IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SIAOSI VANISI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

Case No. 50607

Death Penalty Case

PETITION FOR REHEARING

Appellant SIAOSI VANISI, by and through his attorneys, SCOTT W. EDWARDS and THOMAS L. QUALLS, petitions this Court for rehearing of its Order of Affirmance, filed April 20, 2010.

NRAP 40(2) grants this Court authority to consider rehearing in the following circumstances:

> (i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (ii) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

NRAP 40(2).

In the instant case, though Vanisi disagrees with the Court's analysis, application of facts to law, and final rulings on many issues in its Order of Affirmance, rehearing is appropriate under NRAP 40(2), regarding the following:

(1) Mr. Vanisi requests rehearing on the ground that this Court's order misapprehended the substance of his claim that appellate counsel were ineffective in failing to raise the due process claims which were factually and legally presented in extensive detail in his Supplemental Points and Authorities to the district court, and

which were reiterated in his Opening Brief to this Court.

"Appeals from a district court to the Supreme Court are governed by the Nevada Rules of Appellate Procedure" except to the extent that they are "inconsistent or in conflict with the procedure and practice provided by the applicable statute . . . . applications for extraordinary writs in the Supreme Court are government by the Civil Rules of Appellate Procedure." Nev. R. Civ. P. 81(a). Also, Rule 250 (7)(c) of the Nevada Supreme Court Rules indicate that "[b]riefing shall proceed in accordance with NRAP 28 through 32, inclusive."

Rule 28(a)(C)(8) of the Nevada Rules of Appellate Procedure requires that the argument must contain: "(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)."

Rule 21(3) of the Nevada Rules of Appellate Procedure requires that the contents of a petition must state "'the relief sought, the issues presented, the facts necessary to understand the issue presented by the petition, and the reasons why the writ should issue, including points and legal authorities."

In addition to the first claim of error regarding Mr. Vanisi's incompetency to proceed with habeas proceedings, pursuant to Rohan ex rel Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003), Mr. Vanisi's opening brief raised twenty-one points of error for which he provided detailed specific factual allegations and were supported by points of constitutional, statutory, and case authority and allegations of prejudice. These claims of error contained specific references to the appendix which contained a copy of the petition and supplemental petition filed in the district court, multiple transcripts of proceedings, motions, and various evidentiary documents. In his twenty-second claim of error, Mr. Vanisi specifically alleged that appellate counsel had been ineffective for failing to raise on direct appeal the prior twenty-one claims of error:

> All claims of error alleged herein [Opening Brief at 11-43] were apparent on the face of the record and therefore could have been raised by appellate counsel. Appellate Counsel only raised three: (1) the Faretta error, (2) the Reasonable Doubt instruction was impermissible; and (3) that the Death Penalty was excessive and was unfairly influenced by passion and prejudice. All other errors alleged herein which were not raised by appellate counsel should have been. Jones v. State, 110 Nev. 730, 877 P.2d 1052 (Nev. 1994).

Opening Brief at 76.

In his Reply Brief, Mr. Vanisi went on to argue that:

> It is a reasonable probability 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).

Reply Brief at 43.

Mr. Vanisi's Opening Brief clearly sets forth the factual issues, law, constitutional errors and prejudice which he plainly incorporated by reference in Claim Twenty-Two of his Opening and Reply briefs. The proceedings at issue were the first post-conviction proceedings (not successive, nor proceedings pursuant to Crump v. Warden) and those proceedings (and this appeal from the denial of the first habeas petition) were the first opportunity for instant counsel to raise a claim of the ineffective assistance of appellate counsel.

Similarly, Mr. Vanisi utilized the same format in his Supplemental Points and Authorities to Petition for Writ of Habeas Corpus (Post-Conviction). In Claims One through Twenty-One, he provided points of error for which he provided detailed specific factual allegations of errors supported by points of constitutional, statutory and case authority and allegations of prejudice. In Claim Twenty-Two, he alleged that appellate counsel only raised the previously referenced three claims of errors, and went on to state that "[a]ll other errors alleged herein which were not raised by appellate counsel should have been. [citation omitted] All legal arguments from all Claims set forth above, are incorporated by reference as if set forth verbatim herein." Supp. Points and Authorities at 125.

Rule 10(c) of the Nevada Rules of Civil Procedure states that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes." (Emphasis added).

Rule 8(a) of the Nevada Rules of Civil Procedure requires the pleading to contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the petitioner seeks. The pleading must set forth sufficient facts to establish all of the necessary elements of a claim for relief so that the adverse party has adequate notice of the nature of the claim and relief sought. Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). Courts must liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party. Id. Pleadings of conclusions, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim. Crucil v. Carson City, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979).

Mr. Vanisi, therefore, clearly incorporated by reference his claims that appellate counsel was ineffective for failing to raise meritorious due process claims regarding: (1) the denial of consular contact under the Vienna Convention; (2) the denial of trial counsel's motions to withdraw; (3) that Mr. Vanisi was harmed by his counsel's conflict of interest; (4) that Nevada's Death Penalty scheme allows for a death-qualified jury; (5) that Nevada's death penalty scheme operates in an arbitrary and capricious manner; (6) that the death penalty violates the Eighth Amendment and the International Covenant on Civil and Human rights; (7) the inherent conflict posed by popularly elected judges; (8) that Nevada's lethal injection violates the protections against cruel and unusual punishment; (9) the risk that innocent persons will be executed; (10) that rehabilitation outweighs the government's interest in retribution; (11) that the death penalty presents a wanton, arbitrary infliction of pain; (12) that Nevada's death penalty scheme allows district attorneys to select defendants arbitrarily, inconsistently and discriminatorily; (13) that the sentence was imposed under the influence of arbitrary factors; and (14) that Mr.

Vanisi was unconstitutionally statutorily precluded from entering an insanity plea.

The district court ruled on the merits that appellate counsel was not ineffective for failing to raise: (1) the denial of consular contact under the Vienna Convention, Judgment at 3; (2) the denial of trial counsel's motions to withdraw, Judgment at 7; (3) that Mr. Vanisi was harmed by his counsel's conflict of interest, Judgment at 7; (4) that Nevada's death penalty scheme allows for a death-qualified jury, Judgment at 11; (5) that Nevada's death penalty scheme operates in an arbitrary and capricious manner, Judgment at 8; (6) that the death penalty violates the Eighth amendment and the International Covenant on Civil and Human rights, Judgment at 9; (7) the inherent conflict posed by popularly elected judges, Judgment at 10; (8) that Nevada's lethal injection violates the protections against cruel and unusual punishment, Judgment at 10; (9) the risk that innocent persons will be executed, Judgment at 11; (10) that rehabilitation outweighs the government's interest in retribution, Judgment at 11; (11) that the death penalty presents a wanton, arbitrary infliction of pain, Judgment at 11; (12) that Nevada's death penalty scheme allows district attorneys to select defendants arbitrarily, inconsistently and discriminatorily, Judgment at 11; (13) that the sentence was imposed under the influence of arbitrary factors, Judgment at 11; and (14) that Mr. Vanisi was unconstitutionally statutorily precluded from entering an insanity plea, Judgment at 12.

The district court, thus, ruled upon Mr. Vanisi's claim Twenty-Two that appellate counsel was ineffective for failing to raise the properly detailed claims, not by procedural bar due to a lack of specificity, but by finding that "appellate counsel made reasonable tactical decisions concerning the issues to raise, and that none of the various potential issues were reasonably likely to succeed." Judgment at 13.

This Court's ruling that "[a]ll of these [ineffective assistance of appellate] claims could have been raised on direct appeal and are procedurally barred absent a showing of good cause and actual prejudice," in combination with this Court's ruling that "[o]ther than those addressed above, Vanisi failed to raise any specific claims that his appellate counsel was ineffective" is belied by both the Petition, Supplemental Petition and points

and authorities, and the Opening and Reply briefs. Vanisi v. State, No. 20607 at 10 (Nev. 4/20/2010). Moreover, these two findings appear to be in conflict with one another. Especially if one considers that ineffective assistance (for failure to timely or effectively raise a claim or claims in this matter) has been found to meet the cause and prejudice requirement. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct 2639, 2645 (1986); Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).

Further, since this Court's ruling in Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001), this Court has repeatedly reached the merits of ineffective assistance of counsel claims which incorporated by reference due process claims pled in other parts of petitions and briefs. It is an Equal Protection violation for this Court to deny Mr. Vanisi the same type of review that this Court has been applying to other Petitioners since the Evans ruling.

It is notable that even in Mr. Vanisi's direct appeal, this Court *sua sponte* addressed an issue that had not been raised in the district court or in either parties' briefing regarding the defective jury instruction given about mutilation. Vanisi v. State, 117 Nev. 330, 343, 22 P.3d 1164, 1173 (2001) ("Although Vanisi does not specifically challenge the jury instruction on appeal, we note that it included some language no longer mandated by the statutory aggravating circumstance. The jury was instructed: 'The term 'mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect, or other serious and depraved physical abuse beyond the act of killing itself. This instruction is largely the same as the one we have approved. However, the emphasized language appears to come from an instruction based on a former version of NRS 200.033(8), which referred to 'depravity of mind' as well as torture and mutilation. In 1995, the Legislature amended the statute to delete 'depravity of mind.' Use of the instruction here was not prejudicial since the State did not argue depravity of mind and there was compelling evidence of mutilation, as discussed above. We take this opportunity, however, to clarify that language referring to 'other serious and depraved physical abuse' should no longer be included in a definition of mutilation.").

Finally, this Court has set the limit for Opening Briefs at 80 pages, and has repeatedly denied requests to extend the page limit. Hernandez v. State, 117 Nev. 463, 465, 24 P.3d 767, 768 (2001). This Court, in defending its page limit requirements has said, "[a] reasonable page limit does not prevent an appellant from presenting arguments, but merely limits the manner in which he can present them." Hernandez v. State, 118 Nev. 513, 533, 50 P.3d 1100, 1114 (2002). To require Mr. Vanisi to restate every single stand alone claim in the section where he addresses the ineffective assistance of direct appeal counsel would severely impair Mr. Vanisi's ability to present his meritorious claims to this Court. The "incorporation by reference" procedure enables an appellant to give fair notice of the facts, arguments and prejudice that he is arguing and comply with this Court's page limit restrictions.

Accordingly, rehearing must be granted and this Court accept and review these claims on their merits.

(2) This Court's decision to re-weigh and find harmless the sentence of death, in the face of the acknowledged McConnell error, misapplies or fails to consider the Nevada statutory scheme for capital cases and the federal constitution, including the rights to due process and equal protection. The McConnell error resulted in the jury considering an aggravating factor that was improperly applied in Mr. Vanisi's case. This error affected the assessment of death-eligibility and the ultimate selection of the sentence. *See, e.g.*, Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450 (2002) (weighing of aggravation against mitigation element of death eligibility). Further, the jury has the complete discretion to decline to impose a death sentence, *e.g.* Bennett v. State, 111 Nev. 1099, 1110, 902 P.3d 676 (1995), and impermissible aggravating factor may have swayed at lest one juror not to exercise mercy in this case.

Since there is no case too egregious that the imposition of a death sentence is a foregone conclusion, such an assumption – under any circumstances – would be contrary to the premises of individualized sentence under the Eighth Amendment, *e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978); Sumner v. Shuman, 483 U.S. 66, 75-77 (1987), and to the

Supreme Court's own jurisprudence. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 395-397 (2000) (failure to present mitigation prejudicial, where aggravating evidence included extensive criminal history, including killing with mattock that was capital robbery-murder offense; previous convictions for armed robbery, burglary and grand larceny; two additional auto thefts; two "separate violent assaults" after capital offense, including one "brutal" assault that left the victim in a "vegetative state;" an arson while in jail awaiting capital trial; and expert testimony of "high probability" that defendant would continue to pose threat to society), Caro v. Woodford, 280 F.3d 1247, 1257-1258 (9th Cir. 2002) (aggravation included killing two teenagers and assault with multiple gunshot wounds on the same night, and previous kidnapping and sexual assaults). Simply put, there is no such thing as a "natural" death penalty case, or one in which death is a foregone conclusion.

In State v. Haberstroh, 69 P.3d at 683-84, this Court held that it could not find the inclusion of an invalid aggravating factor in the sentencing calculus harmless beyond a reasonable doubt, even though four valid aggravating factors remained. *See also* Browning v. State, 120 Nev. 347, 91 P.3d 39, 51-52 (2004) (invalid aggravating factor not harmless despite existence of four other valid aggravators). The same error in Vanisi's case cannot then be found harmless beyond a reasonable doubt. This Court continues to misapply or fail to consider both the subjective nature of the Nevada statutory scheme and the constitutional requirements at issue. In short, it is a legal impossibility for this Court, upon review of a cold record, to know what was in the hearts and minds of each of the jurors in this case. Accordingly, pursuant to the acknowledged McConnell error, the sentence of death must be vacated.

Conclusion.

This Petition for Rehearing is based on grounds that this Court has either overlooked, misapplied, erroneously omitted, or failed to consider a number of facts and authorities presented in the appeal in this matter, including, the nature and factual grounds of the claims presented, as well as the legal authorities of the United States

Supreme Court, this Court and the Nevada Statutes, upon which those claims were based.

WHEREFORE, for all the reasons set forth herein, this Court must rehear these matters pursuant to NRAP 40 (2).

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this document does not contain the social security number of any person.

RESPECTFULLY SUBMITTED this 10th day of May, 2010.

/s/ Thomas L. Qualls

THOMAS L. QUALLS, ESQ.
Nevada State Bar 8623
230 East Liberty Street
Reno, Nevada 89501
(775) 333.6633
Attorney for Appellant,
SIAOSI VANISI

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFR 9, I certify that I am an employee of THOMAS L. QUALLS, ESQ, that I am over the age of 18 years and not a party to the within action. I am familiar with the practice of the Law Offices of Thomas L. Qualls, Esq., for the service of documents via facsimile, U.S. mail and electronic mail and that, in accordance with the standard practice, I caused a true and correct copy of the foregoing ***PETITION FOR REHEARING*** to be served on the parties below via the following method(s):

___X___ Via the Nevada Supreme Court ECF system to the following:

_____ Via Hand Delivery

_____ Via Facsimile

_____ Via Overnight Delivery

___X___ Placing the foregoing document(s) in a sealed envelope with postage thereon fully prepaid in the United States Mail, at Reno, Nevada, addressed as follows:

Washoe County District Attorneys Office
Appellate Division
P.O. Box 30083
One South Sierra Street, 4th Floor
Reno, Nevada 89520

DATED this 10th day of May, 2010.

/s/ Michelle D. Harris
Michelle D. Harris