

No. 17-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,
v.

DYLANN STORM ROOF,
Defendant/Appellant.

On Appeal from the United States District Court
for the District of South Carolina, Charleston Division
(The Honorable Richard M. Gergel)

**BRIEF OF AUTISTIC SELF ADVOCACY NETWORK AND AUTISTIC
WOMEN AND NONBINARY NETWORK, AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENT IN PART**

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The Autistic Self Advocacy Network (ASAN) and Autistic Women and Nonbinary Network (AWN) submit this brief as *amici curiae* in partial support of Respondent, the United States. We wish to clarify that Roof’s purported autism diagnosis is not related to his adherence to white supremacist ideology or his premeditated acts of violence, nor did it automatically render him incapable of making decisions about trial strategy. We urge this Court to consider the potentially detrimental effects to the autistic community, particularly autistic people of color, that would result from a finding that Roof lacked capacity to stand trial or that his alleged autism diagnosis was causally related to his acts of violence.

Amici take no position on the other arguments presented in Roof’s brief on appeal and do not take a position on the ultimate disposition of the appeal.

Rule 26.1(a) Disclosure

Neither ASAN nor AWN have any parent corporation, nor do they issue stocks. As a result, no publicly held corporations own 10% or more of their stock.

Interest of *Amici*

ASAN is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN’s advocacy activities include combating stigma, discrimination, and

violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people.

The Autistic Women and Nonbinary Network (AWN) is a national nonprofit organization, run by and for autistic people who experience gender-based discrimination, oppression, and violence. AWN focuses on challenging societal ideas about the value of disabled people's lives and participation in society and providing a supportive and affirming community for autistic people experiencing marginalization due to gender, sexual orientation, and race. AWN's advocacy activities include collaboration on research studies on reproductive health care, diagnostic access, and gender-based disparities; publishing resources focused on autism and race, and autism and gender, including autistic transgender people; hosting educational and community-building programs for autistic youth and adults; and raising public consciousness of prejudice, discrimination, oppression, and violence affecting autistic and other disabled people.

Amici take a strong interest in cases concerning the intersection between disability and racial justice, autistic individuals' interactions with the criminal legal system, and in community perceptions of the autistic community. *Amici* have weighed in as *amici* or as advocates in numerous cases affecting autistic people involved in the criminal legal system, always - until this moment - in favor of

defendants.¹ *Amici* have also sought to dispel myths connecting autism to serious violence.² The instant case presents pressing questions regarding the alleged

¹ See, e.g., Brief for The Bazelon Center for Mental Health Law, the Autistic Self Advocacy Network, & The Arc As *Amici Curiae* Supporting Defendant-Appellant Darius McCollum’s Motion for Leave To Appeal, *The People of the State of New York v. Darius McCollum*, No. 2018-14953 (N.Y. App. Div. Oct. 5, 2018); Press Release, Autistic Self Advocacy Network, Coalition Demands a Full Pardon for Neli Latson (Jul. 7, 2020), available at <https://autisticadvocacy.org/2020/07/coalition-demands-governor-northam-grant-a-full-pardon-of-neli-latson-a-young-black-man-with-disabilities-subjected-to-a-decade-of-injustice/>; Press Release, Autistic Self Advocacy Network, ASAN Celebrates Dismissal of All Charges Against Kayleb Moon-Robinson, (Mar. 10, 2016), <https://autisticadvocacy.org/2016/03/asan-celebrates-dismissal-of-all-charges-against-kayleb-moon-robinson/>; Press Release, Autistic Self Advocacy Network, ASAN & AWN Call for Relief for Matthew Rushin, (July 9, 2020), <https://autisticadvocacy.org/2020/07/asan-awn-call-for-relief-for-matthew-rushin/>; Press Release, Autistic Self Advocacy Network, ASAN Applauds The Pardon of Matthew Rushin, (Nov. 10, 2020), <https://autisticadvocacy.org/2020/11/asan-applauds-the-pardon-of-matthew-rushin/>.

² Letter from Nat’l Disability Leadership Alliance to the Vice President’s Task Force to Curb Gun Violence (Jan. 10, 2013), available at <https://autisticadvocacy.org/2013/01/ndla-letter-to-the-vice-presidents-task-force-to-curb-gun-violence/>; see also ASAN Statement on Media Claims Linking Autism and Violence (May 24, 2014), available at <https://autisticadvocacy.org/2014/05/asan-statement-on-media-claims-linking-autism-and-violence/>, Autistic Self Advocacy Network, *Make Real Change On Gun Violence: Stop Scapegoating People With Mental Health Disabilities* (2018), available at <https://autisticadvocacy.org/policy/briefs/gunviolence/>, Press Release, Autistic Women and Nonbinary Network, AWN Statement on Media Responsibility When Reporting About Autism and Violence (May 25, 2014), available at <https://awnnetwork.org/582/>; Press Release, Autistic Women and Nonbinary Network, AWN Condemns Proposals to Increase Criminalization of Psychosocial Disabilities (Sept. 16, 2019), <https://awnnetwork.org/awn-condemns-proposals-to-increase-criminalization-of-psychosocial-disabilities/> (expressing concern over proposals to increase surveillance and institutionalization of people with disabilities in response to unrelated incidents of mass violence).

relationship between autism and racism and/or mass violence, effective access to counsel, and competency to stand trial.

Amici have grave concerns about the impact of the criminal legal system on autistic individuals and others. In light of these concerns, the decision by *amici* to submit a brief even partially in support of the prosecution's position in the appeal of an autistic criminal defendant, especially a capital defendant, is unprecedented for both ASAN and AWN. Nevertheless, *amici* have taken this extraordinary step because of the dramatic impact that Appellant's autism-related arguments may have on our communities.

Amici file this brief with the consent of both parties, pursuant to Federal Rule of Civil Procedure 29(a)(2).

No party or party's counsel has authored this brief in whole or in part or contributed money intending to fund preparation or submission of this brief. No person, other than amici, contributed money that was intended to fund preparation or submission of this brief.

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Argument

On the evening of June 17, 2015, Dylann Roof ended the lives of nine Black churchgoers at the Emanuel African Methodist Episcopal Church. Roof's actions were deliberate and premeditated, and motivated by his commitment to white supremacy. When apprehended by law enforcement, Roof admitted his actions and confessed that he had been attempting to incite further racist violence.

Although he was represented by a committed and competent team of attorneys, Roof had significant disagreements with his legal team regarding their plan to present evidence of multiple developmental and psychosocial disability diagnoses - most of which he received only after his arrest - for the purpose of mitigation. Roof, who continued to stand by his white supremacist ideology, rejected the implication that his actions were caused by mental disability and believed that autism was for "losers."³ Roof chose to proceed *pro se* at the penalty phase so as to ensure that evidence related to disability would not be presented.⁴ His attorneys had previously sought a determination that Roof was incompetent to stand trial or to make decisions regarding legal strategy, which the trial court rejected.⁵ Following a trial, Roof was convicted of all 33 federal charges against

³ See Report by John Elder Robison, Nov. 19, 2017, at 5 (Joint Appendix 1822).**Error! Bookmark not defined.**

⁴ Appellant's Br. at 24.

⁵ Appellant's Br. at 15-22.

him (including 12 counts of “committing a hate crime against black victims,” 12 counts of “obstructing the exercise of religion,” and nine counts of “using a firearm to commit murder”) pleaded guilty to the nine counts of murder, and was sentenced to death.

Although *amici* take no position on the accuracy or inaccuracy of Roof’s autism diagnosis, we wish to emphasize that racism and severe violence are not characteristic of autistic individuals and that autism does not impair our ability to understand the wrongfulness of premeditated murder. Associating autism with violence harms our community and is particularly harmful to autistic people of color. Moreover, although autistic people facing prosecution may need additional supports in order to ensure access to due process, broadly declaring autistic people incompetent to stand trial could have unintended negative effects.

I. Autism is not connected to severe, premeditated violence and should not be presented as a mitigating factor in such cases.

Although autism does not increase a person’s likelihood of engaging in lethal, premeditated violence, nor does it increase a person’s predisposition to racial bias, autistic people are regularly misrepresented in the media as being predisposed to such violence, particularly after any recent violent event involving a perpetrator who is suspected to be or perceived as autistic. Such misrepresentations are harmful to the autistic community overall. As a result, attempts to present

autism as mitigating evidence in cases involving severe, premeditated violence should be treated with caution.

A. Available research shows no link between autism and racism, nor autism and severe premeditated violence.

Although research on the link between autism and involvement in the criminal legal system is mixed, the available research shows no link between autism and premeditated, lethal violence. Large-scale studies including more than 290,000 people convicted of violent criminal offenses have found that, after other risk factors were controlled for, autism did not increase the risk of violence.⁶ Smaller-scale studies have come to similar conclusions.⁷

Moreover, when autistic people do become involved in the criminal legal system, they are typically not charged with premeditated, carefully planned, and large-scale acts of violence such as that at issue in this case.⁸

⁶ Ragini Heeramun et. al., *Autism and Convictions for Violent Crimes: Population-based Cohort Study in Sweden*, 56 J. Am. Academy of Child & Adolescent Psychiatry 491, 495-497 (2017); see also Svend Erik Mouridsen, et al., *Pervasive developmental disorders and criminal behavior: A case study*, Int. J. Offender Therapy & Comp. Crim., Apr. 2008, at 202-204 (finding no statistically significant differences between the autistic population and control population in violent offenses).

⁷ See Marc R. Woodbury-Smith, et al., *High functioning autistic spectrum disorders, offending and other law-breaking: findings from a community sample*, J. Forensic Psychiatry & Psychol., Mar. 2006, at 114-15.

⁸ See, e.g., C.A., Cheely, L.A. Carpenter & E.J. Letourneau, *The prevalence of youth with autism spectrum disorders in the criminal justice system*, 42 J. of Autism and Developmental Disorders 1856, 1860-62 (2012) (noting that “individuals with ASD may be more likely to lash out violently during an

Literature reviews on the subject over a period of nearly twenty years have also found that the available evidence does not suggest that autism is linked with violence.⁹ Additionally, research has shown that, without the presence of other risk factors, there is no link between autism alone and violent *behavior* more generally.¹⁰ In fact, many researchers have come to the exact same conclusion: that there is no link between autism and violence.¹¹

There is also no evidence suggesting a link between autism and racial prejudice. Although the research on this subject is quite limited, a 2015 study of autistic people's responses to the well-known Implicit Association Test (IAT), a test of the degree to which a particular person has implicit bias towards members

altercation, and less likely to commit a crime involving premeditation due to impairments in executive functioning.”).

⁹ Claire King & Glynis H. Murphy, *A Systematic Review of People with Autism Spectrum Disorder and the Criminal Justice System*, 44 *J. Autism & Developmental Disorders* 2717, 2727-30 (2014); Katie Maras, Sue Mulcahy & Laura Crane, *Is autism linked to criminality?* 19 *Autism* 515, 515 (2015) (describing the King and Murphy study, among others).

¹⁰ Jill Del Pozzo, Matthew W. Roche, & Steven M. Silverstein, *Violent behavior in autism spectrum disorders: who's at risk?* 39 *Aggression & Violent Behavior* 53, 53-55 (2018).

¹¹ Mohammad Ghaziuddin & Neera Ghaziuddin, *Brief report: Violence in Asperger Syndrome, A critique*, 21 *J. Autism & Developmental Disorders* 349, 351 (1991); Sven Erik Mouridsen, *Current status of research on autism spectrum disorders and offending*, *Research in Autism Spectrum Disorders*, Jan.-Mar. 2012, at 81-84. Note that these studies differ in their overall focus. The 1991 study pertains to violent behavior generally and the 2012 study pertains only to violent crime, which, while informative, may also not account for both under-prosecution and over-prosecution of crime. Nonetheless, they show together that autism is not related to violence.

of socially disadvantaged or marginalized groups, found that implicit racial bias was relatively similar between autistic and non-autistic people.¹²

In fact, autistic people tend to possess traits that would make us *less* likely to engage in premeditated violence. Autistic people and those close to us regularly self-report high affective empathy - the tendency to vicariously feel and associate with the emotions of other people - even when we have trouble identifying or naming the emotions another person is feeling.¹³ Some research studies have come to similar conclusions.¹⁴ Many autistic people's rigid conformity to rules and expectations, as well as our status as part of a greater community of people with disabilities, may also grant us a strong sense of justice and morality.¹⁵

¹² Elina Birmingham et al., *Implicit Social Biases in People with Autism*, 26 *Psychological Science* 1693, 1693-1705 (2015).

¹³ See, e.g., Rebecca Brewer & Jennifer Murphy, *People with autism can read emotions, feel empathy*, *Spectrum* (Jul. 12, 2016), <https://www.spectrumnews.org/opinion/viewpoint/people-with-autism-can-read-emotions-feel-empathy/>; Danielle Sullivan, *Autistic People Don't Lack Empathy: In fact, we've got more than enough*, *Medium* (Aug. 4, 2020), <https://humanparts.medium.com/autistic-people-dont-lack-empathy-in-fact-we-ve-got-plenty-of-it-837e326f8246>.

¹⁴ See, e.g., Adam Smith, *The Empathy Imbalance Hypothesis of Autism: A Theoretical Approach to Cognitive and Emotional Empathy in Autistic Development*, 59 *The Psychological Record* 489, 489-493 (2009).

¹⁵ See Jing Li, Liqi Zu, & Michaela Gummerum, *The relationship between moral judgment and cooperation in children with high-functioning autism*, *Scientific Reports*, Mar. 2014, 1-4; Lynne Soraya, Kate Dupere, *7 activists tell us the best thing about being autistic*, *Mashable* (Apr. 23, 2017), <https://mashable.com/2017/04/23/autistic-activists-pride/>.

In fact, autistic people, rather than being more likely to commit violent acts, are more likely to be the *victims* of such acts. People with disabilities are 2.5 times more likely to be the victims of violent crimes, and more than three times as likely to be the victims of serious violent crimes like aggravated assault and robbery.¹⁶ People with cognitive disabilities - like autism - are the most likely to be victimized.¹⁷ As people with disabilities, autistic people are also more likely to experience other forms of violence, such as domestic abuse and neglect and severe bullying.¹⁸ We are also subject to forms of violence that are specific to people with

¹⁶ Erika Harrell, U.S. Dep't of Justice Bureau of Justice Statistics, NCJ No. 250632, *Crimes Against Persons with Disabilities: 2009- 2015 Statistical Tables*, 1, 3, 4, 5 (2017); Michael R. Rand and Erika Harrell, U.S. Dep't of Justice Bureau of Justice Statistics, NCJ No. 227814, *Crime Against People with Disabilities 2007*, 1, 2, 3, 4 (2009).

¹⁷ Erika Harrell, *Crimes Against Persons with Disabilities: 2009-2015 Statistical Tables*, *supra* note 16, at 4, 5.

¹⁸ Patricia M. Sullivan & John F. Knutson, *Maltreatment and Disabilities: A Population-Based Epidemiological Study*, 24 *Child Abuse & Neglect* 1257, 1268-71 (2000) (finding that children with disabilities were 3.5 times more likely than children without disabilities to be abused and/or neglected); Irit Hershkowitz et al., *Victimization of Children with Disabilities*, 77 *Am. J. Orthopsychiatry* 629, 631-35 (2007) (finding that children with disabilities are more likely to be abused but less likely to be able to report it); Liza Little, *Peer Victimization of Children with Asperger Spectrum Disorders*, 40 *J. Child & Adolescent Psychiatry* 995, 995-96 (2001) (finding that a sample of 411 autistic children between the ages of 4 and 17 were four times more likely to have been bullied than non-autistic children in two nationally representative samples from the same time period).

disabilities, such as abuse in residential treatment centers (RTCs) and group homes.¹⁹

B. False public perceptions that autism is linked to racism and lethal violence is harmful to the autistic community and especially to Black autistic people, Indigenous autistic people, and other autistic people of color.

False portrayals of autistic people and others with developmental disabilities as violent and inclined to specifically mass violence do great harm to the autistic community.²⁰ News media depicting people with disabilities as violent have been shown to shape the audience's perception such that they have more negative opinions of people with disabilities, including depictions of autistic people as violent.²¹ Perceptions of autistic people as likely to be violent may fuel policies

¹⁹ Heather Vogell, *Unrestrained*, ProPublica (Dec. 10, 2015), <https://www.propublica.org/article/advoserv-profit-and-abuse-at-homes-for-the-profoundly-disabled>; Quentin Davies, *Prisoners of the Apparatus: The Judge Rotenberg Center*, Autistic Self Advocacy Network (Aug. 9, 2014), <http://autisticadvocacy.org/2014/08/prisoners-of-the-apparatus-the-judge-rotenberg-center>; U.S. Gov't Accountability Off., GAO-08-146T, Residential Treatment Programs: Concerns Regarding Abuse and Death in Certain Programs for Troubled Youth 2, 3 (2007).

²⁰ See Mari-Jane Williams, *Newtown shootings: Media coverage creates dangerous stereotypes of people with autism*, The Washington Post (Dec. 17, 2012), https://www.washingtonpost.com/blogs/on-parenting/post/newtown-shootings-media-coverage-creates-dangerous-stereotypes-of-people-with-autism/2012/12/17/2341fb42-4868-11e2-820e-17eefac2f939_blog.html.

²¹ Neil Brewer, Jordana Zoanetti, & Robyn L. Young, *The influence of media suggestions about links between criminality and autism spectrum disorder*, 21 *Autism* 117, 119-120 (2017).

that result in our segregation from others and deprive us of autonomy and civil rights. One study, for example, found that people who have been exposed to a story about a mass shooting committed by someone with a mental health disability are more likely to support restrictions on these individuals' right to own firearms.²²

Amici have repeatedly voiced concern over coverage of incidents of mass violence that attribute violence to developmental disability, as such coverage often fuels policy proposals that harm our community as a whole. Following the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, ASAN expressed concern over a deluge of policy proposals that targeted people with disabilities for increased surveillance and placement of individuals on firearms prohibition registries on the basis of disability alone.²³ In 2013, following the mass shooting in Newtown, Connecticut, ASAN and other organizations expressed concern that, as a result of media coverage falsely linking mass shootings with neurological and mental health disabilities, policymakers had proposed legislation and regulations that would increase forcible institutionalization of people with

²² Emma McGinty et. al., *Effects of News Media Messages About Mass Shootings on Attitudes Toward Persons with Serious Mental Illness and Public Support for Gun Control Policies*, 170 *Am. J. Psychiatry* 494, 496-99 (2013).

²³ Press Release, Autistic Self Advocacy Network, ASAN Statement on Gun Violence Prevention Following Parkland Mass Shooting (Feb. 16, 2018), available at <http://autisticadvocacy.org/2018/02/asan-statement-on-gun-violence-prevention-following-parkland-mass-shooting/>.

disabilities and place certain disabled Social Security benefits recipients on firearms prohibition registries solely due to disability status.²⁴

Amici emphasize that our position is limited to cases like Roof's, in which an individual engages in premeditated, lethal mass violence. Although autism does not increase the likelihood that a person will engage in mass murder and does not impair a person's ability to understand that murder is wrong, we recognize that there are many situations in which an autism diagnosis is highly relevant to a person's intent and culpability. For example, we have advocated for autism to be considered as a mitigating factor in cases where a person appears to have acted impulsively during a meltdown²⁵ or reacted in self-defense when confronted unexpectedly by a law enforcement officer.²⁶ We have also advocated for autism to

²⁴ Letter from Nat'l Disability Leadership Alliance to the Vice President's Task Force to Curb Gun Violence, *supra* note 2; *see also* ASAN Statement on Media Claims Linking Autism and Violence, *supra* note 2, Autistic Self Advocacy Network, "Make Real Change On Gun Violence: Stop Scapegoating People With Mental Health Disabilities", *supra* note 2, Autistic Women and Nonbinary Network, "AWN Statement on Media Responsibility When Reporting About Autism and Violence", *supra* note 2; Press Release, Autistic Women and Nonbinary Network, AWN Condemns Proposals to Increase Criminalization of Psychosocial Disabilities, *supra* note 2 (expressing concern over proposals to increase surveillance and institutionalization of people with disabilities in response to unrelated incidents of mass violence).

²⁵ *See, e.g.*, Letter from Autistic Self Advocacy Network & Autistic Women and Nonbinary Network to Governor Northam, July 9, 2020, *available at* <https://autisticadvocacy.org/wp-content/uploads/2020/07/Letter-to-Governor-Northam-Re-Matthew-Rushin.pdf>.

²⁶ *See* Press Release, Autistic Self Advocacy Network, Coalition Demands a Full Pardon for Neli Latson (Jul. 7, 2020), *available at*

be considered as a mitigating factor when an autistic person may have genuinely not appreciated that an action caused harm.²⁷

II. Decisions about an autistic defendant’s capacity should be informed by the presence of appropriate decision-making supports.

Roof takes the position that he was incompetent to stand trial, in part due to his performance on evaluations of traits such as social functioning and processing speed that “resembled scores of patients suffering from schizophrenia and autism.” Appellant’s Br. at 77. While *amici* do not take a position on whether these scores, and Roof’s purported autism diagnosis, are accurate or not, we recognize that in general, autistic individuals may need significant accommodations in order to benefit from effective assistance of counsel and to navigate the criminal legal system *pro se*. Nevertheless, autistic differences in social interaction and

<https://autisticadvocacy.org/2020/07/coalition-demands-governor-northam-grant-a-full-pardon-of-neli-latson-a-young-black-man-with-disabilities-subjected-to-a-decade-of-injustice/>; Press Release, Autistic Self Advocacy Network, *ASAN Celebrates Dismissal of All Charges Against Kayleb Moon-Robinson*, *supra* note 1.

²⁷ For example, ASAN has advocated for the release of Darius McCollum, a man with a special interest in public transportation who has been repeatedly convicted of impersonating transit workers and attempting to drive transit vehicles along their scheduled route. McCollum faithfully followed the intended route of the vehicles he drove and did not engage in violence against others. *See* Brief for The Bazelon Center for Mental Health Law, the Autistic Self Advocacy Network, & The Arc As Amici Curiae Supporting Defendant-Appellant Darius McCollum’s Motion for Leave To Appeal, *supra* note 1.

processing information do not in themselves render a person incompetent to stand trial or to represent themselves at trial.²⁸ Instead, to the extent that this Court considers the effects of Roof's alleged autism diagnosis on competency, it should focus on the relationship between Roof's purported autistic traits and the decisions he made, and on the availability of adequate supports to assist him in communicating with counsel. It is not clear to us that Roof's alleged autism-related disabilities specifically were related to his desire not to present disability-related information to the jury or his belief that a death sentence would not be carried out. Moreover, unlike most autistic people facing criminal prosecution, Roof had access to significant supports to enable him to make the relevant trial decisions.²⁹ The Court should focus on whether those specific supports were adequate to enable him to make informed decisions.³⁰

²⁸ *Amici* do not take a position on Roof's additional allegations that he was incompetent as a result of additional mental health disabilities that resulted in psychosis.

²⁹ *Amici* do not take a position on Roof's argument that he was incompetent to proceed *pro se* or that he did not receive adequate accommodations to proceed *pro se*. Although we recognize that autistic defendants may require accommodations in order to proceed *pro se*, we lack the information necessary to develop an opinion on whether the accommodations offered to Roof were adequate or whether any alleged inadequacy was prejudicial.

³⁰ *Amici* recognize that Roof has articulated an *Atkins* argument as well. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). We do not take a position on this argument. We support the holding in *Atkins* and do not in principle oppose the application of *Atkins* to autistic people who do not have intellectual disability, but we do not take a position on whether such an expansion is warranted given the specific facts in this case.

A. Autistic people involved in the criminal legal system may need reasonable accommodations.

Autism is a disability that affects a variety of domains, including social communication, information processing, executive functioning, and sensorimotor processing.³¹ Although autistic people are more likely to be the victims of criminal activity than to engage in criminal activity,³² we nevertheless do interact with the criminal legal system.³³

Amici have consistently taken the position that autistic individuals interacting with the criminal legal system may need additional accommodations in order to ensure meaningful access to due process.³⁴ These accommodations may include additional time to consult with defense counsel in order to understand the charges against them and the risks and consequences of various defense strategies. Because of differences in cognitive processing, autistic people may need information communicated in plain language or via text. Autistic people may also

³¹ See, e.g., Eleni Demetriou et al. *Executive Function in Autism Spectrum Disorder: History, Theoretical Models, Empirical Findings, and Potential as an Endophenotype*. 10 *Front Psychiatry* 753 (2019).

³² See *supra* p. 7.

³³ *Id.*

³⁴ See, e.g., Letter from Autistic Self Advocacy Network & Autistic Women and Nonbinary Network to Governor Northam, *supra* n. 25

need explicit guidance on courtroom practices, etiquette and procedures, assistance with preparing to testify, and access to other supports.³⁵

We recognize that, in cases where no effective supports can be identified, forcing a defendant to stand trial is a violation of the defendant's due process rights. Moreover, to the extent that Respondent suggests that an autistic defendant with a high measured IQ score would not need such supports,³⁶ we strongly disagree with this position. Rather, we believe that measured IQ is not a meaningful measurement of the level of communication or other supports an autistic person may need.

B. Reasonable accommodations are preferable to broad designation of autistic people as incompetent to stand trial.

Amici do not, however, believe that autistic traits such as the social communication impairments cited by Appellant should in and of themselves be a basis for deeming a defendant incompetent to stand trial. Indeed, deeming autistic defendants incompetent to stand trial based on test scores alone could result in significant harm to autistic people who are involved in the criminal legal system. Such a precedent would reinforce damaging stereotypes of autistic people as incapable of making important decisions, even with support. Moreover, autistic

³⁵ See generally Elizabeth Kelley, Ed. *Representing People with Autism Spectrum Disorders: A Practical Guide for Criminal Defense Lawyers* (2000).

³⁶ Respondent's Br. at 32.

people deemed incompetent to stand trial in cases involving violence are at significant risk of indefinite civil commitment in lieu of a speedy trial.

Autistic individuals have historically faced significant deprivations of liberty as a result of misperceptions that we are incapable of making important decisions. Autistic people who are viewed as lacking decision-making capacity have been subjected to court-ordered guardianships that deprive us of autonomy over our health care, finances, where to live, and even intensely personal matters such as marriage.³⁷

As a result of concerns over the autonomy and civil rights of people with disabilities, courts and disability advocates have increasingly questioned traditional conceptions of capacity. Instead of viewing capacity as a trait that an individual either possesses or does not possess, we instead view legal capacity as a fundamental human right, which must be protected through provision of decision-making supports tailored to the individual's needs.³⁸ This model of capacity is known as Supported Decision Making (SDM). Courts and legislatures are

³⁷ See Kristen Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, And Beyond*, 44 Colum. Hum. Rts. L. Rev. 93, 105-106 (2012).

³⁸ Convention on the Rights of Persons with Disabilities art. 12, December 13, 2006, U.N. Doc A/RES/61/106, 6, 2515 U.N.T.S. 3, 78. The Convention came into force on May 3, 2008.

increasingly recognizing SDM as an alternative to deprivations of legal capacity, such as court-appointed guardianship.³⁹

Under Supported Decision Making, an individual with a disability has the opportunity to choose one or more supporters, who may be family members, friends, or professionals. Supporters may provide advice, assistance in understanding information relevant to a decision, assistance in communicating about the decision, and assistance in carrying out the decision. Nevertheless, the person with a disability remains the ultimate decision-maker - even when the person's ultimate decision is not what the supporter recommended.

As in the context of guardianship, *amici* believe that courts evaluating capacity to stand trial should take into account available supports that may help a defendant understand relevant issues related to the proceedings and communicate with defense counsel. This inquiry strikes an important balance between ensuring that people actually have access to meaningful due process and ensuring that autistic people have access to autonomy and a speedy trial.

³⁹ See, e.g., *Julia S. Ross and Richard W. Ross v. Margaret J. Hatch*, No. CWF120000426P-03, (Va. Cir. Ct. Newport News, Aug. 2, 2013), available at http://jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhjp_trial_final_order.pdf (final court order on the guardianship of Jenny Hatch); *In Re Dameris L.*, 38 Misc.3d 570, 577-79 (N.Y. Surr. Ct. 2012); Tex. Estates Code Ann. § 1357 (2019); Del. Code Ann. tit. 16, §§9402A-9410A (2020); Glen, *supra* n. 37, at 119-39 (describing the shift in thinking which led to the development of supported decision-making).

Amici recognize that the supports actually available to autistic defendants are often inadequate to ensure due process, and that for some defendants there may be no identifiable set of supports that would enable an autistic defendant to sufficiently understand relevant issues related to the proceedings or communicate with defense counsel. Nevertheless, we are equally concerned that overly demanding criteria for competency to stand trial, including a determination that people with low test scores in skills such as processing speed, “social-interaction skills,” and “ability to interpret others’ perspectives” are necessarily incompetent to stand trial, would be detrimental to the autistic community as a whole, particularly if that standard were also to be applied to individuals not facing the death penalty. Typically, individuals deemed incompetent to stand trial are eligible for civil commitment either for the purpose of restoring capacity or, if capacity cannot be restored in the foreseeable future, for the purpose of segregating the individual from the community.⁴⁰ Many states’ civil commitment statutes have special provisions to facilitate the long-term civil commitment of persons found incompetent to stand trial and not restorable.⁴¹ Because competency restoration

⁴⁰ See, e.g., S.C. Code § 44-23-430 (2016) (requiring judicial commitment of persons found incompetent to stand trial and who are unlikely to become competent in the foreseeable future).

⁴¹ See, e.g., Joseph D. Bloom & Scott E. Kirkorsky, “Incompetent to Stand Trial, Not Restorable, and Dangerous,” *J. Am. Acad. Psychiatry & L. Online* (February 2020).

programs for people with disabilities are typically designed for people with mental illness, not people with intellectual or developmental disabilities such as autism,⁴² autistic people found incompetent to stand trial are at added risk of prolonged hospitalizations for the purpose of restoring competency (in some cases, for a longer time period than the most likely sentence that they would receive if found guilty) or even more lengthy civil commitments following a determination that their competence is not restorable.

C. The parties' briefs do not adequately address the effectiveness of available decision-making supports.

Although *amici* have encountered numerous cases in which an autistic defendant lacked adequate supports during the trial and plea process,⁴³ Roof had access to at least some degree of decision-making supports before and during trial. Roof's defense team had worked with him extensively over the course of 16 months and, according to reports, spent extensive time explaining the steps of the process and the importance of each step.⁴⁴ Counsel carefully explained not only the basic details of the upcoming trial process, but also courtroom expectations such as

⁴² See Haleigh Reisman, "Note: Competency of the Mentally Ill and Intellectually Disabled in the Courts," 11 J. Health & Biomed. L. 199, 204 n.34, 223-227, 230 (2015).

⁴³ See, e.g., Letter from Autistic Self Advocacy Network & Autistic Women and Nonbinary Network to Governor Northam, *supra* n. 25.

⁴⁴ See Report by John Elder Robison, Nov. 19, 2017 (Joint Appendix 1818-1826).

the importance of wearing appropriate attire.⁴⁵ Although *amici* recognize that for some autistic individuals such supports alone would not be adequate, the record we have reviewed does not indicate *why* they were allegedly inadequate in this case except by stating that Roof continued to reject his attorneys' advice.

The fact that Roof nevertheless ultimately disagreed with his defense team's recommendations on trial strategy is not necessarily the result of autism-related disabilities. Indeed, defense consultant Robison noted that Roof's rejection of his attorney's advice was not characteristic of autism, and instead speculated that this decision was based on stigma.⁴⁶ Although *amici* agree that stigma is very real, a decision based on the desire to avoid stigma is not in itself evidence of incapacity. Indeed, when courts view unwise decisions as *per se* evidence of incapacity, this tends to result in harm to autistic individuals as a whole.

Moreover, Roof's belief that he need not worry about the death penalty because he would be pardoned does not appear to be linked to his alleged autism diagnosis. Indeed, defense consultant Robison took the position that this statement was not characteristic of an autistic person.⁴⁷ Unusual beliefs are not *per se* evidence of incapacity, especially if they are shared by others in a person's social

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 6. *Amici* take no position on Roof's argument that he was experiencing delusions.

circle. Again, the court should instead focus on whether Roof's beliefs were the result of unaccommodated disability-related needs.

Conclusion

For the foregoing reasons, *amici* respectfully ask the Court to consider Appellant's autism-related arguments in light of their broader effects on the autistic community. Autism is not linked to premeditated violence; moreover, although autistic people facing prosecution may need significant supports in order to stand trial, test scores alone should not be the basis for a finding on competence to stand trial. Rather, competence should be evaluated in light of a person's functional need for supports and actual availability of effective supports.

Certificate of Compliance

I certify that this brief:

(1) complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 5,504 words.

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

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Attorney

Date: November 30, 2020