IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * * * *

SIAOSI VANISI, Petitioner, vs. RENEE BAKER et al., Respondents.	No. 65774

APPELLANT'S OPENING BRIEF

Appeal from Order Dismissing Petition for
Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

RENE L. VALLADARES
Federal Public Defender
TIFFANI HURST
Assistant Federal Public Defender
Nevada Bar No. 11027C
RANDOLPH FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
GARY TAYLOR
Assistant Federal Public Defender
Nevada Bar No. 11031C
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
Counsel for Appellant

TABLE OF CONTENTS

I. JURISDICTION. 1

II. ISSUES PRESENTED FOR REVIEW. 1

III. STATEMENT OF THE CASE. 2

IV. STATEMENT OF FACTS. 5

V. SUMMARY OF ARGUMENT. 8

VI. ARGUMENT.. 10

A. The district court erred by rejecting Mr. Vanisi's claim that prior counsel were ineffective by failing to conduct an adequate extra-record investigation. 10

1. Prior counsel failed to investigate, develop and present significant evidence that Mr. Vanisi suffers from organic brain damage, schizoaffective disorder and other mental health disorders, which began in childhood, and increased in severity in the years leading up to the offense. 13

a. There was a wealth of mitigation and mental health evidence, readily available to present to mental health experts and the jury. 14

(1) Mr. Vanisi displayed childhood signs of mental illness.. 16

(2) The rejection by his family and church increased Mr. Vanisi's bipolar manic behavior. 19

(3) Behavior which initially appeared eccentric, obsessive, and manic turned psychotic. 21

(4) Mr. Vanisi begins to develop an obsession, fueled by delusion, with the police. 28

(5) Mr. Vanisi's obsessive, psychotic, delusions increase in severity. 30

(6) Mr. Vanisi's obsessive and psychotic delusions turn violent. 32

(7) An adequate investigation and properly prepared expert would have provided the jury with evidence central to Mr. Vanisi's defense to first-degree murder and death. 33

b. There was no strategic reason for trial counsel to fail to present evidence of Mr. Vanisi's brain damage and psychosis. 36

c. Initial post-conviction counsel was ineffective by failing to investigate, develop and present evidence regarding Mr. Vanisi's brain damage and psychosis. 42

(1) Counsel were aware of their duty to investigate. 43

(2) Counsel planned to investigate. 44

(3) Counsel would have used the results of the current investigation. 46

(4) Counsel made numerous admissions that failure to investigate was not strategic. 47

(5) Mr. Vanisi was prejudiced by counsel's failure to investigate.. 50

d. The district court erred by failing to find initial post-conviction counsel ineffective. 51

2. Direct appeal counsel was ineffective by failing to argue district court error for giving the Kazalyn instruction over trial counsel's objection; Mr. Vanisi's appeal was not final when this Court rejected the Kazalyn instruction. 58

a. Direct and initial post-conviction counsel were ineffective by failing to argue that the Kazalyn instruction was erroneously given over trial counsel's objection.. 59

b. Prior counsel's inadequate investigation compounded the prejudice. 64

c. Prior counsel was also ineffective by failing to argue that the Kazalyn instruction violates the due process and equal protection clauses, and the prohibition against cruel and unusual punishment. 70

3. Trial and direct appeal counsel were ineffective by failing to argue that the legislature's ban of a not-guilty-by-reason-of-insanity plea was unconstitutional. 74

4. Initial post-conviction counsel's failure to conduct an extra-record investigation contributed to this Court's erroneous re-weighing analysis. 76

a. Initial post-conviction counsel was ineffective by failing to present extra-record evidence to this Court to consider as part of its re-weighing process. 77

b. A proper re-weighing analysis can only be done by a jury. 78

5. Initial post-conviction counsel's failure to conduct an extra-record investigation contributed to this Court's erroneous denial of Mr. Vanisi's Vienna Convention claim. 85

a. This Court erroneously rejected Mr. Vanisi's argument that his Vienna Convention rights were violated.. 87

b. Initial post-conviction counsel was ineffective by failing to conduct an extra-record investigation to demonstrate how Mr. Vanisi was prejudiced by the Vienna Convention violation.. 91

B. Mr. Vanisi's incompetency establishes cause and prejudice for this Court to consider the extra-record claims that initial post-conviction counsel was ineffective in failing to investigate, develop and present.. 95

1. The court psychiatrist found that Mr. Vanisi was incompetent because he was being improperly medicated. 97

2. The court psychologist, who was unqualified to assess whether Mr. Vanisi was being properly medicated, found Mr. Vanisi competent. 100

3. Initial post-conviction counsel was ineffective in litigating this claim. 107

4. Mr. Vanisi's incompetence and initial post-conviction counsel's inadequate extra-record investigation, establish cause and prejudice for the current petition to be considered on the merits. 108

C. Mr. Vanisi can overcome the procedural bars because he is actually innocent. 110

1. Mr. Vanisi is actually innocent of the death penalty. 111

2. Mr. Vanisi is actually innocent of first-degree murder. 118

D. Initial post-conviction counsel was ineffective by failing to raise several substantial record-based ineffective assistance of counsel claims. 120

1. Prior counsel was ineffective by failing to argue that the mutilation aggravating factor was unconstitutional. 122

a. The mutilation aggravating circumstance is unconstitutional. 123

b. The mutilation aggravating circumstance was not supported by sufficient evidence. 127

c. Prior counsel was ineffective for failing to raise this claim. 128

2. Trial and direct appeal counsel were ineffective by failing to argue that the jury instructions were unconstitutional. 129

a. Mutilation. 130

b. Sympathy. 131

c. Malice. 133

d. Death-Eligibility. 135

3. Direct appeal counsel was ineffective for failing to address improper victim impact testimony. 136

a. Victim Impact Evidence. 137

b. Payne v. Tennessee and Nevada Law. 139

c. Application in this Case. 142

d. Prejudice. 147

4. Trial and direct appeal counsel were ineffective for failing to address the improper use of a stun belt on Mr. Vanisi.. 148

5. Trial and direct appeal counsel were ineffective by failing to address prosecutorial misconduct.. 150

6. Trial and direct appeal counsel were ineffective during voir dire. 153

a. Trial counsel failed to life qualify the venire.. 154

b. Trial counsel were ineffective by failing to move to excuse biased jurors. 158

c. Trial counsel ineffectively exercised their peremptory challenges. 159

7. Direct appeal counsel were ineffective by failing to argue that the trial court committed error during the voir dire. 160

a. The trial court did not strike Juror Shaylene Grate even though she indicated that her views would substantially impair her ability to act in accordance with instructions and her oath. 161

b. The trial court erred by denying trial counsel's motion for individually sequestered voir dire.. 162

c. The trial court erroneously denied defense motions that would have allowed trial counsel to conduct an effective voir dire. 163

8. Trial counsel was ineffective by failing to renew their venue motion, and direct appeal counsel was ineffective by failing to argue that the trial venue should have been changed. 164

9. Trial and direct appeal counsel were ineffective by failing to argue that the aggravating circumstances should have been submitted for a probable cause determination. 167

10. Trial counsel and direct appeal counsel were ineffective by failing to argue that gruesome photographs should have been excluded. 174

E. The district court erred by rejecting Mr. Vanisi's argument that the cumulative effect of the errors committed at trial, on direct appeal, and during initial post-conviction proceedings, entitled him to a new trial and sentencing hearing.. 175

1. This Court's denial of Mr. Vanisi's Faretta argument was erroneous. 176

2. This Court's denial of Mr. Vanisi's lethal injection claim was erroneous.. 180

3. This Court's denial of Mr. Vanisi's elected judge's claim was erroneous.. 182

4. This Court erroneously denied Mr. Vanisi's argument that the death penalty is arbitrary and capricious. 184

5. This Court erroneously denied Mr. Vanisi's claim that trial counsel was ineffective for disclosing that Mr. Vanisi had confessed. 185

6. This Court erroneously denied Mr. Vanisi's claim that the pretrial death qualification of jurors is unconstitutional. 186

7. This Court erroneously denied Mr. Vanisi's claim that the district attorney arbitrarily, inconsistently and discriminatorily selects defendants for the death penalty.. 188

VII. CONCLUSION. 190

CERTIFICATE OF COMPLIANCE. 192

CERTIFICATE OF ELECTRONIC SERVICE. 194

TABLE OF AUTHORITIES

FEDERAL CASES

Ake v. Oklahoma, 470 U.S. 68 (1985). 107

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003). 63

Alexander v. Louisiana, 405 U.S. 625 (1972). 173

Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005). 38, 83

Apprendi v. New Jersey, 530 U.S. 466 (2000). . . . . Passim

Atkins v. Virginia, 536 U.S. 304 (2002). 41

Babb v. Lozowsky, 704 F.3d 1246 (9th Cir. 2013). 72

Baze v. Rees, 553 U.S. 35 (2008). 181

Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998). 54

Booth v. Maryland, 482 U.S. 496 (1987). . . . . Passim

Bousley v. United States, 523 U.S. 614 (1998). 75

Boyde v. California, 494 U.S. 370 (1990). 134

Brecht v. Abrahamson, 507 U.S. 619 (1993). 150

Brown v. Sternes, 304 F.3d 677 (7th Cir. 2002). 62

Caldwell v. Mississippi, 472 U.S. 320 (1985). 85

California v. Brown, 479 U.S. 538 (1987). 41, 80, 93

Campbell v. Blodgett, 997 F.2d 512 (9th Cir. 1992).. 185

Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002).. 54

Chambers v. Mississippi, 410 U.S. 284 (1973). 175

Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985). 72

Clemons v. Mississippi, 494 U.S. 738 (1990). 84

Coker v. Georgia, 433 U.S. 584 (1977). 73

Cole v. State of Arkansas, 333 U.S. 196 (1948). 172

Correll v. Ryan, 539 F.3d 938 (9th Cir. 2008). 39

Cullen v. Pinholster, 131 S. Ct. 1388 (2011). 109

Daniels v. Williams, 474 U.S. 327 (1986). 189

Department of Agricultural v. Moreno,
413 U.S. 528 (1973). 72

Deutscher v. Whitley, 991 F.2d 605 (9th Cir. 1993).. . . . . 113, 114

Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014).. 76

Donnelly v. DeChristoforo, 416 U.S. 637 (1974).. 174

Duncan v. Louisiana, 391 U.S. 145 (1968). 153, 160

Dusky v. United States, 362 U.S. 402 (1960). 97, 103

Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998). 160

Eddings v. Oklahoma, 455 U.S. 104 (1982). 39

Edwards v. Carpenter, 529 U.S. 446 (2000). 121

Estrada v. Scribner, 512 F.3d 1227 (9th Cir. 2008). 162

Faretta v. California, 422 U.S. 806 (1975). 176

Fields v. Brown, 431 F.3d 1186 (9th Cir. 2005). 160

Flanagan v. Nevada, 503 U.S. 931 (1992). 152

Furman v. Georgia, 408 U.S. 238 (1972). 188, 189, 125

Gardner v. Florida, 430 U.S. 349 (1977).. 152

Gautt v. Lewis, 489 F.3d 993 (9th Cir. 2007). 170, 172

Godfrey v. Georgia, 446 U.S. 420 (1980). . . . . Passim

Godinez v. Moran, 509 U.S. 389 (1993). 176

Gonzalez v.Pliler, 341 F.3d 897 (9th Cir. 2003). 148

Gregg v. Georgia, 428 U.S. 153 (1976). 122, 152, 184, 188

Grigsby v. Mabry, 569 F. Supp.1273
(E.D.Ark. 1983). 186

Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003). 63

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990). 63

Harris ex rel. Ramseyer v. Blodgett, 853 F. Supp.
1239 (W.D. Wash. 1994). 185

Hayes v. Ayers, 632 F.3d 500 (9th Cir. 2011).. 165

House v. Bell, 547 U.S. 518 (2006). 116, 118, 119

Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). 152

Illinois v. Allen, 347 U.S. 337 (1970). 149, 179

In re Winship, 397 U.S. 358 (1970).. 71

Indiana v. Edwards, 554 U.S. 164 (2008). 177

Irvin v. Dowd, 366 U.S. 717 (1961).. 164

Jones v. U.S., 526 U.S. 227, 232 (1999). 170

Kelly v. California, 555 U.S. 1020 (2008). 136

Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007).. 54

Leonard v. United States, 378 U.S. 544 (1964). 160

Lowenfield v. Phelps, 484 U.S. 231 (1988). 125

Martinez v. Ryan, 132 S. Ct. 1309 (2012).. . . . . 52, 105, 110

Matire v. Wainwright, 811 F.2d 1430
(11th Cir. 1987). 64

Maynard v. Cartwright, 486 U.S. 356 (1988). 125, 190, 127

McDonough Power Equipment, Inc. v. Greenwood,
464 U.S. 548 (1984). 155

McGautha v. California, 402 U.S. 183 (1971).. 83

Medellin v. Texas, 128 S. Ct. 1346 (2008). 89, 90

Moore v. Helling, 763 F.3d 1011 (9th Cir. 2014). 71

Morales v. Hickman, 415 F. Supp. 2d 1037
(N.D. Cal. 2006). 180, 181

Morgan v. Illinois, 504 U.S. 719 (1992). . . . . Passim

Murphy v. Florida, 421 U.S. 794 (1975). 165

Murray v. Carrier, 477 U.S. 478 (1986). 115

Nix v. Whiteside, 475 U.S. 157 (1986). 186

Ohio Adult Parole Authority v. Woodard,
523 U.S. 272 (1998). 189

Parle v. Runnels, 505 F.3d 922 (9th Cir. 2007). 175

Payne v. Tennessee, 501 U.S. 808 (1991). . . . . Passim

Penry v. Lynaugh, 492 U.S. 302 (1989). 41, 94

Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). 71

Porter v. McCullum, 558 U.S. 30 (2009). 39, 40

Rideau v. Louisiana, 373 U.S. 723 (1963). 165

Riggins v. Nevada, 504 U.S. 127 (1992). 83

Ring v. Arizona, 536 U.S. 584 (2002). . . . . Passim

Robinson Schriro, 595 F.3d 1086 (9th Cir. 2010). 54, 55

Rohan ex rel. Gates v. Woodford, 334 F.3d 803
(9th Cir. 2003). . . . . Passim

Romano v. Oklahoma, 512 U.S. 1 (1994). 174

Rompilla v. Beard, 545 U.S. 374 (2005). 10

Roper v. Simmons, 543 U.S. 551 (2005). 73

Rosales-Lopez v. United States,
451 U.S. 182 (1981). 154, 155, 163, 164

Ross v. Oklahoma, 487 U.S. 81 (1988). 154

Russell v. United States, 369 U.S. 749,
763-64 (1962). 170

Ryan v. Gonazales, 133 S. Ct. 696 (2013). 105, 109

Sandstrom v. Montana, 442 U.S. 510 (1979). 71

Sawyer v. Whittley, 505 U.S. 333 (1992). . . . . Passim

Schlup v. Delo, 513 U.S. 298 (1995). 116, 119

Schriro v. Sumerlin, 542 U.S. 348 (2004). 75

Sears v. Upton, 561 U.S. 945 (2010). 39

Skilling v. United States, 561 U.S. 358 (2010). 165

Skipper v. South Carolina, 476 U.S. 1 (1986). 41, 83

People v. Flood, 957 P.2d 869 (Cal. 1998). 133

Smith v. Phillips, 455 U.S. 209 (1982). 160

Smith v. Robbins, 528 U.S. 259 (2000). 64

Stankewitz v. Wong, 698 F.3d 1163
(9th Cir. 2012). 39

Strickland v. Washington, 466 U.S. 668 (1984). 52, 64, 180, 185

Stringer v. Black, 503 U.S. 222 (1992). 79

Sullivan v. Louisiana, 508 U.S. 275 (1993). 136

Swain v. Alabama, 380 U.S. 202 (1965). 156

Tuilaepa v. California, 512 U.S. 967 (1994). 122, 124, 125

Tumey v. Ohio, 273 U.S. 510 (1927). 183

Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002). 151

United States v. Flewitt, 874 F.2d 669
(9th Cir. 1989). 179

United States v. Young, 470 U.S. 1 (1985). 151

Uttecht v. Brown, 551 U.S. 1 (2007). 154

U.S. v. Durham, 287 F.3d 1297 (11th Cir. 2002). 149

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002). 85, 131

Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006). 158

Wainwright v. Witt, 469 U.S. 412 (1985). . . . . Passim

Wiggins v. Smith, 539 U.S. 510 (2003). 40, 52, 63

Witherspoon v. Illinois, 391 U.S. 510 (1968). 154, 155, 163, 187

Wolff v. McDonnell, , 418 U.S. 539 (1974). 188

Woodford v. Visciotti, 537 U.S. 19 (2002). 110

Zant v. Stephens, 462 U.S. 862 (1983). 73, 123, 139

STATE CASES

Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983). 144

Archanian v. State, 122 Nev. 1019,145 P.3d 1008 (2006). 77

Atkins v. State, 112 Nev. 1122, 923 P.2d 1119 (1996). 142

Azbill v. Fisher, 84 Nev. 414, 442 P.2d 916 (1968).. 169

Bennett v. State, 111 Nev. 1099, 902 P.2d 676 (1995). 81

Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985). 175

Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). . . . . Passim

Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). 126

City of Las Vegas Downtown Redevelopment Agency
v. Crockett, 117 Nev. 816, 34 P.3d 553 (2001). 134

Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). 152

Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000). 145

Commonwealth v. Carillo, 465 A.2d 1256 (Penn. 1983).. 94

Cooper v. Morin, 399 N.E.2d 1188 (N.Y. 1979). 188

Cordoza v. State, 116 Nev. 664, 6 P.3d 481 (2000).. 133

Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997). 62

D'Agostino v. State, 107 Nev. 1001, 823 P.2d 283 (1991). 145

Ducksworth v. State, 942 P.2d 157, 113 Nev. 780 (1997). 82

Evans v. State, 28 P.3d 498, 117 Nev. 609 (2001). 81

Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001). 176

Ex parte Medellin, 223 S.W.3d, 315
(Tex.Crim.App. 2006). 89

Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001).. . . . . Passim

Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988). 152

Floyd v. State, 118 Nev. 156, 42 P.3d 249 (2002).. . . . . 145, 147

Franklin v. Sheriff, 94 Nev. 676, 585 P.2d 1336 (1978).. 169

Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001). 145, 147

Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000). 64

Griffin v. State, 741 A.2d 913 (Conn. 1999). 187

Gutierrez v. State, 2012 WL 4355518 (Nev. 2012).. 90

Guy v. State, 108 Nev. 770, 839 P.2d 578. 152

Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).. 121

Hern, v. State, 97 Nev. 529, 635 P.2d 278 (1981).. 72

Hernandez v. State, 124 Nev. 978, 194 P.3d 1325 (2009). 77

Hidalgo v. Eighth Judicial District Court ex rel.
County of Clark, 124 Nev. 330, 184 P.3d 369 (2008). 171

Homick v. State, 108 Nev. 127, 835 P.2d 600 (1992). 142

Hymon v. State, 121 Nev. 200, 111 P.3d 1092 (2005). 149

Ikie v. State, 107 Nev. 916, 823 P.2d 258 (1991). 171, 173

In re Marquez, 822 P.2d 435 (Cal. 1992). 52

Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002). . . . . Passim

Jones v. State, 107 Nev. 632, 817 P.2d 1179 (1991). 185

Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004). 142, 143

Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). . . . . Passim

Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988). 134

Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996). 13

Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994). 144

Laney v. State, 86 Nev. 173, 466 P.2d 666 (1970). 170, 171

Lara v. State, 120 Nev. 177, 87 P.3d 528 (2004). 13

Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998). 134, 153

Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). . . . . Passim

Maestas v. State, 128 Nev. Adv. Op. 12,
275 P.3d 74 (2012). 172, 173

Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002). 52, 70, 177

Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996). 115

McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). 77

McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009). . 4, 12, 135, 181

McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995). 143

Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985). 144

Nay v. State, 123 Nev. 326, 167 P.3d 430 (2007). 70

Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2009). 61, 64

Parker v. State, 109 Nev. 383, 849 P.2d 1062 (1993). 145

Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988). . . . 115, 144, 119

People v. Phillips, 414 P.2d 353 (Cal. 1966). 133, 134

Powell v. State, 108 Nev. 700, 709 (1992). 60

Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006). 113

Robertson v. Sheriff, 85 Nev. 681, 462 P.2d 528 (1969). 169

Schoels v. State, 114 Nev. 981, 966 P.2d 735 (1998). 151

Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998). 136, 144, 148

Smith v. State, 110 Nev. 1094, 881 P.2d 649 (1994). 144

State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003).. . . . . 115, 119

State v. Bey, 548 A.2d 887 (N.J. 1998). 187

State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003). 81, 115

State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998). 171, 173

State v. Mohi, 901 P.2d 991 (Utah 1995). 189

State v. Payne, 791 S.W.2d 10 (1990).. . . . . Passim

State v. Smith, 496 A.2d 507 (N.S. Super. Ct. Law. Div. 1985). 190

Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004).. 121

Torres v. State, 2004 WL 3711623 (Okla.Crim.App. May 13, 2004). 91

Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). . . . . Passim

Vanisi v. State, 2010 WL 3270985 (2010).. . . . . Passim

Viray v. State, 121 Nev. 159, 111 P.3d 1079 (2005).. . . . . 170, 171, 173

Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996). 144

Young v. State, 103 Nev. 233, 737 P.2d 512 (1987). 144

FEDERAL STATUTES

28 U.S.C. § 2254(b). 182

La. Code Crim. Proc. Ann. art. 905.3 (1984). 112

U.S. Const. amend VI. 160, 153, 171

U. S. Const. Amend. VIII. 184

U.S. Const. amend. XIV. 90, 153, 160

STATE STATUTES

NRS 34.575(1). 1

NRS 34.830. 1

NRS 177.015(1)(b), (3). 1

NRS 172.255 169

NRS 172.285(1) 169

NRS 173.015 169

NRS 173.035(1) 169

NRS. 173.045(1). 169

NRS 173.075(1) 170, 171, 172

NRS 174.035(a) 75

NRS 175.554(3) 135

NRS 176.015(3) 137

NRS 176.015(5)(b)(1-3). 137

NRS 176.015(f)(a)(1-4). 144

NRS 178.415 96

NRS 200.030(1)(a). 71

NRS 200.030(4)(a). 113, 167, 168

NRS 200.033 190

NRS 200.033(8) 126

Nev. Const. Art. 1 § 5. 181

Nev. Const. Art. 1 § 6. 184

Nev. Const. Art. 4 § 21. 90

Nev. Const. Art. 6 §§ 3, 5. 182

MISCELLANEOUS

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003), 31 Hofstra L. Rev. 1028. . . . . 53, 54, 56, 156

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).. . . . . 156, 158

APA Diagnostic and Statistical Manual of Mental Disorders 105 (5th ed. 2013). 65

APA Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994). 65

Appointment and Performance of Counsel in Death Penalty Cases (1989 ABA Guidelines). 4, 156

Antonin Scalia & Bryan Garner, Reading Law 195 (2012). 126

Antonin Scalia, God's Justice and Ours: First Things (May 2002). 85

Blacks Law Dictionary (9th ed. 2009).. 123

Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 323-24 (1983). 40

International Court of Justice (ICJ). Case Concerning Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31). 88

James R. Acker et al., The Empire State Strikes Back: Examining Death- and Life-Qualification of Jurors and Sentencing Alternatives Under New York Capital-Punishment Law, 10 Crim. Just. Pol'y Rev. 49, (1999). 186

Krauss, Bonora, National Jury Project, Jurywork: Systematic Techniques, § 23.04(4)(a). 186

Merriam Webster Dictionary. 123

M'Naghten's Case, 8 Eng.Rep. 718, 10 Cl. &. 76

N.R.A.P 28(e)(1).. 192

Nevada Indigent Defense Standards of Performance, ADKT. 54

State v. Daniels, Clark County Case No. C126201. 82

State v. Evans, Clark County Case No. C-116071. 81

State v. Powell, Clark County Case No. C-148936. 81

State v. Rodriguez, Clark County Case No. C-130763. 81

State v. Strohmeyer, No. C-144577. 81

Vienna Convention on Consular Relations,
Article 36(1)(b). 86

Welch S. White, Effective Assistance of Counsel
in Capital Cases: The Evolving Standard of
Care, 1993 U. Ill. L. Rev. 323, 361. 41

U.S. Census Bureau, Reno City, Nevada. 165

I. JURISDICTION

This is an appeal from a district court decision denying a petition for writ of habeas corpus in a capital case, Case No. CR98-P0516. The decision in this matter was issued on April 10, 2014, 25AA6240-45, and entered on April 25, 2014, 25-26AA6246-53.[1] A timely notice of appeal was filed on May 23, 2014. 26AA6254-56. This Court has appellate jurisdiction over the instant appeal pursuant to NRS 34.575(1), 34.830, 177.015(1)(b), (3).

II. ISSUES PRESENTED FOR REVIEW

A. Did the district court err by rejecting Mr. Vanisi's claim that initial post-conviction and trial counsel were ineffective by failing to conduct an extra-record investigation?

B. Did Mr. Vanisi's incompetency during initial post-conviction proceedings establish cause and prejudice for this Court to consider extra-record claims that initial post-conviction were ineffective by failing to investigate, develop, and present?

C. Did the district court err by rejecting Mr. Vanisi's claim that he is actually innocent?

---

[1] All citations to "AA" refer to the Appellant's Appendix. Appellant complied with NRAP 30(b)(1) by proposing a joint appendix, but Respondents declined.

D. Did the district court err by rejecting Mr. Vanisi's argument that initial post-conviction were ineffective by failing to litigate several substantial record-based ineffective assistance of counsel claims?

E. Did the district court err by rejecting Mr. Vanisi's argument that the cumulative effect of the errors committed at trial, on direct appeal, and during the initial post-conviction proceedings, entitle him to a new trial and sentencing hearing?

III. STATEMENT OF THE CASE

On January 14, 1998, Mr. Vanisi was charged by complaint with Murder in the First Degree; Robbery with the Use of a Deadly Weapon; and two counts of Robbery with the Use of a Firearm. 2AA251-55. On February 3, 1998, the Complaint was amended to include a fifth count: Grand Larceny. 2AA256-60. A preliminary hearing was held on February 20, 1998, and an Information containing the same counts was filed on February 26, 1998. 2AA262-69. The State filed its notice of intent to seek the death penalty on February 26, 1998. 22AA5323-29. Mr. Vanisi pled not guilty on March 10, 1998. 10AA2356. Mr. Vanisi's trial commenced on January 11, 1999, before the Honorable Connie Steinheimer and ended in a mistrial on January 15, 1999. 11AA2617-

20.[2] Mr. Vanisi's second trial commenced on September 20, 1999. 1SA1. Mr. Vanisi did not testify. On September 27, 1999, the jury returned a guilty verdict for murder in the first-degree with use of a deadly weapon and one count of larceny. 4 AA 988-93.

The penalty hearing began on October 1, 1999, and concluded on October 6, 1999. The jury found three aggravating circumstances: (1) the murder was committed during the commission of a robbery; (2) the murder was committed upon a peace officer who was engaged in the performance of his official duty, and the defendant knew or reasonably should have known that the victim was a peace officer; and (3) the murder involved mutilation. 4-5AA994-1001. The jury sentenced Mr. Vanisi to death. 4-5AA994-1001.

On November 22, 1999, the court entered the death judgment. 22AA5330-32. Mr. Vanisi timely appealed on November 30, 1999, and this Court affirmed on May 17, 2001. Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). Mr. Vanisi's petition for writ of certiorari to the United States Supreme Court was denied on November 13, 2001.

---

[2] The Honorable Connie Steinheimer also handled both the initial and successive post-conviction proceedings.

On January 18, 2002, Mr. Vanisi filed a pro se petition for writ of habeas corpus (post-conviction) in the Second Judicial District Court. 5AA1104-15. Counsel filed a supplemental petition on February 22, 2005, 5-6AA1125-318, a reply to the State's response on March 16, 2005, 6AA1319-325, and McConnell briefing on March 28, 2007, 6-7AA1326-589. On May 2, 18, 2005, and April 2, 2007, the state district court conducted an evidentiary hearing, 7-8AA1590-1816, and subsequently denied post-conviction relief on November 8, 2007, 8AA1817-32. Mr. Vanisi filed a timely notice of appeal on November 28, 2007. This Court affirmed on April 20, 2010, 8-9AA1991-2002, denied the petition for rehearing on June 22, 2010, and issued its remittitur on July 9, 2010.

Mr. Vanisi filed a second petition for writ of habeas corpus on May 4, 2011, within a year of the finality of his initial habeas proceeding. 1AA1-237. He requested an evidentiary hearing. Id. On July 15, 2011, the State filed its answer and motion to dismiss the amended petition. 22AA5470-78. On September 30, 2011, Mr. Vanisi filed his reply and opposition to the State's motion to dismiss. 22-

23AA5479-558. On October 7, 2011, the State filed a response to Mr. Vanisi's Opposition. 24AA5888-91. On February 23, 2012, the district court held oral arguments on the State's motion to dismiss, and granted Mr. Vanisi a limited evidentiary hearing. 24AA4892-942. The order granting the hearing was entered on March 21, 2012. 24AA5943-45. The limited evidentiary hearing was held on December 5-6, 2013. 24-25AA5946-6064; 25AA6139-219. On March 4, 2014, the Court orally denied Mr. Vanisi's petition, and invited the State to draft an order. 25AA6223-30. On March 31, 2014, Mr. Vanisi entered objections to the State's proposed order, 25 AA 6231-36, to which the State responded on April 7, 2014, 25AA6237-39. On April 10, 2014, the district court adopted the State's proposed order in its entirety, and entered its findings denying Mr. Vanisi's petition on April 25, 2014. 25-26AA6240-253. On May 23, 2014, Mr. Vanisi filed his timely notice of appeal. 26AA6254-56.

IV. STATEMENT OF FACTS

A detailed recitation of the facts is included in this Court's opinions both on direct appeal, Vanisi v. State, 117 Nev. at 334-37, 22

P.3d at 1167-69, and on appeal from denial of Mr. Vanisi's prior state habeas petition, 8-9AA1991-2002. Notably absent from both opinions are crucial facts about Mr. Vanisi's background, upbringing, and mental psychosis that would be considered mitigating. This is due to the fact that neither trial nor initial post-conviction counsel fulfilled their obligations to investigate Mr. Vanisi's life and background and present that evidence in mitigation. Despite being appointed thirteen years after Mr. Vanisi's arrest, undersigned counsel were the first of any of Mr. Vanisi's attorneys to conduct a meaningful mental health and mitigation investigation.

If prior counsel had fulfilled their obligations to investigate, this Court would have learned that Mr. Vanisi was brain damaged and psychotic when he committed this offense. This Court would have learned, as verified by thirty collateral sources, that Mr. Vanisi experienced a ten year mental health decline culminating with this offense. See 14AA3381; 14AA3419; 14AA3457; 14AA3465; 14AA3474; 14AA3477; 15AA3515-3567; 15-16AA3750-3794; 16AA3813-3822; 16AA3879-3883; 16AA3903-3907; 17AA4064. Had trial counsel

investigated Mr. Vanisi's Tongan heritage, they would have learned that Mr. Vanisi's Tongan relatives had a hard time spontaneously presenting information about Mr. Vanisi's mental health deterioration when not properly prepared for trial. Tongan psychiatrist Mapa Puloka, M.D. explains:

> The early warning signs of mental illness routinely go unrecognized by most Tongan families until their loved one's life becomes unmanageable and the patients become a threat to themselves and others.
>
> Several superstitious beliefs shaped the views of mental health issues within Tongan culture. The mentally ill were often believed to be bothered or possessed by spirits of the deceased. Many families still seek the advice and assistance of traditional healers before coming into my office for professional help, even now. The traditional healers usually gave the mentally ill various potions and herbal bath mixtures.
>
> . . .
>
> Bipolar disorder, delusional disorders, schizo-affective disorder and schizophrenia are very common diagnoses amongst many of my patients here in Tonga, and I've frequently found that they are inherited disorders which run throughout the patients' blood relations.

16AA3800 ¶¶ 4-5. Indeed, Mr. Vanisi's father appears to have suffered from a similar disorder.20AA4871. Had the information described herein been presented to competent mental health experts, they would

have been able to explain Mr. Vanisi's behavior leading up to the offense and his incompetency during the proceedings. The failure to investigate, develop, and present readily available mental health and social history evidence during the penalty phase of trial was deficient and prejudicial to Mr. Vanisi. There is a reasonable likelihood that had the jury known that Mr. Vanisi was psychotically delusional during the offense, he would not have been sentenced to death.

Other relevant facts will be stated in the argument section of Mr. Vanisi's opening brief

V. SUMMARY OF ARGUMENT

The jury never heard that, at the time he committed his offense, Mr. Vanisi suffered from brain damage, schizoaffective disorder, and an obsessive delusion that he needed to defend himself from eminent police attack. Prior counsel failed to investigate, develop and present evidence that Mr. Vanisi suffered fifteen years of mental health history increasing in severity, which culminated in the instant offense. Despite initial post-conviction counsel's testimony that they failed to conduct an extra-record investigation solely because they thought the court would

extend their filing deadline, the post-conviction judge erroneously found their performance not deficient.

Initial post-conviction counsel were ineffective in other areas. For example, although Mr. Vanisi's case was not final when this Court rejected the Kazalyn instruction, they failed to argue direct appeal counsel's ineffectiveness for failing to attack the first-degree murder instructions given Mr. Vanisi's inability to deliberate. When all errors are considered cumulatively, this Court must find that Mr. Vanisi was prejudiced by counsel's ineffectiveness.

Further, Mr. Vanisi's brain damage and delusional psychosis renders him actually innocent of his offense, and, when combined with invalid aggravating circumstances, renders him actually innocent of the death penalty. Finally, Mr. Vanisi's incompetence, unexposed due to counsel's ineffectiveness, renders initial post-conviction proceedings defective.

/ / /

/ / /

/ / /

VI. ARGUMENT

A. The district court erred by rejecting Mr. Vanisi's claim that prior were ineffective by failing to conduct an adequate extra-record investigation.

The jury, the post-conviction court, and this Court were not informed that, through no fault of his own, Mr. Vanisi deteriorated into a state of brain-damaged, delusional psychosis, culminating with his offense. They did not learn of his long history of hearing voices, talking to nonexistent people, severe personality shifts and overtly bizarre behavior. They did not hear about his organic brain damage and ongoing mental health disorders, first displayed when Mr. Vanisi was a child. They were not privy to his history of being beaten by the police during his mental-health-provoked resistance to their authority. His social history would have offered jurors an explanation for Mr. Vanisi's irrational fixation on the police, and his uncontrollable impulse to defend himself from nonexistent police threats.

Instead of presenting the jury with evidence that Mr. Vanisi was brain damaged, delusional, and psychotic during the offense, trial counsel presented testimony that: (1) ten years prior to the crime, Mr.

Vanisi was an admirable student and a helpful individual, and (2) during his sister's wedding, which occurred several months prior to the crime, Mr. Vanisi's family members found his clothing and behavior to be different. The only witness who testified that Mr. Vanisi displayed pre-offense mentally ill behavior, Mr. Vanisi's ex-wife, was discredited because her information was uncorroborated. The evidence presented at Mr. Vanisi's trial "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." See Rompilla v. Beard, 545 U.S. 374, 393 (2005). Trial counsel admit they had no strategic reason for failing to present mitigation evidence in Mr. Vanisi's current petition. See 1AA20-89 (Claims 1-2).

Similarly, because initial post-conviction counsel's extra-record investigation consisted solely of interviewing prior counsel and having Mr. Vanisi examined for competency, they failed to present Mr. Vanisi's severe mental health issues to the post-conviction court, and to this Court. Initial post-conviction counsel admit they had no strategic reason for failing to investigate, develop, and present extra-record evidence from the current petition. Indeed, they had planned to

investigate Mr. Vanisi's mental health and mitigation after the post-conviction court granted their competency motion filed pursuant to Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 819 (9th Cir. 2003). See VI.A.1.c. below. They did not expect their Rohan motion to be denied, or that they would have to file their supplemental petition four days after its denial. 25AA6220 ¶¶ 6-7; 9SA2120; 9SA2153.

Initial post-conviction counsel's failure to conduct a mental health and mitigation investigation prejudiced Mr. Vanisi not only in connection with his mitigation argument, see 1AA20-100 (Claims 1-2), but also in connection with his claims regarding the invalid first-degree murder instructions, 1AA107, 134–40, 227-31 (Claims 3(A), 8(A), 23); legal insanity, 1AA208-10, 227-31 (Claims 18, 23); McConnell-based re-weighing, 1AA127-28 (Claim 6); and Vienna Convention noncompliance, 1AA147-52 (Claims 9, 23). The district court's ruling, that there is no "objective standard" requiring capital post-conviction counsel to conduct a mental health and mitigation investigation, is clearly erroneous. See 26AA6252.

/ / /

1. Prior counsel failed to investigate, develop, and present significant evidence that Mr. Vanisi suffers from organic brain damage, schizoaffective disorder and other mental health disorders, which began in childhood, and increased in severity during the years leading up to the offense.[3]

Mr. Vanisi's social history was readily obtainable from family members who live in Reno, California, and Utah. See § VI.A.1.a below. Neuropsychologist, Jonathon Mack, Psy.D., reports that:

> An in-depth review of the history of Siaosi Vanisi reveals an individual who was in a state of chronic mental illness at the time of the homicide of Sergeant George Sullivan on 1/14/1998. The history makes it clear that Mr. Vanisi had early onset ADHD and a number of psychosocial losses and traumas in childhood. The history also makes it clear that in his mid-20's Mr. Vanisi had a psychotic break and developed a schizophrenic disorder that is best characterized as a Schizoaffective Disorder due to both a chronic schizophrenic presentation that is separate and apart from his mood disorder, but concomitant with a Bipolar One Disorder that is primarily hypomanic/manic, with much less frequent and remote bouts of depression.

20AA4855-56 (emphasis added). Dr. Mack further reports that:

---

[3] "A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review," Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996), but this Court gives deference to a district court's purely factual findings. See Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

> At the time of the homicide Mr. Vanisi had delusional and perseverative thinking about the need to kill a police officer; he had been talking about an imaginary friend Lester; he had a preoccupation with religious ideas/religiosity, flight of ideas, and emotional lability. He appeared to essentially enter into a state of schizophrenia and persistent hypomania/mania in his early twenties.

Id. Dr. Mack diagnosed Mr. Vanisi as suffering from: Schizoaffective Disorder; Attention Deficit Hyperactivity Disorder (ADHD), Combined Type; Dementia Due to Multiple Etiologies; Amphetamine Abuse and Dependence, Remotely; and a History of Alcohol Abuse. 20AA4858. Schizoaffective Disorder is:

> an illness with coexisting, but independent schizophrenic (psychotic) and [bipolar] mood components. Schizoaffective disorder is seen primarily as part of a schizophrenia spectrum.

20AA4867.

a. There was a wealth of mitigation and mental health evidence, readily available to present to mental health experts and the jury.

At trial, the State emphasized that the testimony of Mr. Vanisi's ex-wife regarding Mr. Vanisi's mental health issues was uncorroborated. But there was a wealth of evidence available about Mr. Vanisi's descent into madness which culminated in the instant offense.

This evidence, detailed extensively in Mr. Vanisi's petition, was provided by family members and friends, most of whom lived, and continue to live, in Reno, California, and Utah. These family members and friends indicate that they would have provided this information to prior counsel had they been asked. A minimal investigation would have revealed the evidence contained in Claim 1 of Mr. Vanisi's petition, which would have enabled an expert to diagnose Mr. Vanisi's brain damage and psychosis, as presented in Claim 2 of his petition. Psychiatrist Siale 'Alo Foliaki, M.D., reports that in order to conduct a valid psychiatric assessment for purposes of mitigation in a capital case, it is imperative that experts be given a comprehensive family history. 20AA4928 ¶ 11.0.

Mr. Vanisi's family history reveals that as long as he was being taken care of by family members in a controlled, albeit abusive, environment, he was able to remain within socially acceptable boundaries despite his mental illnesses. Once Mr. Vanisi was pushed from that controlled environment, however, he began a gradual descent into the psychosis culminating in his offense.

(1) Mr. Vanisi displayed childhood signs of mental illness.

Mr. Vanisi first began displaying recognizably strange behavior after being molested by his older brother Sitiveni. 17AA4071. Mr. Vanisi shared a bedroom with Sitiveni when he arrived in the United States from Tonga in 1976, at age six, until Sitiveni left home in 1981. Id. ¶ 3; 14AA3477 ¶ 34. Vanisi's cousin Miles reports:

> I always suspected that Sitiveni sexually abused [Vanisi] because I witnessed Sitiveni chasing [Vanisi] around the house and putting his fingers in his butt, and they shared the same room. [Vanisi] wouldn't have had any protection from Sitiveni at night when they were in the room by themselves.

17AA4071 ¶ 5. Mr. Vanisi confided in his ex-wife in 1995 that he had been sexually molested by Sitiveni. 15AA3515 ¶ 9. The incest that Mr. Vanisi endured would have brought him great feelings of shame and guilt, as Tongans equate incest with murder, and any family where incest occurs is considered to be cursed. 15AA3543¶ 27.

Mr. Vanisi began engaging in bizarre and inappropriate sexual conduct in front of his peers, such as masturbating openly in front of his cousins, at about the age of 13. 17AA4071 ¶ 7. No one in his family

addressed Mr. Vanisi's mental health issues because of the huge stigma attached to mental illness in the Tongan culture. 16AA3822 ¶ 28. When Mr. Vanisi behaved strangely, people ignored him or told him to be quiet. Id. ¶ 28.

Cousins and friends recall Mr. Vanisi's bizarre behavior continuing throughout high school. While engaging in normal conversation, Mr. Vanisi would suddenly begin yelling and shouting strange things. Id. ¶ 5. It was as if a "switch" went "off and on in his head." Id. ¶ 5. One minute he would talk and laugh with friends, and the next minute he would abruptly walk away, sit by himself and stare off into the distance. Id. ¶ 12; 16AA3813 ¶ 3. People would have to touch him to bring him back to reality. 16AA3822 ¶ 16; 16AA3813 ¶ 5. Mr. Vanisi also displayed a severe blinking and eye squinting problem whereby he would uncontrollably blink and squint without stopping. 16AA3822 ¶ 6. Mr. Vanisi often mumbled, spoke and laughed to himself while walking to school, during classes, during sports practice, at movie theaters and at home. Id. ¶ 7; 16AA3813 ¶ 4.

/ / /

Without reason, there were times when Mr. Vanisi would suddenly begin doing the "Sipitau," an ancient Tongan warrior dance, while walking to school, in school hallways, in classrooms, and during football practice. 16AA3822 ¶ 14. At football practice, while the coach instructed the team, Mr. Vanisi would speak over him and give his own instructions. Id. ¶ 10.

Mr. Vanisi suffered severe mood swings. 17AA4071 ¶ 12. Mr. Vanisi would laugh and joke one moment, and then furiously yell the next. Id. Mr. Vanisi also spoke rapidly, and frequently changed topics without explanation, which made conversation difficult. 16AA3755 ¶ 5. Mr. Vanisi complained that he was unable to control his mumbling, laughing, talking to himself, blinking, squinting, shouting, and blurting out random thoughts, and he did not know why. 16AA3822 ¶ 6. Eventually, Mr. Vanisi began using cocaine and marijuana while in high school—which appeared to calm him down. Id. ¶ 20. When Mr. Vanisi used cocaine, he went from talking non-stop to being absolutely quiet, id., a transition unique to people with mental health disorders.

/ / /

(2) The rejection by his family and church increased Mr. Vanisi's bipolar manic behavior.

After high school, Mr. Vanisi's attempts to exist outside of his controlled family environment failed miserably. Mr. Vanisi became an object of disgrace, scorn and humiliation. Without his controlled family environment, Mr. Vanisi's mental health deterioration accelerated.

Mr. Vanisi was raised in a very strict and devout Church of Jesus Christ of Latter Day Saints (LDS) family. 16AA3887 ¶ 50. Mr. Vanisi became extremely religious by the time he had reached high school and often spoke about the Bible, while encouraging his family members to "do the right thing." 17AA4064 ¶ 17; 16AA3755 ¶ 8. Mr. Vanisi first left home when he was accepted to conduct an LDS mission. Mr. Vanisi's family was full of pride, and there were many celebrations. 16AA3887 ¶ 75; 14AA3477 ¶ 28; 14-15AA3490 ¶ 34.

The mission soon ended, however, when Mr. Vanisi revealed to the church elders that he had fornicated with a girl, and she had become pregnant. 14AA3477 ¶ 29; 14AA3423 ¶ 45. Mr. Vanisi was expelled from his mission and sent home in disgrace. 16AA3887 ¶ 75;

16AA3755 ¶ 11; 15AA3543 ¶ 26; 14AA3477 ¶ 30. To make matters worse, it was revealed that the girl he impregnated was his first cousin, although he did not know it when they were together. 16AA3887 ¶ 76; 15AA3543 ¶ 27; 14AA3423 ¶ 45. The head of Mr. Vanisi's family, his uncle Maile, declared him to be a disgrace to the family and announced that Mr. Vanisi was no longer a part of the family. 17AA4071 ¶ 14.

Shortly after his failed mission, Mr. Vanisi visited his cousin Miles who described Mr. Vanisi as "a little crazy" during the visit. 16AA3755 ¶ 12. Mr. Vanisi "dressed weird and he spoke like he wasn't completely in touch with reality." Id. Mr. Vanisi's speech issues were "ten times worse." 16AA3755 ¶ 12. He frequently changed topics, "spoke off subject," and spoke as if "he was carrying on a conversation with himself." Id. Mr. Vanisi also began verbally "lashing out" and "speaking disrespectfully" to the Tongan head of the family, Maile. 14AA3477 ¶ 30.

Mr. Vanisi moved to Los Angeles, ostensibly to attend college, but mostly to escape his shame. 15AA3543 ¶ 27; 16AA3887 ¶ 77. While in college, Mr. Vanisi became obsessed with the idea of becoming a movie

star. 15-16AA3755 ¶ 12. Mr. Vanisi also began to deny and reject his Tongan heritage, which psychiatrist Siale Foliaki, M.D., attributes to Mr. Vanisi's uncertainty about his identity. 20AA4860. The combination of his mental illness, acting obsession and identity issues led Mr. Vanisi to adopt multiple personalities which eventually consumed him. 20AA4860 ¶ 3.2.8.

(3) Behavior which initially appeared eccentric, obsessive, and manic, turned psychotic.

A wide variety of collateral sources, including roommates, friends, family members and co-workers, provide a consistent account of the deterioration of Mr. Vanisi's mental health from the time that he left home until he committed the instant offense. What initially appeared to be eccentric and quirky behavior, caused by Mr. Vanisi's brain damage, bipolar disorder, and ADHD, evolved into psychotic behavior upon the adult onset of Schizoaffective Disorder. See 20AA4856. Dr. Mack reports that "Mr. Vanisi's Psychotic Disorder appeared to begin in his early twenties, which is consistent with the typical course of a schizophrenic illness." 20AA4858. Dr. Foliaki reports

that the extent of Mr. Vanisi's "distorted sense of self, his cognitive and emotional deficits, become more apparent once he [left] the rigidly organized structure of family, school and church life." 20AA4860 ¶ 3.3.1.

Between 1990 and 1991, while living in Los Angeles, Mr. Vanisi was often incoherent, and frequently laughed during "strange and inappropriate times." 16AA3772 ¶ 7.

In 1992, Mr. Vanisi moved to Mesa, Arizona, where he lived with his cousin Michael and a third roommate. 14AA3457 ¶ 11. He changed his name from George Tafuna (the name given to him by his aunt when he began school) to Perrin Vanacy, after a bottle of Lea and Perrins steak sauce. Id. ¶ 15; 16AA3772 ¶ 3; 15AA3538 ¶ 4; 15-16AA3750 ¶¶ 13, 16; 15AA3532 ¶ 3; 16AA3816 ¶ 9.

During this time, Mr. Vanisi began to inappropriately manifest various personalities, with their own accents and mannerisms. 17AA4064 ¶ 3. Mr. Vanisi also possessed various photo identification cards with different names for each personality. Id. ¶ 4. Mr. Vanisi let his short and neat hair grow long and disorderly, and he would wear

his hair differently according to the personality that he was displaying. Id. ¶ 5. Mr. Vanisi also began wearing wigs and pantyhose. Id. ¶ 5.

Mr. Vanisi slept very little. Id. ¶ 11; 16AA3781 ¶ 22. He would appear at his friend Terry's house at 2 or 3 a.m., knock loudly on the door, and then speak with him about insignificant things as if it were the middle of the afternoon. 16AA3781 ¶ 22.

While in Arizona, Mr. Vanisi impregnated a woman who was the daughter of a police officer. 14AA3457 ¶ 15; 17AA4064 ¶ 17. After the police officer threatened him, Mr. Vanisi fearfully left Arizona and moved to Manhattan Beach, California, in 1993. 17AA4064 ¶ 17.

During a return trip to Lake Havasu, Arizona, Mr. Vanisi met his soon to be ex-wife DeAnn. 15AA3515 ¶ 2. When they first met, Mr. Vanisi told her that he had approached her because Sam Beckett from the television series "Quantum Leap" had entered his body and made him approach her. Id. ¶ 4. Mr. Vanisi told DeAnn that his name was Giacomo. Id. ¶ 7. It was not until two weeks later that DeAnn learned that most people in Los Angeles knew Mr. Vanisi as "Perrin." Id.

/ / /

DeAnn became pregnant with their first son two months later, and her parents made her leave their home. Id. ¶ 5; 15AA3524 ¶ 11. Mr. Vanisi took her in, 15AA3515 ¶ 5, married DeAnn in 1994, and their first son was born two months later. Id. ¶ 14. Because DeAnn was Caucasian, only one of Mr. Vanisi's family members attended their wedding. Id. ¶ 14. Mr. Vanisi insisted that his children's birth certificates contain the last name Vanacy. Id. ¶ 15.

At times during this period, Mr. Vanisi's face would appear serious as he said strange things that would make people laugh, after which Mr. Vanisi would look puzzled. 16AA3772 ¶ 12. Mr. Vanisi frequently talked to himself in front of others, oblivious to their presence. Id. ¶ 13. Although Mr. Vanisi often spoke about becoming rich, he could not keep a job, and did not study or take any courses to acquire skills. 16AA3907 ¶ 6.

Mr. Vanisi began wearing "weird and inappropriate outfits" in public. 16AA3772 ¶ 14. He enjoyed dressing up like a super-hero in electric blue waist tights and a cape. Id. ¶ 14. Mr. Vanisi also would dress in native Tongan clothing like the "Lava Lava" wraps and straw

Hawaiian Hula type skirts, and do war dances. 16AA3787 ¶ 19. Mr. Vanisi was expelled by certain neighborhood establishments because he scared the customers and staff. 14AA3457 ¶ 22. Despite his huge, football-player frame, Mr. Vanisi would wear loose dresses, skirts with wigs, high heels and make-up. 16AA3781 ¶ 9. Mr. Vanisi would wear these and other outfits to bars, restaurants, supermarkets, and stores. Id. ¶ 9.

Mr. Vanisi was hyperactive, suffered from racing thoughts, constantly spoke without ceasing, and would answer himself before anyone could respond to his questions. 14AA3474 ¶ 7. Mr. Vanisi's conversations were always incoherent as he would frequently change subjects and make random comments completely unrelated to the topic. Id. ¶ 7; 14AA3465 ¶ 3.

In 1994, Mr. Vanisi decided to "recommit his life" to the LDS Church. 15AA3515 ¶ 17; 16AA3907 ¶ 11. Mr. Vanisi scheduled a meeting with an LDS Bishop where he confessed "every bad thing that he had ever done in his entire life." 15AA3515 ¶ 17. After the meeting, Mr. Vanisi was excommunicated. Id. Although Mr. Vanisi was allowed

to be present during his sons' blessing ceremonies, he was not allowed to "lay hands on them" during either ceremony. Id. Mr. Vanisi's cousin David had to perform this ceremony on Mr. Vanisi's behalf. Id.; 16AA3755 ¶ 24. Mr. Vanisi's excommunication and inability to "lay hands" on his sons was psychologically devastating. 15AA3515 ¶ 18. According to Dr. Foliaki, collateral reports support that Mr. Vanisi's mental status, already indicative of a Schizophrenic-like illness, deteriorated markedly during this time period. 20AA4860 ¶ 3.3.5.

Indeed, Mr. Vanisi regularly displayed five or six personalities. 15AA3524 ¶ 21; 16AA3816 ¶ 10; 15AA3532 ¶ 21; 16AA3781 ¶ 6. The main personalities were Giacomo, Sonny Brown, Perrin Vanacy, and Rocky. 14AA3457 ¶ 17; 15AA3524 ¶ 17; 16AA3816 ¶ 10; 16AA3781 ¶ 6. Mr. Vanisi would re-introduce himself and behave as if it were the first time that he had met his friends when he changed personalities. 16AA3781 ¶ 7. Mr. Vanisi used hats and wigs to transform into his various personalities. 15AA3515 ¶ 20; 16AA3781 ¶ 8. Strangers were often disturbed by Mr. Vanisi's appearance. 15AA3524 ¶ 16.

/ / /

Mr. Vanisi had an imaginary friend named Lester. 15AA3515 ¶ 22; 15AA3538 ¶ 7; 15AA3524 ¶ 33. Mr. Vanisi explained that Lester was more powerful than Jesus and the devil because Lester controlled the universe while the other two only controlled earth. 15AA3524 ¶ 33.

During this time, in the middle of a conversation with his friend, Tim, Mr. Vanisi's voice, facial expression and demeanor changed and he stated "Timmy, I will protect you," in a "weird deep voice with a strange look on his face." 16AA3787 ¶ 13. The statement was completely out of place, and shortly afterwards Mr. Vanisi "snapped back into his normal self and continued carrying on the conversation like nothing had happened." Id. On another occasion, Tim caught Mr. Vanisi sitting in a corner in his livingroom with a spotlight shined on himself while he sobbed and cried for his mother. Id. ¶ 17; 15AA3524 ¶ 12. As Mr. Vanisi cried, he stated "Stop. . . , No daddy," as if he were being abused. 15AA3524 ¶ 12. On other occasions, Mr. Vanisi would stand silently in the dark, posing like he was a statue, for long periods of time. 16AA3781 ¶ 11.

/ / /

Mr. Vanisi's home contained piles of garbage including plastic bottles and fast food wrappers "laying all over the floor in every room." 16AA3766 ¶ 3; 16AA3816 ¶ 17; 15AA3538 ¶ 5. Mr. Vanisi spoke about building a laser beam, and using his collection of plastic bottles to build a starship. 15AA3515 ¶ 23; 15AA3524 ¶ 33. Mr. Vanisi stated that he was going to use the hundreds of bottles to "help with reentry into the atmosphere and landing the spacecraft." 15AA3524 ¶ 13. Mr. Vanisi reported, in a serious manner, that the bottles would serve as protective cushioning and insulation. Id. Mr. Vanisi also stopped bathing daily, wore dirty clothes and gained a lot of weight. 15AA3515 ¶ 28; 15AA3538 ¶ 4; 16AA3755 ¶ 23; 16AA3766 ¶ 2; 15AA3524 ¶ 31; 16AA3816 ¶ 14.

(4) Mr. Vanisi begins to develop an obsession, fueled by delusion, with the police.

Since high school, Mr. Vanisi believed that the police treated him and other Pacific Islanders discriminatorily. 14AA3457 ¶ 30; 16AA3816 ¶ 15. Mr. Vanisi's feelings about this intensified as he became more mentally unstable. 14AA3457 ¶ 32. Mr. Vanisi frequently complained

about being stopped by the police. 15AA3524 ¶ 35; 15AA3532 ¶ 26; 16AA3816 ¶ 15. Mr. Vanisi believed in resisting what he perceived to be unjust stops. 14AA3457 ¶ 33; 15AA3524 ¶ 35; 16AA3781 ¶ 24. There were several occasions, however, when Mr. Vanisi's strange behavior resulted in his being beaten by police officers. 14AA3457 ¶ 33. At first, Mr. Vanisi would laugh when he was beaten by the police. 16AA3787 ¶ 23. With each encounter, beating, or incident, however, his animosity towards the police grew. 14AA3457 ¶ 35; 22AA5311; 22AA5320; 22AA5343.

In November 1995, Mr. Vanisi engaged in a brawl at a bar during which he fought with several men after they laughed at him because someone turned the lights out while he was using the bathroom. 14AA3457 ¶ 34; 22AA5315. After Mr. Vanisi and his friend left the bar, Mr. Vanisi was stopped by the police because two of the individuals that he had fought with were off-duty police officers. 14AA3457 ¶ 35. When Mr. Vanisi refused to exit his car, the police broke his car window and began spraying him with mace, which had no effect. 15AA3524 ¶ 37. Onlookers report that the police then cut off his

seat-belt and dragged him out of the car while beating him with night sticks. 14AA3457 ¶ 35; 15AA3524 ¶ 37; 16AA3781 ¶ 24; 22AA5315. Mr. Vanisi, who did not fight back, "was a bloody mess, with cuts and bruises all over his head, face and torso." 14AA3457 ¶ 35; 15AA3524 ¶ 37; 16AA3781 ¶ 24.

(5) Mr. Vanisi's obsessive, psychotic, delusions increase in severity.

Between 1996 and 1997, Mr. Vanisi began to completely lose control. 15AA3524 ¶ 30. He began to isolate himself and did not show his wife and children attention or affection. Id. He began speaking in tongues, and frequently rambled about biblical topics and the teachings of the LDS prophet Joseph Smith in nonsensical ways. 15AA3524 ¶ 32; 16AA3816 ¶ 20. Then he would suddenly stick out his tongue and perform the Tongan warrior dance. 15AA3524 ¶ 32.

He would talk to himself for hours in mirrors, using rambling, one-sided, incoherent forms of speech. 15AA3515 ¶ 24. Mr. Vanisi began to talk more about taking his starship into outer space. Id. ¶ 23; 16AA3787 ¶ 16. He often said that he was from another planet, and would say "I'm here . . . but I'm really not here." 16AA3781 ¶ 19. Mr.

Vanisi said that he was building a spaceship so that he could return home to his galaxy. Id. He spoke about having invisible alien friends who no one could see except for him. Id. ¶ 20.These friends were going to accompany him back to his galaxy, where they would go on a mission to see whose god was the greatest. Id. ¶ 20; 16AA3816 ¶ 20.

Mr. Vanisi placed strange patterns of symbols on his walls along with sexually explicit drawings. 16AA3766 ¶ 4; 16AA3816 ¶ 18; 15AA3515 ¶ 25; 15AA3838 ¶ 6; 16AA3781 ¶ 18. Mr. Vanisi also began abusing a diet drug called Fen-Phen in order to lose weight, which appears to have hastened his deterioration. Id.; 15AA3515 ¶ 41; 16AA3787 ¶ 24; 16AA3755 ¶ 36; 15AA3524 ¶ 22. Mr. Vanisi's wife DeAnn finally left Mr. Vanisi when she became very uncomfortable about how Mr. Vanisi's psychotic behavior was negatively affecting their children. 15AA3515 ¶ 26. After DeAnn left, Mr. Vanisi's cousin Michael and friend Greg moved into Mr. Vanisi's apartment. 16AA3816 ¶ 21. Mr. Vanisi's behavior worsened. 14AA3457 ¶ 23; 16AA3787 ¶ 11. Mr. Vanisi began to complain about losing his sense of time. 14AA3457 ¶ 24.

(6) Mr. Vanisi's obsessive and psychotic delusions turn violent.

In 1997, after his neighbor died, Mr. Vanisi began to express a paranoid belief that the police were going to attack and falsely arrest him, although that his neighbor's death was attributed to natural causes. 14AA3457 ¶ 34; 16AA3816 ¶ 22; 16AA3781 ¶ 26. Mr. Vanisi had been working for his neighbor, an elderly woman, who paid him to drive her to work. 14AA3457 ¶ 36. Eventually, his neighbor began paying Mr. Vanisi to have sex with her for two hundred dollars a session. 14AA3457 ¶ 36. Although Mr. Vanisi found her obesity to be very unattractive, he used the money to support his drug habit. Id. ¶ 35; 15AA3532 ¶ 26; 16AA3781 ¶ 26. During one of these sessions, the woman had a heart attack and died. 14AA3457 ¶ 35; 16AA3781 ¶ 26. Despite its natural cause, his neighbor's death significantly exacerbated Mr. Vanisi's delusion that he needed to be prepared to protect himself against false arrest and an unprovoked police attack. 14AA3457 ¶ 34; 16AA3816 ¶ 22; 16AA3781 ¶ 26.

Mr. Vanisi's cousin, Tavake, suggested that Mr. Vanisi stay with him in Reno so that he could reconnect with family and "mentally

reset" himself. 14AA3457 ¶ 39; 16AA3816 ¶ 24. Within two weeks of being in Reno, Mr. Vanisi killed a campus police officer with a hatchet.

> (7) An adequate investigation and properly prepared expert would have provided the jury with evidence central to Mr. Vanisi's defense to first-degree murder and death.

Dr. Mack could have explained to the jury that "at the time of the homicide, Mr. Vanisi had delusional and perseverative thinking about the need to kill a police officer." 20AA4856. Mr. Vanisi relayed to Dr. Mack that, at the time of the homicide, he was carrying a hatchet because he had what Dr. Mack characterizes as a delusional belief that he was going to "get beat up or harassed again" by the police 20AA4833. Dr. Mack could have testified that Mr. Vanisi developed this obsessive delusion, in part, from his numerous encounters with police officers wherein Mr. Vanisi delusionally believed that he had been wrongfully harassed and beaten. Id.; see also, Claim 1 at 54-55.

Dr. Mack reports that the severity of Mr. Vanisi's schizophrenic break raises "a reasonable question as to whether or not Mr. Vanisi was fully sane at the time of the commission of this crime." 20AA4789. Mr.

Vanisi's brain damage and psychosis created a problematic cycle which culminated in the murder of a peace officer: Mr. Vanisi's brain damage and psychosis caused him to behave in a manner that provoked police beatings; beatings by the police fueled Mr. Vanisi's psychosis.

Dr. Mack could have explained to the jury that "Mr. Vanisi's Psychotic Disorder appears to have begun in his early twenties, which is consistent with the typical course of a schizophrenic illness." 20AA4858. Given Mr. Vanisi's underlying cognitive impairments, the effects of the psychosis would undoubtedly have manifested itself in bizarre and unpredictable ways, as the witnesses who knew and spent time with Mr. Vanisi during this time period report. See 1AA20-89 (Claim 1). Dressing in strange costumes, assuming fantastical personalities, obsessively relaying delusions about aliens, Lamanite warriors and a god named Lester, all are consistent with Mr. Vanisi's unique cluster of organic, cognitive, and psychotic impairments.

Dr. Mack reports that "[n]europsychological. . . markers of brain damage are very significant in the case of Mr. Vanisi." 20AA4857. Mr. Vanisi has major cognitive deficits that have increased the severity of

his Schizoaffective Disorder. 20AA4860 ¶ 2.7.3-4. Mr. Vanisi suffers from impaired frontal executive functioning, which was caused by a combination of factors such as multiple head traumas and possible traumatic brain injury. 20AA4789. Mr. Vanisi's "severe executive-frontal dysfunction [includes] a very significant perseverative tendency, impaired complex sequencing, impaired concept formation, and impaired non-verbal abstract reasoning." 20AA4857. This cluster of cognitive deficits causes Mr. Vanisi to think and reason in an impaired and irrational manner, to fixate on his irrational ideas, and to have difficulty preventing himself from acting on those ideas—something which he has displayed throughout his life.

A psychiatrist, Dr. Foliaki, reports that the "risk factors for the development of adult psychopathology are as follows: (1) attachment problems, (2) abuse—which can be passive (neglect) or active (sexual or physical abuse), (3) bullying, (4) pathological parenting, (5) exposure to drugs and alcohol, and (6) peer relationship problems. 20AA4860 ¶ 12.0. As explained in detail in Claims One and Two, Mr. Vanisi experienced all of these stressors as well as issues of identity and grief

due to loss of significant others. Id. ¶ 21.0. Individuals like Mr. Vanisi, who suffer from Schizoaffective Disorder, become much more disabled when they have Mr. Vanisi's brain damage. Id. ¶ 2.7.2. After reviewing a vast amount of records including, but not limited to, Mr. Vanisi's social history, psychiatric reports, and incarceration records, Dr. Foliaki concluded that:

> 1.1 Mr. Vanisi suffers from a chronic and disabling mental disorder known as a Schizoaffective Disorder that greatly impairs his cognitive, emotional and behavioral control and the evidence for this is unequivocal as will be demonstrated in great detail in [this] report.
>
> 1.2 Mr. Vanisi, as part of his Schizoaffective Disorder compounded by substance misuse, was suffering from a severe, psychotically driven disturbance of mind with marked delusional ideas at the time of the instant offense–the murder of Police Sgt. George Sullivan on the 13th of January 1998.

20AA4860.

b. There was no strategic reason for trial counsel to fail to present evidence of Mr. Vanisi's brain damage and psychosis.

Trial counsel admits that:

> Had [they] known that there were several witnesses to Mr. Vanisi's childhood in Tonga who could substantiate [their] defense that Mr. Vanisi was psychotic when he

> committed this crime, [they] could have presented this evidence at trial to support the testimony of Mr. Vanisi's ex-wife that Mr. Vanisi had been suffering from a mental health disorder for some time prior to the crime.
>
> Had [they] had the benefit of an expert report confirming what [their] office suspected—that Mr. Vanisi was psychotic during the offense, and while [they] were representing him[—they] could have utilized those reports both to support [their] defense, and to try to convince the trial judge that Mr. Vanisi was not competent to stand trial.

22AA5297 ¶ 5-6; see also 22AA5300 ¶ 10-11. Mr. Bosler, who is currently the Washoe County Public Defender and formerly Mr. Vanisi's trial counsel, reports that:

> It is current office policy to have a mitigation specialist in all capital cases investigate the client's background for the purpose of identifying whether there is any mitigating evidence such as childhood abuse or trauma, a history of mental health disorders, prenatal drug and alcohol abuse, and other factors that could offer a jury an explanation of how the client had arrived at the point in his life of committing the offenses. . . .
>
> It is current office policy to request medical, mental health, scholastic, criminal and other records, and provide them to both my investigator and mental health experts so that they can perform a complete evaluation of the client.

22AA5300 ¶¶ 8-9. This was not done in Mr. Vanisi's case. Mr. Bosler confirms, and co-counsel, Mr. Gregory, agrees that:

> There is no doubt in my mind that Mr. Vanisi was quite mentally ill throughout his proceedings. Unfortunately, both times Mr. Vanisi was examined for competency, he was found to be competent to stand trial. In desperation, we had Edward Lynn, M.D., a psychiatrist, evaluate Mr. Vanisi to determine whether there was any medication that could help to stabilize him. Unfortunately, despite our best efforts, we were unable to get Mr. Vanisi medication until shortly prior to his second trial.

22AA5297 ¶ 4; 22AA5300 ¶ 3. Mr. Bosler reports that he is "unaware of a strategic reason for not obtaining additional collateral reports . . . supporting [their] theory that Mr. Vanisi was mentally ill when he committed the offense." 22AA5300 ¶ 8. Had prior counsel performed effectively in Mr. Vanisi's case, the jury would have learned that Mr. Vanisi suffered from brain damage and mental health impairments for most of his life which gradually increased in severity until it culminated into full blown psychosis leading to the instant offense.

To perform effectively, counsel must conduct sufficient preparation to be able to present and explain the significance of available mitigating evidence. Allen v. Woodford, 395 F.3d 979, 1000 (9th Cir. 2005). The Supreme Court has reversed a state court ruling that the defendant was not prejudiced by trial counsel's deficiency on

the grounds that the "failure to conduct a thorough—or even cursory—investigation is unreasonable." Porter v. McCullum, 558 U.S. 30, 42 (2009) (per curiam). Where capital counsel fails to interview necessary witnesses, track down critical documents, and ends up presenting a false portrait to the jury, counsel's investigation and presentation of mitigating evidence is woefully inadequate. See Stankewitz v. Wong, 698 F.3d 1163, 1171 (9th Cir. 2012) (finding counsel ineffective for failing to investigate).

Trial counsel in the instant case failed to present any evidence about Mr. Vanisi's brain damage, and about his mental health issues first manifesting when he was a child. Evidence of a mental disorder is a "classic" form of mitigation. See, e.g., Correll v. Ryan, 539 F.3d 938, 950 (9th Cir. 2008). Indeed, the leading case on the necessity of allowing the jury to consider all forms of mitigation dealt in part with consideration of evidence of a personality disorder. Eddings v. Oklahoma, 455 U.S. 104, 113 (1982), accord, e.g., Sears v. Upton, 561 U.S. 945, 951 (2010) (per curiam). The influences that produce these disorders, and their symptoms, are part of the "kind of troubled history

[the courts] have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. at 535; see generally Welch S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 361; Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 323-24 (1983).

The evidence presented during the penalty phase of Mr. Vanisi's trial was similar to that presented during the penalty phase in Porter, 558 U.S. at 33 (extensive mitigation evidence was never presented to the jury, "which left the jury knowing hardly anything about him other than the facts of his crimes"). The Supreme Court ruled that trial counsel's performance was deficient because he failed to obtain any "school, medical or military service records or interview any members of Porter's family." Id. at 39. Porter's trial counsel also ignored pertinent avenues of investigation of which he should have been aware, thus failing to "uncover and present any evidence about Porter's mental health or mental impairment, his family background, or his military service." Id. Here, counsel failed to obtain historical records, ask

members of Mr. Vanisi's family about his mental health history, and present the jury with readily available evidence that Mr. Vanisi's mental health issues have plagued him since childhood.

The failure to present evidence about background and character during the penalty phase of a capital trial is prejudicial because:

> of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Conner, J. concurring) overruled on other grounds, Atkins v. Virginia, 536 U.S. 304 (2002). Where the failure to uncover mitigating information results in the jury being presented with a completely inaccurate picture of the defendant's life, the defendant suffers prejudice. The missing evidence need only be "of such a character that it might serve as a basis for a sentence of less than death." Id. (quoting Skipper v. South Carolina, 476 U.S. 1, 5 (1986)). In his petition, Mr. Vanisi has pled with detail the evidence summarized above that trial counsel were ineffective for failing to

present. See 1AA20-89. Mr. Vanisi incorporates herein this evidence in its entirety.

c. Initial post-conviction counsel were ineffective by failing to investigate, develop, and present evidence regarding Mr. Vanisi's brain damage and psychosis.

Thomas Qualls and Scott Edwards represented Mr. Vanisi during initial post-conviction proceedings. 22AA5292 ¶ 1. Mr. Edwards does not "recall any specific interviews with people other than trial counsel," nor do his billing records reflect any other interviews. 25AA6155; See also 25AA6068-89 (Mr. Qualls's billing records); 9SA2026-2058 (Mr. Edwards's billing records); 25AA6146-47 (Mr. Edwards indicating that he submitted the bills for his and Mr. Picker's work).

Although they were provided information about mitigation specialists to contact, "it never reached the state of appointing one or hiring one." 25A6156. Indeed, no investigation into Mr. Vanisi's "family, into his social history, into his background was ever conducted" by Mr. Edwards or Mr. Qualls. 25AA6156. There is no dispute that the only reason they failed to conduct an extra-record investigation was because they ran out of time. 24AA5998-99.

During their representation of Mr. Vanisi, initial post-conviction counsel became very concerned about Mr. Vanisi's competency to proceed and thereby filed a motion to stay proceedings until Mr. Vanisi was restored to competency. 22AA5293 ¶ 2; 25AA6220 ¶ 2; 24AA5958-61. They planned to conduct an extra-record investigation after the competency motion was resolved, 22AA5293 ¶ 5; 25AA6220 ¶ 6, but instead were forced to file their petition within four days after the motion was denied. As described below, both Mr. Qualls and Mr. Edwards admit numerous times under penalty of perjury that their failure to conduct an extra-record investigation was not strategic. Their declarations and testimony resoundingly belie the post-conviction court's finding that it was reasonable for them to delay their investigation until after the conclusion of their competency litigation.

(1) Counsel were aware of their duty to investigate.

Both Mr. Edwards and Mr. Qualls admit that in order to effectively represent Mr. Vanisi, they should have investigated all aspects of his case, including mitigation, 22AA5293 ¶ 3; 25AA6220 ¶ 3. Mr. Qualls testified that "the primary reason" that you want to conduct

an extra-record investigation "is so that you can make informed choices." 24AA5991. "You want to identify and raise all the constitutional error . . . there may be any number of other issues that don't maybe rise to the level of due process or constitutional error alone, but together, with other errors, they may." 24AA5974.

Qualls testified that the first steps towards identifying due process or constitutional error is to read the record and prior counsel's file, and the next step is to investigate things that

> don't appear in the record. And that's, again, a key difference between a direct appeal and a habeas proceeding, is that you then have to start uncovering, marshaling evidence that doesn't appear in the record.

24AA5975-76. This includes obtaining "educational records, medical records, prior psychiatric records." 24AA5977.

(2) Counsel planned to investigate.

Both Mr. Edwards and Mr. Qualls report that it was their plan to conduct a thorough investigation into Mr. Vanisi's life, obtain all medical, employment and educational records, and provide competent experts with an in-depth social history. 22AA5293 ¶ 4; 25AA6220 ¶ 5. Indeed, Mr. Edwards testified that Mr. Vanisi's "mental health issue

was the one issue that I thought was–you know worthy of further investigation right off the bat . . . the mental health issue as perhaps a mitigating factor. 25AA6167.

Counsel indicated that exploring Mr. Vanisi's cultural and family background, including travel to Tonga with a cultural expert, was required given that Mr. Vanisi was born and partially raised in Tonga. 22AA5293 ¶ 4; 25AA6220 ¶ 4; see also 25AA6030 (evidence uncovered regarding the prevalence of hiding of mental illness in the Tongan culture was extremely important). Mr. Qualls testified that he wanted to develop Mr. Vanisi's "social history," and obtain an investigator to assist in developing the "very rich [Tongan] cultural history that we thought was relevant." 25AA5981.

During the hearing, Mr. Qualls identified some of his handwritten notes referencing the investigation that he had planned to conduct, which included hiring a mitigation expert and a Tongan expert. 24AA5983. (Hearing Ex. 205). Mr. Qualls testified that their files contained a bibliography of resources for defense counsel in death penalty cases. 24AA5965 (referencing Ex. 218). Further, counsel files

contained emails from mitigation specialists, and an attorney from the Habeas Corpus Resource center. 24AA5965-66. The emails reflect Mr. Quall's and Mr. Edwards' planned to hire a mitigation expert. 24AA5969.

(3) Counsel would have used the results of the current investigation.

Mr. Qualls testified that the mitigation exhibits attached to Mr. Vanisi's current petition "appear to be relevant to what [he] would [have] want[ed] to know with regard to [his] investigation," and that:

> Each of them were pieces of information that would have been relevant and helpful to me in deciding what I was going to put forward with the judge. I cannot say that each one of them I would have definitely included as a–you know, as a pillar of the case or declarations or witnesses I wanted to put on, but it was all relevant and important to the investigation.
>
> Most of it, I'm sure I would have–I hope I'm not shooting myself in the foot here–wanted to put on to present a complete picture of Mr. Vanisi and a complete picture of what was out there because, again, the idea being that you can't make a strategic decision about what information to put either before a judge or a jury unless you have that information to review.
>
> So from a post-conviction habeas standpoint of alleging IAC of trial counsel, I would have wanted it all to show that defense counsel could not have made a strategic decision

about what story to put on about Mr. Vanisi without having the complete story.

25AA6010 (emphasis added).

(4) Counsel made numerous admissions that their failure to investigate was not strategic

Both Mr. Qualls and Mr. Edwards report that they did not have a strategic or tactical reason for failing to implement their plan to conduct an extra-record investigation. 22AA5293 ¶ 5-6; 25AA6220 ¶ 6-7. Indeed, Mr. Qualls testified that since they did not start an investigation, there was nothing that led them to believe that one would not be fruitful. 25AA6159. "We didn't know anything that told us not to investigate." 25AA6061.

Although Mr. Edwards testified that he had a strategic reason for addressing Mr. Vanisi's incompetency first, he admitted that he had no strategic reason for failing to conduct any mitigation investigation. 25AA6159. Mr. Edwards testified that the only thing that prevented him and Mr. Qualls from conducting the investigation was that they were only allowed a few days to file their petition after the denial of their Rohan incompetency motion. 25AA6154. "When the Rohan motion

was denied, we were left without [extra-record investigation] as an option." 25AA6154-55. Mr. Edwards agreed that if they had suspected that the judge was going to order an amended petition to be filed so quickly after the denial of their incompetency motion, he would not have postponed his factual investigation. 25AA6163.

Similarly, Mr. Qualls testified that the only reason he did not request investigative and expert funds was that he thought that they would have time to request funds after proceedings were stayed due to Mr. Vanisi's incompetency. 22AA5293 ¶ 5. Indeed, Mr. Qualls's entire testimony confirms that the failure to investigate Mr. Vanisi's case was not strategic, they simply believed that they would have more time:

> Q. . . . did you anticipate that the Court would have a hard and fast four-day time for you to file your petition?
>
> A. Whether it was reasonable or not, I did not foresee that coming.
>
> Q. So you expected you would have at least some time to complete your investigation and draft a petition?
>
> A. Yeah. Again, our plan was Rohan first and then we'll have plenty of time to do our investigation while it is stayed. We didn't think that there was any issue about Mr. Vanisi's mental health issues again. That could have been a mistake, but we obviously believed in the Rohan motion. We

> knew the mental health issues were real, and we thought we would have some kind of stay to continue to work on the case. So we were surprised both by the denial of the Rohan motion and by the order to file our supplement [in 4 days].

25AA6033.

Mr. Qualls also testified that because of Mr. Vanisi's psychosis, Mr. Vanisi was unable to help counsel with any investigation, but this was not the reason for their failure to conduct an extra-record investigation. 25AA6050-54. Indeed, Mr. Qualls testified that conducting an adequate investigation could have, and should have, been done while they were pursuing the Rohan incompetency motion, 25AA6065, and the only reason they did not do this was because they thought that they would have plenty of time to conduct an investigation after the Rohan motion was granted. 25AA6055-60 (the plan was for the Court to follow the psychiatrist's medication recommendations so that they could get Mr. Vanisi to a point of competency to assist with his investigation).

Like Mr. Qualls, Mr. Edwards also testified that it was his intent to conduct a complete extra-record investigation. 25AA6151 ("Yes. A complete investigation, that's right, into the things that [current post-

conviction counsel] developed now in your work on this case."); 25AA6153. Mr. Edwards testified that after he filed the Rohan motion, but before its denial, he only completed eight hours of work on Mr. Vanisi's case. After the denial of the Rohan motion, he put in 24 hours of work, in the next four days before the supplemental petition was due, working on an interlocutory appeal as well as the supplemental petition. 25AA6164. Mr. Qualls explained that while they were able to use the few days available to draft what he considers to be very strong record-based claims, they simply were unable to conduct their planned extra-record investigation. 24AA6988.

(5) Mr. Vanisi was prejudiced by counsel's failure to investigate.

In their supplemental petition, initial post-conviction counsel included an ineffective assistance of trial counsel claim for failing to investigate and develop mitigation. 5-6AA1125. Ironically, the same judge who enforced the short filing deadline despite counsel's request for additional time—thereby guaranteeing that no extra-record investigation would be conducted—denied this claim because counsel failed to identify what extra-record evidence could have been

discovered. 25AA6002. Further, initial post-conviction counsel failed to raise substantial extra-record based claims. See VI.D below. A reasonable likelihood exists that, but for prior counsel's deficient performance, Mr. Vanisi would have received a more favorable outcome.

d. The district court erred by failing to find initial post-conviction counsel ineffective.

Despite initial post-conviction counsel's testimony that they had no strategic reason for failing to conduct an extra-record investigation in Mr. Vanisi's case—indeed, their only reason for failing to do so was that they thought that their competency motion would win and they would be granted a stay, during which they would have had time to conduct an investigation—the district court unreasonably concluded "that Vanisi has failed to prove that specific decisions, act or omissions of post-conviction counsel were deficient." 26AA6252.[4] In reaching its

[4] Focusing solely on deficiency, the post-conviction court did not address the issue of prejudice. If this Court concludes that counsel were indeed deficient, this Court must reverse based upon the overwhelming evidence of prejudice contained herein, or remand to the district court for an evidentiary hearing to determine if, with proper testimony about Mr. Vanisi's mental health and social history, there was a reasonable probability of obtaining a sentence other than the

conclusion, the district court erroneously reasoned that it did not believe that there was an "objective standard," that required counsel to conduct an extra-record investigation in Mr. Vanisi's case. This finding completely conflicts with the caselaw and the prevailing legal standards at the time that initial post-conviction counsel represented Mr. Vanisi.

The Supreme Court in Martinez v. Ryan, 132 S. Ct. 1309, 1317-18 (2012), recently recognized that many states, like Nevada, appropriately defer claims of ineffective assistance of trial counsel to initial state post-conviction proceedings because such claims "often require investigative work" and "depend on evidence outside the trial record". Indeed, resorting to evidence outside the record is virtually always required to demonstrate prejudice from the ineffective assistance of trial counsel. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. Smith, 539 U.S. 510 (2003); In re Marquez, 822

---

death penalty. See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("This court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true would entitle him to relief.").

P.2d 435, 446 (Cal. 1992) ("To determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented the . . . defense."). Put differently, failing to conduct an extra-record investigation is usually fatal to an ineffective assistance of trial counsel claim.

According to the 2003 ABA Guidelines, the objective norms in place at the time of Mr. Vanisi's initial post-conviction proceedings required "[p]ost-conviction counsel [to] fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to . . . continue an aggressive investigation of all aspects of the case." 31 Hofstra L. Rev. at 1079-80. "Because state collateral proceedings may present the last opportunity to present new evidence to challenge the conviction, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made." Id. at 935.

> Counsel's obligations in state collateral review proceedings are demanding. Counsel must be prepared to thoroughly reinvestigate the entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law. . . . Like trial counsel, counsel handling state collateral

> proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment.

Id. at 932-33 (emphasis added); see also Nevada Indigent Defense Standards of Performance, ADKT 411, Standard 2-19(e)(i)..

Thus, in a capital case, post-conviction counsel, like trial counsel, have an obligation to conduct a thorough investigation of evidence of mental impairment, Bean v. Calderon, 163 F.3d 1073, 1080 (9th Cir. 1998), including providing mental health experts with the information needed to develop an accurate profile of the defendant's mental health, Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir. 2002). Counsel must "investigate and present mitigating evidence of mental [impairments]." Robinson Schriro, 595 F.3d 1086, 1109 (9th Cir. 2010) (citing Lambright v. Schriro, 490 F.3d 1103, 1117 (9th Cir. 2007)). Post-conviction counsel must determine whether trial counsel met their duty to "conduct a thorough investigation of the defendant's background," Robinson, 595 F.3d at 1108, including "inquiries into social background

and evidence of family abuse, id., 595 F.3d at 1109. Post-conviction counsel cannot determine whether this duty was met by trial counsel without conducting their own investigation.

Indeed, under Nevada's Indigent Defense Standards, post-conviction counsel is required to "investigate all potentially meritorious claims that require factual support," "secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition," and "seek to litigate all issues, whether or not previously presented, that are arguably meritorious." 23AA5604. Here, the district court ignored these objective capital post-conviction standards when it ruled that post-conviction counsel, like direct appeal counsel, should "make tactical decisions on what issues to present," 26AA6251 (emphasis added), without the benefit of an extra-record investigation.

Contrary to this ruling, the Guidelines that were in place during initial post-conviction proceedings, state "[c]ounsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should: consider all legal claims potentially available; and

thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted." 31 Hofstra L. Rev. at 1028 (emphasis added). "Counsel who decide to assert a particular legal claim should: present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and ensure that a full record is made of all legal proceedings in connection with the claim." Id. at 1028-29.

In particular, the Guidelines state that "[p]ost-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review." Id. at 1079: see also 22AA5488-91 (Vanisi's opposition to motion to dismiss quoting all of the professional norms applying to post-conviction counsel).

/ / /

The district court's reason for remaining "unpersuaded that some as yet unidentified objective standard" required counsel to conduct an extra-record investigation, was that "[n]ew mitigation doesn't automatically win because a reviewing court can 're-weigh the aggravating and the mitigating evidence, both the old and the new," and this re-weighing standard can "certainly affect the decision of where counsel should focus their energies." 26AA6251-52. This ruling is erroneous for two reasons. First, it inaccurately assumes that trial counsel made a strategic decision not to conduct a mitigation investigation—despite the overwhelming written and testimonial evidence that counsel fully intended to conduct this investigation, and only failed to do so because they did not expect the district court to order Mr. Vanisi's petition to be filed four days after the denial of their incompetency motion. See I.A.1.c above. See also p. 66 below. Second, the fact that a particular claim might not "automatically" win, is an improper basis to uphold counsel's failure to investigate. Indeed, if an automatic win were a prerequisite to raising a claim, then the courts might as well close their doors.

2. Direct appeal counsel was ineffective by failing to argue district court error for giving the Kazalyn instruction over trial counsel's objection; Mr. Vanisi's appeal was not final when this Court rejected the Kazalyn instruction.

More than a year before Mr. Vanisi's sentence became final, this Court decided Byford v. State, 116 Nev. 215, 233, 994 P.2d 700, 712 (2000). See Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). In Byford, this Court recognized that the Kazalyn first-degree murder instruction, which was given in Mr. Vanisi's case over trial counsel's objection, see 3AA509; 16AA3947, erased the distinction between first- and second-degree murder, see Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). Had initial post-conviction counsel conducted an adequate investigation, they would have discovered not only that direct appeal counsel was ineffective by failing to raise this argument, but also that Mr. Vanisi was prejudiced by the giving of this erroneous instruction because his psychotic delusions reduced his crime to, at most, second-degree murder.[5]

---

[5] Given that Mr. Vanisi operated under a delusional belief that he was defending himself against an unprovoked attack by the officer, the jury may well have found Mr. Vanisi not guilty by reason of insanity. See VI.A.3.

a. Direct and initial post-conviction counsel were ineffective by failing to argue that the Kazalyn instruction was erroneously given over trial counsel's objection.

Had direct appeal and initial post-conviction counsel conducted an adequate review of the record, they would have discovered that trial counsel objected to the trial court's defective Kazalyn instruction, and proffered their own instruction which separately defined the premeditation and deliberation elements of first-degree murder:

> Willfulness, malice and premeditation may exist, without that cool purpose contemplated, and if so, the result is second-degree murder, not first.
>
> Deliberate means formed or arrived at or determined as a result of careful thought and weighing of considerations for or against the proposed course of action.
>
> While intent and premeditation may arise instantaneously, the very nature of deliberation requires time to reflect, a lack of impulse, and a cool purpose.

16AA3949-50. This instruction would have partially cured the defect that this Court later found to exist in the Kazalyn instruction, namely that the instruction reduces the State's burden by failing to adequately define each element of first-degree murder, willfulness, deliberation and premeditation:

> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

3AA509 (emphasis added); see also Byford, 116 Nev. at 235, 994 P.2d at 714 ("In sum, the Kazalyn instruction and Powell [v. State, 108 Nev. 700, 709 (1992)], and its progeny do not do full justice to the phrase 'willful, deliberate, and premeditated.'").[6]

---

[6]The corrected first-degree murder instruction reads as follows:

> Murder of the first degree is murder which is perpetuated by means of any kind of willful, deliberate, and premeditated killing. All three elements–willfulness, deliberation, and premeditation–must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.
>
> Willfulness is intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.
>
> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must

In Nika v. State, 124 Nev. 1272, 1287, 198 P.3d 839, 850 (2009), this Court ruled that "the change effected in Byford applies to convictions that were not yet final at the time of the change." Byford was decided on February 28, 2000, well over a year before Mr. Vanisi's appeal became final upon issuance of the Remittitur on November, 27, 2001. Byford, 116 Nev. 215, 994 P.2d 700. Because Mr. Vanisi's appeal remained pending for more than a year after Byford was issued, direct appeal counsel was ineffective for failing to argue that the trial court erred by giving Mr. Vanisi the Kazalyn instruction over trial counsel's

---

> not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

Byford, 116 Nev. at 236-37.

objection. Similarly, initial post-conviction counsel were ineffective by failing to argue that direct appeal counsel's failure to raise this claim was ineffective, and that ineffectiveness overcomes any procedural default. See Crump v. Warden, 113 Nev. 293, 303-04, 934 P.2d 247, 253-54 (1997).

Here, the district court refused to entertain claims of ineffective trial, appellate, and post-conviction counsel except as to the failure to conduct an adequate investigation of Mr. Vanisi's mental state. 25AA6246-26AA6253. As shown above, the district court's resolution of that claim was wholly erroneous. See VI.A.1 above. The failure to adequately investigate, and seek expert assistance to analyze, Mr. Vanisi's mental state, also had a prejudicial effect on the premeditation and deliberation issue. See VI.A.2.b below. Because the district court did not conduct a hearing on the ineffective assistance of counsel with respect to the Kazalyn instruction, this Court cannot find that direct appeal or post-conviction counsel had a strategic basis for failing to raise the Kazalyn issue. See Brown v. Sternes, 304 F.3d 677, 691-92 (7th Cir. 2002) ("It is not the role of a reviewing court to engage in a

post hoc rationalization for an attorney's action by 'construct[ing] strategic defenses that counsel does not offer") (quoting Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990)); Hamblin v. Mitchell, 354 F.3d 482, 491-92 (6th Cir. 2003) (claimed strategic justification not asserted on record before court); Alcala v. Woodford, 334 F.3d 862, 871 (9th Cir. 2003) (state's argument about supposed tactical justification "would have us find a strategic basis for trial counsel's actions in the absence of any evidence . . . . We will not assume facts not in the record in order to manufacture a reasonable tactical decision for Alcala's trial counsel."); see also Wiggins v. Smith 539 U.S. 510, 527-28 (2003) (6th Cir. 2003) ("[T]he 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.").

In any event, even if appellate or post-conviction counsel had offered a supposedly tactical justification for not raising the Kazalyn issue, it could not be found reasonable. Trial counsel objected to the instruction, and thus the issue would have "leaped out" at appellate

counsel. See Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Once this Court decided Byford, there could have been no conceivable justification for not asserting the claim, since Mr. Vanisi's appeal was still pending. Finally, there was a "reasonable probability" of a more favorable result if the claim had been raised before this Court rather than the district court, see Smith v. Robbins, 528 U.S. 259, 287–88 (2000); Strickland v. Washington, 466 U.S. 668, 694 (1984), because Mr. Vanisi's mental state was very much an issue. See VI.A.2.b below.[7]

b. Prior counsel's inadequate investigation compounded the prejudice.

Not only was direct appeal counsel ineffective by failing to challenge the erroneous Kazalyn instruction that was given over trial

---

[7] The "reasonable probability" standard is an objective one, which is based upon a tribunal "act[ing] according to law," and does "not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness . . . ." Strickland, 466 U.S. at 694 –95. Thus the "reasonable probability" of a more favorable result here cannot be assessed on the basis of the reaction of a tribunal that declined to consider the invalidity of the Kazalyn instruction as failing to implicate any constitutional right, see Garner v. State, 116 Nev. 770, 787 –88, 6 P.3d 1013, 1024 –25 (2000), but one which recognized that the Byford rule had to be applied to all pending cases. See Nika v. State, 124 Nev. at 1287, 198 P.3d at 850.

counsel's objection, but trial counsel's inadequate investigation compounded Mr. Vanisi's prejudice. The jury was not only denied a first-degree murder instruction that adequately defined premeditation and deliberation, it was also denied substantial evidence that Mr. Vanisi's psychotic delusion prevented him from deliberating. This prejudice was further heightened by the jury instruction that:

> The nature and extent of the injuries, coupled with the repeated blows, may constitute evidence of willfulness, premeditation and deliberation.

3AA508.

As described in detail in section VI.A.1 above, an adequate extra-record investigation would have revealed that Mr. Vanisi's psychosis and brain damage caused him to labor under the delusion that he was compelled to kill an officer, and that he was powerless against this compulsion. 20AA489; 20AA4856 (Mr. Vanisi suffers from both Schizoaffective Disorder and Bipolar Disorder).[8] Mr. Vanisi's psychotic

[8] See generally APA Diagnostic and Statistical Manual of Mental Disorders 105 (5th ed. 2013) [DSM-V] (schizoaffective disorder); id. at 99 (schizophrenia); id. at 123 (bipolar I disorder); see also APA Diagnostic and Statistical Manual of Mental Disorders 292, 274, 350 (4th ed. 1994) [DSM-IV].

delusion that he had to kill an officer was part of his Schizoaffective Disorder. 20AA480 ("The delusion was present at the time of the murder and [Vanisi] felt compelled to act on it."). Indeed, Mr. Vanisi describes the crime as occurring

> when he was walking his dog on the University of Nevada's Reno campus. He said the dog veered off to the police car. He said the police officer got out of his car. He said he walked away from the police officer but the police officer came to him and said something to him that he could not understand and "he grabs me and hits me to man handle me and subdue me and he pulls out his billy club and he jabs at my crotch, starts beating me on the leg and at that time I was upset and mad, he enraged me. I grabbed my hatchet (cause I walk everywhere with it for protection) and I hit him on the head until he falls down and kept hitting him with the hatchet and he fell down.

20AA4835. This description is consistent with second-degree murder if Sergeant Sullivan attacked Mr. Vanisi unprovoked—which is unlikely— or if Mr. Vanisi's delusional psychosis caused him to misperceive that he was under attack—which is likely, given his delusional fixation that he would be unjustifiably attacked and beaten by the police. See VI.A.1.a(4), (6) above.

Indeed, an adequate investigation would have revealed that Mr. Vanisi's delusional psychosis drove him to kill Sergeant Sullivan:

> Mr. Vanisi develops in his adolescent years an obsession that police are purposefully harassing him and racially profiling him. This obsession grows in intensity and the more mentally disordered Mr. Vanisi becomes he begins to form an obsession of a delusional nature about killing a police officer.

20AA4877. In the four weeks leading up to the offense, a series of significant stressors occur for Mr. Vanisi: his wife leaves him because of his mental health deterioration; he increases his self-medicating drug and alcohol use; and his neighbor dies of a heart attack while they are having sex, leading Mr. Vanisi to believe that he is in imminent danger of an unprovoked police attack, despite that his neighbor's death is attributed to natural causes. Mr. Vanisi

> descends into florid psychosis and the psychotically driven notion to kill a policeman is released as his labile mood state increases his impulsivity, and propensity towards violence. Mr. Vanisi kills a policeman that he happened upon in a poorly planned, random, non-rational manner in a psychotic rage. It speaks to his delusional thinking that <u>any police man would do</u>. True to his systematized delusional thinking, Mr. Vanisi experiences a momentary release from the unmanageable emotional tensions that had been driving his behavior. He then makes a number of simplistic, poorly considered decisions as he tries to escape the scene and avoid the consequences of his actions.

20AA4884-85.

Because of his psychotic delusions, Mr. Vanisi was unable to deliberate by weighing reasons for and against the act of killing Sergeant Sullivan. Put differently, Mr. Vanisi's attack on Sergeant Sullivan was formed in passion without time for the passion to subside or for the mental ability to deliberate to occur. See also 20AA4836 (at the time of the offense, Vanisi was "delusional and perseverative."); 20AA4881 ¶ 3.7 ("it was not until [Vanisi] was approached by Police Sgt. Sullivan and assaulted by him (the actual sequence of events is debated) that he takes the hatchet out from under his shirt sleeve and kills Sgt. Sullivan in response to a strong compelling urge that had been building inside of him for a long period of time.").

Mr. Vanisi's delusions therefore prevented him from forming the requisite intent to commit first-degree murder. Mr. Vanisi's mood fluctuations resulted in increased impulsivity and propensity towards violence, undermining the State's theory that this was a willful, deliberate, and premeditated murder. See 20AA4885. Mr. Vanisi's delusional ideas caused him to believe that in order to restore balance in his life, he needed to defend himself against the next police officer

that attacked him which, in his mentally disordered mind, occurred when he came upon the campus police officer. In this context, Mr. Vanisi could not have deliberated about whether or not to kill Sergeant Sullivan because he could not actually weigh reasons for and against his actions. Nor could Mr. Vanisi deliberate without passion—his delusion prevented him from processing his thoughts except within the passion of his delusions. Stuck in these delusions, no amount of time would allow his passions to subside–only proper medication and treatment would have allowed Mr. Vanisi to actually "deliberate" as contemplated under the Byford instruction.

Given the evidence of substantial mental health issues, this Court cannot conclude that giving the Kazalyn instruction was harmless. Here, the equivocation between first- and second-degree murder went to the heart of Mr. Vanisi's guilt phase issues. Thus, this Court must reverse to give effect to the Byford line of cases. In the alternative, this Court should remand to the district court for an evidentiary hearing to determine if, with proper testimony about Mr. Vanisi's mental health, there was a reasonable probability of a result more favorable than a

first-degree murder conviction. See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("This court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true would entitle him to relief.").[9]

c. Prior counsel was also ineffective by failing to argue that the Kazalyn instruction violates the due process and equal protection clauses, and the prohibition against cruel and unusual punishment.

Prior counsel were ineffective, not only by failing to argue that the Kazalyn instruction was erroneous under Byford, but by failing to also argue that it violated the due process and equal protection clauses. See 1AA137-138.

/ / /

[9] The prejudice arising from counsel's ineffective failure to adequately investigate and present evidence of Mr. Vanisi's mental state also affected the validity of the felony-murder theory of first-degree murder. This theory required the murder to take place during the course of a robbery, not the other way around. Because Mr. Vanisi's delusions induced him to kill Sergeant Sullivan, and the taking of his gun and badge was merely an afterthought, the felony-murder theory of first-degree murder cannot be valid. See Nay v. State, 123 Nev. 326, 331–33, 167 P.3d 430, 433–35 (2007).

Under the due process clause, the State must prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). A jury instruction that "ha[s] the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind" violates that petitioner's due process rights. Polk v. Sandoval, 503 F.3d 903, 909 (9th Cir. 2007) (quoting Sandstrom v. Montana, 442 U.S. 510, 521 (1979)) overruled on other grounds by Babb v. Lozowsky, 704 F.3d 1246, 1255 (9th Cir. 2013) overruled on other grounds by Moore v. Helling, 763 F.3d 1011, 1021 (9th Cir. 2014); see also 1AA137-40. Here, the Kazalyn instruction violated the due process clause by relieving the State of its burden of proof by allowing the State to obtain a first-degree murder conviction solely based upon premeditation, rather than by finding the existence of all three elements, willfulness, deliberation, and premeditation. 3AA509; see also NRS 200.030(1)(a) (to be first-degree, a murder must be willful, deliberate, and premeditated). See 1AA138-39.

The Kazalyn instruction also violates the Equal Protection Clause because it treats persons guilty of second-degree murder differently.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). A bare decision to harm a politically unpopular group is not a legitimate governmental interest, failing even rational basis scrutiny. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

The temporary reduction in the burden of proof for first-degree murder that occurred between Kazalyn and Byford treats defendants differently depending on when their cases went to trial. Compare Hern, v. State, 97 Nev. 529, 532, 635 P.2d 278, 280–81 (1981), and Byford, 116 Nev. at 234-35 with Kazalyn, 108 Nev. at 75-76. Thus, activity that would be mere second-degree murder before the Kazalyn decision would instead be first-degree murder during the Kazalyn period. Here, the same activity is or is not death eligible based merely upon whether prior counsel litigated this issue before their client's appeal was final. Further, because the instruction offered juries no guidance to distinguish between first- and second-degree murder, the juries were free to impose a first- or second-degree murder conviction with

complete discretion. This discretion, in turn, subjected similarly situated defendants to different treatment in violation of the equal protection clause.

To avoid arbitrary and capricious application of the death penalty, a death penalty 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 (1983). Allowing the death penalty for second-degree murder violates this admonition: regardless of the aggravating circumstance, allowing the death penalty for second-degree murder fails to narrow the class of death eligible persons.

Additionally, "the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions." Roper v. Simmons, 543 U.S. 551, 560 (2005). Thus, the Eighth Amendment bars "not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." Coker v. Georgia, 433 U.S. 584, 592 (1977). Giving the death penalty to a person who has committed

only second-degree murder violates this requirement because it is excessive.

Because the Kazalyn instruction allows persons guilty of second-degree murder to be found guilty of first-degree murder and sentenced to death, it violates both requirements of the Eighth Amendment.

3. Trial and direct appeal counsel were ineffective by failing to argue that the legislature's ban of a not-guilty-by-reason-of-insanity plea was unconstitutional.

This Court should reconsider its procedural ruling refusing to reach the merits of Mr. Vanisi's claim that his constitutional rights were violated by his statutory inability to present an insanity defense. See Claims 18, 23. See Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001). First, because Finger was issued after the conclusion of Mr. Vanisi's direct appeal proceedings, it consisted of an intervening change in the law which established cause and prejudice to overcome any direct appeal procedural default. Second, initial post-conviction counsel's failure, to investigate, develop, and present the extra-record evidence regarding Mr. Vanisi's severe delusional psychosis at the time of his offense, establishes cause and prejudice to overcome the default that

occurred during initial post-conviction proceedings. Compare VII.A.1-2 above with 8AA1923-24; see also 8AA1996.

This Court's rejection of initial post-conviction counsel's Finger argument, on the basis that it was procedurally defaulted because direct appeal counsel failed to raise it on appeal, was erroneous since Finger was announced on July 24, 2001, three months after the conclusion of Mr. Vanisi's direct appeal. See also Schriro v. Sumerlin, 542 U.S. 348, 351 (2004) (new constitutional substantive criminal law decisions apply retroactively because "such rules . . . 'necessarily carry the significant risk that a defendant stands convicted of "an act that the law does not make criminal"' or faces a punishment that the law cannot impose upon him" (quoting Bousley v. United States 523 U.S. 614 (1998))).

In Finger v. State, 117 Nev. 548, 27 P.3d 66 (Nev. 2001), this Court held that Nevada's 1995 amended version of NRS 174.035(a), abolishing the defense of legal insanity, was unconstitutional. Mr. Vanisi's killing of an officer was based upon his psychotic delusion that he was justifiably defending himself, which fits squarely into the

M'Naghten test as set forth by this Court in Finger, 117 Nev. 548, 576-77, 27 P.3d 66, 84-85 (Nev. 2001) (citing M'Naghten's Case, 8 Eng.Rep. 718, 10 Cl. & Fin. 200, 211 (1843)).

Initial post-conviction counsel's failure to investigate, develop, and present the extra-record evidence of Mr. Vanisi's psychotic delusion, driven by his Schizoaffective Disorder, that he had to defend himself from an unprovoked attack by the officer, was ineffective. See VII.A.1 above. This extra-record evidence turns the original claim presented by initial post-conviction counsel into a new one, and counsel's failure to present this evidence constitutes cause and prejudice for this Court to consider this new claim. See, e.g., Dickens v. Ryan, 740 F.3d 1302 (9th Cir. 2014).

4. Initial post-conviction counsel's failure to conduct an extra-record investigation contributed to this Court's erroneous re-weighing analysis.

This Court struck the robbery aggravating circumstance, found by Mr. Vanisi's jury, and held that it was impermissible to base an aggravating circumstance on the same felony upon which the felony murder was predicated. Vanisi v. State, 2010 WL 3270985 *3 (2010).

This Court, citing Archanian v. State, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006), re-weighed the aggravating and mitigating circumstances and concluded that, absent the inappropriate aggravating circumstance, Mr. Vanisi's jury would have still imposed a sentence of death. Vanisi, 2010 WL 3270985 at 3; see Hernandez v. State, 124 Nev. 978, 985-6, 194 P.3d 1325, 1240-41 (2009). This Court should revisit its conclusion in light of substantial extra-record mitigation evidence that initial post-conviction counsel were ineffective by failing to investigate, develop, and present. See Claim 6. Further, Nevada's idiosyncratic death sentencing scheme requires re-weighing by a jury.

a. Initial post-conviction counsel were ineffective by failing to present extra-record evidence to this Court to consider as part of its re-weighing process.

Initial post-conviction counsel were ineffective by failing to investigate, develop, and present the extra-record mitigation evidence listed above, see VI.A.1-2, to this Court as part of their argument under McConnell v. State, 120 Nev. 1043, 1067, 102 P.3d 606, 623 (2004), see 8AA1869-1876. Although initial post-conviction counsel previously

argued that this Court should remand for a new penalty hearing before the jury, see VI.A.3.b below, they also should have argued that in light of the unconstitutional mutilation aggravating circumstance, see VI.D.1 below, and the substantial extra-record evidence addressed herein, this Court could not properly sentence Mr. Vanisi to death. This Court's re-weighing analysis not only should have excluded additional improper evidence, but also should have included the extra-record evidence that trial counsel were ineffective for failing to present: namely that Mr. Vanisi had a long history of mental illness, and was delusional and psychotic when he committed the instant offense. See VI.A.1.a.

b. A proper re-weighing analysis can only be done by a jury.

Nevada's death sentencing scheme requires, given the circumstances of this case, that a jury re-weigh and re-select the appropriate penalty. Thus, this Court performed this function in error.[10]

---

[10] Moreover, this Court erroneously conflated a re-weighing analysis, which requires close judicial scrutiny, with a harmless error assessment. Compare Vanisi, 2010 WL 3270985 at 3 ("[E]rror is harmless if, after reweighing, this court can conclude beyond a reasonable doubt that the jury would have found the defendant death

This Court concluded that Mr. Vanisi's sentence of death should be upheld essentially because of the nature of the crime: this Court found that the remaining aggravating circumstances (victim was a peace officer and evidence of mutilation) were "strong," while "none of the mitigating evidence is particularly compelling." Vanisi, 2010 WL 3270985 at 3. The ultimate question is how an appellate court, on a cold record, can adequately review the effect of a substantial error in the context of the Nevada death sentencing scheme.

The re-weighing of the aggravating and mitigating circumstances is vastly different from this Court's traditional tasks, such as determinating whether the prosecutor's evidence satisfied the elements of a crime. When error is injected into the later equation, it can be a reasonably objective task to determine whether the evidence supporting every element is so overwhelming, or the effect of some impropriety on the jury's deliberations is so slight, that the Court can confidently conclude that the same elements would have been found

---

eligible, and likewise conclude that the jury would have selected the death penalty absent the erroneous aggravating circumstance.") with Stringer v. Black, 503 U.S. 222, 230 (1992).

regardless of the error. But the jury's tasks in the penalty trial of a capital case are significantly different. Although the jury makes some factual determinations, such as the existence of aggravating and mitigating circumstances, they must also make an individual and personal determination as to whether the aggravating circumstances are outweighed by the mitigating circumstances; each juror has complete discretion to place whatever idiosyncratic weight he or she desires upon those circumstances.

Finally, the jurors must reach a "reasoned moral response," California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), to the question of whether they want to take the defendant's life. In making that decision, any single juror can prevent the imposition of a death sentence by deciding that the mitigating circumstances outweigh the aggravating circumstances, or by simply refusing to vote for death; under Nevada law, there is no set of circumstances which requires a juror to vote for death, no matter how greatly the aggravating circumstances outweigh the mitigating circumstances (or even in the absence of any mitigation), and every

juror's right to refuse to impose a death sentence is unlimited. State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003); Bennett v. State, 111 Nev. 1099, 1109-10, 902 P.2d 676, 683-84 (1995).

The effect of the invalid aggravating circumstance on what "reasoned moral response" a juror will have had to the sentencing choice in a particular case is made even more difficult because each juror's response is subjective. In attempting to assess what jurors might do in the absence of error, this Court must account for the "reasoned moral response" that other juries or prosecutorial agencies have had to equally or more egregious offenses.[11] When prosecutors

---

[11] Mr. Vanisi's case is no more egregious than other cases in which Nevada juries did not impose the death penalty, the State did not seek the death penalty, or the State agreed to negotiate it away. Compare Evans v. State, 28 P.3d 498, 117 Nev. 609 (2001) (four murders where original jury found three aggravating factors, including torture or mutilation, and sentenced Evans to death) with State v. Evans, Clark County Case No. C-116071, Sentencing Agreement, February 4, 2003 (State's agreement to sentences of life without possibility of parole for four murders, following reversal of the death sentence for new penalty hearing), and State v. Powell, Clark County Case no. C-148936, Verdicts, November 15, 2000 (jury verdicts for life without possibility of parole for same four murders as in Evans case, with three aggravating factors as to each murder and no mitigating factors); State v. Strohmeyer, No. C-144577, Court Minutes, September 8, 1998 (minutes of change of plea to guilty in return for withdrawal of notice of intent to seek death sentence and imposition of four consecutive sentences of life without possibility of parole, in case involving kidnaping, sexual assault, and strangulation murder of seven-year-old girl); State v. Rodriguez, Clark

make the argument that a jury would necessarily have imposed a death sentence, regardless of any error, because the crime and the defendant are so "horrific," it is only appropriate to ask what juries and prosecutors actually do in response to other egregious cases (although it must be recognized that, to a jury, every first degree murder case will be an egregious one, see Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980)).

Sentencing by a reviewing court cannot encompass the complete range of options available to a jury. Every member of a jury can prevent imposition of a death sentence by finding that the mitigating circumstances outweigh the aggravating circumstances or by concluding, on any or no ground, that he or she will not vote for a death sentence. No court can replicate that dynamic. Nor does any court have

---

County Case No. C-130763, Verdicts, May 7, 1996 (jury verdicts of life without possibility of parole for two murders, each with four aggravating factors where the only mitigating factor cited by the jury was "mercy"); Ducksworth v. State, 942 P.2d 157, 113 Nev. 780 (1997) (jury verdicts of life without possibility of parole for two defendants, based on two murders with total of thirteen aggravating factors, including robbery, sexual assault, and torture or mutilation); State v. Daniels, Clark County Case No. C126201, Verdicts, November 1, 1995 (jury verdicts of life without possibility of parole for two murders, each with four aggravating circumstances).

the ability, or perhaps the inclination, to refuse to impose a death sentence simply on the basis of mercy, as juries have previously done in Nevada. See VI.E.3 below (popularly elected judges face the possibility of removal for making an unpopular decision, rendering them insufficiently impartial under the due process clause to assess penalty in a capital case).

No court, reviewing a cold record, can consider a defendant's demeanor, which a jury can consider in a penalty hearing. See Riggins v. Nevada, 504 U.S. 127, 137-38 (1992); e.g., Allen v. Woodford, 395 F.3d 979, 1014 (9th Cir. 2005). No reviewing court has to look a defendant in the eye while imposing a sentence, as a jury must; and such a court would necessarily send a defendant to his death without ever hearing "the sound of his voice." See McGautha v. California, 402 U.S. 183, 220 (1971). Unlike a new sentencing jury, this Court cannot know, and will not consider, a defendant's good behavior during post-conviction incarceration, which must be considered as mitigation. Skipper v. South Carolina, 476 U.S. 1, 6-8 (1986).

/ / /

While the Supreme Court has in general tolerated the use of a harmless error analysis, or re-weighing, to uphold death sentences, Clemons v. Mississippi, 494 U.S. 738, 741 (1990), the intensively subjective structure of the Nevada sentencing scheme is antithetical to judicial re-weighing or to aggressive harmless error analysis.

Finally, given the intense subjectivity of the weighing process and of the ultimate selection of the penalty to be imposed, no court can adequately review or replicate the situation which confronted Mr. Vanisi's original jury. Fundamentally, in Nevada, a court that upholds a death sentence, in spite of the presence of constitutional error, is essentially imposing a new sentence itself, whether its analysis is called harmless error or re-weighing. Because the Nevada system depends on a weighing system to establish death eligibility, and gives each individual juror unlimited discretion to weigh the factors and to refuse to impose death, any court reviewing the effect of error on that decision necessarily substitutes its own judgment for the jury's. Under those circumstances, it is the court that replaces the jury's "highly subjective" and "moral judgment of the defendant's desert," by

"decreeing death" itself. See Caldwell v. Mississippi, 472 U.S. 320, 340 N.7 (1985); Antonin Scalia, God's Justice and Ours, First Things (May 2002), available at http://www.firstthings.com/article/2002/05/gods-justice-and-ours (last visited December 1, 2014). Such a re-sentencing cannot result in a reliable sentence under the Eighth Amendment or the Nevada Constitution.

Considering all of these factors, it is clear that any death sentence imposed in Mr. Vanisi's case cannot be constitutionally reliable under the Eighth and Fourteenth Amendments unless it is imposed by a fully informed and properly instructed jury. See Valerio v. Crawford, 306 F.3d 742, 758 (9th Cir. 2002) (en banc) (state appellate court cannot cure constitutional error in vague jury instruction on aggravating circumstance by engaging in fact-finding on appeal, when original sentencer was a jury).

5. Initial post-conviction counsel's failure to conduct an extra-record investigation contributed to this Court's erroneous denial of Mr. Vanisi's Vienna Convention claim.

Had they been notified, the Tongan consulate would have helped prior counsel conduct an adequate investigation. See Claims 9, 23.

Article 36(1)(b) of the Vienna Convention on Consular Relations required the State, when they first detained Mr. Vanisi, to advise him of his rights under the treaty and to facilitate his communication with the Tongan Consulate. Specifically, upon request,

> the competent authorities of the receiving State shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by a person arrested, in prison, custody or detention shall also be forwarded by said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Vienna Convention on Consular Relations, Article 36(1)(B), April 24, 1963, 21 ACED 77. Despite that the United States and Tonga were signatories to this treaty, the State failed to notify Mr. Vanisi of his Vienna Convention rights at the time of his arrest. See 1AA148–52. Initial post-conviction counsel were ineffective by failing to conduct an extra-record investigation that would have demonstrated how the Tongan Consulate would have helped had they been contacted.

/ / /

/ / /

a. This Court erroneously rejected Mr. Vanisi's argument that his Vienna Convention rights were violated.

Initial post-conviction counsel alerted this Court to the fact that Mr. Vanisi's rights under the Vienna Convention were violated. 8AA1861-68. Without explanation, this Court erroneously denied Mr. Vanisi's argument on procedural grounds. 8AA1995-96. This Court should revisit its ruling in light of recent caselaw.

Mr. Vanisi was arrested on January 14, 1998, by the law enforcement officials in Salt Lake City, Utah. Vanisi v. State, 117 Nev. 330, 336, 22 P.3d 1164, 1168 (2001). He was later taken into custody by officials from Reno, Nevada. Although authorities from both jurisdictions knew that Mr. Vanisi was a citizen of Tonga, see 2AA421-22, 2AA423-24, they failed to notify Mr. Vanisi of his rights under the Vienna Convention, and the State failed to notify the Tongan Consulate. See 25AA6066 ("I can confirm that the Tongan Government does not have any record that it was informed by any US law enforcement or diplomatic authority that Mr. Vanisi was charged with

/ / /

and tried for murder, or was convicted for murder and sentenced to death.").

Although trial counsel later notified an entity of the Tongan Government about Mr. Vanisi's arrest, this notice was sent to the wrong embassy. See 7AA1699 (HT 5/18/05 at 7) ("We contacted the Tongan Consulate in San Francisco, and they asked us for information about the case. We initially, I think, just sent them the headlines . . . ."). Indeed, counsel was himself unaware of the provisions of the Vienna Convention on Consular Relations, thus he did not send his inquiry to the Tongan Embassy in New York City, which is the "appropriate office to contact for matters concerning the arrests of a Tongan national within the United States." 25AA6066.

The failure of the State to comply with the requirements of the Vienna Convention on Consular Relations is not a new phenomenon. The government of Mexico has sought to vindicate the rights of fifty-one of its citizens, all incarcerated on death row in the United States, under the Vienna Convention on Consular Relations through a claim filed in the International Court of Justice (ICJ). Case Concerning

Avena and Other Mexican Nationals (Mex. V. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31) ("Avena"). The ICJ held that the rights of the Mexican citizens had been violated, and that each was entitled to a review or reconsideration of this claim, regardless of any rule of procedural default or forfeiture. President George W. Bush agreed and, on February 28, 2005, he directed the Attorney General to comply with the Avena judgment "by having State courts give effect to the decision."

However, Texas not only ignored their obligations under the Vienna Convention on Consular Relations but also ignored the presidential directive to give effect to the Avena judgment. Ex parte Medellin, 223 S.W.3d, 315, 322-23 (Tex.Crim.App. 2006). A majority of the Supreme Court, in Medellin v. Texas, 128 S.Ct. 1346 (2008), held that, without congressional action, the president does not have the power to enforce or meet our obligations under Avena. Id., 128 S.Ct. at 1368.

The question remaining, therefore, is the manner in which the United States will meet its obligations. Although the United States entered into a compact between independent nations, which was

violated in this case, the compact failed to contain a stipulation making it self executing, and Congress has not yet passed a law to make it operative. Medellin, 552 U.S. at 505-6.[12] Justice Stevens suggests that this obligation should be met willingly by each state selecting a method to review and reconsider sentences where there has been a Vienna Convention violation:

> The decision in Avena merely obligates the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the affected Mexican national . . . . with a view to ascertaining whether the failure to provide proper notice to consular officials caused actual prejudice to the defendant in the process of administration of criminal justice. The cost to Texas of complying with Avena would be minimal . . . .

Id., 128 S.Ct. at 1375 (citation and quotation omitted).

When presented with similar circumstances, the Oklahoma Court of Criminal Appeals stayed an execution and remanded a habeas

---

[12] This Court addressed a similar issue, albeit in an unpublished opinion. See Gutierrez v. State, 2012 WL 4355518 *2 (Nev. 2012). Although Mr. Vanisi may not rely upon this opinion as legal authority, SCR 123, the opinion may stand for the proposition that this Court and the State of Nevada are aware of its obligations under the Vienna Convention on Consular Relations, and it is evidence of arbitrary and disparate treatment of similarly situated capital litigants, in violation of the state and federal guarantees of equal protection of the laws. U.S. Const. amend. XIV; Nev. Const. Art. 4 § 21.

petition to the district court "for an evidentiary hearing on the issues of: (a) whether [the defendant] was prejudiced by the State's violation of his Vienna Convention rights by failing to inform [the defendant], after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel." Torres v. State, 2004 WL 3711623 (Okla.Crim.App. May 13, 2004). Mr. Vanisi asks this Court for nothing more.

b. Initial post-conviction counsel were ineffective by failing to conduct an extra-record investigation to demonstrate how Mr. Vanisi was prejudiced by the Vienna Convention violation.

Mr. Vanisi was prejudiced by the violation of his rights under the Vienna Convention on Consular Relations. There is ample evidence that Mr. Vanisi was mentally ill and suffered from organic brain damage long before this crime and his arrest. 20AA04865-82 (psychiatric summary of Mr. Vanisi's descent into psychosis); 20AA4858 ("Mr. Vanisi has been mentally ill since well before the onset of the crime in question, with increasing deterioration of mental/psychiatric functions in the years preceding the homicide.").

There is no question that Tongan culture played a role in the development, and the lack of treatment of Mr. Vanisi's mental illness. 20AA4957-58 (explaining the prevalence of mental illness in young Pacific Island people who migrate to the United States at an early age, the poor acceptance of mental health services in this culture, and the debilitating effect of informal Tongan adoptions and sexual abuse on such children). Such evidence was not presented to the jury.

Initial post-conviction counsel were ineffective by failing to investigate, develop, and present evidence about how the Tongan consulate would have assisted counsel in investigating, developing and presenting this evidence. The Tongan Solicitor General, Aminiasi Kefu, explains the assistance that Tonga would have provided Mr. Vanisi had the United States complied with its treaty obligations. 25AA6065. Particularly,

> [T]he Tongan Government . . . would have facilitated any investigation in Tonga that Mr. Vanisi's counsel would have wanted to carry out. The Tongan Government would have facilitated Mr. Vanisi's counsel to obtain background information by providing and arranging a liaison officer, an interpreter, meetings with relevant people and authorities, access to Government information and also information on

> where to source other information not in Government possession.

25AA6067. Such assistance would have benefitted Mr. Vanisi. As is apparent above, substantial evidence relating to Mr. Vanisi's culture, education, social history and mental illness was never provided to his jury. See VI.A.1.a-b above. Indeed, the majority of such evidence was never discovered or provided to this Court until these successor post-conviction proceedings.

Had Nevada officials appropriately notified the Tongan Consulate of Mr. Vanisi's arrest and detention, many of the other errors alleged in this brief would not have occurred. Trial counsel would have received assistance in conducting an adequate investigation into Mr. Vanisi's life and assistance in obtaining relevant documents regarding their client. Trial counsel would have learned information about cultural differences to help explain the nature of Mr. Vanisi's mental illness and his development, and how these issues were exacerbated by Tongan culture and beliefs. Ultimately, Mr. Vanisi's jury would have been afforded the opportunity for an individualized assessment for the death penalty based upon Mr. Vanisi's personal moral culpability. See California v.

Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Only then could the jury's sentencing verdict be directly related to Mr. Vanisi's personal culpability. See Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

Many of the errors in Mr. Vanisi's proceedings are directly related to his nationality and culture and would not have occurred had the Tongan Consul been available to assist his counsel. A fair trial is not a constitutional requirement reserved for United States citizens. See Commonwealth v. Carillo, 465 A.2d 1256, 1262 (Penn. 1983) ("We start by observing that . . . it is an unassailable tenet of our constitutional system that the Government's power to punish citizens or aliens charged with violating the law may be exercised only in accordance with due process as prescribed by the Bill of Rights."). Mr. Vanisi should at least be afforded a hearing to demonstrate the prejudice he suffered by Nevada's failure to comply with the Vienna Convention on Consular Rights.

/ / /

/ / /

/ / /

B. Mr. Vanisi's incompetency during initial post-conviction proceedings establishes cause and prejudice for this Court to consider the extra-record claims that initial post-conviction counsel were ineffective in failing to investigate, develop, and present.

During state post-conviction counsel's first interview, Mr. Vanisi took off his clothes, rolled on the floor, burst into spontaneous song, and explained that he was Dr. Pepper, an independent sovereign. 24AA5958-61; 9AA2026; 8SA1909; 8SA1913-15. Mr. Vanisi was manic and agitated and claimed not to have slept for eight days. 24AA5961; 8SA1914. Mr. Vanisi recited gibberish and poetry, snarled like a wild animal and explained that he had made snow angels while naked. 24AA5961; 8SA1909-10; 8SA1915. During subsequent interviews, there was little to no improvement.24AA5958.

Mr. Vanisi's bizarre behavior prompted initial post-conviction counsel to make further inquiry. Prison disciplinary records were produced revealing that during the prior two years, Mr. Vanisi's mental health and behavior had deteriorated. See 24AA5958, 5960-61. Additionally, Mr. Vanisi was being forcibly injected with powerful anti-psychotic medication which rendered him mute and zombie-like during

certain periods of each month. 8SA1969-70, 73. Trial counsel filed a motion to stay state post-conviction proceedings due to Mr. Vanisi's incompetence. 24AA5960; 25AA6147-48.

The state district court ordered a competence evaluation pursuant to NRS 178.415 and Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003), to be conducted by Thomas E. Bittker, M.D. and Raphael Amezaga, Ph.D. 8SA1947; 9AA2020. Dr. Bittker, a psychiatrist, found that Mr. Vanisi was incompetent to proceed, and recommended a short pause in the proceedings to adjust Mr. Vanisi's medications in order to return him to competency. 8SA1995, 9SA2003, 2020. Dr. Amezaga, a psychologist, was unable to comment on Mr. Vanisi's medication regime, although he acknowledged that the medications being used were powerful ones used to treat psychosis. 9AA2043-44. Dr. Amezaga relied upon a test that measured competency to stand trial which utilizes the Dusky standard, described below, to find Mr. Vanisi competent. 9AA2035; 9AA2104.

The post-conviction court, and this Court, erroneously rejected Mr. Vanisi's argument that he was incompetent, in part, due to initial

post-conviction counsel's ineffective assistance by failing to conduct an extra-record investigation which would have enabled both court appointed experts to diagnose Mr. Vanisi's improperly medicated Schizoaffective Disorder that was causing his incompetency. Both Mr. Vanisi's incompetency, and initial post-conviction counsel's ineffective assistance, establish cause for this Court to consider the merits of Mr. Vanisi's extra-record claims in the current petition. See Claim 4.

1. The court psychiatrist found that Mr. Vanisi was incompetent because he was being improperly medicated.

After examining Mr. Vanisi, reviewing medical and disciplinary records, and interviewing counsel, Dr. Bittker concluded that although Mr. Vanisi had a reasonable level of sophistication about the trial process, his guardedness, Bipolor manic entitlement, and paranoia, inhibited his ability to cooperate with counsel during initial post-conviction proceedings. 9AA2118. He further concluded that Mr. Vanisi did not currently have the requisite emotional stability to permit him to cooperate with counsel or to understand fully the distinction between truth and lying. Id. This latter deficit emerged directly as a

consequence of Mr. Vanisi's incompletely-treated psychotic thinking disorder. Id.[13] Dr. Bittker testified under oath that because Mr. Vanisi was "extremely guarded" and "protective of any information regarding the crime" it was difficult for him to assist counsel. 8SA1997. Further, because Mr. Vanisi was being medicated with haloperidol, "he may not even be able to access information from the past." 8SA1999.

Dr. Bittker also testified that: (1) it would be difficult to make sense of what Mr. Vanisi said if one were not a psychiatrist; (2) the balance of evidence suggests that Mr. Vanisi's psychosis makes him irrational and not forthcoming; (3) Mr. Vanisi's closed demeanor is unique among the people that he has examined on death row; and (4) Mr. Vanisi does not fully understand the role of defense counsel because of his paranoia. 8SA1996-9SA2003, 2006, 2010-12, 2016. Finally, Dr. Bittker directly addressed Mr. Vanisi's inability to assist counsel in the context of post-conviction proceedings:

---

[13] Had initial post-conviction counsel provided Dr. Bittker with Mr. Vanisi's social history, Dr. Bittker would have discovered that Mr. Vanisi's "psychotic thinking disorder" was not only due to Bipolar Disorder, but was also due to Schizoaffective Disorder which produced delusional fixations. See VI.A.1.a(7) above.

> I don't think [Mr. Vanisi] fully understands that in order for [counsel] to assist him that [counsel] need[s] to understand what went on with him in his inner life as [counsel is] attempting to proceed with his appeal. I think that [counsel is] still perceived as an instrument of the State and irrationally so. So there's very little that he will disclose about what went on. I can acknowledge that there may be rational reasons for him not doing this. It would make sense, one would say, if this was prior to his initial conviction. But it isn't making a great deal of sense right now.

Id. at 2002.

Dr. Bittker also testified that:

> I don't think [Mr. Vanisi] understands fully the role of defense counsel and how defense counsel can help him because of that paranoid sense that everybody is out to get him and so why be transparent.
>
> . . .
>
> [T]he concern I have is that nihilistic quality that 'Nothing really makes much difference, and I really can't trust these guys anyway.'

Id. at 2017. Dr. Bittker recommended a modification to Mr. Vanisi's medication regimen and a reevaluation of his competency after ninety days of mental health treatment. Id. at 7-8.

/ / /

/ / /

2. The court psychologist, who was unqualified to assess whether Mr. Vanisi was being properly medicated, found Mr. Vanisi competent.

Two weeks after Dr. Bittker's testimony, the second court expert, psychologist Dr. Amezaga, reported that based upon his interview with Mr. Vanisi and the administration of two tests: (1) Mr. Vanisi's rational ability to assist his counsel with his defense during trial was at most mildly impaired; (2) Mr. Vanisi's body posture at times was mechanical and robotic; (3) Mr. Vanisi's short-term memory may be mildly impaired or delusional; and (4) Mr. Vanisi's ability to testify non-disruptively and in a truthful manner was seriously in doubt. 9AA2036-37, 2040, 2042, 2043.

The first test relied upon by Dr. Amazega, VIP, was inapplicable because it does not assess competency or mental illness, but focuses upon attempts to feign mental retardation. The second test, ECST-R, was inapplicable because it focuses on competency to stand trial, not to participate in post-conviction proceedings. Initial post-conviction counsel were ineffective by failing to call Dr. Bittker in rebuttal to provide the post-conviction judge, whose finding of competency

substantially relied upon the objectivity of these tests, with evidence that these tests were inapplicable. Initial post-conviction also was ineffective by failing to provide Dr. Amezega with Mr. Vanisi's social history, which would have changed his conclusions that were based upon his incorrect assumption that Mr. Vanisi's did not have a history of mental illness.

Dr. Amezaga concluded that while the ECST-R showed that Mr. Vanisi was not malingering, the VIP mental retardation test displayed evidence that Mr. Vanisi was misrepresenting his impairment. 9SA2078, 2080-81. Dr. Amezaga testified that the VIP demonstrated that Mr. Vanisi had the ability to identify the correct answer to difficult VIP questions, suppress those answers and select an incorrect answer. 9SA2094. Dr. Amezaga testified that his conclusion regarding Mr. Vanisi's competency:

> is based in large part on these results here that whatever mental health symptoms Mr. Vanisi is experiencing whatever diagnosis you want to give him, that those symptoms and signs do not overwhelm his cognitive abilities to engage in reasoning in rational thinking, in factual understanding of the information as presented on the VIP.

Id. at 2095 (emphasis added).

Neuropsychologist Jonathan Mack, PsyD. reports that "[t]he technical problem with Dr. Amezaga's conclusion is that he only administered half of the VIP, and that the ECST-R Atypical Presentation range indicates the non-feigning of psychotic symptomatology." 20AA4789. After reviewing Mr. Vanisi's social history, which initial post-conviction counsel were ineffective by failing to investigate, develop, and provide to the experts, Dr. Mack rejected

> [t]he conceptualization by other doctors/mental health experts of Mr. Vanisi as malingering in the face of his chronic (over 15 years), inexorable, severe, and persistent psychotic and manic presentation along with perseveration, and the fact that he has been, defacto, treated for both psychotic and mood disorder for years with massive doses of anti-psychotic and mood stabalizing medication with partial, yet very incomplete, improvement. I have reviewed the report and data summary sheets of Dr. A.M. Amezaga of February 2005, and there is nothing in his report that persuades me against my opinion.

20AA4856.

More importantly, the VIP test measures a person's intelligence. Where a petitioner claims that he should not be executed because he is mentally retarded, the VIP test can distinguish between those who are truly mentally retarded and those who are only pretending to be.

1AA114-15. Mr. Vanisi was not claiming mental retardation, he was claiming incompetency, so the VIP test was completely irrelevant to the proceedings.

Also, Dr. Amezaga's entire testimony regarding the results of the ECST-R test focused upon Mr. Vanisi's understanding of trial proceedings and counsel's role therein. 9AA2039; 9SA2111, 2115.[14] Prior to trial, however, Dr. Bittker too found Mr. Vanisi competent to stand trial. 9AA2111. Unlike Dr. Amezaga, Dr. Bittker recognized that post-conviction proceedings require a different type of assistance from Mr. Vanisi than that required during trial. 9SA2003. Because Dr. Amezaga failed to interview post-conviction counsel, his report and testimony did not recognize or address the differences between assisting counsel during trial versus post-conviction proceedings.

Disturbingly, Dr. Amezaga testified that: (1) he did not interview post-conviction counsel or review their affidavits in support of their motion for a stay, and he did not review the disciplinary actions in

---

[14] The ECST-R test is a semi-structural interview developed specifically for the purpose of determining competency to stand trial under the prongs set forth in Dusky v. United States, 362 U.S. 402 (1960). 9AA2099.

prison—he solely reviewed state prison medical records; (2) he was not familiar with the post-conviction competency standards; (3) he suspected that Mr. Vanisi was suffering from a psychotic disorder, although he was uncertain of what that might be and speculated that some of Mr. Vanisi's symptoms might be feigned; and (4) he suspected that Mr. Vanisi was not likely to engage in truthful testimony. 9SA2064-67, 2070-72, 2101-02, 2106, 2110. Dr. Amezaga would not have speculated that some of Mr. Vanisi's psychotic symptoms might be feigned had he been provided with Mr. Vanisi's social history involving fifteen years of mental illness. This history would have enabled Dr. Amazega to identify that Mr. Vanisi suffers from Schizoaffective disorder.

When a claim is raised during post-conviction proceedings that trial counsel presented inadequate mitigation evidence during the penalty phase, a competent client is in a better position than anyone to identify aspects of his personal history that should have been presented but were not, and that client is in a unique position to testify about the extent of trial counsel's efforts to elicit that mitigating evidence from

him. See Ryan v. Gonazales, 133 S.Ct. 696, 709 (2013); Martinez v. Ryan, 132 S.Ct. 1309, 1316 (2012). Even if the post-conviction court had to speculate as to what evidence Mr. Vanisi might offer, that does not detract from the probability that some corroborating evidence existed within Mr. Vanisi's private knowledge. As Dr. Bittker noted, while there may be a rational motive prior to trial to withhold such information, there is no such rational motive during post-conviction proceedings.

Further, psychiatrist Siale Foliaki, M.D. notes that based upon the administration of the Test of Memory Malingering (TOMM), which is an instrument superior to the VIP, it is clear that Mr. Vanisi is "highly unlikely to be malingering. 20AA4860 ¶ 5.8.7. Dr. Foliaki concludes that if a person is malingering, he would feign both the VIP and the ECST-R. 20AA4860 ¶ 5.8.8. The fact that Dr. Amezaga reports that Mr. Vanisi made no effort to feign or exaggerate psychiatric symptoms on the ECST-R, in order to suggest the possibility of incompetency, makes Dr. Amezaga's conclusion illogical that Mr.

/ / /

Vanisi's performance on the VIP suggests an intent to malinger. 20AA4860 ¶ 5.8.8.

Also, Dr. Amezaga failed to address how performance on the VIP demonstrates that Mr. Vanisi has an ability to competently assist his counsel during post-conviction proceedings, and failed to contradict Dr. Bittker's testimony that, although Mr. Vanisi was intelligent, his level of improperly treated psychosis and paranoia prevented him from competently assisting counsel during post-conviction proceedings.

Finally, because Dr. Amezaga is not a medical doctor and does not have authority to prescribe medicine to treat mental illness, 9SA2063, or to pass judgment on the efficacy of medication, 9SA2070-71, Dr. Amezaga was unable to rebut Dr. Bittker's testimony that Mr. Vanisi's improper medications were causing his inability to understand the role of defense counsel during post-conviction proceedings. Dr. Amezaga agreed with Dr. Bittker that Mr. Vanisi's psychosis made him willing to "deceive his attorneys," but failed to comprehend Dr. Bittker's assessment that it was irrational for Mr. Vanisi to take this action after he had already been found guilty and sentenced to death. 9SA2102.

3. Initial post-conviction counsel were ineffective in litigating this claim.

Initial post-conviction counsel were ineffective by failing to properly prepare the court appointed experts in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). In part, Dr. Amezaga based his position, that Mr. Vanisi might be feigning certain psychotic symptoms, on the fact that he had not been provided any evidence that Mr. Vanisi had a mental health condition prior to his arrest. 9SA2105-06. A reasonable investigation by initial post-conviction counsel would have revealed a wealth of evidence that Mr. Vanisi had suffered mental health issues for fifteen years prior to his arrest. See VII.A.1.a-b above. Further, Dr. Bittker testified that his conclusion was based on the limited records provided to him:

> The information [provided] was relatively limited. . . .
>
> I reviewed the medical records, but the medical records were limited to only [Mr. Vanisi's] encounters at the Nevada State Penitentiary. They did not incorporate those records while housed at Ely nor were there records of his previous encounters at Washoe County Detention Center. I had reference to the report of Dr. Thienhaus, but I had never seen that report.

8SA1995; see also 9SA2010. Initial post-conviction counsel admitted during a limited evidentiary hearing that an adequate mental health investigation would have assisted with their incompetency motion. 25AA6017; 25AA6176.

4. Mr. Vanisi's incompetence and initial post-conviction counsel's inadequate extra-record investigation, establish cause and prejudice for the current petition to be considered on the merits.

Mr. Vanisi's incompetence and initial post-conviction counsel's ineffective assistance by failing to conduct an adequate extra-record investigation establishes cause and prejudice for the extra-record claims in the current petition to be considered on the merits.

The district court issued a written ruling denying Mr. Vanisi's motion for stay:

> 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.

9AA2129 (emphasis added). Had initial post-conviction counsel properly prepared the experts, and called Dr. Bittker in rebuttal, the post-conviction court would not have placed greater weight on Dr. Amezaga's inapplicable tests. Similarly, this Court would not have been able to conclude on appeal that "the district court's competency determination was based on substantial evidence."[15]

Because of initial post-conviction counsel's ineffective assistance, Mr. Vanisi's entire initial post-conviction proceedings were held while he was incompetent. This, along with the ineffective extra-record investigation conducted by initial post-conviction establishes cause and prejudice to review Mr. Vanisi's extra-record claims on the merits.

The importance of a state habeas petitioner's competence cannot be overemphasized. The Supreme Court accords great deference to the state habeas record because these state proceedings are the initial venue for the vindication of the petitioner's rights. Cullen v.

---

[15] Also, this Court inaccurately indicated that Dr. Bittker expressed an opinion that, although Mr. Vanisi "was able to assist his counsel, he was irrationally resistant to doing so." Vanisi, 2010 WL 3270985 at *1. This finding is belied by the transcript. 8SA1997-99; 9SA2001-03. Dr. Bittker in fact testified that Mr. Vanisi's problematic medications made him unable to assist counsel. 8SA1999.

Pinholster, 131 S.Ct. 1388, 1398 (2011); see Gonzales, 133 S.Ct. at 704-5; Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curium). Such deference, however, will not be granted where the state court has failed to ensure that a petitioner can meaningfully participate in, or even understand, the state habeas proceedings. See Martinez, 132 S.Ct. at 1316-7 (2012) (refusing to allow state courts to deprive merits review of claims where state court process was defective); id. at 1318 (these rules reflect an equitable judgment that, where a petition is impeded or obstructed from complying with the State's established procedures, federal habeas courts will excuse the petitioner from the usual sanction of default). Absent this Court's intervention, the federal courts will be the first forum to conduct a merits review of Mr. Vanisi's extra-record claims which were developed once he was restored to competency.

C. Mr. Vanisi can overcome the procedural bars because he is actually innocent.

Mr. Vanisi is actually innocent of first-degree murder because he was incapable of deliberating, and he is actually innocent of the death penalty. Mr. Vanisi can demonstrate a fundamental miscarriage of justice to overcome procedural default rules because he is "ineligible for

the death penalty" and there is "a reasonable 'probability' that the verdict would have been different." Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).

1. Mr. Vanisi is actually innocent of the death penalty.

Under any standard, Mr. Vanisi can overcome the procedural default bars because he is actually innocent of the death penalty. Mr. Vanisi demonstrates in Claim 7 that the mutilation aggravator is unconstitutional both on its face and as applied to him, see VI.D.1 below, and there exists a wealth of mitigating evidence that was not previously considered due to the ineffective assistance of initial post-conviction counsel. See VI.A.1.a above.

In Sawyer v. Whitley, the federal case defining actual innocence of the death penalty, the Supreme Court does not hold that actual innocence of the death penalty means "there are zero aggravating circumstances," rather, it holds that to be found actually innocent of the death penalty, a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under

applicable state law." 505 U.S. 333, 336 (1992). Thus, one cannot analyze Mr. Vanisi's death eligibility in Nevada without first considering the effect of the mountain of mitigating evidence contained in the current petition, and the invalid mutilation aggravating circumstance. In light of this evidence, Mr. Vanisi can show a "reasonable probability that absent the aggravator[s] the jury would not have imposed death . . . ." Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).

The test for actual innocence of the death penalty under Sawyer focuses on what makes a petitioner eligible for the death penalty, Sawyer, 505 U.S. at 347,[16] which, in Nevada, requires an assessment of

[16]In Sawyer the Court was analyzing a claim of actual innocence of the death penalty under the Louisiana death penalty statute. At the time Sawyer was decided that statute read: "'A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.'" Id. at 342 n.9 (quoting La. Code Crim. Proc. Ann. art. 905.3 (1984)). Death eligibility under that statute required only the finding of an aggravating circumstance. In sharp contrast to Louisiana, Nevada is a 'weighing state,' thus, death eligibility is not just a question whether any aggravating circumstances exist, but also a question of whether the mitigating circumstances outweigh the aggravating circumstances.

the mitigation evidence. As a weighing state, Nevada requires that in order for the sentencer to determine whether a defendant is eligible for the death penalty they must perform two tasks: (1) the sentencer must find at least one aggravating circumstance beyond a reasonable doubt; and (2) the sentencer must consider all of the mitigation evidence, and determine whether the mitigation is sufficient to outweigh the aggravation. Deutscher v. Whitley, 991 F.2d 605, 606-07 (9th Cir. 1993) (withdrawn and superseded on other grounds by 16 F.3d 981 (9th Cir. 1994)); Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006) ("The primary focus of our analysis, therefore, is on the effect of the invalid aggravators on the jury's eligibility decision, i.e. whether we can conclude beyond a reasonable doubt that the jurors would have found that the mitigating circumstances did not outweigh the aggravating circumstances even if they had considered only the three valid aggravating circumstances rather than six."); Johnson v. State, 118 Nev. 787, 802-03, 59 P.3d 450, 460 (2002); NRS 200.030(4)(a) (2007).

Thus, death eligibility in Nevada is inextricably bound to both the aggravating and mitigating evidence, and whether the sentencer

believes the one outweighs the other. Therefore, under the Sawyer standard, Mr. Vanisi prevails if he can show by clear and convincing evidence that, but for his trial counsel's ineffectiveness under the Sixth Amendment, a plethora of mitigating evidence would have been presented, and no reasonable juror–weighing that evidence against the single remaining aggravator–would have found Mr. Vanisi eligible for the death penalty.

Thus, in analyzing claims of "actual innocence" of the death penalty under the Nevada statute, courts are required to consider all of the mitigation evidence, including newly presented mitigation evidence, to determine whether the petitioner remains eligible for the death penalty. Deutscher, 991 F.2d at 607 ("In short, Sawyer requires the consideration of mitigating evidence in those states like Nevada that require balancing of mitigating factors against aggravating factors."). The mitigating evidence contained in the instant petition, which trial counsel were constitutionally ineffective for failing to present, constitutes clear and convincing evidence sufficient to demonstrate actual innocence of the death penalty under Sawyer.

Under Nevada law, Mr. Vanisi need only show a "reasonable probability that absent the aggravator[s] the jury would not have imposed death . . . ." Leslie, 118 Nev. at 776, 59 P.3d at 445; see also; Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); cf. Murray v. Carrier, 477 U.S. 478, 496 (1986). Applying this standard, even certain mitigating evidence that was insufficient to outweigh the aggravators under the eligibility determination would nonetheless be relevant to the decision of whether to impose the death penalty.

Thus, when reweighing under Leslie, it is critical for this Court to consider all of the mitigating evidence that the petitioner contends should have been presented at that trial. Leslie, 118 Nev. 773, 59 P.3d 440; see also State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003) (court considered newly discovered evidence not previously presented due to trial counsel's ineffectiveness); State v. Bennett, 119 Nev. 589, 605, 81 P.3d 1, 11 (2003) (evidence relevant to mitigation was suppressed by State: "Considering this undisclosed mitigating evidence with the invalid aggravating evidence, we conclude that the district

court correctly vacated Bennett's death sentence and ordered a new penalty hearing."). Indeed, in House v. Bell, 547 U.S. 518 (2006), the Supreme Court made it clear that, where a habeas petitioner argues that actual innocence forgives a procedural default, the habeas court must consider not only the trial evidence but the new evidence as well. Id. at 536-38 (citing Schlup v. Delo, 513 U.S. 298, 324-32 (1995)). If, after reweighing the aggravating factors and the new mitigating evidence, this Court finds a reasonable probability that absent the error, the jury would not have imposed death, the defendant has established the fundamental miscarriage of justice that overcomes the procedural bars.

Weighing the valid aggravating circumstance in Mr. Vanisi's case against the mountain of mitigating evidence presented in the current petition, Mr. Vanisi has demonstrated under both the Sawyer standard and the Leslie standard that he is actually innocent of the death penalty. During the trial, the only evidence the jury had to weigh against the aggravating circumstances was the testimony of family and friends that Mr. Vanisi was once a very nice, respectful person, who

behaved strangely during a wedding six months prior to the offence.[17] The jury heard nothing about the fact that as a result of his traumatic life, Mr. Vanisi suffers from cognitive deficits, ADHD, and Schizoaffective disorder that seriously diminish his moral culpability. 1AA20-21. The jury did not hear that Mr. Vanisi was regularly beaten and emotionally abused by his uncle throughout his childhood.1AA79-82. The jury was not informed that Mr. Vanisi was sexually abused by his older brother from the time he was six years old. See VI.A.1.a(1) above. It was not explained to the jury that the personal failures in Mr. Vanisi's life, such as being banished from his religious mission and excommunicated by his church, affected Mr. Vanisi more than the average person due to the strong Tongan sense of honor and family shame, and his mental illness. 20AA4865, 4957-66. The effects of multiple childhood abandonments by caregivers were not presented for the jury's consideration.

/ / /

[17] Although Mr. Vanisi's wife testified that he had displayed mental health problems shortly prior to the offense, her testimony was discredited as being uncorroborated.8SA1864-65.

Most importantly, however, Mr. Vanisi's steady and emotionally painful descent into madness, leading to full blown psychosis, mania, and psychotic delusions was not explained to the jury. See VI.A.1.a above. It is reasonably probable that if the jury had heard this evidence and weighed it against the valid aggravating circumstances, they would not have found Mr. Vanisi eligible for the death penalty, or at the very least would not have imposed the death penalty. As a result, Mr. Vanisi can demonstrate a fundamental miscarriage of justice under Leslie and thereby overcome the procedural bars.

2. Mr. Vanisi is actually innocent of first-degree murder.

Mr. Vanisi has presented an overwhelming amount of newly discovered factual evidence that he did not deliberately commit the crime, but that in fact he was suffering from delusional thinking caused by his severe and untreated Schizoaffective Disorder at the time of the offense. See Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001); see also VI.A.1.a; VI.A.3 above.

Once a petitioner has presented a gateway claim of actual innocence, procedural bars do not apply. House v. Bell, 547 U.S. 518,

555 (2006); see also Bennett, 119 Nev. at 597, 81 P.3d at 6 (reviewing issues presented in "untimely and successive" habeas petition where petitioner alleged actual innocence of death penalty due to invalid aggravating factor). Mr. Vanisi can demonstrate good cause and prejudice to raise his claim of actual innocence because he has presented new reliable evidence of his innocence that erodes the outcome of his trial. Schlup, 513 U.S. at 316; Pelligrini, 117 Nev. at 887, 34 P.3d at 537.

"In an effort to 'balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," the United States Supreme Court has set forth a specific procedure for determining whether a petitioner has made a showing of actual innocence. See House, 547 U.S. at 536 (quoting Schlup, 513 U.S. at 324). To establish a gateway actual innocence claim, Mr. Vanisi must demonstrate "that more likely than not any reasonable juror would have a reasonable doubt" of his guilt. House, 547 U.S. at 538. Mr. Vanisi has established a gateway claim.

The authority of Finger, 117 Nev.548, 27 P.3d 66, finding the legislature's abolition of the plea of not guilty by reason of insanity unconstitutional, was not available to Mr. Vanisi at the time of the trial. As a result, his constitutional right to present relevant evidence during the guilt phase regarding his inability to deliberate was denied. See VI.A.3 above. Further, "evidence that does not rise to the level of legal insanity may, of course, be considered in evaluating whether a killing is first or second-degree murder or manslaughter or some other argument regarding diminished capacity." Finger, 117 Nev. at 577, 27 P.3d at 85; see also VI.A.2 above. The denial of Mr. Vanisi's right to present relevant evidence as to his mental state during the guilt phase of the trial was constitutional error, and the State cannot prove that it was harmless beyond a reasonable doubt.

D. Initial post-conviction counsel were ineffective by failing to raise several substantial record-based ineffective assistance of counsel claims.

Initial post-conviction counsel also failed to raise substantial record based claims that trial and direct appeal counsel were ineffective by failing to preserve and present. Both state and federal law hold that

a petitioner can demonstrate cause for failing to raise claims on direct appeal based on the ineffective assistance of trial and direct appeal counsel, so long as these allegations of prior counsel's ineffectiveness are raised in a timely manner. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004) ("Thomas claims that his trial and appellate counsel were ineffective in a number of ways. These claims are properly presented because this is a timely, first post-conviction petition for a writ of habeas corpus."); Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted."). Post-conviction counsel were ineffective by failing to raise the claims listed; this ineffectiveness established cause and prejudice for the district court to consider these claims on their merits. Therefore, the district court erred by finding these claims procedurally barred.

/ / /

/ / /

/ / /

1. Prior counsel were ineffective by failing to argue that the mutilation aggravating factor was unconstitutional.

In reinstating the death penalty, the Supreme Court affirmed a simple principle: "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." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (emphasis added). Thus, "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). The Eighth Amendment, accordingly, imposes two requirements on aggravating circumstances: "First, the circumstance may not apply to every defendant convicted of murder . . . . Second, the aggravating circumstance may not be unconstitutionally vague." Tuilaepa v. California, 512 U.S. 967, 972 (1994). Here, the mutilation aggravating circumstance violates both proscriptions. Further, the aggravating

circumstance is unsupported by sufficient evidence. Insofar as prior counsel failed to raise this claim, they were ineffective. See Claims 7, 3C, 23.

a. The mutilation aggravating circumstance is unconstitutional.

To avoid arbitrary application of the death penalty, "an aggravating circumstance 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, 462 U.S. at 877. Here, the mutilation aggravating circumstance fails to genuinely narrow the class of persons eligible for the death penalty because, in every case, the victim is somehow mutilated. Under any definition of mutilation, the aggravating circumstance would apply in every murder case. See, e.g., Merriam-Webster, "mutilate" available at http://merriam-webster.com/dictionary/mutilation (last visited Dec. 18, 2015) ("to cause severe damage to (the body of a person or animal)"); see also Black's Law Dictionary (9th ed. 2009), mutilation ("The act of cutting off or permanently damaging a body part, esp. an essential one."). The jury

instruction was no more clear: "The term 'mutilate' means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect, or other serious and depraved physical abuse beyond the act of killing itself."[18] 3AA531. On its face, this instruction applies to every murder. Thus, the aggravating circumstance fails to narrow the class of persons eligible for the death

---

[18] This Court's previous ruling—that the inclusion of the language, "other serious and depraved physical abuse" was harmless—was in error. See Vanisi, 117 Nev. at 343, 22 P.3d at 1173 ("use of the instruction here was not prejudicial since the State did not argue depravity of mind and there was compelling evidence of mutilation, as discussed above."). On the contrary, this erroneous language was harmful because it limited the scope of the modifier, "beyond the act of killing itself." See 3AA531. That is, the language, "beyond the act of killing itself" applied only to "other serious and depraved physical abuse"; the "beyond the act of killing itself" requirement did not apply to the other theories of establishing mutilation. So the jury could find mutilation if the defendant (1) cut off or permanently destroyed a limb or essential body part or (2) cut off or altered radically so as to make imperfect–under both theories, the jury did not need to find the these acts occurred "beyond the act of killing itself." See id. Rather, under this instruction, the jury only needed to find an act "beyond the act of killing itself" if the jury applied the "other serious and depraved physical abuse" theory. Thus, the error in including the language "other serious and depraved physical abuse" could not be harmless. This error is an independent ground for relief and this Court should strike the mutilation aggravating circumstance. See Tuilaepa v. California, 512 U.S. at 972. Insofar as this claim could be defaulted, post-conviction counsel were ineffective for failing to make this argument.

penalty and is unconstitutional. See Lowenfield v. Phelps, 484 U.S. 231, 244 (1988).

Additionally, the aggravating circumstance is unconstitutionally vague. "[A] vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by Furman v. Georgia." Tuilaepa, 512 U.S. at 974-75 (citation omitted). A vagueness claim asserts that the aggravating circumstance fails to inform the sentencing body what they must find to impose the death penalty. Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).

However, if an aggravating circumstance has some "common-sense core of meaning" that juries are capable of understanding, the circumstance is not vague. Tuilaepa, 512 U.S. at 973. Here, the mutilation aggravating circumstance lacks a common-sense core of meaning because the word "mutilation," in the context of homicide, is meaningless. That is, "mutilation" does not inform the sentencing body what they must find to impose the death penalty.

/ / /

One possible way of clarifying the circumstance would be to require a specific intent–as this Court has done with the torture aggravating circumstance. See Chappell v. State, 114 Nev. 1403, 1410, 972 P.2d 838, 842 (1998) (striking torture aggravating circumstance where "[n]o evidence exists that [the defendant] stabbed [the victim] with any intention other than to deprive her of life."). This Court has offered no such limiting construction, despite the doctrine of noscitur a sociis, which would require construing "mutilation" in the same way that this Court construes "torture."[19]

And the Supreme Court has also forbidden jurors from imposing the death penalty merely because of the gruesomeness of a murder. See Godfrey, 446 U.S. 433 n.16 ("An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes

---

[19] "The Latin phrase noscitur a sociis means 'it is known by its associates'–a classical version, applied to textual explanation, of the observed phenomenon that birds of a feather flock together . . . . When several nouns or verbs or adjectives or adverbs–any words–are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar The canon especially holds that 'words grouped in a list should be given related meanings.'" Antonin Scalia & Bryan Garner, Reading Law 195 (2012). NRS 200.033(8) reads: "The murder involved torture or the mutilation of the victim."

would be totally irrational."). The Court reaffirmed this principle in Maynard when it noted that it had already "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." 486 U.S. at 363 (emphasis added).

b. The mutilation aggravating circumstance was not supported by sufficient evidence.

Even if the mutilation aggravating circumstance were constitutional, it is not supported by sufficient evidence. While there is no question that the victim suffered disfigurement, that disfigurement was the inevitable result of the weapon used in this case. Thus, the disfigurement resulted from the act of killing itself and not because of an intent to mutilate. Medical examiner Dr. Ellen Clark testified that the victim died from "multiple injuries of the skull and brain due to blunt impact trauma." 3SA533. She found twenty fractures to the face and head that were "all acute and of the same age," and occurred prior to death. 3SA546. Some of the fractures, however, may have radiated from the impact site. Id. This testimony is consistent with the

statements attributed to Mr. Vanisi by his cousin Vainga Kinikini. 4SA997-98.

Thus, apart from the prosecutor's opinion, there is no evidence that this purported mutilation was "beyond the act of killing itself." The State focused on the defensive injuries to fingers, and a crushed upper jaw that occurred during the act of killing. 8SA1809-12. But, there was no testimony that the victim's injuries occurred beyond the act of killing itself. And, as noted above, the jury instructions allowed the jury to find mutilation without necessarily finding that the injuries occurred beyond the act of killing itself. See supra [footnote about the "depraved physical abuse" above]. This dearth of evidence requires this Court to strike the mutilation aggravating circumstance.

c. Prior counsel were ineffective for failing to raise this claim.

On direct appeal, counsel challenged this aggravating circumstance on the basis that, here, the act of mutilation was not "beyond the act killing [sic] itself." 2AA457. Counsel failed to argue that the aggravating circumstance is unconstitutional, either on the basis that it is vague or on the basis that it fails to narrow. See id. Although

direct appeal counsel did argue that there was insufficient evidence, counsel failed to note that the instruction used here did not require the jury to find an act "beyond the act of killing itself" for each of the theories of mutilation. Thus, trial counsel were ineffective for failing to challenge the mutilation aggravating circumstance; direct appeal counsel was ineffective for failing to challenge the aggravating circumstance on constitutional grounds. Finally, initial post-conviction counsel were ineffective for failing to raise this claim and the ineffectiveness of prior counsel in the initial post-conviction proceedings.

2. Trial and direct appeal counsel were ineffective by failing to argue that the jury instructions were unconstitutional.

As with the premeditation instruction, see VI.A.2 above, initial post-conviction counsel were ineffective by failing to investigate, develop, and present a claim that trial counsel was deficient for failing to object to, and direct appeal counsel was deficient for failing to brief, additional improper jury instructions. See Claims 8, 3D & 23. Specifically, trial counsel failed to object to, and direct appeal counsel

failed to brief, the mutilation, the anti-sympathy and the malice instructions. Additionally, Mr. Vanisi's jury was not instructed that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt.

a. Mutilation

The jury was instructed as follows on the aggravating circumstance of mutilation:

> The term "mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect, or other serious and depraved physical abuse beyond the act of killing itself.

3AA531.

The aggravating circumstance of "mutilation" fails to narrow death eligibility, and is vague on its face and in application. See VI.D.1 above. Further the use of the word "depravity" in the mutilation instruction rendered it unconstitutionally vague. As this Court has recognized, the depravity portion of the instruction was based upon a former version of the statute which referred to the "depravity of mind" as well as torture and mutilation. See Vanisi v. State, 117 Nev. 330, 342-43, 22 P.3d 1164, 1172-73 (2001). In 1995, the state legislature

amended the statute to delete "depravity of mind." Id. The "depravity of mind" aggravating circumstance has been held by the Ninth Circuit to be unconstitutionally vague. Valerio v. Crawford, 306 F.3d 742, 750-51 (9th Cir. 2002) (en banc).

The mutilation jury instruction rendered Mr. Vanisi's sentence fundamentally unfair and unconstitutional. The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless.

b. Sympathy

Mr. Vanisi's jury was improperly instructed that "a verdict may never be influenced by sympathy, passion, prejudice, or public opinion." 3AA539. By forbidding the sentencer from taking sympathy into account, this language on its face precluded the jury from considering evidence concerning Mr. Vanisi's character and background, thus effectively negating the constitutional mandate that all mitigating evidence be considered. Accordingly, a reasonable likelihood exists that this instruction denied Mr. Vanisi the individualized sentencing determination that the state and federal constitutions require.

The flaw in this instruction is that it did not preclude the jury's consideration of "mere sympathy"–that is, the sort of sympathy that would be totally divorced from the evidence adduced during the sentencing phase–but rather precluded consideration of all sympathy, including any sympathy warranted by the evidence. Because the jury in this case was told not to consider any sympathy–rather than "mere" sympathy–it is reasonably likely that the jury at Mr. Vanisi's trial understood that when making a moral judgment about his culpability, it was forbidden to take into account any evidence that evoked a sympathetic response.

The giving of the unconstitutional "anti-sympathy" instruction rendered Mr. Vanisi's sentence fundamentally unfair and unconstitutional. The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless. See Morgan v. Illinois, 504 U.S. 719 (1992) (jury must always be able to consider a sentence other than death).

/ / /

/ / /

c. Malice

The malice instruction given during the guilt phase of Mr. Vanisi's trial is unconstitutional because the description of the predicate facts upon which the inference is based–the "heart fatally bent on mischief" and "an abandoned and malignant heart"–are impermissibly vague and over-broad. Mr. Vanisi acknowledges that this Court has rejected these arguments, see, e.g., Cordoza v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000), but without adequately addressing the federal questions presented by this instruction.

In People v. Phillips, 414 P.2d 353 (Cal. 1966), overruled on other grounds by People v. Flood, 957 P.2d 869 (Cal. 1998), the California Supreme Court found it "unnecessary and undesirable" to instruct the jury on implied malice using the "obscure metaphor" of the "abandoned and malignant heart," and ordered the use of a more direct and comprehensible instruction that retains substantially the language of the current instruction. Id. at 363-64; 1 California Jury Instructions, Criminal, CALJIC 8.11 (2004). Since Nevada's statute defining implied malice was taken from California's, it should be construed the same

way. See, e.g., City of Las Vegas Downtown Redevelopment Agency v. Crockett, 117 Nev. 816, 824-25, 34 P.3d 553, 558-59 (2001).

This Court, in Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 295 (1998), conceded that the terms at issue are "not common in today's general parlance," but did not explain how these terms would allow a reasonable lay juror to identify "an abandoned or malignant heart," with acts done "in contradistinction to accident or mischance." Id. at 1208, 969 P.2d at 296. The use of these concededly "archaic," Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988), and "cryptic," Phillips, 414 P.2d at 363, terms could only have caused unnecessary prejudice. The language used in the instruction is unconstitutionally vague and, because it invites the jury to consider the defendant's general "badness" as a basis for finding this element, is over-broad as well.[20]

---

[20] A reasonable juror–the standard by which the constitutionality of an instruction is judged, see, e.g., Boyde v. California, 494 U.S. 370, 382 (1990) (effect of language of instruction on reasonable juror)–would also have understood the "abandoned and malignant heart" and "heart fatally bent on mischief" language to require an objective, rather than subjective, standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary

d. Death-Eligibility

Mr. Vanisi's jury was not instructed on the burden of proof required for finding that the aggravating circumstances outweigh the mitigating circumstances. Under Nevada law, eligibility for the death penalty requires two factual findings: (1) the existence of one or more statutory aggravating circumstances, and (2) that the aggravating circumstances are not outweighed by mitigation. See NRS 175.554(3). While this Court held in McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009), that "[n]othing in the plain language of [the statute] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty," and "[s]imilarly, this court has imposed no such requirement," Id. at 314-15, this is contrary both to this Court's earlier holdings, see Johnson v. State, 118 Nev. 787, 802-03, 59 P.3d 450, 460 (2002), and the United States Supreme Court's interpretations of federal constitutional requirements, which mandate application of the reasonable doubt

---

manslaughter, in violation of the Constitution.

standard to all death eligibility factors, no matter how those factors are characterized under state law. See, e.g., Ring v. Arizona, 536 U.S. 584, 602-06 (2002); Apprendi v. New Jersey, 530 U.S. 466, 483 (2000). The failure to require the jury to find the outweighing element of capital eligibility beyond a reasonable doubt is prejudicial per se, because that failure undermines any and all of the jury findings. Sullivan v. Louisiana, 508 U.S. 275, 279-83 (1993).

3. Direct appeal counsel was ineffective for failing to address improper victim impact testimony.

Over Mr. Vanisi's objection, prosecutors were allowed to introduce testimony from the victim's family and friends which not only included irrelevant and inadmissible evidence, but was a blatant attempt "to rouse jurors' sympathy for the [victim] and increase juror's antipathy" toward Mr. Vanisi. Kelly v. California, 555 U.S. 1020 (2008) (Statement of Stevens, J., Respecting Denial of Certiorari). Although Mr. Vanisi acknowledges that "victim impact" evidence is generally admissible, see Payne v. Tennessee, 501 U.S. 808 (1991), and that this Court has always found such an error to be "harmless," see e.g. Sherman v. State, 114 Nev. 998, 1014, 965 P.2d 903, 914 (1998), Mr. Vanisi contends the

evidence presented in his trial went beyond that which was ever sanctioned by this Court or the Supreme Court, and the evidence admitted here was "so unduly prejudicial that it render[ed] the [penalty] trial fundamentally unfair" under the state and federal due process guarantees, Payne, 501U.S. at 825. See Claims 16, 23.

a. Victim Impact Evidence

Mr. Vanisi requested the trial judge to exclude proposed victim impact evidence which expressed an opinion regarding the appropriate sentence or which was provided by any witness who was not a member of the victim's family. 16AA3943-46; see NRS 176.015(3); NRS 176.015(5)(b)(1-3). The trial judge excluded testimony regarding the sentence, but refused to limit the victim impact testimony to the victim's family. 16AA3951-54.

Stephen Sauter, the victim's friend and co-worker, was allowed to read a statement to the jury which described the phone call he received regarding the victim's death, the atmosphere at the police station, and his comforting the victim's wife. 6SA1279. Sauter described the emotional impact which the victim's death had on all the police officers

and rescue workers in Reno, his voice shaking and breaking as he did so. Id. at 1281-86. Such testimony brought members of the jury to tears. Id. at 1286.

The victim's wife read a statement to the jury which alleged that Mr. Vanisi "didn't care about the family and friends that [the victim] would leave behind, 6SA1298, and requested the juror's verdict ensure that Mr. Vanisi "could never hurt another family like he hurt ours." Id. at 1301. She stated that Mr. Vanisi exhibited no regret for his actions, had a hatred for others, and must be kept forever away from the community. Id. at 1325. Finally, prosecutors showed a video of the victim and his family at family gatherings and on holidays. Id. at 1295-96; 17AA4069. The victim's wife explained that she and the victim anticipated future holidays with their children as they grew and that Christmas was the victim's "favorite time of year." 6SA1308, 1319.

The impact of the victim impact testimony on Mr. Vanisi's trial was evident. Jurors cried, and the gallery had difficulty listening to the emotionally charged evidence. 6SA1286. In the midst of such emotion and angst, Mr. Vanisi was portrayed as a hateful, violent person, who

felt no remorse, and who must never be given a chance to hurt another. This testimony exceeded the bounds of appropriate victim impact evidence.

b. Payne v. Tennessee and Nevada Law

In Booth v. Maryland, 482 U.S. 496, 501-02 (1987), the Supreme Court considered the admissibility of victim impact evidence. The court noted that the constitutionality of the death penalty was dependent upon the ability of a statutory sentencing scheme to allow for an "individualized determination" of the character of the defendant and the circumstances of the crime. Id. 482 U.S. at 502; see Zant v. Stephens, 462 U.S. 862, 879 (1983). Victim impact evidence was held to be irrelevant to these considerations. Booth, 482 U.S. at 502-503 (". . . [W]e find that this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.").

/ / /

Among the Supreme Court's concerns were that the defendant is often unaware of the victim's personal circumstances, the victim's surviving family may be inarticulate, and that the death penalty should not be based upon the victim's value to the community. Id. 482 U.S. at 503-506.[21] In particular, the Court appeared concerned with any considerations of the "value" of the victim, as well as any attempts by the defendant to "rebut" such evidence. Id. 482 U.S. at 506-507. The Court held ". . . the formal presentation of the information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. 482 U.S. at 508.

---

[21] Briefly, the Supreme Court held that, unless the defendant was aware of the victim's personal circumstances, evidence of the existence of, and impact on, friends and family was not relevant to the defendant's moral culpability for his crime. Booth v. Maryland, 482 U.S. 496, 504-505 (1987). That a death penalty may be imposed in some cases, and not in others, because the family member or friend may provide compelling testimony seemed arbitrary. Id. 482 U.S. at 505. Finally, "that the victim was a sterling member of the community rather than someone of questionable character . . . [did] not provide a principled way to distinguish cases in which the death penalty was imposed, from the many cases in which it was not." Id. 482 U.S. at 506; see Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Stewart, J.).

The opinion in Booth was not well accepted and was ephemeral.[22] Four years later a new majority of the Supreme Court reversed course and held

> The misreading of precedent in Booth has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering a quick glimpse of the life which a defendant chose to extinguish, or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

Payne, 501 U.S. at 822. The Court acknowledged the concerns expressed in Booth but noted that, "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial

/ / /

---

[22] The Tennessee Supreme Court called the Booth opinion

> an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of the Defendant, . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

State v. Payne, 791 S.W.2d 10, 19 (1990).

fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[23] 501 U.S. at 825.

The Supreme Court's about-turn on the admissibility of victim-impact evidence was well accepted by this Court. This Court stated: "We applaud the decision in Payne as a positive contribution to capital sentencing, and conclude that it fully comports with the intendment of the Nevada Constitution." Homick v. State, 108 Nev. 127, 136, 835 P.2d 600, 606 (1992); see also Atkins v. State, 112 Nev. 1122, 1136, 923 P.2d 1119, 1129 (1996).

c. Application in this Case

In his concurring opinion in Payne, Justice Souter assured the dissenting justices and other skeptics that the Court's reversal regarding victim impact evidence did not spell impending doom:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. . . . [I]n each case there is a traditional guard

---

[23] The holding in Booth which recognized a violation of the defendant's constitutional rights if victims were allowed to express their views on the appropriate punishment was not disturbed. See Payne, 501 U.S. at 830 n.2; Booth, 482 U.S. at 502-509; see also Kaczmarek v. State, 120 Nev. 314, 340, 91 P.3d 16, 34 (2004).

> against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary appeal. With the command of due process before us, the Court and the other courts of the state and federal systems will perform the duty to search for constitutional error with painstaking care, an obligation never more exacting than it is in a capital case.

Payne, 501 U.S. at 836-837 (Souter, J., concurring) (quotation and citation omitted); see also McNelton v. State, 111 Nev. 900, 906, 900 P.2d 934, 938 (1995). The rectitude of Justice Souter's pronouncement is soundly tested by the admission of the victim-impact evidence in this case.

This Court, having embraced Payne, "integrated" it into Nevada law. Kaczmarek v. State, 120 Nev. 314, 339-340, 91 P.3d 16, 34 (2004). Nevada Revised Statues 175.552(3) allows the admission of evidence "concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible." Contrary to the statutory definition of a victim in Nevada, the Court has held that victim impact testimony may come from the victim's family as well as neighbors or co-workers. Compare

Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996); with NRS 176.015(5)(b)(1-3); NRS 176.015(f)(a)(1-4).

This Court has left questions of admissibility of evidence in a penalty trial largely to the discretion of the trial judge. Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994) (citing Milligan v. State, 101 Nev. 627, 636, 708 P.2d 289, 295 (1985)). Appellate review of such issues is limited to a determination of whether the trial judge abused that discretion. Sherman v. State, 114 Nev. 998, 1012, 965 P.2d 903, 913 (1998); Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996); Pellegrini v. State, 104 Nev. 625, 631, 764 P.2d 484, 488 (1988).

The trial judge's discretion cannot be unlimited. Just as the Supreme Court noted in Payne, victim impact evidence can be so inflammatory as to violate due process, id. 501 U.S. at 825, this Court has held that evidence which is impalpable or highly suspect may not be admitted. Sherman, 114 Nev. at 1012, 965 P.2d at 912; Young v. State, 103 Nev. 233, 237, 737 P.2d 512, 515 (1987); see Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656-657 (1994). Evidence which is "dubious" or "tenuous" may not be admitted, Allen v. State, 99 Nev.

485, 488, 665 P.2d 238, 140 (1983), nor evidence which is irrelevant to the penalty trial. Collman v. State, 116 Nev. 687, 725, 7 P.3d 426, 450 (2000); see Floyd v. State, 118 Nev. 156, 174-175, 42 P.3d 249, 261-262 (2002) (evidence of the victim's life, apart from the crime and its impact on the surviving family or friends, can be irrelevant to the sentencing determination). Indeed, this Court has held that evidence admitted during the penalty trial must, at a minimum, have sufficient indicia of reliability. Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993); D'Agostino v. State, 107 Nev. 1001, 1003-1004, 823 P.2d 283, 284-285 (1991); see Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241-242 (2001).

Here, there can be no argument that the testimony from the victim's wife and Stephen Sauter exceeded the boundaries of Payne and were irrelevant to the issues before the jury. Although neither witness knew Mr. Vanisi, they were permitted to provide their personal opinions regarding his personal culpability, unremorseful nature, and the appropriate penalty. This testimony described the impact of the victim's death not only on his family and friends, but upon an entire

community of police officers and rescue workers. Such evidence only served to arouse the passions and sympathy of the jury. No reasonable juror could hear such evidence and not be moved–as was the prosecutors' intention.

The victim impact testimony in this case was not relevant to Mr. Vanisi's character or his moral culpability. Mr. Vanisi never met the victim, his wife, or his friends and was unaware of any of the circumstances surrounding the victim's life. Moreover, Mr. Vanisi had no reasonable ability to challenge or rebut such evidence. Not only was Mr. Vanisi without the knowledge to investigate such statements, any attempt to rebut these statements would only have further inflamed the passions of the jury against him. He could hardly argue that the goodness of the victim, and the emotional impact of the victim's death on his family and the entire community of police officers and rescue workers, did not render him even more worthy of the death penalty–an inference which was raised by such evidence.

The victim impact evidence in this trial went too far–it exceeded the "quick glimpse" of the victim's life contemplated in Payne, 501 U.S.

at 822, and included an implied plea for the death penalty which was proscribed by Booth. See Payne, 501 U.S. at 830 n.2; Booth, 482 U.S. at 502-509.

d. Prejudice

The improper admission of victim impact evidence in Mr. Vanisi's trial was prejudicial; the evidence inflamed the passions of the jury and invited the jury to compare the worth of his life to that of his victim. The evidence was produced with effect, a video and description of the victim's holiday celebrations with his children. Moreover, the evidence included a thinly veiled plea for the death penalty–to ensure that no other family ever suffered such a loss again. In such circumstances, this Court can have no confidence that the improper evidence had no influence on the jury's verdict.

Since Payne was decided, this Court has never found an error in the admission of victim impact evidence to be harmful. See Floyd, 118 Nev. at 175, 42 P.3d at 262 ("[C]ollateral and inflammatory" victim impact evidence was not "unduly prejudicial."); Gallego, 117 Nev. at 369, 23 P.3d at 241-242 (Officer's statement that defendant was

responsible for additional murders was not prejudicial); Sherman, 114 Nev. at 1014, 965 P.2d at 914 (Evidence on impact of family of extraneous victim's family was harmless). Mr. Vanisi submits that "the command of due process," by which this Court must review this ground, with "painstaking care," see Payne, 501 U.S. at 836-837 (Souter, J., concurring), compels this Court to draw a line in the sand and hold that, some times, emotional victim impact evidence goes too far.

4. Trial and direct appeal counsel were ineffective by failing to address the improper use of a stun belt on Mr. Vanisi.

Throughout Mr. Vanisi's trial he was required to wear a stun belt restraining device. This requirement deprived him of his Sixth Amendment and due process rights to confer with counsel, be present at trial, and participate in his defense. Further, requiring Mr. Vanisi to wear a stun belt deprived him of due process and unduly prejudiced him by negatively affecting his demeanor in front of the jury. See Claims 15, 23.

The decision to use a stun belt must be subjected to close judicial scrutiny. See, e.g. Gonzalez v.Pliler, 341 F.3d 897, 901 (9th Cir. 2003);

U.S. v. Durham, 287 F.3d 1297, 1304 (11th Cir. 2002); see also Illinois v. Allen, 347 U.S. 337, 344 (1970).. It has been recognized by federal courts that the use of a stun belt on a defendant during trial interferes with the defendant's Sixth Amendment and due process rights to confer with his counsel, to be present during trial and to follow the proceedings and actively participate in his defense. See, e.g., Pliler, 341 F.3d 897, 900 (2003). This Court has also recognized the negative Sixth Amendment and due process implications of the use of stun belts during criminal proceedings. See Hymon v. State, 121 Nev. 200, 207-09, 111 P.3d 1092, 1098-99 (2005). Before a court may constitutionally allow the use of a stun belt, it must find on the record that there are compelling state interests that justify the derogation of the defendant's constitutional rights and that less restrictive means are not available. See Pliler, 341 F.3d at 901; See also, Hymon, 121 Nev. at 209, 111 P.3d at 1099. This was not done here. Prior counsel were ineffective by failing to preserve and present this claim.

/ / /

/ / /

5. Trial and direct appeal counsel were ineffective by failing to address prosecutorial misconduct.

Initial post-conviction counsel were ineffective by failing to present a claim regarding severe and pervasive prosecutorial misconduct, and argue theineffectiveness of prior counsel for failing to raise this claim in prior proceedings. See Claims 14, 23. Trial counsel were ineffective for failing to object when the prosecutor: (1) improperly aligned himself with the jury; (2) improperly commented on the absence of mitigating factors; and (3) improperly argued that justice required the jury to sentence Mr. Vanisi to death. Direct appeal counsel was ineffective for failing to brief these claims. These allegations, when considered singly and cumulatively, demonstrate that the State's pervasive misconduct prejudiced Mr. Vanisi and deprived him of his right to a fair trial. See Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993).

Throughout his entire closing argument, the prosecutor constantly used the words "we," "us," and "our" in a manner that suggested that the jury was aligned with the State in deliberating Mr. Vanisi's guilt. The prosecution repeatedly spoke to the jury as if the

State were part of the deliberative process with them. It is improper for the prosecution to align itself with the jury as if they were deliberating together. See Schoels v. State, 114 Nev. 981, 987, 966 P.2d 735, 739 (1998); United States v. Young, 470 U.S. 1, 18-19 (1985).

During closing argument in the penalty phase of Mr. Vanisi's trial the State improperly characterized the defense mitigation evidence by saying:

> [W]e have a series of family witnesses that have said he was raised in a loving, caring environment. He wasn't abused. That's also offered as mitigating evidence that someone was abused. Was it in this case? No.

8SA1863. It was misconduct for the State to highlight the absence of a potential mitigating factor. Turner v. Calderon, 281 F.3d 851, 869 (9th Cir. 2002).

Twice during closing arguments in the penalty phase of Mr. Vanisi's trial, the State improperly argued that justice required the jury to impose a death sentence. The last sentence of the prosecution's rebuttal closing argument was "[j]ustice in this case demands death." 8SA1879. Earlier, in the State's opening statement, trial counsel objected to the State making the same argument, but was overruled.

5SA1152-54. These arguments were improper, and the trial court erred by failing to sustain trial counsel's objection. The argument left the impression with the jury that the authority of the State of Nevada required them to reach a death verdict. Mr. Vanisi was prejudiced by this argument. It is violative of a capital defendant's Fifth and Fourteenth Amendment due process rights for a prosecutor to argue to a jury that it is required to impose a sentence of death. See, e.g. Flanagan v. State, 104 Nev. 105, 109, 754 P.2d 836, 838 (1988) (vacated and remanded on other grounds by Flanagan v. Nevada, 503 U.S. 931 (1992)).

Mr. Vanisi had a right to fundamental fairness, a reliable determination of punishment and an individualized determination of an appropriate sentence guided by clear, objective, and evenly applied standards.[24] It is most important that the sentencing phase of the trial not be influenced by passion, prejudice, or any other arbitrary factor. Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126 (1985); Guy v. State,

---

[24] See, e.g., Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).

108 Nev. 770, 780, 839 P.2d 578, 585; Leonard v. State, 114 Nev. 1196, 1212, 969 P.2d 288, 298 (1988).

6. Trial and direct appeal counsel were ineffective during voir dire.

All capital defendants are guaranteed the right to an impartial jury. U.S. Const. amends. VI, XIV; see also Duncan v. Louisiana, 391 U.S. 145, 155 (1968) (right to jury trial is so fundamental that States must recognize it). This right carries within it other important rights. See Morgan v. Illinois, 504 U.S. 719, 725-34 (1992) (cataloguing various rights encompassed under right to impartial jury); see also VI.D.7 below. For example, jurors must not have views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424-25 (1985). To effectuate these rights, the Supreme Court has noted that "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan, 504 U.S. at 729.

Here, trial counsel were ineffective by failing to uphold these rights. This ineffective assistance came in three forms: (1) counsel

failed to life-qualify the venire; (2) trial counsel failed to excuse biased jurors for cause; and (3) trial counsel were ineffective in exercising peremptory challenges. Because direct appeal and initial post-conviction counsel failed to raise these claims, they, too, were ineffective. See Claim 3A.

a. Trial counsel failed to life qualify the venire.

Trial counsel failed to life-qualify the venire in accordance with Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). "It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." Ross v. Oklahoma, 487 U.S. 81, 85 (1988); Uttecht v. Brown, 551 U.S. 1, 22 (2007) ("Capital defendants have the right to be sentenced by an impartial jury."). And voir dire "plays a critical function in assuring the criminal defendant that his Sixth [and Fourteenth] Amendment right[s] to an impartial jury will be honored." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). Thus, "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan, 504 U.S. at 729. So the Supreme Court has not "hesitated,

particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." Id. at 730 (emphasis added). These inquiries not only protect a defendant's right to intelligently exercise his for cause and peremptory challenges, they also ensure the defendant's culpability or death-worthiness is not "entrust[ed] . . . to a tribunal 'organized to convict'" or "organized to return a verdict of death." Witherspoon, 391 U.S. at 521; see also Rosales-Lopez, 451 U.S. at 188 ("lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges"); McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984) ("Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.")

Because of the importance of voir dire, attorneys have an obligation to "conduct a voir dire that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, whether because they will automatically vote for death

in certain circumstances or because they are unwilling to consider mitigating evidence." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003 ABA Guidelines) Guideline 10.10.2, Commentary (2003); see also ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989 ABA Guidelines), Guideline 11.7.2(B). Nevada Supreme Court ADKT No. 411, Standard 2-14(b). As a result, "voir dire in American trials," particularly in death penalty cases, "tends to be extensive and probing, operating as a predicate for the exercise of peremptories." Swain v. Alabama, 380 U.S. 202, 218-19 (1965) overruled on other grounds by Batson v. Kentucky, 476 U.S. 79 (1986); see also Wainwright, 469 U.S. at 423 ("it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (emphasis added)).

Thus, "follow the law" questions are not enough "to detect those in the venire who automatically would vote for the death penalty." Morgan, 504 U.S. at 734-35. This is so because "jurors could in all truth and candor respond affirmatively, personally confident that such

dogmatic views are fair and impartial, while leaving the specific concern unprobed." Id. at 735. Here, trial counsel failed to specifically ask all the jurors if their views of the death penalty would prevent or substantially impair their performance as jurors in accordance with the instructions and oath. See Wainwright, 469 U.S. at 424.

Trial counsel's ineffectiveness was exacerbated by the trial court's order narrowing the scope of voir dire:

> The Court: Curtail your inquiry into the permissible inquiry, which is whether or not they will look at other evidence in determining penalty."
>
> Mr. Bosler: So don't talk about specific mitigators?
>
> The Court: No.
>
> Mr. Stanton: Other than the ones that are listed in the statute.
>
> The Court: That's right.

2SA340-41. Thus, trial counsel could not conduct a sufficient voir dire to determine if a potential juror lacks impartiality. And counsel were ineffective.

b. Trial counsel were ineffective by failing to move to excuse biased jurors.

In addition to conducting an adequate voir dire, trial counsel also has an obligation to move to strike biased jurors. See Virgil v. Dretke, 446 F.3d 598, 609-10 (5th Cir. 2006) (counsel was ineffective for failing to challenge, for cause, two biased jurors); 1989 ABA Guidelines, Guideline 11.7.2(B) ("Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors"). A juror is biased if their views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright, 469 U.S. at 424 (1985).

Here, prospective juror Grider indicated that he was prejudiced against minorities. 2SA304 (Q: "You came out and said I'm prejudiced against minorities." A: "Yes, I am."). Trial counsel asked, "So you are saying that you still feel this prejudice in your mind against minorities?" Mr. Grider confirmed, "Yes, I do," and that his prejudice applied to all minorities. Id. at 304-05.

Mr. Vanisi is a minority. See 2AA421.

Trial counsel were ineffective by failing to move for cause to strike Mr. Grider. See 2SA312. Instead, counsel used a peremptory challenge on Mr. Grider, effectively allowing Shaylene Grate to serve on the jury. See 20AA4788. As will be discussed below, Ms. Grate was biased, but trial counsel ran out of peremptory challenges before being able to remove her from the panel. Id. Thus, trial counsel's failure to challenge Mr. Grider prevented Mr. Vanisi from having an impartial jury.

c. Trial counsel ineffectively exercised their peremptory challenges.

Trial counsel also failed to use a peremptory challenge against Ms. Grate. This failure has no possible strategic explanation. For example, counsel used a peremptory challenge to remove Leon Ralston. His questionnaire indicated that, although he favors the death penalty, he did not believe in it in all cases. 21AA5121. His answers during voir dire demonstrated substantially less bias than Ms. Grate. Compare 2SA327-42 with 1SA53-56. In fact, counsel did not challenge Mr. Ralston for cause; counsel did challenge Ms. Grate for cause. Compare 2SA342 with 1SA59. This was ineffective assistance because trial counsel allowed a biased juror to sit on the jury.

This error was prejudicial because a biased juror's presence on Mr. Vanisi's jury is structural error requiring reversal. See, e.g., Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring); Leonard v. United States, 378 U.S. 544 (1964); Fields v. Brown, 431 F.3d 1186, 1192 (9th Cir. 2005) ("A defendant is denied the right to an impartial jury if only one juror is biased or prejudiced."); Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998).

7. Direct appeal counsel were ineffective by failing to argue that the trial court committed error during the voir dire.

As noted above, Mr. Vanisi had a constitutional right to an impartial jury. See VI.D.6 above; see also U.S. Const. amend VI; U.S. Const. amend. XIV; see also Duncan, 391 U.S. at 155. This right includes the right to an adequate voir dire and a jury free from jurors with views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." Wainwright, 469 U.S. at 424-45; see also Morgan, 504 U.S. at 729.

/ / /

The trial court violated Mr. Vanisi's right to an impartial jury in four ways: (1) the court denied defense counsel's motion to strike a biased juror, who sat on the panel; (2) the trial court denied trial counsel's motion for individually sequestered voir dire; (3) the trial court denied defense motions that would have allowed trial counsel to conduct an effective voir dire. See Claims 5, 23.

Direct appeal counsel was ineffective by failing to raise these claims on appeal; post-conviction counsel were ineffective for failing to raise these claims during initial post-conviction proceedings.

a. The trial court did not strike Juror Shaylene Grate even though she indicated that her views would substantially impair her ability to act in accordance with instructions and her oath.

Ms. Grate indicated she knew a number of people associated with law enforcement. 1SA53-54. She admitted that knowing these people would prevent her from being fair. Id. ("It would impair my judgment, honestly."). In fact, she indicated that her brother-in-law could have been the victim instead of Sergeant Sullivan. Id. at 60 ("Because he was almost hired on UNR. It could have been him, is what I'm trying to say.

That is what I was thinking when all this happened."). She also indicated that, based on what she already knew of the case, she would not be impartial. Id. (Q: "But does it necessarily in your mind follow that, whoever is accused of this offense must be found guilty?" A: "That is a tough one. Well, I mean, based on what I have seen, it's hard, what I already know.").

These indications showed that Ms. Grate had views which would prevent or substantially impair her ability to act in accordance with the instructions and her oath. See Wainwright, 469 U.S. at 424-25. Despite this, the court denied trial counsel's motion to remove her for cause. 1SA62. Ms. Grate served on the jury. 21AA5167. This was structural error, and this Court must reverse. See Estrada v. Scribner, 512 F.3d 1227, 1240 (9th Cir. 2008).

b. The trial court erred by denying trial counsel's motion for individually sequestered voir dire.

Mr. Vanisi moved for individually sequestered voir dire both before his mistrial and his actual trial. 21AA5168, 21AA5173. The trial court denied this motion. 21AA5225. This violated Mr. Vanisi's right to

conduct an adequate voir dire. See Rosales-Lopez, 451 U.S. at 188; see also Morgan, 504 U.S. at 729. This error had a substantial and injurious effect on the verdict because jurors were able to tailor their responses to questions based upon what previously struck jurors stated. Trial counsel made a record of this prejudice:

> What was trying to be prevented [by trial counsel's motion] in the jury selection actually came to pass. In fact, what you had is a person put on their questionnaire that they were prejudiced against minorities and could not be fair in the case, but that person for whatever reason was able to answer the questions correctly to avoid any Whitt, Witherspoon, or Morgan challenges. I would submit that was a systemic problem that could have been cured had we been able to do individual sequestered voir dire.

2SA484-85. Trial counsel continued by noting that Mrs. Bell and Ms. Grate, both who expressed possible bias, were seated on the panel. Id. This was erroneous.

c. The trial court erroneously denied defense motions that would have allowed trial counsel to conduct an effective voir dire.

In addition to failing to grant individually sequestered voir dire, the trial court denied counsel's request for an extended juror questionnaire, a motion for additional peremptory strikes, and

counsel's motion to prevent death qualification of jurors. See Rosales-Lopez, 451 U.S. at 188; see also Morgan, 504 U.S. at 729. These denials, both individually, and cumulatively, denied Mr. Vanisi an adequate voir dire, thereby preventing him from rooting out biased jurors and from learning facts to support a change of venue motion. See VI.D.8 below.

This court must consider all of the errors in voir dire cumulatively, both those caused by trial counsel's ineffectiveness and those caused by the trial court's erroneous rulings. Thus, although any of these errors alone warrant relief, this Court must also consider the errors cumulatively for their effect on the jury panel.

8. Trial counsel were ineffective by failing to renew their venue motion, and direct appeal counsel was ineffective by failing to argue that the trial venue should have been changed.

Under the Sixth and Fourteenth Amendments, a criminally accused is entitled to a fair trial by a panel of impartial, indifferent jurors. Irvin v. Dowd, 366 U.S. 717, 722 (1961). "Interference with a defendant's fair-trial right 'is presumed when the record demonstrates that the community where the trial was held was saturated with

prejudicial and inflammatory media publicity about the crime.'" Hayes v. Ayers, 632 F.3d 500, 508 (9th Cir. 2011). Under the United States Supreme Court's jurisprudence, a conviction is invalid if it was "obtained in a trial atmosphere that [was] utterly corrupted by press coverage." Skilling v. United States, 561 U.S. 358, 380 (2010) (quoting Murphy v. Florida, 421 U.S. 794, 798-99 (1975)). Two factors are relevant: (1) the size and characteristics of the community and (2) the level of prejudice contained in the pretrial publicity. Skilling, 561 U.S. at 383-84.[25]

Thus, in the seminal pretrial publicity case, Rideau v. Louisiana, 373 U.S. 723 (1963), the Supreme Court overturned a conviction where a confession was broadcast to 20,000 people in a community of 150,000. 373 U.S. at 724, 726. The confession was broadcast three times, enough for the Court to conclude that it was prejudicial. Id. at 726. Here, media attention in Mr. Vanisi's case was more extensive. During the voir dire proceedings in Mr. Vanisi's case, the majority of the venire, including

---

[25]As of the 2000 census, Reno had a population of roughly 180,000. U.S. Census Bureau, Reno city, Nevada, available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last accessed on Dec. 21, 2014).

several venire persons who actually served as jurors, acknowledged being familiar with Mr. Vanisi's case from media reports, and/or harboring bias against Mr. Vanisi. 21AA5030 (seated juror Shaylene Grate answering that she could not be fair and stated "I heard a UNR police Sergeant had been murdered and that the police had a suspect and were trying to find him. Later I heard that Siaosi Vanisi was the suspect and he was running from the police. I believe he ran to his relative's house and there was some sort of standoff with the police. They eventually arrested him. He was very resistive and upset."); 21AA5135 (seated juror Michael Sheahan recalled the details of the crime and stated "I truley [sic] believe this man is guilty of a terouble [sic] crime for killing of a person."); 21AA5153 (seated juror Richard Tower stated "I work at the Reno Gazette Journal so I have read every article written about this matter from the initial investigation to his capture in Utah and subsequent actions to delay the trial."); see also 21AA5046-50; 21AA5056-60; 21AA5043-45; 20AA4986-90; 20AA4991-95; 20AA4996-5000; 21AA5006-10; 21AA5012-16; 21AA5096-100; 21AA5106-10.

At the end of voir dire, trial counsel failed to renew his motion for a change of venue. See 3SA504 ("We're not going to raise a change of venue at this time."). Counsel's failure to pursue a change of venue, especially in light of the seated jurors who had expressed bias against Mr. Vanisi based on media reports and public opioin, fell below an objective level of reasonableness and prejudiced Mr. Vanisi. Direct appeal counsel was ineffective for failing to raise this claim. See Claims 17, 23.

9. Trial and direct appeal counsel were ineffective by failing to argue that the aggravating circumstances should have been submitted for a probable cause determination.

The failure to seek a determination that there was probable cause to charge Mr. Vanisi with capital murder rendered Mr. Vanisi's charging document unconstitutional. See 2AA262-66; Claims 13, 23. In Nevada, first degree murder is aggravated, and therefore punishable by the death penalty, only upon the presentation and proof of one or more aggravating circumstances. See NRS 200.030(4)(a); 200.033. Regardless of the nomenclature employed by the Legislature, an aggravating circumstance is a fact which, if found, will increase the penalty for first

degree murder so long as the aggravating circumstances are not outweighed by mitigating circumstances. See NRS 200.030(4)(a) ("A person convicted of murder of the first degree is guilty of a category A felony and shall be punished . . . [b]y death, only if one or more aggravating circumstances are found . . . ."). Thus, this Court must hold that the aggravating circumstances, which the prosecutor contends will allow first degree murder to be punishable by death, are elements of first degree murder. Ring v. Arizona, 536 U.S. 584, 609 (2002) (aggravating circumstances operate as functional equivalent of an element of greater offense); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (any fact that increases the penalty for a crime is an element of the offense); see Johnson v. State, 118 Nev. 787, 798-801, 59 P.3d 450, 460 (2002) ("Nevada statutory law requires two distinct findings to render a defendant death-eligible: The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance . . . found.").

In Nevada, there are two routes a prosecutor may follow to institute criminal proceedings–a defendant may either be charged by indictment or by information. See NRS 173.015; 173.035. An indictment is a determination of the grand jury that there is probable cause to believe the defendant committed the offense alleged. See NRS 172.255; NRS 172.285(1); see also Franklin v. Sheriff, 94 Nev. 676, 677, 585 P.2d 1336 (1978) (evidence before grand jury was insufficient to establish probable cause).

An information is generally filed by the prosecutor after a preliminary examination in which the magistrate has found probable cause that the defendant committed the offense charged in a complaint. See NRS 173.035(1); NRS. 173.045(1); see also Robertson v. Sheriff, 85 Nev. 681, 682-83, 462 P.2d 528, 529 (1969) (court found evidence in preliminary hearing established probable cause); Azbill v. Fisher, 84 Nev. 414, 418, 442 P.2d 916, 918 (1968) (purpose of preliminary hearing "is to determine the basis for prosecution and the issue involved in the proceedings is not the question of guilt or innocence, but whether there is sufficient evidence for probable cause to hold the accused over to

answer and stand trial."). Whichever route the prosecutor elects to follow in a criminal case, "the indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075(1).

Due process, the Sixth Amendment and NRS 173.075(1) require that every element of first degree murder be alleged in the charging document. See Jones v. U.S., 526 U.S. 227, 232 (1999) (elements must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt); Russell v. United States, 369 U.S. 749, 763-64 (1962); Gautt v. Lewis, 489 F.3d 993, 1003 (9th Cir. 2007) ("[T]o satisfy the Sixth Amendment, an information must state the elements of the offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against."). This Court held that the "indictment standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense." Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970); see Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081-82 (2005) ("An

information must properly include a statement of facts constituting the offense in ordinary and concise language.") (quotation omitted). The Court has never distinguished between the type of charging document used when considering the due process requirements that each element of an offense be alleged. See Hidalgo v. Eighth Judicial Dist. Court ex rel. County of Clark, 124 Nev. 330, 338-39, 184 P.3d 369, 375-76 (2008); see State v. Hancock, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998); Ikie v. State, 107 Nev. 916, 919, 823 P.2d 258, 161 (1991).

Due process, the Sixth Amendment, NRS 173.075(1), as well as the opinions of this Court, all require that each element of an offense be alleged in a charging instrument. See Laney, 86 Nev. at 178, 466 P.2d at 669; Viray, 121 Nev. at 162, 111 P.3d at 1081-82. Moreover, Apprendi, Ring, and Johnson all hold that any fact which will increase a defendant's punishment as to allow the imposition of death is in effect an element of the offense. Ring, 536 U.S. at 609; Apprendi, 530 U.S. at 490; Johnson v. State, 118 Nev. at 798-801, 59 P.3d at 460. Therefore, due process, the Sixth Amendment, NRS 173.075(1) and the previous holdings of this Court all required prosecutors to allege in the charging

instrument the facts constituting aggravating circumstances which they believed would allow the imposition of the death penalty.

Mr. Vanisi has found only one opinion from this Court addressing this issue. In Maestas v. State, 128 Nev. Adv. Op. 12, 275 P.3d 74 (2012), this Court purported to distinguish and quickly dispose of the notice requirement in Apprendi and Ring by holding that the requirement that an aggravating fact must be alleged in an indictment "stems from the Fifth Amendment right to presentment or indictment of a Grand Jury, which applies only to the federal government and has not been incorporated into the Due Process Clause of the Fourteenth Amendment." Id., 275 P.3d at 86 (quotations omitted). This Court did not address the Nevada statute which requires every element of the offense to be included in a charging document. Id.; see NRS 173.075(1). Likewise, this Court did not consider Gautt, 489 F.3d at 1003, and other cases which find such a requirement under due process and the Sixth Amendment. See Maestas, 275 P.3d at 86; see also Cole v. State of Arkansas, 333 U.S. 196, 201 (1948) ("It is as much a violation of due process to send an accused to prison following conviction of a charge on

which he was never tried as it would be to convict him upon a charge that was never made."). Finally, this Court did not address or attempt to distinguish its own authority which, regardless of whether the charging document is an indictment or an information, has always required the charging document to be "a statement of facts constituting the offense in ordinary and concise language." Viray, 121 Nev. at 162, 111 P.3d at 1081-82; see, e.g., Hancock, 114 Nev. at 164, 955 P.2d at 185; Ikie, 107 Nev. at 919, 823 P.2d at 161.

Mr. Vanisi submits that Maestes does not control the resolution of this claim because he does not contend that he was entitled to the presentation of his case to a grand jury. See Maestes, 275 P.3d at 86; Alexander v. Louisiana, 405 U.S. 625, 633 (1972). Mr. Vanisi was entitled, under due process, the Sixth Amendment, and Nevada statutes, to a probable cause determination as to each of the elements of the offense which the prosecutor sought to bring and a charging document which included a statement of facts regarding those elements presented in a clear and concise manner. Viray, 121 Nev. at 162, 111

/ / /

P.3d at 1081-82. The prosecutor failed to do so here and, under Apprendi and Ring, Mr. Vanisi is entitled to relief.

10. Trial counsel and direct appeal counsel were ineffective by failing to argue that gruesome photographs should have been excluded.

The trial court admitted gruesome photographs into evidence and allowed the prosecution to project those photographs onto a large screen. 13AA3016. This occurred despite trial counsel's objection. 13AA3017. This was error because these photos so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); accord Romano v. Oklahoma, 512 U.S. 1, 12-13 (1994). These photos infected the trial with unfairness because of how gruesome they were. For example, Exhibit 4B was a frontal depiction of the decedent's face. See 16AA3860-72. The photograph showed several bloody gashes on all parts of the face, swollen, partially open eyes and a jagged broken tooth protruding from the decedent's open mouth. See 16AA3860-72. These photographs encouraged the jury to find guilt and impose a death sentence on constitutionally impermissible grounds, based simply on

the gruesomeness of the offense, and the jury's emotional reaction to it. See Godfrey, 446 U.S. at 433 n.16. Direct appeal counsel was ineffective for failing to raise this claim. See Claims 22, 23.

E. The district court erred by rejecting Mr. Vanisi's argument that the cumulative effect of the errors committed at trial, on direct appeal, and during initial post-conviction proceedings, entitled him to a new trial and sentencing hearing.

Mr. Vanisi requests this Court to cumulatively consider claims not previously raised, see VI.A above, claims raised ineffectively, see VI.D above, and the claims below, which were fully raised by initial post-conviction counsel, but erroneously rejected by this Court as procedurally barred or unmerited, see Claims 3H, 24. Constitutional errors that may be harmless in isolation may have the cumulative effect of rendering the petitioner's trial fundamentally unfair. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Parle v. Runnels, 505 F.3d 922, 927-28 (9th Cir. 2007). This Court must consider the cumulative effects of multiple errors in assessing whether any particular error may have been prejudicial in combination with other constitutional errors that infected the trial. Id. at 927; see Chambers v.

Mississippi, 410 U.S. 284, 298, 302-03 (1973). This Court has long engaged in cumulative error analysis in habeas cases. See, e.g. Evans v. State, 117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001).

1. This Court's denial of Mr. Vanisi's Faretta argument was erroneous.

"The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." Faretta v. California, 422 U.S. 806, 833-34 (1975). Thus, the Supreme Court concluded that "a state may not constitutionally" "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." Id. at 807. This Court erred by denying Mr. Vanisi's Faretta argument. See Claim 10.

The standard for self-representation is one of waiver: if a defendant competently and intelligently waives his right to counsel, he is entitled to represent himself. Faretta, 422 U.S. at 835; see also Godinez v. Moran, 509 U.S. 389, 399 (1993) ("the defendant's 'technical

legal knowledge' is 'not relevant' to the determination of whether he is competent to waive his right to counsel") (quoting Faretta, 422 U.S. at 836)).[26] As noted by this Court, "[t]he district court did not question that Vanisi was prepared to enter a knowing, intelligent, and voluntary waiver of his right to counsel." Vanisi, 117 Nev. 338, 22 P.3d 1164, 1170 (2000). In fact, the State conceded that Mr. Vanisi had a right to represent himself: "The State has seen nothing in the canvass this morning that would render Mr. Vanisi incapable pursuant to our guidelines of representing himself, although we collectively do it, make

/ / /

---

[26] The Supreme Court's decision in Indiana v. Edwards, 554 U.S. 164 (2008), does not apply here. 554 U.S. at 174. (States may "limit [a] defendant's self-representation right by insisting upon representation by counsel at trial–on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented"). Nowhere here did the prosecution argue that Mr. Vanisi lacked the mental capacity to conduct his trial defense; similarly, the trial court did not find a lack of capacity. In fact, so far as the State or the trial court were concerned, Mr. Vanisi was competent. See 4AA814 ("He has no defect in his ability to read, to write, or to otherwise communicate, or to understand subject matter that he may be, that may be foreign to him, specifically here the law."). Insofar as Indiana v. Edwards applies to this case, an evidentiary hearing is required because of the lack of factual findings as to this specific issue. See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

that assessment with a severe degree of caution." 4AA815. The trial court denied this request. 3AA633.

This Court upheld the trial court's denial on the basis that Mr. Vanisi intended to delay the proceedings, and because Mr. Vanisi would disrupt the proceedings. Both of these rulings are contrary to the controlling federal law and belied by the record.[27] Mr. Vanisi unequivocally indicated that he was ready to proceed to trial: "I just wanted to put on the record that I am not, I'm not–I'm not delaying time. I will be ready on September 7." 4AA775. If the trial court were concerned that Mr. Vanisi would later seek a continuance, the appropriate action would have been to deny the continuance. It was not a basis to deny Mr. Vanisi's motion. See 1AA154-58.

/ / /

---

[27]Notably, the concurrence in Mr. Vanisi's direct appeal incorrectly stated the majority's holding: "I concur in the majority's conclusion that Vanisi's request to represent himself was improperly denied on the bases of the delay in asserting his request and the complexity of his case." Vanisi, 117 Nev. at 345, 22 P.3d at 1174 (Rose, J., with Agosti and Becker, JJ., concurring) (emphasis added); see id. at 340, 22 P.3d at 1171 ("We conclude that the district court acted within its discretion in finding that Mr. Vanisi harbored an intent to delay the proceedings.")

Additionally, the record did not support the trial court's finding, affirmed by this Court, that Mr. Vanisi would be disruptive during the proceedings. As a basis for denying a Faretta motion, disruption must be flagrant and during trial. See United States v. Flewitt, 874 F.2d 669, 674 (9th Cir. 1989) ("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." (emphasis in original)). The flagrant conduct described by the Ninth Circuit in Flewitt was where a defendant "engage[d] in speech and conduct which [was] so noisy, disorderly, and disruptive that it [was] exceedingly difficult or wholly impossible to carry on the trial." Id. (quoting Illinois v. Allen, 397 U.S. 337, 338 (1970)). Nothing in the record suggests that Mr. Vanisi's behavior before trial ever approximated this level of disruption. On the contrary, the State conceded that Mr. Vanisi was not disruptive. 4AA813 ("But certainly this morning Mr. Vanisi has been anything but disruptive."). Justice Rose's concurrence is instructive:

> 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, 117 Nev. 345-46, 22 P.3d at 1174-75 (with Agosti and Becker, JJ.). Thus, this Court incorrectly found that Mr. Vanisi would be disruptive in representing himself. See also 1AA158-63.[28]

2. This Court's denial of Mr. Vanisi's lethal injection claim was erroneous.

This court should revisit its denial of Mr. Vanisi's lethal injection claim. See 8AA1996; Claims 11, 23. Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), aff'd. 438 F.3d 926 (9th Cir. 2006), cert. denied, 546 U.S. 1163

---

[28] Additionally, the trial court erred by denying trial counsel's motion to withdraw. See Claim 3B. After Mr. Vanisi expressed both that he had murdered Sergeant Sullivan and that he was going to testify to contrary facts, trial counsel sought to withdraw. See 4AA818-43. Counsel cautioned that if they were not allowed to withdraw, they would have to certify themselves as ineffective. 4AA824, 4AA827-28. Despite this, the trial court denied the request, creating a conflict of interest, in violation of Mr. Vanisi's right to effective assistance of counsel. See Strickland, 466 U.S. 668.

(2006). The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales and Baze v. Rees, 553 U.S. 35, 62 (2008), to ensure the adequate administration of anesthesia, poses an unreasonable risk of inflicting unnecessary suffering.[29] This Court should revisit its procedural denial of this claim. See 8AA1996.

Mr. Vanisi acknowledges that this Court has held that an attack on the method of execution is not cognizable in habeas proceedings. McConnell v. State, 125 Nev. 243, 246-49, 212 P.3d 307, 310-11 (2009). The McConnell ruling, however, amounts to an unconstitutional suspension of the writ, Nev. Const. Art. 1 § 5, based upon the construction of the habeas statute. Further, the State has not conceded

---

[29] The Court is no doubt familiar with and may take judicial notice of the media reports of Arizona's execution of Joseph Rudolph Wood on July 23, 2014, which took nearly two hours, and was described by a reporter as "very disturbing to watch . . . like a fish on shore gulping for air." http://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/ (last accessed December 1, 2014). The Court will also recall the recent botched execution of Clayton Lockett in Oklahoma, on April 29, 2014, wherein state officials attempted to take Lockett's life by lethal injection for more than forty minutes before they were ultimately successful. See http://newsok.com/family-of-executed-inmate-sues-governor-executioners/article/5353204 (last accessed December 1, 2014).

that exhaustion of this claim in state proceedings is unnecessary to obtain federal review, see 28 U.S.C. § 2254(b), and has continued to argue that federal courts cannot address a claim that lethal injection is unconstitutional if it is not first raised in state proceedings (and that the claim can be procedurally defaulted if not raised in state court). Until the State ceases to invoke the doctrines of exhaustion and procedural default to attempt to bar this claim because it has not been raised in state court, Mr. Vanisi must raise it here.

3. This Court's denial of Mr. Vanisi's elected judge's claim was erroneous.

This Court should revisit its denial of Mr. Vanisi's elected judges claim. See 8AA1996; Claim12, 23. Mr. Vanisi alleged in his petition that his convictions and death sentence are invalid because the tenure of judges of the Nevada state district courts and of the Justices of this Court is dependent upon popular contested elections. 1AA187-89; see Nev. Const. Art. 6 §§ 3, 5.

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, had tenure during good behavior. Nevada law does not include any mechanism for insulating state judges and justices from majoritarian 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). One justice of the Nevada Supreme Court has acknowledged publicly that the time and expense of an election challenge involving a charge that a sitting justice was "soft on crime" due to a ruling that favored the defense "was not lost on" the elected Nevada judiciary.

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. 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 Mr. Vanisi's convictions and death sentence be vacated.

4. This Court erroneously denied Mr. Vanisi's argument that the death penalty is arbitrary and capricious.

This Court should revisit its procedural denial of Mr. Vanisi's claim that trial and direct appeal counsel were ineffective by failing to argue that the death penalty is arbitrary and capricious. 8AA1996; See Claims 19, 23. Nevada Revised Statutes 177.055(2) requires this Court to review each death sentence to determine whether there was sufficient evidence to support the aggravating circumstances found by the jury and whether Mr. Vanisi's death sentence was imposed under the influence of passion and prejudice. Such a review is part and parcel to the Eighth Amendment's requirement of reliability. See Gregg v. Georgia, 428 U.S. 153, 195 (1976); see also U. S. Const. Amend. VIII;

Nev. Const. Art. 1 §6. This Court has never enunciated the standards it applies in conducting its review under this statute. See Jones v. State, 107 Nev. 632, 638, 817 P.2d 1179, 1182 (1991). The complete absence of standards renders the purported review unconstitutional under federal due process standards. Harris ex rel. Ramseyer v. Blodgett, 853 F. Supp. 1239, 1291 (W.D. Wash. 1994), affirmed 64 F.3d 1434 (9th Cir. 1995) (absence of standards for proportionality review); cf. Campbell v. Blodgett, 997 F.2d 512, 523 n.13 (9th Cir. 1992) (detailed standards for mandatory review of issues other than proportionality comply with due process).

5. This Court erroneously denied Mr. Vanisi's claim that trial counsel were ineffective for disclosing that Mr. Vanisi had confessed.

Counsel violated Mr. Vanisi's right to the effective assistance of counsel when he revealed privileged information to the trial court. See Claim 3B. Specifically, Mr. Gregory revealed to the court that in February of 1999, Mr. Vanisi admitted that he had killed the victim. 4AA821. Thus, Mr. Gregory was ineffective. Compare Strickland, 466 U.S. 668, 688 ("Counsel's function is to assist the defendant, and hence

counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.") with 4AA827-28; but see Nix v. Whiteside, 475 U.S. 157, 174 (1986).

6. This Court erroneously denied Mr. Vanisi's claim that the pretrial death qualification of jurors is unconstitutional.

This Court should revisit its procedural denial of Mr. Vanisi's claim that trial and direct appeal counsel were ineffective by failing to argue that the pretrial death qualification of jurors is unconstitutional. 8AA1996; 8AA1917-20; Claim 20, 23. Protracted discussions with potential jurors regarding penalty implicitly suggests the defendant's guilt, thereby undermining the presumption of innocence, and impairing the impartiality of the jurors. See Grigsby v. Mabry, 569 F.Supp.1273, 1302-05 (E.D.Ark. 1983). Further, social science research using diverse subjects and varied methodologies reveal that death qualified juries are conviction prone. Krauss, Bonora, National Jury Project, Jurywork: Systematic Techniques, § 23.04(4)(a); James R. Acker et al., The Empire State Strikes Back: Examining Death- and Life-Qualification of Jurors and Sentencing Alternatives Under New

York Capital-Punishment Law, 10 Crim. Just. Pol'y Rev. 49, (1999) ("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.").

Numerous jurists have concluded that the constitutional guarantee of a right to an impartial jury forbids pretrial death qualification. See Griffin v. State, 741 A.2d 913, 948 (Conn. 1999) (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 convict at the guilt phase," and that costs and time are insufficient basis to trump capital stakes involved); State v. Bey, 548 A.2d 887, 923 (N.J. 1998) (same).

At minimum, the United States Constitution requires the "balancing of the harm to the individual . . . against the benefit sought

by the government." Witherspoon v. Illinois, 391 U.S. 510, 517, 520-21 & n.18. (1968) (while holding that the defendant had not substantiated his claim that pretrial death qualification made his jury unconstitutionally biased, the Supreme Court also recognized that further proof might have done so); Cooper v. Morin, 399 N.E.2d 1188, 1193-94 (N.Y. 1979).

7. This Court erroneously denied Mr. Vanisi's claim that the district attorney arbitrarily, inconsistently and discriminatorily selects defendants for the death penalty.

This Court should revisit its procedural denial of Mr. Vanisi's claim that trial and direct appeal counsel were ineffective by failing to argue that the district attorney arbitrarily, inconsistently and discriminatorily selects defendants for the death penalty. 8AA1996; 8AA1912-16; Claims 21, 23. By allowing prosecutors to seek death against virtually any defendant indicted for first-degree murder, Nevada's capital punishment scheme violates the Fifth, Sixth, Eight and Fourteenth Amendments. See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972) (the death sentences under review were deemed "cruel and unusual in the same way that

being struck by lightening is cruel and unusual"); Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Daniels v. Williams, 474 U.S. 327, 331 (1986); see also Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 294-95 (1998).

As Nevada's death penalty scheme does not provide guidance to prosecutors, or demand that government death-notice determinations be established and subject to judicial oversight, the scheme authorizes arbitrariness. In Nevada, the district attorneys' discretion to select defendants for capital prosecution, which directly implicates sentencing, lacks objective guidance. The key component of the process leading to a death sentence–only those defendants chosen by the prosecutors can receive this punishment–rests entirely on the whim of the prosecutor, and the possibility of facing a death sentence is akin to being "struck by lightening." Furman, 408 U.S. at 309; see also State v. Mohi, 901 P.2d 991, 998-1004 (Utah 1995) (a system where prosecutors have total discretion in deciding which children are to be tried as adults violate the constitution).

A Nevada's district attorney's decision to seek death is not a charging decision constricted by statutory requirements because of the constitutional infirmities of NRS 200.033, which allows for death to be sought in every first-degree murder case. "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).[30] Since Nevada's 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.

/ / /

---

[30] Mr. Vanisi acknowledges difference between a "groundless prosecution" and an "arbitrary and capricious" prosecution, State v. Smith, 496 A.2d 507, 515-16 (N.S. Super. Ct. Law. Div. 1985). It is the later concern—as to the inherent arbitrariness and inconsistency of the method by which death penalty decisions are made in Nevada—that animates Mr. Vanisi's arguments. Cf. Maynard v. Cartwright, 486 U.S. 356, 360-64 (1988).

VII. CONCLUSION

For the foregoing reasons, Mr. Vanisi respectfully requests that this Court reverse the order of the district court and vacate his convictions and death sentence. In the alternative, Mr. Vanisi requests that this Court remand his case to the district court so that he can receive an opportunity to demonstrate cause and prejudice through discovery and an evidentiary hearing.

DATED this 7th day of January, 2015.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

Tiffani Hurst
Assistant Federal Public Defender
tiffani_hurst@fd.org

Randolph Fiedler
Assistant Federal Public Defender
randolph_fiedler@fd.org

Gary Taylor
Assistant Federal Public Defender
gary_taylor@fd.org

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5), and the type style requirements of NRAP 332(a)(6), because this brief has been prepared in a proportionally spaced typeface using WordPefect X6 in 14 font and in Century style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 36,747 words.

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 certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including N.R.A.P 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of January, 2015.

Respectfully submitted,

Tiffani D. Hurst
Assistant Federal Public Defender
Nevada Bar No. 11027C
411 E. Bonneville Ave., #250
Las Vegas, Nevada 89101
tiffani_hurst@fd.org

Counsel for Appellant

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that pursuant to NRCP 5(b)(2)(D), this document was filed electronically with the Nevada Supreme Court on the 7th day of Janaury, 2015. Electronic Service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the Master Service List as follows:

Terrence McCarthy, Deputy District Attorney
Catherine Cortez Masto

Felicia Darensbourg
An Employee of the Federal Public Defender