* 20AA4796–805 (citing Exhibit 7). And so did his Opening Brief. Opening Br. at 95–106. This report detailed new testing, and provided a fresh conclusion that Ybarra has intellectual disability. 12AA2837–43. Additionally, the report analyzed its findings against the backdrop of prior evaluations, and explained why an intellectual disability diagnosis is appropriate notwithstanding potential objections. *See, e.g.*, 12AA2838.

Not once does the State engage with this report. Thus, the State does not dispute that this report conclusively establishes that Ybarra has intellectual disability. Ans. Br. at 42–47. This is a concession that this new evidence establishes intellectual disability. *See Polk v. State*, 126 Nev. 180, 185–86, 233 P.3d 357, 360–61 (2010).

Where the State does quibble with Ybarra's arguments, it is to argue distinctions that make no difference or to argue that the prior adjudication was correct on the prior record.

Specifically, the State argues that Supreme Court cases do not require "strict adherence" to clinical guidelines, but only that they be "informed" by the medical community's diagnostic framework. Ans. Br. at 45. But this distinction is unhelpful to the State because even merely being "informed" by the guidelines, Ybarra is intellectually disabled. *See* § (a) below.

As referenced above, the State does not dispute that the evidence now available shows Ybarra has intellectual disability. Instead, the State repeatedly refers to this Court's prior adjudication of Ybarra's intellectual disability, arguing it was correct. Ostensibly, this is in response to Ybarra's argument that one reason the law of the case doctrine does not apply is that the prior determination was clearly erroneous. Current evidence supporting Ybarra's intellectual disability is helpful in showing that the prior determination was clearly erroneous, and so these issues are discussed together. *See* § (b) below.

a) The State does not dispute that "adjudications of intellectual disability" must be "informed by the medical community's diagnostic framework."[22]

The State, following the district court's lead, argues that *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*) do not require "strict" adherence to the clinical guidelines, but only that courts are "informed" by the medical community's diagnostic framework. Ans Br. at 45; 20AA4935. The State fails to explain how this is a material difference.

Moreover, other than objecting to the parlance, the State does not dispute Ybarra's reading of *Atkins*, *Hall, Brumfield v. Cain*, 576 U.S. 305 (2015), *Moore I*, and *Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*)). These cases collectively show that the clinical guidelines are not optional to an *Atkins* inquiry.

And the holdings of these cases specify the level of adherence required:

- Under *Hall*, states are not free to ignore the standard error of measurement for intelligence tests because the clinical

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[22] Ans. Br. at 45 (emphasis in original).

guidelines require clinicians to consider the standard error of measurement. *Hall*, 572 U.S. at 712–13.

- *Brumfield* identified two ways in which state courts may not deviate from clinical guidelines:
    - Like *Hall*, *Brumfield* explained that state courts may not ignore the standard error of measurement for intelligence testing. 576 U.S. at 315–16.
    - *Brumfield* also explained that states may not give relevant weight to evidence that is clinically irrelevant. *Brumfield*, 576 U.S. at 319 (holding state court determination unreasonable because of reliance on antisocial personality disorder as rebutting deficits in adaptive behavior even though "[t]he relevance of this diagnosis is . . . unclear, as an antisocial personality is not inconsistent with adaptive impairment or with intellectual disability more generally.").

- *Moore I*, following both *Hall* and *Brumfield*, also explained that states must consider the standard error of measurement. *Moore I*, 581 U.S. at 13–14.
- *Moore I* also specified five ways in which state courts may not deviate from clinical guidelines in analyzing adaptive behavior deficits:
    - First, courts may not emphasize strengths because "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.* at 15 (emphasis added).
    - Second, courts may not stress improved behavior in prison because clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting.'" *Id.* at 16.
    - Third, courts may not rely on academic failure, childhood abuse, and suffering as detracting from an intellectual disability conclusion because clinicians view those as risk factors for intellectual disability. *Id.* at 16–17.

    - Fourth, courts may not require a showing that deficits are unrelated to a personality disorder because clinicians recognize "many intellectually disabled people also have other mental or physical impairments." *Id.* at 17.
    - Fifth, courts may not rely on subjective factors based on lay stereotypes. *Id.* at 18.
- *Moore II* reiterated the five errors it identified in *Moore I* related to deficits in adaptive behaviors. *Moore II*, 586 U.S. at 139–42.

Being "informed" by the clinical guidelines in these cases is more than salutatory: the failure to comply with the relevant clinical guidance in these cases was error warranting reversal.

Nor is this merely a "choice of law" question. As amicus curiae American Association on Intellectual and Developmental Disabilities [AAIDD] make clear, the current clinical guidelines are the result of more than 150 years of "systemic and methodical study" seeking "better understanding [of] the condition and providing support to people who have it." Br. of Amicus Curiae AAIDD at 2–3 [hereinafter AAIDD Br.].

The "[l]ongstanding study of intellectual disability has resulted in a large body of knowledge regarding the condition, its features and the requirements for clinicians to conduct an accurate and correct diagnosis." *Id.* at 4. That is, the guidelines are uniquely suited to provide a reliable diagnosis. To again quote the AAIDD: "The long-established clinical framework used in diagnosing intellectual disability bars any reliance on stereotypes, uninformed assumptions, or *ad hoc*, seat-of-the-pants assessments made by laypeople (or careless clinicians)." *Id.* at 5. In contrast, "[u]sing a non-clinical framework creates a very real risk of an unreasonable (and invalid) interpretation of the diagnostic facts in an *Atkins* evaluation." *Id.*

Applying that clinical framework, whether through strict adherence or merely being informed, Ybarra is intellectually disabled.

b) The State does not dispute that, informed by the medical community's diagnostic framework, Ybarra is intellectually disabled.

The State also does not dispute that informed by the medical community's diagnostic framework, Ybarra is intellectually disabled. Instead, the State relies entirely on the prior adjudication of this claim.

But comparing the merits of Ybarra's claim against the prior adjudication shows that the prior adjudication was clearly erroneous. So law of the case does not bar consideration of this claim.[23]

To recap: a claim of intellectual disability must show deficits in intellectual functioning, deficits in adaptive behaviors, and onset during the developmental period. *See* NRS 174.098(7); *see also* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* 1 (12th ed 2021) [hereinafter AAIDD-12 Manual]; *see also* DSM-5-TR at 37; *see generally* AAIDD Br. at 16–18 (describing diagnostic process).

(1) The State does not dispute that Ybarra has significant subaverage intellectual functioning.

Significant subaverage intellectual functioning requires a full-scale IQ score that is two standard deviations below the mean; this generally means an IQ score of 75 or lower qualifies as significant

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[23] Law of the case is more fully discussed below. § II(B)(2)(d). However, because the State's only response to the merits of Ybarra's intellectual disability claim is to refer to the prior determinations, Ybarra addresses them here alongside the merits.

subaverage intellectual functioning. AAIDD-12 Manual at 29, 35–36; DSM-5-TR at 38. In April of 2024, Dr. Viljoen administered a WAIS-IV and received a full-scale score of 63. 12AA2834. The State does not dispute the accuracy of this score. Nor does the State dispute Drs. Viljoen & Millspaugh's conclusion that, reviewing their testing and historical testing data, the consistency of test and subtest scores since 2002 confirm Ybarra has significant subaverage intellectual functioning.

Rather, the State refers to the district court's 2008 reasoning on subaverage intellectual functioning. *See* Ans. Br. at 46. And, specifically, the State makes three points in response. None are persuasive.

(a) The district court did not "prefer" the standard error of measurement.

The State writes, "The district court considered the Flynn effect, but gave appropriate reasons to prefer SEM." Ans. Br. at 46 (providing no citation). This, ostensibly, refers to this statement in the 2008 Order: "Despite [reference to the Flynn effect], the AAMR does not recommend

an adjustment for the Flynn effect as it does for SEM." 11AA2626. The State's argument is problematic.

First, it inaccurately summarizes the record: the district court did not express a preference between the Flynn Effect and the standard error of measurement. *Compare* Ans. Br. at 46 *with* 11AA2626.

Second, there is no reason to have a preference between the two because they are not inconsistent with each other. The Flynn effect refers to how clinicians adjust scores to compensate for how testing norms become obsolete over time. *See generally* Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect in The Death Penalty and Intellectual Disability*, 155 (Edward A. Polloway ed. 2015); *see also* James W. Ellis, et. al., *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1365–66 (2018) [hereinafter *Evaluating Intellectual Disability*]. The standard error of measurement refers to the "inherent imprecision of the test," reflecting that an "individual's IQ test score on any given exam may fluctuate." *Hall*, 572 U.S. at 713. "The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score," and is better understood as "a range of scores on either side of the recorded score." *Id.*

Third, current clinical practice considers norm obsolescence, so whatever the district court's "preference," before, that determination is clearly erroneous in light of practice today. *See Evaluating Intellectual Disability*, 46 Hofstra L. Rev. at 1365–66 ("While it is important to assure that the scientific significance of Norm Obsolescence data is not misunderstood or distorted, failing to adjust an individual's obtained score to reflect it is unwarranted, and can result in an artificial inflation of the individual's true IQ.").

Fourth, and finally, the State's reliance on the district court's prior order glosses over this Court's treatment of this issue in its prior opinion. *Compare* Ans. Br. at 46 *with Ybarra v. State*, 127 Nev. at 67, 247 P.3d at 282–83. Specifically, as Ybarra went to lengths to note in his Opening Brief, this Court side-stepped all questions related to the 1981 IQ test by noting that it, "as with all of Ybarra's IQ tests, was administered well after [Ybarra] turned 18 years of age," and thus the "issue ha[d] little value in evaluating whether Ybarra presented sufficient evidence to establish mental retardation." *Ybarra*, 127 Nev. at 67, 247 P.3d at 282–83; *see also* Opening Br. at 121–22. So, what the district court did or did not do is irrelevant because this Court held that

all post-age-18 IQ testing was of "little value." Relying on the district court's prior reasoning—and not this Court's—perhaps reflects that the State agrees that assigning little value to all post-18 testing is contrary to clinical guidance. *See* AAIDD Br. at 30–31 (noting that the third diagnostic prong "does *not* require that psychometric testing or a formal diagnosis have occurred during that time" (emphasis in original)).

(b) The district court's reliance on the 1981 IQ test was improper.

The State next argues, "The district court gave weight to the 1981 IQ test and that was not improper." Ans. Br. at 46 (providing no citation); *see* 11AA2626–27 (district court's discussion of 1981 IQ test). It was improper.

First, no expert relied on the 1981 IQ test to rebut Ybarra's significant subaverage intellectual functioning. Dr. Schmidt, one of Ybarra's experts, relied on his own testing; Dr. M. Young, another of Ybarra's experts relied on Dr. Schmidt's testing. 9AA2238; 10AA2367–68. The State's expert, Dr. Ted Young, also did not rely on the 1981 testing, but his own. 10AA2468. Thus, as a question of methodology,

both the defense experts and the state expert agreed that the 1981 test was not dispositive.

This is, perhaps, because clinical guidelines counsel against relying on older testing. As the AAIDD Brief explains, testing errors can occur "in administering or scoring the test." AAIDD Br. at 24. This error is exacerbated if the test giver is inexperienced. *Id.* Here, the test was administered by an intern. 11AA2677.

The AAIDD counsels, "Because errors in testing can easily occur, and because there is no alarm mechanism to alert the examiner of an error, when a diagnosis of intellectual disability carries significant consequences, subsequent evaluators may consider prior testing scores with some caution." AAIDD Br. at 25. Careful evaluators, AAIDD explains, "review the raw test data," which provides critical information "validating the accuracy of any prior testing, particularly when the results of that prior testing diverge from the results of other administrations of the same or a similar test." *Id.* at 25–26.

The raw data for the 1981 test is unavailable. *See* 9AA2243.

Even setting aside the problems presented in the prior adjudication, Ybarra's new evidence shows that the 1981 testing is not

reliable. Every subsequent intelligence test administered to Ybarra resulted in a similar full-scale IQ score, and similar subtest scores. Copying the chart from the Opening Brief, here are Ybarra's test and subtest scores:

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

See 11AA2690 (Schmidt testing); 11AA2706 (T. Young testing); 12AA2758 (Mack testing); 12AA2834 (Millspaugh/Viljoen testing). The 1981 full scale score of 86 is inconsistent with the sub-60 scores that every other evaluator received. *See* 11AA2676. Moreover, it bears emphasis that, adjusting the score for norm obsolescence (.3 x 26 = 8; 86 – 8 = 78), and then considering the standard error of measurement (± 5), the 1981 score could be as low as 73, which is close to the cutoff. *See* AAIDD-12 Manual at 29, 35–36; DSM-5-TR at 38.

So the 1981 score was not reliable when the district court relied on it and it is even less reliable today in light of the evidence now available. Thus, insofar as the State invites this Court to rely on the 1981 test score, the Court should decline.

(c) The record is not replete with reliable opinions from evaluators.

Finally, the State argues, "The [2008] finding that Ybarra is a person without significant subaverage intellectual functioning was supported by relevant clinical guidelines and the determination was supported by a record replete with reliable opinions from evaluators at Lake's Crossing with specialized professional training." Ans. Br. at 46 (providing no citations). This is inaccurate.

Until the early 2000s, when Ybarra's intellectual disability became an object of litigation, no one evaluated Ybarra for intellectual disability. The only person to evaluate Ybarra's intelligence using a psychometrically sound intelligence test was Dr. Gutride's intern in 1981. *See* AAIDD Br. at 20–24 (describing importance of using test that has high level of validity and that has been normed and validated on population that includes those with intellectual disability). For all the

reasons described above, the 1981 test is not sufficiently reliable, and does not rebut the last 20 years of consistent testing. *See* § (b) above.

Presumably, the State is referring to the clinician reports summarized in the district court's 2008 order. *See* 11AA2624–25. But none of these sources purported to be a thorough evaluation of intelligence. To take them in turn: the district court wrote that Dr. Richnak "opined that Ybarra was borderline [intelligence]." 11AA2624. But Dr. Richnak conducted no testing, and, worse, he did not "opine" that Ybarra was borderline, he noted "borderline intellectual functioning" as a differential diagnosis. *See* 12AA2901, 2902.[24] The district court wrote, "In 1981 he was described as having normal intelligence," citing to a report by Lynn Gerow. 11AA2624; *see*

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[24] A differential diagnosis is not a diagnosis: "The *diagnosis*—the *disease* the physician concludes is the best explanation of the patient's symptoms—is arrived at through a process of gathering information, positing one or more diagnostic hypotheses, and examining each hypothesis to determine whether to accept or reject it. Where several diseases may be suggested by the patient's signs and symptoms, the process of distinguishing them and arriving at the most likely diagnosis is called *differential diagnosis*." 2 Mod. Sci. Evidence § 21:40 (Dec. 2024 Update) (italics in original).

12AA2906.[25] Dr. Gerow also did not administer an intelligence test. 12AA2904–06. Next, the district court referred to Dr. Gutride's 1981 test, which is discussed above. *See* § (b) above. Then: "In February 1981, Dr. Neal believed Ybarra's intellectual functioning tests were consistent with a low-normal range of intelligence." 11AA2624. Though Dr. Neal referred to "[t]ests of intellectual function," he did not explain which tests, or provide scores. 12AA2909. Nothing in this report suggests that Dr. Neal administered accurate intelligence testing; indeed, the evaluation was for competency to stand trial, not to evaluate intellectual disability. 12AA2908. Finally: "In August 1990, Dr. Pauly estimated Ybarra's IQ to be 70–80." 11AA2624.[26] Dr. Pauly's exact words were, "I would estimate his IQ to be around 70 to 80, although it is difficult to evaluate this because of the profound depression and retardation." 12AA2913. This assessment was not based on testing. Moreover, half of that estimated range qualifies as significant

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[25] The district court erred in referring to this as a 1981 report; it was actually a 1980 report. *Compare* 11AA2624 *with* 12AA2904.

[26] This was actually August 1980. *See* 12AA2912.

subaverage intellectual functioning. AAIDD-12 Manual at 29, 35–36; DSM-5-TR at 38.

Notably each of Drs. Richnak, Gerow, Neal, and Pauly are medical doctors, not psychologists. 12AA2902, 2906, 2910, 2913. Intelligence tests are generally administered by psychologists. *See Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 979 (Benjamin James Sadock, et al., eds. 9th ed. 2009).

Moreover, the AAIDD specifically cautions against reliance on this kind of observation because "even clinicians who do not have experience with intellectual disability" might operate from "misconceptions about the existence of a definitive cap on the possible abilities in people with intellectual disability." AAIDD Br. at 19. Where an observer acts on such a misconception, "[a]n evaluating clinician who fails to investigate such observer reports thoroughly risks accepting some or all of this faulty information and then compounding this error by using that faulty information as a reason to ignore (or discredit) the severity of the individual's actual deficits." AAIDD Br. at 19–20. It is worth emphasizing, too, that none of these experts purported to offer a clinical opinion about whether Ybarra has significantly subaverage intellectual

functioning, and none of them had reason to think their statements would be given clinical weight for such a determination.

Finally, as explained in the AAIDD Brief, Ybarra's other mental illness might "obscure the less visible indicators of intellectual disability," as the clinician focuses on the more "blatant" or "obvious problem or symptom." AAIDD Br. at 15–16. Thus, Ybarra's unique combination of conditions requires extra scrutiny of prior evaluators' commentary about his intelligence.

(2) The State does not dispute that Ybarra has deficits in his adaptive behaviors.

Deficits in adaptive behaviors refers to limitations in "conceptual, social, and practical" skills. AAIDD-12 at 1; *see also* DSM-5-TR at 37. Evaluation under this prong requires the administration "of a standardized adaptive behavior instrument." AAIDD Br. at 17. "The purpose of this part of the evaluation is to determine whether and how well the individual could perform various conceptual, social, or practical tasks, and whether the individual could do them as well as an average person would do them." *Id*. Dr. Millspaugh administered a test recognized by the AAIDD-12 as appropriate to Ybarra's cousin.

12AA2835, AAIDD-12 Manual at 31. Ybarra's scores qualify him as having deficits in all three domains and his composite score. 12AA2835. These results were consistent with the results Dr. Greenspan received in 2011. *Compare* 12AA2840 *with* 12AA2778, 2783–84. Thus, Ybarra has deficits in adaptive behaviors.

As with the rest of Ybarra's new evidence, the State does not engage with these new test results or this fresh conclusion that he has deficits in adaptive behaviors. Rather, the State argues that this Court's prior opinion upholding the district court's prior order "was not unreasonable." Ans. Br. at 45. Specifically, the State argues that, though Ybarra was bullied and performed poorly in school, "there are other explanations than intellectual disability provided in the record." Ans. Br. at 45.

To contextualize: the intellectual disability manual at the time listed both poor academic performance and avoids victimization as examples of deficits in adaptive behaviors. *See* American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and*

Systems of Supports 82 (10th ed. 2002) [hereinafter AAMR-10].[27] During the hearing in 2008, Ybarra's experts both testified that he had deficits in adaptive behaviors, referencing both the bullying and his poor academic performance. 9AA2222–23; 10AA2367–68 (deficits generally). The State's expert did not testify about adaptive behaviors at all. 10AA2468; 10AA2499; 10AA2492. The district court rejected the undisputed evidence of deficits and instead concluded that Ybarra had none. *See* 11AA2645–52. Relevant to the State's argument, the district court rejected the idea that victimization could ever evidence a deficit:

> In other words, it is the victim of the bully who has the problem. The Court finds this testimony to be without weight. The Court cannot accept the notion that in this case, the fact that Ybarra may have been bullied in school means he was suffering an adaptive deficit.

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[27] The American Association on Mental Retardation is the predecessor to the American Association on Intellectual & Developmental Disabilities. *See* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* xiii (11th ed. 2010) [hereinafter AAIDD-11].

11AA2646.[28] The court also rejected Ybarra's poor academic performance because "Ybarra continued in night school while working a job," which "the Court finds . . . to be evidence of his ability to adapt and respond to a bad situation." 11AA2646. This Court affirmed this reasoning. *Ybarra*, 127 Nev. at 69–71, 247 P.3d at 284–85.

The State's point is that the district court, and this Court in affirming, got it right. Ans. Br. at 45–46. To support the prior determinations, the State notes Dr. Gutride's testimony that Ybarra self-reported truancy, suspension, running away, drug use, and starting fights, that Ybarra used drugs and alcohol, and finally that Ybarra's poor academic performance pre-dated his swing accident at age 9. Ans. Br. at 45–46.

But Ybarra does have deficits in adaptive behavior, and the prior determinations were wrong to conclude otherwise.

First, the State appears to agree that Ybarra's poor academic performance qualifies as a deficit in adaptive behaviors and does not

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[28] Undersigned notes that this framing—that someone with a deficit in adaptive behaviors has "the problem"—problematically suggests that individuals with intellectual disability are "the problem."

dispute that he had poor academic performance. Under both the AAIDD definition and the DSM-5-TR definition, that by itself meets the requirement for Prong 2. *See* AAIDD-12 Manual at 30; DSM-5-TR at 42. Whether Ybarra had poor academic performance both before and after or only after his swing injury at age 9 does not change that he had poor performance; nor does substance abuse or any of the self-reported information given to Dr. Gutride. Indeed, no expert so opined; Dr. Gutride did not testify about intellectual disability or deficits in adaptive behavior. *See* 9AA2212–32; 10AA2367–68; 18AA4392–414, 4419–73.

And the district court was wrong to reject poor academics as a deficit for Ybarra. The district court's reasoning appeared to be that going to night school and working at the same time is inconsistent with poor academic performance. 11AA2646. But no expert testified to this analysis, and it is based on the kinds of stereotypes that the AAIDD criteria are designed to avoid. *See* 9AA2212–32; 10AA2367; 10AA2492; *see also* AAIDD Br. at 18–20. To put it concretely: people with intellectual disability can graduate from high school. Marc J. Tassé & John H. Blume, *Intellectual Disability and the Death Penalty: Current*

Issues and Controversies 7 (2018) [hereinafter Tassé & Blume] (explaining that inability to graduate from high school is a "common mistaken belief about the ability or inability of people with intellectual disability"). Indeed, the U.S. District Court concluded that the state district court's analysis here was "another instance of the state court rejecting an expert opinion and substituting its own without any clinical basis for doing so." *Ybarra v. Gittere*, No. 3:00-cv-00233-GMN-VPC, 2020 WL 5731793, at *8 (Sept. 23, 2020).

The district court, and this Court in affirming, was also wrong to reject evidence that Ybarra was bullied. There is no dispute that Ybarra was bullied in school or that this is evidence of a deficit in adaptive behavior. 9AA2212–32; 10AA2367–68; 10AA2492; 14AA3332; AAMR-10 at 82; AAIDD-12 Manual at 30. The State's response is that, "bullying often involves other reasons than intellectual disability." Ans. Br. at 46 (providing no citation). The State offers no other reasons; the AAIDD-12 also offers no other reasons; and this Court need not speculate what these other reasons might be: this is evidence of a deficit. Here, again, the U.S. District Court agreed that the state district court erred in discounting this evidence. *Ybarra*, 2020 WL 5731793 at *7.

But there is significantly more important evidence showing that Ybarra has deficits in adaptive behaviors—evidence that the State fails to reference: objective testing. First, in 2012, Dr. Greenspan administered the Adaptive Behavior Assessment Scale (2d ed.) to Ybarra's cousin, Martin Ybarra. 12AA2783. Dr. Greenspan received scores showing deficits in all three areas and in his composite score. 12AA2784. Second, in 2024, when Dr. Millspaugh administered a more recent version of this examination, the third edition, she received scores also showing deficits in all three areas and in his composite score. 12AA2835–36. Although the State referenced how "the Greenspan report focused on an interview of Ybarra's cousin, Marty," the State did not discuss how this "interview" was a formalized test meeting all the requirements of the then-current AAIDD manual for adaptive behavior testing. *Compare* Ans. Br. at 45 *with* 12AA2835–36 and AAIDD-11 at 50–54.[29] And the State does not discuss Dr. Millspaugh's administration

[29] *See also* J. Gregory Olley, *Adaptive Behavior Instruments in The Death Penalty and Intellectual Disability* 187, 187 (Edward A. Polloway, ed. 2015); Tassé & Blume at 115.

of the test at all. Both show that Ybarra has deficits in adaptive behavior; the State disputes neither.

(3) The State does not dispute that the onset of Ybarra's disability was during the developmental period.

The final requirement for a diagnosis of intellectual disability is that it originated "during the developmental period," which is currently defined as "before the individual attains age 22." AAIDD-12 Manual at 1. Two points about this requirement are relevant here. First, this requirement does *not* require a diagnosis or formalized testing from the developmental period. *See* AAIDD Br. at 30–31.[30] Second, as discussed at length in the Dr. Millspaugh and Viljoen report, significant evidence shows that the onset of Ybarra's intellectual disability was during the developmental period. *See* 12AA2837–40; *see also* Opening Br. at 106–08 (providing additional record support).

The State disputes neither point. In fact, the State does not discuss this prong at all. Ans. Br. at 42–47. This is remarkable:

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[30] *See also Evaluating Intellectual Disability*, 46 Hofstra L. Rev. at 1338; Stephen Greenspan, et. al., *Age of Onset and the Developmental Period Criterion*, *in The Death Penalty and Intellectual Disability* 77, 79; Tassé & Blume at 135.

Ybarra's Opening Brief devoted considerable attention to the developmental period prong because it shows why this Court's prior determination was clearly erroneous. *See* Opening Br. at 121–26. To repeat that argument: five times this Court conveyed its misunderstanding that *only* evidence from the developmental period was relevant in determining intellectual disability. *Ybarra*, 127 Nev. at 58, 58 n.8, 68, 69, 71 n.20, 247 P.3d 276, 276 n.8, 282–83, 283, 285 n.20; *see also* Opening Br. at 121–22. On the basis of this misunderstanding, this Court assigned "little value" to *all* of the IQ tests in this case, to the Test of Memory Malingering (which was the basis of the state expert's opinion), and to evidence of adaptive behavior deficits from ages 18–25. In effect, this Court's misunderstanding swept away all the clinically relevant evidence. This was error.

And the State does not dispute that it was error.

(4) The State's reliance on malingering is contrary to the medical community's diagnostic framework.

The State's final factual argument is that the "record is overflowing with evidence of Ybarra's malingering." Ans. Br. at 46. The State lists these instances, without providing any citations. *See* Ans. Br.

at 46–47. The State does not address that Drs. Millspaugh and Viljoen's point that it would be nearly impossible for someone to malinger consistent test and subtest scores for more than twenty years. *Compare* Ans. Br. at 46–47 *with* 12AA2848 ("Furthermore, it would be extremely difficult, if not impossible, for an individual with low cognitive functioning to malinger cognitive impairments and psychotic symptoms in such a consistent manner for several decades (e.g., to achieve very similar scores on intelligence tests over time)."). As the AAIDD explain in their brief, "[n]either the specific test questions on IQ test nor the manuals for those tests are available to the general public," not all subtests are necessarily given in every instance, and "the items in the subtests are generally progressive, meaning that each question is a little harder than the one before." AAIDD Br. at 26–27. Thus, "[i]t would be very difficult for an untrained examinee to know or even guess precisely which subtests will be given, the order in which they will be given, or when to begin deliberately answering incorrectly." *Id.* at 27. "For each test, a malingerer would have to know the subtests and the questions, memorize the subtests and questions administered in that round of testing, and then, for each subsequent administration

remember which questions were answered correctly and which were not." *Id.*[31]

The State disputes none of this.

Instead, the State points to a number of observations that are more than 40 years old to argue that "the new information presented is insufficient to overturn" the 2008 decision. Ans. Br. at 47. But the State cites no clinical guideline—nor any expert testimony or report—that suggests 40-year old evidence of malingering is dispositive for contemporary intelligence testing. Nor could the State. No expert—including the State's expert in the 2008 hearing—testified that this was a clinically appropriate conclusion to draw from the competency evaluations. 9AA2171–11AA2611.

And more fundamentally: the recitation of "malingering" evidence is highly selective, as shown by comparing the State's malingering paragraph with its own Statement of the Facts. *Compare* Ans. Br. at 46–47 (summarizing malingering evidence) *with* Ans. Br. at 6

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[31] This would be nearly impossible for anyone; it would be especially impossible for someone, like Ybarra, who also has dementia, schizophrenia and catatonia. *See* 12AA2837.

(recommendation that Ybarra receive treatment for depression and possible paranoid schizophrenia) *and id.* at 6 (referring to letters from medical professionals expressing concern about "Ybarra's suicidal ideations, delusions, visual and auditory hallucinations, fantasies about living in the country with animals"); *id.* at 6 (Chappel concluding "Ybarra's mental status 'so severely impairs his ability to cooperate with counsel that . . . it would be impossible.'"); *id.* at 7 (Chappel describing Ybarra as "psychotic," having "severe mental illness," "paranoid schizophrenia or depression," and having "paranoid delusions"); *id.* at 7 (O'Gorman concluding that "Ybarra should be placed in an in-patient facility to examine his overall mental, physical, and neurological health"); *id.* at 9 (Richnak noting "delusions of persecution" and "hallucinations that since being in jail had become voices telling him to kill himself."); *id.* at 11 ("Chappel concluded Ybarra was a paranoid schizophrenic"); *id.* at 11 (reference to Ybarra being treated with Lithium).

Moreover not every item described is an example of malingering. Being manipulative, for example, is neither a clinical conclusion nor a conclusion about malingering (let alone a conclusion about malingering

on intelligence testing). The State writes that "Ybarra quickly passed the Sanity Commission without difficulty once he realized it was stopping him from addressing his legal problems," but leaves out that he was receiving treatment (including psychotropic medications) during this same period of time. *See* Ans. Br. at 47; *see also* 5AA1122 (describing treatment plan and behavioral modification techniques, participation in therapeutic community); *id.* ("The client's chemotherapy included Lithium Carbonate, Thorazine, Loxitane, Stelazine, and Mellaril."). Thus, this Court should not rely on its previous malingering analysis to disregard Ybarra's intellectual disability.

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

The State argues that this claim is successive, untimely, barred by laches, and barred by law of the case. *See* Ans. Br. at 42–43. None of these bar Ybarra's claim.[32] Ybarra has established a miscarriage of

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[32] Preliminary, laches does not apply at all here. The State is not prejudiced in its ability to respond to this petition because intellectual disability is a condition that is a lifelong. *See Evaluating Intellectual*

justice, which excuses all of these defaults. *See* § (a) below. New evidence provides a factual basis not reasonably available before. § (b) below. New legal authority supports Ybarra's claim. *See* § (c) below. Finally, law of the case does not bar this claim. § (d) below.

a) The State does not dispute that the current evidence of intellectual disability establishes a miscarriage of justice.

The State does not dispute that, if Ybarra is intellectually disabled, he is actually innocent of the death penalty, which would establish a miscarriage of justice. *See* Ans. Br. at 43; *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Instead, the State summarily argues, "Ybarra is not intellectually disabled." Ans. Br. at 43. However, as discussed above, the State fails to engage with the report by Drs. Millspaugh and Viljoen, which shows that Ybarra is intellectually disabled. This is a concession. *Polk*, 126 Nev. at 185–86, 233 P.3d at 360–61. Nor could the State reasonably dispute their conclusions, which

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Disability, 46 Hofstra L. Rev. at 1392. Thus, the State is not prejudiced in responding to the petition because the State is just as capable now as any time of gathering evidence related to Ybarra's intellectual disability. *See* NRS 34.800(1)(a). Moreover, retrial is not implicated because if Ybarra has intellectual disability, his ineligibility for the death penalty does not require retrial. *See* NRS 34.800(1)(b).

are supported by appropriate testing, review of records, and an evaluation of Ybarra. *See* 12AA2789–849.

Ybarra is intellectually disabled; he is, thus, innocent of the death penalty, and failing to consider this claim would result in a miscarriage of justice.

b) The State does not dispute that Ybarra's new evidence provides a factual basis not reasonably available before.

The State does not dispute that where the "factual basis for a claim was not reasonably available at the time of any default," then "an impediment external to the defense prevented their compliance" establishing good cause. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003). In his Opening Brief, Ybarra explained that the prior determinations rested on a finding of malingering, but that that finding of malingering was undermined by newer testing showing that Ybarra has intellectual disability. *See* Opening Br. at 109–14 (summarizing Mack, Warnick, Greenspan, and Millspaugh/Viljoen Reports). The State does not dispute any of this evidence, or that it shows Ybarra has intellectual disability.

c) The State fails to explain why *Hall*, *Moore I*, and *Moore II* are not new legal authority supporting Ybarra's intellectual disability.

This Court's precedent also recognizes that new legal authority might support good cause to excuse procedural default. *See Clem*, 119 Nev. at 621, 81 P.3d at 526. In his Opening Brief, Ybarra argued that *Hall* 572 U.S. 701 (2014), *Brumfield*576 U.S. 305 (2015), *Moore I*, 581 U.S. 1 (2017), and *Moore II*¸ 586 U.S. 133 (2019)—all cases that post-date this Court's 2011 opinion—are new legal authority.

In response, the State argues that *Hall* "existed at the time Ybarra filed his fifth habeas petition in 2017." Ans. Br. at 44. But *Clem* asks whether the legal basis was available at the time of the default, not whether it was available at the time of a later petition. Here, that would either mean one year after Ybarra's conviction under NRS 34.726(1) or when he filed the petition that resulted in the prior determination under NRS 34.810(3). Under either timeframe, *Hall* was not available. Moreover, Ybarra's point is that *all* of the post-*Atkins* cases; *Hall*, *Brumfield*, *Moore I*, and *Moore II*; reflect a heightened

commitment to the clinical guidelines of intellectual disability. The State does not dispute this broader point.

Additionally, the State argues that *Moore I* is not retroactive. Ans. Br. at 44. The State answers none of the arguments Ybarra provided on this issue, and does not provide any supporting arguments of its own. *Compare* Opening Br. at 129–32 *with* Ans. Br. at 44. This Court is under no obligation to consider conclusory arguments. *See* State Bar of Nev., *Nevada Appellate Practice Manual* ¶[9:12] (citing *SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984)); *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978)). Nonetheless, as explained in the Opening Brief, *Hall*, *Moore I*, and *Moore II* are not new rules because they "merely interpret[] and clarif[y]" an existing rule. *Buffington v. State*, 110 Nev. 124, 127, 868 P.2d 643, 645 (1994); *see also* Opening Br. at 129–32. But, even if they are a new rule, accuracy of an intellectual disability claim is "seriously diminished" without the rule, thus warranting retroactive application. *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002).

d) The State fails to address the exceptions to the law of the case doctrine.

The law of the case doctrine does not apply if (1) subsequent proceedings produce substantially new or different evidence; (2) where there has been an intervening change in controlling law; or (3) where the prior decision was clearly erroneous and would result in a manifest injustice. *Litchfield v. Tucson Ridge Homeowners Assoc.*, 140 Nev. Adv. Op. 57, 555 P.3d 267, 269 (2024) (citing *Hsu v. County of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007)). As Ybarra explained in his Opening Brief, all three exceptions apply here. *See* Opening Br. at 118–26.

The State devotes one sentence to this argument, without citation: "The law of the case doctrine applies." Ans. Br. at 43. The State does not explicitly respond to the exceptions at all; though in arguing against the miscarriage of justice, the application of *Hall* and *Moore I*, and in favor of the prior determinations, the State's position on some of these exceptions can be discerned. Ybarra has addressed miscarriage of justice, *Hall* and *Moore I*, and why the prior determinations were clearly erroneous above. *See* § II(B)(2)(a) above (miscarriage of justice);

§ II(B)(2)(c) above (*Hall* and *Moore I*); § II(B)(1)(a) above (also discussing Supreme Court cases); § II(B)(1)(b) (describing why prior determinations were erroneous with merits discussion).

Notably absent from the State's argument is any substantive discussion of the new evidence in support of Ybarra's intellectual disability. As discussed above, the State completely fails to engage with the Millspaugh and Viljoen report, but also the other reports that post-date the 2008 hearing.

Ybarra is intellectually disabled, and the law of the case doctrine is flexible enough to accept his intellectual disability.

III. Ybarra is incompetent.

"Since Socrates, competency . . . has been a civil right fundamental to a fair system of justice. It stems from a bedrock understanding of the relationship between the individual and the State, and the purpose of criminal justice . . . ." Rashmi Goel, *Not Demented Enough: Dementia and Competency to Stand Trial*, 25 Nev. L.J. 203, 255 (2025). Despite the acknowledgment that competency is a bedrock principle in the American criminal justice system, Nevada's statutory scheme prevents Ybarra, who is incompetent to be executed because of

his dementia and serious mental illness, from asserting his own incompetence and, instead, gives the Director of the Nevada Department of Corrections discretion and sole authority to raise this issue.

A. The State agrees that Ybarra cannot raise his own incompetency to be executed.

Nevada law does not specifically provide a mechanism for which someone who is incompetent to be executed can raise his incompetency. Rather, the law unconstitutionally permits only the Director of the Nevada Department of Corrections to raise incompetency. *See* NRS 176.425. The State does not dispute Ybarra's allegation that NRS 176.425 does not provide any means for Ybarra to raise the issue of his competency to be executed himself. Ans. Br. at 53–54. Nor does it dispute that the statute is discretionary and provides that the Nevada Department of Corrections ("NDOC") Director *may* bring a petition, verified by a physician, alleging the condemned inmate is insane. Ans. Br. at 53. Rather, the State claims that "this court has already found

NRS 176.425 the sole mechanism to challenge competence to be executed."[33] Ans. Br. at 53.

1. Because Ybarra cannot raise his own incompetency to be executed, NRS 176.425 is unconstitutional.

The State agrees that NRS 176.425 does not provide Ybarra with a mechanism to raise his own competency to be executed. Should this Court agree with the State's view, that NRS 176.425 is the only way to raise a competency to be executed claim, then it must also find that NRS 176.425 is unconstitutional because granting the Director of the NDOC sole authority to raise an incompetency to be executed claim creates obvious concerns. The statute:

- fails to specify how the Director—who presumably does not interact with inmates on Nevada's death row—would come to learn of an inmate's incompetency;
- is silent on any provision requiring the Director to avail himself of any such knowledge or information that would assist in making such a determination; and

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[33] This argument is addressed in detail in Section III(A)(2) below.

- contains permissive language, which affords the Director discretion in determining whether to initiate competency proceedings at all.

Accordingly, as stated in *Calambro*, "even if an inmate was clearly insane, the Director would have the discretion not to petition the court." *Calambro ex rel. Calambro v. Second Jud. Dist. Ct. (State),* 114 Nev. 961, 973, 964 P.2d 784, 801 (1998).

The State argues that the Director does not intend to violate Ybarra's constitutional rights in carrying out an execution. Ans. Br. at 65. However, even in the face of ample evidence[34] calling Ybarra's competence to be executed into question, the Director did not initiate a competency inquiry after the December 17, 2024 or March 26, 2025[35] warrants of execution were issued.

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[34] *See e.g.,* 12AA2789–2849; 14AA3274–30; Ex.19; Ex. 20;. Exhibit citations are to the exhibits accompanying the March 28, 2025 motion to stay warrant. Ybarra cites these exhibits as a proffer of what would be presented during an evidentiary hearing related to his competence.

[35] The Seventh Judicial District Court issued a warrant on March 25, 2025, for the week commencing on April 13, 2025. The corrected warrant of execution was issued the following day for the week commencing April 14, 2025. It appears the corrected warrant was

If this Court finds that NRS 176.425 provides the only mechanism to initiate a competency to be executed challenge, then it should also declare the statute unconstitutional due to its permissive structure.

The State further argues that Ybarra is not entitled to relief because his execution is not imminent.[36] Ans. Br. at 54–55. This is based on NDOC's representation that they do not possess necessary unexpired drugs, sufficient personnel to form the execution team, and the team has not attained the appropriate level of training. Ans. Br. at 54−55; *see also* 1 Resp.'s App. 3–5. Thus, the State concludes, no execution can be carried out. However, absent further intervention from this Court there is nothing to prevent the Seventh Judicial District Court from issuing additional warrants of execution, and no indication that NDOC would not then be ready.[37] Regardless, as this Court is no

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issued to comply with NRS 176.495(2) which specifies that the warrant must appoint a week, "the first day being Monday and the last day being Sunday."

[36] The State appears to agree that these claims are not ripe until an execution is imminent.

[37] The likelihood of the district court issuing additional warrants is especially likely because of the district court's not-subtle suggestion about potential contempt proceedings targeting NDOC. 1 Resp.'s App. 32−33.

doubt aware, Ybarra's execution was sufficiently imminent to warrant a stay notwithstanding NDOC's then-unreadiness. April 14, 2025 Order Granting Motion to Stay Warrant of Execution at page 1, fn. 1.

The State's position is also impractical. Were this Court to accept that Ybarra's execution is not imminent enough, Ybarra (and this Court, presumably) would be forced to a competency hearing at the eleventh hour at the same time that the parties might be litigating other complex and important issues related to this State's first execution in nearly twenty years. Ascertaining his competency to be executed at the outset would lessen the burden on the government and conserve judicial resources. *See e.g., Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 106, 506 P.3d 334, 337 (2022) (granting writ petition to clarify standard in order to promote "judicial economy by providing guidance" for future matters).

Further, a determination that execution is not imminent, and thus, a competency claim is not ripe, would only delay consideration of Ybarra's claims by requiring Ybarra to file a new petition when the claim is ripe. The State repeatedly stresses that Ybarra has filed

several prior petitions throughout the Answering Brief. *See* Ans. Br. at 3, 23–28, 36–37, 47, 56, 57, 60, 62.

2. This claim is cognizable in habeas.

This Court has not clearly stated whether NRS 176.425 is the exclusive mechanism to initiate a competency inquiry or if a competency challenge may also be raised in a petition for writ of habeas corpus under NRS 34.720. As stated in the Opening Brief, this Court should determine whether a competency to be executed claim can be raised in habeas (as the State has argued in the case proceeding in the Eighth Judicial District Court challenging the constitutionality of NRS 176.425 and requesting that a competency evaluation take place) or via petition pursuant to NRS 176.425 (as the State has alleged in the instant appeal).

The State argues that in seeking guidance from this Court regarding the proper mechanism to raise a competency challenge, Ybarra has "admit[ted] that this court has already found NRS 176.425 the sole mechanism to challenge competence to be executed." Ans. Br. at 53. This is an overstatement because this Court has not yet definitively answered this question. In *Mulder v.* State, No. 69490, 2018 WL

3628963, at *3 n.3 (Nev. July 26, 2018), for example, this Court declined to address the competency claim because it was filed in Mulder's habeas petition, not NRS 176.425. But this decision was unpublished. *Id.* *Calambro* also did not address the question of what legal mechanism should raise an incompetency to be executed claim. *See Calambro,* 114 Nev. 961, 973, 964 P.2d 784, 801 (1998) (habeas action brought by next friend of condemned inmate); *see also Chappell*,137 Nev. at 804 n.13, 501 P.3d at 960 n.13 (dicta suggesting competency challenge could be raised under NRS 176.425, and implicitly suggesting habeas improper).[38]

Additionally, Ybarra's decision to raise the issue of his competency in a habeas petition and via separate challenge pursuant to NRS 176.425 was done in an abundance of caution. That Ybarra had to initiate two separate actions to ensure that he did not inadvertently waive a right to have his competency ascertained underscores the need for guidance from this Court.

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[38] The State does not answer Ybarra's argument that the structure of the post-conviction petition statutes and NRS 176.425 also suggest that habeas is not the proper vehicle.

3. The State does not dispute the need for guidance from this Court.

The State does not disagree with Ybarra's contention that guidance regarding the proper method to raise a competency to be executed claim is needed. Ans. Br. at 52–57.

In light of the lack of clarity in the statutory scheme, this Court should provide the parties with guidance on: (1) the proper mechanism to initiate a competency to be executed challenge; (2) which court is the appropriate venue; (3) when execution is imminent; (4) what standard applies to determine competency; and (5) if NRS 176.425 is unconstitutional, what the process for ascertaining an individual's competency to be executed should be. Notably, the State does not dispute that venue is proper in the court for the prison where the person is housed, *cf.* NRS 176.455(2) (stating court that conducted competency hearing shall serve copy of the order "on the clerk of the district court of the county in which the conviction was had"), that the competency to be executed standard should also assess whether the prisoner has sufficient capacity or ability to rationally communicate with counsel, or that a sufficient doubt about competency is enough to

warrant a formalized competency proceeding. *Compare* Opening Br. at 146–49 *with* Ans. Br. at 51–56.

B. Ybarra is incompetent to be executed.

Ybarra is incompetent to be executed because he has dementia and severe mental illness. The State alleges that, "it is remote that he would be found incompetent." Ans. Br. at 55. In support of this argument the State cites Dr. Price's November 19, 2024 report and claims it demonstrates that "Ybarra has a concrete understanding about why he was sentenced to death." However, this characterization does not accurately capture the opinion provided by Dr. Price. *See* Ex. 19 at 0633–35. Thereafter, the State cites *Calambro* in support of its claim that Ybarra is "competent enough to be executed" while also arguing that the issue of his competency is not yet ripe because Ybarra's execution is not imminent. Ans. Br. at 55. Ybarra address each of these points, in turn.

Ybarra meets the standard for incompetence set forth by the United States Supreme Court in *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Madison v. Alabama*, 586 U.S. 265 (2019). Because of his various diagnoses,

including mild neurocognitive disorder due to dementia, schizophrenia, catatonia, and unspecified depressive disorder, Ybarra cannot comprehend the reason the State seeks to execute him. 12AA2837, 2843–45; 14AA3274; Ex. 20 at 660–63. However, as set forth in the opening brief, Ybarra urges this Court to construe sanity consistent with the common law, that is, requiring the ability to meaningfully communicate with counsel. Opening Br. at 168–69. The State's Answering Brief did not address this request and thus, it has waived any argument against recognition of this standard. Ans. Br. at 51–57; *Polk*, 126 Nev. at 185–86, 233 P.3d at 360–61. That Nevada's competency to be executed standard should follow the common law is supported by the fact that the language of NRS 176.425 regarding insanity has not changed since Nevada first adopted territorial law, which, in turn, explicitly adopted the common law. *Compare* NRS 176.425(1) ("If, after judgment of death, there is a good reason to believe that the defendant has become insane . . . ."), *with* 1861 Laws of the Territory of Nevada, ch. 104, § 458, at 484 (WM. Martin Gillespie 1861) ("If after judgment of death there be good reason to suppose that the defendant has become insane . . . ."); *see also* 1861 Laws of the Territory

of Nevada, ch. 1, §1, at 1 ("The common law of England, so far as it is not repugnant to, or inconsistent with the Constitution or Laws of the United States, or the Laws of the Territory of Nevada, shall be the rule of decision in all Courts of this territory.").[39] Common law sources recognize that someone lacking the capacity to assist in their defense is ineligible for execution. *See Singleton v. State*, 437 S.E.2d 53, 80–82 (S.C. 1993) (quoting Matthew Hale, *The History of the Pleas of the Crown* ch. IV, 35 (1736) & 4 William Blackstone, *Commentaries* ch. 31, *389); *see also* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 297 (Little Brown 2d Ed. 1858).

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[39] This is so notwithstanding other changes since the original territorial law. *See* 1912 Revised Laws of Nevada, ch. 35 § 7271, at 2038 (warden of state prison instead of sheriff); 1943 Nev. Stat. 41 (requiring warden to file petition alleging insanity of defendant); 1967 Nev. Stat. 1440 (removing jury from process); 1977 Nev. Stat. 861 (director of department of prisons instead of warden of state prison); 1991 Nev. Stat. 1003 (allowing for evaluation by psychiatrists or psychologists); 2001 Nev. Stat. 219 (replacing department of prisons with department of corrections). For reference, these statutes are collected in the Addendum attached to this brief.

The State claims that Dr. Price's initial declaration[40] "offered little support" for a factual basis of incompetence. Ans. Br. at 56. However, the State fails to acknowledge that Dr. Price's declaration tracks the language of NRS 176.425 and ignores the ample information that Dr. Price reviewed to form his opinion. 14AA3274–30.Additionally, this declaration was submitted before Dr. Price had the opportunity to examine Ybarra. As noted in the Opening Brief, in light of the lack of guidance regarding the procedures related to the initiation of competency proceedings, Ybarra was left to speculate on when to have a competency evaluation conducted. Opening Br. at 167.

After Dr. Price had the opportunity to evaluate Ybarra in person, he submitted a report confirming his opinion that there is good reason to believe that Ybarra is insane. Ex. 19. Additionally, based on subsequent information conveyed to Dr. Price following Ybarra's transfer to Ely State Prison, Dr. Price reiterated his opinion that Ybarra is not competent, and noted that Ybarra's mental state has

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[40] The State claims that Dr. Prices September 25, 2024 declaration should not be considered because it fails to comply with NRS 53.045(2). Ans. Br. at 56. The failure to strictly comply with the statute does not alter the opinion contained therein.

deteriorated. Ex. 20 at 660–63; Ex. 56 at 1410–11. For example, Ybarra "evidenced confusion, disorientation, anomia, agitation, disorganized thought process, paranoia, hallucination and memory impairment." Ex. 20 at 0662. In mid-March, Ybarra had an "altered mental status, confusion, and [displayed] slow response;" pants-less and underwear-less, he "scooted" across his cell floor where "[o]ld feces and urine were visible." Ex. 50 at 1277. And Ybarra's mental health has declined to the point that he does not have a rational understanding of the reason the State of Nevada is seeking his execution. 14AA3274–30; Ex. 19; Ex. 20; Ex. 56.As recently as March 30, 2025, Dr. Price explained that Ybarra's deterioration "illustrate a complete break with reality and his understanding of his life circumstances." Ex. 56 at 1411.

The State claims that Dr. Price's subsequent reports should not be considered by this Court because these reports were not before the district court when it adjudicated this claim while also arguing that the claim is not ripe. Ans. Br. at 54–55, 57. However, this Court should consider the information contained in the supplemental reports because competency is fluid. *Indiana v. Edwards*, 554 U.S. 164, 175 (2008). Moreover, NDOC's unilateral decision to transfer Ybarra after a

stipulated stay rendered the December 17, 2024 execution warrant moot, and in violation of NDOC's execution protocol, caused Ybarra's mental state to deteriorate. *See* Ex. 20; Ex. 29; Ex. 56.

Ybarra made the requisite showing to initiate competency proceedings under the standard set forth by the Supreme Court in *Ford* and *Panetti*.[41] The standard, as articulated by the Supreme Court in *Ford* and *Panetti*, exempts from execution those individuals whose "'concept of reality' is 'so impair[ed]' that he cannot grasp the execution's 'meaning and purpose' or the 'link between his crime and its punishment.'" *Madison*, 586 U.S. at 269 (quoting *Panetti*, 551 U.S. at 958).

Dr. Price's opinion, combined with Ybarra's various diagnoses—including dementia, significant cognitive impairment, and schizophrenia—have raised significant questions regarding Ybarra's

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[41] Ybarra has used this standard because this Court has never construed NRS 176.425. *See Calambro*, 114 Nev. 961, 964 P.2d 794 (declining to decide whether NRS 176.425 was constitutional because substantial evidence supported the finding that Calambro was competent to be executed).

competence to be executed. No execution should take place until Ybarra's competency to be executed has been reliably ascertained.

IV. Ybarra's execution violates the constitution.

As explained in his Opening Brief, Ybarra's execution is unconstitutional. Opening Br. at 158–165 (discussing Claims Five through Seven). The State's arguments to the contrary are wrong.

A. The State's reliance on *Niergarth v. State*, 105 Nev. 26, 768 P.2d 882 (1989), is misplaced.

Claim Five asserts that the unavailability of clemency renders Ybarra's execution unconstitutional. Opening Br. at 159–163. Relying on *Niergarth*, the State argues that this Court should reject this claim. Ans. Br. at 58. But *Niergarth* is distinguishable.

In *Niergarth*, the defendant plead guilty to robbery with the use of a deadly weapon and was sentenced to two consecutive six-year terms in Nevada State Prison. *Niergarth*, 105 Nev. at 27, 768 P.2d at 882. These circumstances represent drastically lower stakes than those Ybarra now faces—to access his last chance to request mercy because Nevada's statute denies him his equal protection and due process rights.

Most significantly, however, Neirgrath had the opportunity to appear before the Parole Board. 105 Nev. at 28–29, 768 P.2d at 883–84.

The State argues that clemency does not implicate a constitutional right and relies on *Niergrath*'s citation to *Severance v. Armstrong,* 96 Nev. 836, 620 P.2d 369 (1980). *See* Ans. Br. at 58. But the State misreads the holding in *Severance*, that an inmate has no right to expect a *particular result* in a parole board hearing. *Severance*, 96 Nev. at 839, 620 P.2d at 370 ("inmate does not have a protectible expectation of parole unless that expectation is created by a state statute"). The expectation of a particular result and the expectation of *a meaningful opportunity to participate and be heard at a proceeding* are very different.

Ybarra is simply asking for the opportunity to be heard, and the State does not dispute that Ybarra should be heard. Ybarra also noted several issues with the clemency process. Opening Br. at 161−162.The State made no effort to address these issues within the statutes and regulations. Niergrath had the opportunity for a hearing; but Ybarra has not. *Niergarth*, 105 Nev. at 29, 768 P.2d at 884. Thus, *Niergarth* does not require denying these claims.

B. Claim Six and Seven warrant relief.

For the reasons stated in the Opening Brief, Ybarra is entitled to relief on these claims.

V. Ybarra is entitled to an evidentiary hearing.

Habeas petitioners are entitled to an evidentiary hearing where they "assert[] claims supported by specific factual allegations not belied by the record that, if true, would entitle [them] to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (citing *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984)). This includes an evidentiary hearing in support of excusing procedural default. *See Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 254 (1997). Ybarra provided extensive evidence in support of his severe mental illness, intellectual disability, and incompetency to be executed. This is far more than sufficient to order a hearing.

In answering, the State merely notes that Ybarra's petition is subject to procedural default. However, the State does not dispute that an evidentiary hearing is permissible for evidence to excusing defaults, that Ybarra pled specific factual allegations not belied by the record, or that Ybarra's severe mental illness, intellectual disability, or

incompetency would render his execution a miscarriage of justice. *See* Ans. Br. at 60–61.

An evidentiary hearing is warranted.

CONCLUSION

This Court should not countenance executing someone with Ybarra's conditions.

Based on the foregoing, Ybarra requests that this Court hold that individuals with severe mental illness are ineligible for the death penalty under the Nevada Constitution, and, because Ybarra has severe mental illness, he is ineligible for execution.

Additionally, this Court should hold that because Ybarra has intellectual disability, he is ineligible for execution.

This Court should hold that NRS 176.425 is unconstitutional, and that no execution may proceed until Ybarra's competency to be executed has been determined. This Court should also provide guidance to lower courts on how proceedings to determine competency to be executed should occur. The Court should further hold that Ybarra is incompetent to be executed.

In the alternative, this Court should remand for an evidentiary hearing to determine any factual issues.

Dated this 14th day of July, 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 14 point Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 18, 472 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of July, 2025.

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CERTIFICATE OF SERVICE

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

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ADDENDUM

I. 1861 Territorial Law of Nevada

> Sec. 458. If after judgment of death there be good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of twelve persons to inquire into the supposed insanity, and shall give immediate notice thereof to the district attorney.

1861 Laws of the Territory of Nev., ch. 104 § 458.[42]

II. 1912 Revised Laws of Nevada

> Sec. 421. If, after judgment of death, there is good reason to suppose that the defendant has become insane, the warden of the state prison to whom he is delivered for execution, with the concurrence of the judge of the district court of the county in which such prison is situated, may summon from the list of jurors selected by the county commissioners for the year, a jury of twelve persons, to inquire into the supposed insanity, and must give immediate notice thereof to the attorney-general and the district attorney of said county.

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[42] Other than capitalizing "District Attorney" beginning with the 1873 compilation, this statute remained unchanged until the Crimes and Punishments Act of 1911. *See Compiled Laws of the State of Nevada*, ch. LIII § 2083 (Bonnifield & Healy 1873); *General Statutes of Nevada*, ch. XXI, § 4388(Baily & Hammond 1885); *Compiled Laws of Nevada* § 4423 (Cutting 1900).

Revised Laws of Nev. § 7271 (1912).

III. Nevada Compiled Laws, Supplement 1943–1949

> § 2. If, after judgment of death, there is a good reason to believe that the defendant has become insane, the warden of the state prison to whom the convicted person has been delivered for execution, may by a petition in writing, verified by a physician, petition the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon such judge shall fix a day for hearing of the matter of the inquisition and summon from the list of jurors selected by the county commissioners for the year such number as he shall deem adequate to provide a jury of twelve persons to inquire into the insanity of the convicted person, and such judge shall give immediate notice of such hearing to the attorney-general and the district attorney of the county in which the conviction was had; *provided*, that if such judge shall determine that the hearing on and the determination of the sanity of the convicted person cannot be had before the date of the execution of such person, such judge may stay the execution of the judgment of death pending the determination of the sanity of such convicted person.

Nev. Compiled Laws, Ch. 43a § 11192.02 (supp. 1943–1949); *see also*

1943 Nev. Stat. 41.

IV. 1967 Statutes of Nevada

> Sec. 271. 1. *If, after judgment of death, there is good reason to believe that the defendant has become insane, the warden of the state prison to*

whom the convicted person has been delivered for execution may by a petition in writing, verified by a physician, petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon the judge shall:

(a) Fix a day for a hearing to determine whether the convicted person is insane;

(b) Appoint two physicians, at least one of whom shall be a psychiatrist, to examine the convicted person; and

(c) Give immediate notice of the hearing to the attorney general and to the district attorney of the county in which the conviction was had.

1967 Nev. Stat. 1440.

V. 1977 Statutes of Nevada

Sec. 71. NRS 176.425 is hereby amended to read as follows:

176.425 1. If, after the judgment of death, there is good reason to believe that the defendant has become insane, the **[**warden of the state prison**]** *director of the department of prisons* to whom the convicted person has been delivered for execution may by a petition in writing, verified by a physician, petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon the judge shall:

(a) Fix a day for a hearing to determine whether the convicted person is insane;

(b) Appoint two physicians, at least one of whom shall be a psychiatrist, to examine the convicted person; and

(c) Give immediate notice of the hearing to the attorney general and to the district attorney of the county in which the conviction was had.

1977 Nev. Stat. 861.

VI. 1991 Statutes of Nevada

Sec. 3. NRS 176.425 is hereby amended to read as follows:

176.425 1. If, after the judgment of death, there is good reason to believe that the defendant has become insane, the director of the department of prisons to whom the convicted person has been delivered for execution may by a petition in writing, verified by a physician, petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon the judge shall:

(a) Fix a day for a hearing to determine whether the convicted person is insane;

(b) Appoint two **[**physicians, at least one of whom shall be a psychiatrist**]** *psychiatrists, two psychologists, or one psychiatrist and one psychologist*, to examine the convicted person; and

(c) Give immediate notice of the hearing to the attorney general and to the district

attorney of the county in which the conviction was had.

1991 Nev. Stat. 1002–03.

VII. 2001 Special Session Statutes of Nevada

Sec. 59. NRS 176.425 is hereby amended to read as follows:

176.425 1. If, after the judgment of death, there is good reason to believe that the defendant has become insane, the director of the department of **[**prisons**]** *corrections* to whom the convicted person has been delivered for execution may by a petition in writing, verified by a physician, petition a district judge of the district court of the county in which the state prison is situated, alleging the present insanity of such person, whereupon the judge shall:

(a) Fix a day for a hearing to determine whether the convicted person is insane;

(b) Appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the convicted person; and

(c) Give immediate notice of the hearing to the attorney general and to the district attorney of the county in which the conviction was had.

2001 Special Session Nev. Stat. 219.