ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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SIAOSI VANISI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 50607

DEATH PENALTY CASE

APPELLANT'S REPLY BRIEF

Appeal from Denial of Post-Conviction Habeas Petition, Second Judicial Dist. Ct., The Honorable Connie J. Steinheimer, Dept. 4, Dist. Ct. Case No. CR98P0516.

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08-30537

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THE DISTRICT COURT'S DETERMINATION THAT VANISI WAS COMPETENT TO PROCEED WITH COLLATERAL ATTACK ON HIS CONVICTION AND SENTENCE WAS CLEARLY ERRONEOUS.

"*Fiat justicia ruat coelum*"-"Let justice be done, though the heavens fall." These words were delivered by Lord Mansfield, Lord Chief Justice, in the case of *Rex v. Wilkes*, 4 J. Burrow 289 (K.B. February 5, 1770). They were also quoted with approval in several cases of this Court, notably *Calambro, by and through Calambro v. District Court*, 114 Nev. 961, 980 P.2d. 794, 806 (1998). The State's approach to this claim of Vanisi rejects such long settled jurisprudence and instead calls for a rule requiring an incompetent capital prisoner to proceed with his collateral attack, lest he be killed for inaction despite his deranged, demented inability to do so. This argument is an invitation to folly and must be rejected and corrected.

Rohan v. Woodford, 334 F.3d 803, (9th Cir. 2003) is the supreme law of this federal jurisdiction. The district court recognized as much in the habeas proceedings, much to the State's vexation. Accordingly, the effort expended by the prosecution in this appeal attempting to convince this Court that *Rohan* should not be followed and that it has no application to these proceedings is unconvincing and no basis for the rejection of this claim. (See, State's Answering brief, page 4, lines 13 through 26 wherein the State argues the Rohan decision is "nonsense" and has "no application to these proceedings" and page 5, line 11 and page 7, line 3, wherein the ruling is deemed a "non-sequitur" and an "absurdity.") Quite to the contrary, the legal issue raised in *Rohan* has been decided. It was deliberately examined and should be considered settled. *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947). The doctrine of stare decisis is an indispensable principle necessary to this Court's jurisprudence and to the due administration of justice. *Warden v. Harte*, 124 Nev. Adv. Op. No. 82 (October 30, 2008). The State's cavalier

dismissal of that principle and conclusion that the considered opinion of the Ninth Circuit Court of Appeal is nonsense must be disregarded.

Similarly, the State's reliance on this Court's decision in *Calambro, by and through Calambro v. District Court*, 114 Nev. 961, 964 P.2d. 794 (1998) does not govern the issue litigated in lower court proceedings. Vanisi did not seek appointment of a next friend to litigate on his behalf. He did not wish to abandon litigation and volunteer for execution. Instead, he presented his mental health as a basis for staying proceedings rather than being compelled to go forward in an incompetent state.

What is really at the heart of this issue and its prominence in this and lower court proceedings, is not whether this Court should obey federal precedent. The lower court did. The issue is whether the factual determinations made by the lower court in obedience to the federal decision are worthy of any respect and correctness. Vanisi respectfully submits they are not.

The opening brief in this matter sets forth the facts relative to the incompetence issue in great detail. The State discusses the record in a few vapid sentences at the conclusion of its response. Predictably supportive of the district court's competency finding because it was based on the opinion of "a doctor" who used "objective testing" the State maintains that substantial evidence supports the district court rejection of this issue. Nothing could be further from the bare truth of the record. Amazaga was a psychologist, with no medical training degree or licensure permitting him to analyze, prescribe or opine on Vanisi's powerful psychotropic medication regimen. His "objective testing" consisted of posing secret questions that to this day have not been revealed. How could the district court conclude there was any objectivity in the process without even knowing what the process consisted of? Such fact-finding deserves no deference, especially in this capital setting.

The issue before this Court remains whether the district court ruling rests on a substantial basis. It does not. The State has not demonstrated otherwise, instead embarking on a recasting of the issue to discuss the absurdity of binding federal precedent. The district court's final support for a conclusion of Vanisi's competency was that he cracked a smile during proceedings, thereby demonstrating that he was "connected". A ghastly grin should not form the basis for such an important matter. Again, it is respectfully requested that this Court bring justice to this matter by reversing the lower court determination, adopting the applicable federal precedent and issue a stay in compliance with those actions.

CLAIM ONE OF THE HABEAS PETITION:
VANISI WAS DENIED HIS RIGHT TO CONSULAR CONTACT UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS.

The State makes a big deal of the assertion that the record does not contain proof beyond any doubt that Vanisi is not a United States citizen, but a Tongan national. In the State's view, this alone should be the basis for denial of the claim. Fortunately, the district court did not find that a basis alone for denial of the claim, instead finding the alleged violation of international treaty as non-prejudicial.[1] However, the State's reliance on the paucity of proof regarding Vanisi's nationality does point up one of the prejudices stemming from the immediate previous issue concerning his competency. As was revealed during the record-making relative to the *Rohan* issue, Vanisi was not competent to assist counsel. Moreover, both experts found him unable to engage

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[1] Perhaps someday, in other court proceedings, the circumstances surrounding the nonappearance of a Tongan consulate representative at the lower court proceedings in this case, will come to greater light. Such future discussions might even delve into the legal process of compelling appearance of those with diplomatic privileges in state habeas proceedings and strategic decision making of habeas counsel not to seek public funding to travel to Tonga, verfiy Vanisi's ancestry and family history, along with other mitigating circumstances of his life outside the United States. If such alleged failure of proof were the sole basis for lower court denial of this claim, perhaps a *mea culpa* by present counsel would be in order. As things stand, that must wait for another day.

in truthful testimony. Accordingly, the prospect of an incompetent habeas petitioner ascending the witness stand and establishing his nationality (especially when he considered himself an independent sovereign and "Dr. Pepper") was dubious at best.

Staying thematically consistent with their overall response throughout the Answering brief, this issue like others, is belittled for its legal viability and persuasive force. ("The greater question, of whether the Convention gives rise to a private remedy that has any application to any case, can wait another day..." , Answering brief page 9, lines 21-23) The State is mistaken to do so. Violation of the Vienna Convention remains the subject of vigorous litigation and relief for many. Case in point, the federal appeals court ruling in *Osagiede v. U.S.*, 543 F.3d 399 (7th Cir. 2008), decided after the filing of Vanisi's opening brief in the instant case (September 8, 20008). Therein, the Seventh Circuit Court of Appeals ruled:

> (1) failure to notify defendant of his right to contact the Nigerian consulate violated his consular rights under the Vienna Convention;
>
> (2) right of a detained foreign national to receive notice of his right to contact his consulate under the Vienna Convention was an individually enforceable right; (emphasis added)
>
> (3) counsel's performance in failing to invoke defendant's right to consular access was deficient; and
>
> (4) defendant would be entitled to evidentiary hearing, if he could make credible assertion of the assistance that Nigerian consulate would have provided to him.

Any help the Tongan consulate could have provided in this case would have been material, considering Vanisi proceeded to trial with virtually no counsel at all. The district court erred in basing its denial of this claim on the fact he had not established enough prejudice from the treaty violation.

CLAIM TWO OF THE HABEAS PETITION:

ONE OF THE THREE AGGRAVATING CIRCUMSTANCES FOUND IN THIS CASE: THAT *THE MURDER OCCURRED IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT ROBBERY*, WAS IMPROPERLY BASED UPON THE PREDICATE FELONY-MURDER RULE, UPON WHICH THE STATE SOUGHT AND OBTAINED A FIRST DEGREE MURDER CONVICTION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Asked and Answered.

The State begins its Answer of this claim with the argument that *McConnell* should not be applied to this case, because "The inclusion of the felony-murder theory added nothing to the prosecution of this case..." (State's Answer, 10).

Despite being rebuffed numerous times by this Court in similar attempts[2], the State continues to argue that this Court's decision in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004),either must be overturned or doesn't apply to cases clearly on point with *McConnell*. In *McConnell* I, *McConnell* II, *Bejarano* and *Bennett*, *inter alia*, this Court consistently made it clear that it will not allow the State to circumvent the intent of its rulings. It is worth the effort to include here several quotes which illustrate this point.

In *McConnell I*, after explaining that its decision prohibited the State from charging a felony murder theory followed by an alleged aggravating circumstances which is based upon the same felony, the Court added:

> **We further prohibit the State from selecting among multiple felonies that occur during "an indivisible course of conduct having one principal criminal purpose" and using one to establish felony murder and another to support an aggravating circumstance.**

McConnell I, 102 P.3d at 625 (emphasis added).

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[2]*See McConnell v. State* , 120 Nev. Adv. Op. 105, 102 P.3d 606 (2004); *McConnell v. State*, 121 Nev. Adv. Op. 5, 107 P.3d 1287 (2005); *Bennett v. Eighth Judicial Dist. Ct.*, 121 Nev. Adv. Op. 78, 121 P.3d 605 (2005); *Bejarano v. State*, 122 Nev. Adv. No. 92, 146 P.3d 265 (2006); and *Rippo v. State*, 122 Nev. ____, 146 P.3d 279, 282-283 (2006).

In *McConnell II*, the Court answered the State's plea for reconsideration with the following:

> Citing Schad[3], the State also inquires what should be done "if all of the charged theories have been proved, or if the jury is split regarding the theory of liability." **McConnell makes clear that if one or more jurors decide to convict based only on a finding of felony murder, then prosecutors cannot use the underlying felony as an aggravator in the penalty phase.**

McConnell II, 107 P.3d at 1290-91 (emphasis added).

The *McConnell II* Court – along with rebuffing every argument posited by State and Amicus – also disagreed with the argument that the State could get away with charging felony murder and seek the death penalty with the same felony, because mitigating circumstances could ameliorate the harm done:

> **...amicus advances the novel and unsound argument** that an aggravator that fails to constitutionally narrow death eligibility is of no concern because of the possibility that a jury may not return a death sentence due to mitigating circumstances.

McConnell II, 107 P.3d at 1292 (emphasis added).

In *Bennett*, the Court chastised the State's behavior in language akin to judicial estoppel:

> Despite predicating this entire matter on its assertion before the district court that McConnell applies to Bennett's case, the State has retreated from this initial position and has expressed shifting positions about whether the holding announced in McConnell even applies to Bennett's case at all...
>
> Because Bennett is awaiting a new penalty hearing, his conviction, at least in regard to his sentence, is clearly no longer final. Thus, *McConnell* applies to the penalty hearing to be conducted in this matter, and its retroactive application is simply not an issue.

Bennett, 121 P.3d at 608-09 (emphasis added).

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[3]*Schad v. Arizona*, 501 U.S. 624, 630-45, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991) (plurality opinion).

Further, even after two published decisions clearly stating the holding of *McConnell*, the State still attempted to wiggle free from its confines:

> The State later asserts in its answer that "there was no specific finding by the jury that Defendant was found guilty based solely on a felony murder theory." The State maintains that it is therefore "unclear whether the felony murder aggravating circumstances [based] on burglary and robbery are in fact improper as to Defendant's case." **The State's assertion that it is "unclear" whether McConnell applies to Bennett's case** because there was no specific finding by the jury that Bennett was convicted based solely on a theory of felony murder **is troubling.**
>
> Bennett's murder conviction need not have been based solely on felony murder for McConnell to apply.

Bennett, 121 P.3d at 609 (emphasis added). The State's position in this appeal is no different than its previous attempts to discredit the ruling in *McConnell* and its applicability.

B. *Genuine, Sufficient,* or *Adequate* Narrowing.

The State presents a semantics-based argument which infers that this Court used the wrong standard when reviewing whether Nevada's statutory scheme provides the requisite constitutional narrowing. Specifically, the State infers that this Court's use of the words "sufficient" or "adequate" – instead of "genuine" – to describe the narrowing at issue, indicates that it used the wrong standard. The State's argument is without merit.

To begin, in the initial *McConnell* decision, this Court recognized that the U.S. Supreme Court "has held that to be constitutional a capital sentencing scheme 'must *genuinely* narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *McConnell*, 102 P.3d at 620-621, *quoting Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)(emphasis added). *See also McConnell*, 102 P.3d at 623:

> The question is, in a case of felony murder does either of these two aggravators "*genuinely* narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant

> compared to others found guilty of murder"? We conclude that the narrowing capacity of the aggravators is largely theoretical.

(emphasis added).

Finally, the *McConnell* Court concluded, "the felony aggravator fails to *genuinely* narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies." *McConnell*, 102 P.3d at 624 (emphasis added). Having relied upon the wording which the State prefers no less than three time in the original *McConnell* decision, it would appear that the Court properly understood the law upon which it formed its conclusion.

Again on rehearing, in *McConnell v. State*, 121 Nev. Adv. Op. 5, 107 P.3d 1287 (2005), the Court acknowledged that, in order "to meet constitutional muster, a capital sentencing scheme "must *genuinely* narrow the class of persons eligible for the death penalty..." Id., 107 P.3d at 1288-89 (*quoting Leslie v. Warden*, 118 Nev. 773, 784-86, 59 P.3d 440, 448-49 (2002) (Maupin, J., concurring)(emphasis added), and *citing Lowenfield v. Phelps*, 484 U.S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988).

In *Bejarano v. State*, 122 Nev. Adv. Op. 92, 146 P.3d 265, 272 (2006), the Court again recognized that the statues in question must "genuinely" narrow the class of persons at issue. And again the Court relied upon the same language no less than three times in forming its conclusion that, "the statutes in 1988 failed to *genuinely* narrow death eligibility." Id., 146 P.3d at 275 (emphasis added).

If all this language were not evidence sufficient to assuage the State's concerns whether this Court has employed proper reasoning in the decisions at issue, the High Court, too, in its controlling decisions, has used both terms which the State finds suspicious. For example, it used "adequate" to describe the requisite narrowing in *Zant*, *supra*, 462 U.S. at 886, 894, and also the

word "sufficient" at 895. *See also Brown v. Sanders*, 546 U.S. 212, 223-224, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

C. Whether Nevada's Murder Statutes Provide Requisite Narrowing.

The Supreme Court has ruled that statutes must meet the narrowing requirement by: (1) narrowing the definition of capital offenses by including a list of specific aggravating circumstances as elements of the crime that make a person eligible for the death penalty; or (2) defining capital offenses broadly and requiring the finder of fact to consider whether specified aggravating circumstances exist during the sentencing phase. *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The State argues that, due to a number of other distinctions -- such as vehicular manslaughter, voluntary manslaughter and second degree murder -- Nevada's definition of first-degree murder provides constitutionally-adequate narrowing of the class of individuals eligible to receive the death penalty. Therefore, the state argues, the use of aggravating factors under Nev. Rev. Stat. § 200.033 is not required under *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and the aggravating factors that merely duplicate the theory of first-degree murder are of no constitutional significance because the constitutionally-required narrowing is already satisfied by the definition of first-degree murder. Again, the State's position is meritless.

As this Court explained in *McConnell*, Nevada's first degree murder statute is extraordinarily broad. (This fact alone, logic tells us, requires the narrowing to occur at sentencing, pursuant to *Zant*, et al.) The felony-murder portion of the statute extends to all the forms of common law felony murder, *see* 120 Nev. at 1065-1068, including some far broader than the

common law definition.[4] The other sections of the statute extend the definition of first-degree murder to a broad range of murders that, like the felony-murder definition, do not qualify for imposition of the death penalty under the Eighth Amendment standards of *Tison v. Arizona*, 481 U.S. 137, 157-158 (1987) and *Enmund v. Florida*, 458 U.S. 782, 797 (1982). *See* Nev. Rev. Stat. § 200.030(1); *Deutscher v. State*, 95 Nev. 669, 667, 601 P.2d 407 (1979) (murder by torture does not require intent to kill). The scope of the statute is, in fact, expanding: just this session, the Legislature added a new theory making murder of a "vulnerable" person a first degree murder. 2007 Nev. Stat. ch. 35, amending Nev. Rev. Stat. § 200.030(1). The Nevada statute is thus the archetype of a definition of first-degree murder that does not meet the "genuinely narrowed" requirement.

D. Theoretically Distinguishable Is Not the Same Thing as More Narrow.

In *Lowenfield*, the Supreme Court reviewed the Louisiana murder statute. In contrast to the Nevada statute, the Louisiana statute requires a showing greater than, for instance, felony-murder to establish first-degree murder: felony-murder simpliciter constitutes only second-degree murder in the Louisiana scheme, while first degree felony murder requires as elements that the defendant have the specific intent to kill, or to inflict great bodily harm, in addition to the particular aggravated offense underlying the felony murder theory. *Lowenfield*, 484 U.S. at 241-242 and n. 5.

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[4] For instance, a killing committed in the perpetration of a burglary is a first degree murder by statute. Nev. Rev. Stat. § 200.030(b). Under the common law burglary required an actual breaking and entry of a residence during the night. *See, e.g., Taylor v. United States*, 495 U.S. 575, 594 (1990). Under the Nevada definition of burglary, a daytime entry into an open commercial establishment during the daytime can be burglary. *See* Nev. Rev. Stat. § 2005.060(1); *State v. Adams*, 94 Nev. 503, 505, 581 P.2d 868 (1978).

The other Louisiana theories of first degree murder are similarly circumscribed, for instance, by requiring that the victim be a peace officer or firefighter, or that the victim be younger than twelve or older than sixty-five, or that the perpetrator have the specific intent to kill or inflict great bodily harm on more than one person. *Lowenfield*, 484 U.S. at 242, citing La. Rev. Stat. Ann. § 14.30.1. These elements of first degree murder under the Louisiana scheme are strikingly similar to the aggravating factors under Nevada law. *See* Nev. Rev. Stat. § 200.033. The Louisiana scheme is thus fundamentally different from the Nevada one, and the Nevada scheme fits squarely within the category of statutes in which the definition of first degree murder does not satisfy the narrowing requirements of the Eighth Amendment.

Instead of addressing the actual relationship between the scope of the Nevada statute and the analysis of *Lowenfield* in *McConnell*, the state's brief discusses hypothetical situations in which individual first degree murders in Nevada might be aggravated to the point that the narrowing requirement imposed by the state and federal constitutions would be satisfied. (Opening Brief, at 4-6). The State's argument here provides little, if anything, but the proverbial smoke and mirrors.

Given the fact that the Nevada scheme does not employ the requisite narrowing at the guilt phase, as the Louisiana scheme does, the issue then is whether the requisite narrowing at the penalty phase exists. Because Louisiana had adopted a system in which first degree murder included "a narrower class of homicides," more restricted than intentional murder or felony murder, that categorical restriction satisfied the narrowing required by the Eighth Amendment. As this Court acknowledged in the first McConnell decision, regarding felony murder,"a killing involving the same enumerated felonies was only second-degree murder when the offender 'has no intent to kill or to inflict great bodily harm.'" *McConnell*, 102 P.3d at 621, *citing Lowenfield*, 484 U.S. at 241 n.5, *quoting* La. Rev. Stat. Ann. § 14:30.1(A)(2). The focus, then, is on whether the system

as a whole provides "genuine" narrowing.

Indeed, the Court in *Lowenfield* focused on the system as a whole: "the Legislature may itself narrow the class of capital offenses . . . so that the jury finding of guilt response 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." *Lowenfield*, 484 U.S. at 246. Comparative analysis shows us that Nevada has opted for the latter process: the statute includes a long list of theories of first degree murder, including traditional felony-murder, Nev. Rev. Stat. § 200.030(1)(6), and a laundry list of other means or circumstances in addition to premeditation and deliberation. Nev. Rev. Stat. § 200.030(1)(a,c-e). As the *McConnell* decision itself acknowledged, the felony-murder theory by itself is too broad under *Lowenfield* to perform the required narrowing at the guilt phase. *McConnell*, 120 Nev. at 1065-1066. A fortiori, the felony-murder theory of first degree murder, plus the other non-felony-murder theories, is too broad under *Lowenfield* to make an aggravating factor that duplicates the theory of felony murder constitutionally acceptable.

Further, this Court addressed these very objections in the second *McConnell* decision:

> We further pointed out that Nevada's definition of felony murder is broader than that set forth in the death penalty statute extant in 1972 when the Supreme Court temporarily ended executions in the United States. Consequently, felony murder in Nevada is so broadly defined that further narrowing of death eligibility by the finding of aggravating circumstances is necessary. Amicus fails to address this analysis, let alone show that it is in error.

McConnell, 107 P.3d at 1292.

This is no small matter for consideration. The State takes a factor – felony murder – which actually *broadens* the class of persons eligible for first degree murder in Nevada, and attempts to reason that this scheme is akin to the requisite narrowing under *Furman v. Georgia,* 408 U.S. 238,

33 L Ed 2d 346, 92 S Ct 2726 (1972), *Gregg, Zant*, et al. Which is more of an argument to do away with felony murder than it is to affirm its dual use. The reality is that while the rest of the country is moving away from the death penalty, despite the legal mandate otherwise, Nevada continues to broaden its death eligibility, making the decision in *McConnell* not only legally sound, but legally necessary.

Finally, the structure imposed by *Lowenfield* establishes the constitutional minimum required by the federal due process guarantee and the Eighth Amendment. This Court's decision in *McConnell* is based on the state constitution's requirement of narrowing as well, *see McConnell*, 120 Nev. at 1063, and the *McConnell* analysis is thus not circumscribed by *Lowenfield.* The state's argument offers no rationale for this Court to reconsider the *McConnell* decision to the extent that it is based on state law, much less for ignoring the federal constitutional minimum prescribed by *Lowenfield.* Accordingly, this Court should reject the state's misdirected attempt to discredit *McConnell.*

E. Other Jurisdictions.

A review of the decision in *Enberg v. Meyer*, 820 P.2d 70 (Wyo. 1991), which was *cited* by this Court in *McConnell*, 102 P.3d at 620, and which the State attempted to distinguish in *McConnell*, 107 P.3d at 1291, reveals additional helpful material, as the *Enberg* Court explained:

> Black's Law Dictionary, 60 (5th ed. 1979) defines "aggravation" as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of the crime or tort itself."* (emphasis added)
>
> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the *Furman/Gregg* weeding-out process fails.

Enberg, 820 P.2d at 90.

The Court recognized that this failure to narrow, under the circumstances, created precisely the sentencing scheme found unconstitutional in *Furman*:

> This statute provided no requirements beyond the crime of felony murder itself to narrow and appropriately select those to be sentenced to death and therefore, on its face, permitted arbitrary imposition of the death penalty. This statutory scheme of death sentencing preserved in felony murder the very evil condemned and held unconstitutional in *Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726.* It permitted in felony murder cases a sentence to death without applying any standards that generally narrowed the class of crimes and persons who were given the death penalty. The statute recreated a sentencing scheme that the United States Supreme Court found resulted in death sentences being imposed unevenly, unfairly, arbitrarily and capriciously.

Enberg, 820 P.2d at 89.

Likewise, as noted elsewhere, this Court recognized in *McConnell*, that Nevada's definition of felony murder is broader than that set forth in the death penalty statute in 1972 when the Supreme Court in *Furman* temporarily ended executions in the United States. Id., 102 P.3d at 622. The State presents no argument which refutes this. Nor does it explain, in rational terms, how such finding is in error.

The State's argument that there is a narrowing that takes place between the felony murder and the felony murder aggravator is disingenuous. The Court in *Engberg* addresses this logical fallacy as well:

> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in *W.S. 6-4-102* that at least one "aggravating circumstance" be found for a death sentence becomes meaningless.

Enberg, 820 P.2d at 90.

Also, as noted in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), the High Court has consistently mandated that the *genuine narrowing* must be done through a process which "reasonably justifies" the imposition of the more severe penalty:

> As a constitutionally necessary first step under the Eighth Amendment, the Supreme Court has required the states to narrow the sentencers' consideration of the death penalty to a smaller, more culpable class of homicide defendants than the pre-*Furman* class of death-eligible murderers. *See Pulley v. Harris, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).* **A state, however, must not only genuinely narrow the class of death eligible defendants, *but must do so in a way that reasonably justifies* the imposition of a more severe sentence on the defendant compared to others found guilty of murder.** *Zant v. Stephens, supra, 462 U.S. at 877, 103 S. Ct. at 2742, 77 L. Ed. 2d at 249-50.* A proper narrowing device, therefore, provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not, *Godfrey v. Georgia, supra, 446 U.S. at 433, 100 S. Ct. at 1767, 64 L. Ed. 2d at 409*, and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed. *Zant, supra, 462 U.S. at 879, 103 S. Ct. at 2744, 77 L. Ed. 2d at 251.* As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers -- those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate. *See Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).*

Middlebrooks, 840 S.W.2d at 343 (emphasis added). Hence, despite the State's protestations otherwise, there is more to the question than simply whether the class is "genuinely" narrowed.

The *Middlebrooks* Court looked also to the North Carolina Supreme Court, and agreed with its reasoning that the use of the felony murder aggravating circumstances defeats the purpose of the narrowing requirement in that it actually broadens the class of eligibility, establishing a system in which one who did not intend to kill is more likely to get the death penalty than one who planned, premeditated and deliberated the killing:

> . . . A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and

> deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. **This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.**
>
> . . . .
>
> We are of the opinion that, nothing else appearing, **the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death** due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first-degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.

Middlebrooks, 840 S.W.2d at 341-342, *quoting State v. Cherry*, 257 S.E.2d 551, 567 (N.C. 1979) (emphasis added). In this situation, the death penalty scheme neither narrows the class eligible nor reasonably justifies itself, as required by *Zant*, *supra*. This is in accord with the High Court's position that, after restricting the class of death-eligible offenses, a state must still utilize additional procedures that assure reliability in the determination that death is the appropriate punishment in a given capital case. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Put another way:

> A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability.

Middlebrooks, 840 S.W.2d at 345.

The State makes much of a *mens rea* difference between the felony murder and the felony murder aggravator. This is legal fiction. As stated, felony murder broadens, not narrows the class. Further, a system of "narrowing" that is based upon felony murder does not "reasonably justify" itself, and not does it provide any assurance of reliability in the determination that death is the

appropriate sentence, under *Zant* and *Woodson*. Moreover, as explained in *Middlebrooks*, using the presence or absence of the *men rea* associated with felony murder cannot be seen to narrow the class of eligibles:

> [T]he Supreme Court case of *Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)*, now places a nationwide threshold of culpability at the reckless indifference level, meaning that **a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty**. *Id., 481 U.S. at 157-58, 107 S. Ct. at 1687-88, 95 L. Ed. 2d at 144-45*. Therefore, since the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants.

Middlebrooks, 840 S.W.2d at 345 (emphasis added).

Nevada's death penalty statutory scheme does not genuinely narrow the class eligible nor does it reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder, as required by *Zant*, *supra*. Accordingly, the State's argument that this Court should overturn *McConnell* is without merit.

There was no indication from the jury as to whether they decided the murder was deliberate and premeditated or felony murder. Thus, under the authority of *McConnell*, the two aggravators: (1) that *the murder occurred in the commission of a robbery*, and (2) that *the murder occurred in the commission of or an attempt to commit burglary*, are unconstitutional, and therefore must be vacated as invalid.

Because neither the district court nor the Nevada Supreme Court can constitutionally make the findings of elements necessary to impose a death sentence, this Court must order the impanelment of a new jury to determine the appropriate sentence

F. Remedy & the Prejudice Analysis.

The unconstitutionality of the Nevada procedure is further demonstrated by the distinction drawn in *Apprendi* between its holding and the holding in *Walton v. Arizona*, 497 U.S. 639 (1990). In *Apprendi*, the Court distinguished *Walton*, holding that the rule it announced would not "render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Id.* at 16 (citation omitted; emphasis added). The court relied on the reasoning in Justice Scalia's opinion in *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n. 2 (1998) (Scalia, J., dissenting):

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death. it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

Apprendi at 16 (emphasis supplied). Under the Arizona scheme at issue in *Walton*, the statute provides that the maximum penalty for first degree murder is death. Ariz. Rev. Stat. § 131 lO5(C)("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703."); *Walton v. Arizona*, 497 U.S. at 643 (expressly overruled by *Ring*, *supra*).

By contrast, under Nevada law the penalty of death is not the maximum penalty for first degree murder simpliciter: the statute itself provides that the penalty is not available for first degree murder unless additional elements - - the existence of aggravating circumstances, and the failure of mitigating circumstances to outweigh the aggravating circumstances - - are found. *See Apprendi* at 29 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment - - for establishing or increasing the prosecution's entitlement - - it is an element.")

Simply put, a jury's verdict of first degree murder under Nevada law is not "a jury verdict holding a defendant guilty of a capital crime," *Id.* at 16, because the statute itself provides that the punishment of death is not available simply on the basis of that verdict, but can be imposed "only if" further findings are made to increase the available maximum punishment.

Under *Ring & Apprendi*, the courts of Nevada cannot constitutionally proceed to make the findings in this case regarding the existence of aggravating factors and/or the weighing of mitigating factors to aggravating factors which are necessary to increase the maximum punishment for the offense to a death sentence. Findings of these elements of capital murder can constitutionally be made only by a jury.

Finally, this Court is bound to follow *Apprendi* and *Ring* under the supremacy clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI; *Powell v. Nevada*, 511 U.S. 79 (1994) (state court cannot refuse to apply federal constitutional retroactivity doctrine); Nev. Const. Art. 1 § 2.

The *Brown* Decision.

Accordingly, there was no error in the *McConnell* decision, or its progeny, as it concerns this case. There was no error in the District Court's applying *McConnell* to this case. The error was in the District Court's prejudice analysis. As argued in the Opening Brief, the decision in *Brown*: (1) applies prospectively (*Brown*, 546 U.S. at 220, 126 S.Ct at 892 (*Brown* was not decided until January 11, 2006)); and (2) does not render harmless the error in this case.

The State misinterprets the *Brown* decision. First, the State manipulates the law by arguing that it is the *facts* which are to be weighed, and not the number of aggravators. This is not true. The State argues that "the facts available to be weighed are unchanged by the number of aggravators." This is simply not an accurate description of the legal process. As appropriately explained by Justice Scalia, writing for the majority in the *Brown* decision:

> This test is not, as Justice Breyer describes it, "an inquiry based solely on the admissibility of the underlying evidence." *Post, at 241, 163 L. Ed. 2d, at 746* (dissenting opinion). If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here. See *supra, at 219, 163 L. Ed. 2d, at 732*; see also n 6, *supra.* [7] **The issue we confront is the skewing that could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty**. See, *e.g.*, *Stringer, 503 U.S., at 232, 112 S. Ct. 1130, 117 L. Ed. 2d 367* ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale").

Brown, 546 U.S. at 220-21, 126 S.Ct. at 892 (emphasis theirs and added).

Moreover, while it is true that, in Nevada, the death penalty is not a numbers game, i.e., jurors do not calculate the number of aggravating circumstances versus mitigating circumstances to determine whether the death penalty is imposed, the State skews the process with its argument. The State makes it sound as if the jury simply weighs the facts of the murder, alone, in its weighing process. This argument completely discounts the two-stage process of determination of eligibility and then determination of aggravating and mitigating circumstances. Again, as explained by Scalia, the facts of the death have already been placed before the jury, including the alleged theft of the weapon, during trial. (As prohibited by *McConnell* and its progeny.) The question is whether it is proper to emphasize those facts/factors again in the penalty phase, under the guise of narrowing the class of persons eligible, when what is actually happening is that the class is being broadened.

Next, the State argues that the theft of the weapon was admissible to show that Vanisi knew he was killing a police officer in the performance of his duties. Again, the explanations of Justices Scalia and Breyer are important here. The evidence that the weapon was stolen was presented at trial and was alleged in the charging document, under the felony murder rule. Hence, the prohibition against using the theft as an aggravating factor under *McConnell*. These facts are not then "available" to support another aggravating factor. The officer in question was dressed in full uniform and standing next to his patrol car when the incident occurred. Accordingly, the State's argument that it was the service revolver which tipped Vanisi to the fact that the deceased was a police officer is disingenuous to say the least. Instead, it is but another attempt by the State to make an end run around the rule in *McConnell* as it has tried repeatedly since that decision. The interests of justice would be well served by this Court's rejection of this, the State's latest theory of avoidance, as well.

Because neither the district court nor the Nevada Supreme Court can constitutionally make the findings of elements necessary to impose a death sentence, this Court must order the impanelment of a new jury to determine the appropriate sentence.

CLAIM THREE:

THE DISTRICT COURT'S FAILURE TO ALLOW VANISI TO REPRESENT HIMSELF, PURSUANT TO *FARETTA v. CALIFORNIA*, RESULTED IN A STRUCTURAL ERROR AMOUNTING TO "TOTAL DEPRIVATION OF THE RIGHT TO COUNSEL," IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State misconstrues this claim, self-styling it as "The District Court Properly Declined to Overrule the Supreme Court." (Answering Brief, 19). This was neither the title of the claim nor the substance of the claim. As set forth in the Opening Brief, the fact is that *this* Court has the authority to re-visit the *Faretta* claim at this time, as well as the new arguments, along with the

more complete record available to the Court after the post-conviction habeas hearings. The State's arguments focus on whether the district court should have overruled this court, instead of the substance of the claim, largely – if not completely – ignoring the considerable facts and legal argument.

The State's reliance upon Indiana v. Edwards, 128 S.Ct. 2379 (2008), is also misplaced. The decision in *Edwards* is inapposite to the instant case, as there were no severe mental health reasons cited for denying Vanisi's *Faretta* motion. These are slick maneuvers by the State, to be sure. But this Court should not be fooled. Accordingly, the State's inference that a mental health issue of the nature contemplated by the *Edwards* Court had anything to do with the denial of the *Faretta* motion is simply more smoke to cloud the Court's reflection.

The essence of this claim is that the district court placed trial counsel and Vanisi between the Scylla and Charybdis, by not allowing counsel to withdraw and by not allowing Vanisi to represent himself, even though actual conflicts of interest existed, there appeared no valid reason not to allow Vanisi to represent himself, and the result was a trial whereby trial counsel were forced to sit on their hands, forcing a structural error. As this Court has acknowledged, automatic reversal occurs where the defendant is denied substantive due process. *Manley v. State*, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing Guyette v. State*, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968). The denial of the *Faretta* motion resulted in structural error, including a total deprivation of the right to counsel at trial and the deprivation of the right to self-representation at trial, in violation of the 5th, 6th, 8th, and 14th Amendments of the United States Constitution.

CLAIM FOUR:

THE DISTRICT COURT ERRED IN REFUSING TO ALLOW TRIAL COUNSEL TO WITHDRAW DUE TO IRRECONCILABLE CONFLICT, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

It is true that this claim is inexorably linked to the previous claim regarding the *Faretta* error. And while it admittedly takes a backseat to the *Faretta* claim, it is not without merit.

The State is unhelpful in its oversimplification of this claim when it argues that there is no conflict of interest, only a question of whether Vanisi had the right to an unethical lawyer. (State's Answer, 19-20). Setting aside for the moment the accuracy of the State's allegation, as set forth in the Opening Brief, there were many issues raised besides what defense to raise and why.

To recount: There were issues of inadequate advice and inadequate time spent with Vanisi in preparation for trial (SA, 8-10, 16-18), including an issue of the veracity of counsel and of counsel's candor to the court (SA, 29-30). Also, there were issues of difficulties in communication between counsel and Vanisi and of forced medication. (SA, 38-40) .

It is true, as the State argues, that a defendant should not be able to play the courts by continually creating ethical conflicts which would require the replacement of counsel either ad infinitum or until the defendant found an attorney who would put on whatever defense the defendant wanted, ethical or not. However, despite the State's (mis)characterization, that is not the case here. As shown, the conflict was about more than simply which defense was proper. More important, however, is the fact that Vanisi was *not* asking for a new attorney (or string of new attorneys). He was asking for the right to represent himself. Which, barring a situation like the one found in *Edwards* (one of "severe" mental health barriers), is a constitutional right which we all enjoy.

The cases relied upon by the State – beyond being decisions from other states – all involve matters in which the defendant was asking for a new attorney, not seeking to represent himself. In fact, in *Sanborn v. State*, 474 So.2d 309 (Fla.App. 1985), the attorney in question was already the defendant's fourth attorney and if the court would have granted the request to withdraw, it would have meant a fifth attorney. That is obviously not the case in Vanisi's trial, in which the public defenders were the first and only attorneys to represent Vanisi, and as stated, he was not seeking to replace them with new attorneys, but with himself. Finally, the *Sanborn* court recognized that such situations create "an irreconcilable conflict ... between counsel and the accused." Id., 474 So.2d at 314. Which is exactly what Vanisi is saying.

Indeed, the *Sanborn* Court looked to the Arizona Supreme Court in recognizing the problem and its possible solutions:

> If "irreconcilable conflicts" arise between a particular defendant and **a string of attorneys**, we trust the trial court will, when the orderly administration of justice requires, refuse permission to withdraw. In such a case, counsel must, within the confines of the law and his or her professional duties and responsibilities, present the client's case as well as he or she can. A criminal defendant is entitled to full and fair representation within the bounds of the law. If he or she is dissatisfied with the representation to which he or she is entitled in our system, **self-representation is available**. Counsel must not compromise the integrity of his or her client, the court, or the legal profession by exposing a client's proclivities or by engaging in unethical conduct at a client's request.

Sanborn, 474 So.2d at 314, *citing State v. Lee*, 142 Ariz. 210, 689 P.2d 153, 163-164 (1984) (En Banc)(emphasis added).

Again, neither a string of attorneys were involved here, nor was Vanisi given the opportunity of self-representation. In other words, the authority relied upon by the authority cited by the State relies upon the same logic put forth by Vanisi in these proceedings.

CLAIM FIVE:

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL RE: ACTIONS DURING ATTEMPT TO WITHDRAW AS COUNSEL, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

In response to Vanisi's claim that it was improper for his counsel to disclose his admissions to the district court then use that as an excuse for failing to provide a trial defense, the State urges this court to engage in nice calculations as to the amount of prejudice stemming from the disclosure. With all due respect, such analysis misses the point. Admitting a client's guilt, without permission, clearly points out a conflict of interest. Prejudice should be presumed under such circumstances. The claim should not be brushed off as harmless. Further, it is supremely ironic that revealing their client's admissions during the trial phase was the most significant action taken by trial counsel during the guilt phase. They did not bother to even give opening or closing statements, presenting no defense at all. If this was the situation envisioned when the *Sanborn* court required an attorney to "within the confines of the law and his or her professional duties and responsibilities, present the client's case as well as he or she can," *Sanborn*, 474 So.2d at 314, (1984), what a sad state of affairs is legally tolerated. Effective representation in a capital case has become nothing more than a quaint notion that must yield to the dictates of disclosing a client's culpability in featly to ethical requirements of candor with the tribunal.

CLAIM SIX:

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL RE: FAILURE TO PUT ON AN ADEQUATE DEFENSE, INCLUDING FAILURE TO MAKE A CLOSING ARGUMENT DURING THE GUILT PHASE, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This is a claim of structural error. The State argues that it is not properly a structural error claim, because counsel "did indeed participate in the trial." (State's Answer, 24). To recap, here

are all the ways that trial counsel did not participate in trial: For examples of failure to cross-examine, or failure to meaningfully cross-examine, *see* AA, I, 57 (testimony of Dr. Ellen Clark, key State's witness re: autopsy and evidence of mutilation); *and see* AA, I, 126, 142, 162; AA, II, 206, 224, 299, 304, 310; AA, II, 358, 365, 368, 379, 388; AA, III, 455, 467, 480, 518). Also, **counsel for Vanisi did not even give the jury an opening statement nor closing argument at the guilt phase of the trial**. (AA, III, 524-25, 561). Further, as a result of his counsel's failure -- or inability -- to put on a defense or cross-examine witnesses, Vanisi refused to testify. He told the court, "This is a joke. I am not going to testify." (AA, III, 498).

It is true, as the State argues, that counsel did participate in the penalty phase of the trial. This, however, does not cure the absolute lack of participation at the guilt phase. Even a cursory read of the guilt phase transcripts shows that trial counsel's participation in that phase. Out of nineteen State's witnesses at the guilt phase, the defense cross-examined only a five. Only one of nineteen in any depth.

CLAIM SEVEN:

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. CONST. AMENDS. V, VI, VIII & XIV; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ART. VI; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The State does not address the substance of the claim in its Answering brief, electing instead to say that the claim was not likely to succeed in an appellate forum. Respectfully, Vanisi disagrees and submits the claim has merit and relief should have been granted.

CLAIM EIGHT:

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS HIS RIGHTS UNDER INTERNATIONAL LAW, BECAUSE THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT. U.S. CONST. ART. VI, AMENDS. VIII & XIV; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ARTS. VI, VII; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The State does not directly address this claim in its Answering brief. Vanisi respectfully maintains that the death penalty is inconsistent with the evolving standards of decency that mark the progress of a maturing society. Accordingly, it should be abolished and his sentence should be vacated.

CLAIM NINE:

VANISI'S CONVICTION AND SENTENCE ARE INVALID PURSUANT TO THE RIGHTS AND PROTECTIONS AFFORDED HIM UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS. U.S. CONST. ART. VI; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

Vanisi's rights under the Covenant were violated and the district court erroneously declined to afford him relief. Most notably, Vanisi was not afforded the opportunity to defend himself. Nor was he permitted to be defended by counsel of his own choosing. These errors are per se prejudicial and require that Vanisi's death sentence and conviction be vacated. The State's argument that the United States is not a signatory and thereby bound by the terms of the Covenant are without merit.

CLAIM TEN :

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE EXECUTION BY LETHAL INJECTION VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS. U.S. CONST. ART. VI, AMENDS. VIII & XIV; U.S. CONST., ART. VI; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ART. VII.; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

Right Time, Right Place.

The State argues that the instant claim "is not an attack on the judgment or sentence" and therefore must be brought in a separate civil action. (Answering brief, p. 20). The State relies upon *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096 (2006) and *Bowen v. Warden*, 100 Nev. 489, 686 P.2d 250 (1984).

The High Court's decision in *Hill* is distinguishable from the instant case and does not bar the instant claim. *Hill* involved a petitioner who had exhausted his habeas remedies. Thereafter, Hill filed a civil action pursuant to 42 U.S.C.S. §1983. In that action, Hill challenged the method of execution, but not the execution itself. Therefore, the Court determined that the claim was not a disguised habeas claim which would have been barred as a successive petition. The question was whether there was another acceptable means of execution available. The Florida legislature had provided for death sentences to be carried out by lethal injection, unless the person sentenced preferred to be executed by electrocution. *Id.*, 547 U.S. at 576-77, *citing* Fla. Stat. § 922.105(1). Moreover, the Court noted that the Florida Department of Corrections "[had] not issued rules establishing a specific lethal-injection protocol." *Id.*

Accordingly, without deciding the merits of the underlying §1983 case, the High Court determined that the claim should be allow to go forward, in part, because the State's law did not require the use of the challenged procedure. *Id. at 580; see also Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004).

Conversely, in Nevada, NRS 176.355(1) mandates lethal injection as the method of execution. There are no alternatives available. And the Nevada Department of Corrections has set forth a specific protocol which appears unconstitutional in light of *Baze*. Accordingly, McConnell's claim is not barred by *Hill*. Indeed, as recognized in *Nelson* and referenced in *Hill*, the U. S. Supreme Court acknowledged:

> [I]n a State where the legislature has established lethal injection as the method of execution, "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself."

Hill, at 579, *quoting Nelson*, 541 U.S. at 644. Such is the position in which Vanisi finds himself.

Bowen is inapposite to the instant case, as it involves the appropriate means of challenging the conditions of confinement, including beatings and punitive segregation. *Bowen* does not cite to nor reference *Hill* in any way.

CLAIM ELEVEN:

VANISI'S CONVICTION AND SENTENCE OF DEATH ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION AND A RELIABLE SENTENCE BECAUSE PETITIONER MAY BECOME INCOMPETENT TO BE EXECUTED. U.S. CONST. AMENDS. V, VI, VIII & XIV; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

This claim was raised as a precaution against executing Vanisi in an incompetent state. By presenting it to this Court and the lower court, federal intervention at a later date will not face procedural barriers.

CLAIM TWELVE:

PETITIONER'S CONVICTION AND SENTENCE VIOLATE THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS AND A RELIABLE SENTENCE AND INTERNATIONAL LAW BECAUSE PETITIONER'S CAPITAL TRIAL AND REVIEW ON DIRECT APPEAL WERE CONDUCTED BEFORE STATE JUDICIAL OFFICERS WHOSE TENURE IN OFFICE WAS NOT DURING GOOD BEHAVIOR BUT WHOSE TENURE WAS DEPENDENT ON POPULAR ELECTION. U.S. CONST. ART. VI, AMENDS. VIII, XIV; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ART. XIV; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The members of the Nevada judiciary are popularly elected, and thus face the possibility of removal if they make a controversial and unpopular decision. This situation renders the Nevada judiciary insufficiently impartial under the federal due process clause to preside over a capital case. At the time of the adoption of the constitution, which is the benchmark for the protection afforded by the due process clause, *see, e.g., Medina v. California*, 505 U.S. 437, 445-447 (1992), English judges qualified to preside in capital cases had tenure during good behavior.

The tenure of judges during good behavior was firmly established by the time of the adoption: almost a hundred years before the adoption, a provision required that "Judges' Commissions be made *quamdiu se bene gesserint* . . . ." was considered sufficiently important to be included in the Act of Settlement, 12, 13 Will. III c. 2 (1700); W. Stubbs, *Select Charters* 531 (5th ed. 1884); and in 1760, a statute ensured their tenure despite the death of the sovereign, which had formerly voided their commissions. 1 Geo. III c.23; 1 W. Holdsworth, *History of English Law* 195 (7th ed., A. Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." 1 W. Blackstone, *Commentaries on*

the Laws of England *258 (1765). The framers of the constitution, who included the protection of tenure during good behavior for federal judges under Article III of the Constitution, would not likely have taken a looser view of the importance of this requirement to due process than George III. In fact, the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" was one of the reasons assigned as justification for the revolution. Declaration of Independence § 11 (1776); see Smith, *An Independent Judiciary: The Colonial Background*, 124 U.Pa.L. Rev. 1104, 1112-1152 (1976). At the time of the adoption, there were no provisions for judicial elections in any of the states. Id. at 1153-1155.

The absence of any such protection for Nevada judges results in a denial of federal due process in capital cases, because the possibility of removal, and at minimum of a financially draining campaign, for making an unpopular decision, are threats that "offer a possible temptation to the average [person] as a judge ... not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927); *see* Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing, Ass. Conc. Res. No. 3 (file No. 7, Statutes of Nevada 2001 Special Session), meeting of February 21, 2002, partial verbatim transcript (testimony of Rose, J., noting that lesson of election campaign, involving allegation that justice of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability.")

As usual, the State is quite astute at twisting words, meanings, and sometimes, entire claims. In this instance, it wants the Court to believe that Vanisi has accused it of acting like a lynch mob and of being bloodthirsty. (State's Answer, 27). In simple terms, as explained quite completely herein and in the Opening Brief, the claim alleges that the Court is unduly influenced by the desire to get re-elected, not that it has any innate bloodthirst.

Considering all of these factors, it is clear that any death sentence imposed in Mr. Vanisi's case cannot be constitutionally reliable under the Eighth and Fourteenth Amendments, unless it is imposed by a fully informed and properly instructed jury. Accordingly, the death sentence must be vacated and a new penalty phase ordered.

CLAIM THIRTEEN:

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE OF THE RISK THAT THE IRREPARABLE PUNISHMENT OF EXECUTION WILL BE APPLIED TO INNOCENT PERSONS. U.S. CONST. ART. VI, AMENDS. VIII & XIV; U.S. CONST., ART. VI; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ART. VII.; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The State suggests that Vanisi is not innocent so he should be accorded no relief viat the instant claim. In response, one must wonder how the state can be so cocksure of the guilt in this case, considering the structurally flawed, lopsided, sham of a trial that took place with Vanisi virtually unrepresented by counsel. Almost anyone could be found guilty under such circumstances. There was no crucible of adversary testing. The finding of guilt signifies nothing.

CLAIM FOURTEEN:

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FORBID THAT THE COURTS OR THE EXECUTIVE ALLOW THE EXECUTION OF VANISI BECAUSE HIS REHABILITATION AS AN OFFENDER DEMONSTRATES THAT HIS EXECUTION WOULD FAIL TO SERVE THE UNDERLYING GOALS OF THE CAPITAL SANCTION.

Over the course of this century, the United States Supreme Court's jurisprudence regarding rehabilitation and retribution as punishment goals has developed in tandem with the Court's perception of the status of the goals in the mind of the public. At the time of the zenith of corrections reform popularity, the Court held that rehabilitation and reformation had unseated retribution as the "dominant objective in the criminal law." *Williams v. New York*, 337 U.S. 241, 248 (1949). Consistent with all current scientific polling, the Court has always viewed retribution and rehabilitation as adversarial public punishment goals. *See, e.g., Morrisette v. United States*, 342 U.S. 246, 251 (1952) (speaking of the "tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution"). The Court has always refrained from announcing that either of the goals had replaced the other. *See,*

e.g., *Powell v. Texas*, 392 U.S. 514, 530 (1968) (Justice Marshall commenting that the Court "has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects"); *see also Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting) (noting the existence of a "profound dispute about whether we should punish, deter, rehabilitate or cure"); *Furman v. Georgia*, 408 U.S. 238, 414, 452 n.43 (1972) (Powell, J., dissenting, joined by Rehnquist, Burger, and Blackmun, JJ.) (listing these and additional cases). By merely viewing the punishment goals as vying for prominence, however, and giving retribution an almost preemptive role in its capital jurisprudence the Court has seriously underestimated and miscalculated public support for rehabilitation as a punishment alternative, even in the context of capital punishment. The reality demonstrated by all public polling, state statutory schemes, and the behavior of courts is that rehabilitation and retribution are appreciated by the public not only as vying contestants for prominence as punishment criteria but, more importantly, as equally high ideals in punishment with some vacillation in strength between them over time.

Members of the Court announced in *Furman* that retribution and rehabilitation were incompatible, suggesting that rehabilitation had little role to play in capital litigation. For some, this factored into their conclusion that the death penalty was unconstitutional. For the four dissenting Justices, the fact that retribution had never been eliminated by the Court as a proper punishment goal in cases evoking strong community outrage enabled them to accept it over rehabilitation as a dominant basis for preserving the death penalty. All the Justices on both sides of the death penalty issue assumed that, because death terminates the life of the offender, it makes rehabilitation theoretically irrelevant once the punishment is imposed. This perception, which forms the basis of the Court's later "death is different" analysis, leads the Court to direct its concern about rehabilitation within the death penalty context into the capital sentencing procedure, i.e., making sure that capital juries can meaningfully use information about a defendant's "prospects for rehabilitation" in their sentencing decisions. *Lockett v. Ohio*, 438 U.S. 586, 594 (1978) (holding statute unconstitutionally limited sentencer's ability to consider evidence that Sandra Lockett had a good "prognosis for rehabilitation" if returned to society); *Franklin v. Lynaugh*, 487 U.S. 164,

177-78, 179-80 (1988) (holding that the Texas statute allowed jurors to consider the mitigating evidence of Donald Franklin's good prison record).

The Supreme Court has been reluctant to establish classes that are ineligible for the death penalty, relying instead, as noted above, on "sentencer discretion guided by statutory criteria rather than court mandate" to delimit the death-eligible with minimum arbitrariness. This same tendency to focus on guided sentencer discretion, rather than classes of offenders, may account for the paucity of recent comment by the courts, state or federal, on the relative strengths of retribution and rehabilitation as guiding principles in the infliction of the death penalty. This tendency accounts for the general lack of alternative punishment statutes in death penalty states or other kinds of statutes, such as clemency directives, that address rehabilitation of capital offenders. As will be shown below, in Claim Fifteen, the polls are way ahead of the legislatures and the courts in revealing the deep-set respect for rehabilitation as a punishment goal, the relatively equal strength of rehabilitation and retribution, and ways rehabilitation can be applied in capital sentencing. As will also be shown, however, legislatures have continued to encode the public's strong support for rehabilitation and, thus, essentially all capital punishment states still make provision for rehabilitation as a dominant goal in punishment. Legislatures adequately portray the public's desire that rehabilitation be given a prominent place. Due to political pressure and misperception about the public's value of rehabilitation vis a vis retribution, legislators have been slow to generate any laws that would mandate, for instance, the commutation of the sentence of a defendant like Mr. Vanisi, even though such legislation may be required because some procedural mechanism must be made available to prevent the kind of constitutional error present here. The paucity of procedural solutions cannot be held to demonstrate the absence of such error.

CLAIM FIFTEEN:

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FORBID THAT THE COURTS OR THE EXECUTIVE ALLOW THE EXECUTION OF VANISI BECAUSE HIS EXECUTION WOULD BE WANTON, ARBITRARY INFLICTION OF PAIN, UNACCEPTABLE UNDER CURRENT AMERICAN STANDARDS OF HUMAN DECENCY, AND BECAUSE THE TAKING OF LIFE ITSELF IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD VIOLATE INTERNATIONAL LAW.

The State again gave little attention to this claim in its Answering brief, other than pointing

out that it should have been raised on direct appeal and was therefore procedurally barred. Vanisi respectfully submits the claim should indeed been litigated by appellate counsel as it has merit and is supported by substantial evidence in the record.

CLAIM SIXTEEN

NEVADA'S DEATH PENALTY SCHEME ALLOWS DISTRICT ATTORNEYS TO SELECT CAPITAL DEFENDANTS ARBITRARILY, INCONSISTENTLY, AND DISCRIMINATORILY, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The State has argued this Court's decision in *Thomas v. State*, 112 Nev. 1261, 148 P.3d 727, 737 (2006), in which this Court held:

> This court has indicated that the decision to seek the death penalty is a matter of prosecutorial discretion, to be exercised within the statutory limits set out in NRS 200.030 and NRS 200.033 and reviewable for abuse of that discretion, such as when the intent to seek the death penalty is not warranted by statute or is improperly motivated by political considerations, or race, religion, color or the like.

While it sounds as if prosecutorial discretion is being reviewed and subjected to judicial oversight, there really are no articulated public standards guiding the exercise of prosecutorial discretion regarding the decision to seek the death penalty in Nevada.

However, the federal system has a clear protocol in place. The Justice Department's capital case review procedure is governed by a protocol set out in section 9-10.010 et seq. of the United States Attorneys' Manual (USAM). The procedure "is designed to promote consistency and fairness." The protocol provides that "[a]s is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty." USAM 9-10.080. The protocol requires United States Attorneys to submit cases involving a pending charge of an offense for which the death penalty is a legally authorized sanction, regardless of whether or not the U.S. Attorney recommends seeking the death penalty. The death penalty cannot be sought without the prior written authorization of the Attorney General.

The U.S. Attorneys' capital case submissions are sent to the Criminal Division and must include a death penalty evaluation form for each defendant charged with a capital offense, a detailed prosecution memorandum, copies of indictments, written materials submitted by defense counsel in opposition to the death penalty, and other significant documents and evidence as

appropriate. The Capital Case Unit of the Criminal Division reviews the submission, seeks additional information when necessary, and drafts an initial analysis and proposed recommendation.

The case is then forwarded to a committee of senior Justice Department lawyers, the Attorney General's capital case review committee. The review committee meets with the Capital Case Unit attorneys, the U.S. Attorney and/or the prosecutors in the U.S. Attorney's office who are responsible for the case, and defense counsel. During this meeting, defense counsel are afforded an opportunity to present any arguments against seeking the death penalty for their client. The review committee considers "all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty." USAM 9-10.050. The review committee thereafter meets to finalize its recommendation to the Attorney General, to whom all submitted materials are forwarded. The Attorney General makes a final decision as to whether a capital sentence should be sought in the case.

Why such a system is not in place in Nevada speaks volumes about the unfettered, unguided, capricious death penalty decision making process in Washoe County. Tragically, this Court approved of the present state of affairs in *Thomas v. State*, 148 P.3d at 736:

> This court has held that "[t]he matter of the prosecution of any criminal case is within the entire control of the district attorney," absent any unconstitutional discrimination.
>
> Thomas points us to no authority in any jurisdiction for the proposition that the Constitution or Nevada law requires a prosecutor to allow a defendant any participation in the death penalty charging process.

Apparently, the litigants in *Thomas* did not bring the federal protocol to the attention of this Court.

The decision to dismiss this claim on the grounds that it had no reasonable ground for success is clearly erroneous in light of the USAM and the argument above. (AA XIII, 2637). Since the current system violates the ban against cruel and unusual punishment and defendants' rights to Due Process and Equal Protection, the NRS 200.033 notice filed against Vanisi must be stricken, and either the judgment reversed, or, in the alternative, the death sentence vacated. This Court

should either remand this matter to the trial court for re-sentencing or reduce the sentences to life-without-parole.

CLAIM SEVENTEEN:

NEVADA'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL INSOFAR AS THEY PERMIT A DEATH-QUALIFIED JURY TO DETERMINE A CAPITAL DEFENDANT'S GUILT OR INNOCENCE.

The State unfairly characterizes this claim as one in which Vanisi is claiming entitlement to jurors who will disregard the law. Contrary to the State's argument, the effect of death-qualification is far from hypothetical. For example, three jurors were improperly excluded for cause, Raul Frias, Caballero Salais, and Joy Ashley, because they expressed that they did not want to sign a death warrant as a foreman. (Second Supplemental Appendix (SSA) I, 186-189; SSA II, 484-485). There is no requirement in the law that a juror have to act as a foreman or sign a death warrant in order to be qualified to serve on a capital jury. It was error for the District Court to exclude them for cause.

Further, there was considerable and ongoing difficulty regarding the issue of Vanisi's right to ask potential jurors whether they were willing to consider the aggravating factors and the mitigating factors pursuant to *Morgan v. Illinois*, 504 U.S. 719 (1992). (SSA I, 13-16). The District Court improperly relied upon state court decisions over the controlling precedent of the United States Supreme Court in *Morgan*. ("Objection is overruled pursuant to Nevada Supreme Court rulings.")(SSA I, 16-17). There are also numerous examples of persons who clearly said they could not be fair in light of the circumstances, or they would always believe that the death penalty was appropriate for first degree murder, or that they believed in an eye for an eye and many of Vanisi's challenges for cause were improperly denied by the Court and the Court often improperly limited voir dire in violation of *Morgan*. (*See* SSA I, 54-56, 58, 61, 74, 186-87, 222, 226, 227; SSA II, 254, 265-67, 270, 271, 273, 274, 279-80, 285-86, 287, 288, 289-90, 296, 301-338, 353, 457, 458, 460, 484).

In *Szuchon v Lehmen*, 273 F.3d 299 (3rd Cir.2001), the Court explained that a *Witherspoon* violation requires habeas relief even where a single prospective juror was improperly excluded. "The question posed did not probe willingness to vote in a certain way, but, rather, sought out any

scruples or hesitation. In *Szuchon*, a prospective juror apparently interpreted a voir dire question as seeking his views and, in responsive fashion, he noted his lack of belief in capital punishment. At that point, the prospective juror's views on the death penalty became the issue, and the prosecutor asked, "You do not believe in the death penalty?" He simply replied "no," and the prosecutor moved to exclude him. The prosecutor failed, however, to meet his burden under *Witt* of asking even a limited number of follow-up questions to show the prospective juror's views would render him biased. Thus, the Court found that the only supportable inference on the record was that the potential juror was excluded because he voiced opposition to the death penalty. Even those firmly opposed to the death penalty can serve as jurors if they are "willing to temporarily set aside their own beliefs in deference to the rule of law."

Conversely, in *State v. Jacobs*, 789 So. 2d 1280 (La. 2001), the Court found that the denial of defendant's for-cause challenges to two prospective jurors who unequivocally stated they could only impose a death sentence if defendant were convicted was error. The Court explained that, in view of trial judge's failure to further question those jurors (or invite the prosecutor attempt to rehabilitate) to clarify their position on the death penalty and their understanding of requirement that they consider mitigating evidence and a life sentence.

In *Green v. Commonwealth*, 546 S.E. 2d 446 (Va.. 2001), the trial court committed reversible error in not removing for cause two jurors. The first juror possessed a firm belief in the adage, "an eye for an eye, tooth for a tooth." He stated that if the Commonwealth proved beyond a reasonable doubt that the defendant had committed a capital offense, he would vote to fix the defendant's penalty at death and that he would not give any consideration to a lesser penalty because the defendant "didn't give his victim consideration when he took [her] life." *Id.*, at 448-49. Even though the trial court and the State were able to partially rehabilitate the prospective juror, the Court found that "(w)e can only conclude from [the juror's] responses to the voir dire questions that he had formed a fixed opinion about the punishment that the defendant should receive if the defendant were convicted of a capital offense and, thus, [the juror] was not impartial and 'indifferent in the cause.'" *Id.*, at 452.

In *Warner v. State*, 29 P.3d 569 (Okla.Crim. 2001), the trial court abused its discretion in declining to remove a juror because he was strongly biased in favor of the death penalty. The prospective juror stated at the beginning of his voir dire that he had a "strong bias towards the death penalty." *Id.*, at 573. He went on to indicate that he had difficulty conceiving of a situation where the death penalty would not be appropriate for someone convicted of this type of crime. After questioning by the trial court, the prospective juror stated that he thought he could give both sides a fair trial and he would consider all three punishment options. However, he again indicated that he had a strong bias toward the death penalty. Defense counsel noted that the prospective juror had stated he could consider all three punishments, but when asked directly whether he could *fairly consider* all three, he responded, "I would say that I would be biased towards the death penalty." The court held that "(w)hen the voir dire of this prospective juror is considered in its totality, it is clear that his strong bias towards the death penalty would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.*, at 573.

Accordingly, pretrial death qualification undermines a capital defendant's right to a fair trial. First, the process conditions jurors toward a guilt verdict because it requires them to assume the defendant's guilt. Protracted discussions with potential jurors regarding penalty implicitly suggest the defendant's guilt, thereby undermining the presumption of innocence and impairing the impartiality of potential jurors, in violation of Vanisi's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM EIGHTEEN:

VANISI'S SENTENCE OF DEATH WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR ARBITRARY FACTOR(S), IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Citing to the law of the case doctrine, the State concludes that this Court has already determined that Vanisi's death sentence was not imposed under the influence of passion or prejudice. It is axiomatic that the law of the case doctrine is not absolute. Accordingly, this Court should frankly revisit the conclusion that the death sentence of a cop-killer who was virtually unrepresented by counsel at trial was not imposed as a result of prejudice.

CLAIM NINETEEN:

VANISI WAS NOT COMPETENT DURING THE CRIME, HIS LEVEL OF INTOXICATION AND PSYCHOSIS AMOUNTED TO LEGAL INSANITY UNDER THE AUTHORITY OF *FINGER v. STATE*; THE LEGISLATURE'S BAN ON A VERDICT OF "NOT GUILTY BY REASON OF INSANITY" PREVENTED TRIAL COUNSEL FROM PUTTING ON EVIDENCE OF VANISI'S STATE OF MIND, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The State ignored virtually everything related to mental health in this case except the testimony from one of the two defense attorneys. In fact, both attorneys testified that part of the reason they did not pursue a not-guilty by reason of insanity defense was because, at the time, it was not legally available. (AA XI, 2092-2093; 2131-2132).

Also, the State ignored the part of the claim in which, under *Finger v. State*, 117 Nev.548, 27 P.3d 66 (Nev. 2001), *cert. denied*, -- U.S. --, 122 S. Ct. 1063, 151 L. Ed. 2d 967 (2002), the state of mind of a defendant in a self-defense case is material and essential to the defense. In *Finger*, the Nevada Supreme Court held that evidence of a mental state that does not rise to the level of legal insanity may still be considered in evaluating whether the prosecution has proven each element of an offense beyond a reasonable doubt, for example, in determining whether a killing is first- or second-degree murder or manslaughter or some other argument regarding diminished capacity.

Accordingly, under the Due Process Clause of the U.S. Constitution, Vanisi must be afforded the means and the permission to put on a defense of legal insanity. *See also O'Guinn v. State*, 118 Nev. Adv. Op. No. 85, 59 P.3d 488 (2002). His conviction and sentence must therefore be reversed.

CLAIM TWENTY:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE POSSIBLE MITIGATING FACTORS AND/OR TO PUT ON WITNESSES AND/OR EVIDENCE IN MITIGATION DURING SENTENCING, INCLUDING AN EXPERT ON MITIGATION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As previously discussed, the State has consistently maintained that Vanisi should be compelled to litigate his collateral attack on his conviction and death sentence despite the virtual overwhelming evidence presented of his mental incapacity. That same mental incapacity explains why more mitigating evidence was not presented to the district court. Vanisi's inability to

communicate in any meaningful way with counsel or investigators rendered him unable to develop any further evidence, thus allowing the district court to deny his claim as unproven. The unfairness of disposing of the claim is apparent. It is no better than rejecting a mute man for failing to speak up. Further, it should be noted that the mental health evidence presented in the course of litigating the *Rohan* motion was far more extensive and probative than the analysis presented to the jury by Dr. Thienhaus. Had the jury been presented with such evidence, it is likely they would have more favorably approached the weighing of aggravators and mitigation evidence. (That calculation has already been altered by the rejection of one of the aggravators in this case by the district court during habeas proceedings.)

CLAIM TWENTY ONE:
BUT FOR THE INDIVIDUAL AND COLLECTIVE FAILURES OF TRIAL COUNSEL, VANISI WOULD HAVE BEEN ABLE TO PUT ON A MEANINGFUL DEFENSE; THEREFORE, THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL HAS PREJUDICED VANISI IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This is a cumulative error claim. The State cleverly tries to shift the burden to the defense in this claim, alleging that Vanisi never explained "the nature" of the defense which should have been mounted. (State's Answer, 31). Because several of the ineffective assistance claims are based in structural error, this claim need not explain what defense(s) might have been marshaled and mounted, but is subject to "automatic reversal" pursuant to *Arizona v. Fulminate*, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991).

The Court is reminded that "structural error" is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. Examples of structural error include **total deprivation of the right to counsel** at trial, a judge who is not impartial, the unlawful exclusion of members of the defendant's race from a grand jury, **deprivation of the right to self-representation at trial**, and deprivation of the right to public trial. Id. at 309-10. Because the entire conduct of the trial is affected, structural error defies analysis by "harmless-error" standards. *Id.*

Because what occurred in the trial below was the virtual deprivation of counsel, as well as the complete deprivation of the right to self-representation, structural error occurred in more than

one aspect of the case. This Court has agreed that automatic reversal occurs where the defendant is denied substantive due process. *Manley v. State*, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing Guyette v. State*, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968). Accordingly, the District Court erred in denying this claim, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM TWENTY TWO:
INEFFECTIVE ASSISTANCE OF OF APPELLATE COUNSEL FOR FAILURE TO RAISE ALL CLAIMS OF ERROR LISTED IN THIS PETITION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of counsel on appeal. *See Evitts v. Lucey*, 469 U.S. 387, 396-99 (1985).

It is reasonably probable that a more favorable result would have been obtained if all of these claims had been properly asserted and if the standard of prejudice of Chapman v. California, 386 U.S. 18 (1967), requiring the state to show beyond a reasonable doubt that any error was harmless, had been applied. Further, the petition alleges that counsel had no tactical or strategic basis for failing to raise these claims. (JA I, 164-65).

The State's reliance upon *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001), is misplaced. (State's Answer, 31-32). In *Evans,* the opening brief contained a section that asserts that *trial* counsel were ineffective "for the reasons set forth" in the issues raised in the rest of the brief. Such is not the case here, as the Petition clearly sets forth first the issues, including the facts, the law, and the constitutional errors for each. (AA X, 1819-1943). The Petition also alleges that *appellate* counsel was ineffective *for failing to raise these issues*, complete with supporting facts and constitutional grounds. (AA X, 1859-62; 1861: 5-8; 1943). These facts are clearly distinguishable from *Evans*, in which there was no discerning how the other issues raised would amount to ineffective assistance of *trial* counsel. Accordingly, the State's argument is not persuasive.

Appellate counsel's failure to raise the issues prior was ineffective, in violation of Mr. Vanisi's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution. These issues, including structural error issues would have reasonably lead to a new trial.

CLAIM TWENTY THREE

THE DISTRICT COURT ERRED IN DENYING VANISI'S MOTION FOR PROTECTIVE ORDER, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State mischaracterized this claim as well. The motion in question never sought to have the State defend the petition (for writ of habeas corpus) without knowing the claims. (State's Answer, 32). It is agreed, such an effort would be nonsensical, as is the State's Answer. The motion sought only "to preclude the State from sharing or using [the privileged and previously sealed communications] for any purpose other than the litigation of Mr. Vanisi's... habeas petition." (AA IX, 1786: 1-4; 1777-86).

It is unclear as to how much of the rest of the State's argument applies to this claim, as it generally consists of a diatribe against letting a defendant perjure himself without fear of impeachment, which has nothing to do with the matter at hand. The motion in question had largely to do with conversations which were held between Vanisi's counsel and the District Court.

The State implied that the case of *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), relied upon by Vanisi in his motion for protective order, was somehow wrongly decided, as "[n]o court, save the 9th Circuit, has ever adopted such a rule of law. This Court ought not to be the first." (State's Answer, 33). Respectfully, whether the State, the district court, or this Court, agrees or disagrees with a decision by the Ninth Circuit Court of Appeals is not a matter within this Court's discretion or jurisdiction. *Bittaker* involved a requested protective order covering attorney-client privileged communications in the context of a Sixth Amendment claim raised in a federal habeas petition. It is axiomatic that, on matters of federal constitutional law, decisions of the Ninth Circuit are controlling over this Court, as well as all state courts within the jurisdiction of the Ninth Circuit.

The State also argues that the decision in *Bittaker* was "limited to federal habeas corpus claims..." (State's Answer, 33, *citing* to 331 F.3d at 726). This is not a true statement. Indeed, the *Bittaker* decision, at 331 F.3d at 726 explains just the opposite:

> [W]e hold that the scope of the implied waiver must be determined by the court imposing it as a condition for the fair adjudication of the issue before it.

Id. The *Bittaker* Court further explains that both state and federal courts have the power to limit the scope of the waiver involved in litigating any discrete issue:

> The power of courts, state as well as federal, to delimit how parties may use information obtained through the court's power of compulsion is of long standing and well-accepted.

Id. (citations omitted.)

Finally on this point, the *Bittaker* Court explained the importance of a court's (be it state or federal) power to limit the use of sensitive information:

> Courts could not function effectively in cases involving sensitive information--trade secrets, medical files and minors, among many others--if they lacked the power to limit the use parties could make of sensitive information obtained from the opposing party by invoking the court's authority.

Id. In short, there is nothing unique about federal habeas proceedings that would allow the protective order sought, where a state habeas proceeding would not. Indeed, as explained, the claims at issue involve federal constitutional rights, which are the same no matter where they are litigted.

Also, the State quotes *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995), "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." (State's Answer, 34). *Wardleigh* stands for the position that a waiver of part of a privileged communication under the attorney-client privilege is a waiver of the whole communication regarding the subject matter. *Id.* This is a somewhat unremarkable legal conclusion. One which is hardly applicable to the issue at hand. As the *Wardleigh* Court explains in the next paragraph after the language quoted by the State:

> In other words, "where a party injects part of a communication as evidence, fairness demands that the opposing party be allowed to examine the whole picture."

Wardleigh, 111 Nev. at 355, 891 P.2d at 1186 (citation omitted).

Unlike *Bittaker*, *Wardleigh* does not address the use of sensitive information in other proceedings or the court's inherent authority to order a restriction regarding the same. Mr. Vanisi, by his motion, was not attempting to limit the State's use of the sensitive information in the post-conviction habeas proceedings at issue. Further, Vanisi was not attempting to use only part of the information in question and hide the rest from the State. Accordingly, *Wardleigh* is inapposite to this matter.

Finally, the State argues that petitioner is attempting to use his privileges as both a sword and a shield by raising claims of ineffective assistance but seeking to prevent the State from using the evidence upon which the claims are based. (State's Answer, 34). This is not the case. Petitioner's motion makes it clear that the relief sought is only an order that prevents the State from using any otherwise privileged information against Mr. Vanisi in the event of a re-trial of his case and from disseminating that information to other agencies that would use it against him. *See Osband v. Woodford*, 290 F.3d 1036, 1042 (9th Cir. 2002). The relief sought did not attempt to prevent disclosure, as so limited, to the district attorney for the purpose of litigating this habeas proceeding. The State's arguments on this point do not address the actual position taken by the petitioner and they therefore do not form a basis for denial of the motion.

The necessity of a protective order in this case is simple. Mr. Vanisi had a constitutional right to effective assistance of counsel at trial and on appeal. In order to prove that he was deprived of those rights, Mr. Vanisi had to disclose information that would otherwise be protected from disclosure by the attorney-client privilege, the work-product doctrine, the privilege against self-incrimination, or other privileges. But since these disclosures were effectively compelled as a result of the deprivation of his constitutional rights in the previous proceedings, it is unfair to allow the State to exploit those disclosures in any proceeding other than the habeas proceeding itself, such as in a re-trial or in a separate prosecution. This rather obvious analysis is the basis of *Bittker v. Woodford*, 331 F.3d 715, 722 (9th Cir. 2003) (en banc), upon which petitioner relies. *Accord*, *Osband v. Woodford*, 290 F.3d 1036, 1042-1043 (9th Cir. 2002).

CONCLUSION

The Appellant, SIAOSI VANISI, respectfully requests that this Honorable Court find that there were multiple errors made in this case and those errors unfairly prejudiced SIAOSI VANISI.

It is further respectfully requested that this Honorable Court vacate the judgment of conviction and sentence.

RESPECTFULLY SUBMITTED this 01 day of December, 2008.

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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.

I hereby certify that, pursuant to 239B.030, no social security numbers are contained within this document.

DATED this 01 day of December, 2008.

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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 Edwards, Esq., and that on this date, I served the foregoing Supplemental Appendix 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.

__X__ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

_____ Reno/Carson Messenger service.

addressed as follows:

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DATED this 15th day of December, 2008.

Linda G. Barnes