SIAOSI VANISI,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

/

No. 50607

RESPONDENT'S ANSWERING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,

Appellant,

v.

THE STATE OF NEVADA, No. 50607

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

Petitioner Vanisi was represented by the Washoe County Public Defender on charges including murder, stemming from the brutal attack on University Police Sergeant George Sullivan. The case has a lengthy procedural history including a mistrial, pre-trial writs and appeals. Ultimately, the case was tried and Vanisi was sentenced to death. He appealed but the judgment was affirmed. *Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001). In the course of affirming, this Court noted, inter alia, that the evidence of Vanisi's guilt was "overwhelming."

Vanisi later filed a petition for writ of habeas corpus (post-conviction). Appellant's Appendix, Volume 8 (8 AA), pp. 1504-1509. The district court appointed counsel and allowed a supplemental petition. Before counsel filed the supplement, however, counsel filed a motion in which they suggested that Vanisi was incompetent and that the cause should be stayed indefinitely until he regained competence. 8 AA 1524. Counsel suggested that they should not be required to file a supplement because there could be other claims that would come to light only if Vanisi was competent. The State opposed the motion and suggested that even if Vanisi were incompetent, that would not lead to indefinitely staying the proceedings. 8 AA 1539. The district court ordered competency evaluations and then, on February 18, 2005, the court conducted a hearing on the

issue. 8 AA 1611 through 9AA 1772. Upon considering all the evidence, the court determined as a matter of fact that Vanisi was not incompetent. Consequently, it was not necessary to decide the consequences of the alleged incompetence. 9 AA 1773-1776. The court then directed counsel to file the supplement. The original petition had no specific claims for relief and so the only claims were those presented in the supplement.

The State filed its motion to dismiss, but the court held that motion in abeyance and allowed petitioner to present evidence concerning all of the claims. At the close of that hearing, the court initially took the matter under advisement. Before any ruling, however, the Supreme Court issued its ruling in *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006). Accordingly, the district court called for additional arguments relating to the application of that case to the instant case. Afterwards, the court again took the matter under advisement. Ultimately, the court entered specific findings of fact and conclusions of law and denied the petition. 13 AA 2626-2642. This appeal followed.

The State has only one additional comment concerning the procedural history. The opening brief repeatedly asserts that the district court blindly signed whatever proposed orders were prepared by the State. That claim is not supported by the record. The record does not include any draft decisions nor does it show the extent of any editing by the district court. If the court were willing to suspend the rules of appellate procedure and allow references to matters *de hors* the record, the State would be more than willing to provide its proposed orders and allow this Court to decide for itself if the district court was simply the pawn of the prosecutor. For the moment, however, the State would merely point out that the record does not support the conclusion that the prosecutor controlled the court. The unsupported insult to the district court ought not to go without some response by this Court. *Cf. Leonard v. State*, 114 Nev. 639, 649, n.3, 958 P.2d 1220, 1228, n.3 (1998)(counsel chastised for unnecessary and harsh rhetoric).

II. STATEMENT OF THE FACTS

The underlying facts concern a particularly brutal murder of a police officer. The facts are

set out at length in *Vanisi v. State, supra,* and need not be repeated here (as this brief is already too long).

III. ARGUMENT

1. The Court Did Not Err in Failing to Be Persuaded That Vanisi Was Presently Incompetent.

The first issue in the opening brief concerns the claim that Vanisi was incompetent, not at the time of the trial but at the time he was seeking habeas corpus relief.[1] The argument presents a number of interesting issues, but can be readily resolved because the trier of fact was simply not persuaded that Vanisi was presently incompetent.[2] 9AA 1773.

One of the first issues is whether the claim of present incompetence has any relevance to this action. Vanisi relies exclusively upon a 9th Circuit decision interpreting a federal statute: *Rohan v. Woodford,* 334 F.3d 803 (9th Cir. 2003). In that case, a panel of 3 of the 28 judges of the Court of Appeals construed a federal statute and concluded that a federal habeas corpus petitioner in a capital case has the right to counsel and that the right to counsel includes the right to assist counsel and therefore the right to be competent during federal habeas corpus proceedings. The court forged a previously untrodden path and ruled that because the petitioner in that case was incompetent, the remedy was to make his petition sufficient to invoke the jurisdiction of the court, but once the jurisdiction is invoked the court must indefinitely stay the proceedings until the petitioner regained competence. Part of the basis for the ruling was the court's rejection of the notion that incompetence would provide for equitable tolling of the time in which to seek relief.

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[1]At ground 11 of the petition he asserted that he was *not* presently incompetent but may become incompetent in the future. He should be estopped from asserting that he both is and is not incompetent.

[2]The additional arguments are included, not because they are necessary, but in the hopes of obtaining a ruling. There are several cases pending in the Second Judicial District Court in which the petitioner filed a petition for writ of habeas corpus and them immediately claims he was sufficiently competent to sign the petition, but incompetent to proceed with the litigation that he initiated. A ruling from this Court on the significance of the claim would be helpful.

334 F.3d at 812. Despite that, in *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), just three months later, a different panel from the same court held that incompetence does indeed result in equitable tolling of the time in which to seek habeas relief. That panel also declined to extend the role in *Rohan* to non-capital cases. 351 F.3d at 923. As the basis for *Rohan* was rejected in *Laws*, the conclusion of the *Rohan* court must be seen as questionable.

The real basis for the ruling in *Rohan* appears to be in the discussion concerning executive clemency. In a remarkable acknowledgment that the Circuit Court considers its role to assume roles assigned to other branches of governments, the *Rohan* court explained that the new-found right was necessary because the Governors of the several states no longer commute as many death sentences as they once did. 331 F.3d 811. The remarkable part is not that the judges thought of that rationale, but that they put it in a published opinion. The State is confident that this Court does not share that willingness to usurp the role of other government agencies.

The federal statute at issue in *Rohan* has no application to these proceedings and this Court is the final arbiter of the meaning of state statutes. Nevada recognizes a right to counsel in a capital post-conviction action. NRS 34.820. There is no hint, however, that the legislature intended to create an ancillary right to be competent during post-conviction proceedings, or that the legislature mandated the indefinite stay created by the *Rohan* court. Instead, the prior decisions of this Court indicate that a claim of incompetence has only the effect of allowing an action by a next friend. *Calambro, by and through Calambro v. District Court*, 114 Nev. 961, 964 P.2d 794 (1998). The 9th Circuit rule would require the litigation to determine the propriety of allowing litigation through a next friend, but then require that there be no actual litigation so long as the next friend could be appointed. The 9th Circuit would have the trial court allow the appearance of the next friend and then not allow the next friend to do anything. That is nonsense. The flaw in the analysis is at 331 F.3d 816. The court, in discussing a next friend, recites "that a next friend *may* pursue relief does not imply that he *must* do so." However, as the ultimate ruling mandated an indefinite stay, the court actually held that because a next friend *may* pursue relief,

but the court must stay the proceedings once it is shown that the next friend can appear, then the next friend who *may* pursue relief *may not* pursue relief because the case will be stayed until the next friend is no longer needed. That is what is known in logical circles as a "non-sequitur."

The better course is to recognize that the existing claims can be heard and the question of the prisoner's competence will become relevant, if at all, only if he files a successive petition or if the State proposes to carry out the execution.

Another part of the *Rohan* decision makes no sense at all. The court indicated it rejected the notion that the petitioner who is unable to litigate on his own behalf need only decline to initiate the lawsuit. The reasoning of the court was simply that would leave the petitioner unable to seek relief. How that differs from any other plaintiff is not clear, and yet quite clearly the court has not extended the rule to other plaintiffs. Again, the ruling is a non-sequitur.

Finally, even if *Rohan* were binding and applicable, the State would point out that the *Rohan* court would condition the stay and require that counsel identify, at least in a general way, the claims that cannot be pursued because of the alleged incompetence. The Court of Appeals stated "Accordingly, we hold that where an incompetent capital habeas petitioner raises claims that could potentially benefit from his ability to communicate rationally," then the court should stay the proceedings. 334 F.3d at 819. In contrast to *Rohan*, Vanisi has made no effort to identify any pleaded claim that would require his assistance. Instead, he seemed to argue that he had to be competent in order to allow counsel to plead his claims in a supplemental petition. 8AA 1568. Even the *Rohan* court, as misguided as it may be, would not go that far. Neither should this Court.

Turning to Nevada law, this Court has recognized that an action can indeed proceed with a next friend when the petitioner is incompetent. *Calambro, supra.* That ruling is consistent with NRCP 17 that allows for the intervention or appointment of a next friend when an incompetent person initiates a law suit. That rule is applicable to habeas corpus petitions, under NRS 34.780, as chapter 34 does not mention the subject of competency. Therefore, under state law, the action could proceed with a next friend even if the petitioner were incompetent.

The net effect of the *Rohan* ruling was to create an indefinite stay of execution because the defendant was unable to assist counsel. Both this Court and the legislature have rejected that procedure. The standards for incompetence at trial are not the same as the standards for insanity such as will allow a stay of execution. A stay of execution due to the mental state of the condemned is appropriate where the prisoner does not know that the State proposes to execute him, or why. *Demosthenes v. Baal*, 495 U.S. 731, 110 S.Ct. 2223 (1990). That is a far cry from the criminal incompetency standard employed by the *Rohan* court. The legislature has provided the circumstances in which a stay of executing pending litigation is appropriate. NRS 34.726(2). That statute does not include the reasoning of the *Rohan* court. As this matter is governed by state law, not federal, the State contends that state law is contrary to the analysis of the *Rohan* court.

The correct approach was described in a Washington case, *Matter of Hews*, 741 P.2d 983 (Wash. 1987). The court noted that it would infringe on the rights of other incompetent prisoners to hold that they were barred from obtaining relief while incompetent. The Washington court also anticipated that the alleged incompetency might serve to allow a subsequent petition based on information that was not available to the prisoner due to his legal incompetence. The State sees nothing wrong with the notion of making the inquiry and creating a record, just in case the petitioner was later to file a successive petition and try to claim that it was excused due to incompetence. For the moment, the State suggests that this Court should rule as did the Washington court, and hold that this litigation could properly go forward even if the petitioner was found to be incompetent.

Other courts agree that if a petitioner is incompetent, that does not prevent litigation of a petition that has been filed. *Carter v. State*, 706 So.2d 873 (Fla. 1998); *State v. Debra E.*, 523 N.W.2d 727 (Wisc. 1994); *Commonwealth v. Haag*, 809 A.2d 271 (Penn. 2002); *Fisher v. State*, 845 P.2d 1272 (Okla. Cr. 1992); *Ex Parte Mines*, 26 S.W.3d 910 (Tex. Cr. 2000); *O.K. v. Bush et al.*, ___ F.Supp. ___ (D.D.C. October 26, 2004). The last case listed involves a prisoner held at Guantanamo Bay, Cuba, who claimed a right to be competent as he litigated his habeas corpus

petition. The court rejected the argument.

The absurdity of the rule announced by the 9th Circuit can be seen by an example. Suppose that post-conviction counsel or the next friend of a prisoner discovered reliable scientific evidence demonstrating actual innocence – that the wrong person had been convicted. Suppose further that there was indisputable evidence that trial counsel simply forgot to present that evidence to the jury. A mandatory stay would prohibit that prisoner from seeking to overturn his conviction. This Court ought not to be a party to such an unfair ruling.

The second question that this Court need not address relates to the standard of competency. As the petitioner is not being hailed into court to defend himself against an indictment, it seems like the proper standard would be a civil standard, not a criminal standard.

All that being said, the State contends that it is not necessary for this Court to examine the significance of a finding that a habeas corpus petitioner was incompetent (even after being competent enough to invoke the jurisdiction of the court). The district court, as the trier of fact, determined that Vanisi was indeed competent. 9 AA 1774-75. This Court has held that where the district court employs the correct standard, and the trier of fact determines the weight to be assigned to bits of competing evidence, the result will be affirmed. *Doggett v. Warden*, 93 Nev. 591, 594, 572 P.2d 207 (1977). As noted in the opening brief, one of the two examiners found that Vanisi was competent. The district court accorded that witness more weight because that doctor used objective testing. 9 AA 1774-75. In contrast, Dr. Bittker came up with a diagnosis not found in the standard Diagnostic and Statistical Manual. 8 AA 1639-40. Instead, his diagnosis concerned a subject customarily discussed in the Philosophy Department of a University, not in the Medical School. 8 AA 1640. He conceded that Vanisi would have the ability, if motivated, to reveal information to his lawyers. 8 AA 1634. Thus, Bittker's analysis seemed to be that because Vanisi was not motivated to assist his lawyers, he was incompetent. That is most assuredly not the correct standard. In contrast, Dr. Amazaga conducted an objective analysis and determined that Vanisi indeed had the capacity to assist his attorneys. Both doctors agreed that he understood the

procedure.

As substantial evidence supports the court's factual conclusion that Vanisi was indeed competent, that portion of the judgment of the district court should be affirmed.

2. The District Court Did Not Err in Failing to Grant Relief Due to the Alleged but Unproven Violation of the Vienna Convention on Consular Relations.

Vanisi alleged in his petition, and alleges in the opening brief, that he is a Tongan national and that when he was arrested in Salt Lake City he was not informed of this right to contact the Tongan Consulate. The Court may notice that the assertion in the opening brief, at page 11, *et seq.*, is not supported by any reference to the record. That is because there was no evidence supporting the allegation. Neither Vanisi nor anyone from the Salt Lake City police agency testified in the habeas corpus hearing to support the basic claim. Counsel predicted that a consular officer would be at the habeas corpus hearing, but no such officer testified. 11 AA 2086; 2181. In contrast, Washoe County Public Defender Mike Specchio and his staff testified, and the district court found, that his office contacted the consulate within days of the arrest and that the Tongan government had no interest in rendering any sort of assistance to Vanisi. 11 AA 2173-74; 11 AA 2190-91. By the time of the habeas corpus hearing, that attitude was apparently unchanged.

Whether the claim is viewed as a stand-alone claim for relief, a claim of error, a claim of ineffective trial counsel or a claim of ineffective appellate counsel, the result is the same.

Vanisi's position is based on the idea that any violation must lead to an irrebuttable presumption of prejudice. No authoritative court has adopted that standard. Indeed, even the International Court of Justice ruled that the signatory states should evaluate, by means of their choosing, whether a violation "caused actual prejudice" to the defendant. *See* quoted portion in *Medellin v. Texas*, 128 S.Ct. 1346, 1374, ___S.Ct. ___ (2008)(Stevens, J., concurring).[3] In the instant case, Vanisi failed to establish a violation. He failed to establish prejudice. There is no

[3]Medellin was executed on August 6, 2008.

presumption of prejudice. If there was a presumption of prejudice it was overcome by the evidence that the Tongan government had no interest in rendering any sort of assistance. He suggests to this Court that the consulate could have helped gather mitigating evidence. In response, the State would mention that there was not one iota of evidence supporting that claim. Second, the alleged but unproven violation concerns the relative timing of the notice of the right to contact the consulate. There is absolutely no reason to believe that the consulate could have helped if Vanisi had been told of his right, but was unable to help because of the delay in contacting the consulate. The contention that the delay had some prejudicial significance defies logic and is supported by nothing.

On the subject of timing, this Court should note that the Washoe County Public Defender was preparing to defend Vanisi even before he was arrested. 11 AA 2196. Upon his arrest they quickly prevailed upon their Utah counterparts to render some immediate advice to the effect that he should not talk to police. 11 AA 2195, 2197. There is simply no reason to believe that the Tongan consulate could have acted more quickly or that a quicker response would have had any effect on this litigation.

It seems clear enough that the claim is subject to state procedural bars. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S.Ct. 2669 (2006). Furthermore, as the Convention applies to any detention exceeding a couple hours, it would seem that any remedy would have to be one that would apply to all such detentions, not just to those folks who are convicted of murder and sentenced to death. Certainly, if Vanisi had proved a violation, that would not deprive the court of jurisdiction. *Garcia v. State*, 117 Nev. 124, 17 P.3d 994 (2001). The greater question, of whether the Convention gives rise to a private remedy that has any application to any case, can await another day, as it is clear that Vanisi was not entitled to any remedy at all.

The State anticipates an eventual ruling that there is no private remedy, and that any remedy would have no application to this case where counsel was appointed and had the ability to call the consulate, and did contact the consulate. This Court need not rule on the nature of the

remedy because Vanisi failed to prove the violation. Accordingly, that portion of the judgment should be affirmed.

3. The District Court Did Not Err in Failing to Grant Relief on the Claim Based on the New Rule Announced in *McConnell v. State*.

a. Application of *McConnell*.

Vanisi raised a claim based on the rule announced in *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005). The Court announced in that case that where the State charges first degree murder and alleges a felony-murder theory, and there is no special verdict demonstrating what theory the jury relied on, then an aggravating circumstance based on the same underlying felony is inappropriate. The Court did not apply that rule to *McConnell* because the conviction was clearly based on a premeditated intentional killing, not on the felony-murder rule. That reasoning applies to this case as well. The inclusion of the felony-murder theory added nothing to the prosecution of this case and so this Court should find that the *McConnell* rule ought not to apply.

b. *McConnell* Should Be Overruled.

McConnell was wrongly decided. There are three major flaws in the decision. This Court seems to have held first that the constitution requires that no matter how narrowly the legislature defines the highest degree of murder, it must provide an additional narrowing before the murderer may be eligible for the death penalty. Although the Court did not explicitly hold that was the analysis to be applied, that is how the opinion proceeded. The second flaw is in the assumption that the additional narrowing must be "sufficient" or "adequate" instead of being "genuine." Finally, the decision is flawed in that it fails to recognize that the aggravating circumstance involving felony-murder is indeed distinguishable from the elements required for a conviction for first-degree murder under a felony-murder theory.

We turn, then, to the crux of the matter: the assumption that no matter how narrowly the legislature defines first-degree murder it must further narrow the field of murders before a killer

may be eligible for the death penalty. That analysis is not justified by any policy or by any prior decision of this Court or by any general principle of law.

This first flaw can be readily discerned by a hypothetical scenario. If our legislature created several degrees of murder, and first-degree murder was defined as a premeditated murder of a police officer, by torture, followed by dismemberment, the *McConnell* analysis would demand that it be further refined before one could be eligible for the death penalty. That is the incorrect analysis. The correct analysis, according to other courts that have considered it, asks if the statutory scheme as a whole distinguishes some killers from the others. *See United States v. Jones*, 132 F.3d 232 (5th Cir. 1998); *Revilla v. Gibson*, 283 F.3d 1203 (10th Cir. 2002); *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003); *Ferguson v. State*, 642 A.2d 772 (Del. 1994).

Our legislature has developed an elaborate classification of homicides. The legislature need not have done so. It could have lumped all homicides together into one or two degrees, and then had an elaborate sentencing analysis. That is one constitutional route. The other, chosen by the Nevada legislature, calls for quite a few different laws defining different homicides, each with its own sentencing scheme. For example, one type of homicide is known as vehicular manslaughter, defined in NRS 484.3775. That is a misdemeanor. Next is voluntary manslaughter, defined in NRS 200.070 as causing the death of another through an unlawful act. That is a class "D" felony. Then there are specific crimes involving death, such as reckless driving (NRS 484.377) and driving while under the influence (NRS 484.3795). There are others, of course. Death through overloading a vessel is described in NRS 200.230. Death by a vicious animal arises in NRS 200.240. NRS 200.260 is concerned with death via the improper storage of gun powder or explosives. Administration of poison to cause death is treated separately at NRS 200.390. Death stemming from a challenge to fight is a separate type of murder, described at NRS 200.450. In describing what is *not* manslaughter, in NRS 200.070, the legislature created a second-degree felony-murder that involves felonies that are inherently dangerous but which are not enumerated in the first-degree murder statute. *See Noonan v. State*, 115 Nev. 184, 990 P.2d 637 (1999). Then there is

second-degree murder, involving intentional killings without premeditation.[4] Finally, the legislature has described several types of first-degree murders. NRS 200.030. In that statute, the legislature has singled out certain types of homicides and designated them as first-degree murder. Those include premeditated and intentional killings and killings that occur during certain enumerated felonies.[5] Notably, under the felony-murder rule, intent to kill is not an element of the offense. An intentional killing to avoid lawful arrest is also classified as first-degree murder. NRS 200.033 also includes a provision relating to terrorism and one concerned with the potential for school yard massacres, although those would also seem to fall within the greater category of premeditated murders.

The net effect of that scheme is to distinguish the vast majority of homicides from those constituting first-degree murder. Each of the listed offenses constitutes different variations of the single generic offense of felonious homicide, but the effect is to select a small number of killings that, in the considered view of the legislature, warrant special treatment. Then, after that distinction, the legislature has decreed that of those guilty of first-degree murder, some (but not all) may be eligible for the death penalty.

Virtually every court that has considered the issue, save this Court, has concluded that the narrowing function can be accomplished through the use of aggravating circumstances, or by the definition of the most serious degree of homicide, or by a combination of both. *See e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988), which reasoned: "[T]he narrowing

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[4]The line between first and second-degree murder was once somewhat blurred. This Court created a more discernable distinction in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). If *McConnell* had been decided before the Court clarified the blurred distinction between first and second-degree murder, the analysis here might be different. However, the fact remains that this Court clarified the issue and gave vitality to second-degree murder *before* the Court ruled that the current scheme doesn't sufficiently distinguish murderers from each other.

[5]The statute also mentions murder by torture, but it is not a separate variety of murder. Instead, proper construction of the statute leads to the conclusion that it is merely an example of a premeditated murder.

function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." 484 U.S. at 246, 108 S.Ct. at 555. This Court stands virtually alone in assuming that the starting point of the analysis is in the definition of first-degree murder. The correct starting point, the point at which we begin selecting defendants for different treatments, ought to begin with the generic definition of a homicide. The problem with *McConnell* is that this Court began with the statute defining first-degree murder, without recognizing that the class of killers has already been genuinely narrowed by the various statutes that recognize lesser homicides that would be murder at common law. The *McConnell* Court asked whether the scheme properly distinguished between all those who are guilty of "first degree murder," 120 Nev. at 1066. The proper question is whether the scheme distinguishes between all those who are guilty of felonious homicide.

Having suggested that the *McConnell* Court began its analysis at the wrong place, the question naturally arises: where to start? The State offers two suggestions. The first would be with what the Supreme Court has termed a "generic offense of felonious homicide." *See Mullaney v. Wilbur*, 421 U.S. 684, 688, 95 S.Ct. 1881, 1884 (1975)(describing Maine's various levels of homicide). The second, and perhaps better, starting place, would be with the common law definition of murder. If we are to distinguish murderers from each other, then this starting place has the advantage of being the same throughout the common law world. At the common law, murder required malice, either express or implied, but the definition of malice was broad enough so as to encompass all of Nevada's first and second-degree murders and a significant number of other homicides. *See* the discussion in *Jeffries v. State*, 90 P.3d 185 (Alaska App. 2004)(discussing second-degree murder conviction stemming from drunk driving). For a more thorough discussion of the scope of the common law crime of murder, *see* 3 Wayne R. LaFave, Substantive Criminal

Law, section 14.1 at pp. 416-418 (2d Ed. 2003)(discussing five common law variants of malice, including ill-will and extreme negligence as evincing a malignant heart).

Whether the narrowing process starts at the notion of a felonious homicide, or with the common law definition of murder, is it clear that Nevada's statutory scheme as a whole serves to eliminate all but the most severe from those killings that warrant consideration of the death penalty.

Had the *McConnell* Court begun its analysis with a generic homicide, the unlawful killing of a person by another person, the Court would have recognized that our statutory scheme does indeed genuinely narrow the class of killers. By beginning the analysis with the definition of first-degree murder, this Court came up with the wrong question and, necessarily, the wrong answer. That is the primary reason why *McConnell* should be revisited. Upon revisiting the analysis, this Court should recognize that the statutory scheme as a whole constitutionally distinguishes between those who commit unlawful homicides.

The next difficulty with *McConnell* is that the Court improperly analyzed the question of whether the statutory scheme "genuinely" narrows the class of murderers, by asking instead whether the aggravating circumstance "sufficiently" excludes an adequate number of killers from the death penalty. *See* 120 Nev. at 1067. Mathematics is an incorrect analysis. Objectivity is correct. Sufficient is wrong. Genuine is correct. If Nevada suffered a spate of murders by hired killers, each with prior violent felonies, and each tortured and robbed their victim, and each victim was a peace officer, the mere fact that none of them would be excluded from the death penalty by our statutes is not grounds to rule that there is something wrong with our statutes. Instead, it is grounds to celebrate the wisdom of the legislature.

If the legislature had undertaken the analysis which this Court employed – had explicitly designed the statutes with a goal toward excluding a certain number of murderers (and thus including a certain number of murderers), instead of basing the scheme on legitimate distinctions, the State has no doubt that this Court would look askance at such a scheme. If the legislature

undertook to define those eligible for the death penalty not by a reasoned moral evaluation but upon the notion that a certain number of killers should be included and certain number of killers excluded from the death penalty, this Court would seize on such a debate as evidence that the entire scheme is irrational by valuing the number included or excluded over the attempt to morally, qualitatively, define which murderers warrant the ultimate sanction and which do not. Despite that, it appears that is what this Court did in *McConnell*. Instead of asking whether the aggravating circumstances "genuinely" or objectively narrowed the class of killers, this Court asked if the scheme "sufficiently" narrowed the class of murderers. In doing so, this Court stated that the Supreme Court's decision in *Lowenfield* gave rise to question of whether the narrowing was "sufficient." 120 Nev. at 1065. That, contends the State, is not the question suggested by *Lowenfield* and when this Court asked the wrong question, it necessarily came up with the wrong answer.[6] The proper question, as announced in *Lowenfield*, is whether the scheme "genuinely" narrows the class of killers. That, in turn, is generally recognized as calling for a determination of whether the narrowing factors are objective. *See e.g.*, *Metheny v. State*, 759 A.2d 1088, 1109 (Md. 2000); *State v. Fry*, 126 P.3d 516 (N.M. 2005). The legislature acts constitutionally if the aggravating circumstance does not apply to every murder (of every degree) and if it is objective. *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534 (1993). By rephrasing the analysis to ask if the narrowing function was "sufficient," to determine if it excluded a sufficient number of murderers, this Court has announced an unworkable standard that advanced inappropriate policy. This Court ought to revisit *McConnell* without the analysis asking if the aggravating circumstance excludes enough killers, and instead asking if the aggravating circumstance necessarily includes all killers.

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[6]If the proper question does indeed ask if the scheme excludes an adequate number of murderers, the State must ask "How many?" What percentage of killers should be excluded from the death penalty in order for the statutory scheme to pass scrutiny? Should that percentage be static or dynamic? If in some given year we have only a small number of murders, but each is of such a nature that the death penalty is available, how should we select which ones will be excluded? Because those questions cannot give rise to a legally sound answer, this Court should conclude that it posed the wrong question in *McConnell*.

Indeed, the Court seems to have already recognized in denying rehearing in *McConnell* that the felony murder aggravator is not universally available as it does not apply to all murderers. That ought to be the end of the analysis.

There is a final flaw in the *McConnell* analysis. In the original decision, this Court seems to have discounted the requirement that the felony-murder aggravator be accompanied by certain mental states. In denying rehearing, this Court appears to have recognized that by virtue of the *mens rea* requirement, the aggravator "is narrower than felony murder, which in Nevada requires only the intent to commit the underlying felony." 121 Nev. ___, 107 P.3d 1287, 1289 (2005). The Court then indicated that "notwithstanding" that narrowing function, "it is quite arguable" that the aggravating circumstance fails to narrow the class of murderers subject to the death penalty.[7] Because this Court recognized that the *mens rea* operates to further narrow the class, perhaps the mention of this additional flaw is unnecessary. Nevertheless, the State would point out the statutory scheme, by requiring an additional *mens rea* for the felony murder aggravator, has objectively excluded some first-degree murderers from the death penalty. Indeed, the State contends that the notion that a *mens rea* requirement is insignificant seems to fly in the face of hundreds of years of jurisprudence in this state, in the United States and indeed in every common law country. The *mens rea* has always been the factor that distinguished rude or impolite acts from criminal acts. Thus, if this Court indeed considered the *mens rea* requirement to be insignificant, the Court ought to revisit *McConnell.*

This case demonstrates the folly of the Court's adventurism in *McConnell,* both in its application and in the arguments to extend it to include all of the other aggravators that are mentioned in the definition of first-degree murder. The instant case shows how the scheme should work. If Vanisi had killed his victim but had not stolen the gun (and there were no other

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[7]The State might point out that if a position is "arguable," that is grounds for submitting the dispute to this Court for resolution, but the fact that a position is "arguable" ought not to end the argument. Thus, the Court's purpose in mentioning that the propriety of our statute is "arguable" is not altogether clear.

aggravators), then he would not be subject to the death penalty. Because he committed first-degree murder, and the murder was aggravated in several ways, he was properly exposed to the death penalty.

The scheme distinguishing between those who commit a felony murder and those who commit a felony murder coupled with the intent to kill is a "genuine" distinction and this Court's analysis in *McConnell* was flawed in asking if it was a "sufficient" distinction.

Because *McConnell* was wrongly decided, a product of an incorrect analysis, it should be overruled.[8]

c. The Analysis of Prejudice Was Correct.

Assuming the continuing vitality of *McConnell*, there was no error in rejecting the claim because there was no prejudice. The State contends that once at least one aggravating circumstance is proven, as it was here, there number of aggravators is irrelevant. We do not instruct jurors to count aggravating circumstances. We instruct the jury to weigh those circumstances. As the district court noted, the facts available to be weighed are unchanged by the number of aggravators and so there is no reasonable likelihood of a different result based on the *McConnell* analysis.

In *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006), the Court indicated that the analysis of harmlessness is akin to the traditional analysis of prejudice commonly applied by Nevada trial courts in post-conviction actions. The court ruled that where the facts concerning the invalid aggravating circumstance are nevertheless available to be considered when weighing a valid aggravating circumstance, then the invalidation of the aggravating circumstance ought to be seen as non-prejudicial. Here, the invalid aggravator involved robbery. The nature of the robbery

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[8]The opinion in *McConnell* had an additional logical flaw. The Court stated that the *mens rea* requirement in the aggravator does little more that state the minimal constitutional requirement. 120 Nev. at 1067. But the Court went on and apparently held that because it barely meets the minimal constitutional requirement, it is unconstitutional. If the aggravator meets the minimum constitutional requirement, then it is not unconstitutional.

involved the theft of the service weapon of a uniformed police officer. Those facts were still available to the jury even after eliminating the aggravating circumstance of robbery. The facts concerning the invalid aggravator (robbery) could nevertheless be given aggravating weight under the rubric of a valid aggravator (killing and mutilating an officer). The ferocity of the attack, and its attendant mutilation, rendered Sergeant Sullivan unable to resist the theft of his service weapon. The theft was part and parcel of the killing and the killing included the theft. The theft, the killing and the mutilation were all temporally and geographically contemporaneous and so the jury, in considering what weight to assign to the valid aggravators, could certainly have considered the facts and circumstances of those valid aggravators as they included the theft and the officer's inability to resist the theft. The court also notes that the aggravator involving the killing of a police officer required the State to prove that the defendant knew or should have known that the victim was a police officer performing his duties. The theft of the service weapon certainly is available as part of the proof that Vanisi knew he was killing a police officer who was performing his duties. Thus, under the analysis of *Brown v. Sanders*, this Court should find that there is no likelihood of a different result by the retroactive application of *McConnell*. Whether the nature of the crime amounted to one aggravating circumstance or a dozen, the facts and the attending weight remain unchanged. Therefore, the claim concerning the retroactive application of *McConnell* was properly denied.

4. The District Court Properly Declined to Overrule the Supreme Court.

Vanisi next argues that the trial court erred in denying his motion for self-representation. That claim was considered and rejected on direct appeal and thus is barred under the "law of the case." *See Hall v. State*, 91 Nev. 314, 535 P.2d. 797 (1975).

Vanisi points out that the doctrine is not absolute. That is correct. As this Court has noted, a court of last resort has limited discretion to revisit a legal issue. *Pellegrini v. State*, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (2001). However, the district court is not the court of last resort. The district court has no authority to overrule the Supreme Court. Therefore, this Court should find

no error in the refusal of the district court to assume appellate jurisdiction over the Supreme Court. Had the claim been based on new facts, a different result might arise. As it is, however, the claim was based solely on the record.

If Vanisi is asking this Court to reconsider in the first instance, this Court should decline that opportunity. First, none of the facts have changed since this Court first ruled. Thus, the doctrine of the "law of the case" remains undisturbed. This Court has recognized that an intervening change in the law could lead to disregarding the law of the case. *Hsu v. County of Clark*, ____ Nev. ____, 173 P.3d 724 (2007). There has indeed by an intervening change, but the result is that the district court has greater, not lesser, authority to deny self-representation to a defendant. *See Indiana v. Edwards*, ____ U.S. ____, 128 S. Ct. 2379 (2008). In that case, the High Court distinguished a prior line of cases and ruled that a defendant may be competent to stand trial and yet the trial court may still deny his right to represent himself because he is incompetent to represent himself. If that change has any effect at all, it is to assure this Court that the trial court did not err in denying Vanisi's request to represent himself. Indeed in the direct appeal, this Court took pains to rule that the ability of the accused to defend himself was not a factor. Those comments have now been undercut by *Edwards, supra*. Accordingly, that portion of the judgment concerning the request for self-representation should be affirmed.

5. The District Court Did Not Err in Denying Relief Based on an Alleged Conflict of Interest.

Related to the claim regarding self-representation is the claim that counsel should have been allowed to withdraw due to a "conflict of interest." There was no conflict as that term is generally understood. Instead, it appear that the only conflict concerned the ethical limitations. *See* Testimony of Mike Specchio at 11 AA 2196. As indicated in the opening brief, Vanisi proposed to defend based on his own perjured testimony and would not allow any defense based on the notion that he had participated in the murder of Sgt. Sullivan. As trial counsel put it, the alleged conflict was "a conflict between our ethical obligation and what Mr. Vanisi wanted to do." 11 AA

2096. No one alleged or proved an actual conflict, that counsel was representing competing interests. Thus, we are not considering a conflict of interest at all. Instead, the underlying question is whether the defendant in a criminal action has some constitutional right to a lawyer who will present a defense based on alleged facts that the defendant has admitted are untrue.

The issue was previously before the court upon a pre-trial petition for extraordinary relief, but this Court declined to intervene. *Vanisi v. District Court*, Docket No. 34771, Order Denying Petition for Writ of Certiorari or Mandamus (September 10, 1999). At that time, various orders of the district court had prevented the State from knowing the nature of the ethical quandary. We now know that the ethical problem arose because Vanisi proposed to perjure himself and would not allow counsel to pursue any type of defense based on any other theory. So, the question is whether the district court in the habeas corpus hearing properly denied relief based on the claim.

The claim was based solely on the record and therefore could have been raised on direct appeal. It was therefore barred by NRS 34.810. That can sometimes be defeated by a claim of ineffective appellate counsel, but in the district court, and now in this Court, Vanisi presented (and now presents) only a generic claim that counsel was ineffective in failing to present everything. *See* Opening Brief at 76. This Court has condemned that sort of conclusory pleading. *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001).

As to the merits of any purported claim of ineffective assistance of appellate counsel, the district court found, based on the testimony of appellate counsel John Petty, that he had made reasonable tactical decisions concerning what issues to raise. 11 AA 2164-65; 13 AA 2635. Tactical decisions are virtually unassailable absent extraordinary circumstances. *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Mr. Petty testified that he decided not to raise the alleged ethical conflict because it never really "materialized" because Vanisi declined to testify at trial. 11 AA, 2154. Mr. Petty testified that he believed he had a powerful issue in the direct appeal and that he did not raise other issues because he did not wish to bury his solid argument within other less meritorious issues. 11 AA at 2164-66. The district court found that testimony to be credible. 13

AA 2635. There is no rule of law that requires appellate counsel to raise every possible argument. Instead, appellate counsel should carefully select the arguments to be raised. *See Hernandez v. State*, 117 Nev. 463, 24 P.3d 767 (2001). *A fortiori*, merely demonstrating that another argument was available is not sufficient to demonstrate that appellate counsel was ineffective.

Finally, we come to the merits of the question. Did the district court err in refusing to allow counsel to withdraw based on the alleged ethical quandary? A defendant has a right to counsel, but does not have a right to counsel who is free from the strictures of the rules of ethics. *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986).

According to trial counsel, Steve Gregory, they attempted to dissuade Vanisi from committing perjury. When that failed, they moved to withdraw. When that failed, they tried not to undercut Vanisi's defense, without supporting the proposed perjury, but they were hampered because Vanisi, by the time of the trial, would not reveal his theory of defense. 11 AA 2094, 2116. Almost anything they did ran the risk of undercutting his defense. According to Mr. Gregory, they acted in accordance with the advice of bar counsel. 11 AA 2096-97.

Every lawyer who represents desperate people will occasionally find themselves in this ethical dilemma. The question, however, is whether the district court is absolutely required to allow counsel to withdraw under those circumstances. The State contends that such a rule would be meaningless because the result would be the appointment of another lawyer who would then face the same dilemma. Or, worse, a new lawyer who simply presents the perjured testimony. Perhaps for those reasons, courts that have addressed it have found that the district court does not err in denying the motion to withdraw based on the ethical problem of a client who proposes to commit perjury. *See State v. Henderson*, 468 P.2d 136 (Kan. 1970). The Kansas court also noted the maxim that one who by his own act invites error cannot be heard to complain of that error. 468 P.2d at 141. In *Sanborn v. State*, 474 So.2d 309, 314 (Fla.App. 1985), the court ruled:

> If withdrawal were allowed every time a lawyer was faced with an ethical disagreement with the accused, the ultimate result could be a perpetual cycle of eleventh-hour motions to withdraw and an unlimited number of continuances for

> the defendant. In addition, new counsel might fail to recognize the problem of fabricated testimony and false evidence would be presented to the court; or, perhaps the defendant might eventually find an attorney who lacks ethical standards and who would knowingly present and argue false evidence. Neither result is acceptable since fraud is committed upon the court in either case.

A California court has also ruled that the lawyer in the instant situation may properly move to withdraw, but that the trial court may properly deny that motion, and then the lawyer must proceed without presenting false facts or undercutting the theory of defense. *See People v. Brown*, 203 Cal.App.3d 1335 (1998). In short, Vanisi created the problem when he proposed to commit perjury and was persistent in that plan, and when he refused to disclose the theory of defense other than to deny the homicidal act. After that, both trial counsel and the court acted properly within the constraints of the ethical rules. Therefore, this Court should find that if appellate counsel had raised the argument that the district court erred in denying the motion to withdraw, that would not have resulted in relief to Vanisi.

6. The District Court Did Not Err in Denying Relief on the Claim That Counsel Had Disclosed Confidential Information.

There was a claim in the petition that the defense had disclosed confidential information in the course of moving to withdraw. Vanisi intimated that the confidences had been revealed to the prosecutor, but of course that was untrue and Vanisi never supported that claim with any actual evidence. *See* 13 AA 2633. So, the claim has morphed into an assertion that the conviction must be set aside because when trial counsel moved to withdraw, as described above, counsel mentioned the grounds for that motion to the district court judge.

The present argument is couched in terms of conceding guilt. The decisions upon which Vanisi relies concern cases in which counsel conceded guilt to the trier of fact, thus essentially interfering with the defendant's right to decide how to plead. *See Jones v. State*, 110 Nev. 730, 877 P.2d 1052 (1994)(Lawyer concedes the homicidal act in statements to the jury). Those cases have no application here, because the ethical problem was revealed *in camera*, to the trial judge, and not to the trier of fact.

The question is not whether counsel acted contrary to the rules of ethics. In *Nix v. Whiteside, supra*, the Court rejected the argument that a ethical lapse equals ineffective assistance of counsel. Nevertheless, the ethical rules are not completely irrelevant as they may help determine the prevailing professional norms by which claims of ineffective assistance are judged.[9] The recently adopted rules of professional conduct specifically include the possibility of disclosure to the tribunal as an option. *See* Rule3.3(b). Thus, it would appear that disclosure is not clearly outside the prevailing professional norms.

In addition, there is the lack of prejudice. The disclosure was not made to the trial jury that decided both the guilt phase and the sentencing phase of the trial. Thus, any claim that the result of the litigation would have been different is unsupported by any reading of the record. Accordingly, the Court should find no grounds for relief in the record showing that counsel disclosed the nature of the problem to the trial judge in an effort to withdraw.

7. The District Court Did Not Err in Ruling That Vanisi Had Failed to Prove Ineffective Assistance of Counsel.

Ordinarily, in a claim of ineffective assistance of counsel, the petitioner must show prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). When he claims, for instance, that counsel failed to elicit or present evidence, he must demonstrate just what evidence was available and that it was of such a nature as to affect the outcome of the litigation. *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). Here, Vanisi railed on his trial attorneys but presented not one bit of additional evidence and so failed to meet that standard. So, he now claims that he should be excused from showing prejudice because the trial was a farce and a sham.

In the same term that the court decided *Strickland*, it also decided *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). In that case, the court recognized that in certain circumstances, such as the total absence of counsel during the trial, the petitioner is excused from

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[9]*See Strickland, supra*, for the discussion of the prevailing professional norms and the relationship to things like ABA standards.

demonstrating prejudice. The court later reiterated: "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 696-697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Here, the claim is based on assertions that counsel failed to "vigorously" cross examine certain witnesses.[10] The record reveals that counsel did not indeed participate but that they were hampered by Vanisi's refusal to identify the theory of defense that he intended to advance in his own testimony. The defense team became much more active during the sentencing phase at the trial, but the fact remains that Vanisi was represented by two fine lawyers during the guilt phase, and that they did indeed participate in the trial. Thus, the *Cronic* analysis is inappropriate. The more appropriate analysis is found in *Strickland* and under that standard, the trial court correctly required the petitioner to demonstrate prejudice, to demonstrate that there was something specific that reasonable counsel should have done and that but for counsel's failure to pursue that course, a different result was likely. As Vanisi failed to even try to demonstrate that there was something that could have been done to affect the outcome, the district court properly denied relief.

8. The District Court Did Not Err in Rejecting the Various Generic Attacks on the Death Penalty Because Each Was Barred and Was Without Merit.

Part seven of the opening brief consists of a series of brief assertions that Nevada's death penalty scheme is unconstitutional. To the extent that these are stand-alone claims, each is barred for failure to raise it on direct appeal. NRS 34.810. To the extent that the claim is a claim of ineffective assistance of appellate counsel, the State first contends that the mere existence of an argument, even a non-frivolous argument, does not mean that appellate counsel is required to raise the argument. Instead, reasonable lawyers may, and should, pick their best arguments and take their best shot. *Hernandez v. State*, 117 Nev. 463, 24 P.3d 767 (2001). Appellate counsel,

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[10]Even under the appropriate analysis, that claim would not suffice because it is necessarily subjective and the proper analysis requires an objective standard. *See Strickland.*

John Petty, testified that he was familiar with the various arguments but that he made a tactical decision to focus his efforts on the assertion that the court erred in denying self-representation. 11 AA 2149-2167. The district court, the trier of fact, found that testimony to be credible. 13 AA 2634. Strategic and tactical decisions are virtually unchallengeable absent extraordinary circumstances. *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Vanisi has not proved any facts that would lead to the conclusion that some extraordinary circumstance exists that would allow the court to second-guess appellate counsel.

Furthermore, each argument has been repeatedly rejected. *See McConnell v. State, supra*; *Hernandez v. State*, 118 Nev. 513, 50 P.3d 1100 (2002); *Rhyne v. State*, 118 Nev. 1, 38 P.3d 163 (2002); *Evans v. State, supra*; *Leonard v. State*, 117 Nev. 53, 17 P.3d 397 (2001)(and cases cited therein); *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997). Thus, this Court should also rule that the various arguments were not likely to succeed.

9. The District Court Did Not Err in Denying Each of the Generic Attacks on the Death Penalty, Including the Claim Concerning the International Covenant on Civil and Political Rights.

Much of the opening brief is devoted to general attacks on the death penalty, without any application to the instant case. First is a contention that the death penalty is unconstitutional in all cases as it is cruel and unusual. That claim suffers from all the same defects as ground 7. It is also incorrect. *McConnell v. State, supra.*

Ground 9 includes the assertion that the death penalty violates the International Covenant on Civil and Political Rights. That claim suffers the same deficiencies as grounds 1, 7 and 8. In addition, the State notes that the Covenant does not preclude the death penalty for adults. Furthermore, the list of rights mentioned in the Covenant, and described at p. 47 of the opening brief, is far *less* extensive than what is already guaranteed by the Due Process clause. The argument does not identify any issue that is unique to the Covenant and so there is nothing additional for this Court to decide. Finally, as the district court noted, there is some debate about whether the United States is a signatory to the Covenant. *See Roper v. Simmons*, 543 U.S. 551, 125

S.Ct. 1183, 1226 (2005)(Scalia, J., Dissenting). The Covenant was drafted in a manner by which each country must either accept it or reject it. The Senate "reserved" a clause but attempted to ratify the rest. It is at least arguable, therefore, that the Covenant has never been ratified in this country. Either way, no relief is warranted.

10. The District Court Did Not Err in Denying the Claim Relating to the Manner of Execution.

Ground 10 is a claim that the sentence calling for death by lethal injection must be vacated because it might be applied in a manner that could be more serene. That argument has also been rejected by the Nevada Supreme Court. *McConnell, supra.* The district court found, therefore, that appellate counsel was not ineffective in failing to raise this argument and that the argument was not likely to succeed. 13 AA 2635.

There are other flaws in the argument as well. First, the argument does not attack the judgment of conviction, but the manner in which the sentence may (or may not) be carried out. Habeas corpus is not available for that purpose. If the challenge is to the judgment of conviction, then that can be addressed in a habeas corpus action. NRS 34.720. However, where no statute mandates a particular combination of drugs, then a challenge to a particular proposed method of lethal injection would not invalidate the judgment and therefore should be brought in a separate civil action to enjoin the particular proposal. *See Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096 (2006). Indeed that separate civil action is what led to the recent decision in *Baze v. Rees*, ___ U.S.___, 128 S.Ct. 1520 (2008). There may be such a civil action currently pending before this Court, but Vanisi is apparently not a party to that lawsuit.

The next flaw is in the assumption that when the court approved denial of the stay in *Baze*, and approved the Kentucky procedure for lethal injection, the court ruled that all other procedures are therefore cruel and unusual. The court did no such thing. Instead, the court ruled that an injunction will issue only where a particular proposed procedure carries a substantial or intolerable risk of severe pain, such as death by torture. The court held that a party seeking to enjoin a

particular procedure must demonstrate the availability of a different procedure (Vanisi has not) and must also show that the proposed procedure has a substantial risk of wanton and unnecessary pain or torture. The opening brief mentions only that a few people have suffered the sort of inconveniences that one might suffer at any hospital or medical laboratory. The fact that a phlebotomist might (or might not) have some difficulty establishing a good intravenous connection does not render every injection cruel and unusual punishment. On that subject, the Court might note that if getting a difficult injection amounts to cruel and unusual punishment, then someone better enjoin all the government-run hospitals in this country, including prison infirmaries, from treating patients.

11. The Claim That Vanisi Might Someday Be Incompetent Is Frivolous.

Ground 11 mentions that Vanisi might someday become incompetent to be executed but he seeks no relief based on that allegation. Therefore, no relief is warranted.

12. The District Court Properly Rejected the Claim That the Constitution Prohibits Elected Judges from Serving.

Ground 12 is an assertion that the conviction and sentence are invalid because the judicial officer presiding over the trial was an elected judge. Vanisi asserts that this Court and the district court act as a "lynch mob" in the effort to uphold sentences of death. How that explains adventurism like that seen in *McConnell, supra*, is not altogether clear. This Court might also note that the vast majority of convicted murderers in Nevada are not sentenced to death.

The claim that the justices of this Court are bloodthirsty and would sacrifice Vanisi on the alter of re-election could have been raised on direct appeal and is therefore barred by NRS 34.810. As to any claim of ineffective appellate counsel, the Court might note that this argument has never been accepted by any court, at any level, at any time. In *Harris v. Alabama*, 513 U.S. 504, 115 S.Ct. 1031 (1995), the Court approved of an Alabama procedure by which the elected judge could override a jury's recommendation for a life sentence, and impose the death penalty. That, of course, is even greater authority than granted to our elected judges in Nevada. Thus, reasonable

lawyers would not see a viable source of relief in asserting that this Court has no authority to review the conviction and thus no authority to grant relief from the conviction.

13. The District Court Properly Rejected the Claim That the Sentence Must Be Set Aside Because Some Other People Might One Day Be Proven Innocent.

Vanisi next claims that the death sentence must be set aside because there is a possibility that an innocent person might be executed. The district court noted that there is no doubt that Vanisi is not one of those innocent persons. The court found that counsel was not ineffective in failing to raise this issue and that it had no reasonable likelihood of success. 13 AA 2636.

The State would point out that the argument is convoluted in that it equates a finding of error with a declaration of innocence. Then, the brief goes on to suggest that a finding of error that results in reversal is evidence that the conviction has not been reversed but that instead an innocent person has been executed. There are too many flaws in that position to detail them all.

14. The District Court Properly Rejected the Argument That the Death Penalty Is Irrational.

The 14th claim is an argument that the death penalty is prohibited by the Due Process clause because it is not rationally related to any legitimate government goal. This claim suffers from all the defects found in parts 7 through 13. It is also legally wrong. In addition to the other factors, our legislature could legitimately determine that the death penalty is a way to advance society's interests in deterring others, in preventing future crimes by the murderer and in punishing the wrongdoer. The Court might also note that the repeated comments about the rehabilitated killer would appear to have no application to the instant case. Despite the opportunity, Vanisi presented not a single word of evidence concerning any alleged change in his character during his incarceration. In fact, the only evidence on the subject seems to be the evidence that even while incarcerated he will recognize no limitations on his conduct. *See* 8 AA 1624. Therefore, this Court should find no error.

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15. The District Court Properly Declined to Instruct the Supreme Court on Contemporary Standards of Human Decency.

Vanisi also suggests that the death penalty is contrary to contemporary standards of human decency and thus is always unconstitutional. This claim is barred. NRS 34.810. It is also incorrect. The constitution does not bar the execution of killers who are chronological adults with comparable intelligence. *See Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005).

16. The District Court Properly Rejected the Claim That Someone Other Than the Prosecutor Must Make Prosecutorial Decisions.

Ground 16 includes the defects found in parts 7 through 15. The court found that counsel was not ineffective in failing to raise these arguments and that they had no reasonable likelihood of success. As to the claim that the decision to seek the death penalty must be made by someone other than the prosecutor, this Court has rejected that argument. *Thomas v. State*, 122 Nev. ____, 148 P.3d 727, 736 (2006).

17. The District Court Properly Rejected the Claim That a Defendant Is Entitled to Jurors That Are Willing to Disregard the Law.

Ground 17 fairs no better than grounds 7 through 16. It is an argument to the effect that a "death qualified" jury, a jury that agrees to follow the law, prevents a fair trial. This claim has been repeatedly rejected by the courts that have considered it. The constitution does not demand that the jury pool be limited to those who will not agree to follow the law presented by the judge. *See McKenna v. State*, 103 Nev. 227, 737 P.2d 508 (1987). Vanisi has not directed any of his arguments to the jury that actually heard this case. He presents only generic arguments that ought to be presented to the legislature. The Court found that counsel was not ineffective in failing to advance this argument and that it was not reasonably likely to be successful.

18. The District Court Properly Declined to Exercise Appellate Jurisdiction Over the State Supreme Court.

Ground 18 is a claim that the death sentence was imposed due to passion, prejudice or some

arbitrary factor. That claim was considered and rejected on direct appeal. This claim is barred by the doctrine of the law of the case.

19. The District Court Properly Rejected the Claim That Counsel Was Ineffective in Failing to Assert Insanity When Counsel Testified That They Looked Into it and Found No Factual Basis.

Ground 19 of the supplement is a claim that the conviction must be set aside because the statutes in effect at the time of the trial precluded a defense based on insanity and the decision of the Supreme Court invalidating that statute was not issued until after Vanisi's trial. Trial counsel testified, however, that they were aware of the potential challenges to the statute but did not attempt to present an insanity plea because they had no basis for the plea. 11 AA 2117-2118, 2132. Counsel testified that they had a mental health evaluation performed on Vanisi and obtained no evidence supporting the defense and therefore did not devote energies to seeking a pyrrhic victory. 11 AA 2118. Furthermore, there was no evidence presented in the habeas corpus hearing supporting such a defense. There was some evidence that Vanisi was bi-polar, but nothing supporting a potential defense of insanity. Mental illness alone does not establish an insanity defense. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001). Mental illness may be grounds to investigate further, as trial counsel did, but it is not a defense to a murder charge. Therefore, the Court should remain confident of the verdict and find no error in the determination that neither trial counsel nor appellate counsel were ineffective. The Court should further approve the finding that Vanisi was not prejudiced by the alleged failings of counsel.

20. The Claim That Counsel Was Ineffective in Failing to Present Additional Mitigating Evidence Was Properly Rejected Because Petitioner Did Not Show That Such Evidence Exists.

The next part asserts a claim of ineffective assistance of counsel in that it is framed in terms of counsel's failure to investigate potential mitigating evidence. The district court found that there was no significant additional mitigating evidence presented in the habeas corpus hearing and thus found that there is no reason to believe that counsel could have obtained additional evidence or that Vanisi was prejudiced by the alleged failure to investigate. 13 AA 2638. That factual finding

is supported by the record showing that years after the crime Vanisi could still not identify any additional mitigating evidence.

Vanisi also suggests that trial counsel should have retained a mitigation specialist. However, there was no evidence presented tending to show that such a person could have done more than was already done. Trial counsel testified to a fairly extensive investigation. 11 AA 2100-2101; 2128-29; 2137-2141. The district court found that there is no reason to believe that someone else would have conducted the investigation differently or would have discovered additional mitigating evidence. 13 AA 2638. The record reveals that the defense presented the testimony of Dr. Ole Theinhaus at sentencing. *See Vanisi v. State, supra.* That witness discussed Vanisi's mental illness. Other witnesses discussed his drug and alcohol abuse and his declining condition in the months preceding the murder. However, there is still no new significant mitigating evidence and so this claim was properly denied.

21. As There Was No Ineffective Assistance of Counsel, the Claim of Aggregate Ineffective Assistance Was Properly Rejected.

The next claim is an assertion that but for the collective failures of counsel, Vanisi would have mounted a more meaningful defense, although the nature of that defense is still not identified. The court notes that Vanisi did not testify in the habeas corpus hearing and thus there is no evidence tending to support this claim. Instead, the testimony established that Vanisi prohibited any defense such as self-defense, provocation and coercion and refused to cooperate in presenting any defense except his false claim that he did not participate in the killing of Sergeant Sullivan. The district court found no evidence supporting the notion that counsel's alleged failings were the cause for the lack of a viable defense. Instead, the cause for the lack of any viable defense was that no such defense existed and Vanisi refused to cooperate in presenting any defense.

22. The Generic Claim of Ineffective Appellate Counsel Was Properly Rejected.

Ground 22 is a catch-all assertion that counsel was ineffective on appeal in failing to raise each and every issue raised in the supplement. The district court found that appellate counsel

made reasonable tactical decisions concerning the issues to raise, and that none of the various potential issues were reasonably likely to succeed. In addition, the State would point out that this Court had disapproved of such conclusory allegations. *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001).

23. The District Court Did Not Err in Refusing to Make a Hypothetical Ruling.

The final part of the opening brief concerns a motion for a protective order. Vanisi apparently wished to have the district court order that certain unspecified information could not be used later in a new trial. 9 AA 1777-1787. The District Court found that issue was not ripe for determination. 9 AA 1813. It should be noted here that the original petition said essentially nothing and the supplement is signed by counsel, not by Vanisi. 10 AA 1943. Therefore, nothing in the petition amounts to a statement by Vanisi that could be used in a subsequent proceeding. Furthermore, Vanisi elected not to testify in the habeas corpus hearing and so, once again, there is nothing that might be used by the prosecution in another trial. This all seems to be much ado about nothing.

In part of the motion, and in part of the brief, Vanisi seems to be arguing that his supplemental petition should have been kept secret. He could have kept it secret by not filing it, but no rule of criminal procedural or civil procedure or any other source of law allows a pleading that defines the scope of the litigation to be kept secret. The very notion that a defendant could be required to defend against a secret indictment, or that a civil defendant would have to defend against unknown claims, is ludicrous. The proposal to require the respondent to defend without knowing the claims is equally nonsensical.

The State would also point out that prior to the supplemental petition, Vanisi had clearly, unambiguously and unconditionally waived the attorney-client privilege relating to the County Public Defender. 9 AA 1803. The decision upon which Vanisi relies, *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), quite clearly applied only to the implied waiver that attends any claim of ineffective assistance of counsel. 331 F.3d at 719-20. Here, prior to pleading any claim of

ineffective assistance, Vanisi expressly waived the privilege. So, even the 9th Circuit would have no problem with denying a protective order.

The *Bittaker* decision is clearly limited to federal habeas corpus claims and has no application to this state court. *See* 331 F.3d at 726.

The United States Supreme Court once recognized a limited testimonial privilege applicable to state courts. If a state court requires a criminal defendant to establish standing in order to pursue a motion to suppress based on an alleged unconstitutional seizure, then in that limited circumstance the defendant may do so while being assured that his testimony establishing standing will not be used as substantive proof of an element of the crime at trial. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968). That court has never expanded on that case to hold that whenever a person has a strong motive to provide evidence, that person may do so with the assurance that the evidence will never be used against him in any court or in any manner. Such a rule of law would be absurd and contrary to the evidence rule allowing the use of prior statements of the defendant. The State notes that by the plain language of *Bittaker v. Woodford*, counsel for the government was prohibited from even telling the local prosecutor about the evidence adduced in the federal habeas action. Furthermore, by the plain language of that same case, the petitioner would be free to perjure himself in a subsequent trial, free of any concern that he might be impeached. No court, save the 9th Circuit, has ever adopted such a rule of law. This Court ought not to be the first. The rules of privilege and the rules of evidence are both established by the state legislature and this Court ought not to adopt the ruling of a federal court, establishing a rule only for federal actions, that would serve to overrule the legitimate decisions of the legislature. A ruling that would allow a defendant to perjure himself without fear of impeachment is contrary to the ruling in *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643 (1971)(allowing impeachment with unlawfully obtained statements of the defendant). This Court ought not to adopt a rule that would allow a defendant to commit perjury with impunity. At an absolute minimum, this Court should find that the motion for a protective order was too broad as it would

have prohibited impeachment of the defendant in a re-trial with his own prior statements.

A litigant who makes choices is often confronted with competing considerations. A defendant who chooses to testify must do so knowing that he is subject to cross-examination and that cross-examination may yield information helpful to the prosecution. That does not mean that he must be relieved of the decision or that he may not be subjected to cross-examination. Similarly, when Vanisi chooses to call the performance of his attorneys into question, he might thereby make available to the State information that would otherwise remain secret. That does not mean that he must be relieved of the choice or that the information must remain secret. It means only that he has some tough decisions to make. This Court, in construing state law, has followed just that approach and held that "where a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." *Wardleigh v. Second Judicial District Court*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995). That is, held the Court, the privilege is intended as a shield, not a sword. When a litigant elects to deploy his sword, to use the relationship between attorney and client to achieve an advantage, he loses his ability to continue to claim the benefits of the shield. That is the law that should govern this action. Accordingly, the motion for a protective was properly denied.

IV. CONCLUSION

Vanisi had a full and fair opportunity to present his legal claims on appeal and to prove his factual claims on the habeas corpus action. The court bent over backwards to give Vanisi years to

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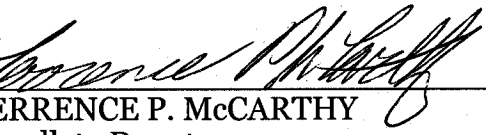
plead his claims. Because he failed to prove anything calling the verdict into question, the judgment of the district court should be affirmed.

DATED: September 22, 2008.

RICHARD A. GAMMICK
District Attorney

By 
TERRENCE P. McCARTHY
Appellate Deputy

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 the Nevada Rules of Appellate Procedure.

DATED this 22 day of September, 2008.

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CERTIFICATE OF MAILING.

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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DATED: September 22, 2008.

Tammy Riccio