IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 78209

SIAOSI VANISI

Appellant,

v.

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

Respondent.

Appeal From The
Second Judicial District Court, Washoe County
The Honorable Connie J. Steinheimer

BRIEF OF AMICI CURIAE NEVADA LAW PROFESSORS IN SUPPORT OF REVERSAL

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INTRODUCTION

The United States and Nevada Constitutions bar the execution of people who are intellectually disabled, young, or insane because unique characteristics of these populations make them less culpable, and therefore not appropriate subjects for the most severe punishment. For the first two classes, the U.S. Supreme Court has held that a categorical bar against executing in a defined class is required because an individualized legal standard leaves too much risk that the death penalty will be imposed on people who are not sufficiently culpable. To define the boundaries of those classes, the Court looked to medical, psychological, and sociological definitions of intellectual disability and childhood. For the third class, the only protection against improper execution is the availability of an individualized determination of whether the defendant meets legal definitions of insanity and competency not rooted in modern medical and psychological knowledge.

The protections offered by the legal standards and processes for insanity and competency in Nevada are insufficient to guard against the execution of offenders who are less culpable because of severe mental illness. Although the U.S. Supreme Court has not yet instituted a categorical bar against the execution of severely mentally ill people, such a ban is necessary in Nevada for the same reasons it was necessary to protect intellectually disabled and young people. This Court has the authority to hold that Article 1, section 6 of the Nevada Constitution categorically

bars the execution of people who suffer from a severe mental illness, as defined by current medical and psychological understandings. It should do so.

ARGUMENT

I. A CATEGORICAL BAR AGAINST EXECUTING PEOPLE SUFFERING FROM SEVERE MENTAL ILLNESS IS REQUIRED TO ENSURE THAT THE DEATH PENALTY IN NEVADA SERVES A PENOLOGICAL PURPOSE AND REFLECTS COMMUNITY STANDARDS.

A. Execution of certain classes of people is unconstitutional if it violates the community's evolving standards of decency.

By prohibiting "excessive" sanctions and "cruel and unusual punishments," the Eighth Amendment to the U.S. Constitution requires that "punishment for a crime must be graduated and proportioned to the offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). *See* U.S. Const. amend. VIII. Determination of whether a punishment is proportional is made with reference to "the evolving standards of decency that mark the progress of a maturing society" and is not tethered to the societal standards that prevailed at the time the Bill of Rights was adopted. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Court therefore looks for "objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects." *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). This standard recognizes that community

judgments regarding the acceptability of punishment will shift over time due to changing moral standards or to advances in medical and psychological knowledge. Thus, the Supreme Court has more than once held a punishment to be unconstitutional despite an earlier holding to the contrary. See *Roper v. Simmons*, 543 U.S. 551, 561, 563, 578 (2005); *Atkins v. Virginia*, 536 U.S. 303, 314 (2002).

A specific type of punishment may violate the Eighth Amendment no matter who it is applied to, e.g., *Weems*, 217 U.S. at 382 (sentence of fifteen years of hard labor in chains is excessive); *Trop*, 365 U.S. at 92 (revocation of citizenship unconstitutional as punishment for a crime), but neither the U.S. Supreme Court nor the Nevada Supreme Court has ruled that the death penalty does.[1] The imposition of an otherwise constitutional punishment may violate the Eighth Amendment if it is not proportional to the crime. E.g. *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008) (death penalty excessive when imposed for the rape of a child); *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982) (death penalty excessive when imposed on a defendant who did not kill, intend to kill, or attempt to kill); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977) (death penalty is excessive when imposed for the rape of an adult); *Robinson v. California*, 370 U.S. 660, 667

[1] Of course, the death penalty can also violate the Eighth Amendment if it is applied in an arbitrary manner, *Fuhrman v. Georgia*, 408 U.S. 238, 256 (1972), but states employing the death penalty today do so through a procedural scheme similar to that approved by the Court. *See Gregg v. Georgia*, 428 U.S. 153 (1976).
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(1962) (imprisonment for ninety days is excessive when imposed for the status of addiction).

Most significant for purposes of this case, the imposition of certain punishments on certain classes of people is unconstitutional because of a mismatch between the severity of the punishment and the culpability of the offender. *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (life without parole unconstitutional for juvenile homicide offenders); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010) (life without parole unconstitutional for juveniles who commit offenses other than homicide); *Roper*, 543 U.S. at 575 (death penalty unconstitutional for juveniles); *Atkins*, 536 U.S. at 321 (death penalty unconstitutional for intellectually disabled people); *see also Ford*, 477 U.S. at 408-09 (recognizing that the Eighth Amendment bars the execution of the insane, but relying on longstanding traditions rather than evolving standards).

The first bar against executing a class of people was a prohibition in the execution of "insane" people. *Ford*, 477 U.S. at 408-09. In *Ford*, the court noted that the common law rule against executing an insane person has "impressive historical credentials." *Id*. at 406. Well before the Bill of Rights was adopted, commentators identified an English common law prohibition against trying, sentencing, or executing a "lunatic" or a "mad man." *See id*. at 407 (citing 4 W. Blackstone, Commentaries *24-*25 (1769); E. Coke, 3 Institutes 6 (6th ed. 1680);

1 M. Hale, Pleas of the Crown 35 (1736); 1 W. Hawkins, A Treatise of the Pleas of the Crown 2 (7th ed. 1795); Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685)). This prohibition was based on the belief that execution of an insane person "offends humanity" and "contributes nothing to whatever deterrence value is served by capital punishment." *Id*. at 407 (citing O. Holmes, The Common Law 5 (1881)). This historical tradition carried through to modern times, the Court found, as evidenced by the fact that all states at the time prohibited the execution of an insane offender, and by widespread agreement that the execution of "a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life" or "who has no capacity to come to grips with his own conscience or deity" has no retributive value and "simply offends humanity." *Ford*, 477 U.S. at 409-10. The Court held that "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications," *id*. at 417, and required that states implement an adequate factfinding process to weigh any individual person's claim of insanity, *id*. at 416-17.

The Court later clarified the meaning and scope of the insanity bar, but it left the ultimate determination of competence to an individualized inquiry about a person's mental state at a specific moment in time. In *Panetti v. Quarterman*, the

Court held that a mentally ill person who comprehends the proceedings, but whose illness "obstructs a rational understanding of the state's reason for his execution," cannot be executed. 551 U.S. 930, 959 (2007).[2] In so holding, the Court disapproved of Texas' interpretation of competency as turning only on whether a person is aware he committed a crime, aware he will be executed, and aware that the execution is punishment for the crime. *Id*., at 956, 959. Beyond the question of basic awareness of facts, the Court held, "[g]ross delusions stemming from a severe mental disorder may put an awareness of the link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Id*., at 960. The retributive goal of the death penalty is called into question when the punishment is imposed on someone whose "mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id*., at 958-59.

In determining "the extent to which severe delusions may render a subject's perception of reality so distorted" that the person is legally incompetent to be executed, the Court deferred to state-specific, individualized determinations. *Id*., at

[2] In *Madison v. Alabama*, the Court further explained that this lack of rational understanding should be treated the same whether it is the result of a diagnosed mental disorder or another condition affecting the mind, such as dementia. 139 S. Ct. 718, 728-29 (2019).

960-61. Citing *Roper* and *Atkins*, though, it suggested that the conclusions of "physicians, psychiatrists, and other experts" be brought to bear on the determination. *Id*., at 962.

The second bar came in 2002 when the Court held that the execution of intellectually disabled people violates the constitution. *Atkins*, 536 U.S. at 321. The Court first considered evidence of contemporary values regarding the execution of intellectually disabled people in the form of state legislation. The Court had previously considered and rejected a categorical bar on the execution of intellectually disabled people in 1989, when only two states and federal government specifically banned the practice. *Id*. at 314. (No state barred the execution of intellectually disabled people before 1986. *Id*. at 313.) Between 1989 and 2005, twenty-one more states enacted such bans. *Id*. at 315. Nevada was among the states considering a ban. A.C.R. 3, 2001 Leg. 17th Special Sess. (Nev. 2001); A.B. 353, 2001 Leg., 71st Sess. (Nev. 2001).[3] More striking than the number was the consistent direction of change, coupled with the fact that such executions were uncommon even where they were permitted. *Atkins*, 536 U.S. at 315-16. The execution of intellectually disabled offenders had become, the Court noted, "truly unusual." *Id*. at 316. This unusualness, to the Court, "unquestionably reflect[ed]

[3] During consideration of the second measure, the Court decided *Atkins*. The Nevada legislature subsequently approved the ban. A.B. 15, 2003 Leg., 72nd Sess. (Nev. 2001), codified at NRS 174.098(7).

widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." *Id*. at 317.

The Court further identified specific characteristics of intellectually disabled people that it believed were likely to undermine the procedural protections so important to capital sentencing. The Court noted that they are likely to have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id*. at 318. They "often act on impulse" and in group settings are "followers rather than leaders." *Id*. Given such characteristics, the Court reasoned, "there is a serious question" as to whether retribution or deterrence would apply to an intellectually disabled offender. *Id*. at 318-19. Furthermore, these characteristics meant that individualized determinations left intellectually disabled people "at a special risk of wrongful execution." *Id*. at 321. Specifically, the Court cited the danger of false confessions, difficulty in persuasively showing mitigation, less ability to meaningfully assist defense counsel, a demeanor that may create an unwarranted impression of lack of remorse, and the possibility of the person's disability contributing to a finding of future dangerousness, an aggravating factor. *Id*. at 320-21. The Court's independent evaluation of the death penalty's suitability in this

context confirmed its assessment of its unusualness, leading the Court to hold that the death penalty is constitutionally excessive when imposed on an intellectually disabled person.

The Court barred executions of a third category of people in 2005 when it held that execution of anyone for offenses committed while that person was a juvenile is unconstitutional. *Roper*, 543 U.S. at 578. Less than twenty years earlier, the Court had held that the constitution did not forbid execution of juvenile offenders between the ages of fifteen and eighteen. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989); *see also Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (execution of juvenile offenders under the age of 16 unconstitutional). In holding that societal standards of decency had evolved since then, the Court emphasized the unusualness of the punishment, as reflected in a trend among state legislatures since 1986 away from permitting the execution of juvenile offenders, *Roper*, 543 U.S. at 564-67.[4] Specifically, the Court noted that 30 states prohibited the execution of juveniles (including 12 that had abolished the death penalty), *id*. at 564, and that the other states executed juveniles infrequently,

[4] The Court acknowledged that the evidence of a national consensus against the death penalty for juveniles was not as strong as the evidence of consensus in Atkins in that the "rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower," *Roper*, 543 U.S. at 565, but emphasized the "consistency of the direction of the change" over the number of states. Id. at 566 (quoting *Atkins*, 536 U.S. at 315).

id. at 564-65 (noting three executions in the past decade). These factors indicated to the Court that "today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Id*. at 567 (quoting *Atkins*, 536 U.S. at 316).

The Court also relied on its independent assessment of cruelty, as determined by an inquiry into whether the characteristics of juvenile offenders undermine the penological purposes served by the death penalty or the due process protections that are essential to its fair application. *Id*. at 568-74. The Court reasoned that juveniles "cannot reasonably be classified among the worst offenders" because of their lack of maturity, making their conduct less morally reprehensible; their vulnerability to negative outside influences, giving them a greater claim to forgiveness; and the fact that their character and personality traits are "more transitory, less fixed" than those of adults, making reform more likely and crime therefore less indicative of "irretrievably depraved character." *Id*., at 569-70.

In reaching the conclusion that juveniles are less culpable, the Court relied on recent advances in scientific, psychological, and sociological evidence, particularly new knowledge about adolescent brain development. *See* Elizabeth Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE (2010); Terry A. Maroney, Adolescent Brain Science After *Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 782–83 (2010); Laurence Steinberg, The Influence of Neuroscience on

U.S. Supreme Court Decisions About Adolescents' Criminal Culpability, 14 NATURE REVS. NEUROSCIENCE 513, 513–18 (2013). Lesser culpability meant that neither of the two primary justifications for the death penalty – retribution and deterrence – supported the imposition of the death penalty on juvenile offenders. *Id*., at 571-72.[5]

While *Ford* bars the execution of "insane" people and requires that states establish a minimally adequate procedure to determine whether a person is too insane to be executed, it permits states to approach the sanity determination on an individualized basis. *Ford*, 416-17. *Panetti* expanded on the definition of insanity but continued to allow states to make this determination on a case by case basis. Thus, for insanity, federal law does not establish a categorical bar of the kind set forth in *Atkins* and *Roper*. While *Ford* and *Panetti* clearly set forth the Court's view on the cruelty of executing offenders whose rational understanding is impaired by mental illness, the difference seems to turn primarily on the Court's determination of its usualness and the Court's assumption that a case-by-case

[5] Following *Roper*, the Court employed the same test to determine that the penalty of juvenile life without parole is unconstitutional when imposed on anyone for an offense committed before the age of eighteen. *Miller v. Alabama*, 567 U.S. 460, 479 (2012); *Graham v. Florida*, 560 U.S. 48, 74-75 (2010). Since *Roper*, however, the Court has not applied these factors to bar the execution of any other class of people.

approach is sufficient. For the reasons set forth below, both of these factors should be assessed differently in Nevada.

B. While federal and state law clearly prohibit the execution of certain mentally ill offenders, the law does not go far enough to ensure that punishment serves penological purposes and reflects community standards.

Nevada implements *Ford* and *Panetti* through its statutory scheme for competency determinations. That scheme provides that, if there is "good reason to believe" that an individual has become "insane" after being sentenced to death, the Director of the Nevada Department of Corrections may petition the for a stay of execution and an inquiry into sanity. *See* NRS 176.425. The decision whether to file such a petition is within the discretion of the Director. *See Calambro By & Through Calambro v. Second Judicial Dist. Court*, 114 Nev. 961, 973 (1998) (declining to hold statute unconstitutional even though it gives director discretion not to file the petition). The petition must be verified by a physician, and the court upon receipt of the petition is required to appoint "two psychiatrists, two psychologists, or one psychiatrist and one psychologist" to examine person. NRS 176.425. After a hearing at which the State and the convicted person are permitted to introduce evidence and cross-examine witnesses, the court makes a

determination of sanity. N.R.S 176.435. The statute does not provide a legal definition of sanity in this context.[6]

By contrast, Nevada's statutory definition of "mental retardation," through which it implements *Atkins*, includes a three-part definition: (1) significant sub-average general intellectual functioning that exists alongside (2) deficits in adaptive behavior that (3) manifest during the developmental period. See NRS 174.098(7). In reviewing that definition, this Court has noted the extensive similarities between the statutory and clinical definitions of "mental retardation," *Ybarra v. State*, 127 Nev. 47 (2011), and has reviewed and interpreted the elements in light of the guidance provided by medical organizations and in comparison to the standards adopted by other states, *id*. at 56-57 (interpreting "during the developmental period" to mean that the age of onset was before eighteen, in keeping with accepted medical definitions and the approaches of other states).

[6] With regard to the related question of a condemned person's competency to withdraw a petition for certiorari, this Court has held that "the relevant consideration is not whether [a person] comprehends postconviction legal issues in detail or can 'grasp the meaning' of death without resorting to Biblical verses. Rather, it is whether he is 'aware of his impending execution and of the reason for it' and 'has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.'" *Calambro*, 114 Nev. at 971 (quoting *Demosthenes v. Baal*, 495 U.S. 731, 733 (1990) and *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

In addition to the execution competency statutes, two other aspects of Nevada law protect against the danger that the State will execute a person who is too insane. First, a criminal defendant may avoid trial by being found incompetent. NRS 178.400. Second, he may avoid punishment if he can show he committed the act while insane. NRS 194.010 (a person who commits an act "in a state of insanity" is not liable to punishment); *Finger v. State*, 117 Nev. 548, 578 (2001) (conviction of a person who, by virtue of mental illness, is unable to form the requisite criminal intent would violate the Nevada and U.S. Constitutions).

A person is incompetent to stand trial in Nevada if that person lacks the "present ability" to "understand the nature of the criminal charges," understand the nature and purpose of court proceedings," or aid defense counsel "with a reasonable degree of rational understanding." NRS 178.400. Competency to stand trial is a question of whether the defendant is sufficiently aware of and able to understand and participate in legal proceedings. This standard therefore looks to the mental condition during the trial, and it contemplates that incompetent defendants will, if possible, be involuntarily medicated until they attain competency, at which time they may be tried. NRS 178.425. It is thus a time-bound inquiry focusing mainly on the defendant's ability to comprehend the proceedings. It does not include an inquiry regarding the person's relative culpability or the suitability of a particular

punishment, or a long-term assessment of the effect of any mental illness on his capacity for rational understanding.

Procedurally, the idea that insane people are not liable to punishment is implemented by allowing a defendant to plead "not guilty by reason of insanity" ("NGRI") or to offer evidence of insanity prior to trial. NRS 174.035(6).[7] Once a defendant has raised an insanity defense, he must establish by a preponderance of the evidence that "[d] ue to a disease or defect of the mind, [he] was in a delusional state at the time of the alleged offense" and also due to the delusional state, he either did not "know or understand the nature and capacity of his or her act" or "appreciate that his or her conduct was wrong, meaning not authorized by law." *Id*. Under Nevada law, a defendant with a severe mental illness can be convicted and punished as long as, at the time of the act, he knew what he was doing and knew it was illegal. Many severely ill people satisfy this standard because, while they know what they are doing in a rudimentary sense and may know it is illegal, their illness compelled them to act, or they acted under a delusion that made the act seem morally correct or circumstantially urgent, even though it was illegal.

[7] Defendants in Nevada may also plead "guilty but mentally ill." NRS 174.035(1). A "guilty but mentally ill plea" would not relieve the defendant from liability; it may help the defendant receive treatment instead of punishment, but it does not entitle him to treatment or immunize him from criminal sanctions. NRS 174.035(5).

Culpability, of course, is a different question than whether the imposition of a particular punishment would serve a legitimate penological purpose and comport with community notions of decency. As the Court noted in *Roper*, death is the most severe punishment available and must therefore be reserved for the "most deserving" offenders. 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). Those who are not culpable enough to qualify for capital punishment may still be tried and punished for their crimes, but they are not candidates for the most severe punishment.

To achieve this result, the level of sanity required to stand trial or be convicted of a crime should be lower than the level of sanity required to qualify as the most culpable sort of offender, and thus eligible for death. By definition, then, Nevada's recognition of a NGRI verdict is not meant to protect against executing offenders who may be culpable but would not qualify for execution under the Court's standards. Moreover, while states use several different legal definitions of insanity for NGRI, Nevada uses the narrowest one. *See Finger*, 117 Nev. at 559.[8] "The fact that a person has mental health problems [does] not necessarily mean that he or she could meet" this "very strict" standard for determining legal insanity. *Id*., at 556. The *M'Naghten* standard leaves many people open to prosecution and conviction who might be excluded under one of the broader tests used in other

[8] Nevada uses the rule from *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843).

states. *Id.* 558-60 (comparing *M'Naghten* standard for the various insanity tests used in other states).

Insanity, especially the *M'Naghten* version, has become a legal term with little connection to medical or psychological diagnoses. *Finger*, 117 Nev. at 558. Adding to the confusion, the legal concept of insanity is used in at least two contexts in Nevada to mean two different things. The question of whether a person is legally insane under NRS 174.035(6) concerns whether he is criminally culpable, and therefore whether he will be subjected to any punishment at all. To be insane in this context, a person must be mentally ill and must know what he is doing or know the act was illegal as a result of that illness. This standard is crafted to ensure that some mentally ill offenders face criminal liability. Such legislative judgement should not be misread as a judgment that mentally ill offenders are so culpable as to be appropriate candidates for execution, *accord Atkins*, 536 U.S. at 306 ("Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.").[9] The question whether a person is legally insane under NRS 176.425 concerns whether he is culpable enough to bring

[9] Similarly, NRS 194.010 provides that children over ten years old, and children over eight years old who commit murder or sexual offenses, are liable to punishment. Children between ten and seventeen are thus old enough to be held accountable for their offenses, but too young to be given the most severe sentence under *Roper*.

him within the category of the worst offenders that may be candidates for the death penalty. Here, the Nevada legislature has offered no clear definition to distinguish insanity for execution purposes from insanity for conviction purposes.[10]

In short, insanity has been totally divorced from mental illness under the law. A clinical diagnosis of mental illness may be helpful to determine insanity in each context, but it is ultimately meaningless, as a court must be convinced that the, because of the mental illness, the legal standard has been met. Because the legislature has defined insanity narrowly for purposes of NRS 174.035 and not at all for purposes of NRS 176.425, the two standards together are likely to permit the conviction and execution of people who suffer from a severe mental illness that affects their ability to have a rational understanding of what is taking place.

C. A categorical exemption would ensure that Nevada's death penalty is only imposed on people who can rationally understand the reasons for the punishment.

Categorical exemptions are necessary in order to ensure that the death penalty is "limited to those offenders who commit 'a narrow category of the most

[10] *Panetti* instructs that a person must be mentally ill (or mentally impaired by a brain disease) and lack a rational understanding that he is being punished for a crime. 551 U.S. 930, 959 (2001). *Calambro* suggests that the standard in Nevada could be whether the defendant is aware of the impending execution and the reasons for it and has the capacity to make a rational choice about whether to pursue or abandon appeals. 114 Nev. at 971.

serious crimes' and whose extreme culpability makes them the 'the most deserving of execution'." *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). In *Ford* and *Panetti*, the Court has confirmed that insane people are outside that narrow category because they are less culpable and because execution of an insane person serves no penological purpose if the person cannot rationally comprehend the reasons why, but it has permitted states to draw the line using individualized inquiries and narrow standards.

In *Roper*, the Court specifically rejected the argument that an individualized case by case determination of maturity would be better than an "arbitrary" categorical rule, citing an unacceptable risk that the circumstances of a crime or even the characteristics of youth would outweigh any mitigating arguments about immaturity. *Roper*, 543 U.S. at 572-73. In *Atkins*, the Court identified five factors that placed intellectually disabled offenders at a special risk of wrongful death sentences: danger of false confessions, difficulty in persuasively showing mitigation, less ability to meaningfully assist defense counsel, a demeanor that may create an unwarranted impression of lack of remorse, and the possibility of the person's disability contributing to a finding of future dangerousness, an aggravating factor. 536 U.S. at 320-21. These concerns obtain equally to offenders with severe mental illness. *See* Scott Sundby, The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death

Penalty's Unraveling, 23 WILLIAM & MARY BILL OF RIGHTS J. 487, 511-22 (2014) (applying the *Atkins-Roper* "unreliability factors" to severely mentally ill defendants and concluding that "unacceptable" risk of wrongful convictions is also present).

People with severe mental illness, including schizophrenia, bipolar disorder, depression, and post-traumatic stress disorder, are also over-represented among "volunteers" who waive their appeals in order to proceed with execution. Some commentators have characterized volunteerism as suicidal behavior linked to mental illness, suggesting that severely mentally ill people may be less inclined to assist with a vigorous defense. *See* John H. Blume, Killing the Willing: "Volunteers," Suicide, and Competency, 103 MICH. L. REV. 939, 962-63 (2005). This is significant in Nevada, where 11 of the 12 people executed since the death penalty was reinstated in 1977 were volunteers. Michelle Rindels, Nevada's Death Penalty by the Numbers, THE NEVADA INDEPENDENT (Apr. 3, 2017).

This disconnect between existing law, shifting public opinion, and current scientific knowledge has led legal and medical experts to call for a categorical ban on, a moratorium on, or an improved standard guarding against the execution of people who suffer from a severe mental illness. *See, e.g.*, Bruce J. Winick, The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, 50 BOSTON COLLEGE L. REV. 785, 792 (2009) (arguing that the

death penalty is unconstitutional in cases where severe mental illness "produces functional impairments at the time of the offense that significantly reduce culpability and deterrability"); Richard J. Wilson, The Death Penalty and Mental Illness in International Human Rights Law: Toward Abolition, 73 WASH. & LEE L. REV. 1469, 1498 (2016) (arguing that the *Ford* standard is "not rigorous enough" and *Panetti* gives "little concrete guidance); Sundby, *supra*, at 523-34; Christopher Slobogin, What Atkins Could Mean for People with Mental Illness, 33 NEW MEXICO L. REV. 293, 313 (2003) (advancing an argument against the execution of severely mentally ill offenders under the equal protection clause); American Bar Association Death Penalty Due Process Review Project, Severe Mental Illness and the Death Penalty 7-8 (2016); American Psychological Association, The Death Penalty in the United States (approved Aug. 2001), available at https://www.apa.org/about/policy/death-penalty (last visited Oct. 3, 2019); Mental Health America, Position Statement 54, Death Penalty and People with Mental Illness (approved Jun. 2016), available at https://www.mhanational.org/issues/position-statement-54-death-penalty-and-people-mental-illnesses (last visited Oct. 3, 2019) ("MHA believes that our current

system of fact-finding in capital cases fails to identify who among those facing a possible death penalty actually has a mitigating mental health condition.").[11]

An additional factor counsels in favor of a categorical exemption. The current framework in Nevada for implementing the dictates of *Ford* and *Panetti* consists of series of time-bound assessments of a person's mental state, inquiring into the person's mental state at the time of the offense, the time of trial, or immediately prior to execution. In the context of severe mental illness, this approach offers little protection against executing people who lack a rational understanding of why they are being punished. *See* American Bar Ass'n, *supra*, at 24. If the person suffering from mental illness alternates between lucid and delusional states, or is well-practiced at appearing rational even when he is suffering from delusional thoughts, the sanity inquiries used in Nevada will not identify him. Asking whether a particular person appears to comprehend the proceedings and to be able to assist with his defense is of limited use in assessing the overall culpability, lucidity, or capacity for rational thinking that is required of a person in order to ensure that the death penalty serves its purpose. A categorical

[11] There is also evidence that the inadequacy of our current framework exacerbates racial disparities. See, e.g., Mental Health America, *supra* ("African-American defendants are significantly more likely to receive the death sentence than white defendants. African-Americans are also less likely to receive mental health treatment. MHA believes that these discrepancies are linked . . . .").

exemption would ensure that severely mentally ill offenders can be punished if they meet the *M'Naghten* test at the time of the offense and are competent throughout the proceedings, but it would ensure that the State does not inadvertently impose its most severe punishment on people who have overall not demonstrated the level of culpability rational understanding necessary.

II. THIS COURT IS NOT CONFINED TO THE U.S. SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT WHEN DETERMINING WHETHER ARTICLE 1, SECTION 6 INCLUDES A CATEGORICAL BAR AGAINST THE EXECUTION OF PEOPLE SUFFERING FROM SEVERE MENTAL ILLNESS.

A. The Nevada Constitution forbids punishments that are "cruel or unusual."

Article 1, section 6 of the Nevada Constitution provides that 'excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments inflicted . . . ." Nev. Const. art. 1, § 6. This Court has had little occasion to consider whether the use of the term "or" in Nevada's constitution instead of the word "and" has any significance for how this provision should be interpreted.

In *Lloyd v. State*, the defendant challenged his sentence of thirty years imprisonment for the crime of rape, arguing that it violated the U.S. Constitution. This Court held that "a sentence within statutory limits does not constitute cruel

and unusual punishment where the statute fixing punishment is not unconstitutional or the sentence imposed is not disproportionate to the crime in a manner so as to be shocking to the conscience," 94 Nev. 167, 170 (1978),[12] and dismissed the challenge because the sentence fell well within the statutory limit and the defendant had not challenged the statute. *Id*. It did not address any separate protection afforded by Article 1, section 6. The Court cited cases from Hawaii and Arizona. *Id*. (citing *State v. Iaukea*, 56 Haw. 343(1975) and *State v. Guthrie*, 111 Ariz. 471 (1975)). Only the Hawaii Constitution prohibited "cruel or unusual punishment." *Iaukea*, 56 Haw. At 360; *compare Guthrie*, 111 Ariz. at 474. In that case, the Hawaii court had relied on federal standards when interpreting state law limits, but it did not discuss potential differences or directly address the argument that the terms might be interpreted differently. *See Iaukea,* 56 Haw. at 360.

In other cases, this Court has dismissed similar challenges using the phrase "cruel *and* unusual," but not specifying whether it was interpreting the Nevada Constitution, the U.S. Constitution, or both. *See, e.g., Blume v. State*, 112 Nev. 472, 475 (1996); *Culverson v. State*, 95 Nev. 433, 435 (1979).[13] This Court more

[12] Former Chief Justice Rose has criticized this Court's invocation of similar "canned language" to dismiss arguments that some sentences are constitutionally "excessive." *Santana v. State*, 122 Nev. 1458, 1464-65 (2006) (Rose, C.J., concurring).

[13] In neither case did the litigants raise the argument that the Nevada Constitution should be interpreted differently than the U.S. Constitution.

than thirty years ago and at least two district courts in recent years have similarly glossed over textual differences. *See Naovarath v. State*, 105 Nev. 525, 532 n.6 (1989) ("We relate this decision to the eighth amendment of the Constitution of the United States and article 1, section 6 of the Constitution of the State of Nevada, both of which proscribe cruel and unusual punishment."); *Shuman v. State*, 94 Nev. 265, 271 (1978) (mandatory death sentence "did not offend the provisions of the United States or the Nevada Constitutions against cruel and unusual punishment"); *Yohey v. Wickman*, No. CR15-1779, 2019 Nev. Dist. LEXIS 146 (2d Dist. Nev. Mar. 1, 2019), at *12 ("The Nevada Constitution similarly prohibits cruel and unusual punishment."); *Nevada v. Ayala*, No. 07C231146-1, 2016 Nev. Dist. LEXIS 21 (8th Dist. Nev. Jan. 27, 2016), at *34 ("The Eighth Amendment to the United States Constitution, as well as Article 1, Section 6 of the Nevada Constitution, prohibit the imposition of cruel and unusual punishment."); *but see Schmidt v. State*, 94 Nev. 665, 668 (1978) (employing the phrase "cruel or unusual" with reference to the Nevada and U.S. Constitutions).

B. This Court must exercise its independent judgment in determining whether the execution of people suffering from severe mental illness comports with evolving standards of decency.

A 2002 Gallup poll found that 75 percent oppose execution of the mentally ill, nearly as great a share as opposed execution of the intellectually disabled (82 percent) and a greater share than opposed execution of juveniles (69 percent). *See*

Jeffrey M. Jones, Slim Majority of Americans Say Death Penalty Applied Fairly, GALLUP (May 20, 2002), available at https://news.gallup.com/poll/6031/slim-majority-americans-say-death-penalty-applied-fairly.aspx (last visited Oct. 3, 2019) (describing results of poll).

The question of whether a statewide consensus exists against the imposition of the death penalty on a category of people is necessarily different than the question of whether a national consensus exists. Even if this Court were to determine that Article 1, Section 6 only bars punishments that are unusual as well as cruel, the inquiry into evolving standards of decency and whether the punishment shocks the collective conscience should be undertaken at the statewide level, not at the national level.

Community standards change over time. *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 315; *Naovarath v. State*, 105 Nev. 525, 530, 532 (1989) (citing David J. Danelski, The Riddle of Frank Murphy's Personality and Jurisprudence, 13 LAW & SOCIAL INQUIRY 196 (1988) (quoting Unpublished draft opinion by Justice Frank Murphy, Box 171, Harold Hitz Burton Papers, Library of Congress))) ("A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing here with a set of absolutes. Our decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degree of our faith in the dignity of the human personality."). In both *Atkins* and *Roper*, the Court

described a change that began with a few states but did not become a national consensus until it had swept across many states in a consistent pattern. 543 U.S. at 564-67; 536 U.S. at 315. These cases demonstrate that community standards in different states may evolve at different rates. While the U.S. Supreme Court must consider the community standards of states with higher rates of executions and higher rates of mental illness among people sentenced to death, this Court should only consider the evolving standards of Nevadans.

With regard to its approach the death penalty, Nevada's is somewhere in middle of states that allow capital punishment. Polls show that many Nevadans continue to support the death penalty, see, e.g., Riley Snyder, The Independent Poll: Nevada Voters Overwhelmingly Support Death Penalty, THE NEVADA INDEPENDENT (Jan. 20, 2017); David Ferrara, Clark County Sends Many to Death Row, but Executions are Rare, LAS VEGAS REVIEW-JOURNAL (Jul. 28, 2018) (noting that Clark County handed down the second most death sentences of any county last year), but the state has been comparatively cautious about carrying out executions. *Id*. (noting that only 12 people have been executed since 1977); *but see* Terance D. Miethe & Timothy C. Hart, Capital Punishment in Nevada, 1977-2008, Center for the Analysis of Crime Statistics 1 (Jul. 2009) (characterizing Nevada as "17th in the number of executions since 1976").

Nevada has in the past demonstrated its willingness to impose limits on its administration before a trend or consensus has emerged among all states. For example, the Nevada legislature was in the process of adopting a categorical ban on the execution of intellectually disabled offenders before *Atkins* was decided. A.C.R. 3, 2001 Leg., 17th Special Session (Nev. 2001); A.B. 353, 2001 Leg., 71st Sess. (Nev. 2001). At the time, Nevada had never executed a person with a documented intellectual disability, and only one intellectually disabled person was awaiting execution in in Nevada when *Atkins* was decided. Death Penalty Information Center, List of Defendants with Intellectual Disability Executed in the United States (1976-2002), available at https://deathpenaltyinfo.org/stories/list-of-defendants-with-mental-retardation-executed-in-the-united-states-1976-2002 (last visited Oct. 3, 2019). Similarly, Nevada has not executed a juvenile offender since 1949, and only one person was awaiting execution for a juvenile offense when the Court decided *Roper*. Associated Press, Nevada Death Penalty Foes Hail Supreme Court Ruling, LAS VEGAS SUN (Mar. 1, 2005); *compare* Death Penalty Information Center, Case Summaries of Juvenile Offenders Who Were on Death Row in the United States, available at https://deathpenaltyinfo.org/stories/case-summaries-of-juvenile-offenders-who-were-on-death-row-in-the-united-states (last visited, Oct. 3, 2019) (showing, for example, 49 people awaiting execution in Texas and 13 in Alabama for juvenile offenses). In short, a national consensus against young and

intellectually disabled people appears to have emerged well after such a consensus emerged in Nevada.

Whether a categorical exemption is constitutionally required in Nevada also depends on whether the Court's case-by-case approach effectively protects against executions of people whose mental illness so affects culpability as to make the death penalty inappropriate. In Nevada, this approach is not sufficiently protective. The State's narrow insanity rule, which permits a greater number of severely mentally ill people to be prosecuted than in other states, together with the narrow procedural opportunities to make a showing of incompetency, the difficulty with using severe mental illness at the mitigation stage, and the lack of a clear legislative standard for setting aside a death sentence once imposed mean that offenders with severe mental illness that seriously compromised their capacity for rational understanding and affected their culpability might still be candidates for execution here. While a categorical exemption may not be necessary in state with different rules, and while the U.S. Supreme Court has not yet determined necessary at the national level, it is necessary here.

C. The textual difference between the Nevada and U.S. Constitutions provides additional support for a broader interpretation.

State courts can construe state constitutional provisions independently of federal interpretation of corresponding provisions. *State v. Schultz*, 252 Kan. 819,

824 (1993). The rationale for departing from federal interpretations is even stronger where the text of a state constitutional provision differs from that of its federal counterpart.

In determining whether a punishment is barred by the federal constitution, the U.S. Supreme Court has relied heavily on evidence of unusualness; that is, evidence that the punishment is prohibited by a majority, or an increasing number of states. See *Roper*, 543 U.S. at 564-67; *Atkins*, 536 U.S. at 314-16. The Court then independently considers whether a punishment offends the notions of human dignity enshrined in the Amendment, which is at base an assessment of the punishment's cruelty. *Accord Graham*, 560 U.S. at 67 ("The judicial exercise of independence requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.")

The text of the Nevada Constitution bars punishments that are cruel *or* unusual; it does not require on its face that a punishment be both cruel and unusual before it will be prohibited. Under this standard, this Court may determine that a punishment may be so disproportionate to a crime or to an offender that it "shocks the conscience," *Lloyd*, 94 Nev. at 170; *Blume*, 112 Nev. at 475; *Culverson*, 95 Nev. at 435, without also having to weigh the frequency with which such a punishment is imposed. To be sure, unusualness is a strong indicator that a

punishment offends standard of decency or shocks our collective conscience. The textual difference, however, gives this Court the ability to move earlier than the U.S. Supreme Court in outlawing punishments that are disproportionate to offender's culpability.

Upon consideration of the textual differences, at least two states have determined that their state constitutional prohibitions reach further than federal law. Michigan state courts take the position that the textual difference between their state Constitution and the Eighth Amendment is no accident. Thus, the courts will interpret "cruel or unusual" broader than the Eighth Amendment's "cruel and unusual" text if there is a compelling reason to do so. *People v. Lorentzen*, 387 Mich 167, 171-72 (1972); *People v. Bullock*, 440 Mich. 15, 29-30 (1992). Mississippi makes the distinction that punishments may be "cruel or unusual" under Miss. Const. art. 3, § 28, but may not be considered "cruel and unusual" under the Eighth Amendment. *See generally Davis v. State*, 724 So. 2d 342 (Miss. 1998); *Foster v. State*, 639 So. 2d 1263 (Miss. 1994); *Jordan v. State*, 224 So. 3d 1252 (Miss. 2017). The California Constitution's prohibition against cruel or unusual punishment is also construed separately from its counterpart in the federal

Constitution. *People v. Cartwright*, 39 Cal. App. 4th 1123, 1135-36 (1995); *Raven v. Deukmejian* 52 Cal. 3d 336, 355 (1990).[14]

III. IN DETERMINING WHAT CONSTITUTES SEVERE MENTAL ILLNESS, THIS COURT SHOULD EMPLOY A STANDARD THAT ENCOMPASSES THE REALITY OF MENTAL ILLNESS

The Eighth Amendment prohibits the execution of insane people because the influence of mental illness makes those people less culpable than an offender who does not suffer from such an illness. While mental illness may cause a person to have trouble comprehending the proceedings or the wrongfulness of his conduct, many people who suffer from severe mental illness display high intellectual functioning and may even display developmental maturity. Intellectual impairment an inability to comprehend should not be the central features of a definition of severe mental illness. Mental illness may also affect culpability and fairness in other ways, such as when the influence of delusions make the person less blameworthy for their actions, even if the person understands at a basic level what he is doing and that it is illegal. Similarly, a mentally ill person may be able to

[14] On the other hand, some state courts have rejected the argument that the textual difference should lead to any analytical difference. *See State v. Wilson*, 306 S.C. 498, 512, 27 (1992); *Holly v. State*, 241 Md. App. 349, 369 (2019); *State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014); *Commonwealth v. Batts*, 620 Pa. 115, 136 (2013); *Lightbourne v. McCollum*, 969 So. 2d 326, 334 (Fla. 2007); *Adaway v. State*, 902 So. 2d 746, 752 (Fla. 2005); *Valdez v. State*, No. 10-12-00410-CR, 2014 Tex. App. LEXIS 1375, at *5 (Tex. App. Feb. 6, 2014).

comprehend the proceedings quite well and may be intellectually capable of assisting in his defense, but he may actively undermine defense attorneys because of thoughts or behaviors that are a symptom of the illness.

While we do not wish to instruct this Court, or the Legislature, as to the precise definition of severe mental illness that might be used to implement a categorical bar against executing those who suffer from it, the definition suggested by the American Psychological Association, and adopted by the American Bar Association, is a useful starting point: "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 Ass'n, *supra*, at 9 (quoting American Psychological Association, Assessment and Treatment of Serious Mental Illness 5 (2009)).

This definition augments the *Roper* and *Atkins* standards by incorporating contemporary clinical understandings severe mental illness and its effects but focusing on the specific characteristics of these offenders that make them uniquely unsuitable for the death penalty. It implements *Ford* clearly and refines the *Panetti* standard by focusing on the types of illnesses that impair rational understanding and limiting it to people who suffer from a persistent illness that significantly impairs normal functioning. Most importantly, adopting such a standard in Nevada

would clarify the confusion that exists now because the term insanity is used for different purposes at different procedural, but is only defined by statute at one stage.

CONCLUSION

For the reasons stated above, *amici* Nevada law professors urge this court to adopt a categorical ban on executing people who suffer from a severe mental illness.

Dated this 3rd day of October, 2019.

Respectfully submitted,

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APPENDIX: NEVADA LAW PROFESSOR AMICI

The undersigned *amici* are professors at the William S. Boyd School of Law at the University of Nevada, Las Vegas, who study law and procedure, health law, and constitutional law. As professors of law at the only law school in the state, *amici* are responsible for teaching Criminal Law, Criminal Procedure, and Constitutional Law to students who graduate from law school in the State of Nevada. *Amici* are interested in the present case because it has the potential to substantially impact substantive criminal law and future questions of constitutional interpretation in Nevada. *Amici* are also interested in the present case because it concerns the intersection between criminal law and medicine/health care, an area of particular expertise for several signatories.

Addie C. Rolnick is Professor of Law and a co-facilitator of the Program on Race, Gender, and Policing. She teaches first year Criminal Law and courses on civil rights, racial discrimination, and Indian and tribal law. Her research has examined the moral and practical justifications for criminal jurisdiction and punishment, the theory and administration of juvenile justice, and the problem of biased outcomes in criminal punishment. She has advised federal and tribal government officials on criminal and juvenile justice policy and procedure, including drafting and revising jurisdictional, substantive, and procedural laws. Professor Rolnick holds a J.D. and M.A. from the University of California, Los Angeles, and B.A. from Oberlin College.

Christopher L. Blakesley is a Barrick Distinguished Scholar (2009) and Professor Emeritus at the UNLV Boyd School of Law. He is also J.Y. Sanders Professor Emeritus at Louisiana State University. He is a Life Member of the American Law Institute. He has written one hundred or more scholarly articles, in English and in French in U.S. and foreign scholarly journals, and fourteen books. He has taught, among other courses: Criminal Law, Criminal Procedure, Comparative Criminal Law, Comparative and International Criminal Law, and Comparative and International Criminal Procedure. He received his J.D. from the University of Utah; his Master of Laws and Doctorate (Doctor of the Science of Law) from Columbia University; his M.A. in International Law & Diplomacy from the Fletcher School of Law and Diplomacy, Tufts University; and his B.A. from the University of Utah. His prior legal practice was in the Office of the Legal Adviser to the U.S. Department of State under Dr. Henry Kissinger.

Frank Rudy Cooper is the William S. Boyd Professor of Law and Director of the Program on Race, Gender, and Policing. He teaches, among other courses, Criminal Law, Criminal Procedure, and Race and Criminal Justice. Professor Cooper graduated from Amherst College and Duke University Law School, where he was on the *Duke Journal of Gender, Law & Policy* and the Moot Court Board and served as a Research Assistant to Professor Jerome McCristal Culp. He clerked for the Honorable Solomon Oliver, Jr. (N.D. Ohio) and practiced in Boston.

Eve Hanan is an Associate Professor. She teaches Criminal Procedure and Criminal Law and co-directs the Misdemeanor Clinic. She previously taught at the University of Baltimore School of Law in the Juvenile Justice Project and the Mediation Clinic for Families.

Sara Gordon is a Professor of Law, Associate Dean for Academic Affairs, and a faculty member of the Health Law Program. Her research focuses on mental health law and addiction. She teaches Criminal Law, Evidence, and Mental Health Law, and is part of the Health Law Program faculty. Her writing has been published in North Carolina Law Review, Cardozo Law Review, Hastings Law Journal, and Illinois Law Review, among others.

Sylvia Lazos is the Justice Myron Leavitt Professor of Law. A constitutional law and critical race scholar, Professor Lazos has written exhaustively on how constitutional norms can accommodate a new American reality that is increasingly multicultural, multiracial and multiethnic. These articles have appeared in respected journals such as the Indiana Law Journal, Maryland Law Review, Ohio State Law Journal, Oregon Law Review, and Tulane Law Review.

Ann McGinley is the William S. Boyd Professor of Law, Co-Director of the Workplace Law Program, and a faculty member of the Health Law Program. Professor McGinley is an internationally recognized scholar in the areas of employment, disability, and torts law and a leader in Multidimensional Masculinities Theory. She has published more than sixty law review articles and book chapters.

David Orentlicher, M.D., J.D., is the Cobeaga Law Firm Professor and Director of the Health Law Program. He teaches courses in constitutional and health law and previously served as the Director of the Division of Medical Ethics at the American Medical Association, where he worked on ethical issues for physicians in capital punishment. He holds M.D. and J.D. degrees from Harvard University.

David S. Tanenhaus is the James E. Rogers Professor of History and Law. He teaches juvenile justice and American legal history. His research has examined the evolution of juvenile justice in the United States. He is a former editor of the journal Law and History Review, served as editor-in-chief of the Encyclopedia of the Supreme Court of the United States, and is co-editor of the book series Youth, Crime, and Justice. Professor Tanenhaus holds a Ph.D. and M.A. from the University of Chicago, and a B.A. from Grinnell College.

NEVADA RULE OF APPELLATE PROCEDURE 26.1 DISCLOSURE

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

Under Nevada Rule of Appellate Procedure 26.1, the law professors identified in Appendix 1 hereto declare that they do not have a parent corporation or issue publicly held stock.

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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 for Mac, Version 16.28 in Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points and contains 7,929 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 an improper purpose. I further certify that this brief complies with all the 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: October 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Brief electronically with the Nevada Supreme Court on this 3rd day of October 3, 2019. Electronic Service of the foregoing Amicus Brief shall be made in accordance with the Master Service List as follows:

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