

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SIAOSI VANISI,

Appellant,

vs.

RENEE BAKER, WARDEN, and
CATHERINE CORTEZ MASTO,
ATTORNEY GENERAL FOR
THE STATE OF NEVADA,

Respondents.

No. 65774

Volume 5 of 26

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APPELLANT'S APPENDIX

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

Second Judicial District Court, Washoe County

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of January, 2015. Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy
Washoe County District Attorney
tmccarth@da.washoecounty.us

Felicia Darensbourg
An employee of the Federal Public Defender's Office

1 CODE 4245

2
3
4
5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

11 v.

Case No. CR98-0516

12 SIAOSI VANISI,
13 also known as
14 "PE,"
also known as
"GEORGE,"

Dept. No. 4

15 Defendant.

16 _____/
17 *unused*
VERDICT

18 We, the jury in the above-entitled matter, having
19 previously found the defendant, SIAOSI VANISI, also known as
20 "PE," also known as "GEORGE", guilty of murder in the first
21 degree, set the penalty to be imposed at 50 YEARS IN THE NEVADA
22 STATE PRISON.

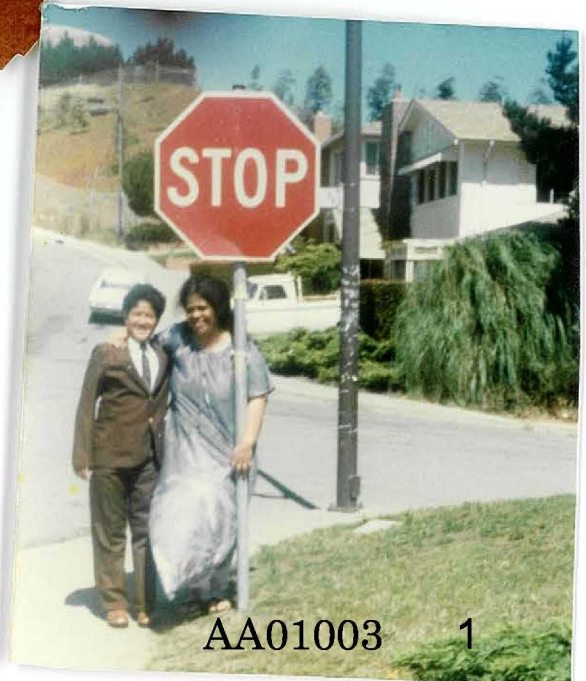
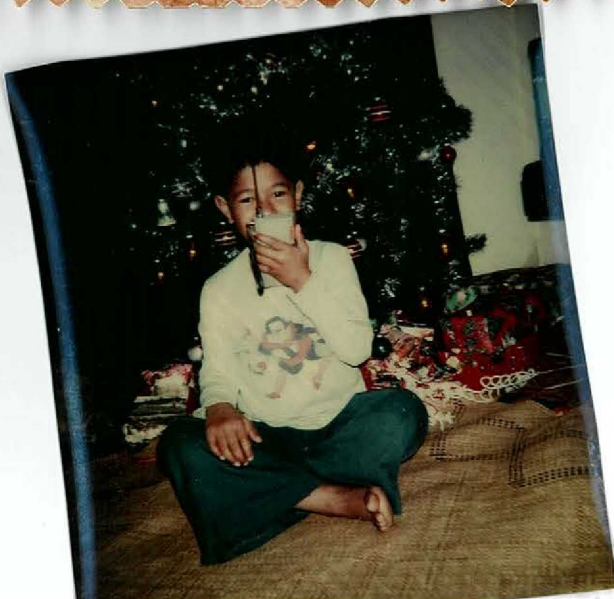
23 DATED this ____ day of _____, 19____.

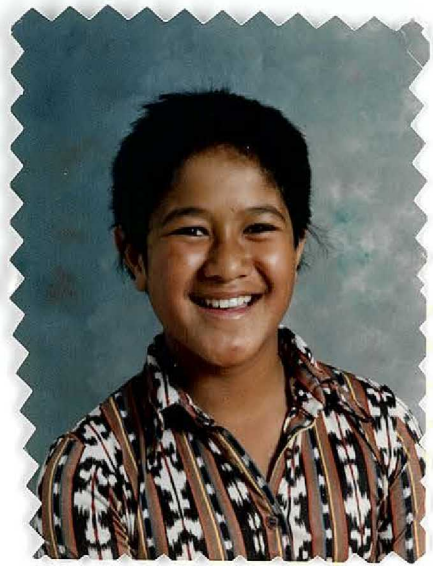
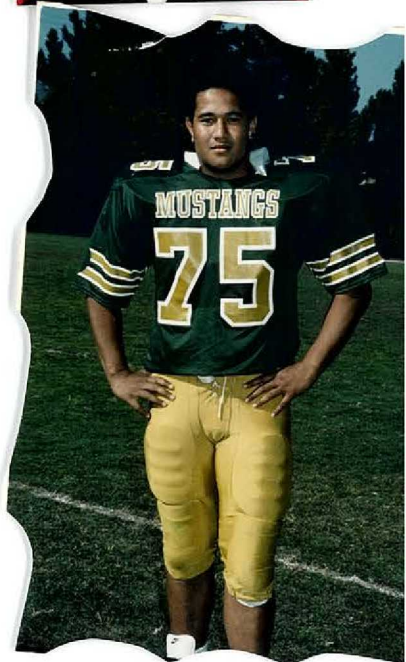
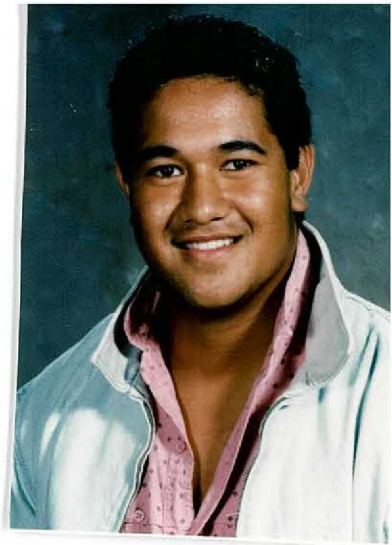
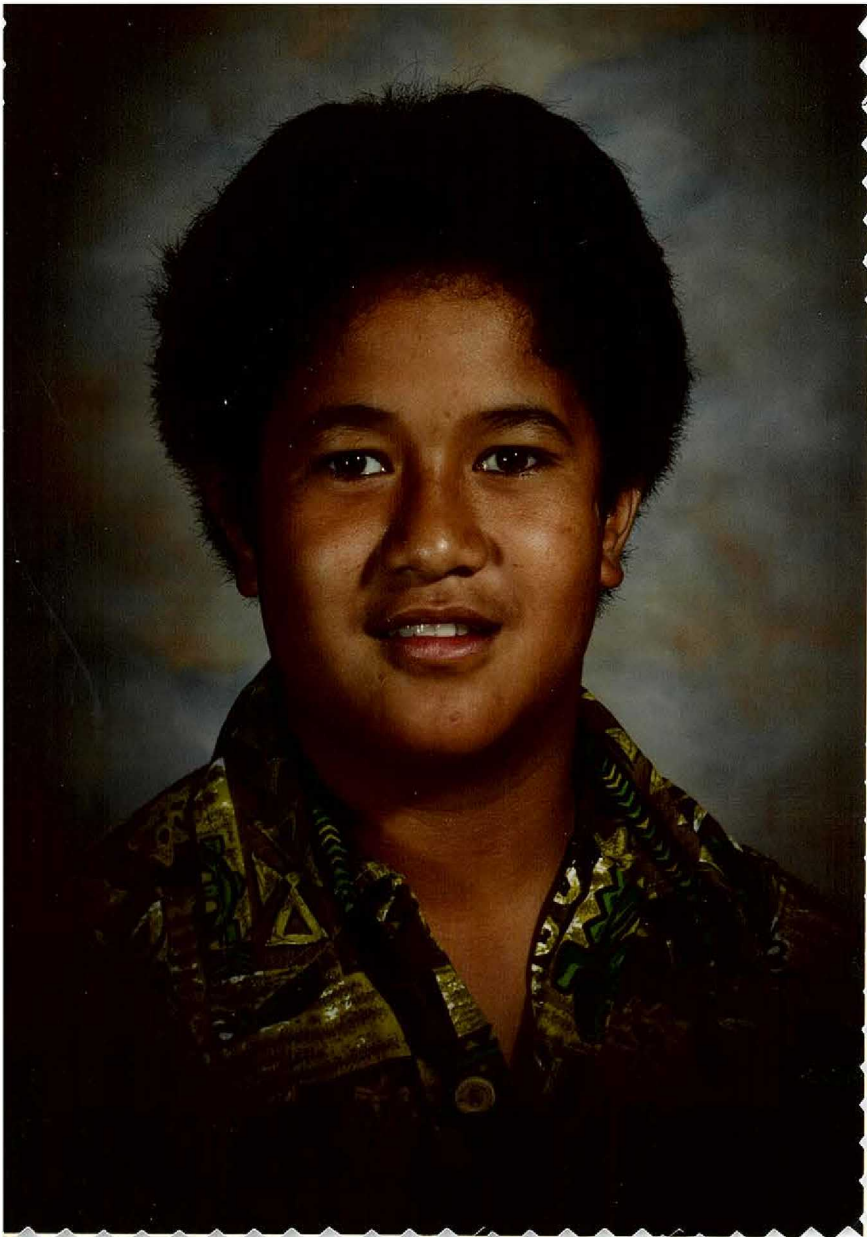
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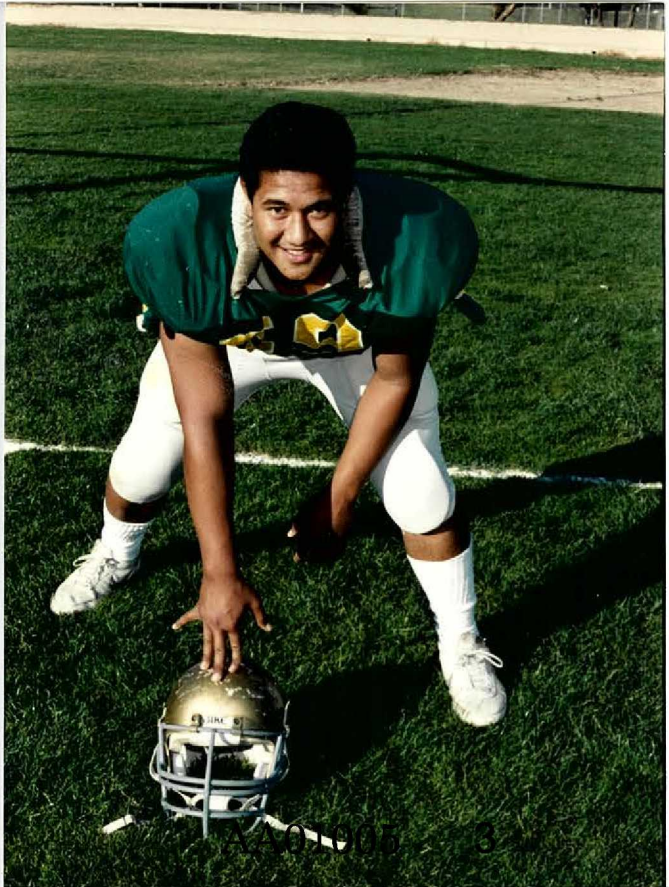
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Exhibit 31

Exhibit 31









AA01006

Exhibit 32

Exhibit 32

1 1670
 2 MICHAEL R. SPECCHIO
 3 BAR# 1017
 4 WASHOE COUNTY PUBLIC DEFENDER
 5 P.O. BOX 30083
 6 RENO NV 89520-3083
 7 (775) 328-3464
 8 ATTORNEY FOR: DEFENDANT

FILED

'99 AUG 12 A9:47

APPROVED BY CLERK

BY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

9 THE STATE OF NEVADA,
 10 Plaintiff,
 11 vs.

Case No. CR98-0516

12 SIAOSI VANISI,

Dept. No. 4

13 Defendant.

UNDER SEAL

14 EX-PARTE MOTION TO RECONSIDER SELF-REPRESENTATION

15
 16 COMES NOW the Defendant, by and through counsel, STEPHEN
 17 GREGORY and JEREMY BOSLER, and moves this Court to reconsider
 18
 19
 20
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 23
 24

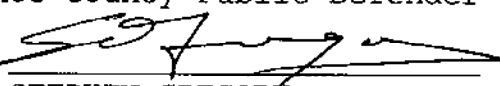
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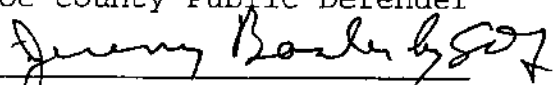
1 It's Order denying the Defendant's request to represent himself
 2 in these proceedings. This motion is based on the following
 3 points and authorities^{sch}

4 DATED this 12 day of August, 1999.

5 MICHAEL R. SPECCHIO
 6 Washoe County Public Defender

7 By: 
 8 STEPHEN GREGORY
 9 Chief Deputy Public Defender

10 MICHAEL R. SPECCHIO
 11 Washoe County Public Defender

12 By: 
 13 JEREMY BOSLER
 14 Deputy Public Defender

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 25 ///

26 ///

POINTS AND AUTHORITIES

Upon receipt of this Court's written Order it was apparent that this Court based It's decisions wholly, or in part, on the Defendant's inability to articulate "why" he wanted to represent himself and his "tactical" reasons for doing so.

The Defendant had been instructed by his counsel to not reveal his defense in open court. Counsel did not believe that the "whys" or the "tactics" of the Defendant's request to exercise his Constitutional right were required under Faretta or its progeny, or Nevada Supreme Court Rule 253.

The Defendant has embraced a defense that his counsel refuses to present at trial. More importantly, the Defendant has refused since March 1999, and continues to refuse to embrace the proffered defense suggested by counsel. The defenses are incompatible.

///

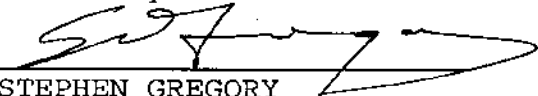
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SVan1s12JDC04837

1 The Defendant requests an in-camera hearing to discuss
2 with the Court privileged communications between the Defendant
3 and his counsel, as soon as possible to prevent any delay to
4 the start of the trial set for September 7, 1999.

5 DATED this 12th day of August, 1999.

6 MICHAEL R. SPECCHIO
7 Washoe County Public Defender

8 By: 
9 STEPHEN GREGORY
Chief Deputy Public Defender

10 MICHAEL R. SPECCHIO
11 Washoe County Public Defender

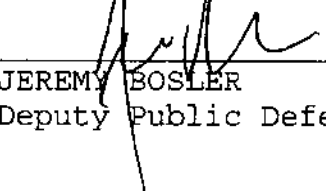
12 By: 
13 JEREMY BOSLER
14 Deputy Public Defender

Exhibit 33

Exhibit 33

Case Number: CR98-0516

Department Four

Second Judicial District Court in and for the State of Nevada

Washoe County, Nevada

The State of Nevada

vs.

Siaosi Vanisi

DEFENSE COUNSEL POST - TRIAL MEMORANDUM

IN ACCORDANCE WITH SUPREME COURT RULE 250

October 15, 1999.

1412

Rec'd 6/28/02
AA01013 H.

TQUALLS01780

STATE OF NEVADA v. SIAOSI VANISI

Case Number: CR98-0516

Trial: January 11, 1999

Court: Honorable Connie Steinheimer

Department Four - Second Judicial District Court

Mistrial Declared - January 15, 1999

Trial Re-scheduled: September 7, 1999

Re-scheduled: September 20, 1999

This Memorandum is prepared in accordance with the mandatory provisions of Supreme Court Rule 250.

Accordingly, the following information will be set forth:

- **The services performed for the Defendant;**
- **The nature and extent of the communication with the Defendant;**
- **The complete compilation of time records of counsel, and the other staff assigned to this Murder Team;**
- **The investigation performed;**
- **The names of witnesses suggested by the Defendant and reasons why called or not called;**
- **List of Motions filed;**
- **The "other" results of further investigations;**
- **The witnesses contacted and not called;**
- **Observations of the Defendant;**
- **The tendered defense...involvement of the Defendant;**
- **Should the defendant testify?**

- **Issues for Appeal, Review:**
- **Seminars and instruction on capital cases**
- **Why was the case difficult/impossible to defend?**
- **- Comments -**
- **Certification**

The Defendant, Siaosi Vanisi, also known as "Pe" (pronounced Bay), Rocky, Perrin was charged with the murder of University of Nevada Policeman, Sergeant George Sullivan in January, 1998.

The State has filed a Notice of Intent to Seek the Death Penalty.

The Defendant had resided in Los Angeles (Redondo Beach), California before visiting in Reno.

The death of Sgt. Sullivan was particularly gruesome in that the cause of death was alleged to have been numerous blows to the head with a hatchet or axe.

The Defendant had made statements about wanting to "kill a cop" to numerous people in the Reno area for days before, including the day that Sgt. Sullivan was killed.

The Defendant left the Reno area shortly after the death of Sgt. Sullivan.

There are varying interpretations on whether the Defendant ever admitted to friends and relatives to the killing of Sgt. Sullivan.

The Defendant did not give any incriminating statements to the police.

The State had a strong circumstantial evidence case against the Defendant.

- SERVICES PERFORMED

Every resource available was utilized in the defense of Mr. Vanisi. It became apparent from the outset that this would be a difficult, if not impossible, case to defend.

We contacted every relative that might have something positive to say about the Defendant.

The Defendant is Tongan...unfortunately the local Tongan community, who had professed aid and assistance for the Defendant, became disenchanted and have ignored our requests to confer with them.

Even the local Tongan witnesses have refused to speak with us.

We have made untold efforts to contact Losa Louis, Renee Paeua, Corrina Louis, Shomari Roberts, Teki, Laki, etc. and all of these requests have not been afforded a response.

We contacted the Tongan Consulate, without success.

We contacted the Center for Capital Assistance in San Francisco (Scharlette Holdman - Anthropologist and Debra Sabah - Attorney)...the most they could offer was that we should pursue the cultural differences in our defense...since he was 6 years of age when he came to the U.S., I didn't think there was much basis in pursuing this.

We either contacted or attempted to contact:

Dr. Adrienne Kaeppler - Smithsonian expert on Tongan culture.

Professor Susan Phillips - University of Arizona

Barbara McGrath - University of Washington

Dr. Helen Morton - Australian Anthropologist

Regarding cultural differences, I read the following books and articles sent to me: *Becoming Tongan, Islanders in Space: Tongans On-line, Creating Their Own Culture: Diasporic Tongans.*

It was readily apparent that raising cultural differences was NOT going to be effective.

I personally went to Simi Valley to interview the Defendant's wife, Deanne, and his cousin Michael Finau. The wife has always been ambivalent and remains that way... we anticipated calling her at the penalty hearing.

Finau never appeared. I interviewed him by phone...it was readily apparent that I was not going to be able to use Michael as a witness.

I did interview David Goodman. He likes Vanisi, doesn't believe that he could do anything like this...he never saw Vanisi angry or aggressive...(possibly a little aggressive toward his wife).

Investigators followed up with trips to Los Angeles to interview all of the witnesses and San Bruno, California to speak with the mother(s) and sister of Vanisi.

Finau confirmed the worst. There WERE hatchet marks in the door in Vanisi's bedroom...(practicing).

Finau and Greg confirmed the stealing, running women, bodyguard, wanting to kill a cop, also the stealing of a scanner in an attempt to rob banks, etc.

Finua is Vanisi's legitimate cousin...he blames all of Pe's actions on the fact that he was taking diet pills.

The Defendant was examined, independently, in the hopes that SOME medical condition could assist in the defense...no such luck. The initial report was that the Defendant is sane, mean, without compassion and remorse, and reasonably intelligent.

The single factor that made the Defendant "analyze" his situation into an impossible position is the fact that two (2) psychiatrists indicated the Defendant possessed "above-average" intelligence.

- **COMMUNICATION WITH THE DEFENDANT**

In addition to seeing the Defendant weekly, since appointment. I spoke to him on the phone regularly at the office and when he would call me at home collect from the jail.

The Defendant had access to me or a member of the Murder Team working his case twenty-four (24) hours a day, seven (7) days a week.

In addition to my time with the Defendant, he was also in contact with the Investigators and other Lawyers assigned to this case.

For a complete breakdown of my communication with the Defendant, as well as the other members of the defense team, I refer you to the Time Records, herein.

- **TIME RECORDS**

Michael Specchio, Washoe County Public Defender, was lead counsel for the Defendant.

A complete listing of time involved in representation of the Defendant is submitted herewith.

Subsequent to the mistrial and due to health problems, Stephen Gregory, Chief Deputy, and Jeremy Bosler, Deputy Public Defender assumed primary responsibility for the representation of the Defendant. I remained as counsel solely in an advisory capacity.

- **THE MURDER TEAM**

In addition to the undersigned, Michael Specchio, as lead counsel, the defendant was afforded the knowledge and expertise of the following Murder Team members:

John Petty - Chief Trial Deputy. John prepared and assisted in the preparation of the pre-trial motions. John also advised regarding the Defendant's Motion to represent himself, our Motion to Withdraw and the subsequent Writ to the Nevada Supreme Court.

Steve Gregory - Chief Trial Deputy. Steve prepared and presented the defense and mitigation in this case as well as dealing with the Defendant's direct testimony.

Jeremy Bosler - Deputy Public Defender. Jeremy selected the jury and made the opening statement. He also assisted Steve with the defense and mitigation.

The Investigators assigned to this case were Crystal Calderon and Evo Novak.

My Assistant, Laura Bielser, was responsible for calendaring, correspondence, meetings, etc.

• INVESTIGATION

The Investigation in this case was somewhat limited as the defendant initially refused to allow us to have contact with his biological family.

We traveled to Simi Valley, California to interview the Defendant's wife. We also interviewed Deanne Vancey for hours over the telephone.

We spoke with the pertinent witnesses in Salt Lake City.

We traveled to Redondo Beach, Manhattan Beach and Los Angeles, California to interview witnesses.

We traveled to San Bruno, California to interview the mother(s) and sister of the Defendant.

As requested by the Defendant, we did NOT attempt to contact the father of the Defendant in Hawaii.

I traveled to Lake Lopez (Pismo Beach) in an attempt to follow up a lead from the Defendant which was without basis.

We made efforts to follow-up on every possible lead that could render beneficial information for the Defendant.

We contacted all of the local Tongan community that had ANY contact with this case or the Defendant. As time progressed, they all decided it was best to distance themselves from the Defendant and they refused to speak with us. We posted notes and cards on their residence doors and they wouldn't return calls.

Others took a different approach and would make appointments to come to the office and not show up.

The Investigators kept us apprised of the evidence and the scientific findings.

I believe all possible investigative avenues were discussed and the most important followed-up.

- **WITNESSES SUGGESTED BY THE DEFENDANT**

The Defendant was not insistent on the calling of any witnesses.

He did want my commitment that we would not call his father...he hasn't seen him in about twenty (20) years.

In light of the Defendant changing the spelling and pronunciation of his name (from Vanisi to Vanacey), because he wanted to distance himself from the family name because of his hatred for his father, I elected to honor this request.

He did discuss the calling of: Robert Kurts, Greg Gardner, and Michael Finau.

These fellows were all friends and roommates.

After speaking with them, they had too much damaging information (that I am convinced they have not and will not tell the police) to risk calling as defense witnesses.

Individually and collectively they know: Vanisi carried a hatchet in LA; that he practiced with the hatchet on the closet door in his bedroom (confirmed by our investigation); they knew of some robbery attempts; they knew about other fights; they PROBABLY knew more than they were telling us; they knew about the stealing of a police scanner so they could be more effective in doing robberies; they knew about an old Indian that was recently released from prison for killing someone with a knife/axe.

With the explanation as to why these witnesses should not be called on his behalf, the Defendant acknowledged and acquiesced in this decision.

The Defendant did not insist on ANY witness that should be called.

• THE FOLLOWING PRE-TRIAL
MOTIONS WERE FILED IN THIS CASE

Motion for Individual Voir Dire

Motion for Early Jury List

**Motion for Background Information on Prospective
Jurors**

Motion for Change of Venue

Motion for Jury Questionnaire

Motion to Avoid Death-Prone Jury

Motion for Proper Number of Jury Veniremen

Motion for Additional Peremptory Challenges

Motion in Limine: Racially Mixed Jury

Motion in Limine: State's Penalty Hearing Argument

Motion in Limine: Future Dangerousness of the Defendant

Motion in Limine: Gang Affiliation

Motion in Limine: Custody Status

Motion in Limine: Courtroom Security

Motion in Limine: Arrest of Defendant

Motion in Limine: Prior Bad Acts

Motion in Limine: Prosecutorial Misconduct

Motion in Limine: DNA Expert

Motion in Limine: Gruesome Photographs

Motion in Limine: Hearsay Evidence at Penalty Phase

Motion in Limine: State's Penalty Hearing Argument

Notice of Mitigating Factors

Motion to Disqualify Certain Potential Jurors

Motion to Expand Admonition to Jury Panel

**Motion to Allow Jury Consultants and Psychologists at
Counsel Table During Jury Selection**

Motion to Strike Aggravating Factors

Motion for Consideration of All Mitigating factors

Motion to Limit Victim Impact Statements

**Motion to Declare Nevada Death Penalty
Unconstitutional**

**Motion for Right of Defendant to Exercise Right of
Allocution**

Motion for Discovery

Motion to Sever

Motion for Invocation of Rule of Exclusion

Motion for Production of All Exculpatory Material

**Motion to Preclude Photographs and Media Coverage in
the Courtroom**

**Motion for Production of Samples, Procedures and
Results of All DNA Testing for Independent Analysis**

Motion for Bifurcated Penalty Hearing

Motion for Production of Criminal Histories of Witnesses

Motion for Order to Exchange Expert Witness List

Motion to Compel State to Designate Trial Witnesses

**Motion to Exclude Inadmissible and Prejudicial Evidence
at Penalty Phase**

**Motion for Production of All Aggravating Factors and
Character Evidence the State Intends to Produce at the
Penalty Phase**

**Motion for Reasonable Time between Guilt and Penalty
Phases of Trial**

**Motion for Hearing to Determine Competence of
Witnesses Under the Age of 14 Years**

Motion to Exclude Testimony of Undisclosed Informants

**There were approximately eight (8) other Motions that
were withdrawn or not filed.**

- **OTHER RESULTS OF INVESTIGATIONS**

and

- **WITNESSES CONTACTED - NOT CALLED**

The continuing Investigation in this case resulted in the finding of less than helpful facts and circumstances.

Particularly we were surprised that the State was not aware of some of this information and we had to make some tactical decisions regarding the testimony/evidence that we would avoid.

Further investigation revealed:

1. He had a child with a former girlfriend, Leanne Morris, of Chandler, Arizona. He has never paid child support and refused her request to consent to a termination of his parental rights to allow her husband to adopt the child.
2. He fathered a child with his cousin while on a mission for the LDS Church.

3. He has a history of drug use, thievery, sporadic employment, aggressive acts toward women (physical), practiced throwing a hatchet when he lived in California.
4. The Defendant had a fixation on "superheroes". He would wear tights and speak with young children about Robin Hood, etc. At first blush this should give one cause for concern. Once the true character of the Defendant is understood, one realizes that this is a young man that craves attention and will do anything to accomplish that end, hence: the wig, the dreadlocks, the beanie, the hatchet, the statements "I want to kill a cop", etc. He was constantly surrounding himself with youngsters that he could impress...most adults thought he was a braggart.
5. The defendant was alleged to have been involved as a bodyguard as well as having a stable of prostitutes in Los Angeles. He was involved in many petty thefts. He was involved in planning robberies. He wanted to be a gang member.
6. Apparently the statements that the Defendant made to Vainga Kinikini were fairly accurate. These are confirmed by his brother, David...never asked by the State.
7. It became obvious after initial investigation that the defense could not afford to call Michael Finau (cousin), Robert Kurts and Gary Gardner (friends/roommates) as defense witnesses. We would have to proceed with family members for the penalty phase, as best we could.

- **OBSERVATIONS OF THE DEFENDANT**

The Defendant is a very strange person. He craves attention at all costs. He has a desire to be noticed. His wearing of bizarre clothing (tights, tu tus, capes) are really nothing more than an attempt to draw attention to himself.

This is one of the reasons that he was hanging around young "gangbangers" in Los Angeles and high schoolers here in Reno (he was accompanied by three (3) young girls when the hatchet was purchased). He could more easily influence these young minds.

My initial reaction was that this Defendant had a screw loose and the defense would shift in that direction.

I had him examined early on and found that he was competent, could assist counsel, was very aggressive, was very mean spirited and reasonably intelligent.

The Defendant was housed at the Nevada State Prison for about six (6) weeks from July 15th through September 1st. I received reports that the Defendant:

- Was wearing a hand-made mask
- Was drawing Tattoos on himself
- Was talking in tongue (gibberish)
- Was acting bizarre
- Was refusing to wear clothes, etc. etc., etc.
- Was shot in a feeble escape attempt

I went to the prison to visit with the Defendant.

After much evaluation and my discussions with the Defendant, it was ascertained that he was "just playing with their minds" and would continue to do so.

The Court received the same information and Ordered the Defendant examined by two (2) doctors. He was determined to be sane, normal with above-average intelligence.

The Defendant began to realize about November that the State of Nevada was serious. They would NOT exile him to Tonga...they would try to execute him. He developed mood swings. He continued to do things to gain attention. He acknowledged that he acts bizarre because all superheroes act bizarre...I told him that he could not "snow" me with that hyperbole...he acknowledged he was doing it to harass the jailers and get attention.

The demeanor of the Defendant has remained fairly constant. It was only when he first realized the State wanted to execute him that he became interested in his defense.

The Defendant, in response to my Motion to exclude cameras and media from the courtroom, became as animated as I have seen. He WANTS the attention...at any cost.

He has been trying to "sell" his story to Hollywood. (He worked in Hollywood...did one beer commercial and mostly worked back stage).

The Defendant was advised early on that he would surely be convicted on Murder (1) and that there was the very strong possibility that he would be executed. From the outset, I so advised the Defendant. He was not given any false hope.

When the local Tongan community, and his relatives, decided there was some truth to these allegations and they withdrew support for the Defendant, he began to voice the fact that he would be found not guilty and "beat the rap".

When I explained that IF he were ever to "beat the rap" on the murder, he still was facing one hundred ten (110) years for the Robbery charges (3) and Possession of Stolen Property. He was astounded.

He was advised, on more than one occasion that he would spend the rest of his natural life in prison. He would never be a free man again. He would either die in prison in many years or he would die by lethal injection when the State says it's time. There is NO doubt this was fully understood by the Defendant.

The Defendant, having been uncomfortable with his present situation, began attempting to sabotage his defense team. He would refuse to sign documents (waivers, consent for documents, etc.), he would ask the same question over and over again (he wanted the answer to be as he wished), he would become difficult to deal with.

I am comfortable with the decisions in this case. The Defendant is legally sane and competent. He is attention starved.

The Defendant has NEVER shown any remorse. He only feels bad that HE is jail.

- **THE DEFENSE - THE DEFENDANT'S INVOLVEMENT**

The Defendant, despite the best efforts of the defense team, insisted on the use of the SODDI defense.

It was the considered opinion of the undersigned that (1) the Defendant was going to be convicted, and (2) our only goal was to try to save his life. It was my belief that a provocation defense was the only viable explanation that would have ANY chance of avoiding the Death Penalty...although that was a long-shot. The Defendant was advised repeatedly by everyone on the Murder Team that his choice of options was severely limited by the facts of the case and his choice of defenses was not in his best interests.

The Defendant began a campaign of attempting to find old Tongans, in ill health and /or failing health, who would want to accept responsibility for this murder and allow him to go free....needless to say there were no takers.

After attempting to persuade the Defendant that the SODDI defense was not workable in this case, we bowed to his wishes, after having advised him of the foolishness of his choice.

The defense in this case would be that "some other dude did it" ...S.O.D.D.I...

This was the Defendant's choice that was not shared by any members of the defense team.

Subsequent to the mistrial, the Defendant realized the problems associated with his choice of defenses and reluctantly agreed to pursue the provocation defense at re-trial.

The defendant subsequently changed his mind and refused to cooperate with counsel.

- **SHOULD THE DEFENDANT TESTIFY?**

This was a decision made by the Defendant...that he would testify. His options were explained to him. I told him I thought he would be a bad witness. He had a tendency to answer everything with "and so on and so forth". I thought this very dangerous.

The Defendant indicated he had the right to testify and he would.

I am convinced that the thought of having a captured audience excited him. He wanted to exploit his unfulfilled need for attention.

He was also convinced that with his acting background, he would be able to tell the jury anything and they would believe it and find him not guilty. Despite my admonitions to the contrary, he believed he could "talk the jury to acquittal".

In light of the impossible defense the Defendant wished to proffer, his testimony was needed to fill in the many gaps in testimony elicited from the State's witnesses.

The entire situation changed when the Defendant indicated he would commit perjury.

It became obvious that a conflict of interest was created when the Defendant advised that he did, in fact, kill Sergeant Sullivan and he was going to testify and commit perjury when he was on the witness stand.

He was advised that his creation of a conflict of interest for us prevented us from representing him at trial. He moved the Court to represent himself.

The Court did an extensive *Faretta* canvass and despite the Defendant's demand to represent himself, his willingness to forego any delay in the commencement of trial and his answering all of the Court's inquiries properly, the Court denied his Motion.

We received an advisory opinion from the State Bar that the conflict required us to withdraw as counsel. The Court refused denied the Motion. On appeal, through Writ of Certiorari, the Nevada Supreme Court refused to intervene and the trial proceeded on September 20, 1999.

The defense was in a tenuous situation. As officers of the Court we had our ethical obligation and in representing the defendant our loyalty to the client.

We were required to proceed to trial with little help that we could provide to the Defendant. We had to exercise caution in cross-examining witnesses. We elected to take our only shot at trying to save the defendant's life at the penalty phase...guilt was not going to be a contested issue.

The Defendant was convicted and sentenced to death.

- ISSUES FOR APPEAL, REVIEW

The first place I would concentrate would be with the Motions filed in the case.

Motions for Individual Voir Dire/Jury
Questionnaire:

Motion for Background Information on Prospective
Jurors:

The State, as a matter of course, "runs" each potential jurors' criminal background. The defense does not have access to this information. The Court's denial of this Motion is error.

Motion to Disqualify Certain Jurors:

The defense moved to disqualify police and UNR students from the panel. This could readily necessitate the use of peremptory challenge. The Court's denial of this Motion is error.

Motion in Limine Re: Gruesome Photographs:

The Court erroneously denied this Motion AND allowed the State to take 8 x 10 photographs and enlarge them to four (4) feet by five (5) feet in front of the jury. This was clearly error.

**Motion to Exclude Television and Media Coverage
In the Courtroom:**

With the extensive media coverage of this case and the Defendant, the Court erred in denying this Motion.

Counsel believes the following issues must be reviewed for possible inclusion in the Defendant's appeal:

From Vanisi I

All potential Jurors and all seated Jurors expressed an opinion as to the Defendant's guilt

All potential Jurors and all seated Jurors indicated they would have NO difficulty in imposing the death penalty

Juror number 4 (Adamson) indicated the defense would have to prove the Defendant was innocent

Juror number 35 (Burke) had a pre-conceived opinion of guilt AND knowledge of the case beyond what was in the media

Juror number 13 (Gerbatz) has a pre-conceived opinion as to guilt AND would believe a police officer over ANYONE else

The challenges for cause were denied. The Motion for Additional Peremptory Challenges was denied which prevented the seating of a jury other than one death prone.

The photographs the State intended to introduce were overly gruesome...they should not have been permitted. The Court indicated that the enlargement of the photographs to 4' x 4' was less gruesome than viewing the 8" x 10" photos.

These are the submitted issues, PRIOR to the declaration of the Mistrial.

Subsequent issues include:

The Defendant made a Motion, per *Feretta*, to represent himself. The Court conducted an extensive inquiry and it is submitted the Court erroneously denied the Motion to allow the defendant to represent himself.

The Defendant then advised that he would proffer perjured testimony through "his" (unidentified) selected witnesses and through his own testimony. We subsequently, upon the advice of Bar Counsel, attempted to withdraw from the representation of the Defendant.

The trial court denied our Motion to Withdraw.

We filed a Writ with the Nevada Supreme Court. The Court indicated they would not intervene and we continued to represent the Defendant.

The representation of the Defendant, under these circumstances, was precarious. We could not proffer testimony, evidence or even lead questioning in the direction of the defense demanded by the defendant. We were instructed by the Defendant he did NOT want us to pursue our defense.

The trial left little room for meaningful cross-examination and presentation of ANY viable defense.

- **DIFFICULTY IN DEFENDING THE CASE**

and

- **COMMENTS**

This was an extremely difficult case to defend for many reasons.

Unfortunately, the Defendant never expressed any remorse and until 60-90 days prior to trial did not express concern for his situation (the State wanted to kill him).

The difficulty in representing the Defendant in this case is highlighted by:

The Defendant was accused of killing a police officer;

Generally, a "cop killer" is given the death penalty;

The victim was a well-liked, 23 year veteran of the University Police Force;

The Defendant expressed no remorse for the officer or his family;

The Defendant had told at least fifteen (15) people that he wanted to kill a cop...up to and including the date of the murder of Sgt. Sullivan;

After the fact, the Defendant admitted to a number of people that he DID murder the officer;

The Defendant purchased a hatchet at the Wal-Mart store in the presence of three (3) young, high school girls;

The Defendant was seen with a bent hatchet AFTER the murder of the victim;

The Defendant told the young ladies that he wanted to kill a cop...going so far as to say "stop the car, I'll kill that cop" {sidewalk};

The Defendant left the jurisdiction within hours after the death of the victim...the flight instruction was not beneficial to the defense;

The Defendant had the victim's gun in his possession when he was arrested in Salt Lake City;

The Defendant was positively identified as the robber of the 7/11 and Jackson Markets in Reno and Sparks;

The blood of the victim was found on property found at the Rock Blvd. address, allegedly put there by the Defendant;

The Defendant insisted on pursuing an untenable defense, against the advice of counsel;

The Defendant was in possession of the stolen motor vehicle in Salt Lake City;

The Defendant had difficulty comprehending the concept of "circumstantial evidence." He erroneously believed, for some time, that if the State did not have a confession, there would be no conviction;

The Defendant, having heard his mental evaluations as "above average intelligence" provided him with the misconception that he was more intelligent than his counsel; This proved a false assumption. His decisions were skewed. His desire for notoriety exceeded his desire to be found not guilty;

The Defendant was never able to see the danger in having 10-15 people testify that he said "I want to kill a cop". He assumed if he testified that he was just kidding, the jury would believe him. He never did understand the irony of that statement AND the fact that he said it with an axe in his hand AND hours later, a cop is killed...with an axe;

The Defendant was convinced that with his acting ability, ability to speak with people and genuine personality the jury would have no alternative but to acquit him;

The Defendant relied heavily on support from the local Tongan community...they have totally distanced themselves from the Defendant. They refused to cooperate with the defense investigation;

The intent of the Defendant to attempt to throw suspicion on "other Tongans" was without basis and fraught with danger;

The Defendant did little to further his cause. This was a very inept murder. The Defendant insisted in proffering the most implausible defense, against the advice of counsel;

The Defendant was initially of the opinion that he would plead guilty...that he would take his chances before a three-judge panel. It took the undersigned more than three (3) months to convince the Defendant that he should NOT go before a three-judge panel.

The Defendant would alternate between wanting to die and wanting to be acquitted. This symptom was directly keyed to the status of his relationship with his wife.

The Defendant's attempt to "sell his story to Hollywood" was a lesson. The Defendant did not command the respect of his "Hollywood" peers as he had initially thought.

**MISTRIAL DECLARED ON THE FIFTH DAY
OF TRIAL, JANUARY 15, 1999**

**TRIAL WAS RE-SCHEDULED FOR
SEPTEMBER 7, 1999, THEN RE-SCHEDULED
TO SEPTEMBER 20, 1999 TO ALLOW THE
DEFENSE TO FILE A WRIT IN THE NEVADA
SUPREME COURT.**

**THE PRECEDING DOCUMENTS SHALL
BE A PART OF THIS MEMORANDUM, TO
COMPLETE THE RECORD.**

**SUBSEQUENT TO THE MIS-TRIAL AND
PRIOR TO THE RE-TRIAL, THE DEFENDANT
DID EVERYTHING HE COULD POSSIBLY**

DO TO INSURE THAT HIS COUNSEL WOULD
BE PREVENTED FROM PRESENTING ANY
DEFENSE.

MINIMALLY, THE DEFENDANT AGREED TO
DISPENSE WITH THE UNTENABLE S.O.D.D.I.
DEFENSE IN FAVOR OF THE MORE
PROBABLE PROVOCATION DEFENSE.

UNFORTUNATELY, THE DEFENDANT BEGAN
TO INVOLVE HIMSELF IN UNACCEPTABLE
BEHAVIOR WHILE IN THE COUNTY JAIL...
REQUIRNG NUMEROUS CELL
EXTRICATIONS THAT WOULD INFLAME
AND PROVOKE ANY JURY.

UPON HIS SUBSEQUENT TRANSFER TO THE
N.S.P. HE CONTINUED TO WEAR MASKS,
WEAR TOOTHPASTE ON HIS FACE, DISTURB
AND PROVOKE OTHER INMATES AND
GUARDS AND HE ATTEMPTED A FEEBLE

ESCAPE REQUIRING THE GUARDS TO SHOOT
HIM WITH RUBBER BULLETS.

HE EFFECTIVELY CURTAILED ANY
REMOTE POSSIBILITY COUNSEL MAY HAVE
HAD TO SAVE HIS LIFE.

THE FINAL OUTCOME OF THIS CASE CAME
AS NO SURPRISE.

THE DEFENDANT WAS ADVISED THE ONLY
WAY WE COULD SAVE HIS LIFE (AND THIS
WAS A REMOTE POSSIBILITY) WAS IF HE
CONDUCTED HIMSELF IN A RATIONAL AND
ORDERLY MANNER WHILE
INCARCERATED...HE HAD TO BE A
MODEL PRISONER.

THE DEFENDANT, PRIOR TO RE-TRIAL,
DID EVERY CONCEIVABLE THING TO
UNDERMINE OUR EFFORTS WITH HIS

COMBATIVE AND BIZARRE BEHAVIOR.

**THE DEFENDANT BECAME AN IMMEDIATE
DISCIPLINE PROBLEM AT THE JAIL.**

**THE DEFENDANT CONSTANTLY
ANTAGONIZED OTHER INMATES.**

**THE DEFENDANT REFUSED TO ALLOW
OTHER INMATES TO SLEEP.**

**THE DEFENDANT REFUSED TO ABIDE
WITH THE MOST SIMPLE REQUESTS
OF THE JAIL PERSONNEL.**

**THE DEFENDANT'S BEHAVIOR
NECESSITATED HIS ULTIMATE TRANSFER
TO THE NEVADA STATE PRISON.**

**THE DEFENDANT INSISTED ON BEING
NAKED ALL THE TIME.**

**THE DEFENDANT INSISTED ON WEARING
HIS UNDERWEAR ON HIS HEAD.**

THE DEFENDANT PUT TOOTHPASTE
ON HIS FACE (THE GUARDS INTERPRETED
THIS AS "WAR PAINT").

THE DEFENDANT'S BEHAVIOR REQUIRED
A NUMBER OF CELL EXTRICATIONS.

THE DEFENDANT ATTEMPTED TO DIG
UNDER A SECURITY FENCE WHEN
INCARCERATED AT THE NEVADA STATE
PRISON.

TH DEFENDANT'S INSISTENT ON TALKING
GIBBERISH AND HIS OTHER BIZARE
BEHAVIOR NECESSITATED FURTHER
MENTAL EVALUATIONS,

THE DEFENDANT'S MENTAL CONDITION
AND HIS ELECTION TO ACT IN SUCH A
BIZARRE FASHION MADE HIM UNABLE
TO ASSIST COUNSEL IN HIS OWN DEFENSE.

TIME RECORDS

SVANIS6-TQUALLS01824

1456

AA01057

TQUALLS01824

State of Nevada vs. Siaoosi Vanisi

SCR 250 Time Record

Michael R. Specchio

Bar Number 1017

1998

JANUARY, 1998:

1/19/98	Review newspapers; memoranda re: Killing of UNR Policeman	2.0
1/20/98	Assigned case to myself and Wally Fey	1.0
	Discussed, informally, case with Wally Fey and had him contact Salt Lake City P.D. to have client remain silent until discusses case with our office	2.0
1/21/98	Telephone conversation with Dick Gammick	.3
	Discussion with Wally Fey	.2
	Memorandum re: case	
	Preliminary Hearing to be set 2/17-2/18	
	Arrangements to view Sullivan's car - Crime Lab	3.0
1/22/98	Crime Lab - viewed victim's patrol car...notes	2.5
1/23/98	Review tape regarding vehicle	1.0
1/26/98	RJC - Arraignment /notes	1.5
1/26/98	WCJ - 1" interview with client; Memo; tape television interviews	5.5
1/27/98	Review notes; taped interview	
	Prepare Trial Books	5.0
1/27/98	Conversation/interview with Defendant's wife; Memo	2.0
1/28/98	Telephone - wife	.5
1/28/98	WCJ - client interview and memo	3.0
1/29/98	Memo: re: police reports; autopsy; interview; view of photos; defense team;	3.0
1/29/98	Jenkins P.C. Affidavit reviewed - Memo re: State's witnesses	2.5
1/29/98	Telephone with Jenkins re: blood draw	
	Telephone - client re: blood draw	.5
1/29/98	Telephone with Rusk State's Investigator on case	.5

(36.0)

FEBRUARY, 1998:

2/5/98	Discussed Vanisi with members of the Tongan community - memo	1.5
2/6/98	Discovery	3.5
2/7-8/98	Discovery- review and catalog	12.0
2/9/98	Viewed photographs memos	2.5
2/10/98	Prepare materials for Vanisi	2.0
2/11/98	Interview client at WCJ - Fey; documents, memo	2.5
2/12/98	New Discovery - memo	2.5
2/12/98	Ford and documents to WCJ	1.0
2/13/98	Discovery	1.0
2/14-15/98	Review, note and catalog new Discovery	9.5
2/18/98	Reviewed all L.v. news tapes - Reno and Utah	1.5
2/18/98	Letter to client's wife	1.5
2/19/98	Review and prepare witness re-cap	3.5
2/19/98	Discovery- review and catalog (PM)	3.0
2/20/98	Preliminary Hearing	10.0
2/24/98	WCJ- interview, other, memo	2.5
2/25/98	Notice of Intent (D.P.) to client	.5
2/26/98	New Discovery - Review / Memo	3.0
2/27/98	Discover -- needs - list	3.5

(67.0)

(103.0)

MARCH, 1998:

3/2/98	WCJ - D.P. Notification	1.5
3/2/98	Note - Wally - Motions	.5
3/2/98	Ok'd release of Officer's badge/name tag	.5
3/2/98	Memo; letter - wife;	1.5
3/3/98	(T) - Wife re: mothers; Letter	1.5
3/3/98	Reviewed P/H photographs	1.0
3/4/98	Compiled background profile on client	5.0
3/5/98	(T) - David Goodman; Letters/ memo	3.0
3/5/98	(T) client	.5
3/6/98	(R) P/H transcript	1.5
3/6/98	Letters; Pascetta (Fed. P.D.; Center for Capital Assist. S.F.; review material, affidavits	3.0
3/8-9/98	Review, prepare Motions list	10.0
3/10/98	ARRAIGNMENT D-4; Memo	2.0
3/10/98	Prepare State's witness list	3.0
3/11/98	Motions	3.0
3/11/98	Preparation	2.5
3/12/98	Prepare MOTIONS books	1.5
3/13/98	Interview - WCJ; memo	3.0
3/13/98	Review and preparation	2.5
3/19/98	CONTINUED ARRAIGNMENT; memos; meeting w/team re: motions	5.5
3/20/98	MOTIONS (P)	6.0
3/21-22/98	MOTIONS (P)	15.0
3/23/98	MOTIONS (P)	3.0

3/22-23/98	JAIL INCIDENT - BLACK EYE MESSAGE -WIFE	1.0
3/24/98	MOTIONS (P)	4.5
3/25/98	MOTIONS (P)	4.5
3/26/98	MOTIONS (P)	4.0
3/27/98	MOTIONS (P)	3.0
3/30/98	Photos - jail incident	2.5
3/31/98	Tom - Tongan activist	1.0

(98)

(201)

APRIL, 1998:

4/2/98	WCJ	1.5
4/3/98	(T) wife	.5
4/8/98	Discovery	6.0
4/9/98	Motions/ polygraph/ misc.	8.0
4/10/98	WCJ (draft Motions to client {50})/ Motions	6.0
4/11/98	Review	4.5
4/13/98	Center for Capital Assistance (2x)	2.0
4/13/98	Jail re: prison transfer	2.5
4/14/98	Telephones, Letters, other (Doctors)	5.5
4/15/98	Motions (O); (P)	6.0
4/16/98	Doctors, correspondence, etc.	4.5
4/16/98	(T) David Goodman; correspondence, memo	2.0
4/16/98	Meeting - Investigator	1.0
4/17/98	Leeanne Morris - Telephone, memo, etc.	3.0
4/17/98	WCJ - client	2.0

4/20/98	Investigations; defense witnesses; (L) client	5.5
4/21/98	WCJ – Leanne Morris papers; (L)	3.0
4/22/98	Tongan Culture – Internet – Center for Capital Assistance (CCA)	6.0
4/23/98	(“)	6.0
4/24/98	(“)	7.0
4/25/98	Helen Morton’s Book from CCA	5.0
4/26/98	(“)	6.0
4/27/98	Dr. Widman replacement – (t), (l’s) etc.	2.0
4/27/98	Dr. Lynn (T’s, O); Memo	2.5
4/29/98	Internet – Chat lines	4.0
4/30/98	(Book)	2.0

(104)

(305)

MAY, 1998:

5/1/98	Review Motions	4.0
5/1/98	Team meeting	1.0
5/7/98	(T) – David Goodman	.5
5/11/98	Murder Team up-date	1.0
5/12/98	Dr. Lynn (T); Memo	1.5
5/13/98	Pre-Trial Motions – Petty/Laura	1.0
5/14/98	WCJ	2.0
5/14/98	(T) – Client	.5
5/15/98	Murder Team Meeting	2.0
5/15/98	Possible Witnesses: (T’s): Giorgio; Terry Williams; Greg Garner	1.5
5/18/98	Books for client; Crystal	1.0
5/20/98	Investigation – Pismo Beach	8.0

	Travel	5.0
5/21/98	Investigation ~ Simi Valley (Redondo, Manhattan Beaches)	8.0
5/21/98	Travel	5.0
5/22/98	Investigation and Notes	8.0
	Travel	5.0
5/29/98	Team meeting	1.0
	(160)	
	(361)	
6/1/98	Investigation Memos	5.5
6/1/98	© J.P. re: Motions	1.5
6/2/98	(L) wife re: mother(s) addresses	1.0
6/3/98	(O) Memo re: finalizing investigation	1.5
6/4/98	WCJ	2.0
6/8/98	Discovery:	
	Cell extrication -- ordered tape from T. Rusk	
	Albertson's threat -- BMA	2.0
6/9/98	Reviewed tape of Cell Extrication, (O)	1.0
6/9/98	Memo -- Investigation -- Losa and Renee	1.0
6/10/98	D.P. LETTER	2.5
6/11/98	WCJ; MEMO	2.5
6/12/98	TEAM MEETING	1.0
6/15/98	LETTER -- WIFE	1.0
6/18/98	WCJ --	1.5
6/19/98	© Investigator	.5
6/19/98	MEMO -- TRIAL -- INVESTIGATION	2.5
6/22/98	"AMOK"	1.5
6/22/98	CONSULATE	.5
6/23/98	MARGARET KAVAPALU (R) STATEMENT	1.5
6/26/98	RESPONSES TO MOTIONS (8)	3.5

6/26/98	TEAM MEETING	1.0
6/29/98	RESPONSE TO CLIENT (L)	1.0
	(37)	
	(398)	
7/1/98	(L) CLIENT RE: WITNESSES	1.0
7/1/98	(T) - CLIENT	.5
7/2/98	(L) WIFE 3X FOR FAMILY ADDRESSES	1.0
7/1/98	RESPONSES TO MOTIONS (3)	1.0
7/2/98	(L) D.A RE: SULLIVAN RECORDS	1.0
7/2/98	RESPONSES TO MOTIONS (3)	1.0
7/2/98	(T) - CLIENT	.5
7/6/98	(T) CHILDS - "NUT HOUSE"	1.0
7/7/98	(T'S) CAPT. DON MEANS - SUICIDE ATTEMPT? - TRANSFER TO NSP?	1.0
7/7/98	TERRY RUSK FOR 2 ND EXTRICATION TAPE	1.0
7/8/98	(C) - INVESTIGATOR	1.0
7/8/98	RESPONSES TO MOTIONS (3)	1.0
7/9/98	(M) - DENIAL OF SULLIVAN'S PERSONNEL FILE; MEMO TO JRP	1.0
7/9/98	(T) DAVID GOODMAN	1.0
7/10/98	RESPONSES TO MOTIONS (3)	1.0
7/10/98	TEAM MEETING	1.0
7/13/98	DNA - STATISTICAL REPORTS	1.5
7/13/98	MOTIONS	1.0
7/14/98	MOTIONS	1.0
7/15/98	MOTIONS	1.0
7/15/98	CAPTAIN MEANS - TRANSFER TO PRISON	.5
7/16/98	MOTIONS	2.0
7/16/98	RESPONSES TO MOTIONS (2)	1.0

7/17/98	(P)...MOTIONS, WITNESSES; DEFENSES; DISCOVERY; (T) WIFE	8.0
7/20/98	MOTIONS	2.0
7/21/98	WCJ	1.5
7/21/98	LETTER TO D.A. RE: DISCOVERY	2.0
7/22/98	STATUS HEARING (A, P) (CONT'D. BY CT.)	2.0
7/22/98	CRYSTAL - DISCOVERY - FORENSIC	1.5
7/22/98	REVIEW ALL FORENSIC REPORTS	3.5
7/22/98	RESPONSES TO MOTIONS (3)	1.0
7/24/98	INVESTIGATION RE: MEETING WITH SPOUSE/SISTER	2.5
7/24/98	TEAM MEETING	1.0
7/27/98	TRANSFER TO PRISON WIFE -NO SHOW- 7/23 PREPARATION	6.0
7/28/98	RESPONSES TO MOTIONS (2)	2.0
7/29/98	REVIEW AND PREPARATION	3.5
7/31/98	MEMO	1.0
7/31/98	(T) DA STANTON -CLIENT-PRISON-	.5
7/31/98	MEMO RE: CLIENT'S MENTAL STATUS - NSP.	1.0

(62.5)

(456.5)

8/1/98	INVESTIGATION MEMO	1.5
8/3/98	PREPARATION	1.0
8/4/98	PRPEARATION - HEARING	2.0
8/4/98	STATUS HEARING	1.5
8/4/98	COURT'S FIRST MOTION'S ORDER	1.5
8/5/98	HEARING MEMORANDUM	2.5

8/6/98	REVIEW	2.0
8/7/98	TEAM MEETING	1.0
8/11/98	N.S.P. - INTERVIEW CLIENT	3.5
8/11/98	MEMO	1.0
8/12/98	REVIEW AND PREPARATION	2.0
8/12/98	REVIEW TRANSCRIPT - NOTES/MEMO	2.0
8/12/98	JURY BOOK - INDEX	2.0
8/13/98	MEETING WITH DA - DISCOVERY	2.0
8/13/98	PREPARATION - MEMOS, BOOKS, WITNESSES	3.5
8/14/98	MEMORANDUM	1.5
8/14/98	MEMORANDUM - UPDATE	2.5
8/14/98	INVESTIGATION MEETING	2.5
8/16/98	JURY QUESTIONAIRRE	6.0
8/17/98	JURY QUESTIONAIRRE	5.0
8/18/98	LETTER - D.A. - LAB PERSONNEL - DISCOVERY	1.0
8/20/98	RESPONSE MOTIONS (1)	1.0
8/21/98	TEAM MEETING	1.0
8/21/98	INVESTIGATION - WITNESSES	1.0
8/24/98	MOTIONS/GRANTED/DENIED/SUBMISSION	2.0
8/24/98	(T) DAVID GOODMAN	.5
8/26/98	FORENSIC REPORT - BLOOD SPLATTER	1.0
8/31/98	INVESTIGATION MEETING - MEMO	2.5
8/31/98	DISCOVERY	1.0

(57.5)

(514.0)

9/1/98	DISCOVERY	1.0
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9/2/98	DISCOVERY - SALT LAKE CITY	3.0
9/3/98	PREPARATION	1.0
9/3/98	DISCOVERY - DNA	1.0
9/4/98	STATUS HEARING	1.0
9/4/98	MEMO	1.0
9/4/98	INTERVIEW WITNESSES LOSA, CORRINA - MEMO (NO SHOW 3X- WAITED 2 HOURS)	1.5
9/4/98	WCJ (DEFENDANT RETURNED)	3.0
9/8/98	MEMO...MOTIONS...NEWSPAPER...LETTER	5.5
9/9/98	MEMO, REVIEW, MOTIONS	5.0
9/10/98	DISCOVERY PRINT COMPARISONS	1.0
9/10/98	VANISI (L) PENALTIES - OTHER CAHRGES	1.5
9/10/98	(L) DA. PRISON EVALUATIONS	1.5
9/11/98	DRAFT - MEDICAL RELEASE - NOTE -EXECUTE	1.5
9/11/98	WCJ - MEMO	3.5
9/12/98	MEMO - INVESTIGATOR FOR L.A.	2.5
9/12/98	LAB REPORTS - REVIEW - (L) CLIENT	2.5
9/14/98	MOTIONS - REVIEW - FOR SUBMISSION	4.5
9/14/98	MOTIONS FOR SUBMISSION - PETTY - MEMO	1.0
9/14/98	CONTACT DA - NO RESPONSE TO MOTION # 46	.5
9/15/98	INVESTIGATION UP-DATE REQUEST	.5
9/15/98	WCJ - MEMO	3.0
9/15/98	DISCOVERY - (R)	.5
9/16/98	REQUEST FOR SUBMISSION OF PRE-TRIAL MOTIONS	2.5
9/16/98	PRELIM. TRANSCRIPT BREAKDOWN	2.5
9/16/98	MEMO - INVESTIGATIONS	.5
9/17/98	MURDER TEAM MEETING MEMO	1.5
9/17/98	MODIFIED INDEX	4.5
9/17/98	DNA - REPORT	.5

9/21/98	REVIEW PRISON MEDICAL RECORDS	1.0
9/22/98	D.A. LETTER RE: STIPULATION (UTAH COPS) & TRIAL WITNESSES	.5
9/23/98	DISCOVERY - DNA REPORT	.5
9/23/98	WCJ - CLIENT	2.0
9/24/98	BRIEFING - STEVE GREGORY, PRPEPARATION	4.0
9/25/98	WCJ - MEMO	2.5
9/26/98	REVIEW FILES	6.0
9/28/98	HEARING - MENTAL STATUS - MEMO	3.5
9/28/98	MEMO TO STEVE GREGORY RE: WITNESSES	1.5
9/29/98	WCJ - MEMO	3.0
9/30/98	REVIEW, MEMO, INVESTIGATION, PREPARATION	8.0
9/30/98	MEETING WITH EVO AND CRYSTAL	1.0
	(93)	
	(607)	
10/1/98	WCJ - MEMO	3.0
10/1/98	CONFIDENTIAL LETTER TO CLIENT	2.0
10/1/98	SET UP INVESTIGATION MEETING	.5
10/5/98	SET UP WCJ INTERVIEW	.5
10/5/98	TRIAL ASSIGNMENTS	1.5
10/5/98	E-MAIL, MEMOS TRIAL TEAM	1.5
10/6/98	MEETING - INVESTIGATION	1.5
10/6/98	C - JEREMY BOSLER	.5
10/7/98	WCJ- WITH INVESTIGATORS	3.5
10/8/98	WCJ - MEMO	3.0
10/8/98	DEFENSE TEAM MEETING (ALL)	2.5
10/9/98	NOTICE OF ASSOCIATION OF COUNSEL	1.0
10/9/98	INVESTIGATION REPORT	.5

10/9/98	MEMOS - TO DEFENSE TEAM - ATTORNEYS	2.5
10/11/98	REVIEW INVESTIGATION REPORT (FINAU)	1.0
10/12/98	WCJ	2.5
10/13/98	MEMO - RE: TRIAL TEAM - INVESTIGATORS	1.0
10/14/98	(L) CLIENT - STATE'S WITNESSES	1.0
10/14/98	(L) CLIENT - SON OF SAM LAW	1.5
10/15/98	(L) CLIENT - UTAH - HAT	1.0
10/15/98	REVIEW INVESTIGATION REPORT (GARNER)	2.0
10/15/98	(T) - CLIENT - ARIZONA PATERNITY - MEMO - TEAM	1.5
10/16/98	(L) CLIENT - BLOOD/DNA/GLOVE	2.5
10/18/98	(T) COLLECT - HOME	1.0
10/19/98	(L) (T-C)	2.0
10/19/98	REPRODUCTION	4.0
10/20/98	(L) COPIES	2.0
10/20/98	REPRODUCTION	4.0
10/20/98	(T) CLIENT -	.5
10/21/98	(L) COPIES	1.0
10/21/98	REPRODUCTION	3.0
10/21/98	CORRESPONDENCE - DISTRICT ATTORNEY RE: UTAH WITNESSES STATE'S GUILT PHASE WITNESSES HATCHET	4.0
10/21/98	(L) COPIES	1.0
10/22/98	REPRODUCTION - NEWSPAPERS	2.0
10/22/98	REPRODUCTION; (L)	4.0
10/23/98	WCJ - MEMO	3.5
10/23/98	LETTERS TO CLIENT - RESEARCH AND OTHER	6.0
10/24/98	REVIEW FILES	5.5

(79.5)

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(686.5)

11/4/98	REVIEW CORRESPONDENCE	1.5
11/4/98	(C) INVESTIGATOR	.5
11/4/98	REVIEW EVALUATIONS	1.5
11/5/98	REVIEW LETTER TO WIFE (COPIED)	1.0
11/5/98	PREPARATION - HEARING	1.0
11/5/98	REVIEW DNA CORRESPONDENCE OF DA	1.5
11/5/98	(T) CLIENT	.5
11/6/98	MEMO	1.0
11/6/98	MEDIA INTERVIEW	1.0
11/6/98	(A) HEARING RE: EVALUATIONS	1.0
11/9/98	SET TEAM MEETING	.5
11/9/98	TRIAL PREPARATION	5.5
11/10/98	(A) HEARING - SELF -REPRESENTATION	1.0
11/10/98	WCJ	2.5
11/10/98	MEMO	1.0
11/10/98	TRIAL PREPARATION	2.5
11/11/98	TRIAL PREPARATION	5.0
11/12/98	REVIEW, PREPARATION - MOTIONS	4.0
11/13/98	TRIAL PREPARATION	4.0
11/15/98	REVIEW WITNESS' STATEMENTS	5.0
11/16/98	WCJ	2.5
11/16/98	MEMO	1.0
11/17/98	REVIEW MATERIAL OF D.A. RE: DNA/RIOLO	2.0
11/17/98	COLLECT CALL - CLIENT	.5
11/19/98	PREPARATION - MOTIONS	3.0
11/19/98	SENT MOTION TO CLIENT; (r) INVESTIGATION REQ.	1.5

11/20/98	TEAM MEETING - MEMOS	2.5
11/20/98	MISC.:	
	CAR INVENTORY - STANTON	
	DAVID KINKINI - "O.C." - VAINGA	
	REVIEW OTHER DISCOVERY MATERIAL	2.5
11/21/98	PRPREPARATION - MOTIONS	2.0
11/22/98	PREPARATION - MOTIONS	2.5
11/23/98	PREPARATION - MOTIONS	4.0
11/23/98	MEMO - KINKINI	1.0
11/23/98	MEMO - MITIGATORS	1.0
11/24/98	HEARING - MOTIONS	6.0
11/24/98	TRIAL PREPARATION	2.5
11/24/98	MEMO - RE: MOTIONS	1.0
11/25/98	TRIAL PREPARATION - MEMOS	6.0
11/25/98	MEMO - COWBOY HAT - HILL VEHICLE	1.0
11/29/98	COLLECT CALL - WCJ - HOME	1.0
11/30/98	JAIL CLASSIFICATION - RELEASING HAND DURING ATTORNEY VISIT	.5
11/30/98	WCJ - CLIENT	3.0
11/30/98	MEMO, (O)	1.5
	(88.0)	
	(774.5)	
12/1/98	WCJ - MEMO	3.0
12/1/98	REVIEW, RESEARCH AND (L) CLIENT:	
	DAVID KINKINI	
	VAINGA KINKINI	
	SISTER, WIFE (T) - INVESTIGATOR	
	NEWSPAPER ARTICLE - SALT LAKE CITY	
	TOYOTA INVENTORY	2.5

12/1/98	REVIEW TRANSCRIPT - 11/6/98 HEARING	1.0
12/2/98	CORRESPONDENCE; OTHER	2.0
12/3/98	CORRESPONDENCE	1.0
12/4/98	OTHER	2.0
12/5/98	MISCELL.; LETTERS - WIFE TAPED STATEMENT INVESTIGATION MEMOS TRANSCRIPT OF 11/24 HEARING COURT ORDER - MOTIONS MEMO TO TEAM REVIEWING, COPYING, ETC.	8.0
12/7/98	WCJ	3.5
12/7/98	MEMO	1.5
12/7/98	MEETING - JUDGE - TRIAL/COURTROOM SECURITY (cancelled as to parties - Memo)	1.0
12/8/98	POST TRIAL MEMORANDUM	6.0
12/9/98	SET TEAM MEETING; (C); (O)	3.0
12/10/98	HEARING - MOTIONS -	2.5
12/10/98	COURT REPORTER - REAL TIME LETTERS - WIFE TRANSCRIPT OF TAPED EXAMINATION	4.0
12/11/98	MEMO RE: VANISI TESTIMONY	3.5
12/11/98	MEMO - FINAL PREPARATION	2.0
12/11/98	MURDER TEAM MEMO	1.0
12/12/98	REVIEW STATE'S WITNESS TESTIMONY PREPARE CROSS-EXAMINATION	6.5
12/12/98 - 12/23/98:	E-MAILS WITH D.A. GAMMICK	3.0
12/13/98	PREPARATION- PREPARE AND UP-DATE TRIAL BOOK REVIEW NEW DISCOVERY REVIEW NEW LAB REPORTS PREPARE PACKGE FOR VANISI TO REVIEW JURY QUESTIONNAIRE	7.0
12/14/98	TEAM MEETING - MEMO	3.0

12/15/98	(L) - JUDEG RE; MOTIONS	.5
12/15/98	CORRESPONDENCE - VANACEY	2.0
12/15/98	(T) MAFFI	.5
12/15/98	(L'S) JUDGE - DA RE: JURY QUESTIONNAIRE	.5
12/16/98	WCJ - MEMO	3.0
12/16/98	DISCOVERY - TAPE OF SCENE; (O)	2.5
12/16/98	CRYSTAL (T) - SAN BRUNO	.5
12/18/98	(R)	4.0
12/21/98	WCJ AND (R)	4.0
12/23/98	TEAM MEETING; (P); (O)	4.0
12/24/98	PHOTOS	1.0
12/28/98	TRIAL PREPARATION	6.0
12/28/98	SLC - TAPE 1/14/98	1.0
12/28/98	JAIL "PICTURE" DA - INVESTIGATOR	.5
12/29/98	TRIAL PREPARATION	6.0
12/29/98	E-MAILS - GAMMICK - PHOTOS	1.0
12/29/98	MEMO - SUBPEONAS	1.0
12/30/98	COLLECT CALL - HOME	.5
12/30/98	TRIAL PREPARATION	6.0
12/30/98	CONFERENCE CALL - DA- COURT	.5
12/30/98	MEMO RE: EVIDENCE - JURORS	1.0
12/31/98	PREPARATION AND SUBPEONAS	3.5
12/31/98	MEETING WITH D.A	1.0
12/31/98	MISCELLANEOUS AND CLEAN-UP	3.0

(130.5)

(905)

1999

1/2/99	MEMO AND REVIEW, INSTRUCTIONS	3.5
1/3/99	PREPARATION OF TRIAL BOOK #4	5.0
1/4/99	WCJ; PREPARATION; JURY;	5.0
1/4/99	JURY ADMONISHMENT	2.0
1/5/99	PREPARATION; REVIEW	5.0
1/5/99	JURY QUESTIONNAIRES; LETTERS; OTHER	2.5
1/6/99	PREPARATION	5.0
1/6/99	CONFERENCE - TEAM; LETTERS	2.5
1/7/99	TRIAL PREPARATION	5.0
1/7/99	HEARING(s) RE: MOTIONS, SECURITY, JURY SELECTION	4.0
1/8/99	PREPARATION	5.0
1/8/99	MARKING EVIDENCE	2.0
1/10/99	PREPARATION	8.0
1/11/99	TRIAL (DAY ONE); PREPARATION	10.0
1/12/99	TRIAL (DAY TWO); PREPARATION	10.0
1/13/99	TRIAL (DAY THREE); PREPARATION	10.0
1/14/99	TRIAL (DAY FOUR); PREPARATION	10.0
1/15/99	TRIAL (DAY FIVE); PREPARATION	10.0
<hr/> MISTRIAL <hr/>		
1/17/99	REVIEW AND PREPARATION	3.0
1/19/99	HEARING - RE-SET - CHANGE OF VENUE - PREP.	5.0
1/20/99	TELEPHONE CPT. GANYON - MOVE VANISI - N.S.P. MEMO - OTHER	1.5
1/21/99	WCJ	2.0
1/25/99	E-MAILS - D.A. - DISCOVERY	1.0
1/26/99	POST-MISTRIAL JUROR INTERVIEWS - INVESTIGATORS' REPORTS	2.0

1/27/99	PREPARATION AND RE-FORMULATION AND PREPARATION OF CAPITAL CASE QUESTIONNAIRE	6.0
1/28-29/99	DISCOVERY - 600 PAGES OF UNRPD REPORTS 76 AUDIO AND VIDEO TAPES	8.0
1/29/99	SPOUSE LETTERS	2.5
1/29/99	CHAITRA HANKE TAPES	1.5

(136)

(1,041)

2/1/99	CAUTIONARY LETTER TO CLIENT REGARDING CHOICE IF DEFENSE	3.0
2/2/99	DISCOVERY - TAPES	4.5
2/9/99	"HELLO, BABY" CORRESPONDENCE	3.5
2/23/99	CONFERENCE - DEFENSE STRATEGY EVIDENCE: DIAGRAM - UNR BY RPD - MC MENOMY; PICTURE OF "DOBBIE"; CASSETTE INTERVIEW OF CHRISTIAN LAUDERDALE; REVIEW FILES	5.5
2/24/99	AMENDED NOTICE TO SEEK THE DEATH PENALTY; OPPOSITION TO AGGRAVATORS; "HELLO, BABY" LETTERS; TAPES OF LAUDERDALE	5.5
2/25/99	DISCOVERY...STATEMENTS OF: CATHLEEN KRUTZ AND JEANNE OHLSON. CRIME SCENE AND VICTIM PHOTOS. PROPERTY/EVIDENCE LOGS. PICTURES OF "DOBBIE", VANISI AND POLICE REPORTS (LAUDERDALE)	5.5

(27.5)

(1,068.5)

3/1/99	"HELLO, BABY" CORRESPONDENCE	1.0
3/3/99	"	1.0
3/4/99	"	1.0
3/8/99	"	1.0
3/10/99	"	1.0
3/11-12/99	PREPARED MEMO AND DOCUMENTS FOR GREGORY AND BOSLER REPRESENTATION OF VANISI	3.0

(8.0)

(1,076.5)

5/14/99	DISCOVERY	1.0
5/21/99	TAPES (EXTRICATION)	3.0
5/27/99	NSP - ESCAPE ATTEMPT REPORTS	1.0
5/28/99	SCR - POST - TRIAL MEMORANDUM	10.0

(15.0)

(1,091.5)

6/1/99	MOTIONS HEARINGS	2.5
6/7/99	VIDEO -- 7/11 ROBBERY	1.0
6/23/99	COMPETENCY; MOTION TO TERMINATE COUNSEL REVIEW MOTION, RESPONSE, TIME RECORDS PREPARE NOTES IN OPPOSITION	4.0
7-8-9/99	ADVISING COUNSEL DEFENDANT'S MOTION TO REPRESENT HIMSELF STATE BAR COUNSEL MOTION TO WITHDRAW WRIT TO THE SUPREME COURT TRIAL PREPARATION, STRATEGY	200.0

(207.5)

(1,299)

Case re-assigned to other counsel
Total hours: 1,299

1476

AA01077

TQUALLS01844

SVANIS6-TQUALLS01844

State v. Siaosi Vanisi
CR98-0516

Time Record of Laura Bielser

<u>Event</u>	<u>Date</u>	<u>Time</u>
Transcribe tape of car viewing	1/22/98	1.0
Catalog discovery	2/19/98	0.5
Format, correct motions	4/13/98	3.0
Format, correct motions	4/14/98	3.0
Format, file motions	4/15/98	1.0
Meeting w/ team	4/16/98	1.0
Format, correct motions	4/20/98	2.0
Format, correct motions	4/21/98	3.5
Format, correct motions	4/22/98	2.0
Format, file, copy, dist. Motions	4/23/98	1.0
Format, correct, copy, dist. Motions	4/28/98	2.0
Internet research Tongan chatlines	4/20/98	2.5
E-mail Ptukia, Australian Anthro- Pologist, Sphillips, Center for Capital Assistance	4/20/98	3.0
Correspondence w/ Dr. McGrath	4/29/98	0.5
Correspondence w/ Adrienne Kaeppler	4/29/98	0.5
Meeting w/ team	5/01/98	1.0
Motion meeting w/ Petty	5/13/98	1.0
Cut, paste, correct, format motions	5/26/98	3.0
Cut, paste, correct, format motions	5/27/98	3.0
Copy, file, dist. Motion	5/28/98	1.0
Meeting w/ team	5/29/98	1.0
Transcribe tape MRS California trip	6/1/98	1.0
Cut, paste, correct, format motions	6/01/98	2.0
Cut, paste, correct, format motions	6/02/98	2.0
File, copy, dist. Motion	6/05/98	0.5
File, copy, dist. Motion	6/08/98	0.5
File, copy, dist. Motion	6/09/98	0.5
File, copy, dist. Motion	6/17/98	0.5
File, copy, dist. Motion	6/18/98	0.5

Meeting w/ team	6/26/98	1.0
Meeting w/ team	7/10/98	0.5
Format, correct motions	7/13/98	2.0
File, copy, dist. Motion	7/14/98	0.5
File, copy, dist. Motion	7/15/98	0.5
File, copy, dist. Motion	7/16/98	0.5
File, copy, dist. Motion	7/21/98	0.5
File, copy, dist. Motion	7/22/98	0.5
Meeting re: Discovery	7/20/98	1.5
Meeting w/ team	7/24/98	0.5
Meeting w/ team	8/07/98	0.5
Meeting w/ DA Discovery	8/13/98	1.5
Prepare minutes of meeting	8/13/98	1.0
Meeting w/ team	8/21/98	0.5
Format, copy, file motion	9/16/98	0.5
Meeting w/ team	10/8/98	0.5
Format, copy, file motion	10/9/98	0.5
Transcribe Gregory tape	12/4/98	1.0
Transcribe Gregory tape	12/7/98	0.5
Transcribe Gregory tape	12/8/98	0.5
Transcribe Gregory tape	12/9/98	0.5
Cut/paste Jury Questionnaire	12/14/98	2.0
Meeting w/ team	12/14/98	0.5
Format Jury Questionnaire	12/15/98	2.0
Final Jury Questionnaire	12/16/98	1.0
DA's office re: evidence	12/31/98	1.5
Meeting w/ team	01/4/99	0.5
Review, revise jury questionnaire	01/4/99	1.0
Evo, RPD, evidence	01/5/99	1.0
Prepare out of state subpoenas	09/1/99	3.0
Prepare out of state subpoenas	09/2/99	2.0
Coordinate arrangements	09/3/99	1.5
Meeting re: Nev State Bar call	9/15/99	0.5

Copy and distribute correspondence	11/9/98	5 minutes
WH	WH	11/30/98
WH	WH	12/7/98
WH	WH	12/8/98
WH	WH	12/9/98
WH	WH	12/11/98
WH	WH	12/15/98
WH	WH	12/17/98
WH	WH	12/22/98
WH	WH	12/28/98
WH	WH	12/29/98
WH	WH	12/30/98
WH	WH	12/31/98
WH	WH	12/31/98
WH	WH	01/4/99
WH	WH	01/20/99
WH	WH	01/21/99
WH	WH	01/25/99
WH	WH	01/26/99
WH	WH	01/28/99
WH	WH	02/1/99
WH	WH	02/2/99
WH	WH	02/8/99
WH	WH	02/9/99
WH	WH	02/10/99
WH	WH	02/12/99
WH	WH	02/16/99
WH	WH	02/23/99
WH	WH	02/25/99
WH	WH	03/1/99
WH	WH	03/2/99
WH	WH	03/3/99
WH	WH	03/4/99
WH	WH	03/10/99
WH	WH	03/11/99
WH	WH	03/16/99
WH	WH	03/17/99
WH	WH	03/29/99

W	W	04/20/99	5
W	W	04/21/99	5
W	W	04/27/99	5
W	W	05/3/99	5

**Several mailings, quick tasks,
chats, short meetings, etc. 10.0

Approximate Total: 90 hours

JEREMY BOSLER

STATE V. STAOISI VANISI

10/9/98 associated as counsel

reviewed memo from Mike, files, motions, police reports 10 hours

11/25/99 motions hearing

Talked to Mike Stoudt .5 hours

Contacted National Jury Project in Oakland .25 hours

Reviewed and prepared jury questionnaire 4.0 hours

12/11/98 questionnaire submitted

12/16/99 mitigation witnesses reviewed with investigators

vacation in vegas 20.0+ hours reviewing police reports

1/4/99 eyeballed jurors-questionnaire filled out

1/8/99 eyeballed jurors-questionnaire filled out

Renewed motion for additional peremptory challenges

4/13/99 motion for individual voir dire prepared and submitted submitted 3.5 hours

1/5/99 lunch with Annabelle, discussed voir dire strategies, mitigation witnesses 1.0 hour

1/11/99 trial begins

1/16/99 mistrial declared

1/21/99 reviewed jury debriefings 2.5 hours

4/23/99 bi-weekly meeting 1.0 hour

5/7/99 bi-weekly meeting, talked with steve after morning calendar 1.5 hours

5/4/99 meeting with Vanisi at WCJ 1.5 hours

5/5/99 meeting with Vanisi and jail personnel 1.5 hours

5/12/99 in chambers status hearing re: custody placement, discussion with steve re: medication. 2.0 hours

5/21/99 bi-weekly meeting, met with Steve to discuss case after morning calendar 1.5 hours

6/29 – 7/1 Capital Seminar vegas (22 hours)

7/6 drafted letter to client re: double jeopardy
discussed pleading out robbery, etc. with Steve. (client may not commit)
talked about rescheduling bi-weekly meetings. 1.5 hours

7/5 Talked to mike stout, made arrangements for capital jury seminar 2.0 hours

7/9 meeting with investigators, Steve: discussed defense, compelling out of state witnesses, forensic expert re: wounds to Vanisi, def. Carrying hatchet in California, pleading out to robberies before trial, compelling out of state witnesses. 1.25 hours.

7/12/99 prepare out-of-state sub.'s for trial, discussed ex-parte drug regimen request with Steve. 1.25 hours

7/20/99 visited vanisi at jail. He would not talk about anything other than double-jeopardy motion, despite attempts to discuss new trial. He would not commit to any particular defense and refuses to tell us what strategy he would like to pursue. 1.5 hours

7/22/99 discussed "administrative conference call" with Steve. We will object to client not being available and that our request to medicate defendant has now been stalled, so that effectiveness of regimen is called into question as trial is now approaching. 30 minutes

8/1/99 visit Vanisi at jail. He insists he doesn't have all discovery, but won't tell us what he thinks is missing. He also says he believes there are many defenses to case, but doesn't want to tell us what they are. He says he wants us to "sit on our hands" during the trial, because there is no defense. 1.25 hours

Spoke to attorney Shedwill, he will file sub. applications for us. .5

Reviewed applications, discussed witnesses to be sub'd with Crystal, Steve and Specchio. 1.0

8/3/99 visit Vanisi at jail. Client will not elaborate on defense. Client wants to proceed pro se. Client agreed to talk about medication at today's hearing and put off decision on Faretta until medication kicks in. Client says he will be prepared by September date. 1.5 hours

Hearing on medication motion. Court ordered Steve to contact WCJ and if they agree to follow regimen outlined by Dr. Lynn, medication can begin. If they disagree, hearing needs to be set.

Client indicated he wants to represent himself. Court ordered him to file a written motion?

8/4/99 reviewed client's request for discovery (again). Specchio says he has sent 2 complete copies. Spoke to Gregory about newspaper motion tomorrow, sorted through discovery, gave copies of discovery to Laura to be sent out for reproduction. 2.5 hours

8/5/99 hearing

8/10 hearing

8/11 hearing

refiled motion for jury questionnaire, signed Gregory's motion for reconsideration, reviewed old motions, reviewed witness statements 3.0 hours

8/12/99 discussed reconsideration motion with Gregory. Spoke with Crystal regarding Monday meeting in S.F. 1.5 hours

8/16/99 trip to San Francisco: reviewed capital jury handout, met with Crystal, went to San Mateo muni court, went to redwood city, met with private counsel.

Attempted to serve subpoenas.

Met with Mr. Fry

9 hours

8/17/99 attempted to serve other witnesses, spoke to Judith Celeste, Samuel Johnson. Discusses strategy with Crystal.

10 hours

8/18/99 reviewed Steve's motion, State's opposition, advised Specchio of development. 2.5 hours

8/22-8/23 drove to S.F., appeared at hearing in San Mateo to compel attendance of Samuel Johnson, Jr. and Janet Yee. Reviewed mitigation witnesses information. 15 hours

7 hours

9/13/99 Spoke with Victor Sherman about ethical dilemma, discussed information with Steve, Petty and Spec., reviewed file 4.0

9/14/99 met with Spec., Steve, Petty, discussed strategy options, reviewed witness statements 3.5

9/15/99 met with Spec. steve, petty, conference call with bar counsel, reviewed questionnaires. 4.0

9/16/99 met with spech., Steve, Petty about strategy, reviewed questionnaires 5.0

9/17 met with Ryan ,reviewed jury lists; met with Spec. , Gregory, Petty, decided not to approach judge about issue of ethics, but rather maintain our current strategy. 2.0 hours

9/18/99 reviewed jury materials
3.0 hours

9/19/99 tabulated juror information, structured voir dire questions, graded jurors based upon questionnaires
7.5 hours

9/20 trial: jury selection, prepared questions for second day of selection 9.0 hours

9/21/99 trial: jury selection, reviewed voir dire questions, cases 9.5 hours

9/21/99 trial

9/22/99 trial half-day

9/23/99 trial

9/27 final day. Waived final argument. Spoke with Crystal, Steve and John DiGiacinto about mitigation witnesses. 5.0 hours

9/28/99 status hearing. Spoke with Gregory, Crystal and DiGiacinto about compelling out of state witnesses. Faxed more information to John. Steve and I decided not to call Dr. Bucklin and rest of state's medical evidence that all wounds were "contemporaneous" and none was inflicted after death. 4.5 hours

9/29 no court. talked with DiGiacinto, Crytsal, Steve about out-of-state witnesses, prepared jury instructions; reviewed mitigation witnesses 7.0 hours

9/30/99 hearing on pre-sentencing motions; prepared sentencing instructions, reviewed with Maizie, John Petty, Steve and Ryan; reviewed citations for State's instructions. Talked about mitigating witnesses to call for tomorrow. Reviewed crytsal's reports on Sione Peaua and Rene. 11 hours

10/1/99 sentencing hearing. Called renee and sione as witnesses 9.0 hours

10/3/99 reviewed sentencing instructions; bi-polar information, met with mitigation witnesses; prepared sentencing argument; reviewed transcripts of prior witnesses. 7.0 HOURS

10/4/99 prepared opening statement, reviewed mitigation evidence, reviewed instructions, sentencing hearing, kept in court settling instruction until 8:00 14 hours

10/5/99 reviewed instructions, met with steve, discussed additional mitigating witnesses, interviewed and prepared Deeann Vanacey, prepared closing argument 12 hours

10/6/99 finished penalty hearing, argued case. 8 hours

10/7/99 met with Steve, discussed post trial motions 1 hour

STATE V. SIAOSI VANISI, CR98-0516

TIME RECORD

STEPHEN GREGORY

TOTAL AS OF 10/8/1999: 577.95 HOURS

1489

AA01090

TQUALLS01857

SVANIS6-TQUALLS01857

VANISI TIME RECORD

Month	Meetings/Preparation/Research/Hearings/Trial	Hours
September:		
9-22	Specchio/review discovery	2
9-23	Specchio/review discovery	3
9-24	Vanisi	1.75
9-25	Review discovery	2
9-28	Hearing	1
9-29	Review discovery	4
9-30	Review discovery	3
October:		
10-1	Review discovery	3
10-2	View crime scenes etc.	3.5
November:		
11-2	Review discovery	2.5
11-3	Review discovery	1.75
11-4	Review discovery	4.25
11-12	Vanisi/prep	2/1
11-19	Vanisi/prep	2/3
11-20	Vanisi/prep	1/3
11-24	Vanisi/prep	2/1
December:		
12-11	Vanisi/prep	2/1
12-15	Vanisi/prep	2/2
12-16	Vanisi/prep	2/1
12-22	Vanisi/prep	2/2
12-23	Vanisi/prep	2/3
12-28	Vanisi/prep	2/2
12-29	Vanisi/prep	2/3
12-30	Vanisi/prep	2/3
12-31	Vanisi/prep	2/2
January:		
1-4	Court/Vanisi/prep	8.5
1-5	Prep	9
1-6	Vanisi/prep	7.75
1-7	Vanisi/prep	8.5
1-8	Vanisi/prep	8
1-11	Trial	8
1-12	Trial	8
1-13	Trial	8
1-14	Trial	8
1-15	Mistrial/Vanisi/meetings	9
1-19	Court/Vanisi	8
1-20	Vanisi	2
1-21	Vanisi	3

1-22	Review	1.25
1-25	Review	1.5
1-26	Review	2
2-4	Vanisi	1.5
2-11	Vanisi	1
3-3	Review/research	4.25
3-10	Motions	3.7
4-8	Vanisi/investigators/Bosler	7
4-9	Vanisi/investigators/Bosler	4
5/14	Meeting-team	1.25
5/28	Meeting-team	1.5
6/1	Motions hearing	4
6-3	Vanisi/phone	.25
6-10	Prison	4
6-11	Meeting-team	1.25
6-15	Stanton	.5
6-18	Meeting-team	1.5
6-23	Motions hearing/preparation	5
7-9	Meeting-team	1.5
7-12	Prep	4
7-16	Jail	2
7-19	Jail	2
7-20	Jail	2
7-21	Jail	2
7-22	Jail	2
7-23	Jail	2
7-26	Jail	2
7-27	Jail	2
7-28	Jail	2
7-29	Jail	2
7-30	Jail	2
8-2	Jail	2
8-3	Jail	2
8-4	Jail/motions	5
8-5	Jail/motions	6
8-6	Jail	2
8-9	Jail	2
8-10	Jail	2
8-11	Jail	2
8-12	Jail	2
8-13	Jail	2
8-16	Jail	2

8-17	Jail	2
8-18	Jail	2
8-19	Jail	2
8-20	Jail	2
8-23	Jail	2
8-24	Jail	2
8-25	Jail	2
8-26	Jail	2
8-27	Jail	2
8-30	Jail/ trial prep	8
8-31	Jail/ trial prep	8
9-1	Jail/ trial prep	10
9-2	Jail/ trial prep	8
9-3	Jail/ trial prep	8
9-7	Jail/ trial prep	9
9-8	Jail/ trial prep	7
9-9	Jail/ trial prep	8
9-10	Jail/ trial prep	6
9-11	Trial prep	10
9-13	Jail/ trial prep	8
9-14	Jail/ trial prep	9
9-15	Jail/ trial prep	7
9-16	Jail/ trial prep	8
9-17	Jail/ trial prep	8
9-20	Trial/prep	10
9-21	Trial/prep	11
9-22	Trial/prep	10
9-23	Trial/prep	8
9-24	Trial/prep	11
9-25	Jail/prep	8
9-26	Prep	6
9-27	Trial/prep	11
9-28	Prep	12
9-29	Prep	10
9-30	Prep/ hearing	12
10-1	Penalty	8
10-2	Jail	2
10-3	Prep	9
10-4	Penalty/prep	10
10-5	Penalty/prep	12
10-6	Penalty	7

WASHOE COUNTY PUBLIC DEFENDER

INVESTIGATOR CALDERÓN TIME LOG

DATE	HOURS	INVESTIGATION CONDUCTED
01-20-98	1	Review newspaper articles, research the internet
01-27-98	2.5	Meet with Mr. Vanisi
02-03-98	2	Review material
02-20-98	4	Preliminary hearing
03-24-98	3	Photograph Mr. Vanisi's injuries; prepare report
03-26-98	.5	Review and finalize report
04-14-98	1	Review memos
04-15-98	3.5	Review memos; case documents
04-16-98	1	Consult with attorney
04-20-98	.5	Consult with attorney
04-29-98	1.5	Review Tongan chat line
05-18-98	2	Contact Channel 2, attempt to obtain copy of entire i/v of Vanisi
06-01-98	2.5	Meet with Mr. Vanisi; reading material; sergeant
06-02-98	2	Attempt to locate and contact witnesses
06-04-98	1	Attempt to locate and contact witnesses
06-05-98	2.5	Meet with Mr. Vanisi
06-09-98	1.5	Attempt to locate and contact witnesses; phone contact included
06-10-98	1	Consult with attorney
06-11-98	1	Waited for witnesses; no show; including phone contact
06-12-98	1	Waited for witnesses; no show; including phone contact
06-15-98	1	Attempts to locate and contact witnesses
06-16-98	1	Attempts to locate and contact witnesses
06-17-98	2	Review case material
06-18-98	4	Interview witnesses
06-19-98	1	Attempt to locate and contact witnesses
06-22-98	.5	Consult with attorney
07-07-98	2.5	Meet with Mr. Vanisi
07-15-98	1	Attempt to locate and contact witnesses
07-16-98	1	Attempt to locate and contact witnesses
07-17-98	1.5	Attempt to locate and contact witnesses
08-06-98	1	Attempt to locate and contact witnesses
08-13-98	2	Consult with Prosecutors re. evidence list
09-22-98	1	Attempt to locate and contact witnesses
09-25-98	1	Attempt to locate and contact witnesses
10-05-98	1	Consult with attorney; read memos
10-16-98	1	Consult with attorney; read memos
11-09-98	1	Attempt to locate and contact witnesses
11-12-98	1	Contact with witnesses
11-20-98	1	Consult with attorney; read memos
11-21-98	1	Contact with witnesses

12-02-98	4	Interview witnesses
12-07-98	4	Interview witnesses
12-11-98	3	Contact witnesses
12-13-98	10	Travel; interview witnesses
12-14-98	8	Interview witnesses
12-15-98	10	Locate and interview witnesses, includes attempts
12-16-98	12	Locate and interview witnesses, includes attempts
12-17-98	12	Locate and interview witnesses, includes attempts
12-18-98	8	Interview witnesses; travel
12-21-98	10	Travel; interview witnesses
12-22-98	6	Travel; interview witnesses
12-23-98	7	Prepare reports
01-04-99	4	Finalize reports; consult with attorney
01-05-99	1	Consult with attorney
01-12-99	7	Trial
01-13-99	7	Trial
01-14-99	10	Trial; interview witness
01-15-99	6	Trial; mistrial
01-18-99	1	Contact witnesses
02-03-99	2.5	Meet with Mr. Vanisi
02-05-99	.5	Consult with attorney
04-05-99	1.5	Review letters and memos
04-22-99	1	Consult with attorney
05-03-99	2.5	Meet with Mr. Vanisi
06-02-99	2	Search the internet; expert
06-04-99	1	Search the internet; expert
06-16-99	1	Out of state witness arrangements, phone calls, etc.
06-24-99	1	Out of state witness arrangements, phone calls, etc.
07-08-99	2	Consult with attorneys, investigators, support staff re: CA attorney, phone calls, etc.
07-09-99	1	Prepare letters for out of state witnesses
07-13-99	3	Attempts to locate and contact out of state witnesses; prepare documents for out of state service
07-14-99	2	Arrangements for out of state service of witnesses
07-16-99	1	Calls to other investigators re: expert
07-22-99	2	Search the internet; expert
07-23-99	.5	Search the internet; expert
07-24-99	1	Search the internet, phone calls, expert
07-26-99	.5	Consult with attorney re: expert
08-16-99	12	Consult with attorneys; court clerks; locate witnesses
08-17-99	14	Locate witnesses
08-18-99	5	Travel; locate witnesses
09-10-99	.5	Phone calls, e-mails re: witness arrangements
09-12-99	1.5	Phone calls re: witness arrangements
09-14-99	1	Phone calls re: witness arrangements

09-15-99	1	Phone calls re: witness arrangements
09-16-99	2	Phone calls; locate attorney to assist in Butte county
09-17-99	2	Phone calls; locate attorney to assist in Butte county
09-20-99	3	Phone calls re: witness arrangements
09-21-99	2	Phone calls re: witness arrangements
09-24-99	6	Trial; phone calls re: witness arrangements
09-25-99	3	Phone calls re: witness arrangements
09-27-99	7	Trial; phone calls re: witness arrangements
09-28-99	7	Trial; phone calls re: witness arrangements
09-29-99	8	Trial; phone calls re: witness arrangements
09-30-99	3	Phone calls re: witness arrangements
10-01-99	4	Penalty phase began; phone calls re: witness arrangements
10-03-99	5	Witness contact
10-04-99	14	Penalty phase; witness preparation
10-05-99	12	Penalty phase; witness arrangements
10-06-99	8	Penalty phase; witness arrangements

Total 338.5 Hours (does not include the time spent interviewing either juries)

SVANIS6-1
Journal 01866

PUBLIC DEFENDER INVESTIGATOR CASE LOG

INVESTIGATOR E. NOVAK CASE OPENED _____ CLOSED _____
 DEFT. - VANISI, SIAOSI
CR 99-0516 ATTORNEY: _____
 PD # _____ CHARGES: MURDER

DATE	HOURS	INVESTIGATION CONDUCTED	MILES
9-10-98	3	REC'D AND REVIEWED REPORTS ON VANISI CASE.	
9-12-98	1.5	REC'D AND REVIEWED MEMO FROM ATTY SPECCHIO	
10-1-98	1.5	REC'D AND REVIEWED MEMO FROM ATTY.	
10-2-98	6	INTERVIEW VANISI COUSIN (FINAU) IN REDONDO BEACH CALIF. ^{COMPLETED REPORTS}	
10-3-98	3.5	INTERVIEW VANISI ROOMMATE (GARNER) IN REDONDO BEACH, CALIF. ^{COMPLETED REPORTS}	
10-5-98	1	CONSULT WITH ATTORNEY	
10-12-98	1.5	MET WITH VANISI AT JAIL WITH ATTORNEY - DISCUSSED CASE	
10-13-98	1	MET WITH ATTORNEY DISCUSSED CASE	
10-22-98	2	JAIL - MET WITH VANISI - CONSULT WITH ATTORNEY'S	
11-6-98	1.5	REC'D AND REVIEWED ATTORNEY MEMO	
11-20-98	1	CONSULT WITH ATTORNEYS	
11-21-98	1	CONTACT WITH WITNESSES	
2-7-98	1	CONSULT WITH ATTORNEYS	
2-22-98	1	CONSULT WITH ATTORNEYS	
2-30-98	2	SERVED SUBPOENAS TO WITNESSES - REVIEWED MEMO'S	
2-31-98	2	SERVED SUBPOENA ON WITNESSES	
3-31-98	2	ATTEMPT TO LOCATE WITNESSES FOR SERVICE OF SUBPOENA	
4-5-98	2	CONSULT WITH ATTORNEYS, ATTEND EVID VIEW WITH C. CALDERON AT RPD.	
4-16-98	2	OBTAIN CLOTHING FOR VANISI TRIAL - SERVED SUBPOENAS	
12-98	5	TRIAL	
1-15-99	1	NOTIFIED ADDITIONAL WITNESSES - MISTRIAL - REVIEWED	
		MEMO'S FROM ATTORNEY	
	40.5	TOTAL PAGE 1	

TOTAL 1498
AA01099

PUBLIC DEFENDER
INVESTIGATOR CASE LOG

INVESTIGATOR E. NOVAK CASE OPENED _____ CLOSED _____

DEFT - VANISI, SIAOSI
CR 99-0516

ATTORNEY:

CHARGES: MURDER

PD #

DATE	HOURS	INVESTIGATION CONDUCTED	MILES
1-19-99	.5	REVIEWED MEMO'S	
1-20-99	4.5	CONTACTED AND INTERVIEWED 4 JURORS	
1-21-99	3.5	CONTACTED AND INTERVIEWED 3 JURORS	
1-22-99	.5	REVIEWED MEMO'S	
1-24-99	.5	REVIEWED MEMOS	
1-22-99	1	CONSULT WITH ATTORNEY	
1-19-99	1	CONSULT WITH ATTORNEY REGARDING ESCAPE ATTEMPT AT N.S.P.	
1-18-99	2.5	PREPARE DOCUMENT REQUESTS TO 3 LAW ENFORCEMENT AGENCIES IN CALIF.	
1-6-99	2.5	ATTEMPT TO LOCATE EXPERT WITNESS	
1-12-99	2	PREPARE NEW DOCUMENT REQUEST FOR MANHATTAN BEACH P.D.	
1-26-99	1	CONSULT WITH ATTORNEY	
1-3-99	1	ATTEMPT TO LOCATE EXPERT WITNESS	
1-11-99	.5	REVIEWED MEMO'S	
1-16-99	1	CONSULT WITH ATTORNEY'S	
1-18-99	.5	REVIEWED MEMO'S	
1-16-99	.5	REVIEWED MEMO'S	
1-31-99	.5	REVIEWED MEMO'S	
1-13-99	1.5	ARRANGED FOR CLOTHING FOR VANISI TRIAL	
1-3-99	1.5	CONTACTED EXPERT - DR. BUCKLIN, SET UP CALL WITH GREENOY	
1-6-99	2.5	PREPARED AND SENT OUT PHOTO'S AND DOCUMENTS TO DR. BUCKLIN	
	29	TOTAL PAGE 2	1499

TOTAL
AA01100

SVANTIS6-Flouball50

DEFT. - VANISI, SIAOSI
CR 99-0516

PD #

[illegible]

TOTAL
~~AA01101~~

TQUALS01868

CERTIFICATION

The undersigned, Michael R. Specchio, Washoe County Public Defender, Bar Number 1017, certifies that the within Memorandum has been completed, pursuant to Supreme Court Rule 250, within thirty (30) days of the imposition of sentence in the within referenced matter.

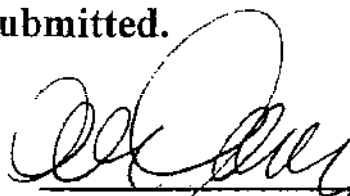
That an Affidavit indicating compliance has been filed with the Clerk of the Court;

That copies of the Affidavit have been provided to the Court and the Office of the District Attorney;

That the undersigned has logged over one thousand two hundred (1,200) hours in representation of the Defendant herein; the Office expended over two thousand five hundred (2,500) hours in the representation of this defendant.

That the within Memorandum satisfies the requirements of SCR 250.

Respectfully submitted.



Michael R. Specchio

State Bar No. 1017

Washoe County Public Defender

Attorneys for Defendant,

Siaosi Vanisi

Exhibit 34

Exhibit 34

CASE NO. CR 98-0516
DEPT. NO. 4

FILED

JAN 18 2002

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE
OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

RONALD M. LONGTIN, CLERK
DEPUTY

SIAOSI VANISI #63376
ELY STATE PRISON
P.O. BOX 1989
ELY, NV, 89301

V.S.

WARDEN OF ELY STATE PRISON

AND THE STATE OF NEVADA

RESPONDENT

(DEATH PENALTY CASE)

PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)

1. NAME OF INSTITUTION AND COUNTY IN WHICH YOU ARE PRESENTLY IMPRISONED OR WHERE AND HOW YOU ARE PRESENTLY RESTRAINED OF YOUR LIBERTY: NEVADA STATE PRISON, CARSON CITY, NV.
2. NAME AND LOCATION OF COURT WHICH ENTERED THE JUDGMENT OF CONVICTION UNDER ATTACK: SECOND JUDICIAL DISTRICT COURT RENO, NEVADA.
3. DATE OF JUDGMENT OF CONVICTION: NOVEMBER, 22, 1999
4. CASE NUMBER: CR98-0516
5. (A) LENGTH OF SENTENCE: DEATH
(B) IF SENTENCE IS DEATH, STATE ANY DATE UPON WHICH EXECUTION IS SCHEDULED: N/A

6. ARE YOU PRESENTLY SERVING A SENTENCE FOR A CONVICTION OTHER THAN THE CONVICTION UNDER ATTACK IN THIS MOTION?

YES — NO X

IF YES, LIST CRIME, CASE NUMBER AND SENTENCE BEING SERVED AT THIS TIME: X

7. NATURE OF OFFENSE INVOLVED IN CONVICTION BEING CHALLENGED: FIRST DEGREE MURDER

8. WHAT WAS YOUR PLEA? (CHECK ONE)

(A) NOT GUILTY X

(B) GUILTY —

(C) GUILTY BUT MENTALLY ILL —

(D) NOLO CONTENDERE —

9. IF YOU ENTERED A PLEA OF GUILTY OR GUILTY BUT MENTALLY ILL TO ONE COUNT OF AN INDICTMENT OR INFORMATION AND A PLEA OF NOT GUILTY TO ANOTHER COUNT OF AN INDICTMENT OR INFORMATION, OR IF A PLEA OF GUILTY OR GUILTY BUT MENTALLY ILL WAS NEGOTIATED GIVE DETAILS: N/A

10. IF YOU WERE FOUND GUILTY AFTER A PLEA OF NOT GUILTY WAS THE FINDING MADE BY: (CHECK ONE)

(A) JURY X

(B) JUDGE WITHOUT A JURY —

11. DID YOU TESTIFY AT THE TRIAL? YES — NO X

12. DID YOU APPEAL FROM THE JUDGMENT OF CONVICTION?

YES X NO —

13. IF YOU DID APPEAL, ANSWER THE FOLLOWING:

(A) NAME OF COURT: NEVADA SUPREME COURT

(B) CASE NUMBER OR CITATION: 352549

(C) RESULT: AFFIRMED

(D) DATE OF RESULT: MAY 17, 2001

14. IF YOU DID NOT APPEAL, EXPLAIN BRIEFLY WHY YOU
DID NOT: N/A

15. OTHER THAN A DIRECT APPEAL FROM THE JUDGMENT OF
CONVICTION AND SENTENCE, HAVE YOU PREVIOUSLY FILED ANY
PETITIONS, APPLICATIONS OR MOTIONS WITH RESPECT TO THIS
JUDGMENT IN ANY COURT, STATE OR FEDERAL? YES X NO

16. IF YOUR ANSWER TO NO. 15 WAS "YES", GIVE THE FOLLOWING
INFORMATION:

(1) NAME OF COURT: U.S. SUPREME COURT

(2) NATURE OF PROCEEDINGS: WRIT OF CERTIORARI

(3) GROUNDS RAISED: SIXTH AMENDMENT

(4) DID YOU RECEIVE AN EVIDENTIARY HEARING ON YOUR
PETITION, APPLICATION OR MOTION? NO

(5) RESULT: DENIED

(6) DATE OF RESULT: ██████

(7) IF KNOWN, CITATIONS OF ANY WRITTEN OPINIONS OR DATE OF
ORDERS ENTERED PURSUANT TO SUCH RESULT: N/A

(8) AS TO ANY SECOND PETITION, APPLICATION OR MOTION,
GIVE THE SAME INFORMATION:

(1) NAME OF COURT: N/A

(2) NATURE OF PROCEEDINGS: N/A

(3) GROUNDS RAISED: N/A

(4) DID YOU RECEIVE AN EVIDENTIARY HEARING ON
YOUR PETITION, APPLICATION OR MOTION? N/A

(5) RESULT: N/A

(6) DATE OF RESULT: N/A

(7) IF KNOWN, CITATIONS OF ANY WRITTEN OPINION OR DATE OF ORDERS ENTERED PURSUANT TO SUCH RESULT: N/A

(C) AS TO ANY THIRD OR SUBSEQUENT ADDITIONAL APPLICATIONS OR MOTIONS, GIVE THE SAME INFORMATION AS ABOVE, LIST THEM ON A SEPARATE SHEET AND ATTACH.

(D) DID YOU APPEAL THE HIGHEST STATE OR FEDERAL COURT HAVING JURISDICTION, THE RESULT OR ACTION TAKEN ON ANY PETITION, APPLICATION OR MOTION? N/A

(1) FIRST PETITION, APPLICATION OR MOTION?

YES — NO —

CITATION OR DATE OF DECISION: _____

(2) SECOND PETITION, APPLICATION OR MOTION?

YES — NO —

(3) THIRD OR SUBSEQUENT PETITIONS, APPLICATION OR MOTIONS?

YES — NO —

CITATION OR DATE OF DECISION: _____

(E) IF YOU DID NOT APPEAL FROM THE ADVERSE ACTION ON ANY PETITION, APPLICATION OR MOTION, EXPLAIN BRIEFLY WHY YOU DID NOT. (YOU MUST RELATE SPECIFIC FACTS IN RESPONSE TO THIS QUESTION. YOUR RESPONSE MAY BE INCLUDED ON PAPER WHICH IS 8 1/2 BY 11 INCHES ATTACHED TO THE PETITION. YOUR RESPONSE MAY NOT EXCEED FIVE HANDWRITTEN OR TYPEWRITTEN PAGES IN LENGTH.) N/A

17. HAS ANY GROUND BEING RAISED IN THIS PETITION BEEN PREVIOUSLY PRESENTED TO THIS OR ANY OTHER COURT BY WAY OF PETITION FOR HABEAS CORPUS, MOTION, APPLICATION OR ANY OTHER POST-CONVICTION PROCEEDING? NO IF SO, IDENTIFY: N/A

18. IF ANY OF THE GROUNDS LISTED IN NOS. 23(A),(B),(C) AND (D), OR LISTED ON ANY ADDITIONAL PAGES YOU HAVE ATTACHED, WERE NOT PREVIOUSLY PRESENTED IN ANY OTHER COURT, STATE OR FEDERAL, LIST BRIEFLY WHAT GROUNDS WERE NOT SO PRESENTED, AND GIVE YOUR REASONS FOR NOT PRESENTING THEM. (YOU MUST RELATE SPECIFIC FACTS IN RESPONSE TO THIS QUESTION. YOUR RESPONSE MAY BE INCLUDED ON PAPER WHICH IS 8 1/2 BY 11 INCHES ATTACHED TO THE PETITION. YOUR RESPONSE MAY NOT EXCEED FIVE HANDWRITTEN OR TYPEWRITTEN PAGES IN LENGTH.)

INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL. THESE MATTERS ARE NOT PROPERLY RAISED ON DIRECT APPEAL.

19. ARE YOU FILING THIS PETITION MORE THAN 1 YEAR FOLLOWING THE FILING OF THE JUDGMENT OF CONVICTION OR THE FILING OF A DECISION ON DIRECT APPEAL? NO, IF SO, STATE BRIEFLY THE REASONS FOR THE DELAY. (YOU MUST RELATE SPECIFIC FACTS IN RESPONSE TO THIS QUESTION.

20. DO YOU HAVE ANY PETITION OR APPEAL (NOW) PENDING IN ANY COURT EITHER STATE OR FEDERAL, AS TO THE JUDGMENT UNDER ATTACK? YES — NO X

IF 'YES', STATE WHAT COURT AND THE CASE NUMBER: N/A

21. GIVE THE NAME OF EACH ATTORNEY WHO REPRESENTED YOU IN THE PROCEEDING RESULTING IN YOUR CONVICTION AND ON DIRECT APPEAL:

TRIAL ATTORNEY: STEVEN GREGORY ESQ.

APPEAL ATTORNEY: JOHN PETTY ESQ.

22. DO YOU HAVE ANY FUTURE SENTENCE TO SERVE AFTER YOU COMPLETE THE SENTENCE IMPOSED BY THE JUDGMENT UNDER ATTACK? YES — NO X

IF "YES", SPECIFY WHERE AND WHEN IT IS TO BE SERVED,
IF YOU KNOW: N/A

23. STATE CONCISELY EVERY GROUND ON WHICH YOU CLAIM
THAT YOU ARE BEING HELD UNLAWFULLY. SUMMARIZE BRIEFLY
THE FACTS SUPPORTING EACH GROUND. IF NECESSARY YOU MAY
ATTACH PAGES STATING ADDITIONAL GROUNDS AND FACTS
SUPPORTING SAME.

(A) GROUND ONE: DENIED RIGHTS UNDER FOURTH, FIFTH, SIXTH
AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE DUE
PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

SUPPORTING FACTS (TELL YOUR STORY BRIEFLY WITHOUT CITING
CASES OR LAW) I AM INDIGENT AND DO NOT UNDERSTAND
THE LAW AND NEED COUNSEL APPOINTED TO HELP ME
COMPLETE THIS PETITION AND FILE A SUPPLEMENTAL
PETITION.

(B) GROUND TWO: DENIED RIGHTS UNDER FOURTH, FIFTH
SIXTH AND FOURTEENTH AMENDMENTS AS I DID NOT RECEIVE
DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL
ON APPEAL.

SUPPORTING FACTS (TELL YOUR STORY BRIEFLY WITHOUT
CITING CASES OR LAW.) I AM INDIGENT AND DO NOT
UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED
TO HELP ME COMPLETE THIS PETITION AND FILE A
SUPPLEMENTAL PETITION.

EXECUTED AT NEVADA STATE PRISON ON THIS 12TH DAY OF
JANUARY, 2002.

SIAOSI UANISI
SIAOSI UANISI #63376
PETITIONER IN PROPER PERSON
NEVADA STATE PRISON
I.D. NO.
P.O. BOX 607
CARSON CITY, NEVADA, 89702

G.

AA01110

2JDC06045

CASE NO. CR98-0516
DEPT. NO. 4

FILED

JAN 18 2002

IN THE SECOND JUDICIAL DISTRICT COURT OF
STATE OF NEVADA, IN AND FOR THE COUNTY OF
WASHOE

SIAOSI VANISI #63376
ELY STATE PRISON
P.O. Box 1989
ELY, NV 89301
VS.

WARDEN OF ELY STATE PRISON
AND THE STATE OF NEVADA
RESPONDENT

MOTION FOR APPOINTMENT
OF POST-CONVICTION COUNSEL

COMES NOW, PETITIONER, SIAOSI VANISI, in proper
PERSON, AND HEREBY REQUEST APPOINTMENT OF EFFECTIVE
COUNSEL TO ASSIST HIM IN STATE POST-CONVICTION PROCEEDINGS.
THIS MOTION IS MADE AND BASED UPON NRS. 34.820 (1)(a),
THE ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES,
THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO
THE UNITED STATES CONSTITUTION, AND THE ENTIRE RECORD
ON FILE HEREIN.

DATED THIS 17TH day of JANUARY, 2002.

SUBMITTED BY:

SIAOSI VANISI
SIAOSI VANISI #63376
IN PROPRIA PERSONA

AA01111

2JDC06046

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 1. I HAVE BEEN AN INMATE ON NEVADA'S DEATH ROW
3 SINCE 1999 I NEEDED AND OBTAINED ASSISTANCE
4 IN THE PREPARATION OF THESE DOCUMENTS.
5

6 2. I AM PRESENTLY WITHOUT COUNSEL TO LITIGATE
7 MY CONSTITUTIONAL CLAIMS IN STATE COURT. AS A
8 LAYMAN, I AM NOT COMPETENT TO REPRESENT
9 MYSELF. I AM PRESENTLY UNDER A SENTENCE OF DEATH,
10 AND I HAVE FILED A PETITION FOR WRIT OF HABEAS
11 CORPUS ATTACKING MY JUDGMENT OF CONVICTION
12 AND SENTENCE, AND A REQUEST TO PROCEED IN
13 FORMA PAUPERIS, DEMONSTRATING THAT I AM
14 INDIGENT. NRS 34.750 (1). APPOINTMENT OF
15 COUNSEL TO PROVIDE REPRESENTATION FOR ME IN
16 THESE PROCEEDINGS IS MANDATORY. NRS 34.820(1)(a).
17

18 3. I AM ENTITLED UNDER NRS 34.820(1)(a) TO
19 EFFECTIVE ASSISTANCE OF COUNSEL IN STATE HABEAS
20 PROCEEDINGS. *Crump v. Warden* 113 NEV. 293, 934 P.2d.
21 247, 253 (1997). I THEREFORE REQUEST THAT THIS COURT
22 APPOINT ME COUNSEL WHO WILL ENSURE THAT ALL
23 AVAILABLE CLAIMS ARE DISCOVERED AND LITIGATED
24 EFFECTIVELY ON MY BEHALF IN THE NEVADA STATE COURT
25 SYSTEM. I DO NOT CONSENT TO WAIVING ANY OF THE
26 CLAIMS RAISED IN THE PETITION NOW ON FILE OR
27 ANY OTHER AVAILABLE CONSTITUTIONAL CLAIM.
28

1 IN ANY STATE PETITION FOR WRIT OF HABEAS
2 CORPUS FILED BY APPOINTED COUNSEL SHOULD BE
3 EXPRESSLY DEEMED TO BE WITHOUT MY CONSENT
4 AND AGAINST MY WILL. SEE, E.G., *RACQUEPAW V. STATE*,
5 108 NEU.1020 (1992); *STEWART V. WARDEN*, 92 NEU.
6 588 (1976) MY AUTHORIZATION ALLOWING APPOINTED
7 COUNSEL TO REPRESENT ME, AND TO BIND ME BY
8 HIS OR HER ACTIONS AS MY AGENT, IS CONDITIONAL
9 UPON COUNSEL PERFORMING EFFECTIVELY AS MY COUNSEL;
10 DISCOVERING, INVESTIGATING AND LITIGATING ALL
11 AVAILABLE CLAIMS ON MY BEHALF; AND MAINTAINING
12 UNDIVIDED LOYALTY TO MY INTERESTS THAT MAY BE
13 AFFECTED BY THE VIGOROUS DISCOVERY AND LITIGATION
14 OF MY CLAIMS AND REGARDLESS OF THE IMPACT OF SUCH
15 LITIGATION ON COUNSEL'S PROSPECTS OF COMPENSATION,
16 APPOINTMENT IN OTHER CASES, OR TREATMENT IN OTHER
17 CASES BY THE PRESIDING JUDGE IN THIS MATTER, OR
18 BY ANY OTHER JUDICIAL OFFICIALS. ANY ACTION BY
19 COUNSEL WHICH IS INCONSISTENT WITH EFFECTIVE
20 PERFORMANCE OF THESE DUTIES IS OUTSIDE THE
21 SCOPE OF MY AUTHORIZATION TO COUNSEL TO ACT
22 AS MY AGENT, AND THE STATE IS HEREBY PLACED ON
23 NOTICE NOT TO RELY UPON COUNSEL'S AUTHORIZATION
24 TO ACT AS MY AGENT IF COUNSEL PERFORMS ANY ACT
25 INCONSISTENT WITH THESE DUTIES WITHOUT MY
26 EXPRESS AND INFORMED CONSENT. SEE. *DEUTSCHER V.*
27 *ANGELONE*, 16 F.3d 981 (9th CIR. 1994).
28

4. THE CONSTITUTIONAL CLAIMS ALREADY IDENTIFIED IN MY CASE, WHICH I DIRECT APPOINTED COUNSEL TO RAISE ON MY BEHALF, INCLUDE, BUT ARE NOT LIMITED TO, THE FOLLOWING:

A. ALL ISSUES RAISED ON MY BEHALF ON DIRECT APPEAL, BECAUSE I WAS PREVENTED FROM PREVAILING ON THEM DUE TO ERRONEOUS COURT RULINGS. LOZADA V. STATE, 110 NEV. 349, 871 P.2d 944 (1994) (ERRONEOUS COURT RULINGS CONSTITUTE IMPEDIMENT EXTERNAL TO THE DEFENSE WHICH JUSTIFIES RELITIGATION OF SAID ISSUES IN SUBSEQUENT COURT PROCEEDINGS).

B. CLAIMS OF INEFFECTIVE PRE-TRIAL, TRIAL AND APPELLATE COUNSEL.

C. ANY AND ALL COGNIZABLE ISSUES NOT RAISED ON DIRECT REVIEW BUT WHICH BECAME KNOWN TO EFFECTIVE POST-CONVICTION COUNSEL AFTER BOTH COMPREHENSIVE INVESTIGATION OF THE FACTS SURROUNDING MY CASE AND A THOROUGH AND EXHAUSTIVE SEARCH OF THE RECORD.

5. I FURTHER CONDITION MY AUTHORIZATION FOR APPOINTED COUNSEL TO REPRESENT ME UPON COUNSEL PERFORMING EFFECTIVELY IN SEEKING AN EVIDENTIARY HEARING(S) ON EACH OF THE ABOVE ISSUES, SEE NRS 34.770, 34.780(2), 34.790, TO PROVIDE THE REQUISITE FACTUAL BASIS FOR THE DEVELOPMENT AND REVIEW OF THE ABOVE CLAIMS.

1
2 I FURTHER DIRECT MY COUNSEL TO SEEK COURT
3 AUTHORIZATION TO EXPEND ANY AND ALL FUNDS
4 NECESSARY TO FULLY AND FAIRLY DEVELOP AND
5 PRESENT MY CLAIMS, INCLUDING WHATEVER FUNDS
6 ARE NECESSARY FOR EXPERT. INVESTIGATIVE, AND
7 OTHER ANCILLARY SERVICES, SEE NRS 7.135, AND TO
8 CONDUCT ALL DISCOVERY PROCEEDINGS, SEE NRS
9 34.780, NECESSARY TO THE IDENTIFICATION AND
10 DEVELOPMENT OF ALL AVAILABLE CLAIMS.
11

12 DATED THIS 17th DAY OF JANUARY, 2002
13

14 SUBMITTED BY:

15 Siaosi Vanisi
16 SIAOSI VANISI #63376
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit 35

Exhibit 35

ORIGINAL

FILED

AUG 18 1999

1 1670
2 MICHAEL R. SPECCHIO
3 BAR# 1017
4 WASHOE COUNTY PUBLIC DEFENDER
5 P.O. BOX 30083
6 RENO NV 89520-3083
7 (775) 328-3464
8 ATTORNEY FOR: DEFENDANT

AMY HARVEY, CLERK
By: [Signature] DEPUTY

9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10
11 IN AND FOR THE COUNTY OF WASHOE
12

13 THE STATE OF NEVADA,
14 Plaintiff,

15 vs.

Case No. CR98-0516

16 SIAOSI VANISI,

Dept. No. 4

17 Defendant.
18
19
20
21
22
23

24 EX-PARTE (NEVADA SUPREME COURT RULE 172) MOTION TO WITHDRAW

25 COMES NOW the Defendant, by and through his counsel,
26 STEPHEN D. GREGORY, and JEREMY BOSLER, and moves to withdraw as
counsel for the Defendant. This Motion to Withdraw is

///

///

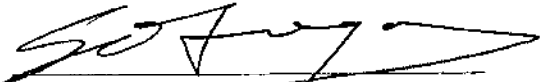
///

3Van1s12JDC04636
1 supported by the following points and authorities herein, an
2 Affidavit of Counsel (attached hereto as Exhibit "A"), and Rule
3 172 on NSCR (attached hereto as Exhibit "B").

4 DATED this 18th day of August, 1999.

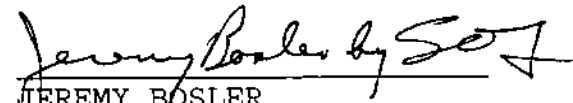
5 MICHAEL R. SPECCHIO
6 Washoe County Public Defender

7
8 By:


STEPHEN D. GREGORY
9 Chief Deputy Public Defender

10
11 MICHAEL R. SPECCHIO
12 Washoe County Public Defender

13
14 By:


JEREMY BOSLER
15 Deputy Public Defender
16
17
18
19
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26

SVan1s12JDC04637

1 POINTS AND AUTHORITIES IN SUPPORT OF EX-PARTE MOTION TO
2 WITHDRAW AS COUNSEL

3 Nevada Supreme Court Rule 166 reads as follows:

4 **Rule 166. Declining or terminating representation.**

5 1. Except as stated in subsection 3, a lawyer shall not
6 represent a client or, where representation has
7 commenced, shall withdraw from the representation of a
8 client if:

9 (a) the representation will result in violation of
10 the rules of professional conduct or other law;

11 (b) the lawyer's physical or mental condition
12 materially impairs the lawyer's ability to
13 represent the client; or

14 (c) the lawyer is discharged.

15
16 2. Except as stated in subsection 3, a lawyer may
17 withdraw from representing a client if withdrawal can
18 be accomplished without material adverse effect on the
19 interest of the client, or if:

20 (a) the client persists in a course of action
21 involving the lawyer's services that the lawyer
22 reasonably believes is criminal or fraudulent;

23 (b) the client has used the lawyer's services to
24 perpetrate a crime or fraud;

25 (c) a client insists upon pursuing an objective that
26 the lawyer considers repugnant or imprudent;

- (d) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (e) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (f) other good cause for withdrawal exists.

- 3. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- 4. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. (added 1-27-86, eff. 3-28-86.)

SVan1s12JDC04639

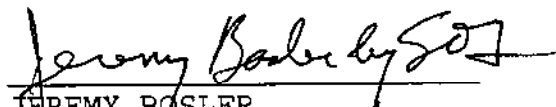
1 Counsel conducted a telephonic conversation with counsel
2 for the State Bar of Nevada concerning a hypothetical
3 representation of a defendant who insists on counsel proffering
4 a defense that violates Rule 166 of the Nevada Supreme Court.
5 Counsel was advised by the State Bar to immediately submit a
6 motion to withdraw as counsel. Furthermore, the State Bar
7 advised counsel to comply with Supreme Court Rule 172 (attached
8 hereto as Exhibit "B") as soon as the Court deems it
9 appropriate to inquire into the matters covered by Rule 172.

10 DATED this 18th day of August, 1999.

11 MICHAEL R. SPECCHIO
12 Washoe County Public Defender

13 By: 
14 STEPHEN D. GREGORY
15 Chief Deputy Public Defender

16 MICHAEL R. SPECCHIO
17 Washoe County Public Defender

18 By: 
19 JEREMY BOSLER
20 Deputy Public Defender
21
22
23
24
25
26

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
) ss
County of Washoe)

I, STEPHEN D. GREGORY , do hereby affirm that the
assertions of this affidavit are true:

1. That I am a duly licensed attorney assigned to
represent the Defendant, SIAOSI VANISI;
2. That I have suggested a defense to the Defendant in
February, 1999, that the Defendant categorically
refuses to allow me to represent to the Court and
Jury since March, 1999;
3. That this defense is supported by the evidence;
4. That this defense does not violate the prohibitions
embodied in Nevada Supreme Court Rule 166;
5. That the Defendant insists on a defense that is not
supported by the evidence;
6. That counsel has been advised by counsel for the
State Bar that the presentation of the Defendant's
defense will result in a violation of Supreme Court
Rule 166;

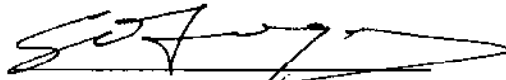
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1 7. That counsel will, according to the State Bar,
2 violate Rule 172 of the Supreme Court if counsel is
3 ordered to present the Defendant's theory of the
4 case;

5 8. FURTHER AFFIANT SAYETH NOT.

6 DATED this 18th day of August, 1999.

7
8 
9 STEPHEN D. GREGORY

10 SUBSCRIBED and SWORN to this 18th day of August, 1999.

11
12 
13 NOTARY PUBLIC



Rule 172. Candor toward the tribunal.

1. A lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a tribunal;
 - (b) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (c) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (d) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
2. The duties stated in subsection 1 continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 156.
3. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
4. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. (Added 1-27-86, eff. 3-28-86.)

Editor's Note. — Former Rule 172 was repealed effective March 28, 1986.

Exhibit 36

Exhibit 36

ORIGINAL

CODE: 4105
SCOTT W. EDWARDS, ESQ.
State Bar No. 3400
729 Evans Ave., Reno, Nevada 89512
(775) 786-4300
THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 E. Liberty St., Reno, NV 89501
(775) 333-6633
Attorneys for Petitioner, SIAOSI VANISI

2005 FEB 22 PM 4: 22

BY CLERK, JR.
 DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

WARDEN, Ely State Prison;
and the STATE OF NEVADA,

DEATH PENALTY CASE

Respondents.

(FILED UNDER SEAL)

SUPPLEMENTAL POINTS & AUTHORITIES
TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

STATEMENT OF CASE

The State charged Siaoosi Vanisi ("Vanisi") with first degree murder for the death of Sergeant George Sullivan, a police officer at the University of Nevada, Reno. Specifically, the State charged that Vanisi committed the killing "during the course of and in furtherance of an armed robbery..." Additionally, the State charged Vanisi with one count of Robbery with the Use of a Deadly Weapon, two counts of Robbery with the Use of a Firearm, and one count of Grand Larceny.

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

AA01126

2JDC04857

1 A direct appeal was filed in the Nevada Supreme Court. Additionally, the Nevada Supreme
2 Court reviewed under mandatory review provisions of NRS 177.055(2) regarding death penalty cases.
3 The Nevada Supreme Court affirmed the conviction and sentence. Vanisi v. State, 117 Nev. 330, 22
4 P.3d 1164 (2001). This timely Petition for writ of habeas corpus (post-conviction) and Supporting
5 Points & Authorities follows.

6 STATEMENT OF FACTS

7 In the early morning of January 13, 1998, UNR Police Sergeant George Sullivan was found
8 dead, apparently murdered and robbed, on the UNR campus. At trial, evidence was presented that two
9 witnesses, including UNR Police Officer Carl Smith, observed Vanisi near the murder site shortly
10 before the time of the killing. Additionally, several witnesses testified that Vanisi had told them he
11 wanted to kill and rob a police officer. Another witness testified that she was with Vanisi when he
12 purchased a hatchet and a pair of gloves and that he told her that he wanted to kill a police officer.
13 A hatchet and gloves were later found at an apartment where relatives of Vanisi's stayed. Evidence
14 at trial showed that stains on the hatchet and jacket contained Sullivan's DNA. Additionally, evidence
15 showed that the gloves contained DNA from both Sullivan and Vanisi.

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

21 Further relevant facts of this case are set forth in each individual claim.

22 INTRODUCTION

23 The petitioner Siao Si Vanisi, by and through counsel, hereby files this supplemental petition
24 for a writ of habeas corpus, pursuant to Nev. Rev. Stat. § 34.724 and Nev. Rev. Stat. § 34.820.
25 Petitioner alleges that he is being held in custody in violation of the First, Fourth, Fifth, Sixth, Eighth,
26 and Fourteenth Amendments of the Constitution of the United States of America, and the rights
27 afforded him under international law enforced under the Supremacy Clause of the United States
28 Constitution, U.S. Const., Art VI, and Article I, Sections 3, 6, 8 and 9, and Article IV, Section 21 of

SVan1s12JDC04859
1 the Constitution of the State of Nevada.

2 Statement with Respect to Previous Proceedings

3 i. The failure to raise any of the claims asserted in this petition which were susceptible
4 to decision on direct appeal was the result of ineffective assistance of counsel on appeal.

5 ii. The failure to raise any of the claims asserted in this petition which were susceptible
6 of being raised in the state trial proceeding and appeal was the result of ineffective assistance of
7 counsel, in a proceeding in which petitioner had a right to effective assistance of counsel under state
8 law and under federal law; was the result of representation by counsel that violated state and federal
9 constitutional due process standards; and was induced by the state trial court's refusal to permit
10 appointed counsel adequate time or resources or authority to identify and present all of the available
11 constitutional claims in violation of the right to an adequate opportunity to be heard guaranteed by the
12 due process clause of the Fourteenth Amendment, and Article I sect. 8 of the Nevada Constitution.

13 iii. Petitioner Vanisi has not competently, knowingly and intelligently waived, deliberately
14 withheld, or consented to the failure to raise, any of the constitutional claims raised in this petition.

15 iv. None of the claims alleged in this petition are subject to any state procedural default
16 rule which is adequate to prevent state review or is independent of state or federal constitutional law.

17 a. The Nevada Supreme Court's administration of its procedural rules is arbitrary
18 and capricious and violates the equal protection and due process clause of the Fourteenth
19 Amendment, and the due process clause of the Nevada Constitution.

20 b. Petitioner alleges that the provisions of Nev. Rev. Stat. § 34.726 do not apply
21 to him. This petition is timely filed and not successive.

22 c. In the event this Court perceives some procedural bar, there is cause to allow
23 this Court to entertain petitioner's claims on the merits. There is no evidence that any delay in filing
24 this petition was due to petitioner's own "fault" and, as the claims in this petition show, he would
25 suffer substantial prejudice if his claims are not entertained. Petitioner is entitled to an evidentiary
26 hearing to demonstrate that he has left the litigation of his claims to counsel, and that there is no
27 element of fault attributable to him.

28 d. Nev. Rev. Stat. § 34.726(1)(a) provides that there is good cause for filing a

petition for writ of habeas corpus more than one year after the finality of the conviction on appeal if the delay is not the petitioner's "fault." The use of the term "the fault of the petitioner" shows that the legislative intent of Nev. Rev. Stat. §37.726(1)(a) is that petitioner himself must act or fail to act to cause the delay. That language is consistent with other legal applications of a subjective fault standard: that is, to be found at fault, it must be proven that the person seeking relief has personally acted or failed to act in a manner that constitutes fault. To be at fault, a party must have acted in a manner that goes beyond negligence because "[f]ault contemplates more than mere negligence, and includes intentional acts." Slade v. Farmers Ins. Exchange, 5 P.3d 280, 285 (Colo. 2000); see e.g., Nev. Rev. Stat. §104.1201(16) ([f]ault means wrongful act, omission or breach"); Nev. Rev. Stat. §104A.2103(1)(f) ("[f]ault means wrongful act, omission, breach or default"); Nev. Rev. Stat. §128.105(2) (fault of parent or parents can be established by proving abandonment, neglect, parental unfitness, failure of parental adjustment, risk of serious physical, mental or emotional injury to child, or token efforts by the parent(s)); In re Termination of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126, 133 (2000) (adopting a best interests/parental fault standard in termination of parental rights cases; best interests of child necessarily include considerations of parental fault and/or conduct and both best interests of the child and parental fault must be proven by clear and convincing evidence); Hill v. State, 955 S.W.2d 96, 100 (Tex. Crim. App. 1997) ("[t]he word "fault" implies wrongdoing; "[f]ault" is defined as "a weakness in character, failing imperfection, impairment, . . . misdemeanor . . . mistake . . . responsibility for something wrong") (citation omitted); State v. Jackson, 94 Ariz. 117, 112, 382 P.2d 229, 232 (Ariz. 1963) ("[f]ault implies misconduct not lack of judgment" (citation omitted)); Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984) (the determination of whether a social security recipient is "at fault" for having received an overpayment "is highly subjective, highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation"). In Pellegrini v. State, 117, Nev. 860, 36 P.3d 519 (2001), the Supreme Court adopted a subjective standard arising from the legislature's use of the term "fault" and held that counsel's failure to act cannot be considered the petitioner's fault under Nev. Rev. Stat. § 34.726:

For example, in Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676,

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1 679 (1995), we concluded that good cause excused the procedural bar
2 at NRS 37.726(1) for untimely filing of a second petition where the
3 first petition had been timely filed, but not pursued by counsel, and any
4 delay in filing the second petition was not the petitioner's fault.

Pellegrini, 34 P.3d at 526 n.10 (emphasis supplied).

5 e. In the alternative, this Court cannot apply procedural bars to avoid consideration of the
6 merits of petitioner's claims, because the cumulative effect of the error alleged amounts to a
7 miscarriage of justice. The cumulative effect of the constitutional errors make petitioner "innocent"
8 of the death penalty. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440, 445 (2002) (en banc).

9 f. This Court is obligated to address the merits of petitioner's claims, despite the default
10 rules contained in Nev. Rev. Stats. §§ 34.726; 34.800; 34.810, based upon federal equal protection
11 principles which require that similarly situated litigants be treated consistently. The Nevada Supreme
12 Court has disregarded Nevada's default rules and addressed constitutional claims in the exercise of
13 its complete discretion to do so, at any point in the direct or collateral proceedings. See, e.g., Bejarano
14 v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default
15 rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised
16 for first time on appeal from denial of third post-conviction petition because claims "of constitutional
17 dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently
18 developed to provide an adequate basis for review."); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d
19 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing
20 the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach
21 the merits of Bennett's contentions.") (emphasis supplied); Powell v. State, 108 Nev. 700, 705-06, 838
22 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that
23 issue not raised at trial or on appeal); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994)
24 (vacating aggravating factor finding based on instructional error on mandatory review error without
25 noting issue not raised at trial or on appeal); Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388
26 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present
27 such [mitigating] evidence constitutes ineffective assistance"); Ford v. Warden, 111 Nev. 872, 886-
28 887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct

1 appeal raised for first time on appeal in second collateral attack, without discussing or applying default
 2 rules); *cf. Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247 (1997)), *Stocks v. Warden*, 86 Nev.
 3 758, 760-761, 476 P.2d 469 (1978) (court "choose[s] to entertain" second post-conviction petition
 4 which could have been barred); *Warden v. Lischko*, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial court's
 5 "choice" to rule on barred claim "within its discretionary power"); *Gunter v. State*, 95 Nev. 886, 887,
 6 620 P.2d 859 (1980) (court "obligated" to consider constitutional issues raised for the first time on
 7 appeal); *Hardison v. State*, 84 Nev. 125, 128, 437 P.2d 868 (1968); *Lord v. State*, 107 Nev. 28, 38,
 8 806 P.2d 548 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on
 9 appeal. However, since this issue is of constitutional proportions, we elect to address it now.")
 10 (citation omitted).

11 g. The Nevada Supreme Court has reached inconsistent results on the issue of
 12 whether a procedural rule that does not exist at the time of a purported default may preclude the
 13 review of the merits of meritorious constitutional claims. *See Pellegrini v. State*, 117 Nev. 860, 34
 14 P.3d 519 (2001).

15 h. This Court and the Nevada Supreme Court cannot apply any supposed default
 16 rules to bar consideration of petitioner's claims when it has failed to apply those rules to similarly-
 17 situated petitioners, and thus has failed to provide notice of what default rules will be enforced,
 18 without violating the equal protection and due process clauses of the Fourteenth Amendment. *Bush*
 19 *v. Gore*, 531 U.S. 98, 104-109 (2000) (per curiam); *Village of Willowbrook v. Olech*, 528 U.S. 562,
 20 564-565 (2000) (per curiam); *Ford v. Georgia*, 498 U.S. 411, 425 (1991); *see* US Const. Art. VI (state
 21 courts bound by federal constitution). Petitioner realizes, of course, that the Nevada Supreme Court
 22 has taken the position that it does apply default rules consistently. *See Pellegrini v. State*, 117 Nev.
 23 860, 34 P.3d 519, 536 (2001).¹ But *Pellegrini* did not address the arguments raised by petitioner with
 24

25 ¹Petitioner notes that the Nevada Supreme Court and the Ninth Circuit Court of Appeals
 26 have reached the exact opposite conclusion with respect to the adequacy of Nevada's procedural
 27 rules to preclude the review of the merits of meritorious claims in capital cases. *Compare*
 28 *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519, 536 (2001); *with Valerio v. Crawford*, 306 F.3d
 742, 778 (9th Cir. 2002); *Petrocelli v. Angelone*, 248 F.3d 877, 886-88 (9th Cir. 2001); *McKenna*
v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995).

respect to unpublished dispositions, and therefore, Pellegrini cannot be authority for rejecting petitioner's position. See In re Tartar, 52 Cal.2d 250, 339 P.2d 553, 557 (1959) (cases not authority for propositions not considered). Second, petitioner raises this issue as a violation of the equal protection and due process clauses of the Fourteenth Amendment. State courts must afford petitioner a hearing on that claim that is adequate to allow him to litigate his federal constitutional claims, Franks v. Delaware, 438 U.S. 154, 171-72 (1978), and this Court must therefore grant petitioner an adequate hearing on this issue. Third, whatever the Nevada Supreme Court has said with respect to the application of default rules, without analyzing the federal constitutional issues presented by petitioner, this Court is bound under the Supremacy Clause, U.S. Const. Art. VI, to apply the federal constitutional guarantees invoked by petitioner. Accordingly, this Court must address the merits of petitioner's constitutional claims, or at the very least, grant petitioner an evidentiary hearing to determine the adequacy of Nevada's procedural rules to bar this Court's review of the merits of petitioner's claims.

II. CLAIMS OF ERROR.

CLAIM ONE:

PETITIONER WAS DENIED HIS RIGHT TO CONSULAR CONTACT UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS, A VIOLATION THAT MUST BE REMEDIED BY THIS COURT UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BY VACATING PETITIONER'S CONVICTION AND SENTENCE.

Supporting Facts.

Mr. Vanisi is a citizen of Tonga. He is not a citizen of the United States. Both nations are signatories to an international treaty providing that Mr. Vanisi should have been informed of certain rights as an accused in a foreign land. Mr. Vanisi was not so informed and did not exercise those rights. Recent precedent of the International Court of Justice dictates that Mr. Vanisi be accorded relief for this violation of his rights under the international treaty. One state court of the United States (Oklahoma) has already accorded relief to a death row inmate similarly situated, by removing the death sentence for the individual. (That opinion is attached to this opinion as Exhibit A for ease of

reference.) Many other individuals have laid claim to relief under the same circumstances. The United States Supreme Court has granted certiorari upon the issue of what relief should be accorded and is expected to hear the case shortly (The petition for writ of certiorari is attached to this pleading as Exhibit B for ease of reference.)

Had Tongan consular officials in San Francisco been provided an opportunity to assist Mr. Vanisi at the time of his arrest and prosecution, he would not be on death row today. Consular officials have already indicated their willingness to assist Mr. Vanisi had they been appraised of his circumstances. The most important assistance the Tongan consulate could have provided would have been the assistance of effective and conflict free counsel. They could have also coordinated the presentation of mitigation evidence relative to Mr. Vanisi's formative experiences in Tonga. As it turns out, Mr. Vanisi ended up enduring a trial with virtually no representation. His appointed counsel moved to withdraw from representation (with the approval of the State Bar of Nevada) but they were denied by the trial court. They were compelled to remain on the case, essentially moot and ineffective. They presented little evidence and no closing argument at all. Mr. Vanisi even tried to represent himself rather than suffer the prejudice of attorneys who were unable to assist in the crucible of adversarial testing. Again, the trial court denied the constitutional request. Thus, the prejudice to Mr. Vanisi from the denial of his rights under the international treaty are readily apparent.

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

Legal Argument.

While numerous state and federal courts have grappled with the application of Article 36, no court has squarely addressed the June 27, 2001 decision of the International Court of Justice ("ICJ") in the *LaGrand Case (Germany v. United States)*, 2001 ICJ 104 (Judgment). This authoritative

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1 decision – which is directly applicable to the case of Mr. Vanisi – will affect all cases of foreign
2 nationals sentenced to severe penalties, who have alleged a violation of Article 36.

3 The ICJ's jurisdiction in *LaGrand* was founded upon the Optional Protocol to Article 36 of
4 the Vienna Convention, a treaty ratified by the United States. Under the Optional Protocol, the United
5 States chose to submit all “[d]isputes arising out of the interpretation or application of the [Vienna]
6 Convention” to the ICJ for resolution. Optional Protocol Concerning the Compulsory Settlement of
7 Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325. As a result, the court's decision is binding on the
8 United States under the Optional Protocol, Article 94 of the U.N. Charter, and customary international
9 law.

10 Confronting a factual scenario strikingly similar to the case of Mr. Vanisi, the *LaGrand* court
11 resolved several issues that had divided the lower courts of the United States. First, the ICJ
12 unequivocally held that Article 36, paragraph 1 creates an individual right to consular notification and
13 access. *LaGrand*, paras. 77, 128(3). Second, the court held that a foreign national deprived of his
14 Article 36 rights, and sentenced to a “severe penalty,” is entitled to “review and reconsideration” of
15 his conviction and sentence. *Id.*, para. 128(7). Third, the court held that domestic rules of procedural
16 default, as applied in the case of the *LaGrand* brothers, violated the United States' obligation to give
17 “full effect” to the purposes of Article 36. *Id.*, paras. 91, 128(4). Thus, *LaGrand* definitively
18 establishes that petitioners such as Mr. Vanisi— whose case cannot be distinguished from *LaGrand* —
19 are entitled to a judicial review of their Article 36 claims.

20 The Court also established important guidelines for judicial review of such arguments. In
21 *LaGrand*, Germany argued that there was a causal relationship between the breach of Article 36 and
22 the ultimate execution of the *LaGrand* brothers. *Id.* at para. 71. Specifically, Germany argued that
23 consular officials would have been able to present persuasive mitigating evidence that would have
24 changed the outcome of the *LaGrand* cases. *Id.* The United States countered that such arguments were
25 speculative, and challenged Germany's assertions that it would have provided such assistance in 1984.
26 *Id.* at para. 72. The Court ultimately concluded that it was “immaterial” whether consular assistance
27 from Germany would have affected the verdict. Put differently, the Court rejected the notion that a
28 foreign national must demonstrate he was prejudiced by the Article 36 violation, before he is entitled

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1 to an effective remedy for the violation.

2 Finally, the court addressed the question of remedies for Article 36 violations. The United
3 States had argued Germany was entitled to no more than an apology for the breach of Article 36. The
4 court squarely rejected this argument, observing that an apology was an insufficient remedy in any
5 case where a foreign national was not advised without delay of his rights under Article 36, paragraph
6 1, of the Vienna Convention, and was facing prolonged detention or a severe penalty such as penalty
7 of death. *Id.* paras 63, 123, 125.

8 In considering the remedy appropriate in the case of Mr. Vanisi, this Court should also look to
9 the advisory opinion issued by the Inter-American Court on Human Rights³ on October 1, 1999. OC-
10 16/99, Inter-Am. Ct. H.R. (October 1, 1999). The Inter-American Court² received briefs and heard oral
11 argument from eight nations – including the United States – and eighteen non-governmental
12 organizations, academics, and individuals appearing as *amici curiae*. After analyzing the text of the
13 treaty, the intent of the parties, and its application in capital cases, the court concluded that Article 36
14 provides one of the “minimum guarantees essential to providing foreign nationals the opportunity to
15 adequately prepare their defense and receive a fair trial” – a right embodied in Article 14(3)(b) of the
16 International Covenant on Civil and Political Rights (“ICCPR”).³ *Id.* at para. 122. The Inter-American
17 Court concluded that international law prohibits the execution of an individual whose consular
18 notification rights were violated. *Id.* at para. 7.

19 In the wake of *LaGrand* – particularly when viewed in tandem with the Inter-American Court’s
20 decision and other principles of international law – there can be no doubt that Mr. Vanisi is entitled
21 to judicial review of the substance of his arguments, and a meaningful remedy for the violation of his
22 Article 36 rights.

23
24 ²The Inter-American Court on Human Rights has jurisdiction to issue advisory opinions “regarding the
25 interpretation of the [American] Convention or other treaties concerning the protection of human rights in the
26 American States.” American Convention on Human Rights, Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May
3, 1996).

27 ³International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171 (*entered into*
28 *force* Mar. 23, 1976). The United States ratified the ICCPR on June 8, 1992, and has not adopted any reservations with
regard to Article 14.

A. The ICJ's Judgment Is Authoritative and Binding Precedent In the Case of Mr. Vanisi.

1. The State of Nevada Is Bound To Apply the ICJ's Decision Under the Charter of The United Nations.

The United Nations Charter is a multilateral treaty, duly ratified by the U.S. Senate. United Nations Charter, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, June 26, 1945. Under the Supremacy Clause of the United States Constitution, the State of Nevada is bound by its terms. U.S. Const. Arts. VI, cl. 2; *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941)("[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land").

The ICJ is the "principal judicial organ of the United Nations," U.N. Charter, art. 92. Pursuant to the U.N. Charter, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." U.N. Charter, art. 93. Thus, the provisions of the Statute of the ICJ also constitute the "supreme Law of the Land" and are binding on Nevada.

Article 94 of the U.N. Charter provides that "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." The language of article 94 is clear and unequivocal. As one commentator has observed, this provision, "as well as corresponding provisions of the ICJ Statute, transfer adjudicatory authority to the U.N. and its organs, and the attribution of binding legal force to their decisions."⁴ Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS INT'L & COMP. L. REV. 27, 50 (1999). See also International Court of Justice, *A Guide to the History, Composition, Jurisdiction, Procedure, and Decisions of the Court: The Decision*, <http://www.ICJ-cij.org/ICJwww/igeneralinformation/ibbook/Bbookchapter5.HTML> [hereinafter "History of the ICJ"] (ICJ "has always taken the view that it would be incompatible with the spirit and the letter of the Statute and with judicial propriety to deliver a judgment the validity of

⁴As *LaGrand* makes clear, foreign nationals have a right to judicial review of Article 36 violations – and it is Article 36 that provides the basis for Mr. Vanisi's claim for relief, not the U.N. Charter. Thus, Mr. Vanisi's case is distinguishable from *Committee of United States Citizens v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1987).

1 which. . . would have no practical consequences so far as their legal rights and obligations were
 2 concerned")(citing *Free Zone of Upper Savoy & the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46,
 3 p. 35 (Judgment)).

4 Mr. Vanisi, a Tongan, respectfully requests that this Court give effect to the ICJ's decision in
 5 *LaGrand*, and enforce the United States' obligations under the U.N. Charter, the ICJ Statute, the
 6 Vienna Convention, and the Optional Protocol to that Convention.

7 2. Customary International Law

8 The decisions of the ICJ are also binding under customary international law. Shabtai Rosenne,
 9 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 127 (1965);
 10 *Committee of United States Citizens v. Reagan*, 859 F.2d 929, 938 (1987). It is equally settled that
 11 customary international law is part of the law of the United States. *The Paquete Habana*, 175 U.S.
 12 677, 700 (1900).

13 Although the D.C. Circuit sought to limit the application of this norm of customary
 14 international law in *Committee of United States Citizens*, the court acknowledged that "[i]n special
 15 agreement cases – in which both parties to a dispute simultaneously submit to the ICJ's jurisdiction--
 16 adherence to the Court's judgment may well be the norm." 859 F.2d at 941. *LaGrand* was a special
 17 agreement case. The ICJ's jurisdiction in *LaGrand* was founded upon the Optional Protocol to Article
 18 36 of the Vienna Convention, a treaty ratified by the United States. The Optional Protocol provides:

19 Disputes arising out of the interpretation or application of the Convention shall lie
 20 within the compulsory jurisdiction of the International Court of Justice and may
 21 accordingly be brought before the Court by an application made by any party to the
 22 dispute being a Party to the present Protocol.

23 Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T.
 24 325. Thus, unlike the situation in *Committee of Citizens*, the United States consented to the ICJ's
 25 jurisdiction in *LaGrand*, and participated fully in written and oral proceedings before the court.

26 Customary international law requires that nations obey the rulings of an international court to
 27 whose jurisdiction they submit – particularly when, as here, the court's jurisdiction is founded upon
 28 a binding treaty obligation.

3. The ICJ's Judgment Applies to All Foreign Nationals Sentenced to Severe Penalties.

1 While the *LaGrand* court addressed a claim brought by Germany on behalf of two German
 2 nationals, the principles announced by the court apply with equal force to the case of Mr. Vanisi. The
 3 court explicitly acknowledged the position of equally situated foreign nationals when addressing the
 4 issue of an adequate remedy for the breach of Article 36:

5 The United States has presented an apology to Germany for this breach. The Court
 6 considers however that an apology is not sufficient in this case, as it would not be
 7 in other cases where foreign nationals have not been advised without delay of their
 rights under Article 36, paragraph 1, of the Vienna Convention and have been
 subjected to prolonged detention or sentenced to severe penalties.

8 *LaGrand*, para. 123.

9 While the ICJ's judgment in *LaGrand* is ostensibly "binding" only on the parties to the
 10 litigation,⁵ the principles announced in the opinion serve as authoritative precedent for all states party
 11 to the Vienna Convention. History of the ICJ, *supra* (court maintains "consistency in its decisions"
 12 that "influence the attitude of States towards questions that have already been dealt with by the
 13 Court"). It is equally apparent that, in the event of future breaches of Article 36 by the United States
 14 involving non-German nationals, parties to the Optional Protocol would be entitled to invoke the ICJ's
 15 jurisdiction and obtain a similar judgment. *Id.* (it is "reasonable to suppose that where the ICJ has
 16 decided a case it would have to have serious reasons for thereafter deciding in a similar case to adopt
 17 a different approach").

18 Any attempt by the United States to limit the application of *LaGrand* to German nationals
 19 would violate the Fourteenth Amendment's proscription against discrimination based on national
 20 origin. See, e.g., *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973); *Makhija v. Deleuw*
 21 *Cather & Co.*, 666 F. Supp. 1158, 1175 (N.D. Ill. 1987). Moreover, the courts of the United States
 22 cannot provide a remedy to German nationals that is not equally available to non-Germans, without
 23 running afoul of the United States' obligations under both the International Covenant on Civil and
 24 Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination

25
 26
 27 ⁵ Statute of the International Court of Justice, art. 59, Oct. 24, 1945, 59 Stat. 1055.
 28

1 ("CERD").⁶

2 Article 26 of the ICCPR specifically guarantees that "[a]ll persons are equal before the law
3 and are entitled without any discrimination to the equal protection of the law." ICCPR, art. 26. In
4 relevant part, the Race Convention obligates member states to "prohibit and eliminate racial
5 discrimination in all its forms and to guarantee the right of everyone, without distinction as to race,
6 colour, or national or ethnic origin, to equality before the law," including the "right to equal
7 treatment before the tribunals and all other organs administering justice." CERD, Article 5(a),
8 *emphasis added*. This principle is also recognized as a norm of customary international law.
9 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §711
10 cmt. C (1987).

11 In Mr. Vanisi's view, any attempt to limit *LaGrand*'s application to German nationals would
12 violate these cardinal principles of non-discrimination.

13 **B. The Application of Procedural Default Rules to Bar Merits Review of This Claim
14 Would Violate the Supremacy Clause.**

15 The State may suggest that state rules of procedural default justify the dismissal of Mr.
16 Vanisi's state post-conviction application. This Court should reject such an invitation, in light of
17 *LaGrand* and the supremacy of treaties over inconsistent state laws.

18 In *LaGrand*, the ICJ analyzed the application of procedural default rules in a case factually
19 indistinguishable from the case of Mr. Vanisi. There, Germany argued that the courts' application of
20 procedural default rules was inconsistent with the United States' obligations under Article 36(2) of
21 the Vienna Convention. The Court concurred, noting that the waiver of this argument was attributable
22 to the failure of American authorities to comply with their Article 36(1)(b) obligations.

23 As a result, although United States courts could and did examine the professional
24 competence of counsel assigned to the indigent LaGrands by reference to United States
25 constitutional standards, the procedural default rule prevented them from attaching any
26 legal significance to the fact, *inter alia*, that the violation of the rights set forth in
27 Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private

28 ⁶The Convention for the Elimination of All Forms of Racial Discrimination opened for signature May 7,
1966, and was signed by the United States September 28, 1966. 600 U.N.T.S. 195. The Senate ratified the convention
October 21, 1994. 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

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1 counsel for them and otherwise assisting in their defence as provided for by the
2 Convention. Under these circumstances, the procedural default rule had the effect of
3 preventing 'full effect [from being] given to the purposes for which the rights accorded
4 under this article are intended,' and thus violated paragraph 2 of Article 36.

5 *LaGrand*, para. 91.

6 This conclusion is entitled to deference from state courts considering identical claims. By
7 ratifying the Optional Protocol, the United States conceded the exclusive jurisdiction of the ICJ over
8 "disputes arising out of the interpretation or application of the Convention." The ICJ's authority to
9 decide such issues cannot be questioned. Because Mr. Vanisi's failure to preserve this issue by
10 objecting at trial was directly attributable to the failure of local authorities to advise him of his rights
11 – as in *LaGrand* – the application of the procedural default doctrine here cannot be squared with the
12 ICJ's judgment.

13 The application of state procedural default rules would also violate the Supremacy Clause of
14 the United States Constitution. Supreme Court has repeatedly recognized the supremacy of treaties
15 over state laws, policies, and constitutions. *United States v. Belmont*, 301 U.S. 324, 327 (1937);
16 *United States v. Pink*, 315 U.S. 203 (1941). State law "must yield when it is inconsistent with, or
17 impairs the policy or provisions of, a treaty or of an international compact or agreement. *Pink*, 315
18 U.S. at 231 (emphasis added).

19 There can be no doubt that the application of procedural default rules in this case would
20 "impair" this Court's ability to review and consider the merits of the treaty violation here. Thus, the
21 procedural default doctrine must give way to the United States' obligations to give "full effect" to the
22 purposes of Article 36. See Douglass Cassel, *Judicial Remedies for Treaty Violations in Criminal*
23 *Cases*, 12 LEIDEN J. INT'L L. 851, 885 (1999); Jordan J. Paust, *Breard and Treaty-Based Rights*
24 *Under the Consular Convention*, 92 A.J.I.L. 691, 692 (1998)(federal judges may not fashion
25 procedural rules to subvert the domestic effect of a treaty).

26 The State may suggest that *Breard v. Greene*, 523 U.S. 371 (1998), supports the application
27 of procedural default rules when considering article 36 claims. *Breard*, however, addressed the
28 application of *federal* rules of procedural default. It has long been accepted that federal statutes and
treaties are on the same footing. *Whitney v. Robertson*, 124 U.S. 190 (1888). The same cannot be said

1 for *state* statutes – which, as noted above, must yield when they impair the United States’ treaty
 2 obligations. Article 36(2) requires that states give “full effect. . . to the purposes for which the rights
 3 accorded are intended.” This treaty provision, which supercedes any inconsistent state laws, clearly
 4 mandates review of Mr. Vanisi’s Article 36 claim.

5 Finally, it should be noted that Mr. Vanisi’s Article 36 claim can be reviewed as an allegation
 6 of ineffective assistance of trial and appellate counsel, a claim that is timely and not procedurally
 7 barred. Had his previous counsel been cognizant of the right to consular notification and assistance,
 8 they could and should have acted to preserve Mr. Vanisi’s rights under the treaty. Their failure to do
 9 so, constitutes prejudicial ineffective assistance of counsel that warrants relief by the vacating of the
 10 conviction and sentence stemming from the violation.

11 **C. Mr. Vanisi’s Death Sentence should be Vacated in Accordance with the**
 12 **Remedies Prescribed by International Law for Treaty Violations.**

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

19 The remedy prescribed by the Inter-American Court is consistent with the remedy required
 20 under established principles of international law. While Article 36(1)(b) of the Vienna Convention
 21 fails to specify an appropriate remedy, this omission should not be taken to mean that no remedy is
 22 available to individuals whose rights are violated under the treaty. “[I]t is not unusual for “substantive
 23 rights [to] be defined by [treaty] but the remedies for their enforcement left undefined or relegated
 24 wholly to the states.” Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92
 25 COLUM. L. REV. 1082, 1144 (1992)(quoting Hart & Wechsler, *THE FEDERAL COURTS AND*
 26 *THE FEDERAL SYSTEM* 533 (1988). Indeed, the International Court of Justice has recognized that
 27 a remedy must be imposed for the breach of an international agreement – even where the remedy is
 28 not provided in the text of a Convention. *Factory at Chorzow* (Jurisdiction)(Ger. v. Pol.), 1927 P.C.I.J.

(ser. A) No. 6, at 21 (July 27).

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

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

The need for an effective remedy is particularly acute in a capital case. An apology – like a promise to refrain from similar violations in the future – will provide no comfort to Mr. Vanisi, who is facing execution. International law requires that procedural guarantees of fairness and due process be strictly observed when a country seeks to impose the death penalty. See *Reid v. Jamaica* (No. 250/1987), Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, *reprinted in* 11 Hum. Rts. L.J. 321 (1990)("in capital punishment cases, the duty of States parties [to the ICCPR] to observe rigorously all the guarantees for a fair trial. . . is even more imperative"); G.A. Res. 35/172, Dec. 15, 1980 (member states must "review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases"); NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 225-28 (1999); Case 11,139, Inter-Am. C.H.R. at para. 171, Report No. 57/96

of 6 December 1996, OEA/Ser/L/V/II.98, Doc. 7, rev., (February 19, 1998) (“before the death penalty can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes those rights and freedoms enshrined in the American Declaration [of the Rights and Duties of Man]”).

To fulfill the United States’ obligations under Article 36, the International Covenant on Civil and Political Rights, and customary international law, this Court should grant Mr. Vanisi’s application for post-conviction relief, and vacate his conviction and death sentence.

D. Mr. Vanisi was Prejudiced by the Violation of the Vienna Convention.

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

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

LaGrand, para. 74.

The Inter-American Court on Human Rights has likewise implied that a defendant need not show prejudice, before he is entitled to a meaningful remedy for the violation. The decisions of these international tribunals call for revision of the “prejudice” standard adopted by some lower courts considering Vienna Convention claims.⁷ Particularly in a capital case, prejudice should be presumed. Should this Court adopt a prejudice test – despite the rejection of this standard by international tribunals – a full evidentiary hearing is warranted. (See discussion, *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994)(holding violation of INS consular notification regulations did not implicate “fundamental” right, therefore alien must demonstrate prejudice); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998)(applying prejudice standard based on *Faulder*).

Although he is not required to demonstrate prejudice, Mr. Vanisi has amply demonstrated the harm resulting from the Article 36 violation in his case. The evidence establishes that at the time of

⁷ See, e.g., *Faulder v. Johnson*, 81 F.3d 515, 520 (Cir. 1996)

1 his arrest, Mr. Vanisi was a bipolar psychotic who would have benefited greatly from consular
 2 assistance. Tongan consular officials, like their Mexican counterparts have done, could have assisted
 3 trial counsel in locating witnesses, communicating with non English-speaking family members, and
 4 persuading prosecuting authorities to dismiss capital charges. *See, e.g.,* Laura Lafay, *Virginia Ignores*
 5 *Outcry*, THE ROANOKE TIMES, July 6, 1997 (noting that Mexican consulate negotiated plea
 6 bargains on behalf of two Mexican citizens facing the death penalty); Claire Cooper, *Foes of Death*
 7 *Penalty Have a Friend: Mexico*, SACRAMENTO BEE, June 26, 1994. (noting Mexico's intervention
 8 in Kentucky and California capital cases where death penalty avoided) Tonga could have served as
 9 a liaison between the defendant and his trial counsel.⁸ Perhaps most important, given the facts of this
 10 case, Tonga could have assisted Mr. Vanisi in locating competent defense counsel and effective
 11 mental health and other experts. All of these efforts are consistent with the non-exhaustive list of
 12 functions enumerated in article 5 of the Vienna Convention.¹² 21 U.S.T. 77, art. 5.

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

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

25
 26
 27 ⁸ The U.S. Department of State also recognizes that a consular official should serve as "effective liaison with
 28 attorneys, court officials and prosecutors," 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL §423.3, and should
 help "arrestees understand what is happening to them" as "a yardstick against which they can measure attorney
 performance." *Id.* at §413.4

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

5 **CLAIM TWO:**

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

12 **Supporting Facts.**

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

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

19 (TT, Vol. VI, 1009).

20 Further, the record shows that when the jury imposed a death sentence for the murder, it found
21 three aggravating circumstances: (1) *the murder occurred in the commission of or an attempt to*
22 *commit robbery*; (2) the victim was a peace officer engaged in the performance of his official duties,
23 and the defendant knew or reasonably should have known the victim was a peace officer; and (3) the
24 murder involved mutilation.

25 The inclusion of this first aggravator: that the murder occurred in the commission of or an
26 attempt to commit robbery, which is based upon the predicate felony used to find felony murder,
27 brings rise to the instant claim.

28 **Legal Argument.**

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. In 1972,
the Supreme Court held that capital sentencing schemes which do not adequately guide the sentencers'
discretion and thus permit the arbitrary and capricious imposition of the death penalty violate the

1 Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 206-07, 49 L. Ed. 2d 859, 96
 2 S. Ct. 2909 (1976) (plurality opinion) (summarizing Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d
 3 346, 92 S. Ct. 2726 (1972)); Id. at 220-21 (White, J., concurring) (same).

4 The Eighth Amendment applies to the individual states through the Fourteenth Amendment's
 5 Due Process Clause. Robinson v. California, 370 U.S. 660, 666, 8 L. Ed. 2d 758, 82 S. Ct. 1417
 6 (1962); U.S. Const. amend. XIV, § 1. As a result, the U. S. Supreme Court has held that to be
 7 constitutional a capital sentencing scheme "**must genuinely narrow the class of persons eligible for**
 8 **the death penalty and must reasonably justify the imposition of a more severe sentence on the**
 9 **defendant compared to others found guilty of murder."** Zant v. Stephens, 462 U.S. 862, 877, 77
 10 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)(emphasis added).

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

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

20 Accordingly, the Nevada Supreme Court in McConnell found:

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

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

24 The McConnell court then concluded:

25 **We therefore deem it impermissible under the United States and Nevada**
 26 **Constitutions to base an aggravating circumstance in a capital prosecution on the**
 27 **felony upon which a felony murder is predicated.**

28 McConnell, 102 P.3d at 624 (emphasis added).

The McConnell court clarified its ruling:

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

3 McConnell, 102 P.3d at 624.

4 Concerning this clarification, the McConnell court went one step further and cautioned the
5 State:

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

8 McConnell, 102 P.3d at 624-25.

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

12 **Remedy.**

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

19 For this court -- or any other -- to reweigh the aggravating circumstances on its own, or to
20 conduct a "harmless error" analysis in the face of this invalid aggravating circumstance would violate
21 the Due Process clause of the Fourteenth Amendment to the United States Constitution. Any finding
22 by this court that harmless error occurred as a result of this invalid aggravator would be mere
23 speculation and conjecture. To uphold anything as serious as the penalty of death upon such improper
24 conjecture would be to admit, as Justice Marshall feared, that "the task of selecting in some
25 objective way those persons who should be condemned to die is one that remains beyond the
26 capacities of the criminal justice system." Godfrey v. Georgia, 466 U.S. at 440, 100 S.Ct. at 1770
27 (J. MARSHALL, Concurring).

28 Moreover, the United States Supreme Court decision of Ring v. Arizona, 536 U.S. 584, 153

1 L.Ed.2d 556, 122 S.Ct. 2428, (2002) held that a court may not reweigh the aggravating and mitigating
2 circumstances in light of a finding that one or more aggravating circumstances were found to be
3 invalid. The Court in Ring considered a situation in which the Supreme Court of Arizona agreed with
4 Ring on appeal that the evidence presented at the trial court level was insufficient to support the
5 aggravating circumstance of depravity, State v. Ring, 200 Ariz. 267, 281-82, 25 P.3d 1139, 1153-1154
6 (2001), but it upheld the trial court's finding on the aggravating factor of pecuniary gain. The Arizona
7 Supreme Court then reweighed that remaining aggravating factor against the sole mitigating
8 circumstance (Ring's lack of a serious criminal record), and affirmed the death sentence. Id., 200 Ariz.
9 at 282-284, 25 P.3d at 1154-1156. The U. S. Supreme Court reversed the judgment of the Arizona
10 Supreme Court. Ring, 536 U.S. at 596. See also, Apprendi v. New Jersey, 530 U.S. 466, 147 L.Ed.2d
11 435, 120 S. Ct. 2348, (2000); Commonwealth of the Northern Mariana Islands v. Bowie, 236 F.3d
12 1109 (9th Cir.2001); Moore v. Morton, 255 F.3d 95 (3d Cir. 2001); State v. Ward, 555 S. E. 2d 251
13 (N. C. 2001); State v. Allen, 353 N.C. 504, 546 S.E. 372 (N.C.2001); People v. Kuntu, 196 Ill. 2nd
14 105, 752 N.E. 2nd 380, (Ill. 2001).

15 The Supreme Court in Ring based its decision upon Apprendi v. New Jersey, 530 U.S. 446
16 (2000), in which the Court unequivocally held: "Other than the fact of a prior conviction, any fact that
17 increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury
18 and proven beyond a reasonable doubt." Id. Citing its previous decision in Jones v. United States,
19 526 U.S. 227 (1999), the Court held:

20 With that exception [of the fact of a prior conviction], we endorse the statement
21 of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for
22 a legislature to remove from the jury the assessment of facts that increase the
23 prescribed range of penalties to which a criminal defendant is exposed. It is equally
24 clear that such facts must be established by proof beyond a reasonable doubt." 526
25 U.S. at 252-253, 119 S.Ct. 1215 (opinion of STEVENS, J.); see also id., at 253, 119
26 S.Ct. 1215 (opinion of SCALIA, J.).

27 Id. (footnote omitted).

28 The concurring opinions of the Court's most conservative justices were equally unequivocal:

What ultimately demolishes the case for the dissenters is that they are unable
to say what the right to trial by jury does guarantee if, as they assert, it does not
guarantee - - what it has been assumed to guarantee throughout our history - - the right
to have a jury determine those facts that determine the maximum sentence the law
allows.

1 ...
2 [T]he guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the
3 right to ... trial, by an impartial jury" has no intelligible content unless it means that all
4 the facts which must exist in order to subject the defendant to a legally prescribed
5 punishment must be found by the jury.

6 Id. at 17 (Scalia, J., concurring) (emphasis supplied).

7 In order for an accusation of a crime (whether by indictment or some other
8 form) to be proper under the common law, and thus proper under the codification of
9 the common-law rights in the Fifth and Sixth Amendments, it must allege all elements
10 of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of
11 the crime must be proved to the jury.

12 ...
13 [A] "crime" includes every fact that is by law a basis for imposing or increasing
14 punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature
15 defines some core crime and then provides for increasing the punishment of that crime
16 upon a finding of some aggravating fact - - of whatever sort, including the fact of a
17 prior conviction - - the core crime and the aggravating fact together constitute an
18 aggravated crime, just as much as grand larceny is an aggravated form of petit larceny.
19 The aggravating fact is an element of the aggravated crime. Similarly, if the legislature,
20 rather than creating grades of crime, has provided for setting the punishment of a crime
21 based on some fact - - such as a fine that is proportional to the value of stolen goods -
22 - that fact is also an element. No multi-factor parsing of statutes, of the sort that we
23 have attempted since *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)], is necessary.
24 One need only look to the kind, degree, or range of punishment to which the
25 prosecution is by law entitled for a given set of facts. Each fact necessary for that
26 entitlement is an element.

27 Id. at 1, 8-19 (Thomas, J., concurring).

28 Under this analysis, there can be no doubt that the aggravating circumstances prescribed by
Nev. Rev. Stat. § 200.033 are "elements" of capital murder. Nev. Rev. Stat. § 200.030 defines the
degrees of murder and prescribes the maximum punishments allowed.⁹ First degree murder is
punishable by various terms of imprisonment, §200.030(4)(b), but it is punishable by death "only if
one or more aggravating circumstances are found and any mitigating circumstance or circumstances

⁹Nev. Rev. Stat. § 200.030(4) provides:

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

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

(b) By imprisonment in the state prison;

(1) For life without the possibility of parole;

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

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

which are found do not outweigh the aggravating circumstance or circumstances...." §200.030(4)(a) (emphasis supplied). The crucial role of aggravating circumstances as elements of capital-eligible first degree murder is further demonstrated by the last sentence of § 200.030(4): "A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole."

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

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

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

Apprendi at 16 (emphasis supplied). Under the Arizona scheme at issue in Walton, the statute provides that the maximum penalty for first degree murder is death. Ariz. Rev. Stat. § 131-105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703."); Walton v. Arizona, 497 U.S. at 643 (expressly overruled by Ring, *supra*).

By contrast, under Nevada law the penalty of death is not the maximum penalty for first degree

murder simpliciter: the statute itself provides that the penalty is not available for first degree murder unless additional elements - - the existence of aggravating circumstances, and the failure of mitigating circumstances to outweigh the aggravating circumstances - - are found. See Apprendi at 29 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment - - for establishing or increasing the prosecution's entitlement - - it is an element.") Simply put, a jury's verdict of first degree murder under Nevada law is not "a jury verdict holding a defendant guilty of a capital crime," Id. at 16, because the statute itself provides that the punishment of death is not available simply on the basis of that verdict, but can be imposed "only if" further findings are made to increase the available maximum punishment.

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

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

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

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

Because neither this court not the Nevada Supreme Court can constitutionally make the findings of elements necessary to impose a death sentence, this Court must impanel a new jury to determine the appropriate sentence.

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1 CLAIM THREE:

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

6 **Supporting Facts:**

7 On June 23, 1999, a closed hearing was held before the District Court to address the Motion
8 of Mr. Vanisi to dismiss his counsel, the Washoe County Public Defender's Office, and to appoint
9 new counsel. The court heard from Mr. Vanisi, who informed the court that his counsel had not given
10 him all the information that he needed and that, as a result, he was being forced to make decisions
11 based upon limited information. Further, Vanisi informed the court that his own research contradicted
12 what his attorneys were telling him. (Transcript of Proceedings, hereinafter "TOP", June 23, 1999,
13 5).

14 The court would not accept Mr. Vanisi's claim of a conflict of counsel without specific
15 information about the alleged conflict. (TOP, June 23, 1999, 5-6). Vanisi repeatedly asked the Court
16 for guidance in what it wanted him to explain. (TOP, June 23, 1999, 7, 8, 9). Vanisi explained that:
17 (1) his attorneys weren't giving him sound advice; (2) they were not spending adequate time with him;
18 and (3) he was getting limited information from them. The court required more. (TOP, June 23, 1999,
19 12). Mr. Vanisi then stated that his research had shown that he could not be prosecuted twice, that
20 the State could not retry his case after the initial mistrial. (TOP, June 23, 1999, 15, 17). He
21 complained that his lawyers did not know the law on the issue of double jeopardy. (TOP, June 23,
22 1999, 17). Further, Vanisi explained that Mr. Specchio, his lead counsel, had put on the record that
23 he and his investigator had seen Vanisi over 20 times, but that the visitation records showed that he
24 had not been there even 10 times. (TOP, June 23, 1999, 28-29).

The court expressed its opinion then that Mr. Vanisi was merely attempting to delay the trial. (TOP, June 23, 1999, 33-34). The court denied Mr. Vanisi's motion. (TOP, June 23, 1999, 34). Afterward, one of Vanisi's lawyers, Mr. Gregory, implored the court to take into consideration how difficult it was for him to have a substantive conversation with Mr. Vanisi. (TOP, June 23, 1999, 37-38). Then Mr. Gregory requested that Mr. Vanisi be medicated in order to make dealing with him easier. (TOP, June 23, 1999, 38). The Court indicated that Vanisi would have to be canvassed after the administration of any medications to verify his competence under the medications. (TOP, June 23, 1999, 39). On July 12, 1999, an Ex-parte Order for Medical Treatment was entered to provide Vanisi with Lithium and Wellbutrin and Titrade.

On August 03, 1999, another sealed hearing was held in which Mr. Gregory informed the Court that Mr. Vanisi had been refusing to cooperate with them. (TOP, August 03, 1999, 1). Mr. Gregory informed the Court that he had informed Mr. Vanisi of his right to represent himself under Faretta, *infra*, and Vanisi had indicated that he wished to do so. (TOP, August 03, 1999, 1). Mr. Vanisi then personally requested the same from the court. Then court answered that Vanisi would have to put the motion in writing. (TOP, August 03, 1999, 2).

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

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1 a fair trial. The Nevada Supreme Court ruled that the third reason was invalid. Vanisi v. State, 117
2 Nev. 330, 22 P.3d 1164 (2001).
3

4 The other two grounds are not supported by the record. The dispute between Vanisi and his
5 lawyers was long-standing and by all appearances, actual and legitimate. Therefore, the finding that
6 the *Faretta* motion was made for the purpose of delay was arbitrary and capricious. Indeed, as
7 mentioned, *supra*, another time when Vanisi announced his legitimate and protected intention to
8 appeal the court's denial of his motion to dismiss his counsel, the court unexplainedly expressed its
9 opinion then that Mr. Vanisi was merely attempting to delay the trial. (TOP, June 23, 1999, 33-34).
10 Accordingly, the record reflects that by the filing of his *Faretta* motion, Mr. Vanisi was merely
11 attempting to resolve a documented and long-standing conflict between himself and the Public
12 Defender's Office. Because the court had refused to grant his motion for new counsel, Vanisi was left
13 with no other option than to ask to represent himself.
14

15 Accordingly, no abuse of process nor intentional disruption is shown on the record. The record
16 merely reflects an ongoing dispute between Mr. Vanisi and the Washoe County Public Defender's
17 Office. Mr. Vanisi first attempted to dismiss his counsel. When he was not successful, he attempted
18 to represent himself. Further, as set forth *supra*, Vanisi raised actual and specific conflicts, as well
19 as intelligent and discrete legal issues in his motions. There were not repetitive motions filed, nor any
20 patently frivolous arguments raised. Although it sometimes took Mr. Vanisi some time to express his
21 thoughts and arguments to the court, he was at all times respectful of the court and polite in his
22 requests. For example, in imploring the Court's assistance to free one of his hands during the
23 proceeding so he could review his papers for his argument, he referred to himself as "an English
24 gentleman." (TOP, June 23, 1999, 16).
25
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1 Indeed, in one hearing when Mr. Gregory was complaining about Mr. Vanisi being manic, the
2 Court disagreed, finding him "excitable," but not manic. (TOP, June 23, 1999, 37). Specifically, the
3 court found that Mr. Vanisi was no worse than trial counsel, Mr. Gregory. (TOP, June 23, 1999, 37).
4 These facts belie any finding that Mr. Vanisi was abusing the process or somehow intolerably
5 disruptive.
6

7 Even the Concurring Opinion in the Nevada Supreme Court agreed that the District Court erred
8 in denying Vanisi's request to represent himself on the grounds that his request was for the purpose
9 of delay. Vanisi, 22 P.3d at 1174. Further, the Concurring Opinion found that the record did not
10 reflect that Vanisi had been or indication that he would be disruptive. Id. Justice Rose:
11

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

16 Id.

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

18 My review of the record reveals that, at least at the hearing on the motion for self-
19 representation, Vanisi was generally articulate, respectful, and responsive during
20 rigorous examination by the district court. It does not appear that Vanisi actually
21 disrupted earlier proceedings, although the court's frustration with Vanisi has some
22 factual basis...

23 The transcript of this hearing as a whole reveals that Vanisi was generally respectful
24 to the court, rarely interrupted or continued speaking inappropriately, and complied
25 when the court told him to refrain from such conduct.

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

27 Finally, the Concurring Opinion noted that counsel for the State as well as counsel for the
28 defense agreed that Vanisi had been "anything but disruptive." Vanisi, 22 P.3d at 1175. The District

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1 Court's decision otherwise is belied by the record and should be reversed.

2 **Legal Argument.**

3 **Structural Error.**

4
5 In Arizona v. Fulminate, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991), Chief
6 Justice Rehnquist, speaking for a majority of the court, distinguished between "trial error" and
7 "structural error" in determining whether a federal constitutional violation could be analyzed under
8 the Chapman test or required automatic reversal. The Court explained that "structural error" is a
9 "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial
10 process itself." Id. at 310. Examples of structural error include total deprivation of the right to
11 counsel at trial, a judge who is not impartial, the unlawful exclusion of members of the defendant's
12 race from a grand jury, deprivation of the right to self-representation at trial, and deprivation of the
13 right to public trial. Id. at 309-10. Because the entire conduct of the trial is affected, structural error
14 defies analysis by "harmless-error" standards. Id.

15
16
17 In Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), the United
18 States Supreme Court indicated that a violation of the right to counsel may be error that is reversible
19 *per se*. Chapman explained "that there are some constitutional rights so basic to a fair trial that their
20 infraction can never be treated as harmless error," *citing* Gideon v. Wainwright, 372 U.S. 335, 9 L.
21 Ed. 2d 799, 83 S. Ct. 792 (1963), as support. Chapman, 386 U.S. at 23 & n.8.

22
23
24 The Nevada Supreme Court has agreed that automatic reversal occurs where the defendant is
25 denied substantive due process. Manley v. State, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing*
26 Guyette v. State, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968).

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The Application of Faretta.

In Faretta v. California, 422 U.S. 806, 821 (1975), the Supreme Court held that an accused has a Sixth Amendment right to conduct his or her own defense in a criminal case. *See also* Martinez v. Court of Appeals, 528 U.S. 152, 154 (2000); U.S. v. Purnett, 910 F.2d 51, 54 (2d Cir. 1990) ("The right to self-representation and the assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin."); Fowler v. Collins, 253 F.3d 244, 249 (6th Cir. 2001) ("The Sixth Amendment implies a right of self-representation.").

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

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

As the *Faretta* Court pointed out, "In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted the practice of forcing counsel upon an unwilling defendant in criminal proceedings" — the Star Chamber. *Id.*

The Petitioner fared no better, in regards to his choice of counsel vs. self representation, than did defendants in the Star Chamber. The Star Chamber specialized in trying "political offenses," and

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1 “for centuries symbolized disregard of basic individual rights.” *Id.* Considering some of the political
2 aspects of the prosecution of Mr. Vanisi, he may well feel that he was tried in a modern Star Chamber.
3 The parallels are ominous. The Star Chamber was efficient and arbitrary at enforcing high state
4 policy. *Id.*, at 822, fn 17.

5
6 The right of self representation in colonial times was fervently insisted upon. *Id.*, at 826.
7 Lawyers at that time were “synonymous with the cringing Attorneys-General and Solicitors-General
8 of the Crown and the arbitrary Justices of the King’s Court, all bent on the conviction of those who
9 opposed the King’s prerogatives.” *Id.*

10
11 The notion of compulsory counsel was totally foreign to the Founders. *Id.*, at 833. “[T]here
12 is no evidence the colonists and the Framers ever doubted the right of self-representation, or
13 imagined that this right might be considered inferior to the right of assistance of counsel.” *Id.*
14 [Emphasis added].

15
16 The Eleventh Circuit has imagined what the Framers did not, holding that the right to self-
17 representation is inferior to the right to counsel, and does not attach until asserted. *Stano v. Dugger*,
18 921 F.2d 1125, 1143 (11th Cir. 1991). That holding directly contradicts the historical analysis of the
19 Supreme Court in *Faretta*. It also confounds logic and common sense. How can the right to have
20 “assistance of counsel” in defending oneself be preeminent over the prior right to defend oneself?
21 How can the right to speak through an agent be superior to the prior right to speak directly?
22

23
24 At the time of the formation of this country, the words “attorney” and “counselor” were
25 understood a bit differently than they may be today. “Attorney” was defined in Samuel Johnson’s
26 *Dictionary of the English Language* (1770), as “such a person as by consent, commandment, or
27 request ... takes upon him the charge of other men’s business, *in their absence*.” [Emphasis added].
28

1 This brings to mind today's similar "power of attorney."

2 "Counselor," on the other hand, was defined as: "One that gives advice; confident [sic], bosom
3 friend; one that is consulted in a case of law." Samuel Johnson's *Dictionary of the English Language*
4 (1770).

5
6 The attorneys appointed to represent Mr. Vanisi at trial, were not his representatives, not in
7 any sense other than that of *tenuous and unacceptable legal fiction*. At the time the Framers adopted
8 the Constitution, the term "representative" was defined to mean "one exercising the vicarious power
9 given by another." Samuel Johnson's *Dictionary of the English Language* (1770).

10
11 "Counsel [advice] is only given to those who are willing to have it." *On Municipal*
12 *Government, The Works of James Wilson* [Supreme Court Justice] (1804), quoting Baron
13 Puffendorf. Mr. Vanisi did not willingly accept counsel from nor delegate his right to speak to his
14 attorneys.

15
16 The Founders believed that self-representation was a basic right, a natural right. *Faretta*, 422
17 U.S. at 830. The right to self-representation is nothing more than an expression of the natural right
18 of self defense, the right of self-preservation, the first right recognized by any civilized people. See
19 *Blackstone's Commentaries*, bk. 1, ch. 1, 129. The right of self-representation didn't need to be
20 spelled out in a Constitution or a Bill of Rights — no one would have thought to deny it. It preexisted
21 the Constitution, remains an unenumerated right, and, as such, still prevails. See the Ninth
22 Amendment, United States Constitution. The right to *assistance of counsel* was more tenuous than
23 the right of self representation, and apparently was thought in need of an express written guarantee.
24 Thus, the Sixth Amendment guarantee.

25
26 The Supreme Court in *Faretta* analyzed whether the defendant had knowingly and intelligently
27
28

1 chosen to forego the benefits of counsel, counsel which was later forced upon him. Faretta, 422 U.S.
 2 at 835. Substituting the Petitioner's name and appropriate facts, the *Faretta* analysis would now read:
 3 Here, [months] before trial, VANISI clearly and unequivocally declared to the court that he wanted
 4 to represent himself and did not want counsel. The record affirmatively shows that VANISI was
 5 literate, competent, and understanding, and that he was voluntarily exercising his informed free will.
 6 The court had warned VANISI that he thought it was a mistake not to accept the assistance of counsel,
 7 and that VANISI would be required to follow all the "ground rules" of trial procedure. We need make
 8 no assessment of how well or how poorly VANISI had mastered the intricacies of the hearsay rule and
 9 the [federal code provisions] ... For his technical legal knowledge, as such, was not relevant to an
 10 assessment of his knowing exercise of the right to defend himself.
 11

12
 13 In forcing VANISI, under these circumstances, to accept against his will a [court-appointed
 14 attorney], the court deprived his of his constitutional right to conduct his own defense. Accordingly,
 15 the judgment before us is vacated ... Paraphrasing *Faretta*, 422 U.S. at 835-836.
 16

17 It is no answer to the Petitioner's challenge to say that he acquiesced in accepting his court-
 18 appointed counsel. The record is clear that he was coerced and threatened into accepting counsel, that
 19 he was deprived of any meaningful possibility of conducting his own defense, and that the Court
 20 would do nothing to help him gain access to what he needed to handle his own defense. His court-
 21 appointed counsel admitted to the magistrate judge that he had coerced him into accepting his
 22 "assistance." Locking up the Petitioner prior to trial and depriving him of any meaningful ability to
 23 conduct his own defense resulted in "interposing an organ of the State between an unwilling defendant
 24 and his right to defend himself personally." This unwanted counsel "represented" Defendant only
 25 through a *tenuous and unacceptable legal fiction*.
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1 **CLAIM FOUR:**

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

5 **Supporting Facts.**

6 On August 26, 1999, after the court had denied Mr. Vanisi's motion for new counsel and his
 7 motion to represent himself under *Faretta, supra*, a new in camera hearing was held to hear from
 8 Vanisi's counsel on their ex parte motion to withdraw as counsel under SCR 172. During that hearing,
 9 counsel for Vanisi, Mr. Gregory, revealed to the court that in February of 1999, he had a conversation
 10 with Mr. Vanisi in which Vanisi admitted that he in fact killed the alleged victim, Officer Sullivan.
 11 (TOP, August 26, 1999, 3). Gregory explained that as a result of this admission, Vanisi's counsel
 12 attempted to fashion a defense based upon provocation, but Vanisi allegedly refused to even talk about
 13 such a defense and instead wanted to present a defense based upon an alleged conspiracy against Mr.
 14 Vanisi, which included someone else doing the killing. (TOP, August 26, 1999, 3, 10). Vanisi's
 15 counsel explained to him that they would not put on such a defense in light of his confession to them,
 16 because they had ethical responsibilities. (TOP, August 26, 1999, 3-4). At some point, Vanisi
 17 inquired as to his right to represent himself. As has been set forth elsewhere herein, Counsel advised
 18 Vanisi this was possible, Vanisi so moved the court and the same was denied. (TOP, August 26,
 19 1999, 4-6). Accordingly, counsel for Vanisi then contacted bar counsel, Michael Warhola, and
 20 presented their dilemma to him. "Without hesitation" bar counsel advised that they had to withdraw
 21 as counsel pursuant to SCR 166 and 172. (TOP, August 26, 1999, 6, 13). Counsel cautioned the
 22 court that if they were not allowed to withdraw, they would have to certify themselves as ineffective.
 23 (TOP, August 26, 1999, 6, 9). Gregory cautioned the court that if they were required to stay on the
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1 case, Vanisi would wind up not having a defense, that counsel would wind up sitting "like bumps on
2 a log doing nothing." (TOP, August 26, 1999, 10). Additionally, bar counsel informed counsel for
3 Vanisi -- and they were of the same mindset -- that to offer evidence or cross-examine vigorously or
4 select a jury under those circumstances would be a prohibited ethical violation. (TOP, August 26,
5 1999, 13, 18).
6

7 In contrast to the defense presented to Vanisi by counsel, Vanisi wished to put on a defense
8 that he wasn't there and that he was being used as a scapegoat. (TOP, August 26, 1999, 17). Vanisi
9 intended to testify accordingly. (TOP, August 26, 1999, 18). Accordingly, counsel for Vanisi
10 requested to be able to withdraw as counsel. (TOP, August 26, 1999, 22).
11

12 The District Court denied their request.
13

14 **Legal Argument.**

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

17 It is well established that the right to effective assistance of counsel carries with it "a
18 correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S.
19 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Indeed, the Sixth Amendment guarantees a
20 criminal defendant the right to conflict-free representation. Clark v. State, 108 Nev. 324, 831 P.2d
21 1374 (1992); Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993).
22

23 The right to counsel's undivided loyalty is a critical component of the right to assistance of
24 counsel; when counsel is burdened by a conflict of interest, she deprives her client of his Sixth
25 Amendment right as surely as if he failed to appear at trial. See Holloway v. Arkansas, supra, 435
26 U.S., at 490, 98 S.Ct., at 1181 ("The mere physical presence of an attorney does not fulfill the Sixth
27
28

1 Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on
2 crucial matters").

3 For this reason, a defendant who shows an actual conflict need not demonstrate that his
4 counsel's divided loyalties prejudiced the outcome of his trial. Cuyler v. Sullivan, 446 U.S. 335, 349-
5 350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980).

6 The right to conflict-free counsel is simply too important and absolute "to allow courts to
7 indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United
8 States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); accord, Cuyler v. Sullivan, *supra*,
9 446 U.S., at 349, 100 S.Ct., at 1718. "We should be no more willing to countenance nice calculations
10 as to how a conflict adversely affected counsel's performance. The conflict itself demonstrate[s] a
11 denial of the 'right to have the effective assistance of counsel.' " Cuyler v. Sullivan, *supra*, at 349, 100
12 S.Ct., at 1719 (*quoting* Glasser v. United States, *supra*, 315 U.S., at 76, 62 S.Ct., at 467).

13 The Nevada Supreme Court has ruled:

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16
17 **Where an attorney's loyalty to a defendant in a criminal case is**
18 **diluted by that attorney's obligation to others, the defendant's**
19 **sixth amendment right to effective assistance of counsel is not**
20 **satisfied.**

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

22 Trial counsel had a personal and ethical conflict regarding their representation. The Nevada
23 Supreme Court has found defense counsel to be ineffective whenever "[a]n actual conflict of interest
24 which adversely affects a lawyer's performance," is present. Coleman, *supra*; Clark v. State, 108 Nev.
25 324, 326, 831 P.2d 1374, 1375 (1992). The Court has repeatedly held that prejudice is presumed in
26 these cases. See Clark, *supra*; Coleman, *supra*; Mannon v. State, 98 Nev. 224, 645 P.2d 433 (1982);
27
28

1 Harvey v. State, 97 Nev. 477, 634 P.2d 1199 (1981); Harvey v. State, 96 Nev. 850, 619 P.2d 1214
2 (1980).

3
4 It is obvious from the language of these cases that in situations of ethical obligation which
5 create conflicts of interest in the representation of a client: (1) the attorney can no longer provide
6 effective assistance of counsel under the Sixth Amendment; (2) that the attorney must bring the matter
7 before the court; and (3) the court has an obligation to remedy the situation.

8
9 The United States Supreme Court has recognized that where a court has denied counsel's
10 request to be replaced because of a conflict of interest, a showing of prejudice is not required in order
11 to obtain a reversal, as prejudice to the defendant is presumed. Flanagan v. United States, 465 U.S.
12 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing* Holloway v. Arkansas, 435 U.S. 475,
13 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).
14

15 **Sixth Amendment Right to Counsel Extends to Sentencing.**

16 The Sixth Amendment right to counsel at a sentencing hearing has been established. Mempa
17 v. Rhay, 389 U.S. 128, 134- 35, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967). The recognition of this
18 right involved the acknowledgment that sentencing is one of "the various stages in a criminal
19 proceeding." *Id.* at 134, 88 S.Ct. at 256.
20

21 *See also* the Nevada Supreme Court:

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

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

27 Accordingly, the conflict extended through the Penalty Phase of this trial and therefore Mr.
28

Vanisi should be granted a separate penalty phase with different counsel in order to remedy the prejudice which is presumed from the actual conflict which exists on the record in this case.

CLAIM FIVE:

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

Supporting Facts.

The record shows that counsel revealed privileged information to the court during their motion to withdraw as counsel. As set forth above, on August 26, 1999, after the court had denied Mr. Vanisi's motion for new counsel and his motion to represent himself under *Faretta, supra*, a new in camera hearing was held to hear from Vanisi's counsel on their ex parte motion to withdraw as counsel under SCR 172. During that hearing, counsel for Vanisi, Mr. Gregory, revealed to the court that in February of 1999, he had a conversation with Mr. Vanisi in which Vanisi admitted that he in fact killed the alleged victim, Officer Sullivan. (TOP, August 26, 1999, 3). Gregory explained that as a result of this admission, Vanisi's counsel attempted to fashion a defense based upon provocation, but Vanisi allegedly refused to even talk about such a defense and instead wanted to present a defense based upon an alleged conspiracy against Mr. Vanisi, which included someone else doing the killing. (TOP, August 26, 1999, 3, 10). Therefore, counsel for Mr. Vanisi revealed privileged attorney-client information to the court, in violation of their professional responsibilities, as well as Mr. Vanisi's constitutional rights.

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Legal Argument.

THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This is the appropriate place in which to raise the questions regarding the effectiveness of counsel through the forum of a Petition for Writ of Habeas Corpus (Post Conviction). Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994). The question of ineffective assistance of counsel should not be considered in a direct appeal from a judgment of conviction. Instead, the issues should be raised, in the first instance, in the district court in a petition for post-conviction relief so that an evidentiary record regarding counsel's performance at trial can be created. Wallach v. State, 106 Nev. 470, 796 P.2d 224 (1990).

In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to independent review. The Supreme Court reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984).

The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland. The Court revisited this issue in Warden v. Lyons, 100 Nev. 430 (1984) and Dawson v. State, 108 Nev. 112 (1992). The Nevada Supreme Court has adopted Strickland's two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency.

In Smithart v. State, 86 Nev. 925 (1970), the Nevada Supreme Court held that it will presume that an attorney has fully discharged their duties and that such presumption can only be overcome by

strong and convincing proof to the contrary. The court went on in Warden v. Lischko, 90 Nev. 220 (1974), to hold that the standard of review of counsel's performance was whether the representation of counsel was of such low caliber as to reduce the trial to a sham, a farce or a pretense.

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

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

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

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

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

6 But for the numerous failures of trial and appellate counsel to raise the critical issues addressed
7 herein, the numerous violations of Petitioner's constitutional rights would likely have been remedied
8 before now. The Nevada Supreme Court has recently clarified the standard of proof required to
9 establish claims of ineffective assistance of counsel:

10
11 Choosing consistency with federal authority, we now hold that a habeas corpus
12 petitioner must prove the disputed factual allegations underlying his ineffective-
13 assistance claim by a preponderance of the evidence. To the extent that our decision
14 today conflicts with the "strong and convincing" language of Davis and its
15 predecessors, we expressly overrule those cases. Therefore, when a petitioner
16 alleges ineffective assistance of counsel, he must establish the factual allegations
17 which form the basis for his claim of ineffective assistance by a preponderance of
18 the evidence. Next, as stated in Strickland, the petitioner must establish that those
19 facts show counsel's performance fell below a standard of objective reasonableness,
20 and finally the petitioner must establish prejudice by showing a reasonable
21 probability that, but for counsel's deficient performance, the outcome would have
22 been different.

23 Means v. State, 120 Nev. Adv. Op. No. 101 (2004).

24 The Petitioner respectfully submits that his trial counsel's disclosure of privileged attorney
25 client information to the trial court fell below an objective standard of reasonableness. It created
26 an actual conflict of interest between counsel and Mr. Vanisi. Moreover, as the privileged
27 information, which was originally submitted under seal, was turned over to the State, (TOP,
28 August 26, 1999, 2) the disclosure completely foreclosed the possibility of Mr. Vanisi pursuing the
defense he wished and compromised his right to testify in his defense. Thus, the trial court
compounded the prejudice to Mr. Vanisi from the disclosure of his privileged admissions to

1 counsel by disclosing the admissions to the State, who could subsequently use them against him,
2 in the event he testified or otherwise supported his defense theory that he did not commit the
3 offense. These facts have been established in the record by a preponderance of the evidence. The
4 prejudice from the disclosure is apparent. However, because the disclosure unequivocally
5 demonstrates an actual conflict of interest between Mr. Vanisi and the individuals compelled to
6 represent him, prejudice must be presumed.
7

8 The right to counsel's undivided loyalty is a critical component of the right to assistance of
9 counsel; when counsel is burdened by a conflict of interest, she deprives her client of his Sixth
10 Amendment right as surely as if he failed to appear at trial. See Holloway v. Arkansas, *supra*, 435
11 U.S., at 490, 98 S.Ct., at 1181 ("The mere physical presence of an attorney does not fulfill the
12 Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed
13 his lips on crucial matters").
14

15 For this reason, a defendant who shows an actual conflict need not demonstrate that his
16 counsel's divided loyalties prejudiced the outcome of his trial. Cuyler v. Sullivan, 446 U.S. 335,
17 349-350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980).
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19 The right to conflict-free counsel is simply too important and absolute "to allow courts to
20 indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v.
21 United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); *accord*, Cuyler v.
22 Sullivan, *supra*, 446 U.S., at 349, 100 S.Ct., at 1718. "We should be no more willing to
23 countenance nice calculations as to how a conflict adversely affected counsel's performance. The
24 conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.' "
25 Cuyler v. Sullivan, *supra*, at 349, 100 S.Ct., at 1719 (*quoting* Glasser v. United States, *supra*, 315
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1 U.S., at 76, 62 S.Ct., at 467).

2 The Nevada Supreme Court has ruled:

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

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

8 Trial counsel had a personal and ethical conflict regarding their representation. The
9 Nevada Supreme Court has found defense counsel to be ineffective whenever "[a]n actual conflict
10 of interest which adversely affects a lawyer's performance," is present. Coleman, *supra*; Clark v.
11 State, 108 Nev. 324, 326, 831 P.2d 1374, 1375 (1992). The Court has repeatedly held that
12 prejudice is presumed in these cases. See Clark, *supra*; Coleman, *supra*; Mannon v. State, 98
13 Nev. 224, 645 P.2d 433 (1982); Harvey v. State, 97 Nev. 477, 634 P.2d 1199 (1981); Harvey v.
14 State, 96 Nev. 850, 619 P.2d 1214 (1980).

15
16 It is obvious from the language of these cases that in situations of ethical obligation which
17 create conflicts of interest in the representation of a client: (1) the attorney can no longer provide
18 effective assistance of counsel under the Sixth Amendment; (2) that the attorney must bring the
19 matter before the court; and (3) the court has an obligation to remedy the situation.
20
21

22 The United States Supreme Court has recognized that where a court has denied
23 counsel's request to be replaced because of a conflict of interest, a showing of prejudice is not
24 required in order to obtain a reversal, as prejudice to the defendant is presumed. Flanagan v.
25 United States, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing* Holloway
26 v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).
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1 **Sixth Amendment Right to Counsel Extends to Sentencing.**

2 The Sixth Amendment right to counsel at a sentencing hearing has been established.

3 Mempa v. Rhay, 389 U.S. 128, 134- 35, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967). The
4
5 recognition of this right involved the acknowledgment that sentencing is one of "the various stages
6 in a criminal proceeding." *Id.* at 134, 88 S.Ct. at 256.

7 *See also* the Nevada Supreme Court:

8
9 It is well established that "*the sentencing (of the defendant) is a critical stage of*
10 *the criminal proceeding at which he is entitled to the effective assistance of*
11 *counsel.*" *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d
12 393 (1977). *See also Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336
13 (1967); *Smith v. Warden*, 85 Nev. 83, 450 P.2d 356 (1969).

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

15 **CLAIM SIX:**

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

20 **Supporting Facts.**

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

24 As a result of having their legal and ethical hands tied, counsel for Vanisi failed to vigorously
25 cross-examine witnesses or put on evidence in Vanisi's defense. (*See Generally*, TT, Vol. 1-6).
26 (For examples of failure to cross-examine, or failure to meaningfully cross-examine, *see* TT, Vol.
27 3, 542 (testimony of Dr. Ellen Clark, key State's witness re: autopsy and evidence of mutilation),
28

1 611, 627, 647; TT, Vol. 4, 687, 704, 778, 783, 789; TT, Vol. 5, 834, 841, 844, 855, 864; TT, Vol.
2 6, 928, 940, 953, 991).

3
4 Counsel for Vanisi did not even give the jury an opening statement nor closing argument at
5 the guilt phase of the trial. (TT, Vol. 6, 997-998, 1034).

6 As a result of his counsel's failure -- or inability -- to put on a defense or cross-examine
7 witnesses, Vanisi refused to testify. He told the court, "This is a joke. I am not going to testify."
8 (TT, Vol. 6, 971).

9
10 **Legal Argument.**
11 **Structural Error.**

12 In Arizona v. Fulminate, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991),
13 Chief Justice Rehnquist, speaking for a majority of the court, distinguished between "trial error"
14 and "structural error" in determining whether a federal constitutional violation could be analyzed
15 under the Chapman harmless error test or required automatic reversal. The Court explained that
16 "structural error" is a "defect affecting the framework within which the trial proceeds, rather than
17 simply an error in the trial process itself." Id. at 310. Examples of structural error include total
18 deprivation of the right to counsel at trial, a judge who is not impartial, the unlawful exclusion of
19 members of the defendant's race from a grand jury, deprivation of the right to self-representation at
20 trial, and deprivation of the right to public trial. Id. at 309-10. Because the entire conduct of the
21 trial is affected, structural error defies analysis by "harmless-error" standards. Id.

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

3
4 The Nevada Supreme Court has agreed that automatic reversal occurs where the defendant
5 is denied substantive due process. Manley v. State, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999),
6 citing Guyette v. State, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968).

7 In the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), the Nevada Supreme
8 Court reversed a conviction, on the grounds of ineffective assistance of counsel, in which, *inter*
9 *alia*, defense counsel failed to present evidence regarding the victim's violent tendencies and
10 failed to pursue an available self-defense theory, thereby failing to present an adequate defense.

11 The Court reasoned:

12
13 **Focusing on counsel's performance as a whole, and with due regard for the**
14 **strong presumption of effective assistance accorded counsel by this court and**
15 **Strickland, we hold that Sanborn's representation indeed fell below an**
16 **objective standard of reasonableness. Trial counsel did not adequately**
17 **perform pretrial investigation, failed to pursue evidence supportive of a claim**
18 **of self-defense, and failed to explore allegations of the victim's propensity**
19 **towards violence. Thus, he "was not functioning as the 'counsel' guaranteed**
20 **the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 104**
21 **S.Ct. at 2064.**

22 Sanborn, 107 Nev. at 404, 812 P.2d at 1283.

23 The Court in Sanborn went on to find that if the jury had been presented with evidence of
24 self-defense, the outcome may have been different:

25 **Had the jury been properly presented with the evidence apparently available**
26 **to support Sanborn's claim of self-defense, the outcome may very well have**
27 **been different. Thus, counsel's efforts both before and during trial were**
28 **sufficiently deficient "to deprive the defendant of a fair trial." Id.**
Accordingly, as discussed in greater detail below, Sanborn has stated a claim
of ineffective assistance of counsel that warrants reversal of his conviction.

1 Sanborn, 107 Nev. at 404, 812 P.2d at 1283.

2 Finally, the Court determined that prejudice resulted and the Strickland standard for
3 reversal based upon ineffective assistance was met:
4

5 Sanborn's defense was clearly prejudiced by his counsel's failure to develop and
6 present evidence which would have corroborated Sanborn's testimony and
7 discredited the state's expert witness. Because of counsel's lack of due diligence,
8 Sanborn was deprived of the opportunity to present testimony material to his
9 defense, and we are therefore unable to place confidence in the reliability of
10 the verdict. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052,
11 2064, 80 L.Ed.2d 674 (1984).

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

13 The trial of Mr. Vanisi in this case was -- to use an older Nevada term -- a sham or a farce.
14 Mr. Vanisi was correct to call it a "joke." Trial counsel admittedly laid down, sat like "bumps on
15 logs" and did not put up a defense, did not engage in any meaningful cross-examination of the vast
16 majority of witnesses and refused to give either opening statement nor closing argument. This is
17 not the right to effective counsel envisioned by the Sixth Amendment. It fact it constitutes a de
18 facto denial of counsel. The State's case was not subjected to the crucible of adversary testing as
19 envisioned by the Constitution. The trial process broke down in clear violations of Mr. Vanisi's
20 Fifth, Sixth, and Fourteenth Amendment right under the United States Constitution. There was a
21 clear structural error. Prejudice must be presumed under these circumstances and Mr. Vanisi's
22 conviction and sentence must be reversed.

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1 CLAIM SEVEN:

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

7 Supporting Facts

8 1. Mr. Vanisi hereby incorporates each and every allegation contained in this petition
9 as if fully set forth herein.

10 2. The Nevada capital sentencing process permits the imposition of the death penalty
11 for any first degree murder that is accompanied by an aggravating circumstance. Nev. Rev. Stat. §.
12 200.030(4)(a). The statutory aggravating circumstances are so numerous and so vague that they
13 arguably exist in every first degree murder case. See Nev. Rev. Stat. §. 200.033. Nevada permits
14 the imposition of the death penalty for all first degree murders that are "at random and without
15 apparent motive." Nev. Rev. Stat. §. 200.033(9). Nevada statutes also permit the death penalty
16 for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson,
17 burglary, kidnaping, to receive money, torture, to prevent lawful arrest, and escape. See Nev. Rev.
18 Stat. §. 200.033. The scope of the Nevada death penalty statute makes the death penalty an option
19 for all first degree murders that involve a motive, and for first degree murders that involve no
20 motive at all. The administration of the Death Penalty Statute by the Nevada Supreme Court also
21 routinely validates constructions of and findings of aggravating circumstances which are not based
22 upon any evidence.

23 3. The death penalty is in practice permitted in Nevada for all first degree murders,
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1 and first degree murders are not restricted in Nevada to those cases traditionally defined as first
2 degree murders. As the result of the use of unconstitutional definitions of reasonable doubt,
3 premeditation and deliberation, and implied malice, first degree murder convictions occur in the
4 absence of proof beyond a reasonable doubt, in the absence of any rational showing of
5 premeditation and deliberation, and as a result of the presumption of malice aforethought. A death
6 sentence is in practice permitted under Nevada law in every case where the prosecution can present
7 evidence that an accused committed an unlawful killing.
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10 4. As a result of plea bargaining practices, and imposition of sentences by juries and
11 three-judge panels, sentences of less than death have been imposed in situations where the amount
12 of mitigating evidence was significantly and qualitatively less than the mitigation evidence that
13 existed in the present case. The untrammelled power of the sentencer under Nevada law to decline
14 to impose the death penalty, even when no mitigating evidence exists at all, or when the
15 aggravating factors far outweigh the mitigating evidence, means that the imposition of the death
16 penalty is necessarily arbitrary and capricious.
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19 5. Nevada law provides sentencing bodies with no rational method for separating
20 those few cases that warrant the imposition of the ultimate punishment from the many that do not.
21 The narrowing function required by the Eighth Amendment is accordingly non-existent under
22 Nevada's sentencing scheme.
23

24 6. Because the Nevada capital punishment system provides no rational method for
25 distinguishing between who lives and who dies, such determinations are made on the basis of
26 illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial
27 minorities: Nevada's death row population is approximately 50% minority even though Nevada's
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1 general minority population is approximately 17%. All of the people on Nevada's death row are
 2 indigent and have had to defend with the meager resources afforded to indigent defendants and
 3 their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually
 4 ensures that compelling mitigating evidence will not be presented to, or considered by, the
 5 sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the
 6 individualized, reliable sentencing determination that the constitution requires.
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 9 7. The defects in the Nevada system are aggravated by the inadequacy of the appellate
 10 review process.

11 8. These systemic problems are not unique to Nevada. The American Bar Association
 12 has recently called for a moratorium on capital punishment unless and until each jurisdiction
 13 attempting to impose such punishment "implements policies and procedures that are consistent
 14 with . . . longstanding American Bar Association policies intended to (1) Ensure that death penalty
 15 cases are administered fairly and impartially, in accordance with due process, and (2) minimize the
 16 risk that innocent persons may be executed" As the ABA has observed in a report
 17 accompanying its resolution, "administration of the death penalty, from being fair and consistent,
 18 is instead a haphazard maze of unfair practices with no internal consistency ." The ABA
 19 concludes that these deficiencies have resulted from the lack of competent counsel in capital cases,
 20 the lack of a fair and adequate appellate review process, and the pervasive effects of race.
 21

22
 23 9. The Nevada capital punishment system suffers from all of the problems identified
 24 in the ABA Report -- the underfunding of defense counsel, the lack of a fair and adequate appellate
 25 review process and the pervasive effects of race. The problems with Nevada's process are
 26 exacerbated by overly broad definitions of both first degree murder and the accompanying
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aggravating circumstances, which permits the imposition of a death sentence for virtually every homicide. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial per se. The scheme also violates petitioner's rights under international law, which prohibits the arbitrary deprivation of life.

CLAIM EIGHT:

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

Supporting Facts.

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

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

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1 trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the
2 evolving standards of decency that mark the progress of a maturing society.

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

8
9 4. The death penalty constitutes cruel and unusual punishment under any and all
10 circumstances, and constitutes cruel and unusual punishment under the circumstances of this case.
11 Petitioner's death sentence also violates international law, which prohibits the arbitrary deprivation
12 of life, and cruel, inhuman or degrading treatment or punishment.

13 **CLAIM NINE:**

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

17 **Supporting Facts.**

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

25 2. Among the additional protections secured by the Covenant for any person charged
26 with a criminal offense are the guarantees: to be informed promptly and in detail in a language
27 which [the accused] understands of the nature and cause of the charge against him; to have
28 adequate time and facilities for the preparation of his defense and to communicate with counsel of

his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed of this right to legal assistance and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and to not be compelled to testify against himself or to confess guilt. (Article XIV).

3. All of the specific rights listed above that are guaranteed in the Covenant were violated in petitioner's case. The rights afforded under Article XIV are guaranteed "in full equality," and thus apply in full force to Mr. Vanisi, the indigent petitioner in this capital case.

4. The violations of Mr. Vanisi's rights under international law are prejudicial per se and require that his conviction and sentence be vacated.

CLAIM TEN :

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

Supporting Facts

1. Nevada law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. §. 176.355(1).

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

1 machine.

2 3. In executions in states employing lethal injection prolonged and unnecessary pain
3 has been suffered by the condemned individual by difficulty in inserting needles, and by
4 unexpected chemical reactions among the drugs or violent reactions to them by the condemned
5 individual.

6 4. The following lethal injection executions, among others, have produced prolonged
7 and unnecessary pain:

8 a. **Stephen Peter Morin** -- March 13, 1985 (Texas) -- Had to probe both arms
9 and legs with needles for 45 minutes before they found the vein.

10 b. **Randy Woolls** -- August 20, 1986 (Texas) -- A drug addict, Woolls had to
11 help the executioner technicians find a good vein for the execution.

12 c. **Raymond Landry** -- December 13, 1988 (Texas) -- Pronounced dead 40
13 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started
14 flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein,
15 spraying the deadly chemicals across the room toward the witnesses. The execution team had to
16 reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not
17 see the intermission.

18 d. **Stephen McCoy** -- May 24, 1989 (Texas) -- Had such a violent physical
19 reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male)
20 fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who
21 represented McCoy and witnessed the execution, thought that the fainting would catalyze a chain
22 reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger
23 reaction," adding "The drugs might have been administered in a heavier dose or more rapidly."

24 e. **Rickey Ray Rector** -- January 24, 1992 (Arkansas) -- It took medical staff
25 more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to
26 view this scene, but reported hearing Rector's loud moans throughout the process. During the
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1 ordeal, Rector (who suffered serious brain damage from a lobotomy) tried to help the medical
2 personnel find a vein. The administrator of the State's Department of Corrections medical
3 programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two
4 medical people that had grown to five worked on both sides of his body to find a vein." The
5 administrator said "that may have contributed to his occasional outburst."

6 f. **Robyn Lee Parks** -- March 10, 1992 (Oklahoma) -- Parks had a violent
7 reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered,
8 the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45
9 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs
10 were administered. Said Tulsa World Reporter Wayne Greene, "the death looked ugly and scary."

11 g. **Billy Wayne White** -- April 23, 1992 (Texas) -- It took 47 minutes for
12 authorities to find a suitable vein, and White eventually had to help.

13 h. **Justin Lee May** -- May 7, 1992 (Texas) -- May had an unusually violent
14 reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item (Huntsville),
15 Mr. May "gaspd, coughed and reared against his heavy leather restraints, coughing once again
16 before his body froze . . ." Associated Press reporter Michael Graczyk wrote, "He went into
17 coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would
18 have arched his back if he had not been belted down. After he stopped breathing his eyes and
19 mouth remained open."
20

21 i. **John Wayne Gacy** -- May 19, 1994 (Illinois) -- After the execution began,
22 one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore stopped
23 flowing. Blinds, covering the window through which witnesses observe the execution, were then
24 drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution
25 process resumed. Anesthesiologists blamed the problem on the inexperience of the prison officials
26 who were conducting the execution, saying that proper procedures taught in "TV 101" would have
27 prevented the error.
28

j. **Emmitt Foster** -- May 3, 1995 (Missouri) -- Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit witnesses from viewing the scene; they were not reopened until three minutes after the death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney; it was so tight that the flow of chemicals into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

k. **Richard Townes, Jr.** -- January 23, 1996 (Virginia) -- This execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes's right foot.

l. **Tommie Smith** -- July 18, 1996 (Indiana) -- Smith was not pronounced dead until an hour and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his heart, a procedure that took 35 minutes. According to authorities, Smith remained conscious during that procedure.

m. **Scott Carpenter** -- May 8, 1997 (Oklahoma) -- Two minutes after the lethal chemicals began flowing into the body of Scott Carpenter at 12:11 a.m., he began to make noises, his stomach and chest began pulsing, and his jaw clenched. In total, his body made 18 violent convulsions, followed by 8 milder ones. His face, which first turned a yellowish gray, had turned a deep purple and gray by 12:20 a.m. He was officially pronounced dead at 12:22 a.m.

n. **Michael Elkins** -- June 13, 1997 (South Carolina) -- Elkin's execution was delayed for 40 minutes while numerous attempts were made to insert the IV needles in a

1 suitable vein for the lethal injection. Because of Elkins' poor physical condition, the first needle
2 was ultimately inserted in Elkin's neck (attempts to use his arms, legs, feet were not successful)
3 and the second needle was not used.

4 o. **Joseph Cannon** - - April 23, 1998 (Texas) - - It took two attempts to
5 complete the execution of Joseph Cannon. The first time, a vein in his arm collapsed and the
6 needle popped out, after Cannon had made a final statement. Cannon had laid back and closed his
7 eyes when he realized what had happened. "It's come undone" he told witnesses. Officials pulled
8 a curtain to block witnesses from seeing what was happening. Fifteen minutes later, a weeping
9 Cannon made a second final statement and the second execution attempt began.

10 **Roderick Abeyta** - - October 5, 1998 (Nevada) - - It took 25 minutes for
11 the execution team to find a vein suitable for the lethal injection.

12 q. **Bennie Demps** - - June 7, 2000 (Florida) - - Prior to being injected with the
13 lethal drugs, Florida death row inmate Bennie Demps proclaimed his innocence and asked his
14 attorney for an investigation into what he described as a "very painful procedure." According to
15 newspaper accounts of the execution, Demps stated that it took nearly an hour for officials to
16 "prepare" him for the execution and that, in the process, he was cut in the leg and groin. "This is
17 not an execution, this is murder," said Demps. "I am an innocent man."

18 r. **Bert Leroy Hunter** - - June 28, 2000 (Florida) - - Hunter had repeatedly
19 coughed and gasped for air before he lapsed into unconsciousness. An attorney who witnessed the
20 execution reported that Hunter had "violent convulsions. His head and chest jerked rapidly
21 upward as far as the gurney restraints would allow, and then he fell quickly down upon the gurney.
22 His body convulsed back and forth like this repeatedly. . . . he suffered a violent and agonizing
23 death."

24 s. **Sebastian Bridges** - - April 21, 2001 (Nevada) - - Mr. Bridges spent
25 between twenty and twenty-five minutes on the execution bed, with the intravenous line inserted,
26 continuously agitated, asserting his innocence, the injustice of executing him, and the injustice of
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1 requiring him to sign a habeas corpus petition, and to suffer prolonged delay, in order to have the
 2 unconstitutionality of his conviction recognized by the court system. He remained agitated after
 3 the execution process began, so the sedative drugs appeared not to take effect and he died while
 4 apparently still conscious and shouting about the injustice of his execution.

5 5. The procedures utilized to conduct the executions described above are substantially
 6 similar to those utilized by the State of Nevada.

7 6. Because of inability of the State of Nevada to carry out Mr. Vanisi's execution
 8 without the infliction of cruel and unusual punishment, the sentence must be vacated. The practice
 9 is also invalid under international law, which prohibits cruel, inhuman or degrading treatment or
 10 punishment.

11
 12 **CLAIM ELEVEN:**

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

18 **Supporting Facts.**

19 1. Mr. Vanisi does not, at this time, assert that he is incompetent to be executed.
 20 Petitioner alleges that he may become incompetent before the execution is carried out.

21 2. Under recent authority in this Circuit, see Martinez-Villareal v. Stewart, 118 F.3d
 22 628 (9th Cir. 1997), affirmed sub nom. Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct.
 23 1618 (1998), it appears that a claim anticipating incompetence to be executed should be raised in
 24 an initial petition for writ of habeas corpus.

25 3. Mr. Vanisi therefore asserts the allegations of this claim pursuant to Martinez-
 26 Villareal v. Stewart in order to avoid any possible implication of waiver of this claim.

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CLAIM TWELVE:

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

Supporting Facts.

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

2. The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. Nev. Rev. Stat. § 177.055(2).

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

4. Nevada law does not include any mechanism for insulating state judges and justices from majoritarian, "lynch mob," pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capital-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

1 exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of
 2 ultimate removal from office. These threats "offer a possible temptation to the average [person] as
 3 a judge . . . not to hold the balance nice, clear and true between the state and the [capitally]
 4 accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927). Judges or justices who are subject to these
 5 pressures cannot be impartial within due process and international law standards in a capital case.

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

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

12 CLAIM THIRTEEN:

13 **MR. VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND**
 14 **FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL**
 15 **PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER**
 16 **INTERNATIONAL LAW, BECAUSE OF THE RISK THAT THE IRREPARABLE**
 17 **PUNISHMENT OF EXECUTION WILL BE APPLIED TO INNOCENT PERSONS. U.S.**
 18 **CONST. ART. VI, AMENDS. VIII & XIV; U.S. CONST., ART. VI; INTERNATIONAL**
 19 **COVENANT ON CIVIL AND POLITICAL RIGHTS, ART. VII.; NEV. CONST. ART. I, §§**
 20 **3, 6, AND 8; ART. IV, § 21.**

21 **Supporting Facts.**

22 1. Both the United States and Nevada Constitutions bar the execution of innocent
 23 persons. Under the due process clause of the Fourteenth Amendment, the execution of the
 24 innocent is "contrary to contemporary standards of decency," Ford v. Wainwright, 477 U.S. 399
 25 (1986), "shocking to the conscience," Rochin v. California, 342 U.S. 165 (1952), and offensive to
 26 "a principle so rooted in the traditions and conscience of our people as to be ranked as
 27 fundamental." Medina v. California, 505 U.S. 537 (1992). Under the Eighth Amendment, the
 28 execution of the innocent is cruel and unusual since it is arbitrary, Furman v. Georgia, 408 U.S.
 238 (1972), and excessive. Coker v. Georgia, 433 U.S. 917 (1977).

2. The Nevada Constitution is violated by the irreparable mistaken application of the

1 death penalty. Nev. Const. Art. 1., § 6 (prohibiting cruel and unusual punishment); Art. 1 § 8,
2 (prohibiting deprivation of life, liberty or property without due process of law.)

3 3. In Nevada and elsewhere across the United States, numerous innocent persons who
4 were once condemned to die have been exonerated. In January, 2000, Illinois Governor George
5 Ryan declared a moratorium on capital punishment after the number of men who were wrongly
6 convicted and released from Illinois's death row -- 13 -- exceeded the numbers of persons
7 executed for their crimes since the reinstatement of capital punishment. In April 2002, the Illinois
8 Governor's Commission on Capital Punishment issued a report containing the Commission's
9 recommendations, which are designed to ensure that Illinois capital punishment is administered
10 fairly, justly, and accurately. All committee members were unanimous in the conclusion that,
11 given human nature and its frailties, no system could ever be devised or constructed that would
12 work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death.
13 On January 10, 2003, Governor Ryan pardoned four more individuals, all former death row
14 inmates, on the grounds that they were not guilty of the offenses for which they were convicted
15 and sentenced to death. On January 11, 2003, Governor Ryan commuted the death sentences of all
16 remaining death row inmates in Illinois.

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

22 5. A comprehensive study recently conducted by the Columbia University School of
23 Law, revealed that the error rate in death penalty cases in America is indicative of a system that is
24 "collapsing under the weight of its own mistakes." The death penalty system in the United States
25 is "persistently and systematically fraught with serious error. Indeed, capital trials produce so
26 many mistakes that it takes three judicial inspections to catch them, leaving grave doubt whether
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1 we catch them all."

2 6. These serious legal errors are no less common in Nevada, which has the highest
3 death penalty rate in the country. The same Columbia University study concluded that seven out
4 of ten Nevada death penalty cases fully reviewed by the state and federal courts are overturned for
5 egregious errors such as those noted above.

6 7. Because of the inability of the State of Nevada to prevent execution of innocent
7 persons, the Nevada capital sentencing scheme is invalid and it cannot be applied to uphold the
8 sentence imposed in this case.

9 **CLAIM FOURTEEN:**

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

15 **Supporting Facts:**

16 The United States Supreme Court has repeatedly held that "the protection of the Eighth
17 Amendment does not end once a defendant has been validly convicted and sentenced." *Herrera v.*
18 *Collins*, 506 U.S. 390, 430, 432 (1993) (Blackmun, J., dissenting, joined by Stevens, J., and
19 Souter, J.) (citing *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford v. Wainwright*, 477 U.S. 399
20 (1986)). The State of Nevada may not constitutionally **inflict** the punishment of death upon Mr.
21 Vanisi. Such punishment would only be cruelly arbitrary, because it would serve neither of the
22 recognized goals of the capital sanction.

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

J., dissenting) (emphasis added). The examination *infra* of public polling, statutes, declarations by religious organizations, executive commutations, and treaty law reveals that, despite the reinstatement of the death penalty in the states and widespread retributive sentiment, rehabilitation remains as prominent a punishment goal as retribution, and as deeply held public value as swift and certain punishment. Deterrence has faded as a punishment goal. Due to the fact that the standards of decency in American society, not excepting in the State of Nevada, have evolved to the point, at present, where retribution and rehabilitation are valued equally, the execution of an authentically reformed perpetrator would violate public morality and shock the conscience. The U.S. Supreme Court has held that when the execution of an offender makes no "measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless infliction of pain and suffering," it must be barred as excessive under the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (explaining the Court's holding in *Gregg v. Georgia*, *supra*). The Supreme Court has recognized retribution and deterrence as the principal goals to be achieved by the capital sanction, while also noting the role of incapacitation of the individual offender. *Gregg v. Georgia*, 428 U.S. at 183 & n.28; *see also Tison v. Arizona*, 481 U.S. 137, 148-49 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *Enmund v. Florida*, 458 U.S. 782, 798-99 (1982); *Ford v. Wainwright*, 477 U.S. 399, 407-410 (1986) (finding that neither deterrence nor retribution are served in the execution of the insane).

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

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1 reformed offender. *See Gregg*, 428 U.S. at 183 (quoting *Furman*, 408 U.S. at 308 (Stewart, J.,
2 concurring) in defining "retribution"). Mr. Vanisi is no longer the same person who committed the
3 offense. That radically challenges his present "desert." He could only be executed with an abstract
4 view toward the unquestionable outrageousness of the crime, without consideration of his present
5 moral status. The fact that **someone**, in society's view, may have "deserved" to die for the offense
6 does not support the execution of Mr. Vanisi if he truly is no longer the same moral entity alleged
7 to have committed the offense. The public's continued strong support for the rehabilitative purpose
8 of punishment demands, along with the retributive concern for proportionate punishment,
9 "consideration" of Mr. Vanisi's rehabilitation.

10 Over the course of this century, the United States Supreme Court's jurisprudence regarding
11 rehabilitation and retribution as punishment goals has developed in tandem with the Court's
12 perception of the status of the goals in the mind of the public. At the time of the zenith of
13 corrections reform popularity, the Court held that rehabilitation and reformation had unseated
14 retribution as the "dominant objective in the criminal law." *Williams v. New York*, 337 U.S. 241,
15 248 (1949). Consistent with all current scientific polling, the Court has always viewed retribution
16 and rehabilitation as adversarial public punishment goals. *See, e.g., Morrisette v. United States*,
17 342 U.S. 246, 251 (1952) (speaking of the "tardy and unfinished substitution of deterrence and
18 reformation in place of retaliation and vengeance as the motivation for public prosecution"). The
19 Court has always refrained from announcing that either of the goals had replaced the other. *See,*
20 *e.g., Powell v. Texas*, 392 U.S. 514, 530 (1968) (Justice Marshall commenting that the Court "has
21 never held that anything in the Constitution requires that penal sanctions be designed solely to
22 achieve therapeutic or rehabilitative effects"); *see also Massiah v. United States*, 377 U.S. 201,
23 207 (1964) (White, J., dissenting) (noting the existence of a "profound dispute about whether we
24 should punish, deter, rehabilitate or cure"); *Furman v. Georgia*, 408 U.S. 238, 414, 452 n.43
25 (1972) (Powell, J., dissenting, joined by Rehnquist, Burger, and Blackmun, JJ.) (listing these and
26 additional cases). By merely viewing the punishment goals as vying for prominence, however, and
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1 giving retribution an almost preemptive role in its capital jurisprudence the Court has seriously
2 underestimated and miscalculated public support for rehabilitation as a punishment alternative,
3 even in the context of **capital** punishment. The reality demonstrated by all public polling, state
4 statutory schemes, and the behavior of courts is that rehabilitation and retribution are appreciated
5 by the public not only as vying contestants for prominence as punishment criteria but, more
6 importantly, as **equally high ideals** in punishment with some vacillation in strength between them
7 over time.

8 Members of the Court announced in *Furman* that retribution and rehabilitation were
9 incompatible, suggesting that rehabilitation had little role to play in capital litigation. For some,
10 this factored into their conclusion that the death penalty was unconstitutional. For the four
11 dissenting Justices, the fact that retribution had never been eliminated by the Court as a proper
12 punishment goal in cases evoking strong community outrage enabled them to accept it over
13 rehabilitation as a dominant basis for preserving the death penalty. All the Justices on both sides of
14 the death penalty issue assumed that, because death terminates the life of the offender, it makes
15 rehabilitation **theoretically** irrelevant once the punishment is imposed. This perception, which
16 forms the basis of the Court's later "death is different" analysis, leads the Court to direct its
17 concern about rehabilitation within the death penalty context into the capital sentencing procedure,
18 i.e., making sure that capital juries can meaningfully use information about a defendant's
19 "prospects for rehabilitation" in their sentencing decisions. *Lockett v. Ohio*, 438 U.S. 586, 594
20 (1978) (holding statute unconstitutionally limited sentencer's ability to consider evidence that
21 Sandra Lockett had a good "prognosis for rehabilitation" if returned to society); *Franklin v.*
22 *Lynnaugh*, 487 U.S. 164, 177-78, 179-80 (1988) (holding that the Texas statute allowed jurors to
23 consider the mitigating evidence of Donald Franklin's good prison record).

24
25 The Supreme Court has generated a line of cases responsive to its concern that jurors not
26 be arbitrarily prevented from considering any evidence, including such evidence as rehabilitation,
27 that could lead to a penalty less than death. Mr. Vanisi bases his instant claim for relief, however,
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1 on the other chief line of Supreme Court precedent arising from the Court's concern, expressed in
2 *Furman*, that sentencers be meaningfully directed in "distinguishing the few cases in which [the
3 death penalty] is imposed from the many in which it is not." *Furman v. Georgia*, 408 U.S. 238,
4 313 (1972) (Stewart, J., concurring); see *Callins v. Collins*, 510 U.S. 1141 (Blackmun, J.,
5 dissenting). Mr. Vanisi's execution would be cruel and arbitrary, because retribution is only
6 abstractly served in his case, and deterrence is not served at all. The national moral consensus,
7 suitably expressed by Justice Stevens, *supra*, requires consideration of his rehabilitation, and the
8 commutation of the sentence of such an offender who is rehabilitated.

9 In short, Mr. Vanisi may not presently, nor in the future, be executed because such
10 infliction of punishment would be constitutionally disproportionate due to his **status** as a
11 reformed errant. *Delo v. Lashley*, 507 U.S. 272, 279, 288 (1993) (Stevens, J., joined by Blackmun,
12 J., dissenting) (recognizing that youth has been considered as an exempt status from execution
13 because of potential for rehabilitation); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (considering
14 youths as a class of offenders ineligible for the death penalty); *Penry v. Lynaugh*, 492 U.S. 302
15 (1989) (considering persons with mental retardation as a class of offenders ineligible for the death
16 penalty); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that persons who are currently insane
17 are, as a class, ineligible for the death penalty).

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

12 Since Mr. Vanisi's execution would not serve the punishment goals of deterrence and
 13 retribution, it is banned by the Eighth Amendment. In the words of an Illinois prison warden, *infra*,
 14 to execute Mr. Vanisi would be to "commit capital vengeance, not punishment." In view of Mr.
 15 Vanisi's rehabilitation, there is utterly no reason to believe that his execution would serve any
 16 penal purpose more effectively than the less severe punishment of imprisonment. *Furman*, 408
 17 U.S. at 305 (Brennan, J., concurring). "The purpose of punishment is fulfilled, crime is repressed
 18 by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the
 19 reformation of the criminal." *Id.* at 305, 343 (citing *Weems v. United States*, 217 U.S. at 381)).

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1 CLAIM FIFTEEN:

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

9 Supporting facts.

10 Mr. Vanisi asserts that Nevada's death penalty violates the Federal constitutional bars
11 against cruel and unusual punishment as well as the rights to due process and equal protection.
12 The death penalty should be stricken as unconstitutional, under the Federal Constitutions, because
13 it violates prohibitions against cruel and unusual punishment, deprives defendants of their
14 fundamental right to life, and is arbitrary and discriminatory.

15 Where the Eighth Amendment is concerned, one oversight in the law continues to strike
16 the undersigned counsel as deeply and sadly profound: the fact that examination of whether the
17 death penalty is "cruel and unusual" is repeatedly and exclusively limited to a discussion of
18 whether the condemned suffers "cruel and unusual" pain or suffering during the actual act of
19 execution.

20 In the law, our considerations of disputes and or accusations consistently turn up what is at
21 risk. A good example is the burden of proof assigned to various types of cases. In a civil case, in
22 which only money is at stake, a plaintiff must prove his case by a preponderance of the evidence.
23 That is, in order to deprive someone of money or property, it must be shown that it is more likely
24 than not that the plaintiff's allegations are true. At the next level, if we are dealing with a family
25 conflict, such as child custody, the burden is raised to one of "clear and convincing" evidence. So
26 where the well-being of a minor person is involved, the bar is raised a notch. As this court is
27 aware, when dealing with criminal matters, it is not simply money, property or the well-being of
28 another at stake, it is a person's liberty. In this country, in our legal system, we hold a person's
liberty to be paramount. It is for this reason that we require the State to prove its case "beyond a

1 reasonable doubt" before it can take away the liberty -- the freedoms guaranteed by the
2 Constitution -- of one of our citizens.

3 Of the rights guaranteed by the Constitution, "life, liberty, and the pursuit of happiness,"
4 the **right to life** comes first. Even though the bar gets raised progressively upward for all other
5 rights, unfortunately, there is no ascension of this bar from the deprivation of liberty to the
6 deprivation of life. Even though our common sense, our innate sense of justice, our empirical
7 knowledge of what is good and fair and right, all demand that there should be such a higher level
8 of certainty. But that is the law. It is not a perfect system. It is not a very dynamic one. A former
9 Chief Justice once explained that the law is only a shadow of the truth. It has failed to be in reality
10 what it desires to be in our hearts.

11 Nowhere is this more true than in the sad fact that there is literally no consideration given
12 to whether depriving one of our own of the rest of his natural days, of the natural progression of
13 his life, is cruel and unusual. Because that is what we are talking about. It is about depriving one
14 of the liberty of living out his life, even under the most strict type of confinement. It is cutting off
15 any chance that person may have to make use of a life. To learn to read. To become educated, to
16 write, to paint, to help others in his bleak situation. To find a god, inside or out. To form
17 thoughts. To take breath in and out. It is a grave offense that the "cruel and unusual"
18 consideration is only about the few minutes it takes to kill a person -- as if after the uncertain pain
19 of death, the condemned were able to get back up and continue a life, eat breakfast, shave, despite
20 the brief but agonizing pain he may have suffered.

22 There are those in the world who would say anyone in the towers of the World Trade
23 Center or the Pentagon, or anyone in one of the four destroyed planes on September 11th deserved
24 their deaths simply because they were part of a Western way of life which the religious-
25 fundamentalist planners deem unholy. But we know without question, without hesitation, that this
26 way of thinking is tragically flawed. We know that just because a belief system or a set of rules,
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1 no matter how interpreted, says that one deserves death does not make it so. If killing is wrong,
2 then all killing is wrong.

3 If we are truly to evolve as a society, if we are to become worthy of the platitudes we
4 espouse daily in our lives and in the media, we must consider the question of what a life is worth.
5 And whether it is cruel and unusual to take such a thing away from another, whatever the reason,
6 whatever the cost.

7 **A. Nevada's Death Penalty Constitutes Cruel and Unusual Punishment**

8 Having stated the argument above, the undersigned are now compelled to make the
9 traditional arguments regarding the "cruel and usual" analysis. The constitutional history of the
10 cruel and unusual punishment clause — adopted against the backdrop of divisive debate about
11 capital punishment — invites this Court to give special consideration to the death penalty's
12 cruelty.

13 Since the prohibition of flogging, *see Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir.
14 1968), death remains the only punishment that intentionally inflicts physical pain. "No other
15 existing punishment is comparable to death in terms of physical and mental suffering." *Furman v.*
16 *Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring); *see District Attorney of Suffolk Dist.*
17 *v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980).

18 The cruelty of capital punishment lies not only in the execution, but also in imprisonment
19 preceding it. Awaiting execution tortures the death row prisoner psychologically and emotionally.
20 In *Watson*, in which the Massachusetts Supreme Court struck down the Commonwealth's death
21 penalty, the majority explained, "[t]he mental agony is, simply and beyond question, a horror," 411
22 N.E.2d at 1283; one justice wrote:

23
24 For over two years, Henry Arsenault "lived on death row feeling as if the
25 Court's sentence were slowly being carried out." Arsenault could not stop thinking
26 about death. Despite several stays, he never believed he could escape execution.
27 "There was a day-to-day choking, tremulous fear that quickly became suffocating."
28 If he slept at all, fear of death snapped him awake sweating.

His throat was clenched so tight he often could not eat. His belly cramped,
and he could not move his bowels. He urinated uncontrollably. He could not keep
still. And all the while a guard watched him, so he would not commit suicide. . . .

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1 The time came. He walked to the death chamber and turned toward the
2 chair. Stopping him, the warden explained that the execution would not be for over
3 an hour. Arsenault sat on the other side of the room as the witnesses filed in behind
4 a one-way mirror. When the executioner tested the chair, the lights dimmed.
5 Arsenault heard other prisoners scream. After the chaplain gave him last rites,
6 Arsenault heard the door slam shut and the noise echoing, the clock ticking. He
7 wet his pants. Less than half an hour before the execution, the Lieutenant Governor
8 commuted his sentence. Arsenault's legs would not hold him up. Guards carried
9 him back to his cell. He was trembling uncontrollably. A doctor sedated him.

10 Id. at 1290 (Liacos, J., concurring).¹⁰

11 Second, because it makes no "measurable contribution to acceptable goals of punishment"
12 the death penalty will result in the "purposeless and needless imposition of pain and suffering."
13 People v. Hooks, 96 A.D.2d 1001, 1002 (3d Dept. 1983); see Broadie, 37 N.Y.2d at 112. It does
14 not deter violent crime, particularly in comparison to the alternative of life-imprisonment-without-
15 parole; it actually fosters social violence. Although some 25 years ago the Supreme Court
16 characterized the empirical evidence on the deterrent effect of the death penalty as inconclusive,
17 see Gregg v. Georgia, 428 U.S. 153, 184-87 (1976), the same cannot be said today. Studies since
18 Gregg have uniformly and conclusively shown no demonstrable deterrent effect from capital
19 punishment laws or actual executions, while confirming the "brutalization" effect of such
20 punishment, including a corresponding increase in homicides. See David C. Baldus, The Death
21 Penalty Dialogue Between Law and Social Science, 70 Ind. L.J. 1033, 1035 (1995); William J.
22 Bowers & Glenn L. Pierce, Deterrence or Brutalization: What is the Effect of Executions?, 26
23 Crime & Delinq. 453, 470, 481 (1980) (examining New York execution and homicide statistics
24 between 1906 and 1964, and showing that on average two to three *additional* homicides occurred
25 in months following executions); cf. New York State Temporary Commission on Revision of the
26 Penal Law and Criminal Code, Special Report on Capital Punishment 88-89 (1965) (capital

27 ¹⁰ Expert studies confirm that "prisoners who spend many years facing impending
28 execution may suffer serious psychological trauma." James R. Acker, New York's Proposed
Death Penalty Legislation: Constitutional and Policy Perspectives, 54 Alb. L. Rev. 515, 577 (1990)
[hereinafter Acker, New York's Proposed Death Penalty], and authorities cited.

1 punishment's deterrent value is highly doubtful) [hereinafter Temporary Commission, Report].¹¹

2 This Court should not defer to the Legislature's erroneous judgment otherwise. See People v.
3 Smith, 63 N.Y.2d 41, 76 n.7 (1984) (rejecting contention that "evaluating deterrence and alternate
4 punishments is for the Legislature, not the courts" and concluding that "such considerations are
5 hardly to be ignored by us" in determining legality of death penalty for killings by defendants
6 already serving life sentences).

7 Nor may sheer vengeance or retribution — the only other possible legislative rationales for
8 capital punishment — support Nevada's death penalty. As one court has held, "the punishment or
9 treatment of convicted offenders is directed toward one or more of three ends," deterrence,
10 incapacitation,¹² or rehabilitation, but "[t]here is no place in the scheme for punishment for its own
11 sake, the product simply of vengeance or retribution." People v. Oliver, 1 N.Y.2d 152, 160
12 (1956); see Broadie, 37 N.Y.2d at 112, 114; Hooks, 96 A.D.2d at 1002.

13 Third, the death penalty conflicts with evolving standards of decency because of the
14 likelihood that it will result in the execution of innocent people — long considered important in
15 assessing use of the sanction. Cf., e.g., People v. Higgins, 5 N.Y.2d 607, 626 (1959) (reversing
16

17 ¹¹ See also, e.g., Raymond Bonner & Ford Fessenden, States with No Death Penalty Share
18 Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, at A1 (during last 20 years, homicide rates
19 in states with the death penalty have been 48 to 101 percent higher than rates in states
20 without death penalty; homicide rates have fluctuated in relatively similar paths in states with
21 and without the death penalty); Lawrence R. Klein *et al.*, The Deterrent Effect of Capital
22 Punishment: An Assessment of the Estimates, in Deterrence and Incapacitation: Estimating the
23 Effects of Criminal Sanctions on Crime Rates 336, 338-49 (Blumstein, Cohen & Nagin, eds.
24 1978); Thorsten Sellin, The Penalty of Death 122-23 (1980); Franklin E. Zimring & Gordon J.
25 Hawkins, Capital Punishment and the American Agenda 167 n.119 (1986); Craig J. Albert,
26 Challenging Deterrence: New Insights On Capital Punishment Derived From Panel Data, 60 U.
27 Pitt. L. Rev. 321 (1999); Jon Sorensen *et al.*, Capital Punishment and Deterrence: Examining the
28 Effect of Executions on Murder in Texas, 45 Crime and Delinq. 481-93 (1999).

¹² Nor is Nevada's death penalty necessary to incapacitate dangerous felons, given the
alternative punishment of life-without-parole. In addition, those convicted of murder have a
notoriously low rate of recidivism, a rate far below that of other violent criminals. See Sellin, The
Penalty of Death at 103-20; Richard O. Lempert, Desert and Deterrence: An Assessment of the
Moral Bases of the Case For Capital Punishment, 79 Mich. L. Rev. 1177, 1189-90 (1981).

conviction and death sentence because conviction contrary to weight of evidence); People v. Hayner, 300 N.Y. 171, 175 (1949) (same); People v. Crum, 272 N.Y. 348, 357 (1936) (same); see also People v. Williams, 292 N.Y. 297, 302 (1944) (“[W]e cannot see in the testimony of [two jailhouse informants] a sufficient basis for the signing of a warrant for the death of this defendant.”); People v. Spickler, 255 N.Y. 408, 408-09 (1931) (reversing conviction and death sentence where identification of defendant “was at least doubtful enough to make it improper to execute the death penalty without every reasonable safeguard for the avoidance of mistake”).

Historically, courts have been unable to avoid executing the innocent. For example, in the twentieth century, New York executed no fewer than eight innocent people. Michael Lumer & Nancy Tenney, The Death Penalty in New York: An Historical Perspective, 4 J. L. & Pol’y 81, 98 (1995) [hereinafter Lumer & Tenney, The Death Penalty in New York]; see Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 72, 118 (1987) [hereinafter Bedau & Radelet, Miscarriages of Justice].¹³ And, time and again, New York has sent innocent men to death row. See Bedau & Radelet, Miscarriages of Justice at 23.

To name a few:

- In 1915, Charles Stielow had his death sentence stayed only after he was strapped into the electric chair. He ultimately won pardon and release after the real culprit confessed and newly uncovered ballistics evidence proved his innocence. Id. at 119.
- In 1932, Pietro Matera’s death sentence was commuted. Almost thirty years later, in 1960, the real culprit’s wife (a key prosecution witness) confessed on her death bed that she had falsely accused Matera to save her husband, and Matera was released. Id. at 144.
- In 1937, the death sentence of Isidore Zimmerman — “two hours away from execution (his head had been shaved and he had eaten his last meal)” — was

¹³ Everett Applegate, for example, was executed in 1936, after having been convicted solely on the inconsistent testimony of an accomplice who had committed two previous murders and who claimed to have committed this killing on Applegate’s insistence. The governor, believing Applegate innocent, sought permission from the prosecutor to commute the death sentence, but the prosecutor refused. See Bedau & Radelet, Miscarriages of Justice at 92. Similarly, Thomas Bambrick was executed in 1916, although evidence that another man had committed the murder was later discovered. The prison warden said: “It is almost as certain that Bambrick is innocent as that the sun will rise tomorrow.” Id. at 93.

commuted. Released after prevailing on appeal some 24 years later, Zimmerman won \$1 million in reparations from the State. *Id.* at 171.

- In 1963, Samuel Williams was released after almost sixteen years in prison — and 22 months on death row — when he was granted habeas corpus relief on the grounds that his confession had been coerced. He, too, was compensated for malicious prosecution. *Id.* at 169.¹⁴

Nothing ensures that Nevada can avoid the documented and intolerable risk of wrongful execution. Just as executing an innocent defendant would constitute cruel and unusual punishment, even were the defendant properly tried, convicted, and sentenced, *see Herrera v. Collins*, 506 U.S. 390, 417 (1993), a capital sentencing scheme that will necessarily condemn unidentified innocents is antithetical to the moral underpinnings of Nevada society and should not stand.¹⁵

Fourth, the lack of standards for seeking and meting out the death penalty, as well as the accompanying risk of racial disparities, render the penalty inconsistent with the State prohibition against cruel and unusual punishment. Among other problems with Nevada's death penalty are that "aggravating factors" rendering a murder death-eligible include the commission of intentional murder "in the course of" and "in furtherance of" robbery, burglary, and other frequently committed felonies,, a category so broad as to allow a vast array of second-degree murders to be charged as capital. *See Stewart F. Hancock, Jr. et al., Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute*, 59 Alb. L. Rev. 1545, 1561-62 (1996) [hereinafter *Hancock et al., Race, Unbridled Discretion*]; New York State Division of

¹⁴ Another "recent study documents fifty-nine wrongful homicide convictions in New York between 1965 and 1988." Acker, *New York's Proposed Death Penalty* at 603 & n.485 (citing New York State Defenders Ass'n, *Wrongful New York State Homicide Convictions Since 1965* (1990)). A 1965 commission relied heavily on the demonstrated risk of executing the innocent in proposing that the Legislature abolish capital punishment. *See Temporary Commission, Report* at 69, 95.

¹⁵ The risk of executing the innocent does not belong solely to history. *See, e.g., Dirk Johnson, Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1 ("Citing a 'shameful record of convicting innocent people and putting them on death row,' Gov. George Ryan of Illinois today halted all executions in the state . . .").

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1 Criminal Justice Services, 1998 Crime and Justice: Annual Report at 18, table 9 (1999) (of
2 homicides with "known circumstances," 29.5% were "felony connected"); *see also* Acker, New
3 York's Proposed Death Penalty at 582 (under section 125.27(1)(a)(vii), "[r]oughly one-third of the
4 homicides in New York State . . . could be prosecuted as capital crimes"). And, though the
5 Legislature empowered individual district attorneys to decide which eligible murders warrant a
6 possible death sentence, *see* C.P.L. § 250.40, it provided no guidelines, procedures, or criteria to
7 guide or review that selection; hence, such decisions potentially turn on the identity of the district
8 attorney, the prominence of the victim, or the notoriety of the case.

9 Given the broad discretion provided prosecutors to seek death and juries to impose it, there
10 is scant chance that Nevada will wholly sidestep the race-of-defendant and race-of-victim
11 discrimination that has plagued the administration of the death penalty elsewhere in this country.
12 *See McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting); David C. Baldus *et*
13 *al.*, Equal Justice and the Death Penalty: A Legal and Empirical Analysis 384-86 (1990)
14 [hereinafter Baldus, Equal Justice]. A 1990 United States General Accounting Office ("GAO")
15 report analyzed 28 studies of racial discrimination in death sentencing (which had analyzed 23 sets
16 of data from 1972 through 1988) and confirmed the prevalence of such discrimination. The GAO
17 found that race-of-victim discrimination was "remarkably consistent across data sets, states, data
18 collection methods, and analytic techniques" and that a majority of the studies had established
19 "that race of defendant influenced the likelihood of being charged with a capital crime or receiving
20 the death penalty." General Accounting Office, Death Penalty Sentencing: Research Indicates
21 Pattern of Racial Disparities, U.S. Gov. Doc. GAO/GGD-90-57, Feb. 1990, at 5.¹⁶

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24 ¹⁶ A recent study concerning application of the death penalty in Philadelphia confirmed
25 such results. *See* David C. Baldus, Racial Discrimination and the Death Penalty in the
26 Post-Furman Era: an Empirical and Legal Overview, with Recent Findings from Philadelphia, 83
27 Cornell L. Rev. 1638 (1998). Further, the studies analyzed by the GAO reveal strong and
28 statistically significant correlations between race and capital sentencing results in Colorado,
Florida, Georgia, Illinois, Louisiana, Mississippi, New Jersey, North Carolina, Oklahoma, and
South Carolina. *See, e.g.*, Baldus, Equal Justice; Arnold Barnett, Some Distribution Patterns for
the Georgia Death Sentence, 18 U.C. Davis L. Rev. 1327 (1985); Leigh B. Bienen *et al.*, The

1 Nevada's lack of exact standards — particularly given the near-inevitable race-based
2 outcomes of death penalty prosecutions — is incompatible with its notion of decency. A capital
3 punishment system infected by arbitrary considerations would be cruel and unusual.¹⁷ See Godfrey
4 v. Georgia, 446 U.S. 420, 442 (1980) (Marshall, J., concurring) (“[T]he effort to eliminate
5 arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it — and
6 the death penalty — must be abandoned altogether.”).

7 More generally, capital sentencing law has resulted in two competing commands: The law
8 must closely guide a jury's discretion to ensure that the death sentence is “based on reason rather
9 than caprice or emotion.” Gardner v. Florida, 430 U.S. 349, 358 (1977). Yet the law may not
10 limit the jury's discretion to exercise mercy and not impose death. See Eddings v. Oklahoma, 455
11 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); see also U.S. Const. amend. VIII. Justice
12 Blackmun correctly described this conundrum: “Experience has taught us that the constitutional
13 goal of eliminating arbitrariness and discrimination from the administration of death can never be
14 achieved without compromising an equally essential component of fundamental fairness —
15 individualized sentencing.” Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J.,
16 dissenting from denial of certiorari) (citation omitted).

17 In all, the death penalty inflicts an excessive and disproportionate punishment in an
18 arbitrary and discriminatory manner and cannot be justified by *any* legitimate purpose. Capital
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22 Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion, 41
23 Rutgers L. Rev. 27 (1988); Linda A. Foley, Ph.D., Florida After the Furman Decision: The Effect
24 of Extralegal Factors on the Processing of Capital Offense Cases, 5 Behav. Sci. & L. 457 (1987);
25 Elizabeth Lynch Murphy, Application of the Death Penalty in Cook County, 73 Ill. B.J. 90 (1984);
26 Raymond P. Paternoster & Ann Marie Kazyaka, The Administration of the Death Penalty in South
27 Carolina: Experiences Over the First Few Years, 39 S.C. L. Rev. 245 (1988); Michael L. Radelet,
28 Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981); M.
Dwayne Smith, Patterns of Discrimination in Assessments of the Death Penalty: The Case of
Louisiana, 15 J. Crim. Just. 279 (1987).

1 punishment is contrary to contemporary notions of human decency in Nevada and cannot
2 constitutionally stand.

3 **B. Nevada's Death Penalty Deprives Persons of the Fundamental Right to Life**
4 **Without Compelling Justification.**

5 Nevada's death penalty also violates the constitutional guarantees of due process and equal
6 protection, because there is no compelling governmental interest to justify depriving Mr. Vanisi of
7 his fundamental right to life. A less restrictive punishment, life-imprisonment-without-parole,
8 would adequately serve the State's interests.

9 The right to life — an indispensable predicate for the exercise of all other rights — is a
10 "fundamental human right." People v. Felder, 47 N.Y.2d 287, 295 (1979). Courts have
11 unambiguously expressed the fundamental nature of the right to life. See People v. Isaacson, 44
12 N.Y.2d 511, 520 (1978) ("[E]very person's right to life, liberty and property is to be accorded the
13 shield of inherent and fundamental principles of justice.") (citations omitted).

14 A law that impinges a fundamental right requires strict judicial scrutiny. The government
15 must prove that the law is necessary to promote a "compelling state interest" and that the law
16 advances that interest by the least restrictive means available. See Rivers v. Katz, 67 N.Y.2d 485,
17 498 (1986) (due process); People v. Onofre, 51 N.Y.2d 476, 492 n.6 (1980) (equal protection).¹⁸
18 The prosecution here cannot meet its burden.

19 The prosecution cannot show that Nevada's death penalty is narrowly tailored to serve a
20 compelling state interest. The punishment does not have a direct and substantial relationship to
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22 ¹⁸ Significantly, the arbitrariness unavoidable in the administration of Nevada's death
23 penalty violates equal protection guarantees regardless of the racial discrimination that adheres to
24 its use. See Trump v. Chu, 65 N.Y.2d 20, 25 (1985) ("[T]he equal protection clause does not
25 prevent [the] Legislature[] from drawing lines that treat one class of individuals . . . differently
26 from others unless the difference in treatment is palpably arbitrary or amounts to invidious
27 discrimination.") (internal quotation marks omitted); People v. Liberta, 64 N.Y.2d 152, 163 (1984)
28 (equal protection clause prohibits statutory provisions that "arbitrarily burden a particular group of
individuals"); People v. Acme Markets, Inc., 37 N.Y.2d 326, 330 (1975) ("The underlying concept
is elemental — that persons similarly situated should be treated the same and that criminal justice
should and must be evenly and equally dispensed.").

preventing crime, either by through deterrence or incapacitation; it does not measurably achieve any legitimate penological goal. Extensive evidence demonstrates otherwise. Nor can the prosecution prove that the death penalty is the least restrictive means of accomplishing its goals. Demonstrably it is not: Evidence convincingly demonstrates that life-imprisonment-without-parole equally — and more efficiently — serves State interests in deterrence and incapacitation. See Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring) (death penalty violates state due process protection of fundamental right to life; state did not demonstrate deterrent effect of capital punishment or otherwise carry burden of showing it is least restrictive means to accomplish compelling interests).¹⁹ Accordingly, Nevada's Death Sentencing Scheme should be invalidated and the judgment should be reversed,²⁰ or, alternatively, remand the case to the trial court for re-sentencing to a sentence less than death, or this Court should reduce the death sentences to life-without-parole.

C. The Current Standards of Decency Require Reversal of the Death Penalty.

Infliction of the death penalty upon Mr. Vanisi would be cruel and arbitrary, because it would be unacceptable in light of current American standards of human decency. "The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." *Herrera*, 506 U.S. at 430, 432 (1993) (Blackmun, J., dissenting, joined by Stevens, J., and Souter, J.); *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford v. Wainwright*, 477 U.S. 399

¹⁹ In O'Neal, 339 N.E.2d 676, the Massachusetts Supreme Judicial Court held that the death penalty violated that state's constitutional protection of the fundamental right to life under the state due process clause. While O'Neal was decided before Gregg, the Massachusetts Supreme Judicial Court reaffirmed its holding subsequent to, and with direct reference to, Gregg. See Opinion of the Justices to the House of Representatives, 364 N.E.2d 184 (Mass. 1977) (advisory opinion to state legislature in which, with respect to O'Neal, court counseled that legislature's proposed death penalty law still would be unconstitutional); Watson, 411 N.E.2d at 1283 (holding state's death penalty law unconstitutional in declaratory judgment action brought by district attorney).

²⁰ The very process of death qualifying Mr. Vanisi's jury — occasioned by his being on trial for his life — caused many otherwise-qualified jurors to be dismissed.

(1986)). Mr. Vanisi cannot be constitutionally executed, because contemporary American society would find the execution of an offender who has been rehabilitated morally offensive and at odds with current standards of human decency.

The "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of **inflicting** the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 407-410 (1986). The State of Nevada may not constitutionally inflict the death penalty on Mr. Vanisi, because of his character and record as a rehabilitated offender. Such sanction would deeply offend contemporary standards of human decency, reflected in the American public's constant high valuation of rehabilitation as a punishment goal. The American public, in fact, rejects punitive justice in favor of a community-based, restorative model of justice.

All evidence shows that the American public holds retribution and rehabilitation to be competing and commensurate avenues to the restoration of public order following a capital offense. Such a statement may initially seem surprising, given the apparent widespread support for the capital sanction. Public opinion polls and social science findings demonstrate, however, that since the reinstatement of the death penalty in the majority of states, public support for rehabilitation in **those states** has not waned dramatically in inverse proportion to the popularity of strict and certain punishment. Real-life sentences that embrace rehabilitative goals of community safety as well as reparation for crime are actually **universally** more popular than the death penalty itself as punishment options for capital offenders, even in states long considered bastions of capital punishment. For that reason, clear and convincing demonstration by a capital offender of authentic rehabilitation must disable the State from carrying out his execution, because execution would not only be contrary to the public's punishment-type preference but would also offend contemporary moral concern for the rehabilitation of errants. There is every indication that the public recoils at

1 the death penalty when rehabilitation can actually be achieved, because rehabilitation defeats
2 sentiment toward vengeance, restores the moral order, meets the community's need for specific
3 incapacitation and, when coupled with proportionately strict sentencing, meets the community's
4 need for general deterrence. Recent public opinion polling shows that the public is aware that there
5 remains no need nor justification for the death penalty when such goals can be achieved.

6 Social science evidence, legislative enactments, public pronouncements by religious
7 bodies, executive commutation actions, and international law and opinion all support this
8 conclusion. As a result, execution of Mr. Vanisi would not be acceptable as justice, would be
9 merely arbitrary, wanton infliction of pain on an individual and would be, in itself, a severe
10 disruption of the moral social order.

11 1. The Social Science Evidence

12 The Supreme Court, on occasion, has looked to social science data as evidence of evolving
13 standards of human decency. *E.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976). Sociological research
14 and opinion polling since the "reinstatement" of the death penalty via *Gregg* clearly demonstrates
15 that the public's high for rehabilitation of offenders has not been devalued by the popularity of
16 punitive measures; that, in fact, a **preferred alternative to the death penalty** that requires
17 rehabilitation of the offender has been universally found in every polled state. *See* William J.
18 Bowers, Margaret Vandiver, & Patricia H. Duggan, *A New Look at Public Opinion on Capital*
19 *Punishment: What Citizens and Legislators Prefer*, 22:1 Am. Jnl. Crim. Law 77 (1994); Richard
20 C. McCorkle, *Research Note: Punish and Rehabilitate? Public Attitudes Toward Six Common*
21 *Crimes*, 39:2 Crime and Delinquency 240 (April 1992); Francis T. Cullen, Sandra Evans Skovron,
22 Joseph E. Scott, Velmer S. Burton, Jr., *Public Support for Correctional Treatment*, 17:1 Criminal
23 *Justice and Behavior* 6 (March 1990); Mark Warr & Mark Stafford, *Public Goals of Punishment*
24 *and Support for the Death Penalty*, 21:2 Journal of Research in Crime and Delinquency 95 (May
25 1984); *see also* Andrew Skotnicki, *Religion and Rehabilitation*, 15:2 Criminal Justice Ethics
26 (Summer/Fall 1996) (noting the reemergence in recent years of the rehabilitative ideal, but lack of
27 appreciation for religious conversion as "a key factor in solving the riddle of wilful human
28

rejection of law and behavioral norms").

Warr and Stafford set out specifically to: (1) "identify the goals or justifications of punishment held by the public at large," and (2) "examine the relation between these goals and public support for capital punishment." Warr, *supra*, at 97. The relative strengths of public justifications for the death penalty are examined through justifications for imprisonment. *Id.* at 99. The authors point out that, since rehabilitation and retribution are logically incompatible, the only way to measure their relative strength in relation to capital punishment is to look at incarceration goals. Imprisonment is commensurate with all punishment goals, whereas it is nonsense to ask whether execution accomplishes rehabilitation. *Id.* The results from the authors' survey indicated:

[A] large majority of respondents see retribution as a legitimate (if not the primary) purpose of punishment. At the same time, however, rehabilitation looms much larger by this reckoning. While less than one-fifth of respondents choose rehabilitation as the most important goal of punishment, fully 59% choose it as one of the three most important goals of punishment, a figure second only to retribution itself. [Incapacitation was third.]

[I]t is interesting to note that those who choose retribution as the most important reason for punishment are most likely to choose rehabilitation as their second most important reason. This finding is similar to that reported by Cullen et al. (1983), who found that their Illinois respondents tended to favor rehabilitation and punishment simultaneously for juvenile offenders.

Id. at 102. Interestingly, a full 50 percent of those who held rehabilitation to be the most important punishment goal also supported capital punishment. *Id.* at 106. Warr and Stafford concluded:

None of the goals of punishment [among retribution, incapacitation, rehabilitation, specific deterrence, general deterrence, and normative validation] is endorsed by more than a minority of respondents, meaning that there is -- at least at present -- no single dominant ideology of punishment. Even if such an ideology did exist it must be interpreted cautiously. Our findings indicate that a preference for one goal of punishment does not necessarily imply utter rejection of others (recall the case of rehabilitation). Rather than viewing public goals of punishment as a binary (either/or) variable, or imputing monolithic consensus to public opinion, we suggest that such opinion can best be viewed as a set of ordered priorities, the order of which changes with time and circumstance.

Id. at 106. Similarly, McCorkle (1993) and Cullen et al. (1990, 1988, 1987, 1985, 1983, 1982, 1977) concur that the public continues to believe violent offenders should not only be punished but also rehabilitated. McCorkle studied public attitudes toward punishment goals for violent and nonviolent offenders (robbery, rape, molestation, burglary, drug sale, drug possession) in a 1992

survey of respondents in the Las Vegas, Nevada, area. McCorkle, *supra*, at 242. The respondents consistently showed "strong punishment orientations," support for "increased use of prisons to ensure offenders received their just deserts." *Id.* at 250. Public attitudes, however, were multifaceted:

[T]his punitiveness represented only one facet of their attitudes toward criminals. There was, in addition, broad support for addressing the underlying causes of their criminal behavior. Most believed that these offenders could still turn their lives around, and renewed efforts should be made to provide them with the treatment, education, and training *inside* the prison that would facilitate their repentance.

Id. (emphasis in original).

The following poll results taken from the Sourcebook of Criminal Justice Statistics show widespread corroboration of the findings of these scholars that the relationship among punishment goals is complex and that retribution and rehabilitation are both high on the public agenda:

1) Louis Harris Poll, 1970, 1978, 1981, 1982: Question A: "Do you think the main emphasis in most prisons is on punishing the individual convicted of a crime, trying to rehabilitate the individual so that he might return to society as a productive citizen, or protecting society from future crimes he might commit?" Question B: What should be the main emphasis?

A: For the four years, punishment ranged from 21 to 27 percent, rehabilitation from 25 to 35 percent, and protection from 8 to 13 percent.

B: For the four years, punishment ranged from 8 to 23 percent, rehabilitation from 44 to 73 percent, and protection from 12 to 32 percent. Support for rehabilitation went down from 73 percent in 1970 to 44 percent in 1982, while support for "punishment" went up and down from 8 percent in 1970 to 19 percent in 1982.

The Harris Survey (New York: The Chicago Tribune-New York News Syndicate, May 24, 1982), in Sourcebook of Criminal Justice Statistics 1982, at 252.

2) The Gallup Poll reported in 1982 results from a poll on the following question: "In dealing with men in prison, do you think it is more important to punish them for their crimes, or more important to get them started 'on the right road'?" 30 percent responded to punish them and 59 percent opted for getting them started right. George H. Gallup, *The Gallup Report*, Report No. 200 (Princeton, N.J.: May 1982), in Sourcebook of Criminal Justice Statistics 1982, at 254.

The same poll was run in 1989, with the results that 38 percent chose punishment and 48 percent rehabilitation. George H. Gallup, *The Gallup Report*, Report No. 285 (Princeton, N.J.: June 1989), in Sourcebook of Criminal Justice Statistics 1990, at 198.

3) More recent polls seem to suggest a more punitive attitude on the part of the public relative to rehabilitation, but also a steadfast belief by the public that most violent offenders can be rehabilitated.

A Roper national poll in 1992 asked the following: "Most people are concerned about the

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1 increase in crime and lawlessness that has been taking place across the country today. On which
2 would you like to see us rely more heavily?"

3 **Stricter law enforcement/severer penalties 44 percent**
4 **Corrective programs 31 percent**

5 The Roper Organization, Inc., in Sourcebook of Criminal Justice Statistics 1992, at 195.

6 A 1993 Los Angeles Times poll asked the following: "Where does government need to
7 make a greater effort these days: in trying to rehabilitate criminals who commit violent crimes or
8 in trying to punish and put away criminals who commit violent crimes?"

9 **Rehabilitate 25 percent**
10 **Punish 61 percent**

11 Los Angeles Times Poll, in Sourcebook of Criminal Justice Statistics 1994, at 177.

12 The same poll was conducted in 1994 by the Los Angeles Times, and 1995 by researchers
13 at Sam Houston University.

14 1994 results:

15 **Rehabilitate 32 percent**
16 **Punish 49 percent**

17 Sourcebook of Criminal Justice Statistics 1994, at 176.

18 1995 results:

19 **Rehabilitate 26.1 percent**
20 **Punish 58.2 percent**

21 Sourcebook of Criminal Justice Statistics 1995, at 177.

22 4) Finally, polls conducted in 1994 and 1995 demonstrate that, although there has been an apparent
23 recent shift toward more punitive than rehabilitative attitudes, public belief in the effectiveness of
24 rehabilitation as a punishment purpose continues to run high.

25 The Los Angeles Times and Sam Houston researchers asked, "Thinking of criminals who
26 commit violent crimes, do you think most, some, only a few, or none of them can be rehabilitated
27 given early intervention with the right program?"

28 1994 results:

Most 17 percent
Some 47 percent
Only a few 25 percent
None 6 percent

Sourcebook of Criminal Justice Statistics 1994, at 176.

1995 results:

Most 14.4 percent
Some 44.8 percent
Only a few 28.7 percent
None 9.1 percent

Sourcebook of Criminal Justice Statistics 1995, at 177.

Although the polls reported in the Sourcebook demonstrate continued public support for both retribution and rehabilitation in relation to violent offenders, they can be faulted for not being specifically applicable to the death penalty, due to the logical difficulty inherent in attempting to apply rehabilitation in the capital punishment context. Arguably, however, a set of polls that have been conducted since 1986 do succeed in measuring the public support for rehabilitation in the death penalty context with the remarkable consequence that a rehabilitative punishment alternative has been observed that is **universally preferred** over the death penalty for capital murder offenders.

This set of post-*Furman* surveys has shown undeviating preference on the part of the public for a kind of compensatory, rather than solely retributive, punishment that necessarily implies a concomitant public belief in rehabilitation of capital defendants. Public opinion polls invariably show that, where respondents are given the alternative punishment choice of a real life sentence, coupled with restitution to the family members of the offender's victim(s), support for the death penalty evaporates. *Bowers, supra*, at 144. Researchers have noted that the standard polling question -- Do you support the death penalty? -- reflects an acceptance of the death penalty but not a **preference** for that punishment over other alternatives:

When people are presented with an alternative to the death penalty that incorporates both lengthy imprisonment and restitution to murder victims' families, and are then asked whether they would prefer the death penalty to such an alternative, they consistently choose the non-death penalty alternative.

Id. at 79. In polls from 1986-1995, a majority of respondents in Arkansas, California, Florida, Georgia, Kansas, Massachusetts, New York, and Indiana have stated a preference for life without parole plus restitution over the death penalty as punishment for capital offenders. *Id.* at 91. The death penalty has not been preferred over life plus restitution in any state poll. Researchers conclude that:

[F]or most people [life imprisonment without parole plus restitution] is "harsh enough" while **the death penalty lacks sufficient restorative or compensatory value**. In most people's minds, the attractiveness of having convicted murderers work in prison for recompense, combined with personal misgivings about capital

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1 punishment, concern for the humane and restorative priorities it denies, and
2 satisfaction with the harshness of the alternative, converts expressed death penalty
3 support into preference for the [life imprisonment without parole plus restitution]
4 alternative. The result is that most people, even most who profess strong death
5 penalty support, would choose the alternative.

6 *Id.* at 145 (emphasis added). Whereas the U.S. public supports the strictness of the capital sanction
7 as an expression of community outrage, the polls indicate that the public also embraces the idea
8 that the punishment of capital offenders, like that of other prisoners, must be undertaken with a
9 view to the comprehensive needs and rights within the community. The firm public support for life
10 without parole plus restitution demonstrates an evolving standard of decency in punishment that
11 transcends -- in its holistic, self-conscious attentiveness to the needs in every community sector --
12 the more ritualized, historical capital sanction. It recognizes, furthermore, the value of the life of
13 the perpetrator, at least as dedicated to restoration of the community breach caused by his actions.

14 The behavior of the *Furman* commutes in Texas demonstrates empirically that the public's
15 belief in rehabilitative options is not misplaced. Forty-seven inmates were physically present on
16 death row when *Furman v. Georgia* was announced in 1972. James W. Marquart, Sheldon Ekland-
17 Olson, & Jonathan R. Sorenson, *The Rope, The Chair, and the Needle* 123 (Univ. of Texas Press
18 1994). Governor Price Daniel commuted all forty-seven inmates to life imprisonment or ninety-
19 nine years. Thirty-seven had been convicted of murder, seven of rape, and three of armed robbery.
20 *Id.* Seventy-five percent committed no serious infractions during their confinement in the general
21 population. *Id.* at 124. Sixty-six percent (31 prisoners) were eventually released to the community.
22 *Id.* at 125. Eighty-six percent were not convicted of a new felony while in the free community,
23 compared to 94 percent of a comparable research control group. *Id.* The recidivism rate in both
24 *Furman* and control groups was low. *Id.*

25 2. Legislative Enactments

26 The public support for restorative justice reflected in widespread polling has been
27 incorporated into our states' penal laws, including the law of Nevada. Although the widespread
28 support for strict, certain, and restorative penalties has not been expressed by way of the
elimination of post-*Furman* capital murder statutes or the passage of laws that provide the jury

more capital offense punishment options, Congress and a majority of state constitutions and legislatures have mandated that **all procedures and punishments** in their criminal codes, not excluding capital offenses, be governed by concern for rehabilitative and restorative values. Almost all states show fundamental respect for rehabilitative principles by way of the codification of their criminal laws or interpretation of statutory provisions for punishment by state high courts. Almost states make some provision for restitution as an adjunct to criminal sentencing. Most of these states do not restrict the obligation of restitution to persons sentenced to life or years. Many states explicitly tie restitution to rehabilitation of the defendant or make restitution a function of rehabilitation. *See also* Stephen Schafer, *Compensation and Restitution to Victims of Crime* 119-22 (2d ed. 1970).

There is no meaningful contrast between death penalty and non-death penalty states in relation to the emphasis given rehabilitation as a punishment goal. For every Wisconsin and Minnesota, there is a Wyoming, Oregon, or Indiana; the latter all having the death penalty and **constitutional** provisions mandating that rehabilitation be considered the preeminent goal in punishment. Retribution as vengeance is not advocated by any state; whereas, retribution as it is represented in the concern for proportionate sentencing is found in many of the states' statutory provisions. The coexistence of the death penalty, retribution, and rehabilitation, along with the omnipresent option of restitution is remarkable, and demonstrates by way of a pattern among the states' statutes not only the resilience of rehabilitation as a punishment goal, but the **dual high punishment priorities** found in public opinion polls and their mutual and productive interaction.

a. The Federal Government

Prior to Congress' sentencing reform in 1984, federal sentencing policy was based almost exclusively upon a rehabilitation model. Continuing Appropriations, 1985--Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221 (1984)("[C]riminal sentencing is based largely on an outmoded rehabilitation model."). On the basis of concerns similar to those driving the Supreme Court's revamping of death penalty jurisprudence -- chiefly the complete discretion afforded sentencers

1 and wide disparities in sentencing results -- and concern about the capacity of the prison setting to
 2 foster rehabilitation, the Senate Judiciary Committee pushed sentencing reform toward greater
 3 uniformity in sentencing and less emphasis on rehabilitation. *Id.* at 3220-23. The product of the
 4 Senate's finding that other concerns than rehabilitation should also guide sentencing was the
 5 Sentencing Reform Act, which outlined four purposes of punishment: retribution, deterrence,
 6 incapacitation, and rehabilitation. 18 U.S.C. § 3553 (a) (2) (1988). The Judiciary Committee
 7 maintained that all four should be considered in sentencing and that no one should be viewed
 8 abstractly as being more important than the others. 1984 U.S.C.C.A.N. 3220, 3250-51. The Senate
 9 recognized, however, that in any individual case one goal might take on more importance than
 10 others, and that not every purpose would be relevant in every case. *Id.* at 3250-51, 3260. The
 11 Senate Judiciary Committee expressed the intent of Congress:

12 The intent of subsection (2) is to recognize the four purposes that sentencing in
 13 general is designed to achieve and to require that the judge consider what impact, if
 14 any, each particular purpose should have on the sentence in each case.

15 *Id.* at 3260. Rehabilitation, thus, survived sentencing reform on equal par with retribution and
 16 deterrence (the two purposes maintained by the Supreme Court as the bases for the capital
 17 sanction) as a Congressionally mandated goal in punishment. Interestingly, the overarching policy
 18 statute also includes as a factor to consider in imposing sentence "the need to provide restitution to
 19 any victims of the offense." 18 U.S.C. § 3353 (a) (7) (1997). The new code embraces the death
 20 penalty for murder and, like many state codes, requires sentencing consideration of a number of
 21 mitigating factors that would include concerns about rehabilitation. 18 U.S.C. 1111 (murder); 18
 22 U.S.C. 3592 (a) (1) (impaired capacity), (5) (no prior history), & (8) (catchall). Rehabilitation also
 23 plays a big role in the Sentencing Guidelines for non-capital offenses. *E.g.*, 18 U.S.C. Appx @
 24 3E1.1.

25 **b. The Model Penal Code**

26 Rehabilitation is one of the chief purposes listed by the American Law Institute, and
 27 retribution is notably absent, except as it is involved in proportionality:

28 The general purposes of the provisions under the code governing the sentencing and

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1 treatment of offenders are:

2 (a) to prevent the commission of offenses;

3 (b) to promote the correction and rehabilitation of offenders;

4 (c) to safeguard offenders against excessive, disproportionate or arbitrary
5 punishment;

6 (d) to give fair warning of the nature of the sentences that may be imposed on
conviction of an offense;

7 (e) to differentiate among offenders with a view to a just individualization in their
8 treatment;

9 (f) to define, coordinate and harmonize the powers, duties and functions of the
10 courts and of administrative officers and agencies responsible for dealing with
offenders;

11 (g) to advance the use of generally accepted scientific methods and knowledge in
the sentencing and treatment of offenders;

12 (h) to integrate responsibility for the administration of the correctional system in a
13 State Department of Correction.

14 Model Penal Code § 1.02 (West 1997).

15 **c. State Constitutions Establishing Rehabilitation as One (or the Only)**
16 **Punishment Priority.**

17 Alaska (no death penalty), Indiana (death penalty), Oregon (death penalty), and Wyoming
18 (death penalty) all have state constitutional provisions requiring that punishment be based upon
rehabilitation.

19 **3. The Behavior of Juries**

20 The Supreme Court has often regarded the behavior of juries as an index of evolving
21 standards of human decency. The Capital Jury Project, a massive social-science undertaking in a
22 number of states, has unearthed some characteristics about capital juries that cast doubt about the
23 reliability of their decisions as a gauge of public attitudes about punishment. *See* William J.
24 Bowers, *Symposium: The Capital Jury Project: Rationale, Design, and Preview of Early Findings*,
25 70 Indiana L. J. 1043 (Fall 1995); *see also* Craig Haney, *Taking Capital Jurors Seriously*, 70
26 Indiana L. J. 1223, 1227 (Fall 1995) (expressing skepticism that jurors understand the significance
27 of mitigating evidence or its correct use in coming to a verdict); Peter Meijeres Tiersma,
28

1 *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 Utah L. Rev. 1. The
 2 Capital Jury Project study has revealed that a majority of jurors enter the punishment stage of
 3 capital trials with their minds already made up about whether they will impose the death penalty.
 4 More than six out of ten jurors have responded that their **guilt stage** deliberations focused a "great
 5 deal" or a "fair amount" on future dangerousness and the punishment to be imposed. *Id.* at 1087.
 6 Thirty-seven percent reported that there was open discussion at the guilt deliberations about
 7 whether the defendant should get the death penalty. *Id.* at 1088. After the guilt stage was over and
 8 the defendant had been found guilty, but before any punishment stage evidence had been
 9 presented, 30 percent had decided the defendant should get the death penalty and 20 percent had
 10 decided on life. *Id.* at 1089. By way of a follow-up question, it was determined that 64.6 percent of
 11 those who had decided on death or life were "absolutely convinced" while another 30.5 percent
 12 were "pretty sure." *Id.*

13 The Project has also found that jurors heavily displace responsibility for the punishment
 14 decision. Eight of ten responded that the defendant or the law was most responsible for the
 15 defendant's punishment. *Id.* at 1094. Three of twenty believed that the jury was the agent most
 16 responsible for the defendant's punishment. *Id.* at 1095.

17 The death bias entering the punishment stage along with the inscrutability of most juries'
 18 decisions in "directed" and "threshold" statute states make any conclusions about juror treatment of
 19 rehabilitation in sentencing speculative. More research must be done among jurors participating on
 20 juries that ultimately voted for life before any reasonable arguments can be advanced on juror
 21 sentencing as an index of the moral consensus favoring life for rehabilitated capital defendants.

22 **4. Statements by American Religious Bodies**

23 The policy positions taken by church bodies regarding the death penalty and rehabilitation
 24 are indicators of contemporary standards of decency that should inform consideration of the Eighth
 25 Amendment questions. Churches are in the business of religious transformation, and represent a
 26 large segment of American society. *See e.g., Thompson*, 487 U.S. at 830 (plurality opinion)
 27 (valuing the opinions of respected organizations with expertise in the relevant area). Religious
 28

bodies have played an integral role in the development of American penal policy and reform from the time of the founding. *See, e.g.,* Gerald A. McHugh, *Christian Faith and Criminal Justice: Toward a Christian Response to Crime and Punishment* (1978) (illustrating the roots of American penology in contrasting ideologies toward crime and punishment held by Puritans and Quakers). In particular, churches have also been involved since before we became a nation state in the policy and practice of the death penalty. *See, e.g.,* Daniel A. Cohen, *Pillars of Salt, Monuments of Grace: New England Crime Literature and the Origins of American Popular Culture, 1674-1860* (1993); Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865* (1989); J. Gordon Melton, *The Churches Speak on: Capital Punishment: Official Statements from Religious Bodies and Ecumenical Organizations* (Gale Research Inc. 1989) [hereinafter Melton]. It is only recently, in fact, that most American church bodies, other than traditional "peace" churches such as Quakers, have issued public pronouncements raising questions about the use and fairness of the death penalty. A large number of churches, however, now have issued such statements (some of which are represented *infra*). Churches are split on the issue of the acceptability of the punishment, primarily along liberal-moderate/conservative lines, with many conservative (or evangelical) churches not taking a public stand on the issue. Recent social science studies, however, reveal a significant correlation between retributivist attitudes toward punishment and conservative American Protestant religion. Harold G. Grasmick, et al., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30 *Criminology* 21, 25, 38 (1992) (noting mounting evidence that religious beliefs play a crucial role in public attitudes about criminal justice policy matters); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 *J. Sci. Stud. Religion* 76, 85 (1992) (finding an association between religious fundamentalism and social support for the death penalty).

Churches that have issued statements on the death penalty -- whether for or against the penalty in general -- have registered special concern regarding the incompatibility of capital punishment with personal, spiritual reformation and rehabilitation. The concern is overwhelmingly present in statement after statement. For example, the Texas Catholic Bishops on October 20,

1 1997, "reiterate[d]" their opposition to the death penalty, calling for "more support for the families
2 of victims and urg[ing] reconciliation as well as rehabilitation of the perpetrators of the sometimes
3 heinous crimes." Statement by the Catholic Bishops of Texas on Capital Punishment, October 20,
4 1997 This statement is consistent with the Pope's own recent declaration against the death penalty
5 (except in the most extreme circumstances). A 1980 Statement on Capital Punishment by the
6 National Conference of Bishops of the Roman Catholic Church does not **per se** reject the death
7 penalty, but rather finds it incommensurate punishment in most cases, precisely because it denies
8 rehabilitation of the offender:

9 We believe that the forms of punishment must be determined with a view to the
10 protection of society and its members and to the reformation of the criminal and his
11 reintegration into society (which may not be possible in certain cases).

12 Statement on Capital Punishment 1980, at I (8), under "Purposes of Punishment." Melton, at 18.
13 Directly in line with the polling results, *supra*, the national bishops find a "difficult[y] inherent in
14 capital punishment" that "infliction of the death penalty extinguishes possibilities for reform and
15 rehabilitation for the person executed as well as the opportunity for the criminal to make some
16 creative compensation for the evil that he or she has done." *Id.* at III (14); Melton at 19. In
17 rejecting the death penalty in 1983, the Catholic Bishops of Oklahoma commented:

18 Putting human beings to death, even when done by lawful sanctions and after
19 proven terrible crimes, seems to be a kind of rejection of hope regarding those
20 persons. There are many instances of persons guilty of terrible crimes coming to a
21 complete moral change. In our own lives, have we not seen this movement from sin
22 to repentance take place?

23 Statement in Opposition to Capital Punishment (1983), Roman Catholic Bishops of Oklahoma;
24 Melton, at 27.

25 As early as 1958, the American Baptist Churches in the U.S.A. issued a statement
26 advocating the abolition of the death penalty, in part on the ground that the church held the
27 "conviction that the emphasis in penology should be upon the process of creative, redemptive
28 rehabilitation, rather than on punitive retribution." The American Baptist Churches were among
the first churches to advocate abolition. American Baptist Churches in the U.S.A., Resolution on
Capital Punishment (1958); Melton, at 53.

1 The Disciples of Christ issued a national statement in 1985 calling for abolition, in part on
2 the ground that "the use of execution to punish criminal acts does not allow for repentance or
3 restitution of the criminal." Christian Church (Disciples of Christ), Resolution Concerning
4 Opposition to Use of the Death Penalty (1985); Melton, at 58.

5 A statement was issued by an ad hoc group of Protestant, Orthodox, and Roman Catholic
6 leaders in Florida in 1984, in opposition to the reinstatement of the death penalty in that state,
7 noting that execution "eclipses" possibilities for reconciliation, and stressing the duties of an
8 offender to participate in rehabilitative activities and practice restitution "however inadequate or
9 symbolic, as a serious attempt toward reconciliation with the person to whom he has caused a life
10 of suffering." Christian Leaders of Florida, The Moral Consequences of Capital Punishment
11 (1984); Melton, at 61.

12 The Episcopal Church issued statements in 1958 and 1969 opposing capital punishment.
13 Melton, at 105.

14 The Friends United Meeting has issued an undated statement expressing its historic
15 opposition to the death penalty, observing members' belief that "the Christian way to deal with
16 crime is to seek the redemption o[r] rehabilitation of the offender." Friends United Meeting,
17 Statement on Capital Punishment; Melton, at 111.

18 The National Council of Churches issued an abolition statement in 1968, announcing its
19 "preference for rehabilitation rather than retribution in the treatment of offenders." National
20 Council of Churches of Christ in the U.S.A., Abolition of the Death Penalty (1968); Melton, at
21 120.

22 The Reformed Church in America issued a statement in 1965 opposing capital punishment,
23 noting in particular that, "Capital punishment ignores the entire concept of rehabilitation."
24 Reformed Church in America, Statement on Capital Punishment (1965); Melton, at 124.

25 The Presbyterian Church (U.S.A.) issued a statement in 1965, since reaffirmed, against the
26 death penalty, in part because of belief in "God's . . . power to redeem and restore the lost to
27 meaningful and useful life." Presbyterian Church (U.S.A.), On Capital Punishment (1965);
28

Melton, at 121.

Having produced a number of statements against the death penalty, the United Church of Christ issued a statement on Alternatives in Criminal Justice in 1981 advocating "legislation to establish programs including restitution, which require perpetrators of crimes to compensate their victims." Melton, at 134-35.

In 1984 the United Methodist Church issued a statement of policy on criminal sentencing: "[W]e urge the creation of a genuinely new system and programs for rehabilitation that will restore, preserve, and nurture the total humanity of the imprisoned. . . . Capital punishment should be eliminated since it . . . is contrary to our belief that sentences should hold within them the possibilities of reconciliation and restoration." United Methodist Church, Criminal Justice (1984); Melton, at 140-41.

The Union of American Hebrew Congregations (Reformed Judaism) issued a statement in 1959 opposing capital punishment, pledging to "foster modern methods of rehabilitation of the wrongdoer in the spirit of the Jewish tradition of tshuva (repentance)." Union of American Hebrew Congregations, Opposing Capital Punishment (1959); Melton, at 143.

As examples of conservative denominations, the Missouri Synod Lutheran Church and the Christian Reformed Church have issued lengthy and thoughtful statements on the question of capital punishment. Both churches conclude that, although the penalty may be biblically permissible, the State is not mandated by God to exercise it. Pointedly, the Christian Reformed Church concludes that executions should only rarely be utilized:

States are not called upon to convert sinners or even to reshape them, but they ought, insofar as possible, to leave room for repentance and amendment, and not unnecessarily shorten the time in which these wholesome things can occur. Death should therefore not be visited upon a person unless this extreme measure is necessitated by overriding social considerations. . . .

Justice alone does not require the death of the murderer. Justice requires only that he be punished and that his punishment be, not equivalent to, but in proportion to his crime. Justice can be served when the murderer is appropriately imprisoned.

Statement on Capital Punishment (1981); Melton, at 95.

The Missouri Synod statement declares that "neither the Scriptures nor the Lutheran Confessions state that the government *must* impose the death penalty in order to serve as the "minister of God" by punishing flagrant wrongdoing, including murder," and advocates support of humane and progressive systems of reformation within the capital context. Report on Capital Punishment (1976); Melton, at 118-19.

The National Association of Evangelicals has issued a short statement on capital punishment that places the values of retribution and rehabilitation in tension:

The place of forgiveness and rehabilitation of the criminal must not be minimized by those who are concerned with the administration of justice. However, concern for the criminal should not be confused with proper consideration for justice. Nothing should be done that undermines the value of life itself, or the seriousness of a crime that results in the loss of life.

National Association of Evangelicals (1972); Melton, at 119.

To the best of Mr. Vanisi's knowledge the religious bodies having issued the above representative number of statements of policy have not changed their positions, to date, on the death penalty or (for the most part) the primary emphasis on rehabilitation over retribution in punishment. These policy statements represent a sea-change in perspective on the issue of capital punishment, accomplished over the last two hundred years, accelerated during the middle part of this century, and accompanied by the rise of the rehabilitative ideal and evolving legal doctrine about individualized sentencing and proportionality. The breadth and depth of support for the rehabilitative ideal is notable. Most of these institutions also, for the most part, make the presumption noted above in regard to the Supreme Court that rehabilitation and retribution pose an either/or choice. Among the foregoing statements, the one that corresponds most to the societal consensus on punishment alternatives found in current polling was issued by the National Conference of Catholic Bishops in 1980, not eschewing the death penalty in theory, but finding the alternative of a life sentence plus restitution the most desirable option.

In the days of swift justice when our Puritan forefathers, Cotton and Increase Mather, had to rush to beat the hangman for a conversion, (almost-symbolic and coerced) salvation, not rehabilitation, was the religionists' and society's goal for the offender, and reestablishment of the

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1 public order was separately accomplished through the inherently oppressive scaffold spectacle
2 rather than any real reconciliation:

3 On execution day, ministers expected the prisoner to enact the drama of penitence
4 and redemption. Condemned to die by civil authorities who believed they acted in
5 accordance with divine precepts, criminals were encouraged and manipulated to
6 recant publicly their sins and plead for the mercy of God. Clergy offered the "true
7 penitence" of the prisoner as proof of the saving grace of God; the execution
8 spectacle dangled before the spectators[] eyes the journey "from the gallows to
9 glory." In this way the ritual of execution served multiple purposes. The idea that
10 the criminal "would this day be in heaven" made the hanging more palatable to
11 some.

12 Masur, *supra*, at 41. Christian ministers routinely gave execution day sermons, distributed
13 pamphlets, and produced the condemned for a public recantation of his sins for the purpose of
14 imposing social order in the name of the "God of Order." *Id.* at 41, 45. Minister Perez Fobes, for
15 example, instructed the crowd assembled to witness the hanging of a burglar that the condemned
16 believed he deserved to die, that the "pardoning mercy" of God would save him, and that the
17 spectators had better get on with the business of their own repentance. *Masur*, *supra*, at 41. Fobes
18 "clarified the relationship of the criminal to the populace-at-large" by asserting that "the difference
19 [between the criminal and the crowd] may consist only in this, that he is detected and condemned,
20 but they as yet are concealed from human eye." *Id.* at 43.

21 Even the most conservative modern church statements reveal an **entirely different**
22 **sensibility** -- rejection of a religiously-sanctioned mandatory death penalty and a desire for the life
23 of the offender in *this* world, not only in the next. This sensibility was most eloquently expressed
24 by the Rev. Pat Robertson on the CBS News show "60 Minutes," in a specific plea for the life of a
25 woman on Texas's death row:

26 In her case compassion should overrule the "so-called" sense of justice. There is a
27 certain right that society has against killers. I support that. I'm not opposed to the
28 death penalty. I think [Governor Bush] should commute her sentence.

29 Robertson affirmed that he believed in a "pro-life policy for people who have committed heinous
30 crimes if they have completely changed." He added that inmates' lives should be spared, also,
31 when they no longer posed any risk of danger to others. This policy, representative of the
32 "religious right" and also akin to the views on rehabilitation held by the broader church spectrum,

1 springs not only from gracious concern for the individual offender, but also from a sense that
2 reestablishment of the social order following a criminal breach is better accomplished by concrete
3 acts of penitence and restitution than a public punishment ritual. This attitude supports the
4 argument that our evolving standards of decency have brought us to a new place, where even
5 among the most conservative churchmen, execution of Mr. Vanisi would be a wanton and arbitrary
6 waste of life.

7 //

8 **5. Commutation Actions by Governors and State Boards**

9 Rehabilitation has played a large role in decisions by Governors and State Boards to grant
10 commutation of death sentences. Michael Radelet and Barbara Zsembik, *Executive Clemency in*
11 *Post-Furman Capital Cases*, 27 U. Richmond L. Rev. 289, 303 (1993) (noting that rehabilitation
12 plays a "secondary role" in many cases. Post-*Furman* Governors in nine states have granted
13 humanitarian commutations. In three of the nine states (Montana, Virginia, and Georgia), post-
14 *Furman* Governors commuted death sentences based primarily on the grounds that the inmate had
15 undergone Christian rehabilitation.. These commutations were granted after enormous outpourings
16 of public support for the inmates. The post-*Furman* practice of commutation based on
17 rehabilitation merely continues a long established practice in the states.

18 Post-*Furman* Nevada Governors have not granted commutation of any death sentence
19 based on any kind of humanitarian reason (including rehabilitation). For that reason, Nevada is an
20 exception to the rule represented in the other states.

21 The actions of the governors in death-penalty states in relation to rehabilitation as a
22 clemency ground are a clear measure of the evolving standards of decency of our society, because
23 executives are politically loathe to take such actions without a sense of strong support from the
24 people.

25 **6. International Opinion and Law**

26 A number of times, the Supreme Court has considered international law as a moral index
27 of evolving standards of decency. *Stanford*, 492 U.S. at 369-71; *McCleskey v. Kemp*, 481 U.S.
28 269, 300 (1987). Of course, evidence of international opinion against the death penalty, and the

growing number of non-death penalty states, must be read as consistent with rehabilitation as a punishment goal. At least one hundred and nine foreign states have abolished the death penalty in law or practice. Report of the Secretary General, Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, U.N. Doc. E/1995/78 (1995).

More importantly, however, the United States and the State of Nevada are bound by international treaty to at least provide meaningful commutation review to rehabilitated capital inmates. The United States is a party to, and has ratified, the International Covenant on Civil and Political Rights, which announces two non-derogative rights that pertain to Mr. Vanisi:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

International Covenant on Civil and Political Rights (entered into force March 23, 1976; ratified by the United States on September 8, 1992), at Article 6, §§ 1 & 4 (emphasis added). Under the Supremacy Clause of Article VI, Section 2, United States Constitution, all treaties made by the federal government are binding on the states. Nevada is currently in violation of Article 6 of the Covenant, because it has *de facto* eliminated clemency and commutation as a relief option for capital prisoners²¹. As applied to Mr. Vanisi in particular, the State might be in further violation of

²¹NRS 213.085 Board prohibited from commuting sentence of death or imprisonment for life without possibility of parole to sentence that would allow parole.

1. If a person is convicted of murder of the first degree before, on or after July 1, 1995, the board shall not commute:

(a) A sentence of death; or
(b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.

2. If a person is convicted of any crime other than murder of the first degree on or after July 1, 1995, the board shall not commute:

(a) A sentence of death; or
(b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.

1 the treaty if it provided Mr. Vanisi with no meaningful clemency or commutation review, because
 2 Article 6, Section 4 necessarily implies that the State must respect rehabilitation of an offender as a
 3 ground for meaningful commutation review. *See, e.g., Shigemitsu Dando, Toward the Abolition of*
 4 *the Death Penalty*, 72:7 Indiana Law Journal 16 (1996) (observing that the "right to seek pardon or
 5 commutation of anyone sentenced to death" presupposes respect for rehabilitative potential).

6 The right of death row prisoners in Nevada to apply for commutation of sentence does not
 7 exist. The literal absence of meaningful clemency/commutation review in Nevada directly violates
 8 Sections 1 and 4 of Article 6 of the International Covenant on Civil and Political Rights, which has
 9 been signed and ratified by the United States and is binding on the states through Article VI,
 10 Section 2, of the United States Constitution. Specifically, the death penalty
 11 clemency/commutation process in Nevada violates, by its total absence of process, these two non-
 12 derogative (against which the United States has made no reservation):

13 Every human being has the inherent right to life. This right shall be protected by
 14 law. No one shall be arbitrarily deprived of his life.

15 Anyone sentenced to death shall have the right to seek pardon or commutation of
 16 the sentence. Amnesty, pardon or commutation of the sentence of death may be
 granted in all cases.

17 International Covenant on Civil and Political Rights (entered into force March 23, 1976; ratified
 18 by the United States on September 8, 1992), at Article 6, §§ 1 & 4. The United Nations General
 19 Assembly has made clear, by way of a resolution adopted on December 15, 1980, that the purpose
 20 of Article 6, Section 4, is to guarantee that signatory countries provide **meaningful** commutation
 21 review:

22 *The General Assembly,*
 23 *Having regard to the provisions bearing on capital punishment in the International*
 24 *Covenant on Civil and Political Rights, particularly its Articles 6, 14 and 15,*

25 *Recalling its resolution 2393 (XXIII) of 26 November 1968, in which it invited*
 26 *Governments of Member States, inter alia, to ensure the most careful legal*
procedures and the greatest possible safeguards for the accused in capital cases in
countries where the death penalty obtains,

27 *Alarmed at the incidence in different parts of the world of summary executions as*
 28 *well as of arbitrary executions,*

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1 *Concerned at the occurrence of executions which are widely regarded as being*
2 *politically motivated,*

3 1. *Urges* Member States concerned:

- 4 (a) To respect as a minimum standard the content of the provisions
5 of Articles 6, 14 and 15 of the International Covenant on Civil and
6 Political Rights and, where necessary, to review their legal rules and
7 practices so as to guarantee the most careful legal procedures and the
8 greatest possible safeguards for the accused in capital cases;
9 (b) To examine the possibility of making automatic the appeal
10 process, where it exists, in cases of death sentences, as well as the
11 consideration of an amnesty, pardon or commutation in these cases;
12 (c) To provide that no death sentence shall be carried out until the
13 procedures of appeal and pardon have been terminated and, in any
14 case, not until a reasonable time after the passing of the sentence in
15 the court in the first instance;

16 2. *Requests* the Secretary-General to use his best endeavors in cases where the
17 minimum standard of legal safeguards referred to in paragraph 1 above appears not
18 to be respected. . . .

19 United Nations General Assembly Resolution 35/172 (adopted on December 15, 1980).

20 In addition, execution of Mr. Vanisi without meaningful clemency/commutation review
21 would violate customary international law, as reflected in numerous important conventions and
22 documents. An ever-growing number of countries are rejecting the death penalty as contrary to
23 civilized norms and the fundamental right to life. *See, e.g.,* Second Optional Protocol to the
24 International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty
25 (in force as of July 11, 1991) (outlawing the death penalty in all parties to the Optional Protocol);
26 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms
27 Concerning the Abolition of the Death Penalty (Convention signed on November 4, 1950)
28 (abolishing the death penalty in European member states); Additional Protocol to the American
Convention on Human Rights to Abolish the Death Penalty (in force October 6, 1993) (abolishing
the death penalty in member states, in part specifically because it does not allow for rehabilitation
of the offender). International instruments repeatedly stress that those countries which retain the
death penalty must provide procedures for meaningful commutation review. International
Covenant on Civil and Political Rights (entered into force March 23, 1976; ratified by the United
States on September 8, 1992), at Article 6, §§ 1 & 4; Safeguards Guaranteeing Protection of the

1 Rights of Those Facing the Death Penalty (adopted by the United Nations Economic and Social
2 Council in resolution 1984/50 at its Spring session on May 25, 1984, and endorsed by the United
3 Nations General Assembly in resolution 39/118, adopted without a vote on December 14, 1984)
4 (Article 7: "Anyone sentenced to death shall have the right to seek pardon, or commutation of
5 sentence; pardon or commutation of sentence may be granted in all cases of capital punishment");
6 American Convention on Human Rights (entered into force on July 18, 1978) (Article 4, Section
7 1: "Every person has the right to have his life respected. This right shall be protected by law, and,
8 in general, from the moment of conception.") (Article 4, Section 6: "Every person condemned to
9 death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be
10 granted in all cases. Capital punishment shall not be imposed while such a petition is pending
11 decision by the competent authority.").

12 This Court must stay Mr. Vanisi's execution and review the Nevada's
13 clemency/commutation rules and practices so as to guarantee the most careful legal procedures and
14 the greatest possible safeguards for the accused in capital cases (including his case), so as to
15 prevent the execution of him under circumstances that would clearly violate the International
16 Covenant on Civil and Political Liberties and the Supremacy Clause of the United States
17 Constitution, as well as customary international law. *See supra* U.N. Resolution 35/172.

18 U.S. Supreme Court Justice Douglas wrote:

19
20 When society acts to deprive one of its members of his life . . . it takes its most
21 awesome steps. No general respect for, nor adherence to, the law as a whole can
22 well be expected without judicial recognition of the paramount need for prompt,
23 eminently fair and sober criminal law procedures. The methods we employ in the
enforcement of our criminal law have aptly been called the measures by which the
quality of our civilization may be judged.

24 Douglas v. People of the State of California, 372 U.S. 353, 357 n.2 (1963).

25 It is clear that it is a principle of fundamental fairness "rooted in the traditions and
26 conscience of our people" that an inmate be given some forum, whether it be in the judicial
27 process or clemency, for the presentation of evidence that she is no longer eligible for the
28 punishment society has allotted her, so that miscarriage of justice may be avoided. *Herrera*, 506

U.S. at 411-12. Noting the severity of every country's criminal code, Andrew Hamilton commented in the Federalist Papers that if there were no "easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Herrera, 506 U.S. at 413-14 (quoting Federalist No. 74). We can be assured that our society has not deviated from that standard, and if a petitioner can show that he is "innocent" of the punishment to be inflicted, he must be given the opportunity to make his case.

CLAIM SIXTEEN

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

Mr. Vanisi asks this court to strike the death sentence against him because Nevada's capital punishment scheme empowers prosecutors to seek death, and secure death sentences, in an arbitrary, idiosyncratic, and discriminatory manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

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

1
2 their rights to due process and equal protection under the Constitution. The State's capital
3 punishment legislation is thus unconstitutional on its face and as administered.²²

4 **A. Unguided and Unreviewed Prosecutorial Discretion Violates the Constitutional**
5 **Proscription Against Cruel and Unusual Punishment.**

6 A capital punishment scheme that allows for the arbitrary and capricious selection of
7 capital defendants violates both the Eighth and Fourteenth Amendments to the United States
8 Constitution. See Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238
9 (1972). In Furman, the death sentences under review were deemed

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

17 ²² There is an acknowledged difference between a "groundless prosecution" and an
18 "arbitrary and capricious prosecution," State v. Smith, 495 A.2d 507, 515-16 (N.J. Super. Ct. Law
19 Div. 1985). It is the latter concern — as to the inherent arbitrariness and inconsistency of the
20 method by which death penalty decisions are made in Nevada — that animates Mr. Vanisi's
21 arguments. Cf. Maynard v. Cartwright, 486 U.S. 356, 360-64 (1988) (in light of Eighth
22 Amendment's concern for minimizing arbitrary and capricious action, vagueness challenge under
23 the Amendment to aggravating factor is facial, not based on facts of the case at hand); Matter of
24 Nicholas v. Kahn, 47 N.Y.2d 24, 28-29, 33-34 (1979) (conflict of interest rules held unenforceable
25 against all agency employees, whatever their circumstances, as the accompanying exemption
26 procedure vested unfettered discretion in chairman to grant or deny exemption, without any
27 guidelines, rendering his decision "arbitrary and capricious as a matter of law"). Mr. Vanisi is
28 making both a facial challenge to NRS 200.033 and to its overall administration, not just a
challenge based on its application in his case. Cf. People v. Galak, 80 N.Y.2d 715, 721-22 (1993)
(notwithstanding defendant's lawful stop and arrest, unconstitutional inventory search policy of
Police Department, which was "arbitrary" and also afforded an "impermissible level of discretion"
to officers in the field, mandated suppression of contraband discovered); Nicholas, 47 N.Y.2d at
28-29, 34 (where neither Legislature nor administrative agency established guidelines for
administrative action, and chairman of agency was vested with unfettered discretion to act,
exemption procedure under review was "arbitrary and capricious as a matter of law" and could not
be enforced against any person who had sought exemption under "fatally flawed" system).

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1 408 U.S. at 309-10 (Stewart, J., concurring) (footnotes omitted); see Gregg, 428 U.S. at 188
2 (quoting Furman with approval). To rationalize the selection of those defendants who are to die,
3 the sentencer's discretion must instead be guided and circumscribed. Furman mandates that
4 "where discretion is afforded a sentencing body on a matter so grave as the determination of
5 whether a human life should be taken or spared, that discretion must be suitably directed and
6 limited so as to minimize the risk of wholly arbitrary and capricious action." Godfrey v. Georgia,
7 446 U.S. 420, 427 (1980) (quoting Gregg, 428 U.S. at 189).

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

14 Relying on certain passages in the plurality and concurring opinions in Gregg, numerous
15 courts of other states have rejected complaints about the standardless exercise of discretion by
16 prosecutors in capital cases. *See, e.g., Keenan v. Superior Court*, 177 Cal. Rptr. 841, 845-46 (Ct.
17 App. 1981); *see also* cases cited therein.

18 To be sure, a prosecutor is afforded broad discretion in deciding what charges to bring
19 against a defendant. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system,
20 so long as the prosecutor has probable cause to believe that the accused committed an offense
21 defined by statute, the decision whether or not to prosecute, and what charge to file or bring before
22 a grand jury, generally rests entirely in his discretion."). Deciding whether to seek the death
23 penalty, however, is not a charging decision. This decision — which is bound to be subjective and
24 laden with value judgments — implicates only the sentencing, and not the charging, function: The
25 prosecutor does not determine, based on the definitions within the Penal Law, which charges are
26 warranted, but instead decides that certain defendants are eligible to face qualitatively more severe
27 punishment than others indicted on identical charges.
28

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

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

Id. at 1002-04 (emphasis added); see also Deal v. United States, 508 U.S. 129, 133-34 & n.2 (1993) (government's proposed interpretation of a sentencing-enhancement statute "would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions . . . by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment. . . . We are not disposed to give the statute a meaning that produces such strange consequences"; while traditional prosecutorial discretion "pertains to the prosecutor's universally available and unavoidable power to charge or not to charge an offense," the government's "reading would confer the extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging"); State ex rel. Schillberg v. Cascade Dist. Court, 621 P.2d 115, 119 (Wash. 1980) (court's statutory authority, after the defendant's arraignment, to refer him for evaluation as candidate for deferred prosecution did not invade prosecutor's traditional charging function: "[T]he court's disposition of the [defendant's] petition [for deferred prosecution] follows the prosecution's decision to charge; once the accused has been charged and is before the court, the charging function ceases."); State v. Leonardis, 375

1 A.2d 607, 617 (N.J. 1977) (deferred prosecution "entails more than merely the charging function,
2 and hence, cannot be said to fall solely within the discretion of the prosecutor").

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

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

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

19 428 U.S. at 199. Absent appropriate channeling, the prosecution's life and death decisions can be
20 based on a coin toss, a prosecutor's political ambitions, racial consciousness, or on any or no
21 reason at all. Even if every prosecutor tries to behave responsibly by the light of his or her
22 individual judgments, there can be no consistency among the myriad assistants involved in capital
23 cases across the state: Nothing requires that the factors driving NRS 200.033 decisions be
24 articulated, vetted, shared, or reviewed.

25 Since Nevada's statutory scheme does not provide guidance to prosecutors, or demand that
26 factors governing death-notice determinations be established and subject to judicial oversight, the
27 scheme authorizes arbitrariness in the ultimate imposition of capital sentences. *Compare*
28 Nicholas, 47 N.Y.2d at 28-29, 34 (where neither Legislature nor administrative agency established
guidelines for administrative action, and agency's chairman was thus vested with unfettered
discretion to act, exemption procedure under review was "arbitrary and capricious as a matter of

law”), with Matter of Big Apple Food Vendors’ Assoc. v. Street Vendor Review Panel, 90 N.Y.2d 402, 408 (1997) (in contrast to the “untrammelled, unreviewable discretion” in Nicholas, “the statutory delegation [reviewed in Big Apple] itself provides an adequate objective, intelligible standard for administrative action”). As held in Furman, 408 U.S. 238, a death sentence imposed under such a scheme necessarily violates the Eighth Amendment, and should be held to violate the ban against cruel and unusual punishment under the State Constitution as well.

B. Unguided and Unreviewed Prosecutorial Discretion Violates Due Process

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

Thus, that the prosecutor does not have the authority to impose a death sentence, but only to seek such a sentence by filing a notice of intent under NRS 200.033, cannot insulate his or her decision from the need for procedural safeguards. The channeling of discretion at later points in the process neither negates nor cures arbitrariness at this earliest stage: But for affirmative action by the district attorney, a defendant would not be subject to the death penalty at all. Surely, a defendant has a protected life interest in the very decision by which it is determined whether his life will ever be in jeopardy.

As Woodard made clear, moreover, due process protection can apply even to decisions committed entirely to the unfettered discretion of the executive branch. See id. at 290-92 (Stevens, J., concurring in part and dissenting in part); id. at 288-89 (O'Connor, J., concurring, joined by Souter, Ginsburg, & Breyer, JJ.) (holding death-sentenced prisoners are entitled to procedural due process with respect to governor's determination to grant or deny clemency).²³ Thus, notwithstanding the prosecutor's "wide discretion" in conducting grand jury proceedings, his or her actions are subject to review and correction even if the evidence supporting the indictment suffices. See People v. Huston, 88 N.Y.2d 400, 406, 410 (1996) (indictment dismissed due to prosecutorial misconduct); see also People v. Caracciola, 78 N.Y.2d 1021, 1022 (1991) (same relief, based on confusing legal instructions given to grand jurors); People v. Louissant, 240 A.D.2d 433, 433-34 (2d Dept. 1997) (same relief, improper cross-examination of defendant); People v. Grafton, 115 A.D.2d 952, 952-53 (4th Dept. 1985) (same relief, prosecutorial misconduct). If it is "as important" that a defendant "be fairly and justly accused . . . as that he be fairly and impartially tried," Matter of Jaffe v. Scheinman, 47 N.Y.2d 188, 195 (1979) (citation omitted), *legislative overruling recognized by Matter of Attorney General v. Firetog*, 94 N.Y.2d 477 (2000), it must be equally important that he be fairly and justly subjected to capital punishment.

In sum, to withstand constitutional scrutiny, the district attorneys' exercise of discretion under NRS 200.033 must be channeled and subject to review. Cf. Galak, 80 N.Y.2d at 721 (noting, in striking down police inventory search policy as unconstitutional, "when 'uncanalized discretion' is ceded to those in the field, there is created not just the possibility but the probability that the search and seizure of a citizen's personal effects will be conducted inconsistently, subject to caprice and the personal preferences of the individual officers — in short, it will be conducted arbitrarily") (citation omitted). At the very least, a list of factors applicable to NRS 200.033

²³ Similarly, equal protection guards against laws that grant unfettered discretion to select among similarly situated individuals and thereby create arbitrary classifications. See Yick Wo v. Hopkins, 118 U.S. 356, 367-68, 373 (1886).

determinations should be compiled and available for inspection, so that improper or irrelevant considerations can be weeded out; these factors should be applied uniformly across the state, to foster consistency in the selection of capital defendants; and prosecutors should be required to file, in every first-degree murder case, a contemporaneous statement explaining the rationale for filing or choosing not to file a notice of intent to seek the death penalty.

These safeguards would not only reduce the risk of arbitrary, capricious, and inconsistent decisionmaking, they would also advance this Court's eventual proportionality review: Written records explaining every NRS 200.033 determination — whether it be to seek death or to not seek death — would be available for both individual and comparative consideration. *See State v. Cooper*, 731 A.2d 1000, 1024 (N.J. 1999) (“The lack of a contemporaneous and reliable summary by the prosecutors of the various factors that were considered in arriving at the decision to forego capital prosecution diminishes the effectiveness and reliability of our [proportionality] review.”).

Such safeguards would also foster public confidence in the administration of the death penalty. *Cf. Gardner v. Florida*, 430 U.S. 349, 358 (1977) (“It is of vital importance to the defendant *and to the community* that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion.”) (emphasis added); *Nicholas*, 47 N.Y.2d at 30 (“It is not only essential that . . . [Public Service Commission] employees in fact avoid basing their decisions on personal financial considerations, it is also critical that they appear to the public to be avoiding that evil.”). Equally significant, these protections would hardly be burdensome to district attorneys. If a legitimate need for confidentiality were identified in a particular case, provisions could be made to accommodate these concerns, *e.g.*, *in camera* appellate review of a prosecutor's reasons for reaching the decision. *See People v. Castillo*, 80 N.Y.2d 578, 586-87 (1992); *cf. Gardner*, 430 U.S. at 360-61 (“Since the State must administer its capital-sentencing procedures with an even hand, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence.”) (citation omitted).

As Nevada's death penalty legislation is currently drafted and administered, however, nothing requires that these safeguards — or indeed any safeguards at all — be implemented. For

1 all the reasons stated, the vesting of unlimited and unreviewable discretion in district attorneys to
2 select capital defendants renders the State's scheme unconstitutional. Given the acknowledged
3 and undeniable fact that "death is a different kind of punishment from any other . . . in both its
4 severity and its finality," Gardner, 430 U.S. at 357 (internal quotation marks and citation omitted),
5 this Court should be especially vigilant in ensuring fairness, rationality, and a modicum of
6 uniformity in the determination of defendants' eligibility for this ultimate penalty.

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

11 The Nevada Supreme Court defines too broadly the scope of aggravating circumstances,
12 specifically its definition of prior convictions and "at random and without apparent motive." *See* NRS
13 200.033(2) and (9).

14 Since the current system violates the ban against cruel and unusual punishment and
15 defendants' rights to Due Process and Equal Protection, the NRS 200.033 notice filed against Mr.
16 Vanisi must be stricken, and either the judgment reversed, or, in the alternative, the death sentence
17 vacated. This Court should either remand this matter to the trial court for re-sentencing or reduce the
18 sentences to life-without-parole.

19 **CLAIM SEVENTEEN:**

20 **NEVADA'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL INsofar AS**
21 **THEY PERMIT A DEATH-QUALIFIED JURY TO DETERMINE A CAPITAL**
22 **DEFENDANT'S GUILT OR INNOCENCE.**

23 Death qualification results in a conviction-prone jury for the guilt phase and disproportionately
24 and unlawfully excludes certain cognizable groups from the jury venire. This prejudice was
25 unnecessary, because the State's interests could be fully reconciled with his rights to a fair and
26 representative jury by death qualifying jurors *after* (and if) he was convicted of a capital offense.

27 Death qualification should be prohibited because of its distinct unfairness to the defendant.
28

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1 Thus, pretrial death qualification violates a Nevada defendant's rights to an impartial jury and due
2 process, as well as other constitutional and statutory rights. See U.S. Const. amends. V, VI, VIII, XIV.

3 **A. The Constitution Prohibits Pretrial Death Qualification**

4 Pretrial death qualification undermines a capital defendant's right to a fair trial. First, the
5 process conditions jurors toward a guilt verdict because it requires them to assume the defendant's
6 guilt. Protracted discussions with potential jurors regarding penalty implicitly suggest the defendant's
7 guilt, thereby undermining the presumption of innocence and impairing the impartiality of potential
8 jurors.²⁴

9
10 Second, the surviving jury, when compared to a traditionally composed jury, is conviction-
11 prone and possesses pro-prosecution attitudes.²⁵ The social science research demonstrating the
12 conviction proneness of death-qualified juries came from numerous researchers using diverse subjects
13 and varied methodologies. "The key to the studies' importance . . . is the remarkable consistency of
14 data. [A]ll reached the same monotonous conclusion: Death-qualified juries are prejudicial to the

15
16 ²⁴ See Grigsby v. Mabry, 569 F. Supp. 1273, 1302-05 (E.D. Ark. 1983) (discussing studies
17 and expert testimony on the "process effect," and noting that subjects exposed to pretrial death
18 qualification are "(1) more predisposed to convict the defendant, (2) more likely to assume . . . that
19 the defendant will be convicted and sentenced to death, and (3) more likely to assume that the law
20 disapproves of persons who oppose the death penalty and (4) more likely to assume that the judge,
21 the prosecutor and the defense attorney all believe the defendant to be guilty and that he will be
22 sentenced to die and (5) are themselves far more likely to believe that the defendant deserves the
23 death penalty" and that (6) "imagining . . . an event and publicly affirming one's commitment to it
24 . . . increases the likelihood that [the juror] will allow that event to occur"), *aff'd*, 758 F.2d 226
25 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986); National Jury
26 Project, Jurywork: Systematic Techniques § 23.01[4], n.3 (Elissa Krauss & Beth Bonora eds., 2d
27 ed.) (1998) [hereinafter Jurywork: Systematic Techniques]; Craig Haney *et al.*, 'Modern' Death
28 Qualification: New Data On Its Biasing Effects, 18 Law & Hum. Behav. 619 (1994) [hereinafter
Haney *et al.*, 'Modern' Death Qualification]; Craig Haney, Examining Death Qualification:
Further Analysis of the Process Effect, 8 Law & Hum. Behav. 133, 134-35 (1984) [hereinafter
Haney, Examining Death Qualification]; Craig Haney, On the Selection of Capital Juries: The
Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121, 128-32 (1984).

²⁵ See Grigsby 569 F. Supp. at 1287-1313; Keeten v. Garrison, 578 F. Supp. 1164, 1171-79
(W.D.N.C.), *rev'd*, 742 F.2d 129 (4th Cir. 1984). For a listing of pro-prosecution attitudes, see R.
1670-71; see also authorities cited in n. 122, *post*.

defendant.” Jurywork: Systematic Techniques at § 23.04[4][a].²⁶ “The true impact of death

²⁶ See James R. Acker *et al.*, The Empire State Strikes Back: Examining Death- and Life- Qualification of Jurors and Sentencing Alternatives Under New York’s Capital-Punishment Law, 10 *Crim. Just. Pol’y Rev.* 49 (1999) [hereinafter Acker *et al.*, The Empire State Strikes Back]; Jane Goodman-Delahunty *et al.*, Construing Motive in Videotaped Killings: The Role of Jurors’ Attitudes Toward the Death Penalty, 22 *Law & Hum. Behav.* 257 (1998); Ronald C. Dillehay & Marla R. Sandys, Life Under *Wainwright v. Witt*: Juror Dispositions and Death Qualification, 20 *Law & Hum. Behav.* 147 (1996); Haney *et al.*, ‘Modern’ Death Qualification at 619; Phoebe C. Ellsworth, To Tell What We Know or Wait for Godot? 15 *Law & Hum. Behav.* 77 (1991); Michael L. Neises & Ronald C. Dillehay, Death Qualification and Conviction Proneness: *Witt* and *Witherspoon* Compared, 5 *Behav. Sci. & L.* 479 (1987); Michael Finch & Mark Ferraro, The Empirical Challenge to Death-Qualified Juries: On Further Examination, 65 *Neb. L. Rev.* 21 (1986); Irwin A. Horowitz & David G. Seguin, The Effects of Bifurcation and Death Qualification on Assignment of Penalty in Capital Crimes, 16 *J. Applied Soc. Psych.* 165 (1986); Rick Seltzer *et al.*, The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example, 29 *How. L.J.* 571 (1986); Gary Moran & John C. Comfort, Neither “Tentative” Nor “Fragmentary”: Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment, 71 *J. Applied Psych.* 146 (1986); Samuel Gross, Determining the Neutrality of Death-Qualified Juries, 8 *Law & Hum. Behav.* 7 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 *Law & Hum. Behav.* 31 (1984) [hereinafter Fitzgerald & Ellsworth, Due Process vs. Crime Control]; Claudia L. Cowan *et al.*, The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation, 8 *Law & Hum. Behav.* 53 (1984); Phoebe C. Ellsworth *et al.*, The Death-Qualified Jury and the Defense of Insanity, 8 *Law & Hum. Behav.* 81 (1984); William C. Thompson *et al.*, Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts, 8 *Law & Hum. Behav.* 95 (1984); Joseph B. Kadane, After *Hovey*: A Note on Taking Account of the Automatic Death Penalty Jurors, 8 *Law & Hum. Behav.* 115 (1984) [hereinafter Kadane, After Hovey]; Haney, Examining Death Qualification at 133.

For a detailed analysis of both the studies and expert testimony, see Grigsby, 569 F. Supp. at 1291-1304; Keeten, 578 F. Supp. at 1171-79; Hovey v. Superior Court, 616 P.2d 1301, 1314-46 (Cal. 1980), *superseded by statute on other grounds as recognized in* People v. Box, 5 P.3d 130 (Cal. 2000). Insofar as Lockhart criticized the results of these studies, the criticism is unwarranted. The Court’s analysis — which failed to consider the studies collectively — disregarded sound academic principles. “[T]he one-by-one elimination of studies from a consistent body of research shows an ignorance of the principle of convergent validity.” Phoebe C. Ellsworth, Unpleasant Facts: The Supreme Court’s Response to Empirical Research on Capital Punishment, in Challenging Capital Punishment: Legal and Social Science Approaches 177, 194-97 (Kenneth C. Haas & James A. Inciardi, eds. 1988); see Lockhart, 476 U.S. at 189 (Marshall, J., dissenting) (“Where studies have identified and corrected apparent flaws in prior investigations, the results of the subsequent work have only corroborated the conclusions drawn in the earlier efforts.”); Jurywork: Systematic Techniques at § 23.04[4][a]; see also Hovey, 616 P.2d at 1341-46

1 qualification on the fairness of a trial is likely even more devastating than the studies show” because
 2 prosecution use of peremptory challenges “expand[s] the class of scrupled jurors excluded as a result
 3 of the death-qualifying voir dire.” Lockhart, 476 U.S. at 190-91 (1986) (Marshall, J., dissenting); *see*
 4 *also* Grigsby, 569 F. Supp. at 1308-10; Bruce J. Winick, Prosecutorial Peremptory Challenge Practices
 5 in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982).

6 Nor should this Court accept the contention that life qualification²⁷ somehow mitigates this
 7 prejudice. All jurors — regardless of whether they are life- or death-oriented — fall prey to the
 8 conditioning effects of the pretrial process in which the defendant’s guilt is assumed. *infra*. In fact,
 9 in life qualifying a jury, the defense may be drawn into the conditioning process, appearing to advocate
 10 — not a finding of innocence — but imposition of a lesser sentence. Nor does life qualification’s
 11 outcome alleviate the conviction proneness or attitudinal bias of the resulting jury. Its failure to
 12 produce excusals in numbers comparable to those from death qualification renders illusory any such
 13 statutory symmetry. *See* Craig Haney *et al.*, ‘Modern’ Death Qualification at 628 (finding that the
 14 relatively few potential jurors excused because of life qualification has little effect on the overall
 15 disposition of the surviving jury); Kadane, After Hovey at 119.²⁸

16 Third, death qualification substantially reduces jury diversity. African Americans and other
 17 racial minorities, women, persons of certain religions, and members of other cognizable groups will
 18 be less likely to survive the process. *See* Acker *et al.*, The Empire State Strikes Back at 69 (“The
 19
 20
 21 (addressing criticisms of studies).

22 ²⁷ Life qualification seeks to identify those jurors whose views in favor of the death penalty
 23 preclude or substantially impair them from rendering an impartial sentence. *See* C.P.L. §
 24 270.20(1)(f); Morgan v. Illinois, 504 U.S. 719, 737 (1992); *see also* Point X., *post*.

25 ²⁸ In upholding, by a bare majority, pre-guilt-phase death qualification against a state
 26 constitutional attack, the Connecticut Supreme Court invoked a capital case pending before it
 27 where the ratio of jurors removed through life qualification as opposed to death qualification was 3
 28 to 2. *See* State v. Griffin, 741 A.2d 913, 934 (Conn. 1999). The majority thereupon opined that
 — assuming death penalty beliefs are predictive of jury voting behavior — it could “not [be]
 conclude[d]” that pre-guilt-phase death and life qualification results in a “Connecticut jury that is
 more, rather than less, ‘conviction prone.’” *Id.* The instant case stands in stark contrast.

1 death- and life-qualification process causes a greater than 50 percent reduction in the proportion of
 2 non-whites eligible for capital jury service.”); Samuel R. Gross, Update: American Public Opinion
 3 on the Death Penalty — It’s Getting Personal, 83 Cornell L. Rev. 1448, 1451 (1998) (“Race and sex,
 4 the two major demographic predictors of death penalty attitudes, continue to be influential on every
 5 survey.”); William J. Bowers *et al.*, A New Look at Public Opinion on Capital Punishment: What
 6 Citizens and Legislators Prefer, 22 Am. J. Crim. L. 77, 128-30 (1994) (1991 poll reveals that race and
 7 gender are “statistically significant predictors” for support for capital punishment in New York State);
 8 Fitzgerald & Ellsworth, Due Process vs. Crime Control at 46 (blacks and women disproportionately
 9 excluded).²⁹ Indeed, a recent poll indicates that, nationwide, a mere 36% of African Americans
 10 continue to support the death penalty. *See* Zogby International, Zogby America June 21, 2000 Poll
 11 — Likely Voters, Question 8.

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

17 This Court should interpret the right to an impartial jury and other guarantees of the State
 18 Constitution as forbidding pretrial death qualification. Numerous jurists have reached the same
 19 conclusion. *See Griffin*, 741 A.2d at 948 (Berdon, J., dissenting) (“[P]utting the studies aside, anyone
 20 with any common sense and who has the experience of life, would be compelled to come to the
 21 conclusion that venire persons who favor the death penalty are more conviction prone than those who
 22 oppose it.”); *id.* at 953, 955 (Norcott & Katz, JJ., dissenting) (finding empirical evidence convincing
 23 but also expressing “intuitive agreement with the claim that death qualified juries are disposed to
 24 convict at the guilt phase”; while cognizant of state’s interest in conserving “cost, time and judicial
 25

26
 27 ²⁹ Mr. Vanisi has standing to raise this claim. *See Powers v. Ohio*, 499 U.S. 400, 402
 28 (1991); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994).

resources,” “given the stakes involved, these concerns are [not] compelling enough” to justify death qualifying a jury before the guilt phase); State v. Bey, 548 A.2d 887, 923 (N.J. 1998) (Handler, J., dissenting) (criticizing Lockhart and noting “in no other context has this Court accepted the proposition that mere prosecutorial convenience — or any state interest — justifies procedures that render the jury somewhat more conviction prone”) (citations and internal quotations omitted); State v. Ramseur, 524 A.2d 188, 295-99, 344-48 (N.J. 1987) (O’Hern, J., concurring; Handler, J., dissenting) (questioning Lockhart and urging that defendant had independent state constitutional right to traditionally composed jury on ground that “pricing the expediency and efficiency of trials at the expense of a capital defendant’s right to be tried before an impartial jury conflicts with our traditional sense of fairness and justice”); Commonwealth v. Maxwell, 477 A.2d 1309, 1319-22 (Pa. 1984) (Nix, C.J., dissenting) (finding death qualification violates state constitution and noting “the time has come to acknowledge on the basis of the considerable reliable empirical data now available that which common sense has long suggested to be true, namely, that the death qualification process . . . produces juries that are both prosecution-prone and unrepresentative”); State v. Young, 853 P.2d 327, 394 (Durham, J., dissenting) (criticizing Lockhart and arguing that “the dual forms of conviction-proneness that death qualification causes . . . violates a defendant’s right to ‘trial by an impartial jury,’ as guaranteed by [the State Constitution,] which requires that ‘in capital cases the right of trial by jury shall remain inviolate’”); State v. Irizarry, 763 P.2d 432, 435-36 (Wash. 1988) (Utter, J., concurring).³⁰

B. Because the Defendant’s Interest in a Fair Determination of Guilt or Innocence by an Impartial and Representative Jury Outweighs Nevada’s Interest In Pretrial Death Qualification, the Process Violates the Federal Constitution.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court first confronted the issue whether death qualification produces an unconstitutionally biased jury for the purpose of determining guilt. Although the Court held that the defendant had not substantiated his claim, it recognized that

³⁰ Alternatively, given Nevada’s overriding interest in fairness and jury diversity, the Court should consider invoking its supervisory powers to eliminate the practice of pre-guilt-phase death qualification. See Griffin, 741 A.2d at 955 (Norcott, J., & Katz, J., dissenting).

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1 further proof might have done so. Id. at 517, 520-21 & n.18. In that event, the Court speculated that
2 under the Federal Constitution:

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

7 Id. at 520-21 & n.18. Therefore, at a minimum, the Constitution requires "balancing of the harm to
8 the individual . . . against the benefit sought by the government." Cooper v. Morin, 49 N.Y.2d 69, 79
9 (1979). And, even were this Court to accept the notion that a State interest *could* outweigh a capital
10 defendant's state constitutional right to a determination of guilt or innocence by a wholly neutral and
11 representative jury, Nevada would not have such an interest.

12 CLAIM EIGHTEEN:

13 VANISI'S SENTENCE OF DEATH WAS IMPOSED UNDER THE INFLUENCE OF 14 PASSION, PREJUDICE, OR ARBITRARY FACTOR(S), IN VIOLATION OF THE FIFTH, 15 SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

16 Supporting Facts.

17 The high media profile which this case received and the emotional testimony from the State's
18 witnesses unfairly prejudiced Mr. Vanisi in the eyes of the jury, causing the jury to base its decision
19 upon these factors instead of the facts of the case. Accordingly, there is a strong indication that the
20 death sentence was then imposed under the influence of passion, prejudice, or other arbitrary factors.

21 In Godfrey v. Georgia, 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed 398 (1980), Justice Marshall
22 in his Concurring Opinion, explains the problem of passion and prejudice inherent in the capital
23 sentencing context:

24 ...I think it necessary to emphasize that even under the prevailing view that the
25 death penalty may, in some circumstances, constitutionally be imposed, it is not
26 enough for a reviewing court to apply a narrowing construction to otherwise
27 ambiguous statutory language. The jury must be instructed on the proper, narrow
28 construction of the statute. The Court's cases make clear that it is the sentencer's
discretion that must be channeled and guided by clear, objective, and specific
standards. See *ante*, at 428. To give the jury an instruction in the form of the bare
words of the statute — words that are hopelessly ambiguous and could be
understood to apply to any murder, see ante, at 428-429; Gregg v. Georgia, 428
U.S., at 201 — would effectively grant it unbridled discretion to impose the death
penalty. Such a defect could not be cured by the *post hoc* narrowing construction of

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1 an appellate court. The reviewing court can determine only whether a rational jury
2 might have imposed the death penalty if it had been properly instructed; it is
3 impossible for it to say whether a particular jury would have so exercised its discretion
4 if it had known the law.

* * *

5 The preceding discussion leads me to what I regard as a more fundamental
6 defect in the Court's approach to death penalty cases. In *Gregg*, the Court rejected
7 the position, expressed by my Brother BRENNAN and myself, that the death penalty
8 is in all circumstances cruel and unusual punishment forbidden by the Eighth
9 and Fourteenth Amendments. Instead it was concluded that in "a matter so grave as
10 the determination of whether a human life should be taken or spared," it would be both
11 necessary and sufficient to insist on sentencing procedures that would minimize or
12 eliminate the "risk that [the death penalty] would be inflicted in an arbitrary and
13 capricious manner." 428 U.S., at 189, 188 (opinion of STEWART, POWELL, and
14 STEVENS, JJ.). Contrary to the statutes at issue in *Furman v. Georgia*, 408 U.S. 238
15 (1972), under which the death penalty was "infrequently imposed" upon "a
16 capriciously selected random handful," *id.*, at 309-310 (STEWART, J., concurring),
17 and "the threat of execution [was] too attenuated to be of substantial service to
18 criminal justice," *id.*, at 311-313 (WHITE, J., concurring), it was anticipated that the
19 Georgia scheme would produce an evenhanded, objective procedure rationally
20 "distinguishing the few cases in which [the death penalty] is imposed from the many
21 cases in which it is not." *Gregg v. Georgia, supra*, at 198, quoting *Furman, supra*, at
22 313 (WHITE, J., concurring).

23 For reasons I expressed in *Furman v. Georgia, supra*, at 314-371 (concurring
24 opinion), and *Gregg v. Georgia, supra*, at 231-241 (dissenting opinion), I believe that
25 the death penalty may not constitutionally be imposed even if it were possible to
26 do so in an evenhanded manner. But events since *Gregg* make that possibility
27 seem increasingly remote. Nearly every week of every year, this Court is presented
with at least one petition for certiorari raising troubling issues of noncompliance with
the strictures of *Gregg* and its progeny. On numerous occasions since *Gregg*, the
Court has reversed decisions of State Supreme Courts upholding the imposition
of capital punishment, frequently on the ground that the sentencing proceeding
allowed undue discretion, causing dangers of arbitrariness in violation of *Gregg*
and its companion cases. These developments, coupled with other persuasive
evidence, strongly suggest that appellate courts are incapable of guaranteeing the
kind of objectivity and evenhandedness that the Court contemplated and hoped for in
Gregg. The disgraceful distorting effects of racial discrimination and poverty
continue to be painfully visible in the imposition of death sentences. And while
hundreds have been placed on death row in the years since *Gregg*, only three persons
have been executed. Two of them made no effort to challenge their sentence and were
thus permitted to commit what I have elsewhere described as "state-administered
suicide." *Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (dissenting opinion). See also
Gilmore v. Utah, 429 U.S. 1012 (1976). The task of eliminating arbitrariness in the
infliction of capital punishment is proving to be one which our criminal justice
system -- and perhaps any criminal justice system -- is unable to perform. In
short, it is now apparent that the defects that led my Brothers Douglas, STEWART,
and WHITE to concur in the judgment in *Furman* are present as well in the statutory
schemes under which defendants are currently sentenced to death.

28 *Godfrey*, 466 U.S. at 437-440, 100 S.Ct. at 1770-1771 (emphasis added).

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1 Justice Marshall then gave a powerful conclusion:

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

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

12 CLAIM NINETEEN:

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

19 Supporting Facts.

20 The authority of *Finger* was not available for Petitioner at the time of trial. Therefore, his
21 constitutional ability to present relevant issues regarding his mental health and intoxication regarding
22 his state of mind during the alleged crime, were never before the court. Likewise, the Nevada
23 Supreme Court could not have reviewed the same on direct appeal. The record is clear that Vanisi
24 suffered from Bipolar Disorder with psychosis at the time of his arrest, diagnosed first upon his
25 incarceration. Moreover, it is also clear that Vanisi was under the influence of speed and marijuana
26 and suffering from lack of sleep at the time of the crime.(TT Volume XI, 1720) The jury in the guilt
27 phase was not presented with said information by counsel for Vanisi or the State. Nor was the jury
28 instructed how it might consider such information in it determination of Vanisi's state of mind at the
time of the offense.

Legal Argument.

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

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

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

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1 **Inadequate Review by Nevada Supreme Court.**

2 Constitutionally-adequate review in a capital case, including the mandatory review required
3 by NRS 177.055(2), must take into account the entire record of the proceedings.

4 Any attempt to conduct the review of the capital sentence in this matter without consideration
5 of the mental state of Mr. Vanisi during the alleged crime would violate the due process right to
6 fundamentally fair review on an adequate record, the equal protection right to review on the same
7 basis of a complete record afforded to other defendants, and the Eighth Amendment right to a reliable
8 sentence under procedures which must satisfy "heightened standards of reliability," Ford v.
9 Wainwright, 474 U.S. 399 (1986) (plurality), in capital cases.

12 **It would be odd were we now to abandon our insistence upon unfettered
13 presentation of relevant information, before the final fact antecedent to execution
14 has been found.**

15 **Rather, consistent with the heightened concern for fairness and accuracy
16 that has characterized our review of the process requisite to taking of a human
17 life, we believe that any procedure that precludes the prisoner or his counsel from
18 presenting material relevant to his sanity or bars consideration of that material
19 by the fact finder is necessarily inadequate.**

20 Id. at 414. E.g., Dobbs v. Zant, _ U.S. _, 113 S.Ct. 835, 836 (1993) (per curiam), *infra*; In re Stevens
21 B., 25 Cal.3d 1, 548 P.2d 480, (1979):

22 **On appeal there must be an adequate record to enable the court to pass upon the
23 questions sought to be raised (citation omitted) This requirement is particularly
24 important where...the sufficiency of the evidence is challenged.**

25 Id. at 484; *see also* Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1995), wherein the court explained
26 that an "independent review" - as required in a habeas action - must include the entire record.

27 **The record must show that the district court examined all relevant parts of the
28 state court record. Since it does not, we cannot affirm the dismissal of the habeas
petition.**

Id. at 961. The court recognized that a review of the "complete state court record:"

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1 ...is indispensable to determining whether the habeas applicant received a full
2 and fair state court evidentiary hearing resulting in reliable findings.

3 Id., at 962.

4 CLAIM NINETEEN:

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

10 Supporting Facts.

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

16 Legal Argument.

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

21 Defense counsel has a duty to reasonably investigate possible mitigating evidence. See
22 Haberstroh v. State, 109 Nev. 22 (1993).

23 In the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), the Court determined that
24 prejudice resulted and the *Strickland* standard for reversal based upon ineffective assistance was met:
25

26 Sanborn's defense was clearly prejudiced by his counsel's failure to develop and
27 present evidence which would have corroborated Sanborn's testimony and discredited
28 the state's expert witness. Because of counsel's lack of due diligence, Sanborn was
deprived of the opportunity to present testimony material to his defense, and we

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1 are therefore unable to place confidence in the reliability of the verdict. See
2 Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674
3 (1984).

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

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

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

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

13 For example, if mental health records indicate that a psychological evaluation may produce
14 favorable reports sufficient to mitigate a sentence of death, counsel's failure to request such an
15 evaluation is both inadequate and prejudicial. See, e.g., Deutscher v. Whitley, 946 F.2d 1443, 1446
16 (9th Cir.1991), *vacated*, 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992), *aff'd sub nom.*
17 Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir.1994); Riley v. State, 110 Nev. 638, 650, 878 P.2d
18 272, 280 (1994).

19 In Evans v. Lewis, 855 F.2d 631 (9th Cir.1988), counsel's failure to investigate defendant's
20 mental condition for the purpose of presenting evidence in mitigation of a death sentence was
21 ineffective where the defendant had a prior diagnosis of schizophrenia that could have shown he had
22 an impaired mental state at the time of the crime. Evans, at 636.

23 In other cases, a trial attorney's failure to investigate or to offer mental health mitigation has
24 been held to be constituted ineffective assistance of counsel. See, e.g., Kenley v. Armontrout, 937 F.2d
25 1298, 1303-1308 (C.A.8), *cert. denied*, Delo v. Kenley, 502 U.S. 964, 112 S.Ct. 431, 116 L.Ed.2d 450
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(1991); Thompson v. Wainwright, 787 F.2d 1447, 1451 (CA11 1986), *cert. denied*, Thompson v. Dugger, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Therefore, trial counsel's failure to investigate, among other things, available defenses, Vanisi's state of mind and the effects of drug abuse on his state of mind, as well as mitigation evidence was ineffective and prejudiced Vanisi as it pertains to his sentencing, as well as his guilt, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM TWENTY:

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

Supporting Facts.

Petitioner hereby incorporates by reference all Supporting Facts from all claims related to the *Faretta* and ineffective assistance claims in the instant Petition, as if set forth herein verbatim.

Legal Argument.

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

All Legal Arguments set forth in all claims of ineffective assistance of trial counsel within the instant Petition are incorporated by reference as if set forth verbatim herein.

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1 CLAIM TWENTY ONE:

2 INEFFECTIVE ASSISTANCE OF OF APPELLATE COUNSEL FOR FAILURE TO
3 RAISE ALL CLAIMS OF ERROR LISTED IN THIS PETITION, IN VIOLATION OF THE
4 FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S.
5 CONSTITUTION.

6 **Supporting Facts.**

7 All claims of error alleged herein were apparent on the face of the record and therefore could
8 have been raised by appellate counsel. Appellant Counsel only raised three: (1) the *Faretta* error; (2)
9 the Reasonable Doubt Instruction was impermissible; and (3) that the Death Penalty was excessive
10 and was unfairly influenced by passion and prejudice.

11 **Legal Argument.**

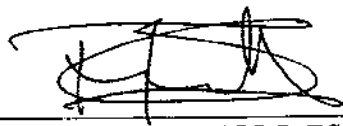
12 All other errors alleged herein which were not raised by appellate counsel should have been.
13 *Jones v. State*, 110 Nev. 730, 877 P.2d 1052 (Nev. 1994). All legal arguments from all Claims set
14 forth above, are incorporated by reference as if set forth verbatim herein.

15 WHEREFORE, Petitioner requests this Court order a hearing on the merits of his Petition for Writ
16 of Habeas Corpus (Post-Conviction) and requests the Court grant his Petition for Writ of Habeas
17 Corpus, including granting him a new trial.

18 DATED this ____ day of February, 2005.

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21
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23 

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