**No. _____**

**IN THE SUPREME COURT OF THE UNITED STATES**

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**ADAM KELLY WARD,**

**Petitioner,**

**v.**

**STATE OF TEXAS,**

**Respondent.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS**

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**CAPITAL CASE: EXECUTION SCHEDULED FOR MARCH 22, 2016, 6 P.M. CST**

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## CAPITAL CASE
## QUESTIONS PRESENTED

1. Does the Eighth Amendment's prohibition on the infliction of cruel and unusual punishments preclude the States from executing individuals whose crimes are attributable to severe mental illness?

2. Have society's standards of decency evolved to the point that the death penalty now violates the Eighth Amendment?

## TABLE OF CONTENTS

## INDEX OF APPENDICES

## TABLE OF AUTHORITIES

**Cases**

**Rules and Statutes**

**Other Authority**

## PETITION FOR WRIT OF CERTIORARI

Petitioner Adam Kelly Ward asks this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals ("TCCA").

## OPINION BELOW

The order of the TCCA dismissing Mr. Ward's application for habeas corpus relief is unreported, but is attached as Appendix A.

## JURISDICTION

This Court has jurisdiction to review the TCCA decision pursuant to 28 U.S.C. § 1257(a). Mr. Ward expects that the State will argue that this Court's certiorari jurisdiction is foreclosed because the decision below is supported by state grounds that are "adequate and independent," *Michigan v. Long*, 463 U.S. 1032, 1037 (1983); accordingly, that argument receives anticipatory treatment here.

In a successive state court application, Mr. Ward raised the Eighth Amendment argument presented here. Pursuant to Texas law, a successive state habeas application requires authorization, and there are three different statutory "gateways" to obtain such authorization. *See* Tex. Code Crim. Proc. art. 11.071 § 5 (a)(1), (2), (3). To dismiss Mr. Ward's successive state habeas application as an abuse of the writ, the TCCA necessarily had to reject all three gateway arguments, and the third gateway is not independent of federal law.

The third gateway permits a successive application where the applicant shows "by clear and convincing evidence, but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury[.]" Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). As

construed by the TCCA, § 5(a)(3) "represents the Legislature's attempt to codify something very much like th[e] federal doctrine of 'actual innocence of the death penalty' for purposes of subsequent state writs." *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App. 2007).

An order dismissing a successive Texas application under § 5(a)(3) can never be independent of federal law because the TCCA must evaluate the merits of the underlying capital eligibility claim. The TCCA has interpreted § 5(a)(3) "to embrace constitutional as well as statutory ineligibility for the death penalty." *Id*. at 161. Consequently, in the case of inmates who seek to raise in a successive application an ineligibility claim pursuant to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Fifth Circuit (i.e., the federal jurisdiction most familiar with Texas law) has held that a state court dismissal is necessarily a merits determination with respect to section 5(a)(3). *See, e.g., Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011) (treating a TCCA order that "dismissed" an *Atkins* claim as an "abuse of the writ" as a decision on the merits; noting that the "state accepts that the CCA decided the merits of Blue's *Atkins* claim").

For purposes of the present petition, there is no difference between a § 5(a)(3) disposition of an *Atkins* claim and a § 5(a)(3) disposition of the claim here. The TCCA's dismissal of Mr. Ward's claim necessarily rests on a determination that Mr. Ward's severe mental illness does not render him constitutionally ineligible for the death penalty. The two concurring opinions make this point clearly. See *Ex parte Ward*, WR-70,651-03, at *9-10 (Tex. Crim. App. Mar. 14, 2016) (Alcala, J., concurring) (noting "more particularized pleadings would be necessary…because of the complexity of the

particular question before this Court").; *id*., at *1-3 (Newell, J., concurring). The Fifth Circuit's authoritative construction of state law as well as the concurring opinions in the court below make clear that the TCCA's decision dismissing Mr. Ward's application was based on, or intertwined with, a determination of the merits of the claim. This Court has jurisdiction to address the ineligibility question presented.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

## STATEMENT OF THE CASE

In 2005, Adam Ward committed a murder, an act inextricable from the delusions and paranoia fed by his disabling bipolar disorder. It is beyond reasonable dispute that Mr. Ward's diagnosis of severe mental illness is well-documented and longstanding. The record reveals prolific and uncontested evidence demonstrating Mr. Ward's mental illness, with roots in his early childhood. Even had his trial lawyers been aware of the full extent of this debilitating disease, the structure of the Texas special issues would not have permitted the sentencing jury to give it mitigating effect. *Cf. Penry v. Johnson*, 532 U.S. 782 (2001); *Tennard v. Dretke*, 542 U.S. 274 (2004). Yet the illness is so severe, so well-documented, and so deeply present in Mr. Ward's entire life as to make him constitutionally ineligible for execution.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the intellectually disabled[1] are categorically exempt from receiving the death penalty. The same characteristics cited by the *Atkins* Court in finding the intellectually disabled ineligible for execution apply with equal force to individuals with severe mental illness. Because the "standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments have evolved to the point that society agrees that severely mentally ill individuals lack the requisite moral culpability to warrant the penalty of death, this Court should find that individuals such as Mr. Ward are categorically exempt from execution. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

## I. Mr. Ward was diagnosed with bipolar disorder at a very young age.

Adam Ward's parents began to see that he was different at only eighteen months of age. Appendix C; Appendix D. He was aggressive, destructive, defiant, uncontrollable. Appendix B; Appendix C. His mother's arms were covered in bruises from Adam biting her. Appendix B. By the time Adam was three years old, he had been prescribed a gamut of psychiatric medications: Mellaril (an antipsychotic used to treat symptoms of schizophrenia), Elavil (an anti-depressant), Dexedrine and Ritalin (drugs used to treat ADHD). Appendix B; Appendix C. Recently, physicians have expressed concerns about the propriety and safety of treating very young children—whose brains

[1] The *Atkins* Court originally referred to such individuals as "mentally retarded." *Atkins*, 536 U.S. at 306. However, this Court has since replaced that term with "intellectually disabled." *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014). For purposes of consistency, all mentions to "mentally

are still developing—with powerful antipsychotic drugs, most of which are only recommended for children at least ten or older.[2]

However, none of these medications managed to improve his condition. Appendix B. Adam's disruptive behavior was so severe that he was asked to leave pre-school. *Id.* But being out of school did not ameliorate his behavior, either; at home, Adam flew into extreme rages and tantrums, lasting up to forty-five minutes an episode. *Id.* After two weeks of his parents failing to control Adam at home, Adam was admitted to an inpatient psychiatric unit, where he spent two and a half months. Appendix B; Appendix E. He had only just turned four years old. Appendix B.

During his first stay at the psychiatric unit, he was diagnosed as having bipolar disorder, and, in addition to a therapy regimen, doctors began treating him with Lithium. *Id.*; *Ward v. Stephens*, 777 F.3d 250, 253 (5th Cir. 2015). His hyperactivity and aggressiveness improved. *Id.* Upon his discharge, his physicians strongly recommended that the family continue therapy sessions. *Id.* Adam's parents did not follow these recommendations; his father, Ralph Ward, called the recommended therapy "a waste of time." R.R. Vol. 42: 47-48, 86-87.[3]

Adam's mental illness continued to plague him as he began school. Not long after his release from inpatient treatment, Adam was enrolled in an early childhood special education program at Commerce Independent School District. Appendix F.

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[2] *See* Alan Schwarz, *Still in a Crib, Yet Being Given Antipsychotics*, N.Y. Times, Dec. 10, 2015, *available at* http://www.nytimes.com/2015/12/11/us/psychiatric-drugs-are-being-prescribed-to-infants.html; *see also Movement in the Fight to Reduce the Use of Psychotropic Medications on Children in Foster Care*, Nat'l Ctr. for Youth Law, *available at* http://youthlaw.org/publication/movement-in-the-fight-to-reduce-the-use-of-psychotropic-medications-on-children-in-foster-care/ (last visited on Feb. 17, 2016) (detailing efforts in California to reform the use of powerful psychotropic medications on wards of the state).

[3] Citations to the Reporter's Record appear as "R.R. Vol. [number]: [page number]."

Adam's condition regressed, and he once again began behaving very aggressively. Appendix G. In addition to Adam's failure to improve, doctors cited the marked family stress in emphasizing the need for therapy. Appendix H.

Only a few months after being discharged from the psychiatric unit, Adam's doctor increased the amount of Lithium he was taking in an attempt to help control his worsening behavior. Appendix I. However, even increased amounts of Lithium failed to be effective, and Adam's doctor strongly recommended treatment with Tegretol, a mood stabilizer. *Id.* Adam's father responded to this suggestion by saying, "There is no way in hell that you are putting him on Tegretol…." Appendix G. That same month, Adam was again admitted for inpatient psychiatric treatment; this stay lasted three weeks. Appendix J; Appendix K.

Following this hospitalization, his doctors continued to recommend the need for individual and family therapy, emphasizing their concerns about Adam being treated with Lithium alone. Appendix L. His doctors stressed that multi-modal care was necessary to produce any long-term positive changes. *Id.* The Wards continued to ignore the doctors' recommendations.

By the time Adam was in second grade, a "Time Out Box" (a small, padded isolation room) had been built inside his school, specifically for him. Appendix N. Teachers and administrators used the room as a place to lock Adam away when he was out of control. *Id.* Teachers were instructed in different holds and restraints to use on him. Appendix M. In third grade, Adam began attending a different elementary school. Prior to his arrival, a box similar to the one that had been used at his first school was built just for Adam. Appendix N. Throughout his time attending school, Adam was

frequently placed inside such rooms; one school employee remembers how he would scream while locked inside. Appendix R; Appendix S.

As Adam grew older, his parents' resistance to therapy continued. Appendix C. They continued to disagree with physicians over which medications Adam should take and refused to follow their recommendations. Appendix O. Adam's illness worsened. A family friend and assistant coach on Adam's youth baseball team remembers an incident from when Adam was nine or so years old; in the middle of a game, something upset Adam and his reaction escalated to the point that he threw himself to the ground kicking, screaming, and crying. Appendix V. Adam's father, Ralph, was the only one who tried to intervene, as everyone else was at a loss for what to do. *Id.* Adam was so aggressive—fighting back and biting—that Ralph had trouble removing him from the field; Ralph would have to keep quickly pulling his arm back, as Adam kept biting at him. *Id.* It was like trying to "catch a wild dog." *Id.*

In middle school, a neuropsychological evaluation detailed: "rage episodes," during which he was unmanageable for an hour or more; "tunnel vision," during which he would get so stuck on an idea or action that he would pursue it without regard for obstacles; a low frustration toleration; and a high level of insecurity and tendency to interpret incoming information as persecutory. Appendix C. Even at just age thirteen, Adam's physician predicted that this behavior would put him at risk in the future for being a victim of violence or assaulting someone himself. *Id.*

By the time he was in high school, Adam's problems had escalated to the point that he completed his education at home by taking classes on a computer. Appendix P.

At that time, his contact with the outside world all but ceased. Adam spent his days at home alone with his father, who did not work. Appendix T; Appendix U; Appendix W.

## II. Mr. Ward's mental illness was exacerbated by his home environment.

Ralph Ward, Adam's father, had problems of his own. Although there is no record of a formal diagnosis, Adam's uncle often wondered if perhaps Adam had inherited his bipolar disorder from his father. Appendix Q. What is clear is that Ralph was a hoarder, and the National Institute of Health has identified hoarding as a symptom of schizophrenia. Dr. Michael Y. Hwang, et. al., *Schizophrenia with Obsessive Compulsive Features*, 3(9) Psychiatry (Edgmont) 34-41 (Sept. 2006), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2963466/ (last visited Mar. 16, 2016). Ralph referred to himself as a "dealer of antiques," and despite the fact that Adam's mother Nancy was the sole source of income for the Ward family and that her modest salary was often not adequate to cover bills and groceries without help from Nancy's family, Ralph nevertheless racked up tens of thousands of dollars in credit card debt; at one time, the figure was as high as $50,000. Appendix U; Appendix W. Ralph spent this money on everything from furniture, books, jewelry and other "antiques" to 150 old chairs being sold off by the local university, several 55-gallon barrels, and a $3,000 large scale. Appendix Q; Appendix U; Appendix W; Appendix X. Ralph claimed to make these purchases for the purpose of making money off the items' sale, though friends and family doubted that Ralph ever actually sold any of the things he bought. Appendix T; Appendix Q; Appendix W; Appendix X. In fact, Ralph refused to sell anything, even when it came time to contribute to Adam's defense. Appendix Q; Appendix W. Years later, the $3,000 scale was still in a family friend's garage, where it had been since its

purchase.

Instead, the items piled up. Antiques, boxes, and stacks and stacks of "stuff" filled the Ward family home, inside and out. *Ward*, 777 F.3d at 254; Appendix Q; Appendix W; Appendix X. *Critically, it was the Ward family's persistent failure to remove the piles of junk, which covered the Wards' yard and driveway, that led to the tragic confrontation with the victim, City of Commerce Code Enforcement Officer Michael Walker. Ward,* 777 F.3d at 254. The few friends and family who had been allowed inside the Ward home described the interior as nearly unlivable; it was filled with "thousands" of antiques, with "boxes everywhere and in every room," "stacked up all over the place." Appendix W; Appendix X. The kitchen table only had room for three settings because the rest of the table was stacked high with junk. *Id.* The house looked more like a "warehouse" or "storage facility" than someplace people actually lived; only two rooms were regularly used by the Wards, with most of the rooms devoted to the storage of Ralph's many things. A small path running through the boxes was the only way to get around the house. Appendix Q; Appendix X. The storage rooms were completely unusable, with boxes, furniture stacked on top of furniture, stacks of magazines and books, and knick knacks everywhere. Appendix Q. The house was also full of guns–at least forty-five or fifty of them–many of which were located inside a room devoted just to firearms, across the hall from Adam's room. *Ward*, 777 F.3d at 254; Appendix Q.

In addition to his volatile personality and deleterious hoarding, Ralph also maintained a persistent theory that the City of Commerce was out to get him and his family, a theory he shared lavishly with Adam. *Ward*, 777 F.3d at 253; Appendix Q; Appendix V. Ralph insisted the city was trying to take their house and that the school

district was to blame for all of Adam's struggles. Appendix Q. He frequently talked about a conspiracy among the police, the city officials, and the school board—he insisted that the "Illuminati," an apocryphal secret society, controlled the city government. *Ward*, 777 F.3d at 253-54; Appendix V.

## III. Mr. Ward's lifelong struggle with bipolar disorder, combined with his isolation and toxic family life, culminated in tragedy.

Ralph taught Adam to believe that various city officials—police, council members, school board officials, etcetera—were conspiring together against the Ward family to take away their home and drive them out of town. He opined that every decision made by teachers and administrators at Adam's school was made out of spite for the Ward family. The aggression and paranoia Adam had exhibited from the time he was but a pre-schooler was nurtured every day by his father. *See e.g.*, *Ward*, 777 F.3d at 253 (remarking on Adam and Ralph's "shared delusions").

Adam's lifelong struggle with bipolar disorder, combined with his isolation and toxic family life, finally culminated in tragedy when he shot and killed City of Commerce Code Enforcement Officer Michael Walker on June 13, 2005. *Id.* at 253. That day, Mr. Walker had arrived at the Ward family home to document code violations pertaining to the junk piled around outside the house. *Id.* at 254. Adam and Mr. Walker argued, with Adam growing increasingly incensed. *Id.* Driven by a belief that "the City" was after him and his family, that Mr. Walker intended to have their home torn down, and that police would show up and kill him if Mr. Walker was not stopped, Adam ran inside the house to pick up one of the many guns and came back out shooting. *Id.* According to Ralph, after he was able to get the gun away from Adam's grasp, Adam looked over at him and asked, with a blank look in his eye, "Dad, what just happened?" R.R. Vol. 39: 57.

## REASONS FOR GRANTING WRIT OF CERTIORARI

**The "evolving standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments prohibit the execution of the severely mentally ill.**

This Court should review this petition to determine whether the Eighth Amendment, which prohibits the infliction of cruel and unusual punishments, precludes the States from executing individuals whose crimes are attributable to severe mental illness. The words of the amendment are not "static"; instead, a court must look to the "evolving standards of decency that mark the progress of a maturing society" in defining the contours of that which is "cruel and unusual." *Trop*, 356 U.S. at 101. In determining whether contemporary standards of decency militate a finding that a particular punishment is unconstitutional, a court should look to "objective factors to the maximum possible extent." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991). To that end, this Court has found a number of factors persuasive: whether state legislative enactments indicate that a national consensus has emerged against the imposition of a particular punishment;[4] whether prosecution and sentencing trends in locations where such punishments are permissible indicate the practice is nevertheless uncommon;[5] polling data;[6] whether there is a consensus among relevant professional and social

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[4] *See e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (finding a national consensus against imposing the death penalty upon juvenile defendants when 30 states prohibit the juvenile death penalty; 12 states that have rejected the death penalty entirely and 18 states that have, either by express enactment or judicial interpretation, excluded juveniles from capital punishment).

[5] *See e.g.*, *Atkins*, 536 U.S. at 316 (finding persuasive that, even in the states that regularly execute offenders and permit the execution of the intellectually disabled, seemingly only five such offenders had been executed since this Court upheld the practice in *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

[6] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (examining public opinion polls in support of a ban on the execution of the intellectually disabled).

organizations;[7] and how the international community views the practice.[8] In addition to looking to objective indicia of consensus, a court must also exercise its own independent judgment in determining whether a punishment is a disproportionate response,[9] given either the severity of the crime or the moral culpability of the defendant.[10] This Court, citing both objective indicia of consensus and its own reasoned judgment, has previously identified several classes of defendants for whom the death penalty is impermissible. These defendants, by virtue of possessing characteristics that diminish their moral culpability, have been deemed ineligible for execution.[11]

For example, in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the Eighth Amendment prohibits the execution of individuals who were juveniles at the time of the offense, because they lacked the culpability of adult offenders. Similarly, in *Enmund v.*

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[7] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (citing the broad consensus against executing the intellectually disabled that can be found among mental health professional organizations and diverse religious communities); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (noting that respected professional organizations oppose the execution of those who were under sixteen at the time of the offense).

[8] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (citing the overwhelming disapproval of the international community for executing the intellectually disabled); *Thompson*, 487 U.S. at 830 (citing the view shared by our international peers that those who were under sixteen at the time of their crime should not be subject to execution).

[9] *See e.g.*, *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)) (remarking that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of acceptability of the death penalty under the Eighth Amendment").

[10] *See e.g., Coker*, 433 U.S. at 598 (death penalty is an excessive penalty for a criminal defendant who has not taken a life); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (death penalty is a disproportionate punishment for defendants who did not actually kill, intend to kill, or anticipate killing would occur).

[11] *See e.g., Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty is a disproportionate punishment for defendants convicted of raping a child); *Simmons*, 543 U.S. 551 (death penalty is a disproportionate punishment for juvenile defendants); *Atkins*, 536 U.S. 304 (death penalty is a disproportionate punishment for intellectually disabled defendants); *Enmund*, 458 U.S. 782 (death penalty is a disproportionate punishment for defendants who did not actually kill, intend to kill, or anticipate killing would occur); *Coker*, 433 U.S. 584 (death penalty is a disproportionate punishment for defendants convicted of raping an adult woman).

*Florida*, 458 U.S. 782 (1982), this Court found that sentencing to death those who did not kill, intend to kill, or anticipate that death would occur was an unconstitutionally excessive punishment. And finally, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the imposition of the death penalty upon the intellectually disabled because "their disabilities in areas of reasoning, judgment, and control of their impulses" mean they do not act with the requisite level of culpability.

As shown below, the same considerations cited by this Court in *Atkins* and *Simmons* apply with equal force to individuals with severe mental illness.[12] This Court should issue this writ to determine whether the Eighth Amendment's prohibition of cruel and

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[12] "Severe" or "serious" mental illness, as the term is used in the mental health field, refers to disorders with psychotic or similar reality-distorting features that are accompanied by some functional impairment for which medication or hospitalization is often requires. According to the American Psychological Association:

> [Serious Mental Illness, or SMI] refers to 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, such as cognitive capabilities; disruption of normal developmental processes, especially in late adolescence; vocational capacity and social relationships. The [Diagnostic and Statistical Manual] diagnoses most associated with SMI include schizophrenia, schizo-affective disorder, bipolar disorder and severe depression with or without psychotic features.

Am. Psychological Ass'n, *Assessment and Treatment of Serious Mental Illn*ess at 5 (2009), available at http://www.apa.org/practice/resources/smi-proficiency.pdf (last visited Feb. 23, 2016). Similarly, Substance Abuse and Mental Health Services Administration and the U.S. Department of Health and Human Services define "serious" mental illness (as opposed to broadly any mental illness) as "a diagnosable mental, behavioral, or emotional disorder (excluding developmental and substance abuse disorders) of sufficient duration to meet diagnostic criteria within DSM-IV (APA, 1994) that has resulted in serious functional impairment, which substantially interferes with or limits one or more major life activities." U.S. Dept. of Health and Human Servs., *Results from the 2012 National Survey on Drug Use and Health: Mental Health Findings*, (2013) available at http://media.samhsa.gov/data/NSDUH/2k12MH_FindingsandDetTables/2K12MHF/NSDUHmhfr2012.htm (last visited Feb. 23, 2016). Mental illnesses that meet the diagnostic criterion for SMI are all generally associated in their acute state with hallucinations, delusions, disorganized thoughts, or significant disturbances in consciousness, perception of the environment, accurate interpretation of the environment, and memory.

unusual punishment, defined by the "evolving standards of decency that mark the progress of a maturing society," exempts those suffering of severe mental illnesses from receiving the penalty of death.

## I. It is unconstitutional to impose the death penalty upon the severely mentally ill because there is a developing national consensus against their execution.

In assessing whether the "standards of decency," *Trop*, 356 U.S. at 101, have evolved such that the Eighth Amendment then prohibits a particular punishment, this Court has looked to objective factors and has, accordingly, sought to identify whether there exists a "national consensus," against the imposition of that punishment.[13] In evaluating national consensus, the Court has relied on "legislation enacted by the country's legislatures" as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 331 (1989). This Court also looks to "measures of consensus other than legislation," *Kennedy*, 554 U.S. at 433, such as "actual sentencing practices[, which] are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Finally, in addition to state legislation and national sentencing trends, this Court has also cited the opinions of relevant professional organizations, polling data, and international consensus in finding that standards of decency have evolved towards prohibition of a particular punishment. *See Atkins*, 536 U.S. at 316 n.21. All of these considerations, in combination with the current saliency of mental health issues in criminal justice, reveal a

[13] *See e.g., Atkins*, 536 U.S. at 316 (finding a "national consensus" against executing the intellectually disabled); *Simmons*, 543 U.S. at 567 (finding a "national consensus" against executing juvenile defendants).

national consensus against subjecting the severely mentally ill to the most severe of penalties.

### A. Twenty-four jurisdictions do not execute the severely mentally ill.

Nineteen states and the District of Columbia prohibit the death penalty[14] and four states currently have governor-imposed moratoriums on executions.[15] While it is true that these twenty-four jurisdictions currently prohibit executing anyone, severely mentally ill or otherwise, the figure is nevertheless relevant, as this Court has included states prohibiting the death penalty altogether in its tally of states prohibiting the death penalty for certain offenders. For example, the *Simmons* Court observed that, "[w]hen *Atkins* was decided, 30 States prohibited the death penalty for the [intellectually disabled]. This number comprised 12 that had abandoned the death penalty altogether and 18 that maintained it but excluded the [intellectually disabled] from its reach." *Simmons*, 543 U.S. at 564. The Court went on to cite a similar statistic for states prohibiting both the death penalty and the death penalty for juvenile offenders. *See id. See also Penry I*, 492 U.S. at 334. As such, it is appropriate, given this Court's practice in tallying such figures, to say that twenty-four jurisdictions do not execute the severely mentally ill. But even if this Court is inclined to assess the prevailing national sentiment by looking solely at jurisdictions that retain the death penalty, the evidence still strongly

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[14] Alaska (1957), Connecticut (2012), Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1846), Minnesota (1911), Nebraska (2015), New Jersey (2007), New Mexico (2009), New York (2007), North Dakota (1973), Rhode Island (1984), Vermont (1964), West Virginia (1965), Wisconsin (1853), and Washington, District of Columbia (1981). *See States With and Without the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

[15] Colorado (2013), Oregon (2011 and 2015), Pennsylvania (2015), and Washington (2014). *See Statements from Governors of Pennsylvania, Washington, Colorado, and Oregon Halting Executions*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/node/5792.

suggests that a consensus has developed–even in death penalty states–against executing those who are severely mentally ill. *See infra* Part I.B.

In addition to the twenty-four jurisdictions without the death penalty, eleven other jurisdictions (though still possessing death penalty statutes) have not executed anyone in at least ten years; in a few states, it has been over twenty years or more since an execution was held.[16] In fact, since 2010, only sixteen states have carried out executions.[17]

All told, since 2010, a full thirty-five states have not carried out executions against the severely mentally ill (or any other defendant). In addition, since 2010, eight states have taken affirmative stances against the death penalty; four states have passed legislation ending the death penalty,[18] and five governors have imposed moratoriums on executions.[19]

As the *Atkins* Court noted, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 314. Since 2010, there has been a consistent drop in the number of states that carry out the death penalty—at this time, a clear majority of states—thirty-five—do not currently carry

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[16] Arkansas (last execution held in 2005); California (last execution held in 2006); Kansas (last execution held in 1965); Montana (last execution held in 2006); Nevada (last execution held in 2006); New Hampshire (last execution held in 1939); New Mexico (last execution held in 2001); North Carolina (last execution held in 2006); Wyoming (last execution held in 1992); U.S. Government (last execution held in 2003); and, U.S. Military (last execution held in 1961). *See Executions by State and Year*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/node/5741.

[17] Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia. *Id.*

[18] Connecticut (2012), Illinois (2011), Maryland (2013), and Nebraska (2015). *See States With and Without the Death Penalty*, *supra* note 14.

[19] Colorado (2013), two governors of Oregon (2011 and 2015), Pennsylvania (2015), and Washington (2014). *See Statements from Governors of Pennsylvania, Washington, Colorado, and Oregon Halting Executions*, *supra* note 15.

out executions. These figures indicate an emerging national consensus against the death penalty for all defendants, including those who are mentally ill.

### B. Of the thirty-three jurisdictions[20] with death penalty statutes, twenty-five specifically address mental illness as a mitigating factor.

Although thirty-three jurisdictions still maintain death penalty statutes,[21] it is notable that, of those, twenty-five—a full three-quarters—specifically ask juries to consider mental or emotional disturbance or capacity as a mitigating factor, circumstances which are of critical relevance in a defendant's mental health status.[22] Most significantly, prior to action by the Connecticut legislature to abolish the death penalty, that state enacted a measure specifically prohibiting the execution of the severely mentally ill; it recognized that mentally ill offenders lack moral culpability in the

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[20] Thirty-one states plus the federal government and the U.S. military. This includes the four states (Colorado, Oregon, Pennsylvania, and Washington) with governor-imposed moratoriums on executions. *See States With and Without the Death Penalty*, *supra* note 14.

[21] *See id.*

[22] Ala. Code § 13A-5-51 (mental or emotional disturbance and capacity); Ariz. Rev. Stat. Ann. § 13-751(G) (capacity); Ark. Code Ann. § 5-4-605 (mental or emotional disturbance and capacity); Cal. Penal Code § 190.3 (mental or emotional disturbance and capacity); Colo. Rev. Stat. Ann. § 18-1.3-1201(4) (capacity and "emotional state"); Fla. Stat. Ann. § 921.141(6) (mental or emotional disturbance and capacity); Ind. Code § 35-50-2-9(c) (mental or emotional disturbance and capacity); Ky. Rev. Stat. Ann. § 532.025(2)(b) (mental or emotional disturbance and capacity); La. Code Crim. Proc. Ann. art. 905.5 (mental or emotional disturbance and capacity); Miss. Code Ann. § 99-19-101(6) (mental or emotional disturbance and capacity); Mo. Rev. Stat. § 565.032(3) (mental or emotional disturbance and capacity); Mont. Code Ann. § 46-18-304(1) (mental or emotional disturbance and capacity); Nev. Rev. Stat. § 200.035 (mental or emotional disturbance); N.H. Rev. Stat. Ann. § 630:5(VI) (mental or emotional disturbance and capacity); N.C. Gen. Stat. Ann. § 15A-2000(f) (mental or emotional disturbance and capacity); Ohio Rev. Code Ann. § 2929.04(B) (capacity); Or. Rev. Stat. Ann. § 163.150(1) ("mental and emotional pressure"); 42 Pa. Cons. Stat. Ann. § 9711(e) (capacity); S.C. Code Ann. § 16-3-20(C)(b) (mental or emotional disturbance and capacity); Tenn. Code Ann. § 39-13-204(j) (mental or emotional disturbance and capacity); Utah Code Ann. § 76-3-207(4) (mental or emotional disturbance and capacity); Va. Code Ann. § 19.2-264.4(B) (mental or emotional disturbance and capacity); Wash. Rev. Code § 10.95.070 (mental disturbance and capacity); Wyo. Stat. Ann. § 6-2-102 (mental or emotional disturbance and capacity); 18 U.S.C. § 3592(a) (mental or emotional disturbance and capacity).

same way that juveniles and the intellectually disabled do.[23] Further, even states that have not by law exempted those with severe mental illness from execution have nonetheless specifically directed the sentencing jury's attention to this factor. For example, several statutes in death penalty states enumerate mitigating circumstances for the jury to consider[24] (such as the youth of the defendant, a lack of criminal history, whether the victim participated in the criminal conduct, whether the defendant was coerced or under duress, and the degree to which the defendant participated in the offense);[25] significantly, these statutes also identify whether a defendant's capacity to appreciate criminality or conform to the law has been impaired and the defendant's mental or emotional disturbance at the time of the crime as a mitigating factors. Typical language is found in the North Carolina statute, which directs the jury to consider whether "the capital felony was committed while the defendant was under the influence of mental or emotional disturbance" and "the capacity of the defendant to appreciate the

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[23] The statute read: "[t]he court shall not impose the sentence of death on the defendant if … at the time of the offense … the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." Conn. Gen. Stat. § 53a-46a(h)(3). If it were not for Connecticut's 2012 abolition of the death penalty as a whole, this statute would still be in force.

[24] *See e.g.,* Ala. Code § 13A-5-51 (providing that "mitigating circumstances shall include, but not be limited, the following"); Fla. Stat. § 921.141(6) (providing that "mitigating circumstances shall be the following"); N.C. Gen. Stat. § 15A-2000(f) (providing that "mitigating circumstances which may be considered shall include, but not be limited to, the following").

[25] *See e.g.,* Fla. Stat. § 921.141(6) ("Mitigating circumstances shall be the following: (a) The defendant has no significant history of prior criminal activity. (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (c) The victim was a participant in the defendant's conduct or consented to the act. (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor. (e) The defendant acted under extreme duress or under the substantial domination of another person. (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. (g) The age of the defendant at the time of the crime. (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.").

criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C. Gen. Stat. Ann. § 15A-2000(f)(2),(6). Other statutes make relevant whether the impaired capacity was due to "mental disease or defect,"[26] "mental condition,"[27] or "mental illness."[28]

The fact that so many death penalty states recognize mental illness as a mitigating factor is a clear legislative signal that severely mentally ill defendants—individuals who are so emotionally disturbed or mentally incapacitated that they cannot be expected to responsibly conform to lawful conduct—should not receive the death penalty. As explained further below, *infra* Part II.B, individualized sentencing and the discretion to consider mental illness mitigating are not sufficient to safeguard severely mentally ill individuals from receiving improvident death sentences. The only way to give effect to the emerging consensus that those suffering from severe mental illness not be executed is for this Court to acknowledge the inadequacies of individualized sentencing and recognize a categorical exemption for severely mentally ill defendants.

### C. Prosecution and sentencing trends reveal a reluctance to impose the death penalty upon severely mentally ill individuals.

A broad national consensus is reflected not only in the judgments of legislatures, but also in the infrequency with which the punishment is actually imposed.[29] As this Court has observed, "actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. At the time *Graham* was decided,

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[26] Ark. Code § 5-4-605(3); Cal. Penal Code § 190.3; Ind. Code § 35-50-2-9(c)(6); La. Code Crim. Proc. art. 905.5(e); Ohio Rev. Code § 2929.04(B)(3); Tenn. Code § 39-13-204(j)(8); Wash. Rev. Code § 10.95.070(6).
[27] Utah Code § 76-3-207(4)(d).
[28] Ky. Rev. Stat. § 532.025(2)(b)(7).
[29] *See e.g.*, *Simmons*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316.

thirty-nine jurisdictions[30] permitted juveniles convicted of non-homicide offenses to be sentenced to life imprisonment without parole. *Id.* This Court nevertheless found a national consensus against the punishment by examining "actual sentence practices" and finding that such sentences were "most infrequent." The *Graham* Court emphasized that it was "incomplete and unavailing" to foreclose further examination of national consensus based on lack of state legislation alone. *Id.*

After conducting a survey of public defenders and capital defense attorneys across Texas and other death penalty states, results reveal that when severely mentally ill defendants commit capital crimes, prosecutors are less likely to seek death and more likely to accept or offer lesser pleas and juries are more likely enter verdicts for life imprisonment over death.[31] Specifically, a survey of thirty death penalty lawyers from ten different death penalty states[32] involving an aggregate of fifty-seven capital defendants facing potential death sentences between the years 2010 and 2015 reveals that only 1 in 3 is in fact sentenced to death–with the other two-thirds receiving less severe sentences precisely because of their mental illness.[33] 17 of the 57 pleaded to life, 6 pleaded to sentences less than life, 10 were sentenced to life at trial, and 19 were sentenced to death.[34]

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[30] Thirty-seven states, the District of Columbia, and the federal government. *See Graham*, 560 U.S. at 62.

[31] These results are preliminary; were this Court to grant *certiorari* and schedule briefing, Mr. Ward would have the opportunity to offer affidavits and more robust data.

[32] Arizona, California, Colorado, Florida, Mississippi, North Carolina, South Carolina, Virginia, Washington, and Wyoming.

[33] This amount merely represents the number of defendants identified through the survey; it is not meant indicate the total number of severely mentally ill death-eligible defendants.

[34] Five additional defendants were identified as severely mentally ill, but their cases were resolved for reasons not involving mental illness, and the others were resolved for reasons not dealing directly with the defendant's mental illness.

Attorneys interviewed in connection with these cases reported that mental illness was a critical part of their defense. Public defenders in Los Angeles and Maricopa Counties, two counties consistently listed among those with the most death sentences,[35] identified that, in their experience, prosecutors rarely sought death against defendants who had a documented history of severe mental illness. For example, in Maricopa County, County Attorney Bill Montgomery, the elected head of the county's prosecuting office, was cited in a local news article as saying, "where someone has a clearly documented mental health history involving serious mental illness, those are circumstances where we probably wouldn't seek the death penalty" and that, "in general, juries are reluctant to issue a harsh punishment to a defendant with mental illness."[36]

Other attorneys described trials after which jurors identified the defendant's mental health as influential in their decision to choose life imprisonment. For example, in the case of James Holmes, the Aurora, Colorado theater shooter,[37] a juror identified that "his severe mental illness…ruled out death" for the jurors who insisted on a life sentence; [38] a different juror confirmed that "[mental illness] was the issue" behind the divided result.[39] In a recent case out of Seattle, jurors in the case of Christopher Monfort

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[35] *See Executions by County*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/executions-county.
[36] Jared Dillingham, *Drowning of twin toddlers puts mental health in the spotlight*, AZ Family – 3 TV News KPHO/KTVK (Sept. 1, 2015, 10:39 PM), http://www.azfamily.com/story/29938400/toddler-drownings-put-mental-health-in-the-spotlight.
[37] *See People v. Holmes*, No. 12CR1522 (Dist. Ct., Arapahoe Co., Colo., Aug. 28, 2015).
[38] Jordan Steffan, *Aurora theater shooting juror breaks silence, says 3 voted for life*, The Denver Post (Oct. 2, 2015, 10:51 AM), http://www.denverpost.com/theater-shooting-trial/ci_28911988/aurora-theater-shooting-juror-breaks-silence-says-3.
[39] Carly Moore, *Juror 17 reveals details of verdict, at least 1 theater shooting juror was against death sentence*, Colorado Channel 2 (Aug. 7, 2015, 7:31 PM),

voted twelve-zero for a life sentence; a juror poll revealed that during guilt-innocence, they had been divided on the not-guilty-by-reason-of-insanity plea but agreed unanimously on a life sentence during the punishment phase, given their concerns about his mental health.[40] Finally, in another example out of Seattle's King County, jurors in the case of Joseph McEnroe[41] cited his mental health as reason for the split decision and subsequent sentence of life imprisonment.[42]

For the cases in which severely mentally ill defendants received the death penalty, respondents identified many of the issues that arise as a result of these defendants' deficiencies, discussed further below, *infra* Part II.B. An inability to meaningfully contribute to their own defense, mental health evidence that became more aggravating than mitigating, an insistence on representing oneself, and asking for death were present in many of the identified cases in which defendants received the death penalty, despite being severely mentally ill. In Texas especially, severely mentally ill defendants are at particular risk of receiving improvident death sentences, due to the "future dangerousness" instruction, discussed further below, *infra* Part II.B.

This initial survey data demonstrates a clear and unmistakable trend away from sentencing severely mentally ill defendants to death. Indeed, the origin of this trend can be traced as far back as the 1990s; an examination of capital sentencing trials in New Jersey between 1990 and 2001 found that the death penalty was imposed in only 7.7%

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http://kwgn.com/2015/08/07/juror-17-reveals-details-of-verdict-at-least-1-theater-shooting-juror-was-against-death-sentence/.

[40] *See State v. Monfort*, No. 091071876 (King Co., Wash. Sup. Ct., July 23, 2015).

[41] *See State v. McEnroe*, No. 071087164 (King Co., Wash., Sup. Ct., May 13, 2015).

[42] *See* Jennifer Sullivan and Steve Miletich, *Split jury spares Carnation killer McEnroe from death*, The Seattle Times (May 13, 2015, 2:16 PM), http://www.seattletimes.com/seattle-news/crime/mcenroe-escapes-death-sentence-for-6-carnation-murders/.

of the cases in which juries found the so-called "5d mitigating factor"—whether the "defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution." *State v. Nelson*, 173 N.J. 417, 483-85, 803 A.2d 1, 42–43 (2002) (Zazzali, J., concurring). By comparison, the rate of jury-imposed death sentences on defendants who were not found significantly impaired by mental disease or defect was 42.6%. In other words, the death-sentencing rate for the group of defendants found to be "significantly impaired" due to mental disease or defect was six times lower than the rate for those who were not found to be significantly impaired.

The experiences of capital defense attorneys, bolstered by past research, evince an increasing opposition to imposing death sentences upon the severely mentally ill. Even the head prosecutor of an infamously death-friendly county publically disavowed the practice. These considerations demonstrate an emerging national consensus against imposing the death penalty on severely mentally ill defendants.

### D. Relevant professional organizations, polling data, and the international community are all in favor of exempting the severely mentally ill from execution.

In addition to legislation and trends in prosecution, this Court has also cited other factors in identifying a national consensus, such as the opinions of relevant professional and social organizations,[43] polling data,[44] and views among the international community.[45]

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[43] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (citing the broad consensus against executing the intellectually disabled that can be found among mental health professional organizations and

In *Atkins*, this Court cited as evidence of national consensus the official opposition of several mental health organizations, the overwhelming disapproval of the international community, and polling data showing a widespread consensus for prohibiting the execution of the intellectually disabled. *Id.* The same evidence exists in support of finding a national consensus against the execution of the severely mentally ill.

Nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty for severely mentally ill offenders.[46] The American Bar Association also publically opposes executing or sentencing to death the severely mentally ill.[47]

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diverse religious communities); *Thompson*, 487 U.S. at 830 (noting that respected professional organizations oppose the execution of those who were under sixteen at the time of the offense).

[44] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (examining public opinion polls in support of a ban on the execution of the intellectually disabled).

[45] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (citing the overwhelming disapproval of the international community for executing the intellectually disabled); *Thompson*, 487 U.S. at 830 (citing the view shared by our international peers that those who were under sixteen at the time of their crime should not be subject to execution).

[46] *See* Am. Psychiatric Ass'n, *Position Statement on Diminished Responsibility in Capital Sentencing* (approved Nov. 2004 and reaffirmed Nov. 2014), *available at* http://www.psychiatry.org/psychiatrists/search-directories-databases/policy-finder (last visited Feb. 23, 2016) (stating position that "defendants shall not be sentenced to death or executed if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity to (a) appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law"); Am. Psychological Ass'n, *Report of the Task Force on Mental Disability and the Death Penalty* (2005), *available at* https://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf (last visited Feb. 23, 2016) (outlining its recommendation to "prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability"); Mental Health Am., *Position Statement 54: Death Penalty and People with Mental Illnesses* (approved Mar. 5, 2011), *available at* http://www.mentalhealthamerica.net/positions/death-penalty (last visited Feb. 23, 2016) (declaring position that "defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct

Public opinion polls, though limited, also support this consensus. A 2002 Gallup poll found that while 70% of respondents supported the death penalty in general, 75% opposed the death penalty for the mentally ill.[48] Notably, a higher percentage of respondents opposed the death penalty for the mentally ill—75%—than for juveniles—just 69%.[49] This disparity is significant because this Court found there was a national consensus against imposing the death penalty on juvenile offenders over a decade ago. *See Simmons*, 543 U.S. 551. A 2009 poll of Californians found 66% of respondents in favor of the death penalty, but 64% opposed to sentencing the mentally ill to death.[50] Finally, a 2007 North Carolina poll found that 52% of respondents were against imposing the death penalty on defendants who had a severe mental illness or disability at the time of the crime, with only 30% being in favor of the practice.[51]

Lastly, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon the severely mentally ill. This Court has often cited international laws and norms in its

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to the requirements of the law"); Nat'l Alliance on Mental Illness, *Death Penalty*, *available at* https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Feb. 23, 2016) (declaring opposition to "the execution of persons with serious mental illness").

[47] Am. Bar Ass'n, *ABA Recommendation 122A* (adopted Aug. 7-8, 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf (last visited Feb. 24, 2016) (recommending that "defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law").

[48] *See* Gallup, *Death Penalty* (poll conducted May 6-9, 2002), *available at* http://www.gallup.com/poll/1606/death-penalty.aspx (last visited Feb. 24, 2016).

[49] *Supra*.

[50] *See* Jennifer McNulty, *New poll by UCSC professor reveals declining support for the death penalty* (Sept. 1, 2009), http://news.ucsc.edu/2009/09/3168.html.

[51] *See* Rob Schofield, *NC Policy Watch Unveils Inaugural "Carolina Issues Poll:" Results Show that Voters are Supportive of Public, Humane Solutions in Mental Health and Affordable Housing* (Apr. 9, 2007), http://www.ncpolicywatch.com/2007/04/09/nc-policy-watch-unveils-inaugural-"carolina-issues-poll"/.

Eighth Amendment jurisprudence.[52] The United Nations Commission on Human Rights has called for capital punishment countries to "[n]ot impose the death penalty on a person suffering from any form of mental disorder or to execute such person."[53] In a recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness."[54] The European Union has likewise declared that the execution of persons "suffering from any form of mental disorder . . .

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[52] *See Atkins*, 536 U.S. at 316 n.21 (execution of intellectually disabled offenders "overwhelmingly disapproved" within the international community); *Thompson*, 487 U.S. at 830–31 ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."); *Enmund*, 458 U.S. at 796 n.22 (death penalty for "felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker*, 433 U.S. at 596 n.10 (noting that the Court previously examined "the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue") (citing United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968)); *Trop*, 356 U.S. at 100 (no support among the world's nations for loss of statehood as punishment). Referring to the history of the Eighth Amendment, Justice Blackmun remarked that "[t]he drafters of the Amendment were concerned, at root, with 'the dignity of man,' and understood that 'evolving standards of decency' should be measured, in part, against international norms." Harry Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 45–46 (1994) (internal citations omitted). Moreover, the Supreme Court has recently considered international human rights law as a reflection of the "values we share with a wider civilization." *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing decisions of the European Court of Human Rights in analysis of Due Process Clause requirements); *see Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the Convention on the Elimination of All Forms of Racial Discrimination in affirmative action ruling); *Thompson*, 487 U.S. at 831 n.34 (citing the International Covenant on Civil and Political Rights and the American Convention on Human Rights in decision on the execution of juveniles).

[53] *See, e.g.,* U.N. Comm'n on Human Rights Res. 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); U.N. Comm'n on Human Rights Res. 1996/91, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999).

[54] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

[is] contrary to internationally recognized human rights norms and neglect[s] the dignity and worth of the human person."[55]

### E. There is an overwhelming national consensus that severely mentally ill offenders deserve special penological treatment.

In addition to the traditional indications of a national consensus against a punishment, there also exists in this country a broader theme of treating severely mentally ill offenders differently, due to recognition of the deficiencies caused by mental illness and the role they play in criminality. There is an emerging national consensus, not just for exempting the severely mentally ill from execution, but also for the more holistic goal of embracing a nuanced understanding of the intersection of mental illness and criminal justice that prioritizes treatment over punishment and acknowledges the unique issues posed by mentally ill offenders. Although state capital punishment laws do not yet fully reflect the emerging national consensus that exists for exempting the severely mentally ill from execution, there are nevertheless other persuasive indications that the standards of decency have evolved towards rejection of such types of punishment for the severely mentally ill.

In fact, the lack of legislative action can itself be understood as reflecting this national trend toward treating mentally ill offenders differently and less punitively. In the context of intellectual disability, for example, there was only modest legislative activity exempting the intellectually disabled from execution prior to this Court's action in *Atkins*, yet this Court properly understood this legislative inaction as consistent with the trend

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[55] European Union, Delegation of the European Commission to the USA, EU Memorandum on the Death Penalty, presented to U.S. Assistant Secretary of State for Human Rights (Feb. 25, 2000), *available at* http://www.eurunion.org/eu/EU-Memorandum-on-the-Death-Penalty-February-25-2000.html (last visited Feb. 24, 2016).

away from executing the intellectually disabled; as this Court put it: "there is little need to pursue legislation barring the execution of the [intellectually disabled]" when those states have not executed anyone in decades. *Atkins*, 536 U.S. at 316.

The social consensus that those suffering from severe mental illness warrant different penological treatment from those of sound mental health is reflected in current criminal justice practices. For example, there is an extensive network of mental health courts across all fifty states, consisting of over 300 such courts.[56] Mental health courts, while diverse, can be broadly defined as "a specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional criminal court processing … [in which participants] voluntarily participate in a judicially supervised treatment plan."[57] The purpose of mental health courts is to attempt to ameliorate the "disproportionate number of people with mental illnesses in the justice system"[58] by "us[ing] the authority of the court to encourage defendants with mental illness to engage in treatment and to adhere to medication regimens to avoid violating conditions of supervision or committing new crimes."[59] Mental health courts, which have experienced a "recent surge in popularity,"[60] represent part of a rapidly growing national awareness of the importance of confronting the role mental illness plays in crime and the need—for the benefit of both the offender and the community—to address the

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[56] *See Adult Mental Health Treatment Court Locator*, Substance Abuse & Mental Health Servs. Admin., *available at* http://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults (last visited Feb. 27, 2016) (listing 336 adult mental health courts).
[57] *Mental Health Courts: A Primer for Policymakers and Practitioners*, at 4, The Council of State Governments Justice Center (2008), *available at* https://learning.csgjusticecenter.org/wp-content/themes/c4-mhc/content/Module_1_Prep_Work/mhc-primer.pdf (last visited Feb. 29, 2016).
[58] *Supra* at 3.
[59] *Supra* at 8.
[60] *Supra* at 1.

problem in specialized ways. These courts are not limited to misdemeanor or non-violent offenders; all told, they have at least one hundred that include felony offenders on their dockets.[61] These special courts clearly reflect a "consistency in the direction of change"[62] in the growing national awareness of the role serious mental illness plays in crime and the special consideration that must be accorded.

## II. It is unconstitutional to impose the death penalty on the severely mentally ill because of their diminished personal culpability.

In addition to identifying a national consensus, a court must also exercise its own independent judgment in determining whether a punishment is a disproportionate response,[63] given either the severity of the crime or the moral culpability of the defendant.[64] In order for a punishment to be an appropriate response to a crime, the severity of the punishment must be proportional to the defendant's personal culpability in the commission of the crime. To impose our society's gravest punishment, the defendant must meet the highest level of moral culpability—the "punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801. Without such congruence, the punishment of death becomes "grossly disproportionate." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592). Only the "most deserving" may be put to death. *Atkins*, 536 U.S. at 320.

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[61] *See Adult Mental Health Treatment Court Locator*, *supra* note 56.
[62] *See Atkins*, 536 U.S. at 315 (noting that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change").
[63] *See e.g., Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597) (remarking that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of acceptability of the death penalty under the Eighth Amendment").
[64] *See e.g., Coker*, 433 U.S. at 598 (death penalty is an excessive penalty for a criminal defendant who has not taken a life); *Enmund*, 458 U.S. at 798 (death penalty is a disproportionate punishment for defendants who did not actually kill, intend to kill, or anticipate killing would occur).

The *Enmund* Court was concerned with a defendant's level of responsibility in the commission of the offense, but responsibility and guilt depend not just on the type of offense, but also on the type of offender. In *Atkins*, this Court determined that the deficiencies of the intellectually disabled "diminish[ed] their personal culpability." *Atkins*, 536 U.S. at 318. In order to be fully culpable for one's actions, one must be a fully rational, choosing agent with the capacity to evaluate the consequences of one's actions and be capable of being fairly expected to conform their behavior to that of a responsible citizen. Severe mental illness, like intellectual disability, is a persistent and frequently debilitating medical condition that impairs an individual's ability to make rational decisions, control impulse, and evaluate information and should garner the same constitutional protections. *See id.* at 318.

Because severely mentally ill defendants lack the requisite degree of moral culpability; because their impairments "jeopardize the reliability and fairness of capital proceedings," *Id.* at 307-08; and lastly, because their diminished culpability negates the acceptable goals of punishment, they should be held categorically ineligible for the death penalty.

### A. Severely mentally ill individuals have impaired understanding and functioning such that their personal culpability is diminished.

Severe mental illness impairs the understanding and functioning of those afflicted in ways that substantially reduce their personal culpability. In *Atkins*, this Court described the following reasons for finding that intellectually disabled individuals, though not exempt from criminal sanctions, nevertheless possessed diminished culpability for their actions:

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their

> impairments, however, by definition they 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. These characterizations apply with equal force to the severely mentally ill. Although severely mentally individuals who are not found incompetent to stand trial or "not guilty by reason of insanity" know the difference between right and wrong, they nevertheless have diminished capacities compared to those of sound mind. Hallucinations, delusions, disorganized thoughts, and disrupted perceptions of the environment lead to a loss of contact with reality and unreliable memories. As a result, they have an impaired ability to analyze or understand their experiences rationally and as such, have an impaired ability to make rational judgments. These characteristics lead to the same deficiencies cited by the *Atkins* Court in finding the intellectually disabled less personally culpable—the severely mentally ill are similarly impaired in their ability to "understand and process information" (because the information they receive is distorted by delusion), "to communicate" (because of their disorganized thinking, nonlinear expression, and unreliable memory), "to abstract from mistakes and learn from experience" (because of their impaired judgment and understanding), "to engage in logical reasoning" (because of their misperceptions and disorganized thinking), and "to understand the reactions of others" (because of their misperceptions of reality and idiosyncratic assumptions).

Similarly, in its juvenile execution cases, this Court reasoned that juveniles lacked sufficient moral culpability because they "may have less capacity to control their conduct and to think in long-range terms," *Thompson*, 487 U.S. at 834, and because of their "immaturity," *Simmons*, 543 U.S. at 571. By the same token, persons experiencing

symptoms of mental illness may have cognitive impairments and distortions of reality that reduce their culpability in ways that are arguably even more substantial than the developmental shortcomings of sixteen and seventeen year olds. Their ability to control impulse, to think rationally—long-term or otherwise—are each substantially impaired by the disordered thinking and distorted perception characteristic of severe mental illness.

Severely mentally ill individuals suffer similar deficiencies in judgment and function as juveniles and the intellectually disabled. Just as juveniles and the intellectually disabled have been held exempt from capital punishment due to their diminished culpability, so, too, should the severely mentally ill.

### B. For severely mentally ill defendants, current safeguards against the imposition of an unconstitutionally disproportionate sentence are inadequate.

The same factors that make severely mentally ill defendants less personally culpable also put them at a disadvantage in coping with the adjudicative process, thus increasing the risk of both unconstitutionally disproportionate sentences and even wrongful convictions. *See Atkins*, 536 U.S. at 320-21 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (because of their "reduced capacity," intellectually disabled offenders are at risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" and "face a special risk of wrongful execution"). The *Atkins* Court observed that the intellectually disabled possessed characteristics that might "jeopardize the reliability and fairness of capital proceedings," *Atkins*, 536 U.S. at 307-08; for example, an increased propensity for "giving false confessions;" the inability to "make a persuasive mitigation showing" or "give meaningful assistance to their counsel" to assist in their own defense; and, the likelihood of being "poor witnesses." *Id.* at 320.

Severely mentally ill offenders are similarly at risk. Their distorted perceptions of reality can affect the voluntariness and reliability of their confessions and their ability to contribute to their own defense; their diminished capacity brings into question whether they are capable of meaningfully consenting to a waiver of their rights to remain silent or have counsel present; their delusions cast doubt on the veracity of any statements they may make. These are but a few possible ways in which a severely mentally ill defendant's deficiencies may put him at risk of either an unconstitutionally disproportionate sentence and even wrongful conviction.

In addition to being at a disadvantage in coping with the adjudicative process, severely mentally ill defendants are also poorly served by capital punishment's system of individualized sentencing. *See e.g.*, *Zant v. Stephens*, 462 U.S. 862, 879 (1983) ("[w]hat is important…is an individualized determination on the basis of the character of the individual and circumstances of the crime"). For those who are not found "not guilty by reason of insanity" or incompetent to stand trial, individualized sentencing arguably presents further opportunity for a jury to give due regard to a defendant's mental capacity, *see supra* Part I.B. However, although the system of case-by-case determination required by the Eighth Amendment in capital cases permits a jury to consider a defendant's mental illness and diminished capacity in meting punishment,[65] this procedure does not sufficiently provide for a reliable assessment of culpability and, as such, does not adequately protect seriously mentally ill defendants from improvident death sentences.

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[65] Some states explicitly direct a jury to consider capacity as a mitigating circumstance, *see supra*, note 22.

For example, although evidence of mental illness is meant to be mitigating, *see supra* Part I.B, it can often be just the opposite. As the *Atkins* Court observed, "reliance on [intellectual disability] as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321. Likewise, "their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* Similar concerns are relevant to the deficiencies of the severely mentally ill. The potential for the severely mentally ill to be unfairly labeled a "future danger" is especially concerning in Texas, where a finding that a defendant is a "continuing threat" paves the way to a death sentence. Texas Code of Criminal Procedure article 37.071, section 2(b)(1) (requiring a finding of "yes" on "whether there is a probability that the defendant would commit criminal acts of violence that could constitute a continuing threat to society" before a death sentence can be imposed). Given the impaired ability to make reasoned judgments and the lack of impulse control characteristic of severe mental illnesses, it is very likely that a jury could—accurately—conclude that such individuals would be unable to curb their dangerous conduct in the future, even though their capacity to do so is outside of their control.

Furthermore, jurors' lack of experience with and faulty stereotypes regarding serious mental illness, coupled with the potential for prosecutors to exploit such ignorance or stereotypes, make juries ill-equipped to judge the severity of someone's mental illness or the effect it has on their behavior. The erratic and unreasoned behavior of some severely mentally ill defendants may frighten a jury; their abrasive and

unrelatable demeanor may alienate them; what may actually be a cognitively distorted perception of reality may, instead, appear to jurors as a lack of remorse.

Finally, the existing procedural safeguards of the competency to stand trial doctrine and the availability of a "not guilty by reason of insanity" plea are also inadequate in safeguarding the severely mentally ill from improvident death sentences.

In order to be found incompetent to stand trial, "the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). Similarly, a "not guilty by reason of insanity" plea requires, for example, "that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." Tex. Penal Code § 8.01(a). Both of these procedural safeguards have onerous burdens of proof—and necessarily so, because being found incompetent or insane has the effect, at least temporarily, of absolving the defendant of criminal responsibility. However, this high bar leaves many seriously ill defendants—who may have some understanding of their surroundings and conception of right and wrong, but whose capabilities are nevertheless significantly impaired—at the mercy of the adjudicative process, despite the fact that their diminished culpability entitles them to constitutional protection from execution. Individuals who fall short of insanity or incompetency should be held responsible for their crimes, but it is not just to hold severely mentally ill defendants, with their diminished capacity and functioning, to the same standards as mentally sound individuals.

The same factors that make severely mentally ill defendants less personally culpable also put them at a disadvantage in coping with the adjudicative process, which is inadequately suited to safeguarding the severely mentally ill from unconstitutionally disproportionate sentences and wrongful convictions.

### C. Given their diminished personal culpability, imposing the death penalty on severely mentally ill defendants serves no legitimate penal objective.

Finally, the diminished culpability of severely mentally ill defendants negates any legitimate penal objective of imposing the death penalty upon such individuals. This Court has held that the death penalty violates the Eighth Amendment and "'is nothing more than the purposeless and needless imposition of pain and suffering'" when it "'makes no measureable contribution to acceptable goals of punishment." *Penry I*, 492 U.S. at 335 (quoting *Coker*, 433 U.S. at 592). This Court has identified two acceptable goals of imposing capital punishment: "'retribution and deterrence of capital crimes.'" *Id.* at 335-36 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). In *Atkins*, this Court held that imposing the death penalty on the intellectually disabled advances neither of these goals. *Atkins*, 536 U.S. at 319-20. Likewise, neither retribution nor deterrence is served by executing the severely mentally ill.

Although retribution for grievous crimes is a legitimate objective of capital punishment, "retribution as a justification for executing [offenders] very much depends on the degree of [their] culpability […] the punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund*, 458 U.S. at 800-01. As discussed above, severely mentally ill offenders possess diminished capacity and understanding and, as such, diminished personal culpability for their crimes. As the *Atkins* Court reasoned, "[i]f the culpability of the average murderer is insufficient to

justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution." *Atkins*, 536 U.S. at 319. The same rationale applies to severely mentally ill offenders, whose cognitive impairments, delusions, and psychoses undermine retributive effect. A person whose illness makes him incapable of controlling his actions, who believes the world is far different from the one we inhabit, who is consumed by a metric of understanding that turns our conception of right and wrong on its head—this person cannot be held to the same standards as a rational citizen, who knows what he does. Execution is appropriate retribution only for those most deserving of death. *See e.g.*, *id.* at 320 ("our narrowing jurisprudence[…] seeks to ensure that only the most deserving of execution are put to death"). The goal of retribution is not served by putting to death those who are crippled by their own minds.

Similarly, because the cognitive deficiencies and distorted perception of severely mentally ill offenders prevent them from making reasoned judgments about the consequences of their actions, it is unlikely such individuals can be meaningfully deterred from committing capital crimes by the prospect of death. "The theory of deterrence in capital sentencing," the *Atkins* Court explained, "is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Id.* at 320. However, this type of cause-and-effect determination depends on one's capacity to engage in reasoned judgment.[66] As the *Atkins* Court observed, "it is the same cognitive and behavioral impairments that make

[66] As Justice Powell observed, "the death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper v South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11).

[the intellectually disabled] less morally culpable … that 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." *Id.* at 320. The very same characteristics that impede the reasoned judgment of the intellectually disabled—"the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses"—are equally shared by those suffering from severe mental illness. *Id.* The cognitive impairments and delusional beliefs of the severely mentally ill similarly interfere with that person's ability to take into account the prospect of execution in conforming his or her conduct to the law. For example, individuals like Mr. Ward, who suffer from bipolar disorder, may experience delusions or hallucinations, resulting in actions or decisions based on distorted perceptions of reality. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 414 (4th edition, text revised 2000). Moreover, they may engage in action "with a high potential for painful consequences" and often suffer from markedly impaired judgment as a result of their condition. *Id.* at 357-58. Given the distorted perceptions, disregard for consequences and impaired judgment that is characteristic of those with severe bipolar disorder, it is unlikely the threat of capital punishment would meaningfully deter such individuals from the criminal conduct they feel compelled to enact. Given their diminished personal culpability, imposing the death penalty upon the severely mentally ill makes no measureable contribution to the acceptable goals of punishment.

## III. As a person with a severe mental illness, Mr. Ward should be held exempt from execution.

It is beyond reasonable dispute that Mr. Ward is severely mentally ill. The murder he committed was driven by delusions and paranoia, fed by his disabling bipolar disorder. The conditions and characteristics that led Mr. Ward to commit this tragic crime, moreover, had plagued him from the time he was a young child. Mr. Ward respectfully asks this Court to recognize that the "standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments have evolved to the point that society agrees that severely mentally ill individuals, such as Mr. Ward, lack the requisite moral culpability to warrant the penalty of death and are thus exempt from execution. *Trop*, 356 U.S. at 101.

## CONCLUSION AND PRAYER FOR RELIEF

This Court should grant *certiorari*, stay Mr. Ward's execution, and schedule this case for briefing and oral argument.

Respectfully submitted,

/s/ David. R. Dow

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**No. _____**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ADAM KELLY WARD,**

**Petitioner,**

**v.**

**STATE OF TEXAS,**

**Respondent.**

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## CERTIFICATE OF SERVICE

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I certify that on this 16th day of March 2016, a copy of this petition was served on Counsel for the State via electronic transmission to:

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_____
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