

Why Abolishing the Insanity Defense Is Unconstitutional in Death Penalty Cases

Table of Contents

I. INTRODUCTION	1
II. THE END OF THE INSANITY DEFENSE.....	4
A. A Short History of Abolition.....	4
B. The <i>Mens Rea</i> Approach.....	9
III. MITIGATION IN DEATH PENALTY CASES.....	10
A. Death is Different.....	10
B. The Eighth Amendment and Mitigating Evidence.....	11
C. Mitigating Evidence and Frontloading	12
IV. THE UNCONSTITUTIONALITY OF ABOLITION	16
A. The Effect of Abolition on Capital Trials.....	16
1. The Unintended Consequences of Abolishment.....	16
2. The Unconstitutional Risk of Execution.....	20
V. CONCLUSION.....	22

I. INTRODUCTION

Lori Vallow is mentally ill, and the state wants to kill her.¹ The State of Idaho alleges she killed, or conspired to kill, her two children and is seeking the death penalty. Even though she faces death, Idaho will not allow Lori Vallow, or any mentally ill defendant, to present mental illness as a defense in court because Idaho has abolished the insanity defense.

¹ Lori Vallow initially faced the death penalty, however very recently, a judge ruled the state could not seek the death penalty because of fairness concerns in her trial. Rett Nelson, *Judge Removes Death Penalty, Addresses Evidence Motions in Lori Daybell Murder Case*, KSL.COM (Mar. 21, 2023), <https://www.ksl.com/article/50605094/judge-removes-death-penalty-addresses-evidence-motions-in-lori-daybell-murder-case>.

Lori Vallow is delusional and displays symptoms of spiritual psychosis.² She believes her children and her ex-husband were possessed.³ She believes dark spirits, evil beings, or zombies took them over.⁴ Lori began to refer to her ex-husband Charles as “Ned,” as she believes he had been taken over by a dark spirit named Ned Schneider.⁵ She believes she is one of the “exhaled 144,000” who would survive when the world ends. She believes she is an “Exhaled Goddess,” a translated being who has visionary capabilities and will lead survivors after the second coming of Jesus.⁶ Lori’s children and ex-husband are now dead, and Lori is accused of their murders.

When people think of the insanity defense, they probably think of a defendant like Lori. An insanity defense could help Lori not only argue for a not guilty by reason of insanity verdict but more importantly help her present mitigating mental health evidence to the jury during the guilt phase of her trial. This strategy is called frontloading.⁷ Frontloading mitigation evidence is

² Bill Chappell, *What to Know About the Lori Vallow Daybell 'Zombie' Multiple-Murder Trial*, NAT’L PUBLIC RADIO (Apr. 12, 2023), <https://www.npr.org/2023/04/12/1169298124/lori-vallow-zombie-murder-trial>; Victoria Koehl, *'Sins of Our Mother': Expert Says Lori Vallow's Signs of 'Classic Psychotic Beliefs' Should've Been Caught 'Much Sooner'*, CHEAT SHEET.COM (Oct. 27, 2022), <https://www.cheatsheet.com/entertainment/sins-of-our-mother-expert-says-lori-vallow-signs-classic-psychotic-beliefs-caught-much-sooner.html/>.

³ Bill Chappell, *What to Know About the Lori Vallow Daybell 'Zombie' Multiple-Murder Trial*, NAT’L PUBLIC RADIO (Apr. 12, 2023), <https://www.npr.org/2023/04/12/1169298124/lori-vallow-zombie-murder-trial>; Perry Vandell, *Maricopa County Grand Jury Indicts Lori Vallow on Conspiracy to Murder Ex-Husband in Chandler*, AZ CENTRAL (June 29, 2021), <https://www.azcentral.com/story/news/local/chandler-breaking/2021/06/29/lori-vallow-indicted-conspiracy-kill-charles-vallow-chandler/7805093002/>.

⁴ Lewis Pennock, *Bombshell Text Messages Reveal Cult Mom Lori Vallow's Ex-Husband Knew He Was in Danger Weeks Before He Was Killed - As Shock Body Cam Footage Reveals Aftermath of Deadly shooting*, DAILY MAIL (Apr. 14, 2023), <https://www.dailymail.co.uk/news/article-11970473/Bombshell-text-messages-reveal-Lori-Vallows-ex-husband-KNEW-danger.html>.

⁵ Erica Stapleton, *Chandler Police Release Evidence Used to Charge Lori Vallow in Death of Fourth Husband Charles; New Husband Not Prosecuted*, 12 NEWS (July 7, 2021), <https://www.12news.com/article/news/crime/chandler-police-release-evidence-used-to-charge-lori-vallow-daybell-in-the-death-of-fourth-husband-charles/75-821cea73-f7cd-41ea-b36e-a9d3e1966280> (scroll to page 2 of embedded probable cause statement pdf at bottom of page).

⁶ Michelle Mark, *How Lori Vallow Became 'Doomsday' Cult Mom: Police Documents Reveal Her Descent into a Wacky World of Zombies, Teleportation, and an Impending Apocalypse*, INSIDER, <https://www.insider.com/police-documents-reveal-how-lori-vallow-became-doomsday-cult-mom-2021-10> (last visited Apr. 20, 2023); Justin Lum, *Documents: Lori Vallow Claims She Was 'God Preparing for Second Coming of Christ'*, FOX 10 PHOENIX (Jan. 3, 2020), <https://www.fox10phoenix.com/news/documents-lori-vallow-claims-she-was-god-preparing-for-second-coming-of-christ>.

⁷ Jesse Cheng, *Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Defense*, 35 L. & SOC. INQUIRY 39, 48 (2010).

extremely important in death penalty cases because it allows the defense to coordinate and integrate the presentation during the guilt phase with the projected penalty phase strategy.⁸ But Idaho has barred the use of the insanity defense in criminal cases. As a result, Lori is functionally prevented from introducing any evidence of her mental health in the guilt phase, even for frontloading mitigation evidence.

In a death penalty case, frontloading mitigation means the difference between life and death.⁹ Barring the use of the insanity defense limits a defendant to two options: argue innocence or argue mental health prevented the formation of the required intent. Neither option is realistic for a defendant like Lori Vallow, who faces mounting evidence of guilt, but cannot show she was mentally ill enough to negate intent. Defendants like Lori often have no choice but to present a denial defense and fight an uphill battle in the face of substantial evidence. Lori went with an alibi defense, blaming her deceased brother Alex Cox for the murders.¹⁰ A strategy that leaves Lori with no opportunity to front-load mitigating evidence.

Because the death penalty is different and because abolition of the insanity defense robs mentally ill defendants of the opportunity to present front-loaded mitigation evidence, abolition interferes with both the defendant's right to present all relevant mitigating evidence and the sentencer's duty to consider all mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Turner v. Murray*, 476 U.S. 28, 33 (1986) ("What sets this case apart ... is that ...the crime charged was a capital offense."). There is also a

⁸ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 926 (2003).

⁹ See *Death Penalty Lessons for All Lawyers: The Art and Necessity of a Mitigation Investigation*, ADVOCACY & EVIDENCE RESOURCES, TEMPLE L., <https://law.temple.edu/aer/2017/07/05/death-penalty-lessons-lawyers-art-necessity-mitigation-investigation/> (last visited Apr. 22, 2023).

¹⁰ Jeremy Stiles, *Lori Vallow's Alibi Won't Clear Her; Came in too Late, Prosecutors Say in New Filing*, KTVB (Mar. 24, 2023), <https://www.ktvb.com/article/news/special-reports/lori-vallow-trial/lori-vallow-daybell-alibi-statement-prosecution-state-response-jj-tylee-ryan-tammy-daybell/277-7d5e25fa-f254-47cb-ac7c-de6fc0afcfa0>.

special risk that death will be imposed despite factors that may call for a less severe penalty. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Without the insanity defense, too great a risk exists that constitutionally protected mitigation cannot be properly comprehended and accounted for by the sentencer, and that unreliability means that the death penalty cannot be constitutionally applied.¹¹

This paper proceeds in five parts. The second part traces the end of the insanity defense in abolition states, the third part lays out death penalty case law and describes mitigation evidence and the importance of frontloading, the fourth part describes the effects of insanity defense abolition on capital trials involving mentally ill defendants and argues that in death penalty cases, forcing mentally ill defendants to proceed without the insanity defense violates the constitutional rights of those defendants, and the fifth part presents the conclusion.

II. THE END OF THE INSANITY DEFENSE

A. A Short History of Abolition

One of the most fundamental tenants of criminal law is that causal responsibility for a crime is not enough to punish someone; there must also be moral responsibility.¹² Historically, if a person commits a crime because of a severe mental illness like schizophrenia, that person can attempt to persuade the trier of fact that they are not morally responsible by presenting evidence of a mental health condition.¹³ The insanity defense, the mechanism through which the defendant attempts this argument, is an affirmative legal defense in which the defendant admits the action

¹¹ Sundby, *supra* note 11, at 496 (2014).

¹² Ken M. Levy, *Normative Ignorance: A Critical Connection between the Insanity and Mistake of Law Defenses*, 47 FLA. ST. U. L. REV. 411, 418 (2022). <https://ir.law.fsu.edu/lr/vol47/iss2/3>.

¹³ See Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 AM. BAR. ASSOC. J. 194 (1983).

but asserts a lack of culpability based on mental illness.¹⁴ However, some states have statutorily dictated that “mental condition shall not be a defense to any charge of criminal conduct,” effectively banning the insanity defense.¹⁵

In the 1970s and 1980s, mental health-based defenses faced fierce public backlash after high-profile defendants utilized them.¹⁶ After the murder trials of Jack Ruby, Charles Manson, and Sirhan Sirhan, each involving the insanity defense, public criticism against the defense started to boil.¹⁷

Public disapproval of mental health-based defenses was further fueled by negative public perception of San Francisco City Supervisor Dan White’s use of the diminished capacity defense in 1979.¹⁸ White’s defense was disparagingly called the “Twinkie Defense,” despite no Twinkies being mentioned in court.¹⁹ White’s defense actually argued that White suffered from periodic bouts of depression that amounted to major mental illness.²⁰ A psychiatrist briefly mentioned that if a person has a predisposition to bipolar mood swings, things the person ingests can play a part and that in the days before the murders, White’s habits changed and he stopped eating his

¹⁴ CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW, RESEARCH AND PRACTICE* 209 (2019); *Insanity Defense Overview*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/insanity_defense.

¹⁵ Idaho Code § 18-207(1). Kansas: “It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.” Kan. Stat. Ann. § 21-5209. Utah: “It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony ... and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide offense” Utah Code Ann. § 76-2-305(1). Montana: “Evidence that the defendant suffered from a mental disease or disorder or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense.” Mont. Code Ann. § 46-14-102.

¹⁶ Stephanie C. Stimpson, *State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense*, 55 MONT. L. REV. 503, 504 (1994).

¹⁷ *Id.*

¹⁸ Tim O’Rourke, *Chronicle Covers: The Dan White Verdict and the Fury that Followed*, SAN FRANCISCO CHRONICLE (May 7, 2019), https://www.sfchronicle.com/chronicle_vault/article/Chronicle-Covers-The-Dan-White-verdict-and-the-7580067.php.

¹⁹ Carol Pogash, *Myth of the 'Twinkie Defense' / The Verdict in the Dan White Case Wasn't Based on his Ingestion of Junk Food*, SF GATE (Nov. 23, 2003), <https://www.sfgate.com/health/article/Myth-of-the-Twinkie-defense-The-verdict-in-2511152.php>.

²⁰ *Id.*

regularly healthy diet, instead opting for junk food.²¹ But instead of a minor symptom of an overall pattern of major depression, the media made junk food the focus of its reporting, and the public came to believe that Dan White's sentence light sentence of seven years eight months was the result of the jury thinking he went crazy from eating too many Twinkies.²²

Shortly before Dan White's trial started, Montana became the first state to legislatively abolish the insanity defense in 1979.²³ The legislation's sponsor, Representative Michael Keedy, thought that psychiatrists were making "arbitrary and God-like determinations" and, along with social workers, they "should be removed from the criminal justice process."²⁴

A few years later, in 1982, John Hinckley Jr. sounded the death knell for the insanity defense.²⁵ In March 1981, Hinckley attempted to assassinate then-President Ronald Regan.²⁶ Hinckley wounded President Regan and three of his attendants, including Press Secretary James Brady, who later died in 2014 of his injuries.²⁷ At trial, Hinckley's defense utilized the insanity defense. In the federal system where Hinckley was tried meant that as soon as Hinckley's attorneys presented evidence of insanity, the burden shifted to the prosecution to prove that

²¹ Carol Pogash, *Myth of the 'Twinkie Defense' / The Verdict in the Dan White Case Wasn't Based on his Ingestion of Junk Food*, SF GATE (Nov. 23, 2003), <https://www.sfgate.com/health/article/Myth-of-the-Twinkie-defense-The-verdict-in-2511152.php>.

²² *Id.*; *Dan White Gets 7 Years 8 Months in Double Slaying in San Francisco*, NEW YORK TIMES (July 4, 1979), <https://www.nytimes.com/1979/07/04/archives/dan-white-gets-7-years-8-months-in-double-slaying-in-san-francisco.html>.

²³ Elizabeth Poche, *Kahler v. Kansas: A Defense Denied*, 98 DENV. L. REV. 867, 874 (2021).

²⁴ Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 MONT. L. REV. 133, 137 n.30 (1984).

²⁵ Natalie Jacewicz, *After Hinckley, States Tightened Use of The Insanity Plea*, NPR (July 28, 2016), <https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea>; Steph Chevalier-Crockett, "A Most Damnable Fraud?" *Public (Mis)conceptions and the Insanity Defense*, NURSING CLIO (Sept. 19, 2019), <https://nursingclio.org/2019/09/19/a-most-damnable-fraud-public-misconceptions-and-the-insanity-defense/>.

²⁶ H. Steven Moffic, *Remember John Hinckley Jr: A Triumph for Psychiatry, But a Failure for Gun Safety*, PSYCHIATRIC TIMES (Jun. 16, 2022), <https://www.psychiatrictimes.com/view/remember-john-hinckley-jr-a-triumph-for-psychiatry-but-a-failure-for-gun-safety>.

²⁷ *This Day in History*, June 21, 1982, HISTORY, <https://www.history.com/this-day-in-history/hinckley-not-guilty-by-reason-of-insanity> (last visited April 19, 2023); Moffic, *supra* note 26.

Hinckley was in fact sane.²⁸ The prosecution failed to prove sanity in Hinckley's case, and Hinckley was found not guilty by reason of insanity.²⁹

Although Hinckley ultimately spent decades committed to a mental institution, the public—fueled by opportunistic politicians—was outraged that someone could shoot at the President right in front of reporters and the world and seemingly face little consequences.³⁰ This strong negative public reaction led to sweeping changes throughout the country to the insanity defense, including total abolition in several states.³¹

Idaho became the first state to totally abolish the defense in response to the Hinckley verdict in 1982.³² Utah also abolished its insanity defense as part of the post-Hinckley anti-insanity movement.³³ In total, eight states made changes to their insanity defense law during the Hinckley trial, and 25 states made changes after Hinckley.³⁴ The federal system also made changes to its insanity defense, with Congress enacting the Insanity Defense Reform Act of 1984 and other measures that toughened procedural barriers to a successful insanity defense, such as

²⁸ Stephen Cohen, *It's a Mad, Mad Verdict*, NEW REPUBLIC (July 11, 1982), <https://newrepublic.com/article/90599/its-mad-mad-verdict>.

²⁹ *Id.*; Natalie Jacewicz, *After Hinckley, States Tightened Use Of The Insanity Plea*, NPR (July 28, 2016), <https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea>.

³⁰ LJ Charleston, *How a Crazy Jodie Foster Fan Almost Killed a US President*, NEWS.COM.AU (Apr. 6, 2019), <https://www.news.com.au/lifestyle/real-life/true-stories/how-a-crazy-jodie-foster-fan-almost-killed-a-us-president/news-story/90032061503a4f967c7f5a69ca030dd4>; *Editorial: Outrage Over Hinckley's Acquittal Changed American Law for the Worse*, LOS ANGELES TIMES (July 28, 2016), <https://www.latimes.com/opinion/editorials/la-ed-hinckley-insanity-20160727-snap-story.html>.

³¹ Elizabeth Bennion, *Death is Different No Longer: Abolishing the Insanity Defense is Cruel and Unusual Under Graham v. Florida*, 61 DEPAUL L. REV. 1, 40-42 (2011); The Associated Press, *Hinckley Acquittal Brings Moves to Change Insanity Defense*, NY TIMES (June 24, 1982), <https://www.nytimes.com/1982/06/24/us/hinckley-acquittal-brings-moves-to-change-insanity-defense.html>; Joseph Lyttleton, *What is the Insanity Defense?*, THE MIL SOURCE (Mar. 26, 2020), <https://themilsource.com/2020/03/26/what-is-insanity-defense/>.

³² The Associated Press, *Hinckley Acquittal Brings Moves to Change Insanity Defense*, NY TIMES (June 24, 1982), <https://www.nytimes.com/1982/06/24/us/hinckley-acquittal-brings-moves-to-change-insanity-defense.html>.

³³ *State v. Young*, 853 P.2d 327, 383 (Utah 1993).

³⁴ Lisa Callahan, Connie Mayer & Henry J. Steadman, *Insanity Defense Reform in the United States Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 55 (1987).

shifting the burden to the defense to prove insanity by clear and convincing evidence and limiting the scope of expert psychiatric testimony.³⁵

Some states made changes not directly related to Hinckley. The year after the Hinckley trial, 1982, Charles Meach killed four teenagers in an Alaskan park.³⁶ Meach had previously been found not guilty by reason of insanity in the beating death of an acquaintance whom Meach said “had an irritating voice.”³⁷ After his acquittal on insanity grounds, he was committed to a mental hospital.³⁸ Because he had been making progress, he was given day passes from the facility, and he was on one of those day passes when he committed the quadruple murders.³⁹ An already outraged after Hinckley Alaskan public was further incensed over Meach’s day pass murders, leading to changes in Alaska’s insanity defense.⁴⁰ In 1995, at the urging of the Nevada District Attorney's Association who believed too many courts were allowing defendants to present evidence of mental health problems, Nevada passed a statute abolishing the insanity defense.⁴¹ Later, the Nevada Supreme Court found the Nevada statute unconstitutional. *See Finger v. State*, 27 P.3d 66 (Nev. 2001). In 1996, Kansas also abolished the insanity defense legislatively.⁴²

³⁵ *From Daniel M’Naughten to John Hinckley, A Brief History of the Insanity Defense*, PBS FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html#:~:text=Before%20Hinckley%2C%20the%20burden%20of,the%20time%20of%20the%20crime>. (last visited Apr. 19, 2023).

³⁶ Robin Barefield, *A Bloody Anchorage Night*, MEDIUM (Aug. 2, 2019), <https://robinbarefield76.medium.com/a-bloody-anchorage-night-74e0a4724303>.

³⁷ Andrew P. March, *Insanity in Alaska*, 98 GEO. L.J. 1481, 1495-96 (2010).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Finger v. State*, 27 P.3d 66, 70, 76-77 (Nev. 2001).

⁴² *State v. Jorrick*, 4 P.3d 610, 617 (Kan. 2000).

B. The *Mens Rea* Approach

The states that abolished the insanity defense converted to a *mens rea* approach.⁴³ *Mens rea* refers to a defendant's moral culpability, "evil mind," criminal intent, or the specific mental element contained in the applicable criminal statute.⁴⁴ The *mens rea* approach allows a defendant to present mental health evidence only to show that defendant could not form, or did not have, the state of mind—or *mens rea*—required by the elements of the crime.⁴⁵ The *mens rea* approach merely allows a defendant to negate the intent element of a crime, rather than present a full affirmative defense.⁴⁶ Abolishment is referred to as the *mens rea* approach because it defines *mens rea*, or criminal intent, only in terms of the decision to do a certain act and eliminates the concept of the appreciation of the wrongfulness of the act. *Finger v. State*, 27 P.3d 66, 75 (Nev. 2001). If someone can appreciate the nature and quality of an act, they are not legally insane and can form the necessary *mens rea*. *Id.* For example, in a murder trial for a shooting death, the defendant may present psychiatric evidence that he did not understand the function of a gun or the consequences of its use—or “the nature and quality” of his actions. *Kahler v. Kansas*, 140 S. Ct. 1021, 1025-26 (2020). If the defendant had no such capacity, he could not form the requisite intent—and thus is not criminally responsible. *Id.* at 1026.

To illustrate the difference between the *mens rea* approach and a traditional insanity defense, imagine two people with schizophrenia are prosecuted for murder. Both defendants shot and killed another person. The evidence at trial shows that the first defendant thought the victim

⁴³ Jacqueline S. Landess & Brian J. Holoyda, *Kahler v. Kansas and the Constitutionality of the Mens Rea Approach to Insanity*, 49 J. AM. ACAD. PSYCH. L. 241, 241 (2021).

⁴⁴ Marc Rosen, *Insanity Denied: Abolition of the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL'Y 253, 254 (1999).

⁴⁵ Lisa Callahan, Connie Mayer & Henry J. Steadman, *Insanity Defense Reform in the United States Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 54 (1987).

⁴⁶ *Finger*, 27 P.3d at 75.

was a dog. *Id.* at 1038 (Breyer, J., dissenting). The only difference in the second case is that the defendant thought a dog ordered him to kill the victim. *Id.* Under the insanity defense, as traditionally understood, the government cannot convict either defendant. *Id.* Under the *mens rea* approach, it can convict the second, but not the first. *Id.* So, even though two people have the same mental illness, and the same level of delusion, one would be permitted to present an insanity defense and one would not.

III. MITIGATION IN DEATH PENALTY CASES

A. Death is Different

Death is different. *Ring v. Arizona*, 536 U.S. 584, 606 (2002). The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). It is unique in its total irrevocability. *Id.* It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. *Id.* And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. *Id.* Because the death penalty is so unique and different, the death penalty must be reserved for the worst of the worst. *Kansas v. Marsh*, 548 U.S. 163, 206 (2006).

To determine the worst of the worst, capital sentencing must narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). The death penalty cannot be carried out without particularized consideration of relevant aspects of the character and record of the defendant. *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring). The concept of individualized sentencing in criminal cases, in general, has long been accepted in the United States. *Lockett v. Ohio*, 438 U.S. 586, 602 (1978). Sentencing judges traditionally have taken a wide range of

factors into account. *Id.* Highly relevant—if not essential—to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. *Williams v. New York*, 337 U.S. 241, 247 (1949); *Lockett*, 438 U.S. at 602-03. Capital sentencing must eliminate the risk that a death sentence will be imposed despite facts calling for a lesser penalty; the sentencer has a responsibility to determine whether the response to the crime and defendant must be death. *Marsh*, 548 U.S. at 206.

B. The Eighth Amendment and Mitigating Evidence

Because death is different, the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Just as the sentencer may not be precluded from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

The qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. *Lockett*, 438 U.S. at 604. "Reliability" in capital cases compels procedures, standards, and actual practices designed to ensure that death will not

be imposed capriciously or disproportionately.⁴⁷ Death penalty case law points to an "unreliability principle" in that if too great a risk exists that constitutionally protected mitigation cannot be properly comprehended and accounted for by the sentencer, the unreliability that is created means that the death penalty cannot be constitutionally applied.⁴⁸ See *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

C. Mitigating Evidence and Frontloading

Mitigating evidence is evidence that reduces the defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense, and need not rise to the level of a defense.⁴⁹ *Smith v. Texas*, 543 U.S. 37, 40 (2004) (quoting Dallas County, Texas jury instructions). Mitigating evidence involves the emotionally-inflected, humanizing considerations in a sentencing process that must permit jurors to evaluate any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.⁵⁰ Mitigating evidence humanizes the person who committed an unspeakable act and communicates that the defendant is indeed a person with a constellation of background experiences and character traits.⁵¹

Capital trials are divided into two separate phases; one to determine guilt (guilt phase), and one to determine the appropriate sentence (penalty phase).⁵² In the death penalty context, the penalty phase is to trial for life; a trial for life because the defendant's life is at stake and because

⁴⁷ Gary Goodpaster, *Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. REV. 299, 317 (1983).

⁴⁸ Sundby, *supra* note 11, at 496.

⁴⁹ Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 31 (1997).

⁵⁰ See Jesse Cheng, *Compassionate Capital Mitigation*, 18 OHIO ST. J. CRIM. L. 351, 351 (2020).

⁵¹ Robert J. Smith, *Forgetting Fuhrman*, 100 IOWA L. REV. 1149, 1173 (2015).

⁵² Cheng, *supra* note 7, at 40.

a central issue is the meaning and value of the defendant's life.⁵³ The penalty phase is usually attended by the same judge, attorneys, and jurors involved in the guilt phase, and generally provides for the weighing of mitigating against aggravating evidence.⁵⁴ At the penalty phase, the government typically must prove at least one statutory aggravating factor, which serves to identify the defendant as the “worst of the worst,” beyond a reasonable doubt and by unanimous vote of the jury.⁵⁵ Mitigating evidence, however, usually requires a substantially lower burden of proof, such as a preponderance of the evidence, and jurors need not come to an agreement on them, but rather an individual juror can rely on any given mitigating fact.⁵⁶ Once the jury finds the aggravating and mitigating evidence they believe has been proven, depending on the jurisdiction jurors must either weigh the former against the latter or find one statutory aggravator and then make an overall assessment in light of mitigating evidence.⁵⁷

The division between the guilt and penalty phases created by bifurcation presents unique challenges for the defense.⁵⁸ While the two phases are separate, there is no firewall between them.⁵⁹ It is essential that the defense tries the guilt phase in a manner calculated to preserve credibility at the penalty phase.⁶⁰ The portrayal of the defendant and the nature of the defense at the guilt phase may significantly, perhaps determinatively, affect the sentencer's perceptions of the defendant at the penalty trial.⁶¹

⁵³ Goodpaster, *supra* note 47, at 303.

⁵⁴ Jesse Cheng, “Mitigate From Day One”: *Why Effective Defense Advocates Do Not Prioritize Liberty over Life in Death Penalty Cases*, 14 OHIO ST. J. CRIM. L. 231, 234 (2016).

⁵⁵ *Id.*; Crocker, *supra* note 49, at 31.

⁵⁶ Cheng, *supra* note 54, at 235.

⁵⁷ Cheng, *supra* note 7, at 44.

⁵⁸ *Id.* at 47.

⁵⁹ James M. Doyle, *Representation and Capital Punishment: The Lawyers' Art: "Representation" in Capital Cases*, 8 Yale J.L. & Human. 417, 423 (1996).

⁶⁰ Goodpaster, *supra* note 47, at 324-25.

⁶¹ *Id.*

So, in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. *Florida v. Nixon*, 543 U.S. 175, 192 (2004). If the defense does not approach a capital case, even though it is bifurcated, as a unified presentation, it greatly increases the risk that the guilt-phase presentation will doom the case in mitigation during the penalty phase.⁶² To avoid such a result, the defense must lay the groundwork for an effective penalty trial during the guilt trial—the affirmative case for life in the form of mitigating evidence must be integrated with the defense against the substantive charges.⁶³ This strategy of injecting mitigating, penalty-type knowledge into the guilt phase to smooth over the divide between guilt and mitigation phases is called “frontloading.”⁶⁴

Frontloading is a crucial strategy in a death penalty case. Not only is it mandated by the American Bar Association’s *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, but it is also key to saving the defendant’s life.⁶⁵ The mitigation evidence presented at the penalty phase will not be persuasive or effective unless it is consistent with the defense at the guilt phase.⁶⁶

Imagine a capital case: in the guilt phase the defendant presents an alibi defense, but the jury disbelieves the defense and finds the defendant guilty.⁶⁷ In the penalty phase, the defense presents evidence that the defendant admitted guilt to a psychiatrist but the psychiatrist believed the murder resulted from severe mental health issues.⁶⁸ This denial defense at the guilt phase and admission defense at the penalty phase will appear radically inconsistent to the jury, who may

⁶² Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1588-89 (1998).

⁶³ Goodpaster, *supra* note 47, at 325.

⁶⁴ Cheng, *supra* note 7, at 48.

⁶⁵ [T]rial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase. American Bar Association, *supra*, note 8, at 926.

⁶⁶ *Id.* at 927.

⁶⁷ Goodpaster, *supra* note 47, at 325.

⁶⁸ *Id.*

feel it was deceived at the guilt phase, making it distrust counsel and view the defendant more harshly.⁶⁹ Having found that the defendant was lying about his alibi at the guilt phase, why should a juror believe, or even care about, any of the mitigating evidence presented the sentencing phase?⁷⁰ A defense of "he didn't do it" in the guilt phase undermines the penalty phase profession "he's sorry he did it" or "he did it because..."⁷¹ Frontloading helps to avoid this inconsistency because it harmonizes the guilt and penalty phases, and after jurors have heard mitigation evidence once, they are primed to be more receptive to related evidence that will prove crucial during the penalty phase."⁷²

Additionally, aggravation is always frontloaded in the government's prosecution of the case because aggravation *is* the crime.⁷³ At the guilt phase, the prosecutor submits facts that often replicate or are consistent with the aggravating factors presented in the penalty phase, because aggravating factors are inherently linked to the underlying murder.⁷⁴ Mitigating evidence, however, may be peripheral to, and often inconsistent with, legal defenses or negating elements of the crime.⁷⁵ Because frontloading evidence is so important, the defense must view the guilt phase not as a contest to defend their client's right to be free, but as an anticipatory prelude to later arguments to preserve their client's right to live.⁷⁶

⁶⁹ *Id.*

⁷⁰ Doyle, *supra* note 59, at 423.

⁷¹ *Id.*

⁷² Sundby, *supra* note 62, at 1595; Avi Frey, *Determinist Mitigation in Capital Cases*, 40 HARBINGER 75, 86 (2015).

⁷³ Cheng, *supra* note 7, at 47.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Cheng, *supra* note 54, at 233.

IV. THE UNCONSTITUTIONALITY OF ABOLITION

A. The Effect of Abolition on Capital Trials

In a death penalty case, abolishment of the insanity defense violates the Eighth Amendment because the defendant is forced to present a denial defense and is unable to front-load mitigating mental health evidence in the guilt phase. The lack of an insanity defense can be deadly for mentally ill defendants and causes too great a risk that constitutionally protected mitigation cannot be properly comprehended and accounted for by the jury, and thus the death penalty cannot be constitutionally carried out.⁷⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (“What sets this case apart ... is that ...the crime charged was a capital offense.”).

1. The Unintended Consequences of Abolishment

At trial generally, there are two types of defenses, denial defenses, and admission defenses.⁷⁸ Denial defenses argue that the defendant did not commit the crimes charged or that guilt cannot be proven, for example, alibi, mistaken identity, and reasonable doubt.⁷⁹ Admission defenses admit the defendant committed the acts charged, but argue that the defendant lacked the requisite intent to be culpable.⁸⁰ The insanity defense falls in this second category, along with provocation, self-defense, diminished capacity, and lack of specific intent.⁸¹

⁷⁷ *Mentally Ill Prisoners Who Were Executed*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/mental-illness/mentally-ill-prisoners-who-were-executed> (last visited May 2, 2023); Sundby, *supra* note 11, at 496; See *Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (upholding severely depressed defendant’s death penalty).

⁷⁸ Goodpaster, *supra* note 47, at 330.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

Because in insanity defense cases, the defendant does not dispute that they committed the crime but instead argues they lack culpability based on their mental state, there is likely substantial evidence of guilt, and in many capital cases generally, the evidence of guilt is overwhelming.⁸² In murder cases where there is substantial evidence, prosecutors are more likely to seek the death penalty and less likely to accept a plea to a life sentence. *See Florida v. Nixon*, 543 U.S. 175, 191 (2004). Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible, and so plea bargains in capital cases are not usually offered.⁸³ Emotional and political pressures, including from the victim's family, the media, or the public are especially likely to discourage the prosecution from a plea bargain.⁸⁴

Even in cases where pleas are available, it may be strategically unwise to enter a guilty plea and move directly into the penalty phase.⁸⁵ A guilty plea concentrates all the aggravating evidence into the penalty phase rather than introducing the crime evidence at the guilt stage, helping to diminish its impact by the penalty phase.⁸⁶

Without a plea bargain, the defendant's only option is trial. At trial, with mental health barred as a defense and a defendant using a denial strategy, it is unlikely the defendant's mental health evidence would be admissible in the guilt phase. Only relevant evidence is admissible, and evidence regarding the mental health of a person claiming they are not involved in the crime is not relevant. FED. R. EVID. 401.⁸⁷ So, the jury will hear no mental health evidence in mitigation

⁸² CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW, RESEARCH AND PRACTICE* 209 (2019); *Insanity Defense Overview*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/insanity_defense; Goodpaster, *supra* note 47, at 329.

⁸³ American Bar Association, *supra*, note 8, at 1040.

⁸⁴ *Id.* at 1041.

⁸⁵ Sundby, *supra* note 62, at 1595.

⁸⁶ *Id.*

⁸⁷ The test for relevant evidence under the federal rules is whether (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. FED. R. EVID. 401. Idaho and Utah's rules of evidence 401 are identical to the federal rules. IDAHO. R. EVID. 401;

from the defense in the guilt phase, not as a defense and not even as an introduction or foreshadowing to the later penalty phase mitigation evidence. However, nothing bars the prosecution from presenting mental health or its symptoms to show motive or other aggravating elements of the crime.

With no viable insanity or other admission defense available, the only option is a denial defense, and in insanity defense cases with no insanity defense, the guilt phase case is virtually indefensible and can prejudice the jury so that no persuasive case for a life sentence can be made at the penalty phase.⁸⁸ When evidence of guilt would persuade any jury beyond all doubt, for trial counsel to suggest doubt or innocence, would deprive the defense of any credibility during the penalty phase. *See Florida v. Nixon*, 543 U.S. 175, 184 (2004). A guilt phase denial defense in the face of substantial evidence means any penalty phase mitigating evidence like acceptance of responsibility will be discredited and will significantly limit the range of mitigating evidence that will be persuasive or effective.⁸⁹ A guilty verdict means that the jury disbelieved the denial defense, and will also disbelieve or discredit penalty phase mitigating evidence⁹⁰

A denial defense at the guilt phase is more than twice as likely to result in a death sentence compared to cases where the defendant acknowledges guilt from the start.⁹¹ Studies have found that juries in denial defense cases imposed death sentences twice as often as they imposed life sentences, but juries in admission defense cases chose a life verdict over a death

UTAH R. EVID. 401. Montana's rule is also identical but adds "Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant." MONT. R. EVID. 401. Kansas' rule is slightly different, stating "Relevant evidence" means evidence having any tendency in reason to prove any material fact." Kan. Stat. § 60-401.

⁸⁸ Goodpaster, *supra* note 47, at 329.

⁸⁹ *Id.* at 330.

⁹⁰ *Id.*

⁹¹ John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases: Presenting Mitigation: Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1044-45 (2008).

sentence by a three-to-two ratio.⁹² Jurors dismiss the penalty phase mitigation evidence as another attempt by the defendant to avoid responsibility.⁹³ The jury will believe the defense tried to fool them in the guilt phase with a denial defense, and now is trying to fool them again with the mitigation evidence to get out of the death penalty.⁹⁴

Additionally, research shows jurors generally have a poor understanding of jury instructions.⁹⁵ Many jurors wrongly believe they must return a death sentence if they find the crime was heinous or there is a risk of future dangerousness.⁹⁶ Jurors also frequently misunderstand mitigating evidence, believing it must be proven beyond a reasonable doubt, or that all jurors must agree on mitigating factors.⁹⁷ Jurors tend to enter their penalty phase believing death is the default sentence.⁹⁸ So, the de facto risk of non-persuasion rests on the defendant, not the state.⁹⁹ So, in a case where the defendant has lost credibility by losing with a denial defense and the jury dismisses mitigating evidence, the defendant has little to no chance of overcoming the presumption of death.

Even worse, many jurors enter the penalty phase with their minds already made up as to the appropriate sentence, reaching a decision based on the quality and quantity of guilt phase evidence.¹⁰⁰ In an insanity defense case with no insanity defense, quality and quantity are likely to be high. Early pro-death jurors decide the penalty as they listen to the evidence in the guilt

⁹² Sundby, *supra* note 62, at 1574-75.

⁹³ Blume et al., *supra* note 91, at 1044-45.

⁹⁴ *Id.*

⁹⁵ Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1542-43 (1998).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Blume et al., *supra* note 91, at 1044; Garvey, *supra* note 95, at 1542-43; Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 63 (2001).

phase, then advocate for death during trial phase deliberations.¹⁰¹ Their individual view that unquestionable guilt demands death lessens the reliability of the penalty decision and may well improperly influence jurors undecided on the penalty and lead them to ignore mitigating evidence in the penalty phase.¹⁰² When jurors decide on death based on the guilt phase, the mitigating mental health evidence of the penalty phase is irrelevant.¹⁰³

2. The Unconstitutional Risk of Execution

And when mitigation evidence is ignored or irrelevant, the Eighth Amendment's requirement that all relevant mitigating evidence is considered is violated. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The Eighth Amendment prohibits the death penalty when there is an enhanced risk of execution despite factors that may call for a less severe penalty. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002); *Roper*, 543 U.S. at 572-73.

For mentally ill defendants in abolition states, the risk of execution is enhanced by their diminished ability to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. *See Atkins*, 536 U.S. at 320. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments made solely in the penalty phase in cases involving mental illness and a defendant barred from the use of the insanity defense. *See Roper*, 543 U.S. at 573.

¹⁰¹ Koosed, *supra* note 100, at 65.

¹⁰² *Id.*

¹⁰³ *Id.* at 63.

The risk is further enhanced because a defendant's mental illness may even be used as an aggravating factor and counted against the defendant. *See id.*

Juries can and do interpret mental illness as an aggravating factor because of the belief that mental illness presents a continuing danger to society and contributes to future dangerousness.¹⁰⁴ To illustrate the risk, a trial judge in Florida sentenced a schizophrenic man to death because “the mental sickness or illness that he suffers from is such that he will never recover from it, it will only be repressed by the use of drugs...[T]he only certain punishment and the only assurance society can receive that this man never again commits to another human being what he did to that lady, is that the ultimate sentence of death be imposed.”¹⁰⁵ *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979).

The inability to frontload mitigating mental health evidence also means a mentally ill defendant's right to effective counsel is violated because defense attorneys are forced to perform at a level far below the established standard. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Prevailing norms of practice are reflected in the American Bar Association standards which have long been recognized as guides to determining what is reasonable. *Id.* at 522.

The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases state that “trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty

¹⁰⁴ Joshua A. Sondheimer, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 420 (1990); Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 299 (1989).

¹⁰⁵ Berkman, *supra* note 104, at 299-300.

phase.”¹⁰⁶ And that “counsel should seek a theory that will be effective in connection with both guilt and penalty and should seek to minimize any inconsistencies.”¹⁰⁷ The Commentary to the ABA Guidelines warns:

if counsel takes contradictory positions at guilt/innocence and sentencing, credibility with the sentencer may be damaged and the defendant's chances for a non-death sentence reduced. Accordingly, it is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages. Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.¹⁰⁸

Since attorneys in states with no insanity defense must take contradictory positions in the guilt and penalty phases, creating inconsistencies, damaging credibility, and ruining the defendant’s chances for a non-death sentence, their performance runs directly contrary to the ABA Guidelines, and thus their performance is unreasonable under prevailing professional norms.

V. CONCLUSION

Abolishing the insanity defense in capital cases violates the rights of mentally ill defendants. Because death is different in its finality and irreversibility, it demands a higher level of reliability than other forms of punishment. It requires the defendant to effectively present, and the sentencer to effectively consider, all relevant mitigating evidence that could point to a sentence less than death. Abolishing the insanity defense interferes with the effectiveness of mental health mitigation evidence by taking away a mentally ill defendant’s opportunity to front-load mental health evidence in the guilt phase of the trial and forcing the defendant to present a

¹⁰⁶ American Bar Association, *supra*, note 8, at 926.

¹⁰⁷ *Id.* at 1047.

¹⁰⁸ *Id.* 1047-48.

denial defense despite substantial evidence of guilt. A denial defense lessens the defendant's credibility in the penalty phase and creates a substantial risk that the death penalty will be imposed on an undeserving, mentally ill defendant.

The death sentence is reserved for the worst of the worst, and when mitigating evidence cannot be presented in such a way that realistically narrows the class of persons eligible and reasonably justifies death compared to other murders, it cannot constitutionally be imposed. Abolition of the insanity defense creates too great a risk that constitutionally protected mitigation cannot be properly comprehended and accounted for by the sentencer, and this unreliability means that the death penalty cannot be constitutionally applied.¹⁰⁹

¹⁰⁹ See Sundby, *supra* note 11, at 496.