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
The Second Judicial District, Washoe County
The Honorable Connie J. Steinheimer, District Judge

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 29(c) of the Nevada Rules of Appellate Procedure, the American Liberties Union of Nevada Foundation (ACLUNV) and the American Civil Liberties Union Foundation, as *amici curiae*, respectfully move for leave to file the accompanying brief (attached as Exhibit A) in support of Appellant, Siaosi Vanisi.

STATEMENT OF INTEREST

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. Within the ACLU, the Capital Punishment Project upholds those rights in the context of death penalty litigation, systematic reform, and public education and advocacy, while the Disability Rights Project advocates for the rights of individuals with both physical and mental disabilities. This work includes ensuring that people with severe mental illness are not unjustly executed.

The American Civil Liberties Union of Nevada Foundation (ACLUNV) is the ACLU's state affiliate with over 7,000 members dedicated to protecting and defending the civil rights and civil liberties granted to Nevadans by both the

Nevada and United States Constitutions. The ACLUNV's work encompasses protecting the constitutional rights of those subject to a sentence of death.

REASONS WHY BRIEF IS DESIRABLE

This case requires the Court to consider the protections the Nevada Constitution in particular provides against government overreach in state executions. The proposed *amicus curiae* brief would provide this Court with significant analysis and insight into whether the Nevada Constitution would bar the proposed execution of Mr. Vanisi, a man with severe mental illness. The brief provides textual and historical analysis of the Nevada Constitution's "cruel or unusual" punishment provision, as well as an in-depth explanation of the difference between that protection and the lesser version the Eighth Amendment affords, the ways in which the Nevada courts have read other provisions of the Nevada Constitution to provide broader rights than the Federal Constitution, and how other state courts with similarly worded provisions have analyzed their own constitutions in death-penalty matters.

Additionally, this brief provides a thorough explanation of why, under the broader protection of the Nevada Constitution, people with severe mental illness should be categorically exempt from execution. This explanation finds its roots in: 1) the rationale of the United States Supreme Court in creating a categorical bar on

the death penalty for people with intellectual disabilities and juveniles; 2) current legal protections for those with severe mental illness (such as the Not Guilty by Reason of Insanity defense and standards for competency to be executed), which though significant prove insufficient to protect this vulnerable population; and 3) evidence of evolving standards of decency that have resulted both in a dwindling overall number of executions of in Nevada and in the United States and in effective consensus that those with severe mental illness should not be executed.

Though counsel for Respondent has not consented to the filing of the accompanying brief, this brief should aid the Court in deciding the weighty issue before it.

DATED: October 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

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The Honorable Connie J. Steinheimer, District Judge

AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF REVERSAL

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Statement of Identity, Interest, and Authority of *Amici*

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. Within the ACLU, the Capital Punishment Project upholds those rights in the context of death penalty litigation, systematic reform, and public education and advocacy, while the Disability Rights Project advocates for the rights of individuals with both physical and mental disabilities. This work includes ensuring that people with severe mental illness are not unjustly executed.

The American Civil Liberties Union of Nevada Foundation (ACLUNV) is the ACLU's state affiliate with over 7,000 members dedicated to protecting and defending the civil rights and civil liberties granted to Nevadans by both the Nevada and United States Constitutions. The ACLUNV's work encompasses protecting the constitutional rights of those subject to a sentence of death.

Respondent has not consented to the filing of this brief. Thus, *amici* filed a motion seeking leave of the court to file this brief per NRAP 29 (a).

Disclosure Statement Pursuant to NRAP 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici have no parent corporations and no publicly held company owns 10% or more of its stock.

The following law firms have appeared and/or are expected to appear in this court:

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Statement of the Case and Introduction

Despite common misconceptions, it is rare for people with severe mental illness to commit violent crimes, and far more likely that they are victims of crime rather than perpetrators. But when a member of this group does commit a death eligible offense, more often than not, this behavior can be traced directly to symptoms of severe mental illness. Such symptoms, as the facts of Mr. Vanisi's case plainly demonstrate, can also impair the trial and appellate proceedings, making the reliability in capital sentencing required under the Nevada Constitution impossible to accomplish. Indeed, while severe mental illness is inherently mitigating, those with such disorders or diseases face increased risk of execution *because of* their disability. As a prophylactic measure to ensure a person with serious mental illness is never unjustly executed, this Court should establish a categorical exemption from execution for this population.

Amici join Appellant, Siaosi Vanisi, in showing that, in addition to the protection the Eighth Amendment affords him, article 1, section 6 of the Nevada Constitution provides unique protection against cruel, unusual, unreliable, and unjust executions. This protection provides an alternative route to the same ruling that Mr. Vanisi may not be executed. At a minimum, this Court should hold that the execution of those with severe mental illness would be *either* cruel or unusual and, therefore impermissible. This brief begins by showing that the "cruel or unusual"

provision of the Nevada Constitution, article 1, section 6, provides broader protection than its Eighth Amendment counterpart. This conclusion is compelled by the plain reading of the text, precedent from this Court interpreting similar language, persuasive precedent from other state courts interpreting identical provisions in their state constitutions, and a historical analysis of the provision.

The second part of this brief demonstrates that the broader protection of the Nevada Constitution in turn mandates a categorical bar from execution for those with severe mental illness. This position finds support in the U.S. Supreme Court's categorical bar against execution for juveniles and those with intellectual disabilities, the current treatment of those with the most severe form of mental illness under the law, and evidence of evolving standards of human decency. While this brief illustrates that executing people with severe mental illness is both cruel and unusual, this Court need only find that such executions are either cruel or unusual to justify the requested categorical bar under the broader protections of the Nevada Constitution. Therefore, this Court should grant Mr. Vanisi's requested relief.

Argument

I. ARTICLE 1, SECTION 6 OF THE NEVADA CONSTITUTION PROVIDES GREATER PROTECTION THAN THE EIGHTH AMENDMENT.

The rights provided in Nevada's Constitution were intended to be independent of and supplemental to those provided by the Federal Constitution. As such, this

Court has a duty to interpret and give meaning to state constitutional provisions. Applying the article 1, section 6 Cruel or Unusual Clause, this Court should find, through both textual and historical lenses, that execution of those with severe mental illness merits stricter scrutiny under the Nevada Constitution than under the Eighth Amendment. Specifically, section 6 provides broader protection than the Eighth Amendment because it bars cruel punishments and bars unusual punishments, rather than barring only punishments that are both cruel and unusual.

A. This Court has an independent obligation to assess the meaning of article 1, section 6 of the Nevada Constitution (barring cruel or unusual punishment).

This Court has a unique and independent responsibility to interpret and apply the Nevada Constitution to Mr. Vanisi's state constitutional claim. As this Court has recognized:

> [F]ederal law, whether based on statute or constitution, establishes a *minimum* national standard for the exercise of individual rights and does not inhibit state governments from affording its citizens greater protections for such rights.

S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 414 (2001) (emphasis added). Although state constitutional declarations of rights typically overlap with much of what is found in the first ten amendments to the Federal Constitution, these state provisions provide individual citizens with protections vis-à-vis their government separate and apart from those provided in the Federal Constitution. It is a touchstone principle in our federalist system that wherever state and federal constitutional

protections diverge, the Federal Constitution always operates as a floor while state constitutions may offer broader protection. Just as the federal courts act as the final authority on issues of federal law, state courts must ultimately decide all issues of state law, particularly state constitutional law. Accordingly, state courts possess not only the freedom but the obligation to develop and "nurtur[e] the jurisprudence of state constitutional rights which it is their exclusive province to expound." *Delaware v. Van Arsdall*, 475 U.S. 673, 707 (1986) (Stevens, J., dissenting). *See generally,* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford University Press 2018) (urging state supreme courts to assert independence in interpreting state constitutional provisions).

The Alaska Supreme Court, interpreting Alaska's constitution, offers equally apt guidance here:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, *and we are under a duty,* to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (emphasis added). This duty is invoked each time a petitioner raises a state constitutional claim. *See State v. Perry*, 610 So. 2d 746, 751 (La. 1992) ("Because of our oaths to support the constitution and laws of our state as faithfully and diligently as those of the federal government, … we are obliged to independently interpret and apply our state

constitution in each case."). "When a state court neglects its duty to evaluate and apply its state constitution, it deprives the people of their 'double security,'" intended by the founders in establishing a federalist system. *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash. 2d 230, 238 (1981) (quoting The Federalist No. 51, at 339 (Modern Library ed. 1937)).

Over the last three decades, state courts have begun to exercise their duty to interpret and apply their state constitutions independent of the Federal Constitution with much greater frequency. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 168 (Ohio 1993) (joining the "noticeable trend … among state courts," which are "increasingly relying on their constitutions when examining personal rights and liberties"). Additionally, such analysis has often produced a finding that state constitutional provisions are more protective than their federal counterparts. *See Davenport v. Garcia*, 834 S.W.2d 4, 12 n.21 (Tex. 1992) (pointing to approximately 600 published opinions over the prior two decades in which state courts across the country "relied on state constitutional grounds to provide protections broader than federally interpreted guarantees under the United States Constitution").

This Court, too, has repeatedly discharged its duty to independently interpret and apply this state's constitution and "expand the individual rights of [its] citizens under state law beyond those provided under the Federal Constitution." *State v. Bayard*, 119 Nev. 241, 246 (2003). For instance, in *Bayard*, this Court declined to

follow the Fourth Amendment precedent set out by the U.S. Supreme Court in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and instead relied on article 1, section 18 of the Nevada Constitution to adopt a stricter standard for when a police officer may arrest a person suspected of a mere traffic offense. *Bayard*, 119 Nev. at 246-7. While the Fourth Amendment only requires probable cause that the suspect has committed the offense, *Id*. at 244 (citing *Atwater*, 532 U.S. at 354), the Nevada test requires this probable cause in addition to "circumstances that require immediate arrest." *Id*. at 247 (emphasis added). Thus, the Nevada Constitution provides greater protection from this particular government intrusion.

This Court has also found broader protections in the Nevada Constitution to correct prosecutorial misconduct. *See e.g.*, *Thomas v. Eighth Judicial Dist. Court* , 402 P.3d 619, 626 (Nev. 2017) (declining to follow, on state constitutional grounds, *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982), and instead holding that the double-jeopardy "protections of Article 1, Section 8 of the Nevada Constitution also attach … when a prosecutor intentionally proceeds in a course of egregious and improper conduct that causes prejudice to the defendant that cannot be cured by means short of a mistrial"); *Roberts v. State*, 110 Nev. 1121, 1131 (1994) (declining to follow, on state constitutional grounds, *United States v. Bagley*, 473 U.S. 667, 674 (1985), "instead constru[ing] the due process clause in the Nevada Constitution, *see* Nev. Const. art. 1, § 8, to require a standard more favorable to the accused" when a

prosecutor suppresses exculpatory evidence), *overruled on other grounds Foster v. State*, 116 Nev. 1088 (Nev. 2000).

Restrictions on governmental takings provide yet another example of this Court's refusal to conform to the lesser protections of the Federal Constitution to find fundamental rights and privileges within the intention and spirit of Nevada's constitutional language. In *McCarran Int'l Airport v. Sisolak*, for example, this Court considered the implications of aircrafts flying at certain altitudes over landowners' properties while taking off or landing at public airports. 122 Nev. 645 (2006). In interpreting Nevada's Constitution, this Court relied on the textual differences as evidence that, unlike the drafters of the Fifth Amendment, "[t]he drafters of our Constitution imposed a requirement that just compensation be secured *prior* to a taking." *Id*. at 670 (emphasis added). In doing so, this Court again found the protections of the Nevada Constitution more expansive than those of the Federal Constitution.

This history reflects a repeated recognition that the Nevada Constitution, written to address the concerns of Nevada citizens and tailored to Nevada's unique regional location, is a source of protection for individual rights that is independent of and supplemental to the protections provided by the Federal Constitution. While the searches and seizures, prosecutorial misconduct, and governmental takings at issue in the above cases are significant and require careful monitoring by state courts,

in no context is the need for checking government action more crucial than when the State seeks to end human life as a criminal punishment. Both the structure of our federalist system and the dictates of our state constitution compel this Court to exercise primary oversight over Nevada's capital punishment system, including as it is applied to those with severe mental illness.

Notably, numerous sister states, many with state constitutional language identical to that of Nevada's, have not hesitated to apply their state constitutions in a more protective manner than the Eighth Amendment in the context of death penalty cases. Although the result has sometimes invalidated capital punishment systems altogether,[1] the vast majority of cases come from states that continue to allow executions but restrict the government from acting in cruel or unusual ways that are permitted under federal Eighth Amendment caselaw. For example, when state legislatures have adopted execution methods that violate state constitutional bans on

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[1] *See e.g.*, *State v. Gregory*, 192 Wash. 2d 1, 19 (2018) ("[W]e strike down Washington's death penalty as unconstitutional under article 1, section 14."); *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (finding "that the death penalty may no longer be exacted in California consistently with article 1, section 6, of our Constitution"), *superseded by*, Cal. Const., art. I, § 27; *State v. Santiago*, 122 A.3d 1, 73 (Conn. 2015) ("We therefore conclude that, following the enactment of P.A. 12-5, capital punishment also violates article first, § § 8 and 9, of the Connecticut constitution because it no longer serves any legitimate penological purpose."); *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (finding "the death penalty is unconstitutionally cruel under art. 26 of the Declaration of Rights").

cruel and unusual punishment, state high courts have unapologetically intervened to bar such executions by applying their state constitutions. *See e.g.*, *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (finding that "death by electrocution as provided in § 29-2532 violates the prohibition against cruel and unusual punishment in Neb. Const. art. I, § 9," despite previous assertions by the U.S. Supreme Court noting that death by electrocution can be carried out constitutionally); *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001) ("[W]e hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment in Art. 1, Sec. 1, Par. XVII of the Georgia Constitution.").

Similarly, state courts have applied state constitutional provisions to protect the rights of incompetent prisoners whom the state has sought to forcibly medicate to restore their competence for execution. *See Perry*, 610 So.2d at 762 (finding that Louisiana's prohibition on cruel or unusual punishment "affords no less, and in some respects more, protection than that available to individuals under the Cruel and Unusual Punishments Clause of the Eighth Amendment"); *Singleton v. State*, 437 S.E.2d 53, 88 (S.C. 1993) (finding that while the U.S Supreme Court decisions establish the federal constitutional analysis required in forced medication cases, "[t]hey do not, however, answer the state constitutional question").

State courts have an independent duty to interpret parallel state constitutional

provisions even where state constitutional language exactly mirrors that of the Eighth Amendment. In *People v. Young*, the Colorado Supreme Court explained:

> The existence of federal constitutional provisions essentially the same as those to be found in our state constitution does not abrogate our responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question. This responsibility springs from the inherently separate and independent functions of the states in the system of federalism.

814 P.2d 834, 842 (1991), *statutorily abrogated on other grounds as noted in People v. Vance*, 933 P.2d 576 (Colo. 1997). Despite identical language, the Colorado court in *Young* nonetheless found more protection in the Colorado Constitution than the Eighth Amendment, and prohibited executions where the jury finds that aggravating and mitigating factors are equally balanced. *Id*. at 847.

Notably, at least two state supreme courts, Tennessee and Georgia, relied on their states' constitutional protections against cruel and unusual punishments to create a categorical ban on executing those with intellectual disabilities before the U.S. Supreme Court reached this same conclusion under the Eighth Amendment. *See Van Tran v. State*, 66 S.W.3d 790, 804-10 (Tenn. 2001) (holding that executing individuals with intellectual disabilities is "grossly disproportionate" under article 1, § 16 of the Tennessee Constitution); *Fleming v. Zant*, 386 S.E.2d 339, 343 (Ga. 1989) (concluding that executing intellectually disabled "offenders violates the Georgia constitutional guarantee against cruel and unusual punishment"), *superseded by statute on other grounds*, O.C.G.A. § 17-7-131(c)(3), (j). Mr. Vanisi's

case provides this Court with an equally important opportunity, indeed an obligation, to develop its state constitutional law in relation to the execution of those with severe mental illness.[2]

B. A plain reading of article 1, section 6 demonstrates that the "cruel or unusual" provision of Nevada Constitution is more protective than the Eighth Amendment.

In determining the meaning of any provision of the Nevada Constitution, courts must "give that provision its plain effect, unless the language is ambiguous." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645–46 (2007). Language is considered ambiguous only when "it is susceptible to 'two or more reasonable but inconsistent interpretations.'" *Id.* at 646 (quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599 (1998)). "[W]hen a constitutional provision's language is clear on its face, [courts] may not go beyond that language in determining the framers' intent." *Id*. Additionally, courts must construe "each sentence, phrase, and

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[2] This Court was previously presented with the argument that article 1, section 6 of the Nevada Constitution provides broader protection than the Eighth Amendment, but in the context of a claim that Nevada's death penalty system as a whole is unconstitutional. *Gallego v. State*, 117 Nev. 348, 370 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749 (2011). Without any state constitutional analysis, this Court simply stated that it would not "reconsider [prior] precedent upholding the constitutionality of the death penalty." *Id*. In *Hover v. State*, No. 63888, 2016 WL 699871, at *10 (Nev. Feb. 19, 2016), this Court was asked to reconsider the same argument, which it again rejected without state constitutional analysis by adhering to prior precedent. These decisions did not address, and therefore do not preclude, consideration of the distinct arguments set out here.

word," *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 841 (2001), in such a way "that gives meaning to all of the terms and language." *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 274 (2010).

Here, the language of article 1, section 6 bars the State from inflicting "cruel *or* unusual" punishments, Nev. Const. Art. 1, § 6 (emphasis added), while the Eighth Amendment bars punishments that are "cruel *and* unusual." U.S. Const. amend. VIII (emphasis added). The Nevada Constitution drafters' selection of the disjunctive "or" rather than the conjunctive "and" is significant, unambiguous, and requires a plain meaning analysis. Such analysis yields only one conclusion: the Nevada Constitution prohibits punishment that is *either* cruel or unusual. Unlike the Eighth Amendment, this prohibition reaches punishments that are cruel, but not unusual, and punishments that are unusual, but not cruel. This distinction is not trivial, as Eighth Amendment claims are regularly dismissed where the challenged punishment is not deemed *both* cruel *and* unusual. *See e.g., Harmelin v. Michigan,* 501 U.S. 957, 994-95 (1991) (upholding severe mandatory penalties under the Eighth Amendment that, although cruel, are not unusual). In this way, the cruel or unusual provision of Nevada's Constitution provides broader protection than the Cruel and Unusual Clause of the Federal Constitution.

This reading of section 6 aligns with this Court's consistent reading of the word "or" with a plain, disjunctive meaning. *See e.g., State v. Catanio,* 120 Nev.

1030, 1033-34 (2004) (finding the term 'or' in the statutory definition of lewd acts "unambiguous" and meaning that either of the conditions separated by the term constitute a lewd act); *Coast Hotels & Casinos,* 117 Nev. at 841 (noting that the use of the word "or" to separate phrases signals that the latter phrase is an "alternative to, and is not conditioned by, the preceding clause"); *Anderson v. State,* 109 Nev. 1129, 1134 (1993) ("[T]he legislature used the disjunctive 'or,' and not the conjunctive 'and,' when it defined 'under the influence,' thereby requiring one or the other, but not necessarily both."); *Jensen v. Sheriff, White Pine Cty*., 89 Nev. 123, 125 (1973) ("The statute spells out the several specific acts in the disjunctive, and any one of them is sufficient to taint the act with criminality."); *Scott v. Justice's Court of Tahoe Twp*., 84 Nev. 9, 11-12 (1968) (finding that either of two actions may be punishable when "[t]he statute separates the words. . . . with the disjunctive conjunction 'or'").

As this Court has explained, the only occasions in which "the word 'or' may be used, interpreted, or construed in a conjunctive rather than a disjunctive sense [is] to prevent an absurd or unreasonable result, or where the context requires such construction, or such construction is necessitated by some impelling reason in the context." *Fredricks v. City of Las Vegas*, 76 Nev. 418, 421 (1960). None of these rationales apply to the "or" in section 6's "cruel or unusual" provision, especially given its language is otherwise identical to the Cruel and Unusual Clause of the

Eighth Amendment. As a result, "there is no reason here for interpreting it other than in its ordinary and elementary sense and giving it its disjunctive meaning." *See id*. Indeed, the federal district court in this state has already held that section 6 "forbids punishments either 'cruel or unusual,'" explicitly noting that "[t]he terms are used disjunctively." *See Mickle v. Henrichs*, 262 F. 687, 689 (D. Nev. 1918) (holding the Nevada Constitution prohibits forced sterilization as unconstitutionally unusual punishment).

Other state's efforts to replace the "or" with "and," and vice versa, in their own constitutional provisions further demonstrate that the textual difference carries substantive significance. The Florida Supreme Court accurately articulated this significance in *Armstrong v. Harris*, when it overturned the results of a ballot measure election that "[r]equire[d] construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment." 773 So. 2d 7, 17 (Fla. 2000). According to the court, such a measure would effectively change the state's then-existing "cruel *or* unusual" constitutional provision to "cruel *and* unusual." *Id.* The court further explained:

> [T]he federal Constitution . . . represents the floor for basic freedoms; the state constitution, the ceiling. In the present case, by changing the wording of the Cruel or Unusual Punishment Clause to become "Cruel *and* Unusual" and by requiring that our state Clause be interpreted in conformity with its federal counterpart, the proposed amendment effectively strikes the state Clause from the constitutional

> scheme. Under such a scenario, the organic law governing either cruel or unusual punishments in Florida would consist of a floor (i.e., the federal constitution) and nothing more.

Id. at 17. The court recognized that the original "[u]se of the word 'or' instead of 'and' in the Clause indicates that the framers intended that both alternatives (i.e., 'cruel' and 'unusual') were to be embraced individually and disjunctively within the Clause's proscription." *Id.* Therefore, the electorate's vote to conform to the Eighth Amendment, constituted a vote to "eliminate rights or protections already in existence" under the state constitution, *id*. at 18, and would result in a "loss or restriction of an independent fundamental state right" with the appearance of creating a new right. *Id*. (quotation omitted). Though Florida eventually did lawfully amend its constitution to adopt the "cruel and unusual" language following the *Armstrong* decision, the *Armstrong* court's textual analysis remains instructive.

Other courts interpreting similarly-worded state constitutional provisions are also consistent with the plain reading analysis Mr. Vansis requests here. *See e.g., State v. Mitchell*, 577 N.W.2d 481, 490 (Minn. 1998) ("The conclusion that [the defendant's] sentence is not cruel does not end our discussion because the Minnesota Constitution forbids punishments that are either cruel *or* unusual.") (emphasis in original); *People v. Bullock*, 440 Mich. 15, 31 (1992) (noting that the textual difference between the cruel or unusual provision of the Michigan Constitution and the Eighth Amendment "constitute[s] a 'compelling reason' for a

different and broader interpretation of the state provision"); *Dodd v. State*, 879 P.2d 822, 829 (Okla. Crim. App. 1994) (Chapel, J., concurring in part and dissenting in part) (citing the example of Michigan, and arguing that the "cruel or unusual punishments clause of the Oklahoma Constitution must also be construed" to provide greater protection than the Eighth Amendment); *People v. Anderson*, 6 Cal. 3d 628, 636–37 (1972), *superseded by* Cal. Const., art. 1, § 27 (finding that "delegates modified the California provision before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state"). In fact, the U.S Supreme Court, in interpreting the Federal Constitution, has expressly acknowledged that state constitutions with the disjunctive language have "more expansive wording" than that of the Eighth Amendment. *Harmelin*, 501 U.S. at 983.

A plain reading of article 1, section 6 thus demonstrates that the Nevada Constitution is more protective than the Eighth Amendment. This conclusion is supported by caselaw from this Court repeatedly and consistently interpreting the meaning of the word "or," as well as persuasive precedent from other courts reading their similarly-worded cruel or unusual provisions in this manner.

C. Historical analysis further supports a broader, more protective, reading of the "cruel or unusual" provision of the Nevada Constitution.

It is well established that to determine the intent of the framers of the

Nevada Constitution, a court may only look to a provision's history where its language is ambiguous. *ASAP Storage*, 123 Nev. at 646. Should this Court find that section 6 is not clear on its face, a historical analysis yields the same conclusion outlined above: the Nevada Constitution provides broader protection than the Eighth Amendment.

Records of the 1863 Constitutional Convection reveal that article 1, section 6 of the Nevada Constitution has its origins in the California Constitution. In creating a proposal for the Nevada Bill of Rights in 1863, the constitutional delegates heavily relied on the California Constitution as their foundation. Andrew J. Marsh, Samuel L. Clemens, & Amos Bowman, *Reports of the 1863 Constitutional Convention of the Territory of Nevada* 16 (William C. Miller et al. eds., 1972) (hereinafter Marsh, 1863 *Reports*) ("[T]he Constitution of California, as amended, [is] adopted as a basis for consideration, so far as it may be deemed applicable to the wants of this State."). *See also, id.* at 32 ("The balance of the report is substantially a copy of the California Bill of Rights."). This choice was made, not for efficiency, but because of the recognized overlap between the needs of those in California and in Nevada. Not only were 29 of the 39 members of the convention originally from California, but, as delegate Mr. Delong explained:

> [T]his Territory is peopled almost exclusively by Californians— by men that have lived and acquired property there for years past— who have lived under and are acquainted with the Constitution of that State as it has been construed from time to time by the Supreme Court of that

> State. They have come into this Territory and found that here the leading paramount interests of our Territory are similar to those which they left behind them in the State of California. This important fact renders the Constitution and laws of the California particularly applicable to us . . .

Andrew Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada* 14 (Eastman 1866) (hereinafter Marsh, *Debates and Proceedings*).

When incorporating California's Cruel or Unusual Clause into Nevada's draft constitution, the provision was "read and adopted" as is without amendment or debate. Marsh, 1863 *Reports*, at 37. Though this particular version of Nevada's Constitution was not ratified, the delegates met again in 1864, and used the language of the 1863 draft as their starting point. *See* Marsh, *Debates and Proceedings*, at 24. The only difference between the language in the 1863 and 1864 drafts is that "cruel *or* unusual" was changed to "cruel *nor* unusual." *Id*. at 24. While it is unclear whether the change from "or" to "nor" was simply a transcription error, it is further evidence that the Nevada drafters intended to use disjunctive phrasing to abolish both cruel punishments and unusual punishments. Despite the fact that the Eighth Amendment's ban on "cruel *and* unusual" punishment had existed for 73 years at the time Nevada adopted its state constitution, the framers of the Nevada Constitution never attempted to incorporate the Eighth Amendment's conjunctive phrasing. Instead, when section 6 came up for debate at the 1864 constitutional

convention, the only amendment made was to change "nor" back to "or," which was "agreed to by unanimous consent." *Id*. at 782.

Due to the significance of the parallel California provision to Nevada's constitutional history, cases interpreting this section of the California Constitution provide additional insight into the meaning of article 1, section 6 in Nevada's Constitution. *See Zahavi v. State*, 131 Nev. 51, 62 n.5 (2015) ("find[ing] cases interpreting [article 1, section 22] of the Indiana Constitution informative" because article 1, section 14 of the Nevada Constitution had its origins in Indiana's parallel provision). In *People v. Anderson*, the California Supreme Court gave the disjunctive term "or" its plain meaning and held that punishments that are either cruel or unusual are prohibited:

> We may not presume, as respondent would have us do, that the framers of the California Constitution chose the disjunctive form 'haphazardly,' nor may we assume that they intended that it be accorded any but its ordinary meaning.

493 P.2d 880, 886 (1972), *superseded by* Cal. Const., art. 1, § 27.[3] Moreover, the court explicitly considered and flatly rejected the suggestion that "the reach of the Eighth Amendment and that of article 1, section 6, are coextensive, and that the use

[3] Although the voters of California subsequently amend the words of their state constitution by referendum, rendering *Anderson's* analysis inapplicable going forward in California, *Anderson's* textual analysis remains a model for this Court.

of the disjunctive form in the latter is insignificant." *Id*. at 883.

Every shred of history connected to article 1, section 6 points in the same direction. As its plain language alone suggests, the framers of the Nevada Constitution looked past the Eighth Amendment to adopt a provision affording its citizens broader protections. This Court should exercise its duty to interpret and apply the Nevada Constitution to Mr. Vanisi's case, and hold that, unlike the Eighth Amendment, article 1, section 6 bars punishments that are *either* cruel or unusual.

II. APPLICATION OF NEVADA'S BROADER PROTECTION PRECLUDES EXECUTING PEOPLE WITH SEVERE MENTAL ILLNESS, WHICH CAN ONLY BE REGARDED AS CRUEL OR UNUSUAL.

What constitutes unconstitutionally cruel or unusual punishment has "not [been] spelled out in either state or federal constitutions." *Naovarath v. State*, 105 Nev. 525, 529 (1989). Instead, the task has been delegated "to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'" *Id*. (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). As with the Eighth Amendment, such analysis under the Nevada Constitution "depends largely, if not entirely, upon the humanitarian instincts of the judiciary." *Id*. at 529-30 (citation and quotation omitted). This Court has explained:

> A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing here with a set of absolutes. Our decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degree of our faith in the dignity of the human personality.

Id. at 530. In short, the standard for whether a punishment is unconstitutionally cruel is whether it "shock[s] the conscience." *Blume v. State*, 112 Nev. 472, 475 (1996) (citation and quotation omitted).

As explained further below, owing to the symptoms they experience and the stigma they face, many persons with severe mental illness live out their lives misunderstood and vulnerable. This includes (but is not limited to) their treatment in the capital sentencing process. The prospect of this state strapping a person with severe mental illness to a gurney and executing him or her should shock the conscience of this Court.

Amici propose that the Court adopt the definition of "severe mental illness" set out by the American Bar Association and the American Psychological Association. American Bar Association, Death Penalty Due Process Review Project, *Severe Mental Illness and the Death Penalty* (Dec. 2016) (hereinafter ABA, *Severe Mental Illness*).[4] Under this definition, severe mental illness "refers to a narrower set of diagnoses than mental illness," namely "mental disorders that carry certain diagnoses, such as schizophrenia, bipolar disorder, and major depression; that are relatively persistent (e.g., lasting at least a year); and that result in comparatively

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[4] ABA, *Severe Mental Illness* is available at https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

severe impairment in major areas of functioning." *Id.* at 1 (quoting American Psychological Association, *Assessment and Treatment of Serious Mental Illness*, at 5 (Aug. 2009)).[5]

The U.S. Supreme Court's rationale for creating categorical bans for both juveniles and those with intellectual disabilities provides ample support for extending such a ban to reach those with severe mental illness. In addition, current doctrinal protections, such as the Not Guilty by Reason of Insanity defense (NGRI)[6]

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[5] American Psychological Association, *Assessment and Treatment of Serious Mental Illness* (Aug. 2009) is available at: https://www.apa.org/practice/resources/smi-proficiency.pdf (last accessed on Sept. 30, 2019). As an alternative definitional approach, this Court could adopt the six-factor test identified by Professor Sundby. Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 511 (Dec. 2014) [hereinafter Sundby, *Legacy of Atkins and Roper*]. Under this approach, mental illness qualifies as "severe mental illness" if, it poses too high a risk of an unreliable sentence based on the following factors derived from *Atkins* and *Roper*: (1) whether the status impairs the defendant's ability to cooperate with counsel, *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002); (2) whether the status renders the defendant a poor witness, *id*. at 321; (3) whether the status causes distortions in the defendant's thinking that increase the chances of bad decision-making, *Roper v. Simmons*, 543 U.S. 551, 569 (2005); (4) whether the status has a double-edged nature as mitigation, *id*. at 573, *Atkins*, 536 U.S. at 321; (5) whether the complexity and conflicting views of experts are likely to generate confusion and misunderstanding among jurors, *Roper*, 543 U.S. at 573; and (6) whether the status increases the likelihood of brutality in the offense, which in turn might preclude jurors from considering the mitigation. *See id*.

[6] While still used in the legal terms "insanity defense" and "legally insane," the words "insanity" and "insane" are closely associated with the eugenics era in U.S. law and policy. *See, e.g.*, *Buck v. Bell*, 143 Va. 310, 313, 319 (1925) (quoting Virginia sterilization act which permitted forced sterilization of inmates deemed

and standards for competency to be executed, were specifically designed to prevent the unconstitutional treatment of those with severe mental illness. Such protections, which have deep roots in the criminal laws of this state and the country as a whole, reflect a widespread recognition that the death penalty as applied to those with severe mental illness is unconstitutionally cruel.

But even if this Court disagrees that the execution of individuals with severe mental illness is unconstitutionally cruel, this Court should still create the categorical

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"***insane***, idiotic, imbecile, feeble-minded, or epileptic" based on a theory that they will parent "socially inadequate offspring likewise afflicted" and noting Virginia's claim of authority to "take into custody and deprive ***the insane***, the feeble-minded and other defective citizens of the liberty which is otherwise guaranteed them by the Constitution") (emphasis added), *aff'd by* 274 U.S. 200, 205-06 (1927) (noting Virginia legislation permitting forced sterilization to prevent purported "hereditary . . . transmission of ***insanity***, imbecility, etc") (emphasis added).

Congress and the Nevada state legislature have periodically updated outdated language regarding disabilities. *See*, *e.g.*, Rosa's Law, 20 U.S.C. § 1400 (2010) (changing "mental retardation" to "intellectual disability" throughout U.S. Code); 2007 Nevada S.B. 491 (Chapter 255), effective July 1, 2007 (updating statutory language used in Nevada Code to refer to persons with physical, mental or cognitive disabilities); Immigration Act of 1990, PL 101-649, 104 Stat 4978, § 601-603 (Nov. 29, 1990) (deleting and replacing language in 8 U.S.C. § 1182 excluding "[a]liens who are insane" and "[a]liens who have had one or more attacks of insanity"). Some jurisdictions, such as California, increasingly use the phrase "mental disorder defense" in place of the "insanity defense." *Amici* refer to the "insanity" defense as the NGRI defense in this brief for the convenience of this Court, though a more acceptable phrasing would be "not criminally responsible on account of mental disorder (NCR-MD), as adopted by the Canada legislature in 1992. *See Criminal Code of Canada,* R.S.C., 1985, c. C-46, s. 487.051.

exemption requested because such executions violate Nevada's constitutional ban on unusual punishments. Given the general decline in the use of the death penalty, combined with already existing protections for those with the most extreme form of severe mental illness (i.e., those who are deemed NGRI or incompetent for execution), people with severe mental illness are not often executed. But, as Mr. Vanisi's case illustrates, a categorical ban is the only sufficient mechanism for avoiding the unconstitutional execution of those with this disability.

A. The reasoning of *Atkins v. Virginia* and *Roper v. Simmons*, barring the death penalty for people with intellectual disabilities and juveniles, applies with equal, if not more force to people with severe mental illness.

The determination of what is considered cruel and unusual punishment under the Eighth Amendment has been guided largely by two fundamental principles. First, death sentences must be justified by legitimate penological reasons for resorting to the most extreme punishment available. *See e.g., Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("[T]he sanction imposed cannot be so totally without penological justification . . ."). Second, death sentences must have "a greater degree of reliability" so that they are only imposed on the most culpable offenders. *McCarty v. State*, 132 Nev. 218, 232 (2016) (Douglas, J., concurring) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). The U.S. Supreme Court heavily relied on both of these principles in creating categorical bars on the death penalty for people with intellectual disabilities and juvenile defendants in *Atkins v.*

Virginia 536 U.S. 304 (2002), and *Roper v Simmons,* 543 U.S. 551 (2005) respectively. But the Court's reasoning related to the cruel and excessive nature of the penalty as applied to those with intellectual disabilities or juveniles is even more compelling when applied to those with severe mental illness.

1. Executing people with severe mental illness lacks penological justification.

It is well established that the only two legitimate justifications for the death penalty are "retribution and deterrence of capital crimes by prospective offenders." *Roper,* 543 U.S. at 553 (citation and quotation omitted). "Unless the imposition of the death penalty on a person [with severe mental illness] 'measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Atkins,* 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

The categorical bars to execution for individuals with intellectual disabilities and juveniles derives from the U.S. Supreme Court's finding that death sentences as applied to these groups serve no retributive or deterrent value. Specifically, the Court identified cognitive and behavioral impairments and limitations typical of individuals with intellectual disabilities and juveniles that "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Atkins,* 536 U.S. at 318.

"With respect to retribution . . . the severity of the appropriate punishment

necessarily depends on the culpability of the offender." *Id.* at 319. Diminished personal culpability in turn diminishes the retributive effect. *Id.* As concerns deterrence, the Court reasoned that there is a "low likelihood that offenders [with such cognitive and behavioral impairments] engage[] in 'the kind of cost-benefit analysis that attaches any weight to the possibility of execution, mak[ing] the death penalty ineffective as a means of deterrence." *Roper,* 543 U.S. at 561–62, (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 836-38 (1988)). Given the gravity of the impairments and limitations identified in *Atkins* and *Roper* and their inherent connection to the crimes that land such individuals on death row, the Court concluded, that "neither retribution nor deterrence provide adequate justification for imposing the death penalty" on these two groups. *See id.* at 572.

The same rationale should exempt defendants with severe mental illness from the death penalty, as they have the same, and in some cases even greater impairments and limitations. Leading legal and medical professionals alike agree that the impairments and limitations emphasized by the Court in both *Atkins* and *Roper* translate "virtually word for-word to defendants with severe mental illness." ABA, *Severe Mental Illness*, at 28. *See also*, Lyn Entzeroth, *The Challenge and Dilemma of Charting A Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant From the Death Penalty*, 44 Akron L. Rev. 529, 559 (2011) (arguing that "the parallels between [individuals with severe mental illness] and the individuals

protected by *Atkins* and *Roper* are remarkable").

In *Atkins*, the impairments the Court highlighted include, "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand [others'] reactions." *Atkins*, 536 U.S. at 305. These impairments and limitations mirror those typical of individuals with severe mental illness. Indeed, "hallucinations, delusions, grossly disorganized thinking – among other symptoms of mental illness – also significantly interfere with an individual's thinking, behavior, and emotion regulation." ABA, *Severe Mental Illness*, at 3. *See also*, Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L.Rev. 293 (2003) (arguing the effects of those with intellectual disabilities and those with severe mental illness are so similar as to eliminate a rational basis for distinguishing between the two categories of defendants). Just as these impairments diminish the personal culpability of those with intellectual disabilities, they too diminish the personal culpability of those with severe mental illness.

Similarly, the impairments described by the Court in *Roper* include, "susceptibility to immature and irresponsible behavior," *Roper*, 543 U.S. at 570, "vulnerability and comparative lack of control over their immediate surroundings," *id*., and the "struggle to define their identity." *Id*. These characteristics, according to

the Court, make it "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* The same is true, not only for those with intellectual disabilities, but for those with severe mental illness. Because the execution of people with severe mental illness does not meaningfully advance either of the recognized penological goals of capital punishment, this Court should create a categorical bar exempting such individuals from the death penalty.

2. Impairments characteristic of severe mental illness increase the likelihood of unreliability in sentencing.

"A further reason for not imposing the death penalty on [people with severe mental illness] is to protect the integrity of the trial process." *See Hall v. Florida*, 572 U.S. 701, 709 (2014). In both *Atkins* and *Roper*, the Court recognized that creating a categorical exemption from the death penalty was the only way to adequately protect groups of people who face "a special risk of wrongful execution." *Atkins*, 536 U.S. at 320-21. *See also Roper*, 543 U.S. at 569 ("[J]uvenile offenders cannot with reliability be classified among the worst offenders."). Symptoms of severe mental illness, too, can harm and distort a defendant's case at every stage of the trial and post-conviction proceedings in the same, and in some respects, more damaging ways than concerned the Court in *Atkins* and *Roper*.

As with intellectual disability and youth, severe mental illness can significantly hinder defendants' ability "to give meaningful assistance to their

counsel" and effectively participate in their defense. *Atkins*, 536 U.S. at 320. People with severe mental illness are often poor historians of their own lives and "are typically poor witnesses." *Id.* at 321. Both medication and a distorted sense of reality can interfere with memory and the ability to accurately recall. ABA, *Severe Mental Illness*, at 14. This can both increase "the possibility of false confessions," and prevent defendants with severe mental illness from communicating crucial information that they alone possess to both law enforcement and their defense team. *Atkins*, 536 U.S. at 320. Symptoms of mental illness can also impair defendants' judgment, causing them to make irrational and ill-thought out decisions related to their defense, such as choosing to represent themselves or waiving their appeals. ABA, *Severe Mental Illness*, at 32. Delusions and paranoia can cause defendants to distrust, misunderstand, and refuse to cooperate with their counsel. *Id*. at 23.

Similarly, delusions, paranoia, and fear of stigmatization may interfere with the opportunity of such defendants to provide the jury and court system (in post-conviction review) with mitigating evidence related to their illness. *Id*. at 32. The Nevada's Constitution and capital sentencing scheme inherently assumes such evidence will be presented. *See* Nev. Rev. Stat. Ann. § 177.055.2(e) (requiring mandatory review to determine "[w]hether the sentence of death is excessive, considering both the crime and the defendant"). When severe mental illness operates in this manner, it impacts not only the rights of the defendant but of society itself,

which is deprived of evidence necessary to determine the appropriate sentence and whether the defendant's life should be spared:

> While defendants have certain guaranteed autonomy at trial, and can represent themselves and can even choose to plead guilty to a crime, they do not have the prerogative to select their sentence. That is not their decision to make. That decision is made by society, through constitutionally valid legislative enactments of penalty provisions and selection of the particular sentence within that range, usually by the judge. The decision is based on multiple policy considerations, the most important one being . . . the public welfare. Public policy has long recognized, however, the importance of individualizing a sentence to the particular offender and his crime.

United States v. Davis, 150 F. Supp. 2d 918, 922 (E.D. La. 2001)(citation and quotation omitted). Severe mental illness can prevent sentencers from having "the fullest information possible concerning the defendant's life and characteristics." *Id.* at 923 (citing *Williams v. New York*, 337 U.S. 241, 246 (1949)).

Additionally, symptoms of severe mental illness can unfairly prejudice jurors' impressions of the defendant, thereby skewing the reliability of the resulting sentence. People with severe mental illness face the risk that jurors considering their fate will view them through the lens of stereotype, as intrinsically dangerous, and therefore more likely to constitute a future danger. Jurors can easily misinterpret symptoms of mental illness that manifest during trial, only exacerbating the risk. A person "suffering from a psychotic episode [during trial] may become agitated, unable to control his movements, or make inappropriate comments – all of which can be interpreted by jurors as dangerous, impulsive behavior and thus increase the

likelihood that jurors find a death sentence appropriate." ABA, *Severe Mental Illness*, at 23. Conversely, defendants with severe mental illness may be heavily medicated during trial, which can cause a flat affect that can "create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321.

For all of the above reasons, the risk of execution because of – not simply in spite of – a defendant's severe mental illness proves significant. And cruel, as this Court has previously recognized that "[m]ental illness is not a crime." *Maatallah v. Warden, Nev. State Prison*, 86 Nev. 430, 433 (1970). Mr. Vanisi's case contains abundant evidence that his death sentence was imposed, and is maintained, because of his severe mental illness. Experts diagnosed him with schizoaffective disorder, mood disorder, and bipolar disorder, and concluded that at the time of the offense he was "suffering from a severe, psychotically driven disturbance of mind with marked delusional ideas"— information Mr. Vanisi's jury never heard. 31-32 AA 0675. Recognizing the significance that Mr. Vanisi's severe mental illness may have played in decreasing his culpability, this Court remanded for an evidentiary hearing specifically on the issue of trial counsel's failure to present substantial mitigation about Mr. Vanisi's mental illness. *Vanisi v. Baker*, 405 P.3d 97 (Nev. 2017). But, Mr. Vanisi's impairments— "guardedness, suspiciousness, distrust and paranoia"— inhibited his ability to cooperate with post-conviction counsel, resulting in his irrational decision to waive the hearing altogether. *See* 13 AA 02690. As such, Mr.

Vanisi's severe mental illness itself prevented both judge and jury from ever evaluating the role that his well-documented disability played in the crime for which he is being punished.

"This is not to say that under current law [Mr. Vanisi, and other] persons with [severe mental illness] who meet the law's requirements for criminal responsibility may not be tried and punished. They may not, however, receive the law's most severe sentence." *See Hall,* 572 U.S. at 709 (citations and quotations omitted). Just as "impos[ing] the harshest of punishments on an intellectually disabled person [or juvenile] violates his or her inherent dignity as a human being[,]" so too does sentencing a person with severe mental illness to death. *See id.* 708. "Not all murderers are executed, and capital punishment is not justified if it chooses the vulnerable in society, no matter how despised, for execution." Dorean Koenig, *Mentally Ill Defendants: Systemic Bias in Capital Cases*, Human Rights, Summer 10 (2001). And "where mitigation defines reliable assessment," as it does in the case of people with severe mental illness, "the only constitutional answer [is] a categorical removal of those cases from the death penalty." Sundby, *Legacy of Atkins and Roper*, at 506.

B. Current legal protections to prevent the unconstitutional execution of people with severe mental illness prove insufficient.

Severe mental illness has long been regarded as a relevant factor in determining the appropriate punishment for criminal behavior. State and federal

NGRI defenses, for example, reflect a "recognition that a severally mentally ill individual may not possess the same level of culpability as a person who has no mental health problems." *Finger v. State* 117 Nev. 548, 562 (2001). While the NGRI defense considers the effects of severe mental illness on an individual at the time of the offense, Eighth Amendment standards regarding competency to be executed take into account symptoms of severe mental illness at the time punishment is to be administered. Under *Ford v. Wainwright*, states cannot execute those who lack competency at the time of execution because such a punishment "simply offends humanity." 477 U.S. 399, 407 (1986). Both the NGRI defense and competency standards were specifically designed for the purpose of preventing the unjust punishment of people with the most severe mental illness. Under these doctrines, mental illness in its most extreme form results in either complete exculpation from criminal responsibility, *Finger*, 117 Nev. at 573, or a prohibition on the State from carrying out an execution. *Calambro ex rel. Calambro v. Second Judicial Dist. Court*, 114 Nev. 961, 970 (1998).

The standard Mr. Vanisi seeks here acknowledges that most people with severe mental illness will not be found NGRI under the stringent "insanity" test adopted in Nevada or incompetent under *Ford*,[7] but nonetheless have significant

[7] The law also forbids states from subjecting incompetent defendants to trial. *Dusky v. United States*, 362 U.S. 402 (1960). For similar reasons as discussed in this

impairments warranting protection from execution (while still warranting the reduced but yet still severe punishment of life imprisonment). Additionally, the right to present mitigation evidence of mental illness in capital cases does not prevent unconstitutional death sentences and executions. As the facts of Mr. Vanisi's case demonstrate, people with profound impairments, can and do, slip through the cracks. Therefore, the only adequate form of protection is a categorical bar against executing those with severe mental illness.

1. The NGRI defense does not adequately protect people with severe mental illness.

The NGRI defense, while reflective of a widespread understanding that people with the most severe mental illness should not be subject to criminal liability, is an insufficient barrier to prevent the execution of individuals in this group. In *Finger v. State*, this Court acknowledged that "legal insanity is a well-established and fundamental principle of the law of the United States[, and] therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions." 117 Nev. at 569.[8] Indeed, all but four states have codified some form of NGRI to preclude criminal liability for those with severe mental illness in its most extreme form. But

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text, that protection too does too little to protect those with serious mental illness from cruel or unusual executions.

[8] The U.S. Supreme Court is considering the whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense in *Kahler v. Kansas,* No. 18-6135, to be argued on October 7, 2019.

where variations in NGRI defenses allow a defendant's severe mental illness to exculpate him in one state, yet permit him to be executed in another, the broader protections of the Nevada Constitution mandate a categorical bar on those with severe mental illness from the death penalty.

Nevada applies the *M'Naghten* test, *id.* at 575, which requires proof of one of two prongs: that "at the time of the committing of the act, the party accused [was] laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know [what] he was doing . . . was wrong." *Id*. at 556 (quoting *M'Naghten's Case*, 8 Eng. Rep. 718, 10 Cl. & Fin. 200, 209 (1843)). This rule has been criticized for years for failing to identify many people accused of crime with serious mental disorders who are not responsible. *See generally,* Frank T. Lindman & Donald M. McIntyre, Jr., *The Mentally Disabled and the Law* (1961). This Court has acknowledged that "[t]his is a very narrow standard," and that "few people will qualify as legally insane under the *M'Naghten* rule." *Finger*, 117 Nev. at 577. As such, twenty-four jurisdictions, including eight death penalty states, have foregone the strict *M'Naghten* rule for a more expansive one – adopting, for example, the Model Penal Code definition in whole or in part, which employs the broader language of "substantial capacity" and which focuses additionally on the effect of mental illness upon behavioral control; or adding an additional prong of "irresistible impulse."

Nevada has not done so, leaving defendants with severe mental illness who could be found NGRI in other states vulnerable to possible execution in this state.

Myths surrounding the NGRI defense pose an additional barrier hindering capital defendants with severe mental illness from effectively relying on NGRI as an adequate protection from wrongful execution. Many people with severe mental illness and their lawyers elect not to assert NGRI at capital trials, in part on the basis that death qualified jurors are often inherently skeptical of the defense, believing that is a legal loophole for guilty defendants to be released immediately back into society. *Not Guilty by Reason of Insanity: Reference Manual for Community Services Boards & Behavioral Health*, Virginia Department of Behavioral Health & Developmental Services 10 (2016). As a result, the accused only assert NGRI defenses in an extremely small number of cases, and find success in an even smaller number. Nationally, it is raised in approximately 1% of all criminal cases and successful only 25% of the time. *Id*. For all these reasons, NGRI, while designed as a bulwark for those with severe mental illness in its most extreme form, nonetheless proves insufficient to prevent unconstitutional executions.

2. The bar on the execution of persons lacking competency does not adequately protect those with severe mental illness.

The protection against execution for those incompetent under *Ford v. Wainwright*, important as it is, also proves insufficient to prevent the execution of people with severe mental illness. 477 U.S. at 399. In holding such executions

violate the Eighth Amendment, the Court, like in *Atkins* and *Roper*, noted the lack of "retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Ford*, 477 U.S. at 409. But, both this Court and the U.S. Supreme Court have acknowledged that there is a "high threshold showing" for *Ford* claims. *Calambro*, 114 Nev. at 970 (quoting *Ford*, 477 U.S. at 425-26).

First, petitioners who raise *Ford* claims do not do so against a neutral background:

> On the contrary, in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a *substantial threshold showing* of insanity merely to trigger the hearing process.

Calambro, 114 Nev. at 970 (citation and quotation omitted). Second, for *Ford* claims to be successful, the analysis turns on whether the petitioner has a rational understanding of the government's reason for executing him at the time of the impending execution. *Panetti v. Quarterman*, 551 U.S. 956-60 (2007). Because this standard sets a very low bar for competency and ignores the individual's mental state at the time of the offense, it does not adequately protect those with severe mental illness from unconstitutional execution.

3. The opportunity to present mitigation evidence does not adequately protect those with severe mental illness.

The opportunity to present mitigating evidence represents yet another area in which the law attempts to treat "defendants who commit criminal acts that are attributable to . . . emotional and mental problems, [as] less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990) (citation and quotation omitted). Mental illness is one of the most widely recognized statutory mitigating factors in capital proceedings. *See* Ellen Fels Berkman, *Note, Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 297-98 (1989) (detailing "[t]he high percentage of statutory mitigating circumstances that have mental illness components"). Nevada's statutory scheme specifically enumerates as a mitigating circumstance that "the murder was committed while the defendant was under the influence of extreme mental… disturbance." Nev. Rev. Stat. Ann. § 200.035.2. Defendants possess not only the right to present evidence of mental illness, but also to have their sentencing juries give it "meaningful consideration and effect" in making the individualized determination of whether death is the appropriate punishment. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

But like the NGRI defense and the bar on executing people who lack competency, the opportunity to present mitigation related to mental illness does too little to protect this population. In the hands of talented prosecutors seeking death

sentences, and even in the minds of death-qualified jurors not subject to such prosecutorial arguments, mental illness, despite being a constitutionally-protected mitigating factor, may be transformed into aggravating evidence weighing in favor of execution. *See e.g.*, Sundby, *Legacy of Atkins and Roper*, at 518-19 (drawing on empirical evidence to describe the phenomenon of mental illness recast as "future dangerousness"); David Baldus et al., *Equal Justice and the Death Penalty* (Northeastern University Press ed., 1990) (finding that a defendant's NGRI defense or incompetence claim was one of the strongest correlates with a death sentence, suggesting that most jurors view mental illness as aggravating rather than mitigating). The Florida Supreme Court banned the non-statutory aggravating factor of "future dangerousness" for just this reason. *See Miller v. State*, 373 So. 2d 882, 886 (Fla. 1979) (finding that "[t]he trial judge's use of the defendant's mental illness, and his resulting propensity to commit violent acts, as an aggravating factor" contradicts the legislative intent that mental illness function as a mitigating circumstance).

Notably, the U.S. Supreme Court expressed similar concerns with juries' consideration of juveniles and defendants with intellectual disabilities in capital cases. *Atkins*, 536 U.S. at 321 ("[R]eliance on [intellectual disability] as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."); *Roper*, 543 U.S. at 573

("[T]he prosecutor argued [the defendant's] youth was aggravating rather than mitigating. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns."). Because intellectually disabled and juvenile "defendants in the aggregate face a special risk of wrongful execution," the Court found that categorical bars to the death penalty were the only appropriate protections. *Atkins* 536 U.S. at 321. *See also*, *Roper*, 543 U.S. at 553. The same logic applies in the context of those with severe mental illness.

C. Evolving standards of decency bar the execution of people with severe mental illness.

At the time of *Atkins*, nineteen states prohibited the execution of people with intellectual disabilities; at the time of *Roper*, eighteen states prohibited the execution of juveniles. While no state currently has a blanket ban on the execution of the people with severe mental illness,[9] it is important to understand that the law does not treat people with severe mental illness in the same way that it treated the people with intellectual disabilities or juveniles prior to the *Atkins* and *Roper* decisions. As

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[9] Before abolishing the death penalty in 2012, Connecticut passed legislation exempting a capital defendant from execution if his "mental capacity was significantly impaired or [his] ability to conform [his] conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." Conn. Gen. Stat. § 53a-46a(h)(2) (2011).

discussed above, the NGRI and competency doctrines represent an attempt of the criminal justice system to accommodate the most severely mentally ill individuals with the understanding that their impairments diminish their culpability and therefore preclude their execution. Because there were no equivalent doctrines for juveniles or those with intellectually disabilities, legislatures recognized the obvious the gap in the law with respect to these two populations and intervened to close it. In the context of those with severe mental illness, the issue is not the law's failure to address their specific impairments at all in the context of capital cases, but rather, a progressive realization that the safety mechanisms the law already provided, some as old as the legal system itself, are inadequate.

The national trend towards abolition of the death penalty, the abundance of state court decisions vacating death sentences on the basis of mental illness, and the public calls for categorical bans by judges in state and federal court evince an even greater consensus in favor of a categorical ban here than there was at the time of *Atkins* and *Roper* for those populations.

First, nationwide, states have moved dramatically away from execution. Since the *Atkins* and *Roper* decisions, nine more states have abolished the death penalty.[10]

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[10] **New Jersey** (2007); **New York** (2007); **New Mexico** (2009); **Illinois** (2011); **Connecticut** (2012); **Delaware** (2016); **Maryland** (2013); **Washington** (2018); **New Hampshire** (2019). *See* Death Penalty Information Center (DPIC),

Some states, including Nevada, continue to authorize executions, but have not carried any out in decades. This further explains the "little need to pursue legislation barring the execution of the [severely mentally ill] in those States." *See Hall*, 572 U.S. at 716 (quoting *Atkins* 536 U.S. at 316). Of the 29 states that currently authorize the death penalty, four have gubernatorial moratoriums on executions.[11] Of the remaining 25 states that have the death penalty and no governor-imposed moratorium, only 13 have carried out executions in the last five years. Nevada is not among them, as this state has not carried out an execution since 2006. Regardless of the reason for their de facto moratoriums, the states that do not actively execute anyone from their death row population are not executing anyone with severe mental illness.

Moreover, many people with severe mental illness who have been sentenced to death are prevented from being executed specifically because of their disease or disorder. Several state courts, including this Court, have vacated death sentences on proportionality review based on severe mental illness. *See e.g.*, *State v. Roque,* 141 P.3d 368, 405-06 (Ariz. 2006) (finding a death sentence disproportionate based on the defendant's mental illness and low intellectual capacity), *abrogated on other*

States by State, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (hereinafter DPIC, State by State).

[11] **Colorado** (2013), **Oregon** (2011), **Pennsylvania** (2015); **California** (2019). *See* DPIC, State by State.

grounds by State v. Escalante-Orozco, 386 P.3d 798 (Ariz. 2017); *State v. Thompson*, No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *36 (Tenn. Crim. App. Apr. 25, 2007) (modifying a death sentence to life imprisonment for "a defendant who possessed a long and documented history of mental illness spanning his adult life"); *Offord v. State*, 959 So. 2d 187, 193 (Fla. 2007) (finding a death sentence disproportionate where there was only one aggravating factor and the defendant had lifelong, well-established history of severe mental illness); *Haynes v. State*, 103 Nev. 309, 319 (1987) (finding the death penalty disproportionate when imposed on a man with severe mental illness who was likely delusional at the time of the crime); *Harvey v. State*, 100 Nev. 340, 341 (1984) (finding the death penalty disproportionate when imposed on a man who "suffered from an extreme mental or emotional disturbance at the time of the killing").

More recently, governors too have begun relying on severe mental illness as a basis for clemency decisions. Though governors do not frequently award clemency to those on death row, in the last two decades governors from Georgia, Ohio, Virginia, and Indiana have done so, stopping the executions of five death row prisoners on the basis of their severe mental illness not rising to the level of legal "insanity." Death Penalty Information Center, *Clemency*, https://deathpenaltyinfo.org/facts-and-research/clemency. While these cases illustrate a consensus against executing those with mental illness, clemency and

proportionality review are not sufficient to prevent the unconstitutional execution of people with severe mental illness.

Across the country, numerous state and federal judges have explicitly called for a categorical rule barring people with severe mental illness from facing the death penalty. *See e.g.*, *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 739 (Mo. 2015) (Teitelman, J., dissenting) ("I would hold that the reasoning in *Ford v. Wainwright*, … *Atkins v. Virginia*, … and *Roper v. Simmons*, … applies to individuals who…were severely mentally ill at the time the offense was committed."); *State v. Lang*, 954 N.E.2d 596, 649 (Ohio 2011) (Lundberg Stratton, J., concurring) ("If executing persons with mental retardation/developmental disabilities or executing juveniles offends 'evolving standards of decency,' then I simply cannot comprehend why these same standards of decency have not yet evolved to also prohibit execution of persons with severe mental illness at the time of their crimes."); *State v. Scott*, 748 N.E. 2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting) ("As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so."). *See also*, *Commonwealth v. Baumhammers*, 960 A.2d 59, 101-08 (Pa. 2008) (Todd, J., concurring); *Baird v. State*, 833 N.E.2d 28, 34-36 (Ind. 2005) (Boehm, J., dissenting); *State v. Nelson*, 803 A.2d 1, 41-50 (N.J. 2002) (Zazzali, J., concurring). *Bryan v. Mullin*, 335 F.3d 1207, 1228 (10th Cir. 2003) (Henry J., concurring in part and dissenting in part).

Similarly, every major mental health association in the United States has taken an affirmative stance in favor of categorically prohibiting the execution of individuals with severe mental illness. *See e.g*., Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illness* (approved June 14, 2016); Murder Victims' Families for Human Rights and National Alliance for the Mentally Ill American Psychological Association, *Double Tragedies – Victims Speak Out Against the Death Penalty for People with Severe Mental Illness* (2009); American Psychological Association, *The Death Penalty in the United States* (approved August 2001), https://www.apa.org/about/policy/death-penalty; American Psychiatric Association, *Position Statement on Moratorium on Capital Punishment in the United States,* (approved October 2000). In 2006, an ABA task force, comprised of both legal and mental health professionals, joined the conversation and called for a categorical ban. ABA, *Mental Illness Resolution* (2006), https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/mental-illness-2006/. Ten years later, the ABA reiterated its recommendation in a comprehensive report, relying heavily on the rational in *Atkins* and *Roper*. ABA, *Severe Mental Illness*, at 26-31.

Finally, the American public is also in favor of exempting those with severe mental illness from the death penalty. In 2014, a national poll found that 58% of Americans supported a severe mental illness exemption from execution. National

Survey Results, Public Policy Polling (Nov. 2014) https://drive.google.com/file/d/0B1LFfr8Iqz_7R3dCM2VJbTJiTjVYVDVodjVVSTNJbHgxZWlB/view. Similarly, a 2015 "multi-state voter survey" that found 66% of people in the U.S. oppose the death penalty for people with mental illness. *Multi-State Voter Survey: Death Penalty and Mental Illness*, Survey conducted: November 30th – December 7th, 2015, DAVID BINDER RESEARCH (2015). After hearing further details about how a severe mental illness exemption would operate in practice, voter support for the exemption rose to 72%. *Id*.

The decline in the death penalty as a whole, the doctrines of NGRI and competency, the use of proportionality review and clemency to vacate death sentences based on severe mental illness, and the recommendations of judges and leading legal and mental health organizations provide support that the death penalty as applied to those with severe mental illness is both cruel and unusual. Given the broader protections of the Nevada Constitution, however, this Court need only find that such a punishment is either cruel or unusual in order to grant the requested relief.

Conclusion

For the foregoing reasons, *amici* respectfully request this court find in favor of Appellant Vanisi by declaring the death penalty unconstitutional as applied to those with severe mental illness, reversing the district court ruling, vacating Mr. Vanisi's death sentence, and remanding this case for proceedings consistent with such relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 12,491 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion regarding matters in the record to be supported by a reference to the page 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 this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this the 3rd day of October 2019.

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CERTIFICATE OF SERVICE

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

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