ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SIAOSI VANISI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 50607

DEATH PENALTY CASE

FILED

AUG 2 2 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S Young
DEPUTY CLERK

APPELLANT'S OPENING 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.

SCOTT W. EDWARDS, ESQ.
State Bar No. 3400
729 Evans Ave., Reno, Nevada 89512
(775) 786-4300
THOMAS L. QUALLS, ESQ.
Nevada State Bar No. 8623
230 East Liberty Street
Reno, Nevada 89501
(775) 333.6633

Attorneys for Appellant,
SIAOSI VANISI

RICHARD GAMMICK, ESQ.
Washoe County District Attorney
TERRENCE McCARTHY
Appellate Deputy District Attorney
P.O. Box 30083
Reno, Nevada 89520

Attorneys for Respondent,
STATE OF NEVADA

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SIAOSI VANISI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 50607

DEATH PENALTY CASE

APPELLANT'S OPENING 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.

SCOTT W. EDWARDS, ESQ.
State Bar No. 3400
729 Evans Ave., Reno, Nevada 89512
(775) 786-4300
THOMAS L. QUALLS, ESQ.
Nevada State Bar No. 8623
230 East Liberty Street
Reno, Nevada 89501
(775) 333.6633

Attorneys for Appellant,
SIAOSI VANISI

RICHARD GAMMICK, ESQ.
Washoe County District Attorney
TERRENCE McCARTHY
Appellate Deputy District Attorney
P.O. Box 30083
Reno, Nevada 89520

Attorneys for Respondent,
STATE OF NEVADA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

State Statutes & Rules:

Other:

STATEMENT OF THE ISSUES

1. Whether the district court's determination that Vanisi was competent to proceed with collateral attack on his conviction and sentence was clearly erroneous.

2. Whether Vanisi was denied his right to consular contact under Article 36 of the Vienna Convention on Consular Relations.

3. Whether 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.

4. Whether 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.

5. Whether 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.

6. Whether ineffective assistance of trial counsel re: actions during attempt to withdraw as counsel, was in violation of petitioner's fifth, sixth, eighth and fourteenth amendment rights under the united states constitution.

7. Whether ineffective assistance of trial counsel re: failure to put on an adequate defense, including failure to make a closing argument during the guilt phase, was in violation of petitioner's fifth, sixth, eighth and fourteenth amendment rights

8. Whether 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.

9. Whether 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.

10. Whether 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.

11. Whether 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.

12. Whether 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.

13. Whether 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.

14. Whether 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.

15. Whether 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.

16. Whether 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.

17. Whether 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.

18. Whether Nevada's death penalty statutes are unconstitutional insofar as they permit a death-qualified jury to determine a capital defendant's guilt or innocence.

19. Whether 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.

20. Whether, because 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.

21. Whether 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.

22. Whether 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.

23. Whether appellant was prejudices by 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.

24. Whether 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

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from an order denying Appellant Siaosi Vanisi's (hereinafter "Vanisi") petition for writ of habeas corpus (post-conviction) following several evidentiary hearings.

Following a jury trial, Vanisi was convicted of killing University of Nevada police sergeant George Sullivan. A jury sentenced him to death. Judgment of conviction entered November 22, 1999. (Appellant's Appendix, hereinafter, "AA" VIII, 1410) Vanisi enjoyed a direct appeal to this Court of his conviction and sentence. That appeal resulted in an affirmance of his death sentence. *Vanisi v. State*, 117 Nev. 330, 22 P. 3d. 1164 (2001). Vanisi filed a timely post-conviction petition for writ of habeas corpus on January 18, 2002. (AA, VIII, 1504) Counsel was later appointed to assist him and eventually filed a supplement to the petition. (AA, X, 1819) Numerous hearings took place in the course of proceedings, including evidentiary hearings upon the petition as supplemented. The case remained under submission with the district court for approximately 2 years. However, on September 7, 2007, the district court orally announced its decision, denying relief in all respects. (AA, XIII, 2583) That oral pronouncement was put to writing in findings of fact and legal conclusions prepared by the State. That written Judgment was entered by the court clerk on November 19, 2007. (AA, XIII, 2626) Timely notice of appeal from that entered order was filed November 28, 2007. (AA, XIII, 2643) This appeal follows.

STATEMENT OF FACTS

The State charged Siaosi Vanisi ("Vanisi") with first degree murder for the death of Sergeant Sullivan. Specifically, the State charged that Vanisi committed the killing "during the course of and in furtherance of an armed robbery..." Additionally, the State

charged Vanisi with one count of Robbery with the Use of a Deadly Weapon, two counts of Robbery with the Use of a Firearm, and one count of Grand Larceny. (AA, I, 16)

A trial was held in January of 1999 and resulted in a mistrial. A second trial was held in September of 1999, and resulted in convictions on all five charges. At the penalty phase, the jury imposed the death penalty on Vanisi, finding three aggravating circumstances: (1) the murder occurred in the commission of or an attempt to commit robbery; (2) the victim was a peace officer engaged in the performance of his official duties, and the defendant knew or reasonably should have known the victim was a peace officer; and (3) the murder involved mutilation. (AA, VII, 1399)

At trial, Vanisi's lawyers, who had earlier been denied in their motion to withdraw from representation, did not cross-examine the vast majority of the State's witnesses, did not put on any evidence in his defense, and refused to give either opening statements or closing arguments at the guilt phase of the trial. (AA, I, II, III) Vanisi, who had earlier been denied his request to represent himself, declined to testify in his defense, calling the proceedings a "joke." (AA, III, 498)

For ease of review and understanding, factual recitations and references to the record will be made in the of discussion of each argued point of appellate error.

LEGAL ARGUMENT

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

Based upon the holding in *Rohan v. Woodford*, 334 F.3d 803 (9th Cir. 2003), counsel for Vanisi moved the district court to stay post-conviction habeas proceedings

pending his return to competency. (AA, VIII, 1524)[1] Following two hearings on the issue, the district court determined that Vanisi was competent to proceed. (AA, IX, 1773) The district court's determination that Vanisi proceed with a hearing upon the merits of his writ claims, despite the evidence of his inability to cooperate and assist counsel and his mental health, was an arbitrary and capricious exercise of discretion. This Court should recognize the clear error and order a halt to all post-conviction proceedings pending Vanisi's return to competency.

On November 22, 2004 the district court heard argument and received evidence upon Vanisi's motion to stay post-conviction proceedings and have his competence evaluated. (AA, VIII, 1552) Having duly considered the matter, the district court found and ordered that Vanisi should be evaluated regarding his present competency to maintain and participate in a capital post-conviction habeas proceeding. (AA, VIII, 1583) Specifically, Vanisi's mental competence to assist and communicate with counsel, understand and knowingly participate in the habeas proceeding as a litigant and witness, were ordered evaluated by mental health experts. Further, the district court perceived a need for an evaluation of the Vanisi's understanding of the difference between the truth and a lie and the consequences of lying as a witness in court. Accordingly, it ordered that pursuant to NRS 178.415, two psychiatrists, two psychologists, or one psychiatrist and one psychologist, must examine the Petitioner in the Nevada prison facility and report back to the court with any and all findings relative to the Petitioner's present mental competence. The experts appointed pursuant to the district court order were given access

---

[1]The Ninth Circuit held in *Rohan* that a determination of mental incompetence in capital post-conviction context would result in a stay of any ongoing habeas proceedings and delay the petitioner's execution.

to review all medical records of Vanisi held by the Department of Corrections. Those records, along with records relative to disciplinary infractions incurred by Vanisi while in prison, were also lodged in the record for the district court to review.

In furtherance of its order for competency evaluation, the district court appointed a medical doctor (psychiatrist), Dr. Thomas E. Bittker, M.D. to examine Vanisi. Doctor Bittker did so and submitted a written report of his findings to the district court. Significant among the written findings were:

---Vanisi admitted feeling chronically suicidal. (AA, IX, 1651)

--- Vanisi admitted to having nihilistic delusions. (AA, IX, 1651)

---Vanisi denied ever experiencing perceptual distortions, but did admit to being bothered by thoughts inside of his head. (AA, IX, 1652)

--Vanisi's social judgment was compromised by his nihilistic delusional system and his narcissistic sense of entitlement. (AA, IX, 1653)

---Vanisi's current presentation is consistent with a diagnosis of Bipolar Disorder, mixed type, with psychosis. The psychotic manifestations are reflected in his bizarre behavior, his nihilistic delusions, his narcissistic entitlement, and his marked ambivalence about such issues as life, death, and the nature of reality. (AA, IX, 1654)

---Although Vanisi has a reasonable level of sophistication about the trial process, his guardedness, manic entitlement and paranoia inhibit his ability to cooperate with counsel. (AA, IX, 1655)

---Mr. Vanisi does not currently have the requisite emotional stability to permit him to cooperate with counsel or to understand fully the distinction between truth and lying. This latter deficit emerges directly as a consequence of his incompletely treated psychotic thinking disorder. (AA, IX, 1655).

--Dr. Bittker recommended a modification of Vanisi's medication regimen and a reevaluation of his competency after 90 days of treatment. (AA, IX, 1656).

Doctor Bittker also presented his findings under oath to the district court in a hearing held January 27, 2005. Notable in his testimony were the following:

---He is a Distinguished Life Fellow of the American Psychiatric Association, a professor at the University of Nevada School of Medicine and on the faculty of the National Judicial College. (AA, VIII, 1615)

---He opined after examination that Vanisi is not currently competent to participate in trial proceedings or to best assist counsel. (AA, VIII, 1617)

---On the basis of his assessment, Vanisi is incompletely treated and has residual evidence of psychosis. (AA, VIII, 1618)

---Although Vanisi denies perceptual distortions—he says he doesn't hear or see things that aren't there—Dr. Bittker was not so sure about that. (AA, VIII, 1620)

---That traditional old-line medicines that Vanisi is receiving have so many side effects that he is unable to represent himself spontaneously in the courtroom. There is a suppression of fluid thinking with the traditional antipsychotic agents. (AA, VIII, 1621)

---Vanisi was not malingering or faking his symptoms when Dr. Bittker examined him.(AA, VIII, 1623)

---Vanisi's behavor is considerably influenced by delusions and serious impairment and judgment. (AA, VIII, 1624)

--Vanisi's derailment of thinking is much more important sign of his psychosis than is the sign of perceptual distortion. (AA, VIII, 1624)

---It would be difficult , if one was not a psychiatrist to make sense of what Vanisi was saying. (AA, VIII, 1628)

---The balance of evidence suggests that Vanisi is not forthcoming and irrational based upon his psychosis. (AA, VIII, 1632)

---Vanisi is unique among all the people he has examined on death row in his closed demeanor. (AA, VIII, 1635)

--Vanisi does not fully understand the role of defense counsel because of his paranoia. (AA, VIII, 1638)

The district court also selected a psychologist named A.M. Amezaga, Jr. to meet with Vanisi and report back about his findings relative to his competence to assist attorneys and ability to testify truthfully. On February 18, 2005, Mr. Amezaga, appeared in court and presented his findings under oath. (AA, IX 1657) Significant among the matters he swore to were as follows:

---Vanisi's rational ability to assist his counsel with his defense was at most mildly impaired. (AA, IX, 1671)

--Vanisi's body posture at times was mechanical and robotic. (AA, IX, 1672)

---Vanisi admitted to delusion of memory. (AA, IX, 1674)

---Vanisi's short-term memory may be mildly impaired. (AA, IX, 1674)

---The results of a competency test indicated no effort to feign or exaggerate psychiatric symptoms in order to suggest the possibility of incompetency. Point of fact, Vanisi attempted to minimize whatever stressors or legitimate complaints he may actually have, in an attempt to present himself who does not require the regime of potent psychiatric medications he is now receiving involuntarily. (AA, IX, 1677)

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

Dr. Amezaga presented his report in a hearing on February 18, 2005. Under oath, he swore to the following notable facts:

---He was licensed in psychology by Nevada in 1996 and does not sit on any professional boards. He is not a medical doctor and does not have authority to prescribe medicine to treat mental illness. (AA, IX, 1660-1)

---He has previously testified in a criminal trial as an expert but could not recall when. (AA, IX, 1662)

---He did not review the affidavits of counsel in support of the motion for a stay. Nor did he review the disciplinary actions in prison. (AA, IX, 1665)

---He was aware that Vanisi was being treated with medication for "individuals who are severely psychotically impaired." (AA, IX, 1668)

---He suspected that Vanisi was suffering from a psychotic disorder of some sort but was uncertain what that might be. (AA, IX, 1669)

---Vanisi's behavior might suggest some sort of catatonic schizophrenia, but that was "amusing" given the diagnosis of bipolar disorder. (AA, IX, 1672)

---He was unwilling to deem Vanisi's behavior malingering. (AA, IX, 1673)

---Just because someone is psychotic does not mean he is incompetent. (AA, IX, 1676)

---One test he administered to Vanisi consisted of secret questions that he would not divulge because it would be "unethical." (AA, IX, 1695)

---Although he did not know Vanisi's IQ, he suspected he was very bright because of a sophisticated attempt to misrepresent his actual abilities on the secret test. Although, the test results could also be explained as an extended run of "bad luck." (AA, IX, 1698)

---Vanisi was not likely to engage in truthful testimony. (AA, IX, 1699).

///

---Mr. Amazaga admitted that part of his basis for questioning Vanisi's psychiatric symptoms was really just speculation. (AA, IX, 1707).

Both Doctor Bittker and Mr. Amezaga found Vanisi presently impaired in his ability to tell the truth under oath. The district court made an oral ruling at the end of the hearing that went as follows:

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

(AA, IX, 1745)

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

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

(AA, IX, 1775).

The issue before this Court is whether the factual determination of the district court regarding the competency of Vanisi to proceed with his capital habeas petition is an arbitrary and capricious abuse of discretion because of its obvious factual incorrectness. The determination is not supported by substantial evidence. In fact, the vast weight of the evidence would dictate to any objective observer a different result. Vanisi respectfully

maintains that the evidence of his present incompetency is substantial and far outweighs the evidence of competency. Accordingly, in accordance with the precedent established by the Ninth Circuit Court of Appeals in the case of *Rohan v. Woodford*, 334 F.3d 803 (9th Cir. 2003), it was clearly erroneous of the district court not to stay habeas proceedings pending the Petitioner's return to competency. By forcing the obviously incompetent habeas Petitioner to proceed with an evidentiary hearing upon his habeas claims, the district court prejudiced Vanisi in that he was unable to assist his attorneys and was not able to substantiate some of his factual allegations through his testimony.

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

In the present proceedings, the district court reluctantly adopted the *Rohan* precedent. However, to avoid according Vanisi the remedy provided by that law, it disregarded the vast weight of competent evidence presented on the issue of incompetency and instead relied upon the questionable opinions of a non-medical professional who administered a secretive test of Vanisi. The result of this factual gymnastics was that Vanisi was not able to assist counsel in his defense (the prosecution of his habeas petition). The determination that the hearing should proceed under these circumstances

/ / /

was an abuse of discretion. A ruling that is without substantial evidentiary support is arbitrary and capricious. *SIIS v. Christensen*, 106 Nev. 85, 88, 787 P.2d 408, 410 (1990).

To find, as the district court did: "The court agrees that Vanisi might present some difficulties for counsel" is a supreme understatement. To pursue life-saving litigation with a client unable to assist counsel or testify truthfully on his own behalf compromises the constitutional protections afforded in death penalty cases by the Sixth Amendment right to counsel. It is an invitation to deadly injustice. The legal claims at issue in the lower court habeas proceeding were substantial. To require counsel to prove up and litigate the merits of such claims without the assistance of the petitioner, does indeed present "some difficulties", if not ineffective assistance of counsel. Moreover, it begs the question of why such proceedings should be forced forward. Certainly, questions of finality and case closure are at issue. However, forcing an incompetent petitioner through a hearing on the merits of his claims of legal ineligibility to be executed, does not serve that end. Even the State would agree that executing incompetents offends the constitution. The matter acquires no more finality by conducting a hearing. Forced lethal injection looms no closer.

The present inquiry into Vanisi's mental competence arose when counsel met with him to go over his habeas issues. Rather than a substantive discussion of legal and factual issues, they were confronted with a client who took his clothes off and rolled on the floor, burst into spontaneous song, thought of himself as an independent sovereign and Dr. Pepper. Vanisi was manic and agitated. He claimed not to have slept in 8 days and related how he made snow angels while naked. He recited gibberish poetry and snarled like a wild animal. Needless to say, the bizarre behavior prompted further inquiry and prison disciplinary records were produced that revealed the vast scope of Vanisi's descent into madness. The records revealed that over the past two years his mental health and

behavior had degenerated. Medical records produced for the hearing revealed that Vanisi was being forcibly injected with powerful anti-psychotic medication that had the effect of rendering him mute and zombie like during certain periods of each month.

Dr. Bittker recognized the precarious mental health of Vanisi and found him incompetent to proceed. He recommended a short pause in the proceedings to adjust Vanisi's medications and return him to competency. Mr. Amezaga paid no attention to the medications, even though he acknowledged they were powerful drugs used to treat psychosis. Instead, he focused on the results of a secretive test and speculation to conclude that Vanisi was ready to proceed to hearing. Notably, both experts found Vanisi unable to testify truthfully at such a hearing, a finding that the district court refused to acknowledge.

Clearly, the vast weight of the evidence raises the specter of Vanisi's present incompetence. To ignore such evidence is arbitrary and capricious. Federal law requires that proceedings be stayed. It is requested that this Court correct the situation by immediately issuing a stay.

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

Vanisi is a citizen of Tonga. He is not a citizen of the United States. Both nations are signatories to an international treaty providing that Vanisi should have been informed of certain consular rights as an accused in a foreign land. Vanisi was not so informed and did not exercise those rights. The most important assistance the Tongan consulate could have provided would have been the assistance of effective and conflict free counsel. They could have also coordinated the presentation of mitigation evidence relative to Vanisi's formative experiences in Tonga. As it turns out, Vanisi ended up enduring a trial with

virtually no representation. His appointed counsel moved to withdraw from representation (with the approval of the State Bar of Nevada) but they were denied by the trial court. They were compelled to remain on the case, essentially mute and ineffective. They presented little evidence and no closing argument at all. Vanisi even tried to represent himself rather than suffer the prejudice of attorneys who were unable to assist in the crucible of adversarial testing. Again, the trial court denied the constitutional request. Thus, the prejudice to Vanisi from the denial of his rights under the international treaty are readily apparent.

There is no question that Nevada authorities failed to comply with Article 36 of the Vienna Convention on Consular Relations, which requires local authorities to notify a detained foreign national, without delay, of his right to communicate with his consulate. At the detainee's request, the authorities must also notify consular officials – again, without delay – of his incarceration. Vienna Convention, art. 36, 21 U.S.T. at 100-01. Because local authorities failed to carry out this mandate, Tongan consular officials were effectively precluded from providing the assistance described above.

Finding that the Tongan consulate expressed absolutely no interest in rendering any sort of assistance to Vanisi or his counsel, the district court disposed of this collateral attack by concluding "as a matter of fact that Vanisi was not prejudiced in any way due to the alleged lack of advisement of his right to contact his consulate, or due to the failure of counsel to raise an issue concerning the Vienna Convention in trial court or on appeal." (AA) The district court did not rule on the legal validity of the treaty violation claim, but instead addressed it only in the context of ineffective assistance of counsel analysis. Essentially, the district court denied the claim as a stand alone claim by applying procedural bar rules. Vanisi respectfully submits this was error.

Subsequent to the district court disposition of this issue, the United States Supreme Court addressed the legal validity of a state habeas claim raising a stand alone Vienna Convention violation in the case of *Medellin v. Texas*, 552 U.S. _____, (Case 06-984) (decided March 25, 2008). In *Medellin*, the U.S. Supreme Court ruled 6-3 that a 2004 ruling by the World Court on a Vienna Convention violation claim could not be enforced against Texas either by direct action of President Bush or by authority of the World Court itself. The Court determined that the 2004 *Avena* judgment of the World Court (forbidding execution of 51 Mexican nationals on death row in the U.S. until state courts had substantively given force and effect to rights accorded under the Vienna Convention provisions regarding access to consulate), did in fact constitute an obligation under international law on the part of the United States. However, the Court ruled that "the means chosen by the President of the United States to comply were unavailable under the US Constitution" and that "neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President's Memorandum, constituted directly enforceable federal law" precluding Texas from "applying state procedural rules that barred all review and reconsideration of Mr. Medellín's Vienna Convention claim" Accordingly, the state of Texas has scheduled the execution of Mr. Medellin for August 8, 2008.

The issue has not been resolved prior to this submission. Like the World Court, Vanisi respectfully submits that it is clear error and violation of international law, to apply procedural default rules to his Vienna Convention claim to consular contact. While the present United States Supreme Court holding would support the district court determination, the rest of the world would disagree. On July 16, 2008, the World Court again issued an order directing U.S. authorities to do everything in their power to halt the

/ / /

execution of Medellin and other Mexicans on death row in Texas until their cases have been reviewed in state court relative to their Vienna Convention claims.

The district court in this case erred in addressing the instant claim only in the context of ineffective assistance of counsel. Contrary to the ruling, it is indeed a stand alone claim well grounded in international law and treaty. No execution of Vanisi should occur until he has been accorded his right to consular contact under the Vienna Convention. In fact, Vanisi's death sentence should be vacated in accordance with remedies prescribed by international law for treaty violations.

It is axiomatic that international law requires strict observance of due process in death penalty cases. The Inter-American Court on Human Rights has observed that, since the lack of consular notification is "prejudicial to the guarantees of due process," a state may not impose the death penalty in the cases of individuals deprived of their Article 36 rights. OC-16/99 at para. 137. The court concluded that the execution of a foreign national under these circumstances would constitute an arbitrary deprivation of life in violation of Article 6 of the International Covenant on Civil and Political Rights.

The remedy prescribed by the Inter-American Court is consistent with the remedy required under established principles of international law. While Article 36(1)(b) of the Vienna Convention fails to specify an appropriate remedy, this omission should not be taken to mean that no remedy is available to individuals whose rights are violated under the treaty. "[I]t is not unusual for "substantive rights [to] be defined by [treaty] but the remedies for their enforcement left undefined or relegated wholly to the states." Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1144 (1992)(quoting Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (1988). Indeed, the International Court of Justice has recognized

that a remedy must be imposed for the breach of an international agreement – even where the remedy is not provided in the text of a Convention. *Factory at Chorzow* (Jurisdiction)(Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 6, at 21 (July 27).

The preamble to the Vienna Convention provides some guidance in this regard: it specifies that matters not expressly covered by the treaty are subject to customary international law. 21 U.S.T. at 79. Norms of customary international law therefore determine what consequences should flow from a state's breach of Article 36(1) in a capital case. Vasquez, *supra*, at 1157; Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 Am. J. Int'l L. 341 (2001).

Of the remedies commonly provided under international law, *restitutio in integrum* is the only one suited to the facts of Vanisi's case. *See People v. Madej*, 2000 Ill. LEXIS 1215 at *16 - *22 (Ill. August 10, 2000)(McMorrow, J., concurring in part and dissenting in part)(advocating that a defendant's death sentence be vacated as a remedy for Article 36 violation, citing OC/16). *Restitutio in integrum* calls for "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification." *Velasquez Rodriguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 26 (1989). *See also Factory at Chorzow* (Merits)(Germ. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 47 (Sept. 13); *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thail.), 1962 ICJ 37 (June 15); International Law Commission: Draft Articles on State Responsibility, 37 I.L.M. 440 (1998); U.N. GAOR, 51st .

The need for an effective remedy is particularly acute in a capital case. An apology – like a promise to refrain from similar violations in the future – will provide no comfort to Vanisi, who is facing execution. International law requires that procedural guarantees of fairness and due process be strictly observed when a country seeks to impose the death

penalty. *See Reid v. Jamaica* (No. 250/1987), Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, *reprinted in* 11 Hum. Rts. L.J. 321 (1990)("in capital punishment cases, the duty of States parties [to the ICCPR] to observe rigorously all the guarantees for a fair trial. . . is even more imperative"); G.A. Res. 35/172, Dec. 15, 1980 (member states must "review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases"); NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 225-28 (1999); Case 11,139, Inter-Am. C.H.R. at para. 171, Report No. 57/96 of 6 December 1996, OEA/Ser/L/V/II.98, Doc. 7, rev., (February 19, 1998)("before the death penalty can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes those rights and freedoms enshrined in the American Declaration [of the Rights and Duties of Man]").

The International Court of Justice has unequivocally rejected the notion that a defendant must demonstrate "prejudice" before he is entitled to a remedy for an Article 36 violation:

> It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

LaGrand Case (Germany v. United States), 2001 ICJ 104 , para. 74.

The Inter-American Court on Human Rights has likewise implied that a defendant need not show prejudice, before he is entitled to a meaningful remedy for the violation. The decisions of these international tribunals call for revision of the "prejudice" standard

adopted by some lower courts considering Vienna Convention claims. [2] Particularly in a capital case, prejudice should be presumed. Should this Court adopt a prejudice test – despite the rejection of this standard by international tribunals – a full evidentiary hearing is warranted. (See discussion, *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994)(holding violation of INS consular notification regulations did not implicate "fundamental" right, therefore alien must demonstrate prejudice); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998)(applying prejudice standard based on *Faulder*).

Although he is not required to demonstrate prejudice, Vanisi has amply demonstrated the harm resulting from the Article 36 violation in his case. The evidence establishes that at the time of his arrest, Vanisi was a bipolar psychotic who would have benefitted greatly from consular assistance. Tongan consular officials, like their Mexican counterparts have done, could have assisted trial counsel in locating witnesses, communicating with non English-speaking family members, and persuading prosecuting authorities to dismiss capital charges. *See, e.g.,* Laura Lafay, *Virginia Ignores Outcry*, THE ROANOKE TIMES, July 6, 1997 (noting that Mexican consulate negotiated plea bargains on behalf of two Mexican citizens facing the death penalty); Claire Cooper, *Foes of Death Penalty Have a Friend: Mexico*, SACRAMENTO BEE, June 26, 1994. (noting Mexico's intervention in Kentucky and California capital cases where death penalty avoided) Tonga could have served as a liaison between the defendant and his trial counsel.[3] Perhaps most important, given the facts of this case,Tonga could have assisted

---

[2] *See, e.g., Faulder v. Johnson*, 81 F.3d 515, 520 (Cir. 1996)

[3] The U.S. Department of State also recognizes that a consular official should serve as "effective liaison with attorneys, court officials and prosecutors," 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL §423.3, and should help "arrestees understand what is happening to them" as "a yardstick against which they can measure attorney performance." *Id.* at §413.4

Vanisi in locating competent defense counsel and effective mental health and other experts. All of these efforts are consistent with the non-exhaustive list of functions enumerated in article 5 of the Vienna Convention.12 21 U.S.T. 77, art. 5.

Tongan consular officers could have sought out assistance in Vanisi's case, and could have consulte attorneys regarding standards of representation in capital cases. The consulate could also have retained a lawyer to advise trial counsel.. If trial counsel appeared to be mishandling Vanisi's case, the consulate could have petitioned the court to appoint more experienced counsel, or – if those efforts were unsuccessful – could have sought funds from the Tongan Foreign Ministry to retain additional legal counsel.

In addition to assisting Vanisi obtain competent legal representation, the consulate could have provided funds for an investigator or mitigation specialist, if trial counsel lacked the resources to obtain their assistance. The consulate would have been willing to assist in gathering records from Tonga, facilitating contact with Tongan witnesses, and arranging the transport of Tongan witnesses to trial. In the other words, the Tongan Consulate could have played as active a role as necessary to help ensure Vanisi avoided the death penalty.

Had Tongan consular officials been promptly notified of Vanisi's detention, they would have been in a position to assist him and his counsel in preparing for trial. At that point, their efforts would have made a qualitative difference in his defense. Once Vanisi was sentenced to death, there was nothing they could do to change the outcome.

///

///

///

///

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.

The record shows that Vanisi was charged in Count I with murder in the first degree, a violation of NRS 200.010 and NRS 200.030 and NRS 193.165, a felony, in that:

> the said defendant during the course of and in furtherance of an armed robbery did willfully and unlawfully murder Sergeant George Sullivan in that the said defendant on or about January 13, 1998, did kill and murder Sergeant George Sullivan, a human being, in the perpetration and/or furtherance of an armed robbery...

(AA, I, 17).

Further, the record shows that when the jury imposed a death sentence for the murder, it found three aggravating circumstances: (1) *the murder occurred in the commission of or an attempt to commit robbery*; (2) the victim was a peace officer engaged in the performance of his official duties, and the defendant knew or reasonably should have known the victim was a peace officer; and (3) the murder involved mutilation. (AA, VII, 1399) The inclusion of this first aggravator: that the murder occurred in the commission of or an attempt to commit robbery, which is based upon the predicate felony used to find felony murder, brings rise to the instant claim.

Standard of Review. The question of whether a sentence violates the Eighth Amendment is reviewed *de novo*. *United States v. Bland*, 961 F.2d 123, 128 (9th Cir. 1992).

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. In 1972, the Supreme Court held that capital sentencing schemes which do not adequately

guide the sentencers' discretion and thus permit the arbitrary and capricious imposition of the death penalty violate the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. 153, 206-07, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (plurality opinion) (summarizing *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)); Id. at 220-21 (White, J., concurring) (same).

The Eighth Amendment applies to the individual states through the Fourteenth Amendment's Due Process Clause. *Robinson v. California*, 370 U.S. 660, 666, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962); U.S. Const. amend. XIV, § 1. As a result, 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."** *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)(emphasis added).

The Nevada Supreme Court recently recognized that "Nevada's current definition of felony murder is broader than the definition in 1972 when *Furman* temporarily ended executions in the United States." *McConnell v. State*, 120 Nev. Adv. Op. No. 105, 102 P.3d 606, 622 (2004)(citation omitted).

On the issue of narrowing as required by *Furman*, the *McConnell* court recognized that one legal scholar concluded: "At a bare minimum, then, a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-Furman capital homicide class." Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C.L. Rev. 1103, 1124 (1990).

///

///

Accordingly, the Nevada Supreme Court in *McConnell* found:

> **So it is clear that Nevada's definition of felony murder does not afford constitutional narrowing.**

McConnell, 102 P.3d at 622 (emphasis added).

The *McConnell* court clarified its ruling:

> [I]n cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony.

McConnell, 102 P.3d at 624.

Thus, under the authority of *McConnell*, the first aggravator found in this case, that *the murder occurred in the commission of or an attempt to commit robbery*, is unconstitutional, and therefore invalid.

District Court's Ruling.

The District Court found that there was no error because the jury would have been able to hear and consider the facts underlying the robbery anyway, i.e., that Vanisi took the officers handgun during the murder, pursuant to *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006). (AA, XIII, 2630-2632)

This reasoning is flawed for several reasons: (1) it is unclear whether the *Brown* decision applies retroactively; (2) the facts of taking the weapon have to be admissible under another valid aggravating factor, and they were not; and (3) the application of the *Brown* decision to a *McConnell* issue is strained, where a *McConnell* issue does not deal exclusively with re-weighing, but also inadequate narrowing due to the dual use of the felony.

///

///

First, as to whether the decision in *Brown* applies to the instant case, the Court specifically stated that "we are henceforth guided by the following rule..." *Brown*, 546 U.S. at 220, 126 S.Ct at 892.

Second, the Court clarified the narrow rule in *Brown*:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Brown, 546 U.S. at 220, 126 S.Ct at 892.

Despite the District Court's reasoning otherwise, it is far from axiomatic that Vanisi's taking of the weapon has anything to do with the aggravating factors: (1) that the deceased was a police office; or (2) the aggravating factor that the deceased was mutilated. The connection strains reason and logic. While a police officer generally carries a firearm, the taking of that firearm in this case is not inexorably tied to the story of the murder. Moreover, the alleged mutilation had nothing to do with the stolen firearm. And a theft of the weapon after the fact of the officer's leaves further distance between the act and its relevance to either of the other two aggravating factors.

Finally, the application of the *Brown* decision to a *McConnell* issue is strained, where a *McConnell* issue does not deal exclusively with re-weighing, but also inadequate narrowing due to the dual use of the felony. Accordingly, we are not simply dealing with whether the jury would have or could have been exposed to the facts of the robbery. The jury was clearly already exposed to the facts of the robbery, as the State used those facts under its felony-murder theory at the guilt phase. Hence, the State is prevented, under the *McConnell* decision, from using those facts again to secure a death sentence. *Brown*,

///

then, is inapposite to the issue at hand, and the District Court erred in relying upon it to deny Vanisi relief under this claim.

Remedy.

Having shown a valid *McConnell* error, and having shown that *Brown* is not dispositive of this issue, it is not proper for any court in this State to engage in a reweighing analysis of aggravating and mitigating circumstances in order to find an element of capital eligibility, pursuant to the U.S. Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The State must prove beyond a reasonable doubt that this error did not effect the ultimate sentence of death. Because it cannot be known to what degree the jury was influenced by this aggravating circumstance, the State cannot meet its burden. It cannot be known how much weight the jury gave this aggravating circumstance, in comparison to the other two, and in light of any mitigating circumstances. Therefore, the sentence of death in this case must be overturned and a new jury empaneled to consider the appropriate sentence.

For this court -- or any other -- to reweigh the aggravating circumstances on its own, or to conduct a "harmless error" analysis in the face of this invalid aggravating circumstance would violate the Due Process clause of the Fourteenth Amendment to the United States Constitution. Any finding by this court that harmless error occurred as a result of this invalid aggravator would be mere speculation and conjecture. To uphold anything as serious as the penalty of death upon such improper conjecture would be to admit, as Justice Marshall feared, that **"the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond**

///

the capacities of the criminal justice system." *Godfrey v. Georgia*, 466 U.S. at 440, 100 S.Ct. at 1770 (J. MARSHALL, Concurring).

Moreover, the United States Supreme Court decision of *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428, (2002) held that a court may not reweigh the aggravating and mitigating circumstances in light of a finding that one or more aggravating circumstances were found to be invalid. The Court in *Ring* considered a situation in which the Supreme Court of Arizona agreed with Ring on appeal that the evidence presented at the trial court level was insufficient to support the aggravating circumstance of depravity, *State v. Ring*, 200 Ariz. 267, 281-82, 25 P.3d 1139, 1153-1154 (2001), but it upheld the trial court's finding on the aggravating factor of pecuniary gain. The Arizona Supreme Court then reweighed that remaining aggravating factor against the sole mitigating circumstance (Ring's lack of a serious criminal record), and affirmed the death sentence. Id., 200 Ariz. at 282-284, 25 P.3d at 1154-1156. The U. S. Supreme Court reversed the judgment of the Arizona Supreme Court. *Ring*, 536 U.S. at 596. *See also*, *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S. Ct. 2348, (2000); *Commonwealth of the Northern Mariana Islands v. Bowie*, 236 F.3d 1109 (9th Cir.2001); *Moore v. Morton*, 255 F.3d 95 (3d Cir. 2001); *State v. Ward*, 555 S. E. 2d 251 (N. C. 2001); *State v. Allen*, 353 N.C. 504, 546 S.E. 372 (N.C.2001); *People v. Kuntu*, 196 Ill. 2nd 105, 752 N.E. 2nd 380, (Ill. 2001).

Under this analysis, there can be no doubt that the aggravating circumstances prescribed by Nev. Rev. Stat. § 200.033 are "elements" of capital murder. Nev. Rev. Stat. § 200.030 defines the degrees of murder and prescribes the maximum punishments

allowed.[4] First degree murder is punishable by various terms of imprisonment, §200.030(4)(b), but it is punishable by death "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances...." §200.030(4)(a) (emphasis supplied). The crucial role of aggravating circumstances as elements of capital-eligible first degree murder is further demonstrated by the last sentence of § 200.030(4): "A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole."

Thus, under state law both the existence of aggravating factors, and the determination that the aggravating factors are not outweighed by the mitigating factors, are necessary elements of death eligibility and are necessary to increase the maximum punishment provided for first degree murder from the various possible sentences of imprisonment to death. Under *Apprendi*, the due process guarantee of the federal Constitution requires those elements to be decided by a jury. Accordingly, any procedure which would allow judges to make those findings, by post-conviction reweighing or otherwise, is unconstitutional.

///

///

---

[4]Nev. Rev. Stat. § 200.030(4) provides:

A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances; or

(b) By imprisonment in the state prison;

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a maximum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

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.

On June 23, 1999, a closed hearing was held before the District Court to address the Motion of Vanisi to dismiss his counsel, the Washoe County Public Defender's Office, and to appoint new counsel. The court heard from Vanisi, who informed the court that his counsel had not given him all the information that he needed and that, as a result, he was being forced to make decisions based upon limited information. Further, Vanisi informed the court that his own research contradicted what his attorneys were telling him. (Appellant's Supplemental Appendix hereinafter "SA," 6).

The court would not accept Vanisi's claim of a conflict of counsel without specific information about the alleged conflict. (SA 6-7). Vanisi repeatedly asked the Court for guidance in what it wanted him to explain. (SA, 8, 9, 10). Vanisi explained that: (1) his attorneys weren't giving him sound advice; (2) they were not spending adequate time with him; and (3) he was getting limited information from them. The court required more. (SA, 13). Vanisi then stated that his research had shown that he could not be prosecuted twice, that the State could not retry his case after the initial mistrial. (SA, 16, 18). He complained that his lawyers did not know the law on the issue of double jeopardy. (SA, 18). Further, Vanisi explained that Mr. Specchio, his lead counsel, had put on the record

///

that he and his investigator had seen Vanisi over 20 times, but that the visitation records showed that he had not been there even 10 times. (SA, 29-30).

The court expressed its opinion then that Vanisi was merely attempting to delay the trial. (SA, 34-35). The court denied Vanisi's motion. (SA, 35). Afterward, one of Vanisi's lawyers, Mr. Gregory, implored the court to take into consideration how difficult it was for him to have a substantive conversation with Vanisi. (SA, 38-39). Then Mr. Gregory requested that Vanisi be medicated in order to make dealing with him easier. (SA,39). The court indicated that Vanisi would have to be canvassed after the administration of any medications to verify his competence under the medications. (SA 40). On July 12, 1999, an Ex-parte Order for Medical Treatment was entered to provide Vanisi with Lithium and Wellbutrin and Titrate.

On August 03, 1999, another sealed hearing was held in which Mr. Gregory informed the Court that Vanisi had been refusing to cooperate with them. Mr. Gregory informed the Court that he had informed Vanisi of his right to represent himself under *Faretta, infra*, and Vanisi had indicated that he wished to do so. Vanisi then personally requested the same from the court. Then court answered that Vanisi would have to put the motion in writing.

On August 05, 1999, Vanisi filed a written Motion for Self-Representation. (SA , 40) On August 10, 1999, a hearing was held on the motion. (SA, 53) The court canvassed Vanisi pursuant to SCR 253 and heard testimony from a psychiatrist who had treated Vanisi. On August 11, 1999, the court entered an Order denying Vanisi's Motion for Self-Representation. (SA ,43) The court based its decision upon three grounds: (1) the motion was made for purpose of delay; (2) Vanisi was abusing the judicial process and presented a danger of disrupting subsequent court proceedings; and (3) the case was a complex,

death penalty case, and the court had concerns about Vanisi's ability to represent himself and receive a fair trial. The Nevada Supreme Court ruled that the third reason was invalid. *Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001).

The other two grounds are not supported by the record. The dispute between Vanisi and his lawyers was long-standing and by all appearances, actual and legitimate. Therefore, the finding that the *Faretta* motion was made for the purpose of delay was arbitrary and capricious. Indeed, as mentioned, *supra*, another time when Vanisi announced his legitimate and protected intention to appeal the court's denial of his motion to dismiss his counsel, the court unexplainedly expressed its opinion then that Vanisi was merely attempting to delay the trial. Accordingly, the record reflects that by the filing of his *Faretta* motion, Vanisi was merely attempting to resolve a documented and long-standing conflict between himself and the Public Defender's Office. Because the court had refused to grant his motion for new counsel, Vanisi was left with no other option than to ask to represent himself.

Accordingly, no abuse of process nor intentional disruption is shown on the record. The record merely reflects an ongoing dispute between Vanisi and the Washoe County Public Defender's Office. Vanisi first attempted to dismiss his counsel. When he was not successful, he attempted to represent himself. Further, as set forth *supra*, Vanisi raised actual and specific conflicts, as well as intelligent and discrete legal issues in his motions. There were not repetitive motions filed, nor any patently frivolous arguments raised. Although it sometimes took Vanisi some time to express his thoughts and arguments to the court, he was at all times respectful of the court and polite in his requests. For example, in imploring the Court's assistance to free one of his hands during the

///

proceeding so he could review his papers for his argument, he referred to himself as "an English gentleman." (SA, 17).

Indeed, in one hearing when Mr. Gregory was complaining about Vanisi being manic, the Court disagreed, finding him "excitable," but not manic. (SA, 38). Specifically, the court found that Vanisi was no worse than trial counsel, Mr. Gregory. (SA, 38). These facts belie any finding that Vanisi was abusing the process or somehow intolerably disruptive.

Even the Concurring Opinion in the Nevada Supreme Court agreed that the district court erred in denying Vanisi's request to represent himself on the grounds that his request was for the purpose of delay. *Vanisi*, 22 P.3d at 1174. Further, the Concurring Opinion found that the record did not reflect that Vanisi had been, or indication that he would be, disruptive. Id. Justice Rose:

> I question whether the district court's findings provide a "strong indication" that Vanisi would be disruptive at trial. Many of the court's findings are more indicative of inconvenience than disruption. A request for self-representation should not be denied solely "'because of the inherent inconvenience often caused by pro se litigants.'

Id.

Justice Rose (with whom Justices Agosti and Becker agreed) continued:

> My review of the record reveals that, at least at the hearing on the motion for self-representation, Vanisi was generally articulate, respectful, and responsive during rigorous examination by the district court. It does not appear that Vanisi actually disrupted earlier proceedings, although the court's frustration with Vanisi has some factual basis...
>
> The transcript of this hearing as a whole reveals that Vanisi was generally respectful to the court, rarely interrupted or continued speaking inappropriately, and complied when the court told him to refrain from such conduct.

Vanisi, 22 P.3d at 1174-75.

///

Finally, the Concurring Opinion noted that counsel for the State as well as counsel for the defense agreed that Vanisi had been "anything but disruptive." *Vanisi*, 22 P.3d at 1175. The district court's decision otherwise is belied by the record and should be reversed.

Law of the Case.

The district court denied this claim on the grounds that it was barred by law of the case.[5] (AA, XIII, 2632) However, this Court has the authority to hear this claim. The United States Supreme Court has recognized that "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618 n.8, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983).

This Court has acknowledged the same in its Opinion in *Bejarano v. State*, 122 Nev. Adv. No. 92, 146 P.3d 265 (2006). In *Bejarano*, while addressing a *McConnell* issue, the Court considered the effect of the doctrine of the law of the case on its decision-making process. Specifically, the Court addressed whether its previous affirmation of the validity of the robbery felony aggravator and receiving-money aggravator in Bejarano's case barred consideration of the alleged *McConnell* error. The Court explained that it did not:

> **[T]he doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine that such action is warranted.**

Bejarano, 146 P.3d at 271 (emphasis added).

///

---

[2] The doctrine of law of the case holds that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969), *vacated in part on other grounds*, 408 U.S. 935, 92 S. Ct. 2855, 33 L. Ed. 2d 750 (1972).

When the Majority and Concurring Opinions of this Court collectively find that all three grounds under which the district court denied the defendant's *Faretta* motion are not supported by the record, that decision should not stand. And where the error in question is a structural error, it is axiomatic that manifest injustice would result if the Court did not depart from the prior holding.

Structural Error.

In *Arizona v. Fulminate*, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991), Chief Justice Rehnquist, speaking for a majority of the court, distinguished between "trial error" and "structural error" in determining whether a federal constitutional violation could be analyzed under the *Chapman* test or required automatic reversal. The Court explained 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.*

The Nevada Supreme 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).

The Application of Faretta.

In *Faretta v. California*, 422 U.S. 806, 821 (1975), the Supreme Court held that an accused has a Sixth Amendment right to conduct his or her own defense in a criminal case.

See also Martinez v. Court of Appeals, 528 U.S. 152, 154 (2000); *U.S. v. Purnett*, 910 F.2d 51, 54 (2d Cir. 1990) ("The right to self-representation and the assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin."); *Fowler v. Collins*, 253 F.3d 244, 249 (6th Cir. 2001) ("The Sixth Amendment implies a right of self-representation."). *But see Indiana v. Edwards*, _ U.S. _, 128 S.Ct. 2379 (2008)(Holding that the Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.)

In *Faretta*, the Court considered whether the Sixth Amendment required, through the Due Process Clause of the Fourteenth Amendment, that states recognize the right of self representation in criminal trials. The Court concluded that such was required. *Id.*, at 818-820. The Court also found that this right did not arise from a defendant's power to waive the right to assistance of counsel; it was held to be *an independent right found in the structure and history of the Constitution. Id.*, at 820.

In discussing the language of "assistance of counsel," the Court observed that "the Sixth Amendment contemplated that *counsel ... shall be an aid to a willing defendant* — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." *Id.*, at 821.

The Founders believed that self-representation was a basic right, a natural right. *Faretta*, 422 U.S. at 830. The right to self-representation is nothing more than an expression of the natural right of self defense, the right of self-preservation, the first right recognized by any civilized people. *See Blackstone's Commentaries*, bk. 1, ch. 1, 129.

It cannot be said that Vanisi simply acquiesced in accepting his court-appointed counsel. The record is clear that he was coerced and threatened into accepting counsel, that he was deprived of any meaningful possibility of conducting his own defense, and that the court would do nothing to help him gain access to what he needed to handle his own defense. This unwanted counsel "represented" Vanisi only through a *tenuous and unacceptable legal fiction.*

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.

On August 26, 1999, after the court had denied Vanisi's motion for new counsel and his motion to represent himself under *Faretta, supra*, a new *in camera* hearing was held to hear from Vanisi's counsel on their ex parte motion to withdraw as counsel under SCR 172. During that hearing, counsel for Vanisi, Mr. Gregory, revealed to the court that in February of 1999, he had a conversation with Vanisi in which Vanisi admitted that he in fact killed Officer Sullivan. (SA, 151) Gregory explained that as a result of this admission, Vanisi's counsel attempted to fashion a defense based upon provocation, but Vanisi allegedly refused to even talk about such a defense and instead wanted to present a defense based upon an alleged conspiracy against Vanisi, which included someone else doing the killing. (SA, 151, 158) Vanisi's counsel explained to him that they would not put on such a defense in light of his confession to them, because they had ethical responsibilities. (SA, 151-152). At some point, Vanisi inquired as to his right to represent himself. As has been set forth previously herein, counsel advised Vanisi this was possible, Vanisi so moved the court and the same was denied. (SA, 152-154). Accordingly, counsel for Vanisi then contacted bar counsel, Michael Warhola, and presented their dilemma to

him. "Without hesitation" bar counsel advised that they had to withdraw as counsel pursuant to SCR 166 and 172. (SA, 154, 161). Counsel cautioned the court that if they were not allowed to withdraw, they would have to certify themselves as ineffective. (SA, 154, 157). Gregory cautioned the court that if they were required to stay on the case, Vanisi would wind up not having a defense, that counsel would wind up sitting "like bumps on a log doing nothing." (SA, 158). Additionally, bar counsel informed counsel for Vanisi -- and they were of the same mindset -- that to offer evidence or cross-examine vigorously or select a jury under those circumstances would be a prohibited ethical violation. (SA, 161, 166).

In contrast to the defense presented to Vanisi by counsel, Vanisi wished to put on a defense that he wasn't there and that he was being used as a scapegoat. (SA, 165). Vanisi intended to testify accordingly. (SA, 166). Accordingly, counsel for Vanisi requested to be able to withdraw as counsel. (SA, 170). The district court denied their request.

The district court denied this claim, misconstruing it as an argument that "Vanisi contends that he is entitled to an attorney who feels that the rules of ethics do not apply to him." (AA, 2632-2633). Of course, nowhere in the Supplemental Petition did Vanisi allege any such thing. The essence of the claim is not that the lawyers would not put on an improper defense, but that: (1) *bar counsel advised counsel that they had to withdraw as counsel pursuant to SCR 166 and 172.* (SA, 154, 161) and (2) under the circumstances, the district court should have allowed them to withdraw as counsel (and/or allowed Vanisi to represent himself, as argue previously herein). The trial court's failure to either allow counsel to withdraw or allow Vanisi to represent himself created an untenable

///

circumstance at trial: a defendant in a capital murder case who was stuck with counsel forced to sit on their hands.

A conflict of counsel violates the Sixth Amendment; prejudice to the client is presumed and need not be shown.

It is well established that the right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Indeed, the Sixth Amendment guarantees a criminal defendant the right to conflict-free representation. *Clark v. State*, 108 Nev. 324, 831 P.2d 1374 (1992); *Coleman v. State*, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993).

The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, she deprives her client of his Sixth Amendment right as surely as if he failed to appear at trial. *See Holloway v. Arkansas*, supra, 435 U.S., at 490, 98 S.Ct., at 1181 ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters"). Because trial counsel could not give Vanisi their "undivided loyalty," an irreconcilable conflict was created.

For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial. *Cuyler v. Sullivan*, 446 U.S. 335, 349-350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980).

The United States Supreme Court has recognized that where a court has denied counsel's request to be replaced because of a conflict of interest, a showing of prejudice is not required in order to obtain a reversal, as prejudice to the defendant is presumed.

Flanagan v. United States, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

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 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.

The record shows that counsel revealed privileged information to the court during their motion to withdraw as counsel. As set forth above, on August 26, 1999, after the court had denied Vanisi's motion for new counsel and his motion to represent himself under Faretta, *supra*, a new in camera hearing was held to hear from Vanisi's counsel on their ex parte motion to withdraw as counsel under SCR 172. During that hearing, counsel for Vanisi, Mr. Gregory, revealed to the court that in February of 1999, he had a conversation with Vanisi in which Vanisi admitted that he in fact killed the alleged victim, Officer Sullivan. (SA, 150). Gregory explained that as a result of this admission, Vanisi's counsel attempted to fashion a defense based upon provocation, but Vanisi allegedly refused to even talk about such a defense and instead wanted to present a defense based upon an alleged conspiracy against. Vanisi, which included someone else doing the killing. (SA, 157). Therefore, counsel for Vanisi revealed privileged attorney-client information to the court, in violation of their professional responsibilities, a well as Vanisi's constitutional rights.

Casting trial counsel's revelation to the district court that Vanisi had admitted the alleged crime as "a little problem" (AA, XIII, 2633), the district court found nothing wrong

with the action and denied relief. Vanisi respectfully submits counsel was ineffective in doing so. Lawyers for an accused should not admit a client's guilt without permission of the client.

In *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law and fact and is subject to independent review. The Supreme Court reiterated the ruling of *Strickland v. Washington*, 466 U.S. 668 (1984). The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in *Strickland*. The Court revisited this issue in *Warden v. Lyons*, 100 Nev. 430 (1984) and *Dawson v. State*, 108 Nev. 112 (1992). The Nevada Supreme Court has adopted *Strickland's* two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency.

The standard for reviewing claims of ineffective assistance of counsel -- as set forth by the *Strickland* Court -- is as follows: First, a habeas petitioner must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness. Second, he must show that counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the results of the trial would probably have been different. *Davis v. State*, 107 Nev. 600, 601-02, 817 P.2d 1169, 1170 (1991) (*citing Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984)). The *Strickland* test, also requires a showing of prejudice regarding the error(s) alleged.

/ / /

The Nevada Supreme Court has found ineffective assistance of counsel for a wide range of errors or failures, from failure to properly investigate, *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991), to failure to call certain key witnesses, *Doleman v. State*, 112 Nev. 843, 921 P.2d 278 (1996), to errors involving counsel's conflict-of-interest, *Coleman v. State*, 109 Nev. 1, 846 P.2d 276 (1993), to matters as simple as a counsel's failure to object to a prosecutor's impermissible comments on defendant's post-arrest silence, *Washington v. State*, 112 Nev. 1054, 921 P.2d 1253 (1996), or a *counsel's inability to phrase his questions* to a witness so as to elicit proper responses to his attempt to rebut certain inferences made by the State, *Knorr v. State*, 103 Nev. 604, 607, 748 P.2d 1, 3 (1987).

In addressing an issue on point with the instant case, the Supreme Court of North Carolina determined that prejudice may be presumed where defense counsel improperly concedes his client's guilt. The Nevada Supreme Court responded by holding:

> Although this Court still adheres to the application of the Strickland test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'

Jones v. State, 110 Nev. 730, 877 P.2d 1052, 1057 (Nev. 1994).

Vanisi respectfully submits that his trial counsel's disclosure of privileged attorney client information to the trial court fell below an objective standard of reasonableness. It created an actual conflict of interest between counsel and Vanisi. It was no "little problem" as the district court concluded. The disclosure completely foreclosed the possibility of Vanisi pursuing the defense he wished and compromised his right to testify in his defense. The disclosure unequivocally demonstrates an actual conflict of interest between Vanisi and the individuals compelled to represent him, prejudice must be presumed.

The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, she deprives her client of his Sixth Amendment right as surely as if he failed to appear at trial. *See Holloway v. Arkansas*, supra, 435 U.S., at 490, 98 S.Ct., at 1181 ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters"). For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial. *Cuyler v. Sullivan,* 446 U.S. 335, 349-350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980).

The right to conflict-free counsel is simply too important and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); *accord, Cuyler v. Sullivan, supra,* 446 U.S., at 349, 100 S.Ct., at 1718. "We should be no more willing to countenance nice calculations as to how a conflict adversely affected counsel's performance. The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.' " *Cuyler v. Sullivan, supra,* at 349, 100 S.Ct., at 1719 (*quoting Glasser v. United States, supra,* 315 U.S., at 76, 62 S.Ct., at 467).

The Nevada Supreme Court has ruled:

> Where an attorney's loyalty to a defendant in a criminal case is diluted by that attorney's obligation to others, the defendant's sixth amendment right to effective assistance of counsel is not satisfied.

Coleman, 109 Nev. at 3, 846 P.2d at 277.

Trial counsel had a personal and ethical conflict regarding their representation. The Nevada Supreme Court has found defense counsel to be ineffective whenever "[a]n actual conflict of interest which adversely affects a lawyer's performance," is present.

Coleman, supra; Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1375 (1992). The Court has repeatedly held that prejudice is presumed in these cases. See *Clark, supra*; *Coleman, supra*; *Mannon v. State*, 98 Nev. 224, 645 P.2d 433 (1982); *Harvey v. State*, 97 Nev. 477, 634 P.2d 1199 (1981); *Harvey v. State*, 96 Nev. 850, 619 P.2d 1214 (1980).

It is obvious from the language of these cases that in situations of ethical obligation which create conflicts of interest in the representation of a client: (1) the attorney can no longer provide effective assistance of counsel under the Sixth Amendment; (2) that the attorney must bring the matter before the court; and (3) the court has an obligation to remedy the situation. In this case, the district court never remedied the situation, neither prior to trial nor when again presented with the prejudicial conflict of interest on collateral review. This Court should correct the error.

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.

The record shows that due to the fact that the court denied Vanisi's motion to represent himself under Faretta, *supra*, as well as his trial counsel's motion to withdraw as counsel, trial counsel were forced to provide ineffective assistance under the Sixth and Fourteenth Amendments.

As a result of having their legal and ethical hands tied, counsel for Vanisi failed to vigorously cross-examine witnesses or put on evidence in Vanisi's defense. (*See Generally*, AA I-III). (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), 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).

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).

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).

The district court completely circumvented the issue of the untenable situation in which it placed counsel and Vanisi, which forced the ineffective assistance. Instead, the district court denied this claim, essentially, because it did not find any prejudice from counsel's lack of advocacy. This finding erroneously ignores the allegation of structural error, which supplants the need for a showing of prejudice.

In *Arizona v. Fulminate*, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991), Chief Justice Rehnquist, speaking for a majority of the court, distinguished between "trial error" and "structural error" in determining whether a federal constitutional violation could be analyzed under the *Chapman* harmless error test or required automatic reversal. The Court explained 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.*

In *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), the Supreme Court indicated that a violation of the right to counsel may be error that is reversible *per se*. *Chapman* explains "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *citing Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), as support. *Chapman*, 386 U.S. at 23 & n.8.

The Nevada Supreme 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). See also *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991)

The trial of Vanisi in this case was a sham and farce. Vanisi was correct to call it a "joke." Trial counsel admittedly laid down, sat like "bumps on logs" and did not put up a defense, did not engage in any meaningful cross-examination of the vast majority of witnesses and refused to give either opening statement nor closing argument. This is not the right to effective assistance of counsel envisioned by the Sixth Amendment. In fact, it constitutes a *de facto* denial of counsel. The State's case was not subjected to the crucible of adversary testing as envisioned by the Constitution. As a result, the trial process broke down in clear violation of Vanisi's Fifth, Sixth, and Fourteenth Amendment right under the United States Constitution. There was a clear structural error. Prejudice must be presumed under these circumstances and Vanisi's conviction and sentence must be reversed.

///

///

///

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 Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. Nev. Rev. Stat. §. 200.030(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case. *See* Nev. Rev. Stat. §. 200.033. Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without apparent motive." Nev. Rev. Stat. §. 200.033(9). Nevada statutes also permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnaping, to receive money, torture, to prevent lawful arrest, and escape. *See* Nev. Rev. Stat. §. 200.033. The scope of the Nevada death penalty statute makes the death penalty an option for all first degree murders that involve a motive, and for first degree murders that involve no motive at all. The administration of the Death Penalty Statute by the Nevada Supreme Court also routinely validates constructions of and findings of aggravating circumstances which are not based upon any evidence.

The death penalty is in practice permitted in Nevada for all first degree murders, and first degree murders are not restricted in Nevada to those cases traditionally defined as first degree murders. As the result of the use of unconstitutional definitions of reasonable doubt, premeditation and deliberation, and implied malice, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any

rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. A death sentence is in practice permitted under Nevada law in every case where the prosecution can present evidence that an accused committed an unlawful killing.

As a result of plea bargaining practices, and imposition of sentences by juries and three-judge panels, sentences of less than death have been imposed in situations where the amount of mitigating evidence was significantly and qualitatively less than the mitigation evidence that existed in the present case. The untrammeled power of the sentencer under Nevada law to decline to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

Nevada law provides sentencing bodies with no rational method for separating those few cases that warrant the imposition of the ultimate punishment from the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme.

Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's general minority population is approximately 17%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. Nevada sentencers

///

are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

The defects in the Nevada system are aggravated by the inadequacy of the appellate review process. These systemic problems are not unique to Nevada. The Nevada capital punishment system suffers from all of the problems identified elsewhere in the nation -- the underfunding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process are exacerbated by overly broad definitions of both first degree murder and the accompanying aggravating circumstances, which permits the imposition of a death sentence for virtually every homicide. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial per se. The scheme also violates petitioner's rights under international law, which prohibits the arbitrary deprivation of life.

When presented with the foregoing argument, the district court found it to be procedurally barred and legally incorrect. (AA, XIII, 2634-35). Vanisi respectfully submits the argument is meritorious, should have been presented in his direct appeal and is grounds for vacating his death sentence.

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 Eighth Amendment guarantee against cruel and unusual punishment prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of a maturing society. The worldwide trend is toward the abolition of capital

punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on all member nations to take steps toward the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment," have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many of the "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

The death penalty is unnecessary to the achievement of any legitimate societal or penalogical interests in Vanisi's case. Vanisi's neurological deficits (bipolar disorder with psychosis) and the absence of any basis upon which to anticipate that Vanisi would pose any danger if incarcerated make a death sentence cruel and unusual punishment.

The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. Vanisis's death sentence also violates international law, which prohibits the arbitrary deprivation of life, and cruel, inhuman or degrading treatment or punishment.

When presented with the foregoing argument, the district court found it to be procedurally barred and legally incorrect. (AA, XIII, 2635). Vanisi respectfully submits the argument is meritorious, should have been presented in his direct appeal and is grounds for vacating his death sentence.

///

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.

The International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life and restricts the imposition of the death penalty in countries which have not abolished it to "only the most serious crimes in accordance with the law in force at the time of the commission of the frame and not contrary to the provisions of the present Covenant..." ICCPR, Article VI, Sect. 2. The Covenant further prohibits torture and "cruel, inhuman or degrading treatment or punishment," (Article VII); and guarantees every person a fair and public hearing by a competent, independent and impartial tribunal. (Article XIV.)

Among the additional protections secured by the Covenant for any person charged with a criminal offense are the guarantees: to be informed promptly and in detail in a language which [the accused] understands of the nature and cause of the charge against him; to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed of this right to legal assistance and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and to not be compelled to testify against himself or to confess guilt. (Article XIV).

All of the specific rights listed above that are guaranteed in the Covenant were violated in Vanisi's case. The rights afforded under Article XIV are guaranteed "in full equality," and thus apply in full force to Vanisi. The violations of Vanisi's rights under international law are prejudicial per se and require that his conviction and sentence be vacated.

///

When presented with the foregoing argument, the district court found it to be procedurally barred and legally incorrect. Moreover, the district court attempted to imply that, on the basis of a dissent in *Roper v. Simmons*, 125 S. Ct. 1183, 543 U.S. 551 (2005), the U.S. is not a signatory to the Covenant. (AA, XIII, 2635). This is incorrect. The U.S. is indeed bound by the provisions of the Covenant. The *Roper* decision stands for the proposition that execution of children is cruel and unusual punishment in violation of the Eighth Amendment. The Covenant was cited and referred to in the opinion as an acknowledgment of how other nations have expressly affirmed certain fundamental rights and to underscore the centrality of those rights within the United States heritage of freedom. To conclude, as the district court did, that the Covenant has no application to the United States is clearly erroneous.

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.

Nevada law requires that execution be inflicted by an injection of a lethal drug. NRS 176.355(1). Competent physicians cannot administer the lethal injection, because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American Medical Association, Judicial Council, Current Opinion 2.06 (1980). Non-physician staff from the Department of Corrections will have the responsibility of locating veins and injecting needles which are connected to the lethal injection machine.

The district court denied this claim, characterizing it as a claim that argues that the death penalty must be carried out in a manner that is more "serene," and relying upon this Court's decision in *McConnell v. State*, 120 Nev. Adv. Op. 105, 102 P.3d 606 (2004). (AA,

///

XIII, 2636). The reliance is misplaced, in light of the record and the recent decision in *Baze v. Rees, 553 U.S. __(2008), infra.*

In *McConnell*, this Court denied McConnell's lethal injection claim for the following reasons:

> McConnell cites no authority from this or any other jurisdiction that deems lethal injection unconstitutional as a matter of law because of the absence of detailed codified guidelines for the procedure. He cites a single law review article criticizing lethal injection, but provides no specific facts or allegations indicating that executions in Nevada have either accidentally or intentionally been administered in a cruel or unusual manner. Rather, McConnell's argument largely consists of speculative accusations, and he cites no part of the record where he challenged the constitutionality of lethal injection before the district court. McConnell's claim raises fact-intensive issues which require consideration by a fact-finding tribunal and are not properly before this court in the first instance.

McConnell, 102 P.3d at 615-16 (footnotes omitted).

In contrast, in his Supplemental Petition, Vanisi cited both legal authorities and numerous examples of actual, not speculative, examples of botched executions, including some in Nevada. (AA, X, 1873-1877). Moreover, Vanisi submitted these same authorities and facts to a fact-finding tribunal, the district court, which, without any actual findings of fact, denied the claim based upon this Court's prior ruling in *McConnell*. That's the definition of circular logic. And though the District Court could be reversed on this alone, there is the decision of *Baze v. Rees, infra*, to consider.

On April 16, 2008, the United States Supreme Court decided *Baze, et al. v. Rees,* 553 U.S. ___, 128 S. Ct. 1520 (2008).[6] In *Baze*, the plurality opinion authored by the Chief Justice and joined by Justices Kennedy and Alito held that a method of execution that presented a "substantial risk of serious harm" would violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.*, 128 S.Ct. at 1532. The plurality opinion explained that conditions of execution that were "sure or very likely" to cause

///

---

[6]It should be noted that, in *Baze*, three Justices combined to issue the Court's plurality opinion (Roberts, joined by Kennedy and Alito), five Justices wrote concurring opinions (Alito; Stevens; Scalia separately commenting in response to Stevens; Thomas, joined by Scalia; and Breyer); and two Justices dissented (Ginsburg, joined by Souter).

serious illness and needless suffering, and give rise to "sufficiently imminent dangers" of serious harm would meet this standard. *Id.*

The plurality explained that – due specifically to a number of extra safeguards in place in the protocol – the Kentucky protocol at issue did not present these risks. In doing so, the opinion relied heavily on the findings of fact by the trial court in *Baze*. *Id.* at 1526. For example, the Court relied upon the safeguards in the Kentucky protocol which specify that:

> • "members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman," *Id.* at 16;
>
> • "these IV team members, along with the rest of the execution team, participate in at least 10 practice session per year . . . [which] encompass a complete walkthrough of the execution procedures, including the siting of IV catheters into volunteers," Id.;
>
> • during an execution, "the IV team [must] establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences .... these redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected. *Id.*; and
>
> • There are two persons in the execution chamber "to watch for signs of IV problems, including infiltration."

Id. at 1527-28.

The plurality opinion made clear that *"[i]n light of these safeguards,* we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation." *Id* at 1534 (emphasis added). To the extent publicly known, the details of the Nevada Protocol were set forth through the Supplement to Petition for Writ of Habeas Corpus (Post-conviction) and Exhibits in support thereof. Additionally, those same procedures were provided to this Court in the Appellant's Appendix herein.[7]

---

[7]It is noted that much of the written protocol is redacted in the copy provided to the undersigned counsel. Further, it is noted that the protocol included in the Appellant's Appendix is a copy from 2006, having last been updated in 2004. (AA, ...). Further, upon information and belief, since the commencement of these proceedings, the Nevada protocol has been amended. It is unknown what those changes entail.

The High Court in *Baze* considered as "*most significant* ...the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman." *Id.* at 1534 (emphasis added). No similar safeguard exists within Nevada's Procedures.

Among other inadequacies in Nevada, there appear to be no provisions for the participation of personnel who are capable of monitoring anesthetic depth, and there are no directives in the written protocol that would instruct such personnel, if *they* were present, to actually undertake the assessment of anesthetic depth. Other states, and courts, and committees, have recognized that given the use of torture-causing drugs such as pancuronium and potassium, it is essential that meaningful and effective steps be in place to ensure that adequate anesthesia is established and maintained.

Further, there is no "back-up" plan for achieving IV access if the IV team is unable to *successfully* place catheters within the veins of the arms. Other states provide for such plans, and in this regard Nevada falls below the standards set by other states when performing execution by lethal injection.

Indeed, the Supreme Court noted that the Kentucky Procedures require that "IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year." *Id.*, at 1534. Again, no similar safeguard exists within the written Nevada Procedures. In fact, the Nevada Procedures are entirely silent as to training.

The Supreme Court in *Baze* went on to highlight how the training sessions, "required by [Kentucky's] written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers." *Id.*, at 1534. As noted, the Nevada Procedures entirely omit any requirement that practice sessions occur and accordingly, does not specify the sort of training that must take place during any practice session.

Next, the Supreme Court pointed to the written mandate of the Kentucky Procedures that the IV team be limited to one hour to establish both the primary and

backup IV access points. *Id.*, at 1534. The Supreme Court also noted that "merely because the protocol gives the IV team one hour to establish intravenous access does not mean that the team members are required to spend the entire hour in a futile attempt to do so." *Id.* The Nevada Procedures place no similar restriction upon any such team.

The Supreme Court then considered how "Kentucky's protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds." *Id.* Once again, Nevada's Procedures fail to provide similar safeguards.

Whereas under the written Kentucky Procedures the execution cannot continue until the warden is satisfied that the inmate is unconscious, the Nevada Procedures include no requirement that anyone affirmatively confirm that the inmate is unconscious before the painful injection of pancuronium bromide and potassium chloride are administered. Additionally, the Nevada Procedures give no explicit directive that the backup IV line be used immediately should a problem be observed by anyone attending.

Another fundamental difference between the Kentucky and Nevada Procedures is that in Kentucky, "once all of the chemicals are administered, a staff member, using a stopwatch, begins a ten minute countdown. If, after the ten minutes have elapsed, there is no flat-line observed on the heart monitor and the physician and the coroner are unable to pronounce death, the Warden shall order a second set of lethal chemicals to be administered until death occurs." No similar limitation upon discretion is imposed by the Nevada Procedures.

As argued in the Supplement to the Petition (AA, X, 1873-1878), Nevada's lethal injection procedure is vulnerable to many potential errors in administration that would result in a failure to administer a quantity of sodium thiopental sufficient to induce the necessary anesthetic depth. The risk of error is compounded by Nevada's use of inadequately trained personnel.

Accordingly, the differences between the Kentucky Procedures found to be constitutional by the United States Supreme Court in *Baze* and the unconstitutional

written Procedures in Nevada are substantial. Employing the *Baze* Court's logic, and thereby relying upon the fact that Nevada lacks nearly all of the safeguards found in *Baze,* leads one simply to the opposite conclusion from that in *Baze*. Namely, that "the risks identified by [appellant] are so substantial or imminent as to amount to an Eighth Amendment violation." paraphrasing *Baze,* at 1534.

Finally, as noted in the *Baze* decision, there was only one Kentucky prisoner, Eddie Lee Harper, who had been executed since Kentucky adopted the lethal injection method. And there were no reported problems at Harper's execution. *Id.* at 1528.

Conversely, in Nevada, there *have* been documented problems with lethal injection executions. As also noted in th Supplement, in the case of **Roderick Abeyta** (October 5, 1998, Nevada), the execution team took twenty- five minutes to find a vein suitable for the lethal injection. *See* Radelet; Sean Whaley, "Nevada Executes Killer," Las Vegas Review-Journal, Oct. 5, 1998.

Also, in the case of **Sebastian Bridges** (April 21, 2001, Nevada), reportedly, Mr. Bridges spent between twenty and twenty-five minutes on the execution bed, with the intravenous line inserted, continuously agitated, asserting his innocence, the injustice of executing him, and the injustice of requiring him to sign a habeas corpus petition, and to suffer prolonged delay, in order to have the unconstitutionality of his conviction recognized by the court system. He remained agitated after the execution process began, so the sedative drugs appeared not to take effect in a timely fashion. *See e.g.*, Brendan Riley, "Convicted Killer Dies in Bizarre Nevada Execution", APBNews.com, April 23, 2001.

This Court, after review of the significant discrepancies between the protocols in Kentucky and Nevada, must find that Nevada's lethal injection system violates the right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution.

Because of inability of the State of Nevada to carry out Vanisi's execution without the infliction of cruel and unusual punishment, the sentence must be vacated. The practice

///

is also invalid under international law, which prohibits cruel, inhuman or degrading treatment or punishment.

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.

Vanisi does not, at this time, assert that he is incompetent to be executed, although the evidence of his incompetence appears clearly in the record relative to his attempt to stay proceedings pending his return to competency. However, Vanisi hereby alleges that he may be deemed incompetent before the execution is carried out.

Under authority in this Circuit, *see Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997), *affirmed sub nom, Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618 (1998), it appears that a claim anticipating incompetence to be executed should be raised in an initial petition for writ of habeas corpus. Vanisi therefore asserts the allegations of this claim pursuant to *Martinez-Villareal v. Stewart* in order to avoid any possible implication of waiver of this claim.

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 tenure of judges of the Nevada state district courts and of the Nevada Supreme Court is dependent upon popular contested elections. Nev. Const. Art. 6 §§ 3, 5.

The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of unfettered discretion to determine whether a

///

death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. Nev. Rev. Stat. § 177.055(2).

At the time of the adoption of the United States Constitution, the common law definition of due process of law included the requirement that judges who presided over trials in capital cases, which at that time potentially included all felony cases, have tenure during good behavior. All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from the influence of the sovereign that would otherwise have improperly affected their impartiality.

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian, "lynch mob," pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "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). Judges or justices who are subject to these pressures cannot be impartial within due process and international law standards in a capital case.

Judges and justices who are subject to popular election cannot be impartial in any capital case within due process and international law standards because of the threat of removal as a result of unpopular decisions in favor of a capital defendant.

The Court denied this claim, also relying upon *McConnell v. State*, 120 Nev. Adv. Op. No. 105, 102 P.3d 606, 622 (2004), although it is far from clear why. (AA, XIII, 2636). There is no discussion in the *McConnell* decision relevant to this claim.

///

Flanagan v. United States, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

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 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.

The record shows that counsel revealed privileged information to the court during their motion to withdraw as counsel. As set forth above, on August 26, 1999, after the court had denied Vanisi's motion for new counsel and his motion to represent himself under Faretta, *supra*, a new in camera hearing was held to hear from Vanisi's counsel on their ex parte motion to withdraw as counsel under SCR 172. During that hearing, counsel for Vanisi, Mr. Gregory, revealed to the court that in February of 1999, he had a conversation with Vanisi in which Vanisi admitted that he in fact killed the alleged victim, Officer Sullivan. (SA, 150). Gregory explained that as a result of this admission, Vanisi's counsel attempted to fashion a defense based upon provocation, but Vanisi allegedly refused to even talk about such a defense and instead wanted to present a defense based upon an alleged conspiracy against. Vanisi, which included someone else doing the killing. (SA, 157). Therefore, counsel for Vanisi revealed privileged attorney-client information to the court, in violation of their professional responsibilities, a well as Vanisi's constitutional rights.

Casting trial counsel's revelation to the district court that Vanisi had admitted the alleged crime as "a little problem" (AA, XIII, 2633), the district court found nothing wrong

Conducting a capital trial or direct appeal before a tribunal that does not meet constitutional standards of impartiality is prejudicial *per se* and requires that Vanisi's conviction and sentence be vacated.

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.

Both the United States and Nevada Constitutions bar the execution of innocent persons. Under the due process clause of the Fourteenth Amendment, the execution of the innocent is "contrary to contemporary standards of decency," *Ford v. Wainwright*, 477 U.S. 399 (1986), "shocking to the conscience," *Rochin v. California*, 342 U.S. 165 (1952), and offensive to "a principle so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 537 (1992). Under the Eighth Amendment, the execution of the innocent is cruel and unusual since it is arbitrary, *Furman v. Georgia*, 408 U.S. 238 (1972), and excessive. *Coker v. Georgia*, 433 U.S. 917 (1977).

The Nevada Constitution is violated by the irreparable mistaken application of the death penalty. Nev. Const. Art. 1., § 6 (prohibiting cruel and unusual punishment); Art. 1 § 8, (prohibiting deprivation of life, liberty or property without due process of law.)

In Nevada and elsewhere across the United States, numerous innocent persons who were once condemned to die have been exonerated. In January, 2000, Illinois Governor George Ryan declared a moratorium on capital punishment after the number of men who were wrongly convicted and released from Illinois's death row -- 13 -- exceeded the numbers of persons executed for their crimes since the reinstatement of capital punishment. In April 2002, the Illinois Governor's Commission on Capital Punishment issued a report containing the Commission's recommendations, which are designed to

ensure that Illinois capital punishment is administered fairly, justly, and accurately. All committee members were unanimous in the conclusion that, given human nature and its frailties, no system could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death. On January 10, 2003, Governor Ryan pardoned four more individuals, all former death row inmates, on the grounds that they were not guilty of the offenses for which they were convicted and sentenced to death. On January 11, 2003, Governor Ryan commuted the death sentences of all remaining death row inmates in Illinois.

Since the reinstatement of capital punishment in 1976, at least 107 inmates have been freed from death row due to serious flaws in the legal process, including recantation of witness testimony, incompetent or negligent counsel, withholding of exculpatory evidence by prosecutors or the police, and exoneration through DNA testing. Since 1982, more than 100 inmates, including 12 on death row, have been exonerated by DNA evidence alone.

A comprehensive study conducted by the Columbia University School of Law, revealed that the error rate in death penalty cases in America is indicative of a system that is "collapsing under the weight of its own mistakes." The death penalty system in the United States is "persistently and systematically fraught with serious error. Indeed, capital trials produce so many mistakes that it takes three judicial inspections to catch them, leaving grave doubt whether we catch them all." These serious legal errors are no less common in Nevada, which has the highest death penalty rate in the country. The same Columbia University study concluded that seven out of ten Nevada death penalty cases fully reviewed by the state and federal courts are overturned for egregious errors such as those noted above. Because of the inability of the State of Nevada to prevent execution of innocent persons, the Nevada capital sentencing scheme is invalid and it cannot be applied to uphold the sentence imposed in this case.

Finding beyond any doubt that Vanisi is not an innocent person, the district court denied the claim. (AA, XIII, 2636). Revealing the bias the court possessed against Vanisi,

one wonders whether the conclusion rests upon reliable evidence. The State's case was certainly not subjected to the crucible of adversary testing. Vanisi was represented at trial by counsel in name only. With such apparent structural error the reliability of the verdict is seriously undermined, and, the district court factual determination of Vanisi's lack of innocence is not supported by valid evidence.

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.

The United States Supreme Court has repeatedly held that "the protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." *Herrera v. Collins*, 506 U.S. 390, 430, 432 (1993) (Blackmun, J., dissenting, joined by Stevens, J., and Souter, J.) (citing *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986)). The State of Nevada may not constitutionally inflict the punishment of death upon Vanisi. Such punishment would only be cruelly arbitrary, because it would serve neither of the recognized goals of the capital sanction.

Vanisi's execution would violate the Eighth Amendment because no reasonable person could conclude that, in light of his reformation of character, society's interest in deterrence and retribution outweigh any concomitant consideration of his rehabilitation. When a "sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished `criminal conduct is so atrocious that society's interest in deterrence and retribution *wholly outweighs* any considerations of reform or rehabilitation of the perpetrator.'" *Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J., joined by Blackmun, J., dissenting) (emphasis added).

The U.S. Supreme Court has held that when the execution of an offender makes no "measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless infliction of pain and suffering," it must be barred as

///

excessive under the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (explaining the Court's holding in *Gregg v. Georgia, supra*).

The Supreme Court has recognized retribution and deterrence as the principal goals to be achieved by the capital sanction, while also noting the role of incapacitation of the individual offender. *Gregg v. Georgia*, 428 U.S. at 183 & n.28; *see also Tison v. Arizona*, 481 U.S. 137, 148-49 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *Enmund v. Florida*, 458 U.S. 782, 798-99 (1982); *Ford v. Wainwright*, 477 U.S. 399, 407-410 (1986) (finding that neither deterrence nor retribution are served in the execution of the insane).

Although incapacitation clearly would be served as well by a life sentence, retribution might be conceded to have some residual value in relation to his execution, in view of the heinousness of the offense. The Eighth Amendment, however, requires infliction of punishment not only with a view to the offense but to the character of the offender. *See e.g., Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Vanisi's status as a reformed offender does not serve society's interest in retribution.

The retributive principle that organized society must be willing to inflict punishment on criminal offenders that they deserve is well challenged by the status of a reformed offender. *See Gregg*, 428 U.S. at 183 (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring) in defining "retribution"). Vanisi is no longer the same person who committed the offense. He could only be executed with an abstract view toward the unquestionable outrageousness of the crime, without consideration of his present moral status. The fact that someone, in society's view, may have "deserved" to die for the offense does not support the execution of Vanisi if he truly is no longer the same moral entity alleged to have committed the offense. The public's continued strong support for the rehabilitative purpose of punishment demands, along with the retributive concern for proportionate punishment, "consideration" of Vanisi's rehabilitation.

///

The Supreme Court has generated a line of cases responsive to its concern that jurors not be arbitrarily prevented from considering any evidence, including such evidence as rehabilitation, that could lead to a penalty less than death. Vanisi bases his instant claim for relief, however, on the other chief line of Supreme Court precedent arising from the Court's concern, expressed in *Furman*, that sentencers be meaningfully directed in "distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (Stewart, J., concurring); *see Callins v. Collins*, 510 U.S. 1141 (Blackmun, J., dissenting). Vanisi's execution would be cruel and arbitrary, because retribution is only abstractly served in his case, and deterrence is not served at all. The national moral consensus, suitably expressed by Justice Stevens, *supra*, requires consideration of his rehabilitation, and the commutation of the sentence of such an offender who is rehabilitated.

In short, Vanisi may not presently, nor in the future, be executed because such infliction of punishment would be constitutionally disproportionate due to his status as a reformed errant. *Delo v. Lashley*, 507 U.S. 272, 279, 288 (1993) (Stevens, J., joined by Blackmun, J., dissenting) (recognizing that youth has been considered as an exempt status from execution because of potential for rehabilitation); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (considering youths as a class of offenders ineligible for the death penalty); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (considering persons with mental retardation as a class of offenders ineligible for the death penalty); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that persons who are currently insane are, as a class, ineligible for the death penalty).

Since Vanisi's execution would not serve the punishment goals of deterrence and retribution, it is banned by the Eighth Amendment. In the words of an Illinois prison warden, *infra*, to execute Vanisi would be to "commit capital vengeance, not punishment." In view of Vanisi's rehabilitation, there is utterly no reason to believe that his execution would serve any penal purpose more effectively than the less severe punishment of imprisonment. *Furman*, 408 U.S. at 305 (Brennan, J., concurring). "The purpose of

punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Id.* at 305, 343 (*citing Weems v. United States*, 217 U.S. at 381)). Accordingly, the District Court's denial of this claim was in 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.

Presenting a thirty page argument, laden with social science research, newspaper reporting, analysis of pronouncements of religious bodies, discussion of international law Vanisi showed how the death penalty in general and in his case in particular is contrary to contemporary standards of decency. (AA, X, 1888-1921) The district court concluded that the claim was a compilation of others already addressed and denied it without further discussion. (AA, XIII, 2637). Vanisi respectfully submits the argument presented did indeed have legal merit and the district court erred in giving it such short shrift in denying relief.

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.

Vanisi petitioned the district court to strike the death sentence against him because Nevada's capital punishment scheme empowers prosecutors to seek death, and secure death sentences, in an arbitrary, idiosyncratic, and discriminatory manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The District Court denied this claim finding that counsel was not ineffective in failing to raise claims 7 through 15 claim and that they had no reasonable likelihood of success. (AA, XIII, 2637). In other words, it is difficult to tell from the order whether the district court

even read this claim, as the claim presented included nothing to do with claims 7 through 15, and the district court never even acknowledged the subject matter of the claim. Accordingly, the district court's order ought to be reversed for lack of adequate findings of fact or conclusions of law.

Under Nevada's scheme, prosecutors may seek a death sentence against virtually any defendant indicted for first-degree murder. Neither NRS 200.033, nor any other statutory provision sufficiently guides prosecutors in determining whether to seek the death penalty in a particular case; nor are district attorneys required either to promulgate their own guidelines or to explain their reasons for seeking or declining to seek death in a particular case. Such a scheme allows for the random and capricious selection of death-eligible defendants, and ensures that any discriminatory, bad faith, or otherwise improper decisions to seek death remain hidden: No procedural mechanisms ensure review of the rationales for death-notice decisions in individual cases, or even the factors generally taken into account by prosecutors in making such decisions. This deprives defendants of their right to be free from cruel and unusual punishment and their rights to due process and equal protection under the Constitution. The State's capital punishment legislation is thus unconstitutional on its face and as administered.[8]

A capital punishment scheme that allows for the arbitrary and capricious selection of capital defendants violates both the Eighth and Fourteenth Amendments to the United States Constitution. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the death sentences under review were deemed:

> cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes] . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.... [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

---

[8] There is an acknowledged difference between a "groundless prosecution" and an "arbitrary and capricious prosecution," *State v. Smith*, 495 A.2d 507, 515-16 (N.J. Super. Ct. Law Div. 1985). It is the latter concern — as to the inherent arbitrariness and inconsistency of the method by which death penalty decisions are made in Nevada — that animates Vanisi's arguments. *Cf. Maynard v. Cartwright*, 486 U.S. 356, 360-64 (1988).

408 U.S. at 309-10 (Stewart, J., concurring) (footnotes omitted); *see Gregg*, 428 U.S. at 188 (*quoting Furman* with approval). To rationalize the selection of those defendants who are to die, the sentencer's discretion must instead be guided and circumscribed. *Furman* mandates that "'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (quoting *Gregg*, 428 U.S. at 189).

Furman addressed the problem of unguided discretion as exercised by the jury in determining sentence. In Nevada, the district attorneys' discretion to select defendants for capital prosecution, which directly implicates sentencing, similarly lacks sufficient guidance. Thus, a key component of the process leading to a death sentence — only those defendants chosen by prosecutors can receive this punishment — rests potentially on whim, and the possibility of facing a death sentence is akin to being "struck by lightning." *Furman*, 408 U.S. at 309.

To be sure, a prosecutor is afforded broad discretion in deciding what charges to bring against a defendant. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). Deciding whether to seek the death penalty, however, is not a charging decision. This decision — which is bound to be subjective and laden with value judgments — implicates only the sentencing, and not the charging, function: The prosecutor does not determine, based on the definitions within the Penal Law, which charges are warranted, but instead decides that certain defendants are eligible to face qualitatively more severe punishment than others indicted on identical charges.

///

The Supreme Court of Utah has recognized this crucial distinction between charging decisions, as to which prosecutors have historically exercised broad discretion, and decisions that go beyond charging, as to which prosecutors are not entitled to unbounded discretion. In *State v. Mohi*, 901 P.2d 991 (Utah 1995), the court examined a scheme that gave prosecutors uncircumscribed power to decide whether to prosecute certain juveniles as adults. Holding that the scheme violated the state constitution, the court observed that, under the scheme,

> prosecutors [have] total discretion in deciding which members of a potential class of juvenile offenders to single out for adult treatment. Such unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decision making. . . . The type of discretion incorporated in the Act is unlike traditional prosecutor discretion. Selecting a charge to fit the circumstances of a defendant and his or her alleged acts is a necessary step in the chain of any prosecution. It requires a legal determination on the part of the prosecutor as to which elements of an offense can likely be proved at trial. . . . The elements of the offense are determined by the charging decision, *and it is only the charging decision that is protected by traditional notions of prosecutorial discretion.*

Id. at 1002-04 (emphasis added).

In Nevada, a district attorney's decision to seek a death sentence is not a charging decision as such; rather, prosecutors have been granted an open-ended license to determine which first-degree murder defendants should be exposed to a qualitatively different punishment upon conviction of the same charge. Thus, the constitutional infirmities of NRS 200.033's death-notice provision cannot be dismissed by reliance on the doctrine of traditional prosecutorial discretion in charging decisions.

Finally, the Supreme Court's consideration of prosecutorial discretion in *Gregg* also reflected the realization that some discretion in the process culminating in the imposition of a death sentence was not only inevitable but beneficial:

> At each of these stages [in the processing of a murder case] an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards . . . .

Gregg, 428 U.S. at 199. Absent appropriate channeling, the prosecution's life and death decisions can be based on a coin toss, a prosecutor's political ambitions, racial consciousness, or on any or no reason at all. Even if every prosecutor tries to behave responsibly by the light of his or her individual judgments, there can be no consistency among the myriad assistants involved in capital cases across the state: Nothing requires that the factors driving NRS 200.033 decisions be articulated, vetted, shared, or reviewed.

Since Nevada's statutory scheme does not provide guidance to prosecutors, or demand that factors governing death-notice determinations be established and subject to judicial oversight, the scheme authorizes arbitrariness in the ultimate imposition of capital sentences. As held in *Furman*, 408 U.S. 238, a death sentence imposed under such a scheme necessarily violates the Eighth Amendment, and should be held to violate the ban against cruel and unusual punishment under the State Constitution as well.

The Due Process Clause protects an individual against arbitrary government action, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), and promotes "fairness" "[b]y requiring the government to follow appropriate procedures" when it seeks to deprive a person of life, liberty, or property, *Daniels v. Williams*, 474 U.S. 327, 331 (1986). State action that moves a defendant from a large "death-possible" group (people indicted for first-degree murder) to a small "death-eligible" group (defendants against whom an NRS 200.033 notice has been filed) is subject to the constraints of procedural due process, as this is the first, critical step in the selection process for imposition of the death penalty. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 294-95 (1998) (Stevens, J., concurring in part and dissenting in part) (procedural due process applies to clemency proceedings, "the final stage of the decisional process that precedes an official deprivation of life").

Nevada's death penalty statutes fail to narrow the class of defendants who are death eligible. *See, e.g., Arave v. Creech*, 507 U.S. 463, 470-74, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (a capital sentencing scheme must direct and limit the sentencer's discretion to minimize the risk of arbitrary and capricious action and must genuinely narrow the class of persons eligible for the death penalty).

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.

Death qualification results in a conviction-prone jury for the guilt phase and disproportionately and unlawfully excludes certain cognizable groups from the jury venire. This prejudice was unnecessary, because the State's interests could be fully reconciled with his rights to a fair and representative jury by death qualifying jurors *after* (and if) he was convicted of a capital offense. Death qualification should be prohibited because of its distinct unfairness to the defendant. Thus, pretrial death qualification violates a Nevada defendant's rights to an impartial jury and due process, as well as other constitutional and statutory rights. *See* U.S. Const. amends. V, VI, VIII, XIV.

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.[9]

Second, the surviving jury, when compared to a traditionally composed jury, is conviction-prone and possesses pro-prosecution attitudes.[10] The social science research demonstrating the conviction proneness of death-qualified juries came from numerous

---

[9] *See Grigsby v. Mabry*, 569 F. Supp. 1273, 1302-05 (E.D. Ark. 1983).

[10] *See Grigsby* 569 F. Supp. at 1287-1313; *Keeten v. Garrison*, 578 F. Supp. 1164, 1171-79 (W.D.N.C.), rev'd, 742 F.2d 129 (4th Cir. 1984). For a listing of pro-prosecution attitudes, see R. 1670-71; see also authorities cited in n. 122, *post*.

researchers using diverse subjects and varied methodologies. "The key to the studies' importance . . . is the remarkable consistency of data. [A]ll reached the same monotonous conclusion: Death-qualified juries are prejudicial to the defendant." *Jurywork: Systematic Techniques* at § 23.04[4][a].[11] "The true impact of death qualification on the fairness of a trial is likely even more devastating than the studies show" because prosecution use of peremptory challenges "expand[s] the class of scrupled jurors excluded as a result of the death-qualifying voir dire." *Lockhart*, 476 U.S. at 190-91 (1986) (Marshall, J., dissenting); *see also Grigsby*, 569 F. Supp. at 1308-10; Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1 (1982).

Nor should this Court accept the contention that life qualification[12] somehow mitigates this prejudice. All jurors — regardless of whether they are life- or death-oriented — fall prey to the conditioning effects of the pretrial process in which the defendant's guilt is assumed. In fact, in life qualifying a jury, the defense may be drawn into the conditioning process, appearing to advocate — not a finding of innocence — but imposition of a lesser sentence. Nor does life qualification's outcome alleviate the conviction proneness or attitudinal bias of the resulting jury. Its failure to produce excusals in numbers comparable to those from death qualification renders illusory any such statutory symmetry. *See* Craig Haney *et al.*, 'Modern' Death Qualification at 628 (finding that the relatively few potential jurors excused because of life qualification has little effect on the overall disposition of the surviving jury).

Third, death qualification substantially reduces jury diversity. African Americans and other racial minorities, women, persons of certain religions, and members of other

---

[11] *See* James R. Acker *et al.*, The Empire State Strikes Back: Examining Death- and Life-Qualification of Jurors and Sentencing Alternatives Under New York's Capital-Punishment Law, 10 Crim. Just. Pol'y Rev. 49 (1999).

[12] Life qualification seeks to identify those jurors whose views in favor of the death penalty preclude or substantially impair them from rendering an impartial sentence. See C.P.L. § 270.20(1)(f); *Morgan v. Illinois*, 504 U.S. 719, 737 (1992); *see also* Point X., *post.*

cognizable groups will be less likely to survive the process. *See* Acker *et al.*, *The Empire State Strikes Back* at 69 ("The death- and life-qualification process causes a greater than 50 percent reduction in the proportion of non-whites eligible for capital jury service."); Samuel R. Gross, *Update: American Public Opinion on the Death Penalty — It's Getting Personal*, 83 Cornell L. Rev. 1448, 1451 (1998) ("Race and sex, the two major demographic predictors of death penalty attitudes, continue to be influential on every survey."); William J. Bowers *et al.*, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J. Crim. L. 77, 128-30 (1994) (1991 poll reveals that race and gender are "statistically significant predictors" for support for capital punishment in New York State); Fitzgerald & Ellsworth, *Due Process vs. Crime Control* at 46 (blacks and women disproportionately excluded).[13] Indeed, a poll indicates that, nationwide, a mere 36% of African Americans continue to support the death penalty. *See* Zogby International, Zogby America June 21, 2000 Poll — Likely Voters, Question 8.

In addition to diminishing the representation of particular cognizable groups, death qualification in Nevada will, by all appearances, serve to disqualify a large percentage of the population from participating in the resolution of the State's most serious criminal cases. This phenomenon will be particularly pronounced in some counties, making capital juries there peculiarly unrepresentative.

This Court should interpret the right to an impartial jury and other guarantees of the State Constitution as forbidding pretrial death qualification. Numerous jurists have reached the same conclusion. *See Griffin*, 741 A.2d at 948 (Berdon, J., dissenting) ("[P]utting the studies aside, anyone with any common sense and who has the experience of life, would be compelled to come to the conclusion that venire persons who favor the death penalty are more conviction prone than those who oppose it."); *Id.* at 953, 955 (Norcott & Katz, JJ., dissenting) (finding empirical evidence convincing but also expressing "intuitive agreement with the claim that death qualified juries are disposed to

---

[13] Vanisi has standing to raise this claim. See *Powers v. Ohio*, 499 U.S. 400, 402 (1991); see also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128 (1994).

convict at the guilt phase"; while cognizant of state's interest in conserving "cost, time and judicial resources," "given the stakes involved, these concerns are [not] compelling enough" to justify death qualifying a jury before the guilt phase); *State v. Bey*, 548 A.2d 887, 923 (N.J. 1998) (Handler, J., dissenting) (criticizing *Lockhart* and noting "in no other context has this Court accepted the proposition that mere prosecutorial convenience — or any state interest — justifies procedures that render the jury somewhat more conviction prone") (citations and internal quotations omitted).

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court first confronted the issue whether death qualification produces an unconstitutionally biased jury for the purpose of determining guilt. Although the Court held that the defendant had not substantiated his claim, it recognized that further proof might have done so. Id. at 517, 520-21 & n.18. In that event, the Court speculated that under the Federal Constitution:

> [T]he question would then arise whether the State's interest in [a neutral penalty-phase jury] may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence — given the possibility of accommodating both interests by means of [alternate procedures].

Id. at 520-21 & n.18. Therefore, at a minimum, the Constitution requires "balancing of the harm to the individual . . . against the benefit sought by the government." *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979). And, even were this Court to accept the notion that a State interest *could* outweigh a capital defendant's state constitutional right to a determination of guilt or innocence by a wholly neutral and representative jury, Nevada would not have such an interest. Accordingly, the district court erred in denying this claim.

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.

The high media profile which this case received and the emotional testimony from the State's witnesses unfairly prejudiced Vanisi in the eyes of the jury, causing the jury to base its decision upon these factors instead of the facts of the case. Accordingly, there is

a strong indication that the death sentence was then imposed under the influence of passion, prejudice, or other arbitrary factors. In *Godfrey v. Georgia,* 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed 398 (1980), Justice Marshall in his Concurring Opinion, explains the problem of passion and prejudice inherent in the capital sentencing context:

> ...I think it necessary to emphasize that even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. See *ante*, at 428. **To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder, see *ante*, at 428-429; *Gregg v. Georgia*, 428 U.S., at 201 -- would effectively grant it unbridled discretion to impose the death penalty.** Such a defect could not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.
>
> * * *
>
> The preceding discussion leads me to what **I regard as a more fundamental defect in the Court's approach to death penalty cases**. In *Gregg*, the Court rejected the position, expressed by my Brother BRENNAN and myself, that **the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments**. Instead it was concluded that in "a matter so grave as the determination of whether a human life should be taken or spared," it would be both necessary and sufficient to insist on sentencing procedures that would minimize or eliminate the "risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." 428 U.S., at 189, 188 (opinion of STEWART, POWELL, and STEVENS, JJ.). Contrary to the statutes at issue in *Furman v. Georgia*, 408 U.S. 238 (1972), under which the death penalty was "infrequently imposed" upon "a capriciously selected random handful," *id.*, at 309-310 (STEWART, J., concurring), and "the threat of execution [was] too attenuated to be of substantial service to criminal justice," *id.*, at 311-313 (WHITE, J., concurring), it was anticipated that the Georgia scheme would produce an evenhanded, objective procedure rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Gregg v. Georgia, supra*, at 198, quoting *Furman, supra*, at 313 (WHITE, J., concurring).
>
> For reasons I expressed in *Furman v. Georgia, supra*, at 314-371 (concurring opinion), and *Gregg v. Georgia, supra*, at 231-241 (dissenting opinion), **I believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an evenhanded manner. But events since *Gregg* make that possibility seem**

> **increasingly remote**. Nearly every week of every year, this Court is presented with at least one petition for certiorari raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny. **On numerous occasions since *Gregg*, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment, frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers of arbitrariness in violation of *Gregg* and its companion cases.** These developments, coupled with other persuasive evidence, n6 strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*. **The disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences.** And while hundreds have been placed on death row in the years since *Gregg*, only three persons have been executed. Two of them made no effort to challenge their sentence and were thus permitted to commit what I have elsewhere described as "state-administered suicide." *Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (dissenting opinion). See also *Gilmore v. Utah*, 429 U.S. 1012 (1976). **The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system -- and perhaps any criminal justice system -- is unable to perform.** In short, it is now apparent that the defects that led my Brothers Douglas, STEWART, and WHITE to concur in the judgment in *Furman* are present as well in the statutory schemes under which defendants are currently sentenced to death.

Godfrey, 466 U.S. at 437-440, 100 S.Ct. at 1770-1771 (emphasis added). Justice Marshall then gave a powerful conclusion:

> I believe that the Court in *McGautha* was substantially correct in concluding that **the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system.** For this reason, I remain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, **it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it -- and the death penalty -- must be abandoned altogether.**

Godfrey, 466 U.S. at 442, 100 S.Ct. at 1772 (emphasis added).

The district court summarily rejected this claim on the grounds it was disposed of on direct appeal and thus barred under the law of the case doctrine. (AA, XIII, 2637). As has been argued previously, the law of the case bar is not absolute, even on identical

///

issues. This Court should again revisit the issue and grant relief on the basis of Justice Marshall's reasoning.

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 authority of *Finger* was not available for Vanisi at the time of trial. Therefore, his constitutional ability to present relevant issues regarding his mental health and intoxication regarding his state of mind during the alleged crime, were never before the court. Likewise, the Nevada Supreme Court could not have reviewed the same on direct appeal.

The record is clear that Vanisi suffered from Bipolar Disorder with psychosis at the time of his arrest, diagnosed first upon his incarceration. Moreover, it is also clear that Vanisi was under the influence of speed and marijuana and suffering from lack of sleep at the time of the crime. (AA, VI, 1263) The jury in the guilt phase was not presented with said information by counsel for Vanisi or the State. Nor was the jury instructed how it might consider such information in it determination of Vanisi's state of mind at the time of the offense.

The district court denied this claim, reasoning that "there was no evidence presented in the habeas corpus hearing supporting such a defense." (AA, XIII, 2638). This finding is erroneous and belied by the record. The facts just reiterated were presented to the district court during the habeas proceedings, and Dr. Bittker presented testimonial evidence of mental illness and incompetency. (AA, VIII, 1611-1647; IX, 1648-1656).

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.

Additionally, in *Finger*, the Nevada Supreme Court found the 1995 amended version of NRS 174.035(4), abolishing the defense of legal insanity, to be unconstitutional and unenforceable. *Id.* 117 Nev. at 575, 27 P.3d at 84. The Court held the portion of NRS 174.035(4) creating a plea of guilty but mentally ill unconstitutional and rejected the amended version of NRS 174.035(3) "in its entirety." *Id.* at 576, 27 P.3d at 84. The *Finger* Court further determined that "legal insanity is a well-established and fundamental principal of the law of the United States" protected by the Due Process Clauses of the United States Constitution. Id. at 575, 27 P.3d at 84. The Court concluded that the pre-existing statutes that were amended or repealed by the 1995 statute should remain in full force and effect. *Id.* at 576, 27 P.3d at 84.

Therefore, 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.

Trial counsel for Vanisi did not contact a mitigation expert to assist them with the Penalty Phase of the trial, even though one was made available to them. Moreover, they did not present a mitigation expert of any kind during the penalty phase of the case. Had they called a mitigation expert during the penalty phase, the outcome, i.e. sentence, would have been different.

The failure of trial counsel to investigate, among other things, Vanisi's state of mind and the effects of substance abuse on his state of mind, as well as mitigation evidence at sentencing, was ineffective and prejudiced Vanisi, as it pertains to his sentencing, as well as his guilt.

Defense counsel has a duty to reasonably investigate possible mitigating evidence. See *Haberstroh v. State*, 109 Nev. 22 (1993). In the case of *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991), the Court determined that prejudice resulted and the *Strickland* standard for reversal based upon ineffective assistance was met:

> Sanborn's defense was clearly prejudiced by his counsel's failure to develop and present evidence which would have corroborated Sanborn's testimony and discredited the state's expert witness. **Because of counsel's lack of due diligence, Sanborn was deprived of the opportunity to present testimony material to his defense, and we are therefore unable to place confidence in the reliability of the verdict**. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Sanborn, 107 Nev. at 405, 812 P.2d at 1284.

Further, the Nevada Supreme Court has recognized the right to effective assistance of counsel at sentencing:

> It is well established that "***the sentencing (of the defendant) is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.***" *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). See also *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Smith v. Warden*, 85 Nev. 83, 450 P.2d 356 (1969).

Cunningham v. State, 94 Nev. 128, 130-131, 575 P.2d 936, 938 (1978).

For example, if mental health records indicate that a psychological evaluation may produce favorable reports sufficient to mitigate a sentence of death, counsel's failure to request such an evaluation is both inadequate and prejudicial. *See, e.g., Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir.1991), *vacated,* 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992), *aff'd sub nom. Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir.1994); *Riley v. State*, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994).

In *Evans v. Lewis*, 855 F.2d 631 (9th Cir.1988), counsel's failure to investigate defendant's mental condition for the purpose of presenting evidence in mitigation of a death sentence was ineffective where the defendant had a prior diagnosis of schizophrenia that could have shown he had an impaired mental state at the time of the crime. *Evans,* at 636. In other cases, a trial attorney's failure to investigate or to offer mental health mitigation has been held to be constituted ineffective assistance of counsel. *See, e.g., Kenley v. Armontrout*, 937 F.2d 1298, 1303-1308 (C.A.8), *cert. denied, Delo v. Kenley,* 502 U.S. 964, 112 S.Ct. 431, 116 L.Ed.2d 450 (1991); *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (CA11 1986), *cert. denied, Thompson v. Dugger*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Therefore, trial counsel's failure to investigate, among other things, available defenses, Vanisi's state of mind and the effects of drug abuse on his state of mind, as well as mitigation evidence was ineffective and prejudiced Vanisi as it pertains to his

///

sentencing, as well as his guilt, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The district court's conclusion to the contrary is erroneous.

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.

Said failures, individually and collectively, constituted ineffective assistance of counsel by trial counsel, in violation of Vanisi's' Fifth, Sixth, Eighth and Fourteenth Amendments. *See also Earl v. State*, 111 Nev. 1304, 904 P.2d 1029, 1034 (1995); *Lay v. State*, 110 Nev. 1189, 1199, 886 P.2d 448, 454 (1994); *Aesop v. State*, 102 Nev. 316, 322, 721 P.2d 379 (1986); *Pertgen v. State*, 110 Nev. 554, 875 P.2d 36, 368 (Nev. 1994).

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.

All claims of error alleged herein 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).

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.

In order to litigate certain claims in his Supplemental Petition, Vanisi was required to divulge work-product materials and confidential communications protected by the

attorney-client privilege.[14] Vanisi sought a protective order pursuant to *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), covering all attorney-client communications divulged by Vanisi in the litigation of his supplemental petition for writ of habeas corpus and all work-product materials of current counsel submitted to the Court to establish prejudice. Accordingly, Vanisi submitted the confidential materials to the district court under seal. The district court denied the motion for protective order and ordered the Supplemental Petition to be unsealed. (AA, IX, 1810-1818). This was error, in violation of Vanisi's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In its decision in *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), the Ninth Circuit addressed a protective order covering attorney-client privileged communications in the context of a Sixth Amendment claim raised in a federal habeas petition. In *Bittaker*, the petitioner was convicted in California of multiple murders and was sentenced to death.

---

[14] Under Nev. Rev. Stat. § 49.095:

> [a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications: 1. Between himself or his representative and his lawyer or his lawyer's representative. 2. Between his lawyer and the lawyer's representative. 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

Also, a communication is "'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Nev. Rev. Stat. § 49.055.

Under Nevada Supreme Court Rule 150(1) & (3)(b),

> (1) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ... . (3) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... (b) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id., at 716. Petitioner filed a federal habeas petition raising several claims, including ineffective assistance of counsel. *Id.* He sought and was granted a protective order in district court. The order precluded the California Attorney General from disclosing any privileged materials to other persons or agencies, including law enforcement and prosecutorial agencies. *Id.* at 717. The state appealed the district court's grant of the protective order. In an *en banc* decision, the Court found that "[a] waiver that limits the use of privileged communications to adjudicating the ineffective assistance of counsel claim fully serves federal interests," and upheld the district court's grant of the protective order. *Id.* at 722.

The district court erred in denying the motion for protective order and in ordering the Supplemental Petition to be unsealed, in violation of Vanisi's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Accordingly, the district court order should be overturned.

///

///

///

///

///

///

///

///

///

///

///

CONCLUSION AND PRAYER OF RELIEF

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 4th day of August, 2008.

SCOTT EDWARDS, ESQ
State Bar No. 3400
729 Evans Ave.
Reno, Nevada 89512
(775) 786-4300
Attorney for Petitioner

THOMAS L. QUALLS, ESQ
State Bar No. 8623
230 East Liberty St.
Reno, Nevada 89501
(775) 333-6633
Attorney for Petitioner

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 4th day of August, 2008.

SCOTT EDWARDS, ESQ
State Bar No. 3400
729 Evans Ave.
Reno, Nevada 89512
(775) 786-4300
Attorney for Petitioner

THOMAS L. QUALLS, ESQ
State Bar No. 8623
230 East Liberty St.
Reno, Nevada 89501
(775) 333-6633
Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Thomas L. Qualls, Esq., and that on this date, I served the foregoing Supplemental Appendix on the party(ies) set forth below by:

__X__ 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:

TERRENCE McCARTHY
Washoe County District Attorneys Office
P.O. Box 30083
Reno, Nevada 89520
(Via Personal Delivery)

DATED this 6 day of August, 2008.

Kristy Schaaf