IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 78209

SIAOSI VANISI

Appellant,

v.

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

Respondent.

Appeal From Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)
Second Judicial District Court, Washoe County
The Honorable Connie J. Steinheimer

MOTION OF NEVADA ATTORNEYS FOR CRIMINAL JUSTICE (NACJ) FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S APPEAL FROM ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Nevada Attorneys for Criminal Justice (NACJ), by and through the undersigned counsel of record, and hereby files this motion for leave to file an *amicus curiae* in support of Appellant's appeal from the district court's Order Denying Petition for Writ of Habeas Corpus (Post-Conviction).

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This Motion is based upon the following Points and Authorities, Declaration of Counsel, and all pleadings and papers on file herein.

Dated this 3rd day of October, 2019.

Respectfully Submitted,
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

/s/ Caitlyn L. McAmis

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POINTS AND AUTHORITIES

Nevada Attorneys for Criminal Justice (NACJ) hereby requests leave to appear and submit a brief as *amicus curiae* in this matter. *See* NRAP 29(a) and (c). Counsel for Appellant, Siaosi Vanisi, consented to this request. Counsel for Respondents were informed about undersigned counsel's intent to file an *amicus* brief and Chief Deputy District Attorney Jennifer Noble indicated that it would be premature for the Washoe County District Attorney's Office to take a position on NACJ's participation as *amicus* without first reviewing the instant Motion to decide what response that Office will take.

As such, pursuant to Rule 29(a) and (c), the undersigned counsel as filed the instant Motion for this Court's consideration. *See* Declaration of Counsel (attached hereto). The proposed brief of amicus curiae is submitted along with this Motion.

I. INTERESTS OF AMICUS

The Nevada Attorneys for Criminal Justice, Inc. ("NACJ"), is a Nevada domestic non-profit corporation comprised of approximately 200 criminal defense attorneys who practice in both the public and private sectors. NACJ is a member affiliate of the National Association of Criminal Defense Attorneys. NACJ members represent defendants in criminal cases at all stages of litigation. It has a material interest in the outcome of the instant appeal because a number of its members are solo practitioners and small firms who accept capital cases and who

also have relevant information to be considered regarding their severely mentally ill clients.

II. DESIRABILITY OF AMICUS CURIAE PARTICIPATION

The "classic role of amicus curiae" is to assist in a case of "general public interest, supplementing the effort of counsel, and drawing attention to law that escaped consideration." *Miller-Wohl Co. v. Com'n of Labor and Industry*, 694 F.2d 203, 204 (9th Cir. 1992). An amicus brief should be allowed "when the amicus has an interest in some other case that may be affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the role that the lawyers for the parties are able to provide. *Ryan v. Commodity Futures Trading Com'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers) (citations omitted).

The brief meets these purposes: the issue will have an impact on how defense attorneys perform their duties in both pending and future cases and amici organizations are in a unique position to provide that perspective.

Among the issues presented in Mr. Vanisi's appeal is the propriety of capital punishment as a sentence for defendants who are severely mentally ill. Mr. Vanisi's post-conviction appeal follows Mr. Vanisi's refusal and/or inability to meaningfully participate in his defense and disclose relevant mitigation evidence

as a consequence of his severe mental illness diagnosis. Mr. Vanisi has been represented by both state and federal public defender agencies, as well as solo practitioners.

NACJ has determined that this case presents an issue of significant interest and impact on its members' ability to zealously advocate for individuals accused of crime, and particularly those individuals who are severely mentally ill and subject to life and death consequences. This *Amicus* Brief provides some perspective about the unique challenges presented by severely mentally ill clients to the solo practitioners or small firms who undertake the worthwhile, but ultimately challenging representation of individuals with significant psychological and/or neurological issues. This Brief offers specific examples of efforts by solo practitioners or small firms to make appropriate records of their challenges and barriers to engaging with severely mentally ill clients, as well as highlight the lack of sufficient procedural safeguards made available to other vulnerable, yet similarly situated populations of clients, including infants and mentally impaired persons. The members of NACJ comprising of solo attorneys or attorneys in small firms have a unique perspective that is relevant to some of the challenges of representing individuals like Mr. Vanisi, and offer this *amicus* brief as a perspective or argument that is not presented in Appellant's Opening Brief.

The issues presented in Mr. Vanisi's post-conviction appeal possess a general public interest in fundamentally fair proceedings involving the severely mentally ill who are accused of crimes, and *amicus* organizations who have an interest in ensuring that a severely mentally ill's refusal or cognitive inability to participate in his mitigation does not result in an unreliable conviction or contribute to his sentence of death.

III. CONCLUSION

For the reasons stated above, Nevada Attorneys for Criminal Justice (NACJ) moves for leave to file the attached amicus brief in support of Appellant's requested relief.

Dated this 3rd day of October, 2019.

Respectfully Submitted,
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

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DECLARATION OF COUNSEL

1. My name is Caitlyn L. McAmis and am employed as an attorney with The Law Offices of Kristina Wildeveld.

2. I serve on Nevada Attorneys for Criminal Justice (NACJ)'s Executive Board as Secretary, and I am counsel for *amicus curiae*.

2. I have spoken with Randolph M. Fiedler, attorney for Appellant, Siaose Vanisi, and he consents to the submission of this *amicus* brief.

3. On October 3, 2019, I sent an e-mail to counsel for Respondents, Jennifer Noble, Chief Deputy District Attorney at the Washoe County District Attorney's Office, asking her position on the *amicus* brief.

4. Ms. Noble indicated that it would be premature for the Washoe County District Attorney's Office to take a position on NACJ's participation as *amicus* without first reviewing the instant Motion to decide what response that Office will take.

5. I have filed this motion for leave to file amicus brief for this Court's consideration, as required by NRAP 29(a) and (c), setting forth the unique perspective of the practical experiences, barriers, and impact solo practice and small firms encounter with severely mentally ill clients.

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I declare under penalty of perjury that the factual representations set forth in the foregoing declaration are true and correct.

Dated this 3rd day of October, 2019.

Respectfully Submitted,
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

/s/ Caitlyn L. McAmis

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CERTIFICATE OF SERVICE

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

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Nevada Attorney General

CHRISTOPHER J. HICKS
Washoe County District Attorney

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Federal Public Defender

RANDOLPH M. FIEDLER
Assistant Federal Public Defender

JOANNE L. DIAMOND
Assistant Federal Public Defender

I further certify that on October 3, 2019, I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

NEVADA SUPREME COURT
408 E. Clark St.
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AMICUS BRIEF OF NEVADA ATTORNEYS FOR CRIMINAL JUSTICE (NACJ) IN SUPPORT OF APPELLANT'S APPEAL FROM ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

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NRAP 26.1 DISCLOSURE

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

Amicus, Nevada Attorneys for Criminal Justice (NACJ), is a non-profit organization with no parent corporation and no publicly held company owns ten percent (10%) or more of its stock. The following non-governmental organizations and/or law firms have appeared and/or are expected to appear in this Court:

1. Nevada Attorneys for Criminal Justice (NACJ);
2. The Law Offices of Kristina Wildeveld & Associates;
3. Washoe County Public Defender;

4. Attorneys Marc Picker, Scott Edwards, and Thomas Qualls;

5. Federal Public Defender, District of Nevada.

Respectfully Submitted,
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

/s/ Caitlyn L. McAmis

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I. IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF INTEREST.

Nevada Attorneys for Criminal Justice (NACJ) is a voluntary, statewide, non-profit organization of criminal defense attorneys in the State of Nevada. Our mission is to ensure accused persons receive effective, zealous representation through shared resources, providing information to the legislature, and intra-organizational support. This includes the filing of Amicus Curiae Briefs pertaining to: (1) state and federal constitutional issues; (2) other legal matters with broad applicability to accused persons; and (3) controversies with potential impact to our members' ability to advocate effectively for accused persons. The Board of Directors of NACJ has authorized the undersigned counsel to prepare and submit the following brief because NACJ offers the collective experiences of its members to assist this Honorable Court in deciding important issues, such as those presented in Appellant Vanisi's case.

NACJ has determined that this case presents an issue of significant interest and impact on its members' ability to zealously advocate for individuals accused of crime, and particularly those individuals who are severely mentally ill and subject to life and death consequences. This *Amicus* Brief provides some perspective about the unique challenges presented by severely mentally ill clients to the solo practitioners or small firms who undertake the worthwhile, but ultimately

challenging representation of individuals with significant psychological and/or neurological issues.

NACJ joins Appellant, SIAOSI VANISI, in his request for this Court to recognize him as a person ineligible for the death penalty because the execution of individuals with such severe mental illnesses violates the Nevada State and Federal Constitutional bars against cruel and unusual punishment. NACJ further joins Appellant Vanisi in arguing the merits of reversing and remanding the District Court's Order allowing Mr. Vanisi to waive his evidentiary hearing because the current "safeguards" of competency proceedings and judicial canvasses do nothing to protect the severely mentally ill from their irrational decisions that lead to life or death sentences or their inability to participate meaningfully in the mitigation aspects of their cases.

This *Amicus* Brief is filed in accordance with Nevada Rules of Appellate Procedure 29 and 32. NACJ's authority to file this Brief derives from our contemporaneously filed Motion of Nevada Attorneys for Criminal Justice (NACJ) to File Brief of *Amicus Curiae* in Support of Appellant Vanisi, to which this Brief is attached.

II. ARGUMENT

Article 1, Section 6 of the Nevada Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, *nor shall cruel or unusual*

punishments be inflicted, nor shall witnesses be unreasonably detained." (emphasis added). In the growing progeny of cases recognizing the narrowing categorical eligibility of the worst-of-the worst offenders who may be subject to the death penalty, vulnerable populations such as the cognitively impaired and juveniles are better understood to be a vulnerable population and not qualified to receive capital punishment. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005). Appellant rightly argues that severe mental illness is among these categorically ineligible populations for execution and, more to the point, that it is cruel and unusual punishment to subject the severely mentally ill to capital punishment based on their lack of reliability.

This concept of a lack of reliability of a severely mentally ill client manifests in a number of ways. Indeed, Mr. Vanisi's case is a prime example of the common barriers presented to a solo practitioner or small firm who undertakes representation of an indigent or low-income client, either through appointment or (sometimes reduced) fees.

A. The Challenges Faced by Mr. Vanisi's Solo Practitioner Post-Conviction Counsel Plague Similarly Situated Defense Attorneys Statewide in Nevada.

From a practical standpoint, the solo practitioner or small firm has a comparatively different array of easily accessible resources. Investigators, social workers, paralegal, appropriate support staff, mitigation experts, or regular reliance

on forensic experts with focused fields of expertise are not in-house. A governmental agency such as a public defender's office may have dedicated staff (admittedly understaffed and underfunded nationally), and those offices generally include a dedicated set of accessible, in-house resources, including investigators, sometimes social workers, and mitigation experts.

By contrast, solo attorneys, either court-appointed or individually retained, generally share access to a limited number of resources known to the legal community. When a case involves a higher consequence, the requisite skillset required of an expert or mitigation specialist necessarily goes up. The pool of qualified expert resources grows increasingly narrow, particularly when a solo practitioner must employ members of a Defense Team qualified to participate in the zealous advocacy and effective representation owed to an accused facing capital punishment. These already limited resources, particularly in the rural areas of Nevada, are further complicated in multiple co-defendant cases in which investigators or mitigation experts may work for different attorneys, but become conflicted off of some cases because of their duty to an individual client.

Although less frequent, some multiple co-defendant cases involve multiple *capital* co-defendants, each of whom is entitled to effective representation and a conflict-free defense team.

Initially, a solo practitioner must ensure his or her expert meets a minimum threshold of competence in the applicable field – investigation, mitigation, neurological examination, forensics, et cetera. Assuming that initial hurdle is met, reliance on defense investigators and experts can be further complicated by a client with a typically undiagnosed or misdiagnosed mental illness so severe that the client thwarts and actively sabotages aspects of his or her case. Generally, these clients can present with strange verbal outbursts, will refuse visits from some or all members of their defense team, and will refuse to provide foundational information for an investigator or mitigation expert to expand upon in independent work. The refusal by an individual client to work with his or her defense team is common.

Supreme Court Rule 250 mandates the criteria expected of defense counsel in capital proceedings. In order to become "250 qualified," there are fairly rigorous standards an attorney must meet in order to be appointed to such a case. However, some clients and their families seek to pay private counsel, not all of whom are Rule 250 qualified, to represent their legal interests in capital cases. Rule 250 applies to all publicly appointed counsel defending those accused of capital murder.

Amicus does not argue that defense counsel should in any way be held to a lesser standard of representation, but instead offers this Brief as an insight into the

specific challenges these severely mentally ill clients pose for their own cases in which they are represented by solo attorneys or small firms, particularly in capital cases, where the procedural safeguards within the existing trial court framework is not protecting them and, instead, deprives them of their right to a fair trial. This was the recurring issue in Mr. Vanisi's case, and he is not an isolated example.

1. Severely Mentally Ill Clients Hinder the Solo Practitioner's Already Limited Resources.

Mr. Vanisi's legal history reflected multiple attempts at a psychiatric diagnosis, sometimes by doctors at the jail and prisons, and other times by medical professionals secured by defense counsel. *See* 10AA02109; 10AA02110; 13AA02729; 37AA07934; 37AA07850; 31AA06566; 31AA06575. His psychosis was so pervasive and recurring that it caused his initial post-conviction counsel, both of whom were private attorneys who accepted appointed cases at the time, to withdraw based on the limited resources. 12AA02573. In fact, when post-conviction counsel, Marc Picker, moved to withdraw, he made a record of just how difficult it had been to take Mr. Vanisi's case, to work on Mr. Vanisi's case, and that it had become impossible to continue representing Mr. Vanisi:

> The history of this matter is simple: No one wanted to take the appointment to represent Mr. Vanisi in this case because it promised to be a difficult, lengthy, time-consuming and thankless task. Only after a considerable number of requests did this counsel agree to take on the task. But, as with all things, circumstances change.

> Because this is a death penalty case which requires both the highest priority and the highest level of competence, this work should only be performed by someone who can dedicate the necessary resources and time to such a matter.

12AA02573. Appellant's Opening Brief highlights that both post-conviction counsel, Mr. Picker and Mr. Edwards were solo practitioners, and "[a]s the Nevada Supreme Court has suggested, it would be more appropriate for these death penalty matters to be handled by attorneys within a medium to large firm, where more resources and time can be allocated without overburdening a single practitioner." *Id.*

This is a compelling record made by experienced criminal defense attorneys who regularly accepted appointed cases, but whose individual practices were thwarted by the lack of resources to zealously represent, investigate, and defend someone with such a severe mental illness. Mr. Vanisi had a record of refusing to see members of his defense team, declining to talk about any facts relevant to mitigation, denying that he even had a mental illness, and fixating on a theory of defense that necessarily relied on a delusion of his mind's making. Despite a solo attorney's best efforts, best hired investigators or experts, or best intentions, a severely mentally ill client retains the unencumbered right to make important decisions for his or her case, regardless of whether the end result is an unreliable conviction. With a smaller sized defense team, attorneys can lack enough team

members to reign in a client's self-destructive tendencies or gain the lack of trust of a mentally ill client.

Mr. Vanisi's case is not the first case of its kind warranting a review of a death sentence based on the complicated relationship between a severely mentally ill defendant and his solo attorney. Consider this Court's published decision in *Watson v. State*, 130 Nev. 764, 335 P.3d 157 (2014) and its procedural history through post-conviction and post-conviction appeal. In the published opinion in *Watson*, this Court acknowledged a factual history presented in mitigation that Mr. Watson was admitted to psychiatric hospitals beginning at the age of eighteen (18) years old and that he had been deemed insane at a hospital in 1958. *Watson*, 130 Nev. at 773, 335 P.3d at 164. Mr. Watson's diagnoses included sociopathic personality disorder and schizophrenia. *Id.* Mr. Watson had subsequent psychiatric hospitalizations continuing through 1960. *Id.* Certainly, sociopathic personality disorder and schizophrenia would seem to qualify as severely mentally ill diagnoses.

Like Mr. Vanisi, Mr. Watson was facing the death penalty. Both individuals received death sentences following jury trials. These individuals had the common experience of solo attorneys representing them at some stage of their proceedings. Mr. Watson's trial counsel, Patrick McDonald, was a solo attorney. Mr. Watson

had gone through a number of attorneys by the time of trial, and his motion to continue the trial in order to collect additional hospital records for mitigation evidence was denied. This Court upheld that denial because, "Watson could have revealed the information at issue to counsel had he chosen to do so." Like Mr. Vanisi's case, Mr. Watson had a history of a severe mental illness, Mr. Watson refused to disclose mitigation evidence to his attorney, and Mr. Watson was subject to competency evaluations prior to trial. The *Watson* decision acknowledged, "While Watson's decision to forgo the presentation of mitigation evidence may seem irrational to some, that decision was [Watson's] alone." *Watson*, 130 Nev. at 789, 335 P.3d at 175, quoting *Detrich v. Ryan*, 677 F.3d 958, 977 (9th Cir. 2012), *overruled on other grounds*.

Mr. Watson's direct appeal was not successful[1], but that case has returned to the Nevada Supreme Court on post-conviction appeal by the State of Nevada. *See* Docket No. 78780, *State vs. Watson, III (John)(Death Penalty-PC)*. Mr. Watson pursued state habeas relief, in which he again went through more than one (1)

[1] On direct appeal, Mr. Watson unsuccessfully argued that his penalty hearing was unfair based on the improper language in the jury instructions for the penalty hearing related to mitigation evidence. It is worth noting that Mr. Watson called no witnesses at the penalty hearing, he allocuted and specifically requested the death penalty because he was Muslim, and the jury found zero (0) mitigators in the case. *Watson,* 130 Nev. at 773-786; 335 P.3d at 165-173.

appointed counsel, and was appointed Mr. Jamie Resch, who successfully argued to vacate Mr. Watson's death sentence. Ritter, Ken, *New Trial for Nevada Death Row Inmate Will Wait Appeal*, U.S. News, June 13, 2019, *available at* https://www.usnews.com/news/best-states/nevada/articles/2019-06-13/new-trial-for-nevada-death-row-inmate-will-await-appeal. Following an unrestricted evidentiary hearing in district court, Mr. Watson's death sentence was vacated because he established that trial counsel conceded guilt at trial over Mr. Watson's objection, in violation of *McCoy v. Louisiana*, 584 U.S. ___, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018). The State appealed the grant of Mr. Watson's state habeas relief, and now this Honorable Court will revisit a case riddled with a history of a severely mentally ill accused and the problems he has making rational decisions with his attorney.

Death penalty cases are inherently complex, but the Watson and Vanisi cases highlight the unique challenges of representing a severely mentally ill individual accused whose irrational choices result in unreliable verdicts. More importantly, the trial court records of these two reflects that they share unexplored severe mental illnesses that were not properly fleshed out in the district courts, and that lack of evidence means that these individuals cannot be the "worst of the worst" offenders who are appropriate for execution.

2. Despite the Law Allowing for *Widdis* Fees, Solo Practitioners are Forced to Litigate to Secure Adequate Funding for Investigators and Experts.

Pursuant to *Widdis v. Second Judicial Dist. Court of State In and For County of Washoe*, 114 Nev. 1224, 968 P.2nd 1165 (1998), "a criminal defendant who has retained private counsel is nonetheless entitled to reasonable defense services at public expense based on the defendant's showing of indigency and need for the services." When requesting that public funds be used for defense services, the burden is on the Defendant to demonstrate both his indigence and a reasonable need for the services in question. *Widdis*, at 1229, 968 P.2d at 1168.

Additionally, "criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Harrington v. Richter*, 562 U.S. 86, 104, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011). The United States Supreme Court has deemed defense counsel to be ineffective under a *Strickland* analysis for the failure to secure the appropriate expert. *See Hinton v. Alabama*, 571 U.S. ___, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014)(Trial counsel was ineffective for failing to request funds to consult a rebuttal expert for possible testimony); *citing Strickland v. Washington*, 466 U.S. 68 (1984); *see also Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984)(Nevada Supreme Court adopted the *Strickland* test).

Solo practitioners and small offices further contend with the barriers to providing effective assistance of counsel when so many trial courts oppose even modest requests for state funds to be used in a client's defense. *Amicus* offers for this Court's consideration another post-conviction appeal pending before the Nevada Supreme Court in *Richardson (Thomas) v. State*, Docket No. 77176. In that case, Appellant is a death row inmate who was represented by the Clark County Special Public Defender's Office for trial, and who was subsequently appointed a solo practitioner attorney, Mr. Dayvid Figler, for state habeas relief. In the district court, post-conviction counsel moved for funds at the State's expense to hire a crime scene reconstruction expert to rebut the State's limited circumstantial evidence tying Mr. Richardson to the offense. Despite ample case law in support of a focused, reasonable expert witness funding request on behalf of an incarcerated habeas defendant on death row, the district court denied the request and restricted the scope of that habeas petitioner's evidentiary hearing. *See Richardson (Thomas) v. State*, Appellant's Opening Brief in Docket No. 77176 filed on May 23, 2019, pp. 21-22; 25-27; 65-67.

Sadly, Mr. Richardson's case is not an isolated instance of the trial court's arbitrary and capricious application of denials of *Widdis*-type fee requests from private counsel whose clients qualify as indigent. Post-conviction counsel was

actually appointed to Mr. Richardson. There appears to be a troubling history emerging among some of the district courts of a bias against private counsel's *Widdis* requests.

Recently, private attorney, Mr. Gary Modafferi, sought and received emergency Writ intervention with this Honorable Court after the Clark County District Court denied his indigent client's motion for *Widdis* funds to secure an investigator and expert to testify on psychological factors that can result in a child's fabrication of criminal allegations against a parent. *Brown v. Eighth Judicial Dist. Ct. in and for Cty. of Clark,* 404 P.3d 407, 2017 WL 4838427 (unpublished disposition). Although that indigent individual was not subject to a death penalty prosecution (non-homicide offense), he was nevertheless subject to a possible sentence of life imprisonment, which is a very serious potential consequence. The fact that the Nevada Supreme Court had to reverse and remand that matter in order for the district court to comply with a proper *Widdis* inquiry is a problem and, regrettably, an unnecessary problem that solo attorneys face all too frequently.

The undersigned counsel has also participated in a successful emergency Writ intervention with this Honorable Court after another judge in the Clark County District Court denied her small firm's indigent client's request for *Widdis*

funds in order to secure an expert witness. *See Lopez (Jonathan) v. Eighth Judicial Dist. Ct. (State),* Docket No. 62754.

While neither of these defendants shared the same extensive history as Mr. Vanisi with respect to him being severely mentally ill, these defendants shared very serious potential sentences and each had defenses that relied heavily on expert testimony. In a case like Mr. Vanisi's, represented by solo attorney post-conviction counsel, *Widdis* funding requests are dependent on a cooperating client disclosing pertinent information to participate in his or her defense and mitigation preparation. This Honorable Court's continued amenability to emergency writ considerations on *Widdis* fees is the only procedural safeguard these indigent clients have.

Mr. Vanisi's record includes attempts by his attorneys or the prison system to medicate him in order to facilitate his participation with his defense team. 24AA05000. This fact brought to mind cases in which the undersigned counsel has participated in which her small firm had been denied state funding for medical procedures or medications that would rule out neurological disorders, brain tumors, or other conditions that have rendered her clients incompetent in their own cases before the Eighth Judicial District Court. The accused may have a number of medical conditions that render them permanently or temporarily severely mentally

ill, but the system lacks the funding by the State or interest by some members in the judiciary to be able to make a thorough record about why certain indigent clients are incompetent or should not be subjected to draconian sentences when they have no cognitive ability to appreciate the purported penological justification behind the sentence. Some of those cases were never appealed because the client came to a negotiation, but the ultimate resolution in no way minimizes some of the unique barriers solo attorneys and small firms have in defending their severely cognitively impaired clients. These clients must be seen by experts, and some of these experts refuse to work with incarcerated and indigent individuals. Money is a powerful motivator, however, money is not something the severely mentally ill tend to have as a general rule.

3. A Solo Practitioner's Ethical Duty to Zealously Advocate for His or Her Client Sometimes Calls on Counsel to Supplement Other Roles, Such as Social Worker or Emotional Supporter That Can Degrade a Client's Trust and Honest Disclosure with the Defense Team.

Mr. Vanisi's trial counsel eventually asked for an evaluation so that prescription medication would be given to Mr. Vanisi in custody. 24AA05000. The task of having the difficult conversations with a severely mentally ill client who adamantly denies any illness or whose delusions are so severe that he or she cannot appreciate the fact of a mental illness leaves any defense team in a difficult position. That difficult position is made worse when the defense team is small or

in a rural location, where a misstep in communication means that the severely mentally ill client moves to represent himself or herself, shuts down honest communication with counsel, investigators, or experts, or when a client completely rejects visits with members of the defense team. Each of these consequences happened in Mr. Vanisi's case because he is cognitively impaired to the point where he cannot appreciate the severity of his mental illness.

When a solo attorney or small firm simply has to work multiple roles, there is a disadvantage to representation. The attorney is splitting his or her time between overseeing a proper investigation and mitigation, while simultaneously acting as a social worker, surrogate parent, or emotional support system to encourage the client to understand the magnitude of a capital case to justify why the client should be amenable to open up to a stranger about sensitive and traumatic information. Absent access to a larger team, the many hats a defense attorney must wear can confuse an already severely mentally impaired client. This can be extremely detrimental to severely mentally ill clients who are predisposed to paranoia, anxiety, and trust issues.

NACJ as an organization, including its solo practitioners and small firms, has a vested interest in seeing that the severely mentally ill are afforded a fair trial, a fair appeal process, and a thorough post-conviction review process in capital

litigation. NACJ is further interested in ensuring that the accused receive effective representation, and that the effective representation is not thwarted by trial court practices that fail to consider the scientific research that rejects the suitability of capital punishment for defendants who are severely mentally impaired or infants. *See Atkins v. Virginia,* 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

Additionally, NACJ has an organizational interest in advocating for competency standards and evaluations that protect the severely mentally ill from their most unreliable and destructive impulses on their legal cases. This interest includes a re-evaluation of the trial court's competency standards.

B. The Current Competency Standards Do Not Allow for a Thorough, Medically Significant Record to be Made for the Severely Mentally Ill.

A discussion of a severely mentally ill individual accused of a crime necessarily overlaps with competency evaluations and standards in the trial court.

The Ninth Circuit Court of Appeals has recently verified that it is a violation of a defendant's due process rights to be forced to proceed with a jury trial when he or she has demonstrable issues raising concerns about competency. *Anderson v. Gipson,* 902 F.3d 1126 (9th Cir. 2018); *see also Drope v. Missouri*, 420 U.S. 162, 171 (1975). If a defendant's behavior during trial raises a bona fide question of competency, it is incumbent upon the trial court to *sua sponte* suspend the trial and

order a hearing into the defendant's competency. *Id., citing Pate v. Robinson*, 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). It is not sufficient that standby counsel was appointed. *See id.*

NRS 178.460 provides:

> 1. If requested by the district attorney or counsel for the defendant within 10 days after the report by the Administrator or the Administrator's designee is sent to them, the judge shall hold a hearing within 10 days after the request at which the district attorney and the defense counsel may examine the members of the treatment team on their report.
>
> 2. If the judge orders the appointment of a licensed psychiatrist or psychologist who is not employed by the Division to perform an additional evaluation and report concerning the defendant, the cost of the additional evaluation and report is a charge against the county.
>
> 3. Within 10 days after the hearing or 10 days after the report is sent, if no hearing is requested, the judge shall make and enter a finding of competence or incompetence, and if the judge finds the defendant to be incompetent:
>
> (a) Whether there is substantial probability that the defendant can receive treatment to competency and will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future; and
>
> (b) Whether the defendant is at that time a danger to himself or herself or to society.
>
> 4. If the judge finds the defendant:
>
> (a) Competent, the judge shall, within 10 days, forward the finding to the prosecuting attorney and counsel for the defendant. Upon receipt thereof, the prosecuting attorney shall notify the sheriff of the county or chief of police of the city that the defendant has been found competent and prearrange with the facility for the return of the defendant to that county or city for trial

upon the offense there charged or the pronouncement of judgment, as the case may be.

(b) Incompetent, but there is a substantial probability that the defendant can receive treatment to competency and will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future and finds that the defendant is dangerous to himself or herself or to society, the judge shall recommit the defendant and may order the involuntary administration of medication for the purpose of treatment to competency.

(c) Incompetent, but there is a substantial probability that the defendant can receive treatment to competency and will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future and finds that the defendant is not dangerous to himself or herself or to society, the judge shall order that the defendant remain an outpatient or be transferred to the status of an outpatient under the provisions of NRS 178.425.

(d) Incompetent, with no substantial probability of attaining competency in the foreseeable future, the judge shall order the defendant released from custody or, if the defendant is an outpatient, released from any obligations as an outpatient if, within 10 judicial days, the prosecuting attorney has not filed a motion pursuant to NRS 178.461 or if, within 10 judicial days, a petition is not filed to commit the person pursuant to NRS 433A.200. After the initial 10 judicial days, the person may remain an outpatient or in custody under the provisions of this chapter only as long as the motion or petition is pending unless the person is committed to the custody of the Administrator pursuant to NRS 178.461 or involuntarily committed pursuant to chapter 433A of NRS.

5. Except as otherwise provided in subsections 4 and 7 of NRS 178.461, no person who is committed under the provisions of this chapter may be held in the custody of the Administrator or the Administrator's designee longer than the longest period of incarceration provided for the crime or crimes with which the person is charged or 10 years, whichever period is shorter. Upon expiration of the applicable period provided in this section, subsection 4 or 7 of NRS 178.461 or subsection 4 of NRS 178.463, the person must be returned to the committing court for a

> determination as to whether or not involuntary commitment pursuant to chapter 433A of NRS is required.

Competency hearings held pursuant to NRS 178.460 have the impact of not being able to appropriately weigh the objective incompetence of the severely mentally ill, whose conduct so painfully and obviously evinces no knowing or meaningful participation in a case.

In Appellant's case, he was described by counsel, the prosecutors, the court, the corrections officers, and even his own family as exhibiting ups and downs emotionally, standing naked in his jail cell, talking incoherently to himself, creating alternate names and identities out of delusional thoughts, physically presenting through voice tone, demeanor, and clothing as different people all reflect such severe mental illness. This is the type of behavior that triggers the referral of an accused for a competency evaluation. The fact that there were times Mr. Vanisi was not even referred for a competency evaluation during the trial court proceedings under these scenarios is mind boggling, but the fact that Mr. Vanisi was deemed competent at other times while cycling through this behavior is extremely concerning. This tends to cast doubt on the propriety of the current competency proceedings used in the State of Nevada, in which defendants can parrot back certain information and be deemed competent.

It cannot be rationally argued that *Gregg v. Georgia*, 428 U.S. 153 (1976) contemplated capital punishment of individuals so severely mentally ill that they are not connected to reality, severely mentally and emotionally impaired, yet are not cognitively impaired within the parameters of *Atkins,* but somehow pass competency evaluations. *Amicus* implores this Honorable Court to reconsider the general importance of emergency writ challenges to competency determinations where the facts of the accused's behavior is so bizarre, like in Mr. Vanisi's case, that extraordinary relief is warranted. Legal research into decisions and challenges to competency decisions pursuant to NRS 178.460 yielded minimal results. Private counsel, Wright Stanish & Winckler, unsuccessfully sought a writ of mandamus to challenge a finding of competency for their client, Mr. Desai. That unpublished denial, for ease of reference only and not for any persuasive or other authority, can be found at *Desai v. Eighth Judicial Dist. Ct. in and for the Cty. of Clark*, 128 Nev. 892 (2012). That unpublished Order Denying Petition does not include a factual review of the district court's analysis.

Mr. Vanisi's case highlights the need for competency determinations to be required to be part of a thorough record. This Honorable Court has the ability to order this case reversed and remanded for such a hearing. Mr. Vanisi, over the advice and objection of counsel, waived the evidentiary hearing on his post-

conviction habeas petition. This conduct was so objectively irrational that the Court should have been obligated to conduct an evidentiary hearing to make a complete record on the underlying merits of Mr. Vanisi's claims.

Mr. Vanisi's case presents a factual scenario outlining the ineffective nature of competency evaluations and the reasons why the standards for these evaluations must be re-evaluated. Absent a meaningful record, Mr. Vanisi's conviction and death sentence is inherently unreliable as a reflection of who the most depraved, worst of the worst offenders are in the State of Nevada whose conduct qualifies for execution under the law.

C. Severely Mentally Ill Defendants Lack Sufficient Procedural Safeguards From Their Actions to Knowingly or Unintentionally Preclude Attorneys from Providing Zealous Representation and Effective Assistance of Counsel.

Although Nevada law does not mandate the appointment of a guardian ad litem in proceedings of a defendant under a disability, the trial court has the power to do so. Some courts have imposed an obligation on trial courts to determine whether an individual is incompetent and require the appointment of a guardian ad litem where an incompetent person's legal interests are affected. *In re Alexander V.*, 223 Conn. 557, 572, 613 A.2d 780, 788 (1992); *In re Serafin*, 272 Ill. App. 3d 239, 243, 208 Ill. Dec. 612, 615, 649 N.E.2d 972, 975 (1995). "The appointment of an appropriate guardian ad litem might very well, in some circumstances, lead to

full compliance with all due process protections for his ward." *In re Alexander V.*, 223 Conn. 557, 572, 613 A.2d 780, 788 (1992) (Borden, J., concurring). The Court suggested that such appointment could be together with or separate from the individual's attorney to protect the individual from his own incompetence at the time. *Id*.

When a substantial question exists regarding the mental competency of a party litigant, the court must, before appointing or continuing the appointment of a guardian ad litem, determine whether the party litigant is competent to proceed in the matter. *In re Doe*, 108 Haw. 144, 154, 118 P.3d 54, 65 (2005). The decision by a court whether to appoint a next friend or guardian ad litem rests with the sound discretion of the court and will not be disturbed unless there has been an abuse of its authority. *Rubin v. Smith*, 882 F.Supp. 212, 215 (1995); *In Re Doe*, 108 Haw. 144, 118 P.3d 54 (2005). Significantly, a court must make a specific finding that the interests of the incompetent person are adequately protected in the event it does not make such appointment. *U.S. v. 30.64 Acres of land, More or Less, Situated in Klickitat County, State of Wash.*, 795 F.2d 796, 805, 5 Fed. R. Serv. 3d 415 (9th Cir. 1986).

Procedural safeguards *must* exist to protect mentally vulnerable litigants and to ensure their meaningful participation in a case. The *Anderson* case emphasized

the importance of the trial court's duty to conduct competency determinations where the facts support an inquiry, and that ordering standby counsel is not enough of a safeguard. *See Anderson*, 902 F.3d 1126. The severely mentally ill facing capital punishment do not have enough procedural safeguards to verify that they are competent, meaningfully engaged in their defense, or cognitively able to make the ultimate decisions regarding their desire defense.

Understanding that counsel for Mr. Vanisi did not request a guardian ad litem be appointed to aid in his representation, this Honorable Court has the ability to issue an Order establishing procedural safeguards of this kind for those defendants who are so severely mentally ill that they are merely contributing to their own death sentences. Supreme Court Rule 250 is a safeguard established by this Court, but as the *Watson* case highlighted, it does not protect all intended defendants. Rule 250 applies to all appointed counsel, and the *Watson* case highlighted some of the particular issues of solo practitioners whose resources may be hindered by not having a full-time, in-house defense team capable of devoting staff, time, and resources to evidence collection.

It should be extremely troubling to this Honorable Court that Mr. Vanisi's severe mental illness has precluded his attorneys from obtaining and presenting mitigation evidence in order to make a record of the depth of his mental illness,

despite the repeated requests by Mr. Vanisi's attorneys for competency evaluations, medication management, and general record making of his severe mental illness since the inception of this case. This death sentence is, therefore, inherently unreliable under these circumstances.

III. CONCLUSION

NACJ joins Mr. Vanisi in his request to vacate his conviction and death sentence because he is a severely mentally ill man, and executing him will serve no legitimate penological purpose under these circumstances. In fact, Mr. Vanisi is so cognitively impaired that he actively worked against his counsel, both solo attorneys and government-appointed attorneys, who sought to make records of his mental illness for mitigation.

The growing body of scientific research reflects that severely mentally ill individuals are akin to the populations protected by *Atkins* and *Roper*, meaning that the severely mentally disturbed should also be deemed categorically less mentally culpable for their crimes. The severely mentally ill – the schizophrenics, those experiencing paranoid delusion or hallucinations– are all unable to appreciate the supposed penological justification behind a death sentence. The severely mentally ill should, thus, be protected from their own disastrous impulses to work against their attorneys, which all but secures a death sentence for them. Instead of continuing to allow these individuals to be subjected to prosecution for capital

punishment, the Nevada Supreme Court should adopt the severely mentally ill as an ineligible class of death penalty-eligible offenders.

Alternatively, *Amicus* respectfully implores this Honorable Court to consider alternative procedural safeguards to the current competency evaluation procedures in Nevada. They are ineffectual. Ineffectual practices lead to wasted state and county funding, costly appellate and post-conviction litigation, and retrials. A change in the law exempting severely mentally ill individuals from execution or, at a minimum, adopting adequate procedural safeguards is desperately needed in Nevada, as highlighted by Mr. Vanisi's case. Solo attorneys and small firms are among the members of NACJ who litigate these very issues on a daily basis throughout the State and who file emergency writs, appeals, and habeas petitions demanding fairness for the severely mentally ill.

For all of these reasons, NACJ joins Mr. Vanisi's request that the Nevada Supreme Court find that there is a fatal unreliability introduced into capital proceedings by the accused who suffer from severe mental illness, and that the

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Eighth Amendment to the U.S. Constitution and Article 1, Section 6 of the Nevada Constitution both exempt Mr. Vanisi from the death penalty.

DATED this 3rd day of October, 2019.

Respectfully Submitted,
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

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1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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3. Finally. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be

supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully Submitted,
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I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 3, 2019. Electronic Service of the foregoing:

***AMICUS* BRIEF OF NEVADA ATTORNEYS FOR CRIMINAL JUSTICE (NACJ) IN SUPPORT OF APPELLANT'S APPEAL FROM ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

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