SUPREME COURT COPY

No. S122611

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	(Orange County Sup. Court No. 99ZF0023)
vs.	
MAURICE G. STESKAL,	
Defendant and Appellant.	

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Orange
Hon. Frank F. Fasel, Judge

APPELLANT MAURICE G. STESKAL'S BRIEF IN ANSWER TO AMICUS CURIAE BRIEF OF MENTAL HEALTH AMERICA AND NATIONAL ALLIANCE ON MENTAL ILLNESS

Gilbert Gaynor, Cal. Bar No. 107109
Law Office of Gilbert Gaynor
244 Riverside Drive, No. 5C
New York, NY 10025-6142
Tel: (917) 388-3447
GilbertGaynor@post.harvard.edu

Attorney for Appellant
MAURICE G. STESKAL

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244 Riverside Drive, No. 5C
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Tel: (917) 388-3447
GilbertGaynor@post.harvard.edu

Attorney for Appellant
MAURICE G. STESKAL

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APPELLANT MAURICE G. STESKAL'S BRIEF IN ANSWER TO AMICUS CURIAE BRIEF OF MENTAL HEALTH AMERICA AND NATIONAL ALLIANCE ON MENTAL ILLNESS

I. INTRODUCTION.

Courts deciding important constitutional questions should not do so in an empirical vacuum.

This case presents the question whether now, four decades after the reinstatement of the death penalty in *Gregg v. Georgia* (1976) 428 U.S. 153, the standards of decency that govern Article I section 17 of the California Constitution and the Eighth Amendment have evolved so that the imposition of the death penalty on defendants whose severe mental illness was the cause of their offenses is, finally, constitutionally unacceptable.[1]

The amicus curiae brief filed in this case by two major nonprofit organizations, Mental Health America (MHA) and the National Alliance on Mental Illness (NAMI), reveals an important perspective on this issue, based on an expertise informed by long and deep experience. The MHA/NAMI amicus brief further provides a valuable overview of the empirical scholarship on severe mental illness as it relates to the criminal justice system in general, and to capital punishment in particular.

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1 In this brief as well as in his earlier briefing, appellant uses the phrase "severe mental illness" to signify the class of offenders who are not just severely mentally ill, but whose severe mental illness was causally related to the offense itself.

In this answering brief, appellant addresses and comments on several aspects of the amicus brief.

II. THE NATIONAL CONSENSUS AGAINST PUNISHMENT BY DEATH FOR THE SEVERELY MENTALLY ILL.

The participation of amici MHA and NAMI in this case is, itself, further evidence that there is now a broad national consensus against the imposition of the death penalty on severely mentally ill offenders. The consensus among national mental-health organizations, taken together with the consensus of professional organizations such as the American Psychiatric Association, the American Psychological Association and the American Bar Association, amply demonstrates that there is now a societal consensus against capital punishment for severely mentally ill offenders that is thoughtful, broad and firm.

This strong consensus of organizations with community and professional expertise must be understood in the context of a larger consensus. As shown in the opening and reply briefs, there is now a national legal consensus against the imposition of the death penalty on severely mentally-ill offenders such as Mr. Steskal. Although this Court has previously addressed the question presented in this case, it has never considered whether there *is*, in fact, a national consensus against the death penalty imposed on the severely mentally ill. (ARB 23, 45-47; 1ASB 3-11.)

Twenty-one jurisdictions, including nineteen states, the District of Columbia and the Commonwealth of Puerto Rico, do not

impose the death penalty at all. (Death Penalty Information Center, *States With and Without the Death Penalty*, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last viewed Nov. 15, 2016).[2]) Six states that do have capital punishment exempt from criminal liability those persons who, as a result of mental illness, were unable to conform their conduct to the requirements of the law.[3] Five other jurisdictions use proportionality review to remove severely mentally ill offenders from death row. And three states have legally-imposed statewide moratoria against executions.[4] (AOB 164-167, ARB 44-45, 2ASB 72.)

Thus, more than thirty American jurisdictions, through legislative, judicial or executive action, do not permit the execution of persons who are severely mentally ill and whose mental illness had a direct causal relation to their offenses.

The societal consensus and the national legal consensus are

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2 Nebraska can no longer be counted among those states that do not permit the death penalty; in November 2016 the voters of that state reinstated the previously-abolished penalty of death.

Delaware's highest court, by contrast, in August 2016 held that state's death penalty unconstitutional, and the state's attorney general has announced the state will not appeal, effectively removing Delaware from the states that allow the death penalty. (See *Rauf v. Delaware* (Del. 2016) 2016 Del. LEXIS 419; *Attorney General Will Not Appeal To U.S. Supreme Court On Death Penalty*, http://news.delaware.gov/2016/08/15/cp/ (last viewed Nov. 15, 2016).)

3 These states are Arkansas, Kentucky, New Hampshire, Oregon, Virginia and Wyoming. (See AOB 165 and citations therein.) The opening brief incorrectly included Georgia in this group.

4 Oregon both precludes criminal responsibility when a defendant "lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law" (Or. Rev. Stat. Ann. § 161.295), and has in place a gubernatorial moratorium.

fortified by a similar international consensus. (See AOB 182-184; ARB 47-49.)

The proper measure of consensus has been misunderstood by some appellate courts. For example, in *State v. Kleypas* (Kansas 2016) 2016 Kan. LEXIS 475, the Kansas Supreme Court found there was no national legal consensus against executing the severely mentally ill primarily because the appellant had failed to demonstrate a national "*legislative* consensus." (*Id.* at p. *195 (emphasis added).) But the Supreme Court's cases do not limit the assessment of consensus to the number of legislatures that have acted to preclude the punishment at issue. The Supreme Court also assesses "state practice." (*Graham v. Florida* (2010) 560 U.S. 48, 61, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 563.) Assessing the national legal consensus relevant to this case must include consideration of all those jurisdictions that do not permit the punishment of death for the severely mentally ill.

III. DETERRENCE, RETRIBUTION, TRIAL INTEGRITY AND THE DOUBLE-EDGED SWORD OF SEVERE MENTAL ILLNESS.

After considering the existence of a consensus against a challenged punishment, under the California and United States Constitutions, this Court must critically exercise its independent judgment as to whether the challenged punishment "measurably contributes" to the penological objectives of deterrence and retribution, and whether it gives rise to a special risk of wrongful punishment. (See *Hall v. Florida* (2014) ___U.S.___ [134 S.Ct.

1986, 1992-1993, 188 L.Ed.2d 1007, 1017].) The MHA/NAMI amicus brief is relevant to all three considerations.

A. Deterrence.

The MHA/NAMI amicus brief observes that for offenders such as Mr. Steskal, the death penalty "can have no deterrent effect." (MHA/NAMI Brief at 1.)

The logic of this position is compelling. As stressed in the opening brief, the proposed categorical exclusion only applies when the offender is severely mentally ill, and when there is a direct causal relationship between the severe mental illness and the offense. (See American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities* (2006) 30 Mental & Phys. Disability L. Rep. 668; AOB 177; ARB 25.)

Thus, by definition, the proposed categorical exclusion reaches only offenders who, like Mr. Steskal, could not be deterred by the prospect of execution, because they were at the time of their offenses impaired in their capacities to appreciate their conduct, its wrongfulness or its consequences, unable to exercise rational judgment, or unable to conform their conduct to the law.

The very characteristics that bring a severely mentally ill offender within the proposed categorical exclusion are the same characteristics that show the death penalty cannot be an effective deterrent for such offenders.

As the Supreme Court observed with respect to intellectually disabled offenders:

As for deterrence, those with intellectual disability are, by

> reason of their condition, *likely unable to make the calculated judgments that are the premise for the deterrence rationale.* They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] 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."

(*Hall v. Florida, supra,* 134 S.Ct. at p. 1993 (emphasis added).) This constitutional reasoning is just as true for severely mentally ill offenders as it is for the intellectually disabled. By definition, those offenders who are severely mentally ill and who come within the proposed categorical exclusion are also, because of their mental illnesses, "likely unable to make the calculated judgments that are the premise for the deterrence rationale." (*Id.*)

The death penalty, as applied to severely mentally ill persons such as Maurice Steskal, cannot "measurably contribute" to any legitimate interest in deterrence.

B. Retribution.

As the MHA/NAMI amicus brief shows, because the execution of persons such as Mr. Steskal can have no deterrent effect, the death penalty must be justified, if at all, on the basis it is "purely retributive." (MHA/NAMI Brief at 1.)

But the imposition of death on severely mentally ill offenders cannot be justified by retribution. The Supreme Court has stated:

> Retributive values are also ill-served by executing those with

> intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment. See [*Atkins*] at 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution").

(*Hall v. Florida, supra,* 134 S.Ct. at p. 1993, quoting *Atkins v. Virginia* (2002) 536 U.S. 305, 319.) Applied to severely mentally ill offenders, this logic has no less force.

The American criminal justice system's central concept of culpability is that it depends both on the nature of the act itself, and on the mental state of the actor. When one person kills another, the homicide may be justifiable and thus lawful, or it may be manslaughter, or murder. Even among murders, the law distinguishes culpability according to the actor's mental state as well as the act -- and the death penalty is reserved, as the Supreme Court has made clear, for the most culpable offenders.

Punishing by death those offenders who killed as a direct consequence of their severe mental illnesses does not further the retributive goals of the punishment because such offenders, by virtue of their disability, just as the intellectually disabled, by virtue of their disability, simply do not have a heightened moral culpability.

C. The Integrity of the Judicial Process and the Special Risk of Wrongful Results.

As the Supreme Court has emphasized with regard to the intellectually disabled,

> A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face "a special risk of wrongful execution" because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel.

(*Hall v. Florida, supra,* 134 S.Ct. 1986, 1992-1993, quoting *Atkins, supra*, 536 U.S. at pp. 320-321.)

The MHA/NAMI amicus brief addresses and illuminates the reasons why the severely mentally ill, just like the intellectually disabled, are particularly at risk for wrongful punishment, discussing *inter alia* the difficulty the seriously mentally ill have in dealing with police interrogations, and the particular danger of false confessions by the severely mentally ill. (MHA/NAMI Brief at 12-16.)

The MHA/NAMI amicus brief also illuminates the very substantial and unavoidable risk that evidence of a defendant's serious mental illness will be seen by the jurors, not as mitigation, but as a reason that the defendant should be sentenced to death. (MHA/NAMI Brief at 18-21.)

A parallel risk was recognized by the Supreme Court in *Roper*, There, the Court quoted the prosecutor's closing argument in the

case to show how the youth of the defendant was being used as aggravating:

> In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

(*Roper v. Simmons*, *supra*, 543 U.S. 551, 558.)

Here, in just the same way, the prosecutor used Mr. Steskal's severe mental illness against him in the closing argument for death:

> if you think the evidence supports [defense psychiatrist Dr.] Pettis, you have a person right now that is capable and willing to kill someone in authority.

(36 RT 6830-6831; see 36 RT 6848-6849.)

IV. IS THE ISSUE TOO COMPLEX?

The MHA/NAMI amici brief correctly points out that certain mental illnesses, such as the delusional-disorder psychosis of appellant Maurice Steskal, are often difficult to diagnose. (MHA/NAMI Brief at 8-12.) There is, however, an important caveat.

While delusional disorders such as appellant's are difficult to diagnose in a civilian, non-institutional setting, once a defendant is in a custodial setting -- such as in jail, awaiting trial for murder -- "the circumstances allow for the prisoners to be thoroughly examined and evaluated." (MHA/NAMI Brief at 8 fn. 18.)

Thus, in this case, appellant Maurice Steskal was given a

battery of neuropsychological tests by an expert neuropsychologist, Dr. Robert Asarnow. (10 RT 1771, 1791; 28 RT 5300-5308, 5311.) The diagnosis of psychiatrist Dr. Roderick Pettis was based on his review of information from a variety of sources, including test results, educational records, medical records, and diagnostic sessions. (11 RT 2050-2051, 2062; 30 RT 5660-5666.)

Dr. Pettis's diagnosis that appellant suffered from a delusional disorder of the persecutory type -- a psychosis, indicating a break with reality -- was factually uncontroverted. (11 RT 2052, 2055; 30 RT 5668, 5673, 33 RT 6210.) So was Dr. Pettis's conclusion that on the night of his offense, Maurice Steskal was "grossly decompensated" (30 RT 5758), meaning "his psychosis has reached an extreme level. . . . He can't control his behavior." (30 RT 5759.)

Of course, as discussed in prior briefing, mental illness is not a unitary concept. The category of severe mental illness comprises a variety of conditions. But finally, just like consideration of intellectual disability, or the assessments of the conditions of persons under California's Sexually Violent Predator statute (Welf. & Inst. Code § 6601), and Mentally Disordered Offender Act (Penal Code § 2962), the question of whether an offender is severely mentally ill must be guided by expert clinical assessments of a sort the courts frequently rely on in other contexts. (ARB 54-59.)

In *Hall v. Florida*, the Court struck down a Florida statute that foreclosed further exploration of a capital defendant's intellectual disability if his or her IQ score was higher than 70. The Court relied on "established medical practice" and the expertise of professionals who have long agreed that IQ test scores should be read as a range in

determining that the Florida statute was unconstitutional. (*Hall v. Florida, supra,* 134 S.Ct. 1986, 1995.)

In *Hall*, the Court recognized the complexity of intellectual disability and the fact that no definitive scientific measurement can be used as a cutoff:

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

(*Hall v. Florida, supra,* 134 S.Ct. 1986, 1995.)

While it might be argued that it is less complex to protect under the Eighth Amendment those with intellectual disability than those with severe mental illness, because intellectual disability is easier to diagnose, *Hall* demonstrates that the Court itself recognizes that the complexity of a diagnosis must not be an obstacle to full implementation of the Eighth Amendment. (See *Brumfield v. Cain* (2015) 576 U.S.____, 135 S.Ct. 2269, 2274, 192 L.Ed.2d 356, 360.)

Though not an issue in Mr. Steskal's case, it may be difficult in some cases to ascertain whether an offender is severely mentally ill, and to determine whether or not there is a causal relationship between his severe mental illness and the offense at issue. But complex factual matters informed by expert testimony are the routine subjects of adjudication, and not beyond the competence of

our criminal justice system.

It is no proper answer for a court to say that the demands of the Eighth Amendment and Article I section 17 of our state constitution are just too difficult to honor.

DATE: November 19, 2016 Respectfully submitted,

GILBERT GAYNOR
Attorney for Appellant
Maurice G. Steskal

CERTIFICATE OF WORD COUNT

I certify that the forgoing brief contains 2,673 words, exclusive of tables, according to the word-count feature of Open Office.

DATE: November 19, 2016 Respectfully submitted,

GILBERT GAYNOR
Attorney for Appellant
Maurice G. Steskal

PROOF OF SERVICE

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is Gilbert Gaynor, Cal. Bar No. 107109, Law Office of Gilbert Gaynor, 244 Riverside Drive, No. 5C, New York, NY 10025-6142.

On Nov. ___, 2016, I served the document entitled APPELLANT'S BRIEF IN ANSWER TO AMICUS CURIAE BRIEF OF MENTAL HEALTH AMERICA AND NATIONAL ALLIANCE ON MENTAL ILLNESS by placing true and correct copies of the documents in envelopes addressed as indicated on the attached Service List.

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Gilbert Gaynor

SERVICE LIST

California Appellate Project
Attn: M. Garelick, Esq.
101 Second Street, Suite 600
San Francisco, CA 94105

Maurice Gerald Steskal, V-23820
CSP-San Quentin
Housing Unit, Cell # 5-EY-23
San Quentin, CA 94974

ATTORNEY GENERAL'S OFFICE
Kelley Johnson, Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101

Orange County Superior Court
Central Justice Center
Attn: Hon Frank F. Fasel
700 Civic Center Drive West
Santa Ana, CA 92701

Mark A. Davis & Arlene Speiser
Orange County Public Defender's Office□
14 Civic Center Plaza□
Santa Ana, CA 92701-4029

Orange County District Attorney
700 Civic Center Drive West
Santa Ana, CA 92701

Michelle Gillette
Mina Nasseri-Asghar
Crowell & Moring LLP
275 Battery St., 23rd Fl.
San Francisco, CA 94111

Nicole Ambrosetti
Tiffanie McDowell
Crowell & Moring LLP
3 Park Plaza, 20th Fl.
Irvine, CA 92614