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

APPELLANT'S REPLY BRIEF

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

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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.

1. The Washoe County Public Defender appeared on behalf of Vanisi during pre-trial and trial proceedings. The Washoe County Public Defender also appeared on behalf of Vansi before this Court during proceedings for an original writ and for Vanisi's direct appeal.
2. Marc Picker, Scott W. Edwards, and Thomas L. Qualls appeared on behalf of Vanisi during initial post-conviction

proceedings. Scott W. Edwards and Thomas L. Qualls appeared before this Court during proceedings for an original writ and for Vanisi's appeal from the district court's denial of post-conviction relief.

3. The Federal Public Defender, District of Nevada, has appeared on behalf of Vanisi in all subsequent proceedings.

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I. INTRODUCTION

In 1913, this Court, looking to the common law and precedent, answered a legal question about insanity. *See State v. Nelson*, 36 Nev. 403, 136 P. 377 (1913). In doing so, this Court explained that the science of mental illness was improving:

> The darkness in which the world condemned the acts of the individual for the breach of the law, and especially for the abnormalities that appear prevalent in him, is being cleared away by the hand of science, and with the light of knowledge there comes the ever-increasing ray of human sympathy and a persistent study and research as to how this sympathy should best be applied.

Id. at 415, 136 P. at 382. The law, in turn, would adapt: "The courts of the land, in dealing with this great subject, cannot stand by and hold a deaf ear to the march of science." *Id.* Rather, "[t]he rules which once governed, according to the standards best considered, must not remain rigid; but their elasticity must be made commensurate and proportionate to human achievement and the definite results of scientific investigation." *Id.*

For intellectual disability and children, the law has found such elasticity. Both the intellectually disabled and children are categorically

exempt from a sentence of death. But the law has left out one group who, at common law, had the same protections of the intellectually disabled and children: the mentally ill.

This Court, construing the Nevada Constitution, should provide to the severely mentally ill what has already been provided to the intellectually disabled and to children: a categorical exemption from sentence of death.

In answering, the State disputes little: the State does not dispute Vanisi's mental illness, the difficulties that illness has presented to Vanisi's counsel, or that the mental illness has prevented Vanisi from receiving a reliable sentencing determination. The State, apparently, disputes only the conclusion, and then, only in two cursory sentences, near the end of its brief:

> To the extent that the FPD urges this Court to bar execution of all non-insane, competent persons who have been diagnosed with mental health conditions, the State respectfully asserts that such a position would depart sharply from United States Supreme Court precedent. It is a question best posed to the Legislature, not this Court.

Ans. Br. at 53–54. But even this argument is half-hearted. The State does not dispute the need for a categorical exemption for the severely mentally ill. The State does not dispute this Court's authority to find an exemption. Insofar as the State raises objections, they are misdirected.

If the first objection is that an exemption would differ from federal jurisprudence, the State misses the point: Vanisi asks this Court to find this exemption construing the *Nevada* Constitution's protections. The State does not deny this Court's authority to read the Declaration of Rights more broadly than the Bill of Rights.

Nor could it. This Court has long recognized its ability to find greater constitutional protections under the state constitution than under the federal constitution. *See, e.g.*, *State v. Kincade*, 129 Nev. 953, 956, 317 P.3d 206, 208 (2013) ("states are permitted to provide broader protections and rights than provided by the U.S. Constitution.").[1] Here,

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[1] *See also Thomas v. Eighth Jud. Dist. Ct.*, 133 Nev. 468, 469, 402 P.3d 619, 622 (2017); *Wilson v. State*, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007); *State v. Bayard*, 119 Nev. 241, 246, 71 P.3d 498, 502 (2003); *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 414, 23 P.3d 243, 250 (2001); *State v. Harnisch*, 114 Nev. 225, 228–29, 954 P.2d 1180, 1182–83 (1998); *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 Nev. 483, 501–02, 396 P.2d 683, 693 (1964) ("We are under no compulsion to follow

especially, there is cause to construe the Nevada Constitution's provision more broadly than its federal counterpart: the Nevada Constitution independently prohibits cruel punishments and unusual punishments. *Compare* Nev. Const. art. 1, § 6 (prohibiting "cruel or unusual" punishments) *with* U.S. Const. am. VIII (prohibiting "cruel

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decisions of the United States Supreme Court which considers such acts in connection with the federal constitution."); Amicus Br. of Am. Civil Liberties Union of Nev. & Am. Civil Liberties Union Found. [hereinafter ACLU Br.] at 2–11 (Oct. 24, 2019) ("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.").

Indeed, federal judges with differing jurisprudence have emphasized that state constitutions may offer broader protections than the federal constitution. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 16 (2018) ("State courts have authority to construe their own constitutional provisions however they wish. Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees found in the U.S. Constitution when it comes to the rights guarantees found in their own constitutions, even guarantees that match the federal ones letter for letter."); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

and unusual" punishments); *Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993).[2]

If the State's second objection is that the question is "best posed to the Legislature," the State again misses the point: even the Legislature is bound by the Nevada Constitution. The State does not dispute this Court's responsibility to answer questions of constitutionality; the State does not claim that only the Legislature may pass upon the constitutionality of its legislation.

Nor could it. "The Legislature has considerable law-making authority, but it is not unlimited." *City of Fernley v. State, Dep't of Tax'n*, 132 Nev. 32, 41, 366 P.3d 699, 706 (2016). For it is the courts "whose judicial functions involve hearing and resolving legal

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[2] *See also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* [hereinafter Scalia & Garner, *Reading Law*] 116, 119 (2012) (describing Conjuctive/Disjunctive Canon and "The Basic Prohibition": With the conjunctive list, the listed things are individually permitted but cumulatively prohibited. With the disjunctive list, none of the listed things is allowed."); *id.* at 116 ("Hence in the well-known constitutional phrase *cruel and unusual punishments*, the *and* signals that cruelty or unusualness alone does not run afoul of the clause . . . .") (italics in original); Br. of Amici Curiae Nev. Law Professors [hereinafter Nev. Law Prof. Br.], at 38–41 (Oct. 3, 2019); ACLU Br. at 11–20.

controversies." *City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 362, 302 P.3d 1118, 1128 (2013). That includes determining the constitutionality of legislative or executive branch action. *See, e.g.*, *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 167 (2011); *State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011); *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004); *Smith v. State*, 93 Nev. 82, 85, 560 P.2d 158, 159 (1977). Indeed, it is the judicial branch that, ultimately, must "be an intermediate body between the people and the legislature." The Federalist No. 78 (Alexander Hamilton).

II. ARGUMENT

A. Because Vanisi suffers from severe mental illness, he is exempt from the death penalty.

Siaosi Vanisi's severe mental illness afflicted him before, during, and after the offense in this case, through two trials and both of his post-conviction proceedings.

In the years before his arrest, Vanisi collected plastic bottles; he "had hundreds of these bottles piled-up in the corner of his living room . . . ." 26AA5482 ¶13. They were "for the spaceship he was building." *Id.* Vanisi needed this spaceship to meet his imaginary friend, "a god whom

he called 'Lester,'" a being "more powerful" than "Jesus and the devil because Lester controlled the entire universe." 26AA5485 ¶33; *see also* 27AA5739 ¶¶19–20. He would inhabit different personalities, without pattern or warning, each with their own identity, manner of speaking, and sense of fashion. *See, e.g.*, 26AA05483 ¶¶17–20. In the months leading up to the offense, Vanisi's behavior intensified, his delusions fixating on police officers. *See* 26AA05417 ¶32; 27AA05774 ¶¶16–17; 27AA05740 ¶26; 27AA05775 ¶22.

His condition did not improve with his arrest. He spoke gibberish, danced naked, showered in his own urine, 23AA04888; he was placed on suicide watch, and made howling sounds, 26AA05530, 26AA05535, 26AA05537, 26AA05548, 26AA05556; he would put "toothpaste markings" on his face, run into walls, and pour soapy toilet water all over himself while nude, 27AA05598, 27AA05600, 27AA05620.

His condition complicated court proceedings. Before his first trial, the district court ordered a competency evaluation; before his second trial the district court ordered a competency evaluation; during his first post-conviction proceeding, the district court ordered a competency

evaluation; during his second post-conviction proceedings, the district court ordered a competency evaluation. *See* 23AA04919; 24AA05004; 22AA04582; 37AA07782. Each time, the district court found Vanisi competent. 24AA05083; 18AA03794; 22AA04611; 38AA08010.

His condition complicated working with counsel. Before his first trial, Vanisi "began attempting to sabotage his defense team." 19AA03865. Before his second trial, counsel insisted on the need for proper medication. 24AA04995–96. Meanwhile, Vanisi attempted to fire his attorneys, 17AA03480; this failed, and Vanisi asked to represent himself, 17AA03490; this failed too, so Vanisi refused to assist in the preparation of a defense, 18AA03692. During Vanisi's first post-conviction proceedings, counsel's singular focus on competence prevented them from developing Vanisi's claims. *See Vanisi v. Baker*, No. 65774, 2017 WL 4350947, at *2 (Nev. Sept. 28, 2017). Finally, during the instant proceedings, Vanisi waived his evidentiary hearing, against the advice of counsel and the warnings of the district court. 38AA08012, 38AA08055–56.

As a result, the most important "relevant mitigating factor"—Vanisi's severe mental illness—has not been considered on its merits as mitigation in this case. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

This violates an important constitutional protection: the requirement that the sentencer be able to consider "any relevant mitigating evidence," which follows from the requirement that death sentences cannot be arbitrarily imposed. *See Gregg v. Georgia*, 428 U.S. 153, 195 (1976); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("Thus the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all."); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) ("the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'").[3]

And here, severe mental illness presents a special problem: though it is important mitigating evidence, there are six reasons a

[3] Indeed, at least one member of this Court has acknowledged that the State has "an interest in ensuring a reliable penalty determination." *Holloway v. State*, 116 Nev. 732, 747, 6 P.3d 987, 997) (2000) (Rose, C.J., concurring).

defendant suffering from severe mental illness cannot receive a reliable sentencing determination: (1) individuals who suffer from severe mental illness have a compromised ability to cooperate with counsel; (2) severe mental illness renders the defendant a poor witness; (3) severe mental illness causes distortions that result in poor decision-making; (4) though severe mental illness should be mitigating, jurors are at great risk of considering it aggravating; (5) state and defense experts are likely to disagree about the severity of mental illness, creating a risk that jurors will not understand the evidence; (6) cases where the defendant suffers severe mental illness are often cases where the brutality of the offense might cause the jury to select a sentence infected with passion and prejudice. *See* 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, *The Unreliability Principle*] (identifying these six factors).

For minors and the intellectually disabled, the Supreme Court has recognized these problems warrant exemption from the death penalty

under the federal constitution. For the severely mentally ill, these same problems warrant exemption from the death penalty under the Nevada Constitution.[4]

1. Executing someone who suffers from severe mental illness is cruel or unusual punishment under the Nevada Constitution.

The first article of the Nevada Constitution is the Declaration of Rights. Section 6 commands, "Excessive bail shall not be required, nor excessive fines imposed, *nor shall cruel or unusual punishments be inflicted*, nor shall witnesses be unreasonably detained." Nev. Const. art. 1, § 6 (emphasis added). The bar against cruel or unusual punishments includes a categorical exemption against the death penalty for individuals suffering from severe mental illness.

a. The State does not dispute that the Nevada Constitution exempts severely mentally ill individuals from the death penalty.

In interpreting the Nevada Constitution, this Court is guided by the principle that it "was written to be understood by the voters; its

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[4] In addition, the federal constitution or international law categorically exempt the severely mentally ill from the death penalty. *See* Opening Br. at 107–10.

words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)). Analyzing a provision of the Constitution begins with its text. *Miller v. Burk*, 124 Nev. 579, 590–91, 188 P.3d 1112, 1119–20 (2008). This Court "will apply the plain meaning of a [constitutional provision] unless it is ambiguous." *Landreth*, 127 Nev. at 180, 251 P.3d at 166. A provision is ambiguous if it is susceptible to two or more reasonable but inconsistent interpretations. *Strickland*, 126 Nev. at 234, 235 P.3d at 608.

Here, the Nevada Constitution's prohibition against cruel or unusual punishment—as to the question of executing the severely mentally ill—is susceptible to two interpretations: the provision prohibits the practice, or the provision does not. The phrase is ambiguous.[5] Resort to dictionary definitions does not decide the better

[5] Indeed, in *Mickle v. Henrichs*, 262 F. 687, 689 (D. Nev. 1918), a U.S. District Judge, analyzing the Nevada Constitution's prohibition against cruel or unusual punishment, noted that decisions from other jurisdictions on similar provisions were "not altogether harmonious."

reading. *See Cruel*, *Webster's 3d New International Dictionary* (1993) ("disposed to inflict pain esp. in a wanton, insensate, or vindictive manner . . . ."); *see Unusual*, *Webster's 3d New International Dictionary* (1993) ("being out of the ordinary . . . .").[6]

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[6] Dictionaries more contemporaneous with the adoption of the Nevada Constitution do not resolve this ambiguity. *See, e.g.*, Joseph Worcester, *A Comprehensive Dictionary of the English Language* 134 (Rev. 1860) (Cruel: "Inhuman; hard-hearted; savage."); *id.* at 455 (Unusual: "Not usual; rare."); *id.* at 456 (Usual: "Common; occurring often; customary; *ordinary*; general." (italics in original)); *see also* Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries* [hereinafter Scalia & Garner, *Dictionaries*], *in* Scalia & Garner, *Reading Law* 415, 421 (offering Worcester as an exemplary dictionary for the time).

Law dictionaries are also unhelpful. A number of contemporaneous law dictionaries did not define cruel, unusual, or the phrase. *See, e.g.* Alexander Burrill, *A Law Dictionary and Glossary*, v. 1, 403 (2d ed. 1867) (providing no entry for "cruel" but defining "cruelty" as "In the law of divorce. Such conduct on the part of a husband towards his wife as affords a reasonable apprehension of bodily hurt."); *id.* at v.2, 563 (containing no entry for "unusual"); *see also* J.J.S. Wharton, *Law Lexicon, or Dictionary of Jurisprudence* 199 (1860) (containing no entry for "cruel"); *id.* at 757–58 (containing no entry for "unusual"); John Bouvier, *A Law Dictionary* 355 (6th ed. 1856) (providing no entry for "cruel" but defining "cruelty": "This word has different meanings, as it appplied [sic] to different things. Cruelty may be, 1. From husband towards the wife, or vice versa. 2. From superior towards inferior. 3. From master towards slave. 4. To animals."); *id.* at v. II, 614 (containing no entry for "unusual"); Henry Campbell Black, *A Dictionary of Law* 305 (1st ed. 1891) (defining "cruelty": "The intentional and malicious infliction of physical suffering upon living creatures, particularly human beings; or, as applied to the latter, the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity; outrage."); *id.* at 1203

Where a constitutional provision is ambiguous, this Court looks to the provision's history, public policy, and reason to determine what the voters intended. *See Miller*, 125 Nev. at 590, 188 P.3d at 1120.

(1) The history of the provision shows that it offers special protection for children, the intellectually disabled, and the mentally ill.

"It is a mistake to divorce the meaning of words from their context." *Strickland*, 126 Nev. at 235, 235 P.3d at 609. Here, the provision's history provides that context: "Cruel or unusual" was a phrase known at common law.[7] It encompassed two concepts.

First, the phrase curtailed arbitrary imposition of punishment. *See, e.g.*, John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 N.W. J. L. & Soc. Pol'y 307, 334 (Spring

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(containing no definition for "unusual"); *see also* Scalia & Garner, *Dictionaries* 421 (offering Burill, Wharton, Bouvier, and Black as authors of exemplary law dictionaries for the time).

[7] Scalia & Garner, *Reading Law* 320 ("The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common-law meanings.").

2018) ("That the English prohibition against cruel and unusual punishments was seen as a constraint on disproportionate penalties, arbitrary judicial power, and otherwise boundless common-law judicial discretion is clear.").[8]

Second, the clause prohibited any punishment contrary to long or immemorial usage.[9] Here, three protections are particularly informative: the prohibitions against punishing infants, the intellectually disabled, and the mentally ill. Under the protection for infants, someone under the age of seven was not capable of committing a crime; for someone between seven and fourteen, there was a

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[8] *See also* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 37 Wm. & Mary Bill Rts. J. 989, 996 (May 2019); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L. J. 441, 475 (Jan. 2017).

[9] John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1745 (Fall 2008). The clause also prohibited excessive punishment. *See, e.g.*, John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 978 (2011) ("The Cruel and Unusual Punishments Clause was meant to prohibit excessive punishments as well as barbaric ones.").

presumption the infant was incapable.[10] Under the protections for the intellectually disabled and the mentally ill, a person suffering these conditions at the time of the offense could not be prosecuted.[11] The common law also protected people from prosecution and execution while they were afflicted by mental illness.[12] Executing anyone entitled to these protections would have been contrary to long usage, and thus cruel or unusual.

Both understandings—that the provision outlawed arbitrary imposition of punishment and that the less capable are less culpable—would have been appreciated by the framers in adopting the language prohibiting "cruel or unusual" punishment.

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[10] Joel Prentiss Bishop, *Commentaries on the Criminal Law*, § 461 (Little Brown 1865) [hereinafter Bishop, *Commentaries on the Criminal Law*]; *see also* 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 2 at 15 (1736 ed.); 4 William Blackstone, *Commentaries* *23.

[11] Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L. J. 2746, 2756 (June 2015); 2 *The Reports of Edward Coke* 572 (Joseph Butterworth & Son 1826); 1 Matthew Hale, *The History of the Pleas of the Crown*, ch. 4, 33 (1736 ed.); 4 William Blackstone, *Commentaries* *24; Bishop *Commentaries on the Criminal Law*, § 468.

[12] *See, e.g.*, 4 William Blackstone, *Commentaries*, *24–25.

(2) Public policy—namely preventing arbitrary punishment and protecting the less capable—requires expanding common law protections for children, the intellectually disabled, and the mentally ill.

These two points—arbitrary imposition of punishment and protecting the less capable—were relevant when the Supreme Court construed the federal "cruel and unusual clause" to determine that the intellectually disabled and juveniles should be categorically exempt from the death penalty. And both points apply with equal, if not greater, force to the severely mentally ill.

(a) Preventing arbitrary imposition of death sentences requires an exemption for juvenile offenders, the intellectually disabled, and the severely mentally ill.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), arbitrary imposition of the death penalty was the Court's motivating concern. *See, e.g.*, *Furman*, 408 U.S. at 277 (death penalty unconstitutional because imposed arbitrarily); *Gregg*, 428 U.S. at 195 (acknowledging concerns that "the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully

drafted statute that ensures that the sentencing authority is given adequate information and guidance").

After *Gregg*, the death penalty could be imposed only with protections against arbitrariness. Thus, the factfinder must consider aggravating and mitigating circumstances, must make an individualized decision, and must consider any relevant mitigating evidence. *Gregg*, 428 U.S. at 196, 198; *Lockett*, 438 U.S. at 605; *Eddings*, 455 U.S. at 112; *Skipper*, 476 U.S. at 4; *accord Ybarra v. State*, 100 Nev. 167, 175, 679 P.2d 797, 802 (describing *Gregg* line of cases: "This balancing process causes the sentence to focus on the circumstances of the crime and the character of the individual defendant, and to follow capital-sentencing procedures *which are designed to preclude imposition of the death penalty in an arbitrary or capricious manner*." (emphasis added)).

But for juveniles and the intellectually disabled, the High Court recognized, these protections are insufficient. Being a juvenile or suffering from intellectual disability creates too great a risk "that the death penalty will be imposed in spite of factors which may call for a

less severe penalty." *Atkins v. Virginia*, 536 U.S. 304, 320 (2002); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005). For the intellectually disabled, this is so because of the heightened possibility of false confessions; a reduced ability to prove mitigation, to aid counsel, or act as a witness; a demeanor that might wrongly imply lack of remorse; and the double-edged nature of intellectual disability as a mitigating circumstance. *Atkins*, 536 U.S. at 320–21. For juveniles, the risk of arbitrary punishment is similar: their immaturity causes "impetuous and ill-considered actions and behavior"; the brutality of a juvenile offense might overpower mitigation; and experts cannot distinguish between temporary immaturity and "irreparable corruption." *Roper*, 543 U.S. at 569, 573.

From these two exemptions, six considerations inform whether someone suffering from severe mental illness can be reliably sentenced to death: (1) whether the status impairs the defendant's ability to cooperate with counsel, *Atkins*, 536 U.S. at 320–21; (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 increases the

chances of poor decision-making, *Roper*, 543 U.S. at 569; (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 properly considering the mitigation. *Id.*; *see* Sundby, *The Unreliability Principle*, 23 Wm. & Mary Bill Rts. J. at 511 (identifying six factors).

All six factors indicate those suffering from severe mental illness cannot, reliably, be sentenced to death. As defined by the American Bar Association and the American Psychological Association, severe mental illness "refers to a narrower set of diagnoses than mental illness," specifically, "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 severe impairment in major areas of functioning." American Bar Association, Death Penalty Due Process Review Project,

Severe Mental Illness and the Death Penalty, at 9, (Dec. 2016) [*hereinafter* ABA, *Severe Mental Illness*]; *see also* American Psychological Association, *Assessment and Treatment of Severe Mental Illness*, at 5 (Aug. 2009); *see also* NRS 689C.169(2) (defining "severe mental illness" in context of health insurance); NRS 689A.0455(2) (same).[13]

More than intellectual disability or youth, severe mental illness impairs a defendant's ability to cooperate with or assist counsel,[14] to act

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[13] Alternatively, instead of adopting the definition offered by the American Bar Association and the American Psychological Association, this Court could adopt Professor Sundby's six factors for determining whether a particular category warrants an exemption from the death penalty. *The Unreliability Principle*, 23 Wm. & Mary Bill Rts. at 511.

[14] *See, e.g.*, Amicus Br. of the Clark Cty. Pub. Def, (CCPD), Clark Cty. Special Pub. Def. (SPD), Nev. State Pub. Def. (NSPD), Washoe Cty. Alt. Pub. Def. (APD), and Washoe Cty. Pub. Def. (WCPD) Supporting Exemption of Severely Mentally Ill Persons from the Death Penalty [hereinafter Nev. Pub. Def. Br.], at 19 (Oct. 3, 2019) (describing severely mentally ill defendant who "refused to speak with his attorney about facts and evidence, would not sign release forms or answer questions authorizing the acquisition of mitigation materials, and turned away doctors and other expert evaluators"); *id.* at 23 (describing situation of delusional client changing object of delusion); *id.* at 24–25 (describing situation where mentally ill defendant refused to acknowledge condition, refused to fully cooperate with mitigation work, and clung to religious ideation); *id.* at 25 (describing how medication does not always help); Br. of Amicus Curiae the American Bar Association, [hereinafter ABA Br.], at 14 (Oct. 24, 2019) ("Paranoid delusions can also make the severely mentally ill distrustful of their attorneys and their attorneys' motives.");

as a witness,[15] and to make rational decisions.[16] More than intellectual disability or youth, severe mental illness has a double-edged nature that jurors could construe as aggravating.[17] Severe mental illness is

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ACLU Br. at 29–30; Amicus Br. of Nev. Attorneys for Criminal Justice, [hereinafter NACJ Br.], at 3–22 (Oct. 24, 2019) (describing particular problems posed to private defense bar by severely mentally ill clients).

[15] *See, e.g.*, Nev. Pub. Def. Br. at 27–28 (describing defendant who believed s/he should be allowed to testify without cross-examination, was too ill to read a prepared statement, and "made detrimental statements that only increased the risk of death"); *id.* at 28 ("Many symptoms of mental illness, such as confusion, delusion, and hallucination make testimony appear dishonest. Confusion and/or auditory hallucination manifests as hesitation in his or her responses. This hesitation may be erroneously construed by the jury as lying."); ACLU Br. at 29, 30 ("Jurors can easily misinterpret symptoms of mental illness that manifest during trial . . . ."); ABA Br. at 12–13 ("During a psychotic episode, for example, a severely mentally ill individual may become agitated, make inappropriate comments, and may be unable to control their movements—all of which can be interpreted by jurors as dangerous, impulsive behavior . . . . On the other hand, when heavily medicated, these defendants may display a flat demeanor or look (and even fall) asleep as a side-effect of their medication, all of which gives the impression that they are remorseless.").

[16] ABA Br. at 12 (noting the "significant effect on decision making caused by the symptoms of their severe mental illness . . . ."); Nev. Pub. Def. Br. at 26 ("Put simply, a mind consumed by severe mental illness can neither soundly assess legal options nor intelligently invoke fundamental constitutional rights."); NACJ Br. at 15–16 (noting how sometimes limited resources for private counsel can exacerbate this problem).

[17] ACLU Br. at 30 ("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."); ABA Br. at 12 ("although severe mental illness ought to be mitigating, jurors often treat such disease as a *de facto*

more likely to generate conflicting—and confusing to jurors—views from experts.[18] And, finally, more than intellectual disability or youth, where the defendant suffers from severe mental illness, the offense's brutality will inflame the passions and prejudices of the jurors.[19] Thus, severe mental illness, more than intellectual disability or youth, creates an intolerable risk of unreliable death sentences.

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aggravating factor instead."); Nev. Pub. Def. Br. at 33 ("That this person was unmedicated at the time of the incident raised additional concerns: If a jury concluded that severe mental illness made the client more dangerous, the condition's manageability might not assuage this concern.").

[18] Nev. Pub. Def. Br. at 37–38; NACJ Br. at 4–5 (noting special problems posed for private counsel in retaining experts); Sundby, *The Unreliability Principle*, 23 Wm. & Mary Bill Rts. J. at 521 (citing Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 477 (1980) ("The factfinder is likely to view with considerable skepticism the defendant's claim that he did not function as would a normal person under the circumstances."); *see also* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1125 (describing capital juror criticism of expert witnesses).

[19] Nev. Pub. Def. Br. at 37; Sundby, *The Unreliability Principle*, 23 Wm. & Mary Bill Rts. J. at 522 (referencing severely mentally ill defendants and particularly brutal offenses: "[a] defendant who heard voices through clocks uttering Old Testament apocalyptic warnings; one who consumed his own bodily wastes; another who cut out the organs of his two little children and wife in order to kill the demons living inside them, and who then placed the organs in his pockets and returned home and tried to commit suicide.")

(b) Theories of punishment do not support executing juvenile offenders, the intellectually disabled, or the severely mentally ill.

Additionally, the execution of the intellectually disabled and juveniles cannot be justified by penological theories. Of the four justifications for punishment—incapacitation, deterrence, retribution, and rehabilitation—two do not apply in the context of the death penalty. *See Ewing v. California*, 538 U.S. 11, 25 (2003); *Gregg*, 428 U.S. at 183 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."). Neither retribution nor deterrence support execution of the intellectually disabled or juveniles.[20]

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[20] *Atkins*, 536 U.S. at 319 ("the lesser culpability of the mentally retarded offender surely does not merit that form of retribution); *id.* at 320 ("the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information"); *Roper*, 543 U.S. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability and blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); *id.* ("it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . .").

Nor do retribution or deterrence support the execution of the severely mentally ill.[21] Retribution is not served by executing someone who suffers from severe mental illness because retribution recognizes that culpability is directly tied to capability. *See, e.g.*, *Atkins*, 536 U.S. at 319; *Roper*, 543 U.S. at 571.[22] Similarly, deterrence is not served because mental illness interferes with rational decision-making, thus the death penalty cannot deter. *See, e.g.*, *Atkins*, 536 U.S. at 320; *Roper*, 543 U.S. at 571.[23] The State does not argue otherwise.

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[21] ACLU Br. at 25–28; Nev. Pub. Def. Br. at 34–38.

[22] *See* ABA Br. at 6 ("A person does not have the extreme moral culpability necessary to face the death penalty when his illness impairs his ability to interpret reality accurately, to comprehend fully the consequences of his actions, and to control those actions in committing a crime."); Nev. Pub. Def. Br. at 10 ("Those suffering from severe mental illness are categorically less culpable than those who commit the most serious crimes, because the illness contextualizes (and usurps) cognitive and behavioral processes that precipitate criminal conduct."); ACLU Br. at 26 ("Diminished personal culpability in turn diminishes retributive effect.").

[23] ABA Br. at 8 ("The same deficiencies that make individuals with severe mental illness less culpable also make effective deterrence impossible because individuals who cannot think rationally cannot be deterred."); Nev. Pub. Def. Br. at 9 (describing severely mentally ill person who, in hours leading up to offense "experienced a flurry of intense symptoms that precluded rational, logical thought" and who "lacked the capacity to consider execution as a potential penalty, much less control behavioral symptoms to avoid the same"); ACLU Br. at 26 (describing

(3) Reason dictates that Nevada's Constitution affords to the severely mentally ill the protections already afforded to juveniles and the intellectually disabled.

Finally, reason requires reading the cruel-or-unusual provision as prohibiting the execution of the severely mentally ill. Reason cannot justify drawing a line between the severely mentally ill on one side and the intellectually disabled and juvenile offenders on the other. All the reasons identified in *Atkins* and *Roper* apply with equal or greater force to the severely mentally ill.[24] A consistent reading of the prohibition

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how cognitive and behavioral impairments preclude cost-benefit analysis required for deterrent effect).

[24] ACLU Br. at 26 ("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.'" (quoting ABA, *Severe Mental Illness*, at 28)); *id.* at 26–27 (citing 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) & Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. Rev. 293 (2003)); Nev. Pub. Def. Br. at 6 ("These similarities are evident in the inability of severe mentally ill persons to conceptualize the death penalty's social justifications, and adjust their conduct in accordance therewith, the impotency of entrenched procedural protections in ensuring the death penalty's reliability when imposed upon severely mentally ill persons, and the reduced culpability of persons whose conduct is attributable to severe mental illness . . . .").

against cruel or unusual punishment, thus, requires finding an exemption for those suffering from severe mental illness.

History, public policy, and reason show that the Nevada Constitution's prohibition against "cruel or unusual" punishment includes an exemption from the death penalty for those suffering from severe mental illness. The State does not dispute this. The State offers no position with regard to the provision's history, public policy, or reason. This can only be because there is no answer helpful to the State.

And the State offers no answer to the fact that Vanisi's case, in particular, shows the need for a categorical exemption.

b. The State does not dispute that Vanisi's case demonstrates an exemption is necessary for those suffering from severe mental illness.

From the moment of his arrest up to the instant proceedings, Vanisi's mental health has posed a fatal problem to the reliability of his death sentence, exemplifying the problems discussed by *Atkins* and *Roper*. *See* Sundby, *The Unreliability Principle*, 23 Wm. & Mary Bill Rts. J. at 511. Vanisi, beyond any reasonable disagreement, suffers from severe mental illness—as both experts testified during the most

recent competency hearing. 37AA07850; 37AA07934. He suffers from schizoaffective disorder. 31AA06566; 31AA6575; 37AA7850.[25] This disorder has left Vanisi "in a psychotic and decompensated state throughout his imprisonment" with partial improvement occurring only with "high doses of anti-psychotic, tranquilizing and mood stabilizing medication." 31AA06566. The disorder "greatly impairs his cognitive, emotional and behavioural control . . . ." 31AA06575.

The State does not dispute that Vanisi suffers from mental illness. *See, e.g.*, Ans. Br. at 2 (acknowledging Vanisi's "mental illness"); *id.* at 21 (same); *id.* at 52 ("Vanisi's mental illness has been well-known for years . . . ."); *id.* at 24 (noting schizoaffective diagnosis); *id.* at 26–27 (noting Vanisi's "serious mental illness"). The State also does not dispute that, by any definition, this mental illness is severe.[26]

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[25] *But see* 37AA07935 (Dr. Moulton assuming either schizoaffective or bipolar disorder for purposes of evaluation).

[26] The closest the State comes to disputing Vanisi's severe mental illness is a sentence near the end of its brief arguing, "Counsel's mere assertion that Vanisi is mentally ill is not a ground for relief." Ans. Br. at 53. But this does not dispute the reality of Vanisi's mental illness, the experts who attested to it, or that it would qualify as "severe mental illness."

Vanisi's severe mental illness (1) has impaired his ability to work with his attorneys; (2) has rendered him a poor witness; (3) has caused distortions in his thinking processes, leading to poor decision-making; (4) has a double-edged nature as far as mitigation; (5) has led to disagreement among the experts to evaluate him; and (6) is evidenced by the brutality of the offense in this case. The State disputes none of these points.

First, the State does not dispute that Vanisi's severe mental illness has interfered with his ability to assist counsel, infecting these proceedings:

- During the first trial proceedings—after Vanisi's urine bathing warranted competency evaluations but not a finding of incompetency—Vanisi attempted "to sabotage his defense team," leading Vanisi's lawyers to pursue a defense theory they felt was "not workable." *See* 23AA04888; 23AA04929; 19AA03865; 19AA03866. A mistrial followed. 25AA05333.
- Before the second trial, counsel begged the district court to have Vanisi medicated so they could work together and

"carry on these proceedings in a fairly civilized manner." 24AA05000. Vanisi tried to fire his attorneys. 17AA03480. Vanisi "refused to cooperate with counsel." 19AA03867. He asked to represent himself. 17AA03491. After this motion was denied, Vanisi's difficulties with counsel escalated to the point that counsel asked to withdraw, repeatedly indicating they would be per se ineffective if required to continue the representation. 19AA03949; 18AA03689; 18AA03691; 18AA03692. The court required them to continue representation. In response counsel presented little evidence during the trial; the jury sentenced Vanisi to death. 12AA02513.[27]

- During initial post-conviction proceedings, Vanisi's "mental state and erratic behavior prevented counsel from obtaining any meaningful assistance towards the preparation of his Supplement to his habeas petition." 13AA02604 ¶4.

[27] The Opening Brief summarized the defense presentation. *See* Opening Br. at 25–28.

Counsel's sole focus on Vanisi's competence caused them to neglect investigation of constitutional claims for relief. *Vanisi v. Baker*, No. 65774, 2017 WL 4350947, at *2.

- In the instant proceedings, Vanisi waived his evidentiary hearing, against the advice of counsel and warnings of the district court, preventing—again—Vanisi's mental illness from being weighed as mitigating evidence. *See, e.g.*, 38AA08012.

Second, the State does not dispute that, with his severe mental illness, Vanisi is a poor witness. Part of Vanisi's condition is "a marked incapacity to understand his own mental status . . . ." 31AA06579; *see also* 38AA07971 (Dr. Moulton explaining Vanisi's limited insight into his mental illness and how records contradict what Vanisi told evaluators). Vanisi's psychosis during the offense also compromises his ability to accurately recall what happened, in turn compromising his ability to testify about it. 31AA06594 (describing psychosis); *see also* 32AA06714 ¶9 (describing Vanisi's desire to testify). Further, Vanisi's mental illness manifests in a demeanor that would not present well to a

jury. *See, e.g.*, 17AA03501–02 (court order describing how Vanisi "blurted out statements in a loud voice," "took an extremely lengthy period of time to respond to many of the Court's questions," would speak "out loud to himself," would stand up "and engag[e] in unsettling rocking motions," and would repeat "himself over and over again.").

Third, the State does not dispute that Vanisi's severe mental illness has caused poor decision-making. Vanisi's decisions in this case—often against the advice to counsel—have, uniformly, worked to the disadvantage of Vanisi's case:

- Before his first trial Vanisi disregarded counsel's advice about what defense to pursue, indirectly causing a mistrial. 19AA03866–67; 19AA03867; 25AA05333;
- Before the second trial, Vanisi's insistence on presenting an untenable defense led to his request to represent himself (which was denied); his attorneys request to withdraw (which was denied); and his attorneys presenting no evidence during the guilt phase because Vanisi threatened to

testify (which he did not). 17AA03491; 17AA03498; 19AA03949; 18AA03699–700; 24AA05054; 32AA06717 ¶14.

- Before the evidentiary hearing ordered by this Court, Vanisi ignored the district court's repeated entreaties to simply allow the hearing to move forward. *See* 38AA08012; 38AA08016 ("But you could still have a hearing. We've got it all set and you could change your mind after the hearing."); 38AA08054–55 ("Any other questions I could ask him to change his mind that you can suggest to me?").

These were ill-considered decisions, and the State does not argue otherwise.

Fourth, the State fails to dispute that Vanisi's severe mental illness has a double-edged nature as mitigation. Indeed, during the penalty phase, the State took advantage of this double-edged nature to take what should have been evidence of Vanisi's mental illness and instead presented it as evidence of incorrigible future dangerousness. *See, e.g.*, 9AA01820 (Q: "Would you consider him a significant risk to

staff and inmates?" Prison Caseworker: "Yes, sir, I do."); *see also* 9AA01781–99; 9AA01800–15; 9AA01862–84; 12AA02437.

Fifth, the State does not dispute that Vanisi's case reflects the complexity of mental health assessment, and how that complexity is likely to confuse jurors. The experts who evaluated Vanisi without his history came to a number of different conclusions: bipolar disorder, rule out bipolar disorder, bipolar affective disorder, or malingering. 18AA03720; 32AA06743; 22AA04619; 3AA00554; 22AA4592; 22AA04601–02. Three of the four experts who have had the benefit of this history were able to conclude Vanisi suffers from schizoaffective disorder. 31AA06568; 31AA06575; 37AA07850. The fourth expert did not reach a diagnosis, but confirmed a "serious mental illness." 37AA07934. And this complexity is reflected in the difficult question of administering appropriate medication. *See, e.g.*, 17AA03571–72 (District Court: "That's why I'm very uncomfortable ordering specific medications because I'm not a physician and I think it makes it difficult for the Court to monitor it."); 37AA07797–98.

Sixth, and finally, the State does not dispute the brutality or cold-blooded nature of offenses committed by the severely mentally ill. In fact, the State referenced the brutality of this offense on the first page of its brief. Ans. Br. at 1 ("In 1998, Siaosi Vanisi . . . brutally murdered University of Nevada Reno Police Sergeant George Sullivan in an unprovoked and planned attack.").

All of these factors, which the Supreme Court relied on to exempt children and the intellectually disabled, are present and exemplified here. Vanisi's case demonstrates why death sentences cannot be reliably imposed on those with severe mental illness.

c. It is cruel or unusual to execute someone who suffers from severe mental illness.

In his 1881 book, *The Common Law*, Oliver Wendell Holmes explains that "[t]he life of the law has not been logic: it has been experience." *Id.* at 1. He adds, "In order to know what [the law] is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage." *Id.*

In construing the Nevada Constitution's prohibition against "cruel or unusual" punishment, this Court must acknowledge what the common law has been: a source of protection for juveniles, the intellectually disabled, and the mentally ill. And, consulting history and theories of punishment, this Court must acknowledge what the law has tended to become: added protection for juveniles and the intellectually disabled in the form of a categorical exemption against the death penalty.

This Court faces now that "most difficult labor," combining what has been with what is now into what must be: added protection for the severely mentally ill, namely categorical exemption from the death penalty. Those suffering from severe mental illness face too great a risk—a risk realized here—of an unreliable death sentence. Thus, the Nevada Constitution exempts them from death.

The State denies none of this, effectively conceding the need for a categorical exemption. But the State does not concede that Vanisi is entitled to relief; rather the State suggests that procedural default requires the result reached by the district court.

The State is wrong.

2. Procedural default does not bar this claim.

This Court has made clear that procedural default will be excused to prevent a "fundamental miscarriage of justice." *See, e.g.*, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). One way to establish a fundamental miscarriage of justice is to show that someone is "ineligible for the death penalty." *Id.* This Court applies this exception to procedural default where there is a "reasonable probability" that a petitioner is actually innocent of the death penalty. *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).

Because Vanisi's severe mental illness renders him ineligible for the death penalty, the fundamental miscarriage of justice exception applies to overcome any applicable procedural default. Both the State and the district court rely on *Lisle v. State*, 131 Nev. 356, 351 P.3d 725 (2015). Both read *Lisle* so narrowly that no petitioner could ever establish "actual innocence" through a categorical exemption from the

death penalty. *See* Ans. Br. at 50; 38AA08178.[28] This Court should reject this narrow reading.

The Opening Brief discussed—at length—why *Lisle* cannot be read to apply to categorical exemptions from the death penalty. *See* Opening Br. at 116–20. The Opening Brief noted that *Lisle* addressed a specific question related to the presentation of "new evidence of mitigating circumstances." *Id.* at 117 (quoting *Lisle*, 131 Nev. at 363, 351 P.3d at 730). And the Opening Brief explained that *Lisle* drew a distinction between the "objective factors or conditions" relevant to the eligibility phase and the "moral determination" relevant to the selection phase. Opening Br. at 117–18 (citing *Lisle*, 131 Nev. at 364, 367, 351 P.3d at 731–32, 733). *Lisle* concluded that new mitigating evidence "does not present a workable analog" for the actual innocence gateway because mitigating evidence is more appropriate for the selection phase. Opening Br. at 117–18 (quoting *Lisle*, 131 Nev. at 367, 351 P.3d at 733).

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[28] The district court adopted the State's proposed order verbatim, despite a number of misrepresentations of the record. *See* Opening Br. at 111–14. The State's Answering Brief addresses none of these problems.

The Opening Brief contrasted the analysis in *Lisle* with categorical exemptions. *See* Opening Br. at 118–19. The difference being that, like aggravating circumstances, the basis for a categorical exemption is objective. *See* Opening Br. at 118 (citing *Ybarra v. State*, 127 Nev. 47, 54–59, 247 P.3d 269, 274–77 (2011); *State v. Boston*, 131 Nev. 981, 986, 363 P.3d 453, 456 (2015)). Moreover, like aggravating circumstances, categorical exemptions serve a narrowing function that is separate and distinct from the individualized consideration that occurs during the selection phase. Opening Br. at 119 (citing, as examples, *Enmund v. Florida*, 458 U.S. 782 (1982), *Guy v. State*, No. 65062, 2017 WL 548322, at *3 (Nov. 14, 2017)).

The State answers none of this. *See* Ans. Br. at 50.[29] Nor does the State answer Vanisi's other point: a holding from this Court that individuals suffering from severe mental illness would itself serve as good cause to overcome any procedural default. *See* Opening Br. at 120

[29] Ostensibly this is because this portion of the Answering Brief is almost the exact same as the State's district court filing. *Compare* Ans. Br. at 48–52 *with* 38AA08117–38AA08120; *see generally Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010) ("We have also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal.").

(citing *Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006)). As the Opening Brief explained, until Vanisi waived his evidentiary hearing, there were legal mechanisms available for the courts of this state to consider his mitigation evidence, be it during the penalty phase of trial, a post-conviction petition, or a petition under *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). *See* Opening Br. at 120. Only after all these means were frustrated did the need for a categorical exemption become clear. *Id.* The State does not dispute this, but argues that Vanisi's mental illness has been known for years. Ans Br. at 51. The issue, though, is that before there was a chance for a fact-finder to weigh his mental illness as substantive evidence of mitigation and now there is not.[30]

Thus procedural default does not bar consideration of this claim.[31]

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[30] Moreover, this Court has recognized, "Although the statute of limitations may time-bar a claim, it does not prohibit this court from reviewing the constitutionality of an enacted statute." *City of Fernley*, 132 Nev. at 41, 366 P.3d at 706.

[31] Nor is Vanisi's waiver a basis to deny this claim. As discussed in the Opening Brief, Vanisi waived only his evidentiary hearing, not the claim that hearing supported, or any other rights, claims, or arguments. *See* Opening Br. at 111–14 (discussing that Vanisi waived only his hearing with supporting record citations). Indeed, where the State

B. The district court erred by accepting Vanisi's waiver.

As explained in the Opening Brief, three independent reasons show that the district court erred by accepting Vanisi's waiver. First, the decision to have a hearing is a decision of counsel, not petitioner, and especially not a petitioner suffering from diminished capacity. Second, Vanisi was not competent to waive the hearing. And third, that the district court violated this Court's mandate rule by failing to hold the hearing.

1. Having a hearing is the decision of counsel, not petitioner, particularly where petitioner suffers from diminished capacity.

The Nevada Rules of Professional conduct lay out the allocation of authority between counsel and client. *See* Nev. R. Prof. Conduct 1.2(a); *accord McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018). The Rules do not allocate to the client the decision to waive a hearing. *See* Nev. R. Prof. Conduct 1.2(a). The State argues that this interpretation "completely ignores that it is the client that gets to decide 'the objectives of the representation . . . .'" Ans. Br. at 18. But the State cites no

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argues that "Vanisi waived his remaining postconviction ground," the State fails to cite the record. *See* Ans. Br. at 47.

authority for the proposition that having or not having a hearing is an "objective of the representation." It is not. The decision to have a hearing is more akin to trial management—in the same category as decisions about arguments to raise, evidentiary objections, and agreeing to the admission of evidence. *See McCoy*, 138 S. Ct. at 1508.

The State relies on *McCoy*, but fails to explain why the *McCoy* right—a pre- and during-trial right—should apply during post-conviction proceedings. *See* Ans. Br. at 19. This distinction is important. Unlike *McCoy*, Vanisi's evidentiary hearing did not require him to concede guilt. Moreover, *McCoy* explicitly noted that counsel could urge that "McCoy's mental state weighed against conviction." *McCoy*, 138 S. Ct. at 1509.

Moreover, the State does not at all respond to Vanisi's argument that he suffers from diminished capacity under Nev. R. Prof. Conduct 1.14. The State also does not respond to the opinion of Professor David M. Siegel indicating in light of Vanisi's severe mental illness, undersigned counsel could reasonably conclude Vanisi suffered from diminished capacity and, thus, had an obligation to take protective

action. *Compare* Opening Br. at 125–30 (arguing diminished capacity) *and* 36AA07695–99 (Professor Siegel opining on diminished capacity) *with* Ans. Br. at 17–33 (not discussing diminished capacity).

2. Vanisi was not competent to waive the hearing.

Two bases require this Court to reverse the district court's finding that Vanisi was competent to waive his evidentiary hearing. *See* Opening Br. at 130–36. First, the doctors did not employ a recognized methodology in their evaluation. *Compare* 37AA07839 (discussing conversational approach to evaluation); 37AA07841 ("I don't think we really had any strategy"); 37AA07842 (discussing lack of clinical reason to do interview together); *and* 37AA07845 (no planning regarding who would lead the discussion) *with* American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Assessment*, 43 J. of the Am. Acad. Psychiatry & Law, No. 2 (2015 Supp.); *see also* American Psychological Association, *Specialty Guidelines for Forensic Psychology*, Am. Psychol. (Jan. 2013). The State offers a lengthy summary of the doctors' testimony, but cites to no authority indicating their methodology was clinically recognized. *See* Ans. Br. at 21–29.

Second, the district court did not have substantial evidence of Vanisi's competence. *See Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006). Dr. Zuchowski acknowledged concerns over Vanisi's medication. *See* 37AA07863. Dr. Moulton noted inconsistency between Vanisi's self-reporting to prison officials and his self-reporting during the evaluation. *See* 38AA07971; 38AA07355. Given these issues, the district court lacked substantial evidence to conclude that Vanisi was competent.

The State emphasizes that undersigned counsel did not raise questions of Vanisi's competence with regard to Vanisi's waiver of appearance. *See* Ans. Br. at 13. As noted before the district court: competency is fluid, particularly for someone—like Vanisi—who suffers a mood disorder characterized by ups and downs. *See* 37AA7846 ("a large proportion of their illness, of their life history, is also interrupted by mood episodes. So they get mania. They get depression."). Indeed, in asking the district court to accept Vanisi's written waiver of appearance, counsel emphasized that transporting Vanisi would disrupt

his then-stable emotional state. *See* 35AA07379.[32] Moreover, competency is context-specific: there is a significant difference between waiving personal appearance at a hearing where counsel will be present and waiving the hearing altogether.

3. The district court violated the mandate rule in accepting Vanisi's waiver.

The district court's failure to conduct the hearing violated the mandate of this Court's prior order. *See Vanisi*, 2017 WL 4350947, at *3; *see also State Engineer v. Eureka County*, 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017). The State fails to address this argument. *See* Ans. Br. at 17–33.

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[32] The State's Answering Brief overstates the record with regard to Vanisi's waiver of personal appearance. *See* Ans. Br. at 6. On March 20, 2018, the State filed an application for Vanisi's presence; on March 23, 2018, the district court issued its order before Vanisi had an opportunity to respond. *See* 35AA07321, 35AA07325. Vanisi's motion for reconsideration was not based on his prior waivers, but rather that "Vanisi has informed undersigned counsel that he wishes to waive his appearance at the October 1, 2018, evidentiary hearing." 35AA07328. The motion indicated, "Undersigned counsel will obtain a signed Waiver of Appearance from Vanisi and file it with the Court within thirty days." *Id.* The motion mentioned the previous waivers merely as reminders that the district court had accepted them before. *Id.*

C. The district court erred by failing to disqualify the Washoe County District Attorney's office.

To prevail on a motion to disqualify, two showings are required. First, there must be "a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Cronin v. Eighth Jud. Dist. Ct.*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989) (quoting *Shelton v. Hess*, 599 F. Supp. 905 (S. D. Tex. 1984)). Second, "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a particular lawyer's continued participation in a particular case." *Id.*

Here, a specifically identifiable impropriety did occur: the Washoe County District Attorney's Office either advised or failed to correct the mistaken impression that the office represented the Washoe County Public Defender's Office.[33] The State does not dispute that post-

[33] The State treats a footnote in the Opening Brief as though it raises another argument for disqualification. *See* Ans. Br. at 39–42 (citing and responding to Opening Br. at 143 n.54). That footnote was not raising an independent basis for relief, but providing additional evidence of confusion over whether the Washoe County District Attorney's Office represents the Washoe County Public Defender's Office in post-conviction proceedings. Thus, the entire discussion found on pages 39–42 of the Answering Brief is irrelevant.

conviction counsel had difficulties acquiring the file in this case, that post-conviction counsel believed the district attorney needed to approve a waiver signed by Vanisi, or that post-conviction counsel believed the district attorney represented the public defender. *See* Ans. Br. at 34–36.[34] The State points out that the district attorney *did* correct any misapprehension about whether it represented the public defender, referring to a July 1, 2002 transcript. *See* Ans. Br. at 37 (citing 36AA07719).

The State neglects to mention that by this point, all the damage of the confusion was done: the State had already acquired the Rule 250 memorandum and a blanket waiver of all privileges over the documents in Vanisi's trial file. *See* 36AA07649; 36AA07659. The State also fails to explicitly indicate one way or another whether the district attorney kept a copy of the memorandum. *Compare* Ans. Br. at 37 ("he possessed it for an hour and delivered it to them without reading it") *with* 36AA07719

[34] Indeed, the State does not address the troubling waiver that Vanisi signed—a waiver that the district attorney's office approved despite the fact that the waiver was so that post-conviction counsel could acquire the public defender's file. *See* 36AA07648–49.

("To the suggestion that I shouldn't have it, I say those that want to keep secrets shouldn't file the lawsuit."). Regardless, an identifiable impropriety occurred, the district attorney had Vanisi's Rule 250 memorandum at least an hour, and possibly longer.[35] This impropriety outweighs the social interest in allowing the district attorney to continue representation.

The State argues that this claim has been waived. *See* Ans. Br. at 37–38. But the doctrines of waiver and laches that the State cites to are as to claims for relief from a conviction. *See* Ans. Br. at 38 (citing *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001)). The error here will not relieve Vanisi from his conviction but would relieve him from facing opposing counsel who violated his rights to confidentiality and privilege.

Finally, there is no proper waiver here. Nev. R. Prof. Conduct 1.6(a) requires informed consent before confidentiality may be waived.

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[35] The State's argument that, by filing the memorandum, the Federal Public Defender "makes the argument incredibly difficult to support," is incorrect. *See* Ans. Br. at 38. As noted below, the memorandum had already been filed by prior post-conviction counsel. *See* 36AA07634 n.22; *see also* 36AA07662.

See also Nev. R. Prof. Conduct 1.0(e) defining informed consent. The State relies on the instructions to the form petition found in NRS 34.735(6). But instruction found at NRS 34.735(6) is insufficient to qualify as informed consent under Nev. R. Prof. Conduct 1.0(e). *See* Nev. R. Prof. Conduct 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."). Indeed, the actual pro se petition filed by Vanisi exemplifies why informed consent is necessary to waive confidentiality: "I am indigent and do not understand the law and need counsel appointed to help me complete this petition and file a supplemental petition." 19AA03938. The State fails to address Vanisi's lack of informed consent. *See* Ans. Br. at 40–42. Finally, the written waiver signed by Vanisi is also insufficient. Vanisi could not have received "adequate information and explanation" about the waiver he signed if his counsel misapprehended the relationship between the district attorney's office and the public defender. The State fails to address this

too. *See* Ans. Br. at 40–42. This completely undermines any suggestion that Vanisi gave informed consent.

Finally, the self-defense exception under Nev. R. Prof. Conduct 1.6(b)(5) does not apply here. As discussed in the Opening Brief: this is not a controversy between trial counsel and Vanisi; there is no criminal charge or civil claim against trial counsel. Thus, the plain reading of the rule shows the self-defense exception does not apply. Moreover, the pro se petition that was on file when the district attorney received the Rule 250 memorandum was bare. *See* 19AA03938. As the State later explained regarding the petition, "At this point there are no claims pending before the Court." Such a petition—raising nothing but the most skeletal of claims—should not serve as a blanket waiver of all confidentiality and privileges.[36]

[36] Formal Opinion No. 55 of the Standing Committee on Ethics and Prof'l Responsibility, which had been withdrawn, then re-issued as a proposed opinion with a call for comment, and then re-issued again as a proposed opinion with a call for comment, before finally issuing as a formal opinion on December 10, 2019, is irrelevant here: the pro se petition raised skeletal claims—"no claims," to use the State's words, 14AA02807—thus, they cannot serve as a basis for waiver.

D. Vanisi is entitled to post-conviction relief because he was deprived of his right to represent himself and, during the guilt-phase, of his right to counsel.

In the opening brief, Vanisi argued he was entitled to post-conviction relief because the trial court erroneously denied his motion for self-representation under *Faretta v. California*, 422 U.S. 806, 833-34 (1975), and then forced him to proceed with conflicted counsel. Opening Br. at 148-57. The State responds that the issue of Vanisi's self-representation falls outside the scope of this Court's limited remand order. Further, this Court's previous denial of this claim is the law of the case, barring reconsideration. Ans. Br. at 44-46. The State contends Vanisi's constructive denial of counsel claim is similarly barred from reconsideration because this Court's previous denial is the law of the case. Ans. Br. at 46.

Contrary to the State's assertions, this Court is not barred from considering Vanisi's claims now. The law-of-the-case doctrine is not a jurisdictional rule. *Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007). Rather, this Court may depart from a prior holding if it is "clearly erroneous" and continued adherence to that prior holding

"would work a manifest injustice." *Id.* The total deprivation of Vanisi's right to counsel at the guilt phase of his capital trial constitutes a manifest injustice. *See* Opening Br. at 156-57. This Court should reconsider its prior holding and grant Vanisi relief.

III. CONCLUSION

Prerequisite to a death sentence is individualized consideration of mitigation; severe mental illness—itself mitigating—prevents this necessary consideration. A categorical bar is necessary.

The State's brief is denigrating: "The 162 page Opening Brief is swollen with much academic and social debate regarding the righteousness of the death penalty, a question better postulated by the Nevada Legislature." Ans. Br. at 15. But Vanisi's Opening Brief cites no "academic" or "social debate" about "the righteousness of the death penalty." Rather, Vanisi relies on the considered opinions of experts, academics, and courts, all engaged in serious attempts to resolve important questions like the one presented here: how should this Court reconcile the requirements of individualized consideration and theories of punishment against the reality of severe mental illness? Supported

by these sources, Vanisi and a chorus of amici offer an answer: the Nevada Constitution requires a categorical exemption for those who suffer from severe mental illness.

Nor is this, as the State suggests, "a question better postulated by the Nevada Legislature." The problem of ensuring that capital defendants receive individualized consideration of mitigating evidence is a judicial problem: it is the judicial branch who must preside over these cases; it is the judicial branch who must construe the Nevada Constitution; and, ultimately, it is the judicial branch who must protect the rights of defendants against the worst excesses of the executive and legislative branches. Vulnerable populations, like the severely mentally ill, require special protection commensurate with the special dangers they face.

Consistent with the Nevada Constitution, and its prohibition of cruel or unusual punishments, individuals who suffer from severe mental illness are exempt from the death penalty. And because Vanisi suffers from severe mental illness, he is ineligible for the death penalty.

Additionally, this Court should reverse the district court's holding accepting Vanisi's waiver, reverse the district court's order declining to disqualify the Washoe County District Attorney's Office, or grant Vanisi post-conviction relief.

For the foregoing reasons, Vanisi requests that this Court reverse the district court's holdings and remand this case for proceedings consistent with such relief.

DATED this 10th day of March, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on March 10, 2020. Electronic Service of the foregoing PETITIONER'S REPLY BRIEF shall be made in accordance with the Master Service List as follows:

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