

● ORIGINAL ●

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,

Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT

COURT OF THE STATE OF NEVADA,

HON. CONNIE STEINHEIMER, DISTRICT

JUDGE,

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

Case No.

45061

FILED

APR 13 2005

BY JANET M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

APPLICATION FOR WRIT OF MANDAMUS and/or WRIT OF PROHIBITION

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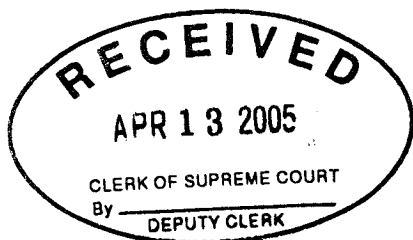
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INTRODUCTION

This is a capital case. Pursuant to NRAP 21, Siaoosi Vanisi, Petitioner herein, requests that this Court grant his request and mandate that proceedings upon his district court Petition for Writ of Habeas Corpus (Post-Conviction) be stayed pending his return to competency. The district court's determination that Petitioner should proceed with a hearing upon the merits of his writ claims, despite the evidence of his inability to cooperate and assist counsel and his mental health, was an arbitrary and capricious exercise of discretion. (App. 251-54).¹ Presently compelled to proceed with a hearing on May 2, 2005, the Petitioner is without a plain, speedy and adequate remedy at law, absent intervention by this Court in its supervisory capacity.

STANDARDS FOR GRANTING THE WRIT

A writ of mandamus should issue to control a court's arbitrary and capricious exercise of discretion. Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992). In Smith v. District Court, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997), this Court explained that it will not exercise its discretion to consider a petition for a writ of mandamus unless considerations of sound judicial economy and administration militate in favor of granting a petition. In addition, this Court may exercise its discretion to grant a petition where an important issue of law requires clarification. Id. at 1345, 950 P.2d at 281. Further, a writ of prohibition or mandamus may properly lie where there is no plain, speedy and adequate remedy at law. Scrimmer v. Eighth Judicial Dist. Court, 116 Nev. 507, 998 P.2d 1190, 1193 (2000). See also, NRS 34.170, 34.330.

In this case, it is necessary to control a lower court's arbitrary and capricious exercise of discretion. Mandating a stay is in the interests of sound judicial economy. Moreover, the legal issue at the heart of the instant petition is one of first impression in the State of Nevada. Finally, without this

¹ "App." Stands for the Petitioner's Appendix which is bound separately and accompanies this Petition.

1 Court's present intervention, the Petitioner has no plain, speedy and adequate remedy as he will be
2 forced to move forward with the presentation of his post-conviction habeas petition and the prosecution
3 of the same, while he is incompetent to do so. The prejudice resulting from such an occurrence should
4 be obvious, but includes the likelihood of an incomplete habeas petition, incomplete claims within the
5 petition, incomplete and/or inadequate information with which to proceed on the petition to an
6 evidentiary hearing, as well as Petitioner's inability to participate in a meaningful way with the
7 proceedings, his inability to consult with and assist counsel with the proceedings, and quite possibly the
8 occurrence of ineffective assistance of counsel during those proceedings.
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11 **STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES**

12 On November 22, 2004 the district court heard argument and received evidence (App. 29-59)
13 upon the Petitioner Siaosi Vanisi's motion to stay post-conviction proceedings and have his competence
14 evaluated. (App. 1-15). Having duly considered the matter, the district court found and ordered that the
15 Petitioner should be evaluated regarding his present competency to maintain and participate in a capital
16 post-conviction habeas proceeding. Specifically the Petitioner's mental competence to assist and
17 communicate with counsel, understand and knowingly participate in the habeas proceeding as a litigant
18 and witness, were ordered evaluated by mental health experts. (App. 60-62). Further, the district court
19 perceived a need for an evaluation of the Petitioner's understanding of the difference between the truth
20 and a lie and the consequences of lying as a witness in court. (App. 60). Accordingly, it ordered that
21 pursuant to NRS 178.415, two psychiatrists, two psychologists, or one psychiatrist and one psychologist,
22 must examine the Petitioner in the Nevada prison facility and report back to the court with any and all
23 findings relative to the Petitioner's present mental competence. (App. 61). The experts appointed
24 pursuant to the district court order were given access to review all medical records of the Petitioner held
25 by the Department of Corrections. Those records, along with records relative to disciplinary infractions
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1 incurred by the Petitioner while in prison, were also lodged in the record for the district court to review.
2 (App. 31-34).

3 In furtherance of its order for competency evaluation, the district court appointed a medical
4 doctor (psychiatrist), Dr. Thomas E. Bittker, M.D. to examine the Petitioner. (App. 61). Doctor Bittker
5 did so and submitted a written report of his findings to the district court. (App. 88-96). Significant
6 among the written findings were:
7

8 ---Vanisi admitted feeling chronically suicidal. (App. 91)

9 --- Vanisi admitted to having nihilistic delusions. (App. 91)

10 ---Vanisi denied ever experiencing perceptual distortions, but did admit to being bothered by
11 thoughts inside of his head. (App. 92)

12 --Vanisi's social judgment was compromised by his nihilistic delusional system and his
13 narcissistic sense of entitlement. (App. 94)

14 ---Vanisi's current presentation is consistent with a diagnosis of Bipolar Disorder, mixed type,
15 with psychosis. The psychotic manifestations are reflected in his bizarre behavior, his nihilistic
16 delusions, his narcissistic entitlement, and his marked ambivalence about such issues as life, death, and
17 the nature of reality. (App. 94)

18 ---Although Vanisi has a reasonable level of sophistication about the trial process, his
19 guardedness, manic entitlement and paranoia inhibit his ability to cooperate with counsel. (App. 95)

20 ---Mr. Vanisi does not currently have the requisite emotional stability to permit him to cooperate
21 with counsel or to understand fully the distinction between truth and lying. This latter deficit emerges
22 directly as a consequence of his incompletely treated psychotic thinking disorder. (App. 95)

23 --Dr. Bittker recommended a modification of Vanisi's medication regimen and a reevaluation of
24 his competency after 90 days of treatment. (App. 96)

1 Doctor Bittker also presented his findings under oath to the district court in a hearing held
2 January 27, 2005. (App. 97-133). Notable in his testimony were the following:

3 ---He is a Distinguished Life Fellow of the American Psychiatric Association, a professor at the
4 University of Nevada School of Medicine and on the faculty of the National Judicial College. (App.
5 102)

6 ---He opined after examination that Vanisi is not currently competent to participate in trial
7 proceedings or to best assist counsel. (App. 103)

8 ---On the basis of his assessment, Vanisi is incompletely treated and has residual evidence of
9 psychosis. (App. 104)

10 ---Although Vanisi denies perceptual distortions—he says he doesn't hear or see things that
11 aren't there—Dr. Bittker was not so sure about that. (App. 106)

12 ---That traditional old-line medicines that Vanisi is receiving have so many side effects that he is
13 unable to represent himself spontaneously in the courtroom. There is a suppression of fluid thinking
14 with the traditional antipsychotic agents. (App. 107)

15 ---Vanisi was not malingering or faking his symptoms when Dr. Bittker examined him. (App.
16 109)

17 ---Vanisi's behavior is considerably influenced by delusions and serious impairment and
18 judgment. (App. 110)

19 --Vanisi's derailment of thinking is a much more important sign of his psychosis than is the sign
20 of perceptual distortion. (App. 113)

21 ---It would be difficult, if one was not a psychiatrist to make sense of what Vanisi was saying.
22 (App. 114)

1 ---The balance of evidence suggests that Vanisi is not forthcoming and is irrational based upon
2 his psychosis. (App. 118)

3 ---Vanisi is unique among all the people he has examined on death row in his closed demeanor.
4 (App. 121)

5 --Vanisi does not fully understand the role of defense counsel because of his paranoia. (App.
6 124)

7 The district court also selected a psychologist named A.M. Amezaga, Jr. to meet with Mr. Vanisi
8 and report back about his findings relative to his competence to assist attorneys and ability to testify
9 truthfully. (App. 61). On February 18, 2005, Mr. Amezaga, appeared in court and presented his
10 findings under oath. (App. 149-250). Significant among the matters he swore to in his written report
11 were as follows:

12 ---Vanisi's rational ability to assist his counsel with his defense was at most mildly impaired.
13 (App. 136)

14 --Vanisi's body posture at times was mechanical and robotic. (App. 136)

15 ---Vanisi admitted to delusion of memory. (App. 137)

16 ---Vanisi's short-term memory may be mildly impaired. (App. 137)

17 ---The results of a competency test indicated no effort to feign or exaggerate psychiatric
18 symptoms in order to suggest the possibility of in competency. Point of fact, Vanisi attempted to
19 minimize whatever stressors or legitimate complaints he may actually have, in an attempt to present
20 himself as one who does not require the regime of potent psychiatric medications he is now receiving
21 involuntarily. (App. 138-139)

22 ---Vanisi's ability to testify in a truthful manner or in a manner in which there was little chance
23 he might display a disruptive form of acting out behavior is seriously in doubt. (App. 142)

1 Dr. Amezaga further swore to the following notable facts during the hearing:

2 ---He was licensed in psychology by Nevada in 1996 and does not sit on any professional boards.

3 He is not a medical doctor and does not have authority to prescribe medicine to treat mental illness.

4 (App. 152-153)

5 ---He has previously testified in a criminal trial as an expert but could not recall when. (App.
6 154)

7 ---He did not review the affidavits of counsel in support of the motion for a stay. Nor did he
8 review the disciplinary actions in prison. (App. 157)

9 ---He was aware that Vanisi was being treated with medication for "individuals who are severely
10 psychotically impaired." (App. 160)

11 ---He suspected that Vanisi was suffering from a psychotic disorder of some sort but was
12 uncertain what that might be. (App. 161)

13 ---Vanisi's behavior might suggest some sort of catatonic schizophrenia, but that it was
14 "amusing" given the diagnosis of bipolar disorder. (App. 164)

15 ---He was unwilling to deem Vanisi's behavior as malingering. (App. 165)

16 ---Just because someone is psychotic does not mean he is incompetent. (App. 168)

17 ---One test he administered to Vanisi consisted of secret questions that he would not divulge
18 because it would be "unethical." (App. 187)

19 ---Although he did not know Vanisi's IQ, he suspect he was very bright because of a
20 sophisticated attempt to misrepresent his actual abilities on the secret test. Although, the test results
21 could also be explained as an extended run of "bad luck." (App. 190)

22 ---Vanisi was not likely to engage in truthful testimony. (App. 191)

1 ---Mr. Amazaga admitted that part of his basis for questioning Vanisi's psychiatric symptoms
2 was really just speculation. (App. 199)

3 It should be noted that both Doctor Bittker and Mr. Amezaga found Mr. Vanisi presently
4 impaired in his ability to tell the truth under oath. (App. 95, 142, 191).

5 The district court made an oral ruling at the end of the hearing that went as follows:

6 It's the Court's opinion at this time after having heard both Dr. Bittker and Dr.
7 Amezaga and seeing their written reports and the prison documents that have been
8 submitted by the defense, and reading those medical records, as well as the history of this
9 case and all information, and lastly my opportunity to observe Mr. Vanisi during these
10 hearings and his reaction to certain things, when a joke is made, Mr. Vanisi cracks his
11 smile. He seems to be connecting to the proceedings. All of that put together, I find that
12 he is competent to proceed. I do find him competent to assist counsel.

13 (App. 238).

14 Almost a month later, the district court, with the able assistance of the prosecutor as scribe, filed
15 a written order denying a motion for stay and finding the Petitioner competent to proceed. The order
16 concluded:

17 Based upon the entirety of the evidence, the court finds that Vanisi understands
18 the charges and the procedure. In addition, the court has given greater weight to the
19 expert who administered objective tests and determined that Vanisi has the present
20 capacity to assist his attorneys. The court agrees that Vanisi might present some
21 difficulties for counsel. Nevertheless, the court finds that Vanisi has the present capacity,
22 despite his mental illness, to assist his attorneys if he chooses to do so. In short, the court
23 finds as a matter of fact that Vanisi is competent to proceed.

24 (App. 253)

25 **STATEMENT OF ISSUES AND RELIEF SOUGHT**

26 The issue before this Court is whether the factual determination of the district court regarding the
27 competency of Siaozi Vanisi to proceed with his capital habeas petition is an arbitrary and capricious
28 abuse of discretion. The Petitioner respectfully maintains that the evidence of his present incompetency
is substantial and far outweighs any evidence of competency. Accordingly, in accordance with the

precedent established by the Ninth Circuit Court of Appeals in the case of Rohan v. Woodford, 334 F.3d 803 (9th Cir. 2003), it was clearly erroneous of the district court not to stay habeas proceedings pending the Petitioner's return to competency. By forcing the obviously incompetent Petitioner to proceed with an evidentiary hearing upon his habeas claims, the district court has prejudiced the Petitioner in that he is now forced to proceed on a possibly incomplete and/or inadequate habeas petition, he will be unable to assist his attorneys in preparation of and during the evidentiary hearing, and will not be able to substantiate some of his factual allegations through competent testimony. Meritorious habeas claims thus risk being denied and procedurally barred in later proceedings. Further, judicial economy is not served by forcing the hearing at this time.²

STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

In Rohan v. Woodford, 334 F.3d 803 (9th Cir. 2003), the Ninth Circuit reviewed a death row prisoner's right to receive a stay of post-conviction habeas proceedings while incompetent. The Court held that if a prisoner cannot communicate with counsel because of incompetency, the state must order a stay of proceedings. Id. at 803-804. Further, in Rohan, the Ninth Circuit held that a district court must stay capital habeas proceedings during the petitioner's incompetence, rather than appointing a "next friend" and requiring the friend to pursue the habeas petition on the petitioner's behalf. *See also* Calderon v. U.S. District Court, 163 F.3d 530 (9th Cir. 1998) (*en banc*).

In the present proceedings, the district court reluctantly adopted the Rohan precedent. (App. 237). However, to avoid affording Mr. Vanisi the remedy provided by that law, it disregarded the vast weight of competent evidence presented on the issue of incompetency and instead relied upon the

² Moreover, it would not prove a hardship for the State or the courts to follow the recommendations of Dr. Bittker regarding a modification of Vanisi's medication regimen and retesting of Vanisi's competence after 90 days of his recommended medication changes. Given the evidence presented of Vanisi's psychosis, such actions are appropriate and are not unreasonable.

1 questionable opinions of a non-medical professional who administered a secretive test of Mr. Vanisi.
2 The result of this factual gymnastics is that Mr. Vanisi will not be able to assist counsel in his defense
3 (the prosecution of his habeas petition). The determination that the hearing should proceed under these
4 circumstances is an abuse of discretion. A ruling that is without substantial evidentiary support is
5 arbitrary and capricious. SIIS v. Christensen, 106 Nev. 85, 88, 787 P.2d 408, 410 (1990). It should be
6 corrected with a writ of mandamus. Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637
7 P.2d 534, 536 (1981); NRS 34.160; see Wardleigh v. District Court, 111 Nev. 345, 350, 891 P.2d 1180,
8 1183 (1995)
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11 To find, as the district court did: "The court agrees that Vanisi might present some difficulties for
12 counsel" (App. 253) is a supreme understatement. To pursue life-saving litigation with a client unable
13 to assist counsel or testify truthfully on his own behalf compromises the constitutional protections
14 afforded in death penalty cases by the Sixth Amendment right to counsel. It is an invitation to deadly
15 injustice. The legal claims at issue in the lower court habeas proceeding are substantial. (The claims
16 may be reviewed in the Supplement to the Petition filed under seal separate from the Appendix to this
17 Petition.) To require counsel to prove up and litigate the merits of such claims without the assistance of
18 the petitioner, does indeed present "some difficulties", if not ineffective assistance of counsel.
19 Moreover, it begs the question of why such proceedings should be forced forward. Certainly, questions
20 of finality and case closure are at issue. However, forcing an incompetent petitioner through a hearing
21 on the merits of his claims of legal ineligibility to be executed, does not serve that end. Even the State
22 would agree that executing incompetents offends the constitution. The matter acquires no more finality
23 by conducting a hearing. Forced lethal injection looms no closer.
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1 The present inquiry into Mr. Vanisi's mental competence arose when counsel met with him to go
2 over his habeas issues. Rather than a substantive discussion of legal and factual issues, they were
3 confronted with a client who took his clothes off and rolled on the floor, burst into spontaneous song,
4 thought of himself as an independent sovereign and Dr. Pepper. Vanisi was manic and agitated. He
5 claimed not to have slept in 8 days and related how he made snow angels while naked. He recited
6 gibberish poetry and snarled like a wild animal. (App. 7-14). Needless to say, the bizarre behavior
7 prompted further inquiry and prison disciplinary records were produced that revealed the vast scope of
8 Mr. Vanisi's descent into madness. The records revealed that over the past two years his mental health
9 and behavior had degenerated. Medical records produced for the hearing revealed that Mr. Vanisi was
10 being forcibly injected with powerful anti-psychotic medication that had the effect of rendering him
11 mute and zombie like during certain periods of each month.
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14 Dr. Bittker recognized the precarious mental health of Vanisi and found him incompetent to
15 proceed. (App. 95-96). He recommended a short pause in the proceedings to adjust Vanisi's
16 medications in an attempt to return him to competency. (App. 96). Mr. Amezaga, not being a trained
17 medical doctor, paid no attention to the medications, even though he acknowledged they were powerful
18 drugs used to treat psychosis. (App. 152-53, 157, 160-61). Instead, he focused on the results of a
19 secretive test and admitted speculation to conclude that Vanisi was ready to proceed to hearing. (App.
20 187-190, 199). Notably, both experts found Vanisi *unable* to testify truthfully at such a hearing, a
21 finding that the district court refused to acknowledge. (App. 95, 142, 191).
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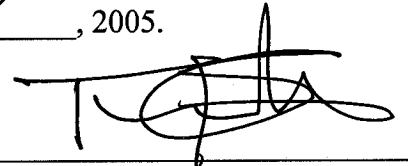
VERIFICATION

The undersigned, as co-counsel for the petitioner, under penalty of perjury, being first duly sworn, depose and say: That each counsel has read the foregoing APPLICATION FOR WRIT OF MANDAMUS and/or WRIT OF PROHIBITION, and knows the contents thereof; that the same is true and correct of their own knowledge, except to those matters stated upon information and belief, as to such matters they believe them to be true. A Petition for relief pursuant to an extraordinary writ may be verified by the petitioner's attorneys if the facts on which the petition is based are within the attorney's knowledge and/or the petitioner is absent from the county or otherwise unable to verify the petition. Thompson v. First Judicial Dist. Court, 100 Nev. 352, 683 P.2d 17 (1984). The Petitioner is indeed absent from the County and the facts upon which the application is based are within the undersigned counsels' knowledge.

DATED this 11th day of April, 2005.



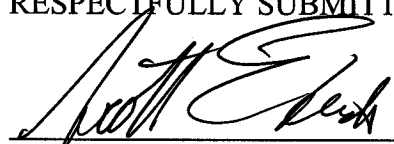
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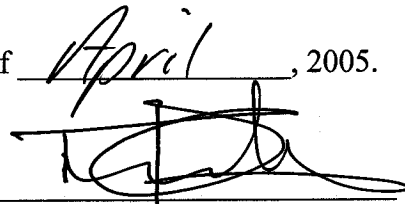
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1 The record is clear that the vast weight of the evidence supports a finding of Vanisi's present
2 incompetence. To ignore such evidence is arbitrary and capricious. Pursuant to Rohan, supra, federal
3 law requires that Vanisi's post-conviction proceedings be stayed until he is able to regain competence, if
4 that is possible. It is requested that this Court act to correct the situation by immediately issuing a stay
5 and granting Vanisi's extraordinary writ.
6

7
8 RESPECTFULLY SUBMITTED this 11th day of April, 2005.

9
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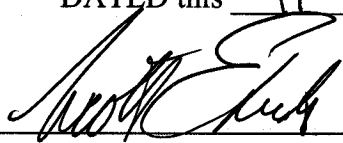
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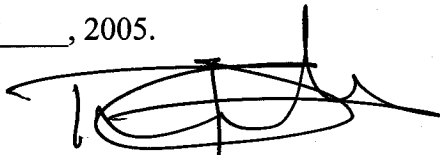
CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this 11TH day of APRIL, 2005.



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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Scott W. Edwards, and that on this date, I served the foregoing *Petition for Writ of Mandamus and/or Prohibition* on the party(ies) set forth below by:

_____ Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

XX _____ Reno/Carson Messenger service.

addressed as follows:

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DATED this 12th day of April, 2005.