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

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

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

as a whole provides "genuine" narrowing.

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

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

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

McConnell, 107 P.3d at 1292.

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

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

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

E. Other Jurisdictions.

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

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

Enberg, 820 P.2d at 90.

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

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

Enberg, 820 P.2d at 89.

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

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

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

Enberg, 820 P.2d at 90.

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

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

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

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

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

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

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

Put another way:

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

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

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

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

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

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

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

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

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

F. Remedy & the Prejudice Analysis.

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

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

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

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

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

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

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

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

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

The *Brown* Decision.

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

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

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

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

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

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

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

CLAIM THREE:

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

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

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

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

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

CLAIM FOUR:

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

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

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

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

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

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

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

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

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

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

CLAIM FIVE:

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

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

CLAIM SIX:

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

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

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

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

CLAIM SEVEN:

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

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

CLAIM EIGHT:

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

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

CLAIM NINE:

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

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

CLAIM TEN :

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

Right Time, Right Place.

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

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

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

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

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

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

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

CLAIM ELEVEN:

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

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

CLAIM TWELVE:

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

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

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

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

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

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

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

CLAIM THIRTEEN:

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

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

CLAIM FOURTEEN:

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

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

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

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

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

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

CLAIM FIFTEEN:

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

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

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

CLAIM SIXTEEN

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM SEVENTEEN:

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

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

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

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

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

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

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

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

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

CLAIM EIGHTEEN:

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

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

CLAIM NINETEEN:

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

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

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

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

CLAIM TWENTY:

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

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

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

CLAIM TWENTY ONE:

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

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

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

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

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

CLAIM TWENTY TWO:

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

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

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

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

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

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

CLAIM TWENTY THREE

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

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

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

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

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

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

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

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

Id. (citations omitted.)

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

RESPECTFULLY SUBMITTED this 01 day of December, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

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

DATED this 01 day of December, 2008.

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CERTIFICATE OF SERVICE

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

_____ Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

__X__ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

_____ Reno/Carson Messenger service.

addressed as follows:

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

DATED this 15th day of December, 2008.

Linda J. Marcet

Exhibit 45

Exhibit 45

CR98P0516
D4

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50607

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Siaosi Vanisi's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Vanisi killed University of Nevada, Reno Police Sergeant George Sullivan in 1998. A jury convicted him of first-degree murder and several related crimes and sentenced him to death. This court affirmed his convictions and sentence on direct appeal. Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001).

In 2002, Vanisi filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent him and counsel filed a supplemental petition. Following an evidentiary hearing, the district court denied the petition.

On appeal, Vanisi claims that the district court erred by concluding that he was competent to participate in post-conviction proceedings, denying a motion for a protective order, and denying each of the 22 claims in his petition. For the reasons stated below, we conclude

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that Vanisi's claims lack merit and affirm the judgment of the district court.

Competency determination

Vanisi claims that the district court erred when it determined that he was competent to proceed with litigation of his post-conviction petition.[1] After his appointment, post-conviction counsel filed a motion to stay the proceedings in light of Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 813-15 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals concluded that where a capital defendant has a statutory right to the effective assistance of post-conviction counsel, he also has the right to be competent to assist counsel and, if incompetent, to a stay until he becomes competent. As a result, the district court ordered that Vanisi be evaluated by two mental health experts and held an evidentiary hearing.

At the hearing, psychiatrist Dr. Thomas Bittker opined that Vanisi was being incompletely treated for his mental problems and had "residual evidence of psychosis" to the extent that, while he was able to assist his counsel, he was irrationally resistant to doing so. On the other hand, psychologist Dr. Alfredo Amezaga testified that Vanisi was competent to assist counsel. Acknowledging that the experts diverged, the district court concluded that based on the entirety of the evidence—which included its own observations—Vanisi had the "present capacity, despite his mental illness, to assist his attorneys if he chooses to do so." We

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[1]Vanisi also claims that while he is not presently incompetent to be executed, he may become so in the future. This claim was raised below and we conclude that the district court did not err in denying it as no relief was requested. We note that specific procedures are in place in the event that Vanisi becomes incompetent to be executed. See NRS 176.425–.455.

conclude that the district court's competency determination was based on substantial evidence and uphold its decision. See Doggett v. Warden, 93 Nev. 591, 594, 572 P.2d 207, 209 (1977).[2]

Protective order

Vanisi claims that the district court erred by denying his motion for a protective order and unsealing his supplemental petition. He argues that he was entitled to a protective order precluding the State from disclosing any privileged information to law enforcement authorities, using the information at a second trial, or disclosing it to any "public or private entity, including the news media." Vanisi fails to demonstrate that the district court erred.

Vanisi's motion for a protective order was based on Bittaker v. Woodford, 331 F.3d 715, 717, 722 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals limited the implied waiver of the attorney-client privilege in a habeas corpus proceeding to "what is needed to litigate the claim[s]" and upheld a protective order precluding the State from disclosing privileged materials "to any other persons or offices." However, in this case, Vanisi expressly waived his attorney-client privilege as it

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[2]Because the district court's finding that Vanisi was competent was supported by substantial evidence, we do not reach the question of whether the procedures set forth in Rohan should be adopted in Nevada, but leave that question for resolution in a more appropriate case. See, e.g., Paul v. U.S., 534 F.3d 832, 848 (8th Cir. 2008) (finding it unnecessary to decide whether there is a statutory right to competency because the district court found the petitioner competent and the finding was not clearly erroneous), cert. denied, ___ U.S. ___, 130 S. Ct. 51 (2009).

related to his representation at trial.[3] Furthermore, Vanisi wholly failed to articulate compelling reasons for sealing his post-conviction proceedings from the public. See Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006). And the admissibility of any of the disclosed information at a subsequent trial is a question better left until the issue arises. See Bittaker, 331 F.3d at 730 n.3 (O'Scannlain, J., concurring); Molina, 120 Nev. at 193 n.25, 87 P.3d at 539 n.25.

Procedurally barred claims

In his petition below, Vanisi claimed that his convictions and sentence should be overturned because (1) he was denied the right to consular contact under the Vienna Convention;[4] (2) he was denied the right to represent himself; (3) the district court erred in refusing to allow

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[3]We also note that, in Nevada, the implied waiver of the attorney-client privilege in a habeas proceeding is limited to that proceeding by statute. See NRS 34.735; Molina v. State, 120 Nev. 185, 193 n.25, 87 P.3d 533, 539 n.25 (2004). A district court order is unnecessary to limit the implied waiver.

[4]Vanisi's claim that the procedural bars do not apply to Article 36 claims is without merit. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006).

Also, in his petition below, Vanisi stated that this claim "can be reviewed as an allegation of ineffective assistance of trial and appellate counsel." To the extent that it was raised as such, the claim is without merit because the evidence presented shows that the Tongan consulate was contacted and refused to provide Vanisi with assistance. See Osagiede v. U.S., 543 F.3d 399, 413 (7th Cir. 2008) (holding that in order to succeed on a claim of ineffective assistance of counsel based on an Article 36 violation, a petitioner must demonstrate that the consulate could have assisted the petitioner with his case and that the consulate would have done so).

counsel to withdraw; (4) Nevada's death penalty scheme operates arbitrarily and capriciously; (5) the death penalty violates the Eighth Amendment; (6) his conviction and sentence are invalid under the International Covenant on Civil and Political Rights; (7) lethal injection violates the Eighth Amendment; (8) his trial and appellate judges were elected; (9) there is a risk that an innocent person will be executed; (10) his rehabilitation outweighs the government's interest in retribution and deterrence; (11) the death penalty violates international law; (12) prosecutors can apply Nevada's death penalty scheme arbitrarily; (13) he had a "death-qualified" jury; (14) his sentence was imposed under the influence of passion, prejudice, or other arbitrary factors; (15) he is insane and was precluded from entering an insanity plea; and (16) the robbery aggravating circumstance is invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). The district court denied each of these claims finding that they were procedurally barred, barred by the doctrine of the law of the case, or without merit. The district court did not err.

All of these claims could have been raised on direct appeal and are procedurally barred absent a showing of good cause and actual prejudice. NRS 34.810(1)(b). With the exception of his challenge to the robbery aggravator, Vanisi failed to demonstrate good cause or prejudice. And Vanisi's claims that he was denied the right to represent himself and that his sentence was the result of passion or prejudice were addressed on direct appeal. They are therefore barred by the doctrine of the law of the case. See Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006); Vanisi v. State, 117 Nev. 330, 337-41, 344, 22 P.3d 1164, 1169-72, 1173-74 (2001).

As to Vanisi's challenge to the robbery aggravator, because McConnell has retroactive application, see Bejarano, 122 Nev. at 1078, 146 P.3d at 274, Vanisi established good cause to raise this claim in a post-conviction petition.[5] However, he failed to show prejudice.

Here, McConnell is implicated because Vanisi was charged with first-degree murder under three alternative theories—(1) the murder was a felony murder based on robbery; (2) the murder was willful, premeditated, and deliberate; or (3) the murder was perpetrated by lying in wait—and the jury verdict did not specify upon which theory it relied in finding Vanisi guilty of first-degree murder. See McConnell, 120 Nev. at 1069, 102 P.3d at 624 ("deem[ing] it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated"); see also Bejarano, 122 Nev. at 1079, 146 P.3d at 274 (McConnell "applies in cases where the defendant was charged with alternative theories of first-degree murder and a special verdict form failed to specify which theory or theories the jury relied upon to convict").

To uphold a death sentence after striking an invalid aggravating factor, this court must reweigh. Archanian, 122 Nev. at 1040, 145 P.3d at 1023. A McConnell error is harmless if, after reweighing, this court can conclude beyond a reasonable doubt that the jury would have found the defendant death eligible, and likewise conclude that the jury

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[5]To the extent that Vanisi claimed that his appellate counsel was ineffective for failing to raise this claim on direct appeal, he failed to demonstrate that counsel's performance was deficient because the legal basis for this claim was not available at the time his appeal was filed.

would have selected the death penalty absent the erroneous aggravating circumstance. See Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1240-41 (2008); Bejarano, 122 Nev. at 1082-83, 146 P.3d at 276-77; Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

Absent the invalid aggravator, two remain: (1) the murder was committed upon a peace officer engaged in the performance of his official duty and the defendant knew he was a peace officer and (2) the murder involved the mutilation of the victim. Of the three aggravators found by the jury, the invalid robbery aggravator was the least compelling. The two remaining aggravators are strong, and none of the mitigating evidence is particularly compelling. Accordingly, we conclude that it is beyond a reasonable doubt that, absent the robbery aggravator, the jury would still have found Vanisi death eligible and that the jury would have imposed a sentence of death. Therefore, Vanisi failed to show prejudice sufficient to overcome the procedural bars, and the district court did not err in denying this claim.

Ineffective assistance of trial counsel

In his petition, Vanisi claimed that his trial counsel were ineffective for (1) breaching the attorney-client relationship, (2) failing to present a defense or argue at closing, and (3) failing to investigate or consult with a mitigation specialist. Vanisi also claims that he was prejudiced by the cumulative impact of counsel's deficiencies.

To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To

establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. Id. at 694.

Breach of attorney-client relationship

Vanisi argues that the district court erred by denying his claim that trial counsel were ineffective for breaching attorney-client confidentiality. Prior to trial, defense counsel filed a motion to withdraw and requested an ex-parte hearing on the motion. The trial court granted counsel's request and held a sealed proceeding in the courtroom without the presence of the State. During that hearing, defense counsel relayed confidential communications to the district court, including Vanisi's stated intention to perjure himself. Vanisi claimed that this disclosure was a breach of attorney-client confidentiality and amounted to ineffective assistance of counsel.

Vanisi failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The United States Supreme Court has specifically stated that an attorney's duty of confidentiality "does not extend to a client's announced plans to engage in future criminal conduct," including the intent to commit perjury. Nix v. Whiteside, 475 U.S. 157, 174 (1986). Accordingly, defense counsel's decision to attempt to withdraw and inform the court of Vanisi's intended perjury—in a sealed hearing outside the presence of the jury and the prosecution—was not unreasonable. Furthermore, because the disclosed information was not provided to the prosecution or the jury, Vanisi failed to demonstrate a reasonable probability that absent counsel's disclosure, the result of trial would have been different.

Failure to present a defense or argue in closing

Vanisi contends that the district court erred by denying his claim that trial counsel were ineffective for failing to present an adequate defense or argue on his behalf at the close of the guilt phase of trial. The district court concluded that trial counsel were not deficient because they did all they could in light of the circumstances and that Vanisi had failed to demonstrate prejudice. The district court did not err.

At an evidentiary hearing, Vanisi's attorneys testified that Vanisi told them that he had multiple defenses but refused to disclose them. As a result, they limited their efforts at trial in order to avoid undercutting Vanisi's undisclosed defenses. In light of Vanisi's refusal to cooperate with his counsel and his specific direction that they "sit on [their] hands" during trial, we conclude that counsel's actions did not fall below an objective standard of reasonableness.

Furthermore, even if counsel's performance was deficient, Vanisi failed to show prejudice because there was overwhelming evidence of his guilt, including: (1) his repeated statements that he intended to rob and kill a police officer, (2) the testimony of witnesses who were with him when he purchased the murder weapon, (3) the testimony of eyewitnesses who placed him at the scene, (4) the DNA and physical evidence linking him to the crime, and (5) his statements to family members admitting what he had done. Therefore, the district court did not err in denying this claim.

Failure to investigate or consult with a mitigation specialist

Vanisi contends that the district court erred in denying his claim that trial counsel were ineffective for failing to investigate the possible effects of substance abuse on his state of mind and for failing to

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

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

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

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

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

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

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

CLAIM EIGHT:

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

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

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

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

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

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

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CLAIM NINE:

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

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

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

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

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

CLAIM TEN :

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1527-28.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM ELEVEN:

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

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

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

CLAIM TWELVE:

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

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

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

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

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

Nevada law does not include any mechanism for insulating state judges and justices from majoritarian, "lynch mob," pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Judges or justices who are subject to these pressures cannot be impartial within due process and international law standards in a capital case.

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

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

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

Accordingly, the District Court erred in denying this claim, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM FIVE:

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

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

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

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

CLAIM THIRTEEN:

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

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

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

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

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

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

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

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

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

CLAIM FOURTEEN:

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM FIFTEEN:

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

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

CLAIM SIXTEEN

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1002-04 (emphasis added).

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

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

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

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

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

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

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

Since the current system violates the ban against cruel and unusual punishment and defendants' rights to Due Process and Equal Protection, the NRS 200.033 notice filed against Vanisi must be stricken, and either the judgment reversed, or, in the alternative, the death sentence vacated. This Court should either remand this matter to the trial court for re-sentencing or reduce the sentences to life-without-parole.

CLAIM SEVENTEEN:

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

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

Pretrial death qualification undermines a capital defendant's right to a fair trial. First, the process conditions jurors toward a guilt verdict because it requires them to assume the defendant's guilt. Protracted discussions with potential jurors regarding penalty implicitly suggest the defendant's guilt, thereby undermining the presumption of innocence and impairing the impartiality of potential jurors.[9]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM EIGHTEEN:

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

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

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

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

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

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

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

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

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

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

CLAIM NINETEEN:

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

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

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

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

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

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

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

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CLAIM TWENTY:

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM TWENTY ONE:

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

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

CLAIM TWENTY TWO:

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

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

CLAIM TWENTY THREE

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

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

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

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

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[14] Under Nev. Rev. Stat. § 49.095:

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

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

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

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

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

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

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CONCLUSION AND PRAYER OF RELIEF

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

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

RESPECTFULLY SUBMITTED this 4th day of August, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

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

DATED this 4th day of August, 2008.

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CERTIFICATE OF SERVICE

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

__X__ Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

__X__ Personal delivery.

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DATED this 6 day of August, 2008.

Kristy Schaaf

Exhibit 44

Exhibit 44

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SIAOSI VANISI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 50607

DEATH PENALTY CASE

APPELLANT'S REPLY BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM TWO OF THE HABEAS PETITION:

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

A. Asked and Answered.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

The court has considered all the evidence and the arguments of counsel but remains unpersuaded that Vanisi is entitled to relief. Vanisi bore the burden of proof and at the close of the evidence the court was not persuaded of the validity of any of the claims for relief. Because Vanisi failed in his burden, the petition is denied.

DATED this 8 day of November, 2007.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of SECOND JUDICIAL DISTRICT COURT; and that, on the 8th day of November, 2007, I deposited in the county mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the foregoing document, addressed as follows:

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Exhibit 43

Exhibit 43

ORIGINAL

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STATEMENT OF THE ISSUES

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

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

3. Whether one of the three aggravating circumstances found in this case: that *the murder occurred in the commission of or an attempt to commit robbery,* was improperly based upon the predicate felony-murder rule, upon which the state sought and obtained a first degree murder conviction, in violation of the eighth and fourteenth amendments to the united states constitution.

4. Whether the district court's failure to allow Vanisi to represent himself, pursuant to *Faretta v. California*, resulted in a structural error amounting to "total deprivation of the right to counsel," in violation of the fifth, sixth, eighth and fourteenth amendments.

5. Whether the district court erred in refusing to allow trial counsel to withdraw due to irreconcilable conflict, in violation of petitioner's fifth, sixth, eighth and fourteenth amendment rights.

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

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

8. Whether Vanisi's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as under international law, because the Nevada capital punishment system operates in an arbitrary and capricious manner. Const. Amends. V, vi, viii & xiv; international covenant on civil and political rights, art. Vi; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21.

9. Whether Vanisi's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Const. Art. Vi, amends. Viii & xiv; international covenant on civil and political rights, arts. Vi, vii; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21.

10. Whether Vanisi's conviction and sentence are invalid pursuant to the rights and protections afforded him under the international covenant on civil and political rights. U.s. const. Art. Vi; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21.

11. Whether Vanisi's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as under international law, because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Const. Art. VI, amends. VIII & XIV; U.S. Const., art. VI; international covenant on civil and political rights, art. VII.; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21.

12. Whether Vanisi's conviction and sentence of death are invalid under the state and federal constitutional guarantees of due process, equal protection and a reliable sentence because petitioner may become incompetent to be executed. U.S. Const. Amends. V, VI, VIII & XIV; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21.

13. Whether petitioner's conviction and sentence violate the constitutional guarantees of due process of law, equal protection of the laws and a reliable sentence and international law because petitioner's capital trial and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. U.S. Const. Art. VI, amends. VIII, XIV; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21; international covenant on civil and political rights art. XIV; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21.

14. Whether Vanisi's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence, as well as under international law, because of the risk that the irreparable punishment of execution will be applied to innocent persons. U.S. Const. Art. VI, amends. VIII & XIV; U.S. Const., art. VI; international covenant on civil and political rights, art. VII.; Nev. Const. Art. I, §§ 3, 6, and 8; art. Iv, § 21.

15. Whether the eighth and fourteenth amendments to the united states constitution forbid that the courts or the executive allow the execution of Vanisi because his rehabilitation as an offender demonstrates that his execution would fail to serve the underlying goals of the capital sanction.

16. Whether the eighth and fourteenth amendments to the united states constitution forbid that the courts or the executive allow the execution of Vanisi because his execution would be wanton, arbitrary infliction of pain, unacceptable under current American standards of human decency, and because the taking of life itself is cruel and unusual punishment and would violate international law.

17. Whether Nevada's death penalty scheme allows district attorneys to select capital defendants arbitrarily, inconsistently, and discriminatorily, in violation of the fifth, sixth and fourteenth amendments to the U.S. constitution.

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

19. Whether Vanisi's sentence of death was imposed under the influence of passion, prejudice, or arbitrary factor(s), in violation of the fifth, sixth, eighth and fourteenth amendments to the U.S. constitution.

20. Whether, because Vanisi was not competent during the crime, his level of intoxication and psychosis amounted to legal insanity under the authority of *Finger v. State*; the legislature's ban on a verdict of "not guilty by reason of insanity" prevented trial counsel from putting on evidence of Vanisi's state of mind, in violation of the fifth, sixth and fourteenth amendments to the U.S. constitution.

21. Whether trial counsel was ineffective for failing to properly investigate possible mitigating factors and/or to put on witnesses and/or evidence in mitigation during sentencing, including an expert on mitigation, in violation of the fifth, sixth, eighth and fourteenth amendments.

22. Whether but for the individual and collective failures of trial counsel, Vanisi would have been able to put on a meaningful defense; therefore, the ineffective assistance of trial counsel has prejudiced Vanisi in violation of the fifth, sixth, eighth and fourteenth amendments.

23. Whether appellant was prejudices by ineffective assistance of of appellate counsel for failure to raise all claims of error listed in this petition, in violation of the fifth, sixth, eighth and fourteenth amendments to the U.S. constitution.

24. Whether the district court erred in denying Vanisi's motion for protective order, in violation of the fifth, sixth and fourteenth amendments to the united states constitution

STATEMENT OF THE CASE

Nature of the Case

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

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

STATEMENT OF FACTS

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

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

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

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

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

LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(AA, IX, 1745)

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

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

(AA, IX, 1775).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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CLAIM TWO OF THE HABEAS PETITION:

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

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

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

(AA, I, 17).

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

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

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

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

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

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

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

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

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

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

The *McConnell* court clarified its ruling:

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

McConnell, 102 P.3d at 624.

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

District Court's Ruling.

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

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

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

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

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

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

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

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

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

Remedy.

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

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

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

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

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

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

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

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

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

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

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

(b) By imprisonment in the state prison;

(1) For life without the possibility of parole;

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

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

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

CLAIM THREE:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

Law of the Case.

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

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

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

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

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

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

Structural Error.

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

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

The Application of Faretta.

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

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

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

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

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

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

CLAIM FOUR:

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

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

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

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

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

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

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

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

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

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

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

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

Accordingly, the District Court erred in denying this claim, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM FIVE:

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

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

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

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

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

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

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

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

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

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

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

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

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

The Nevada Supreme Court has ruled:

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

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

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

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

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

CLAIM SIX:

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

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

As a result of having their legal and ethical hands tied, counsel for Vanisi failed to vigorously cross-examine witnesses or put on evidence in Vanisi's defense. (*See Generally*, AA I-III). (For examples of failure to cross-examine, or failure to meaningfully cross-examine, *see* AA, I, 57 (testimony of Dr. Ellen Clark, key State's witness re: autopsy

and evidence of mutilation), AA, I, 126, 142, 162; AA, II, 206, 224, 299, 304, 310; AA, II, 358, 365, 368, 379, 388; AA, III, 455, 467, 480, 518).

Counsel for Vanisi did not even give the jury an opening statement nor closing argument at the guilt phase of the trial. (AA, III, 524-25, 561).

As a result of his counsel's failure -- or inability -- to put on a defense or cross-examine witnesses, Vanisi refused to testify. He told the court, "This is a joke. I am not going to testify." (AA, III, 498).

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

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

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

The Nevada Supreme Court has agreed that automatic reversal occurs where the defendant is denied substantive due process. *Manley v. State*, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing Guyette v. State*, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968). See also *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991)

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

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CLAIM SEVEN:

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

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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

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SIAOSI VANISI, Appellant, vs. RENEE BAKER, WARDEN, and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondents.	No. 65774 Volume 8 of 26

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

was?

MR. McCARTHY: Your Honor, I'm not actually sure. But I did hear whether a lawyer should do something as part of the question. So I guess my objection is relevance. If the question were about some objective standard, then I wouldn't have that objection.

THE COURT: Rephrase your question. Sustained.

BY MR. QUALLS:

Q This was in response to, just for clarification, to the line of questioning regarding the practicality of raising an issue before the Nevada Supreme Court.

Just to clarify, just because you think or perhaps have a strong belief that relief won't be granted at the Nevada Supreme Court, is that a reason not to raise it?

A Depends on the issue.

Q If it's a meritorious issue?

A I mean it depends on the issue. I mean, you know, it's such a wonderful philosophic question. If we governed ourselves by that rule, we never would have had Brown versus Board of Education, because everybody would have signed off on Plussy versus Ferguson and said that's the law; what are you going to do? Obviously there has to be some lawyers who are willing to step up to the plate

and say the current status of the law is wrong and here's why and go for it. Now, does that mean a lawyer who does it is ineffective, well --

MR. McCARTHY: Your Honor, may the record reflect that the witness kind of threw up his hands at the end of that last question.

THE COURT: The record will so reflect.

MR. QUALLS: I can't help it that Mr. Cornell can't speak without his hands.

THE COURT: He's done pretty well today.

THE WITNESS: Better than other days, thank you.

BY MR. QUALLS:

Q Speaking of this issue, and I think we touched on this earlier, does McConnell fit into that category?

A Yeah. It does. I mean, by golly, a huge award for Ms. Bond for raising that issue. It was terrific work on her part. Unquestionably.

Q And has that had a benefit on death penalty litigation from the defense standpoint in general?

A We don't know yet.

Q At this point?

A I'm litigating this issue now in Petrocelli as we speak. And, of course, the huge issue is going to be can McConnell be applied retroactively, and we don't know the

answer to that yet, but I guess we'll find out in the next few years. But sure. For anybody who was charged with felony murder who sits on death row, it has a huge, potentially huge impact.

Q As an attorney qualified to do death penalty litigation, is there a requirement as far as zealous representation?

A Certainly. All lawyers are required to do that under the Supreme Court rules.

Q Is there a higher standard under Supreme Court 250 for death penalty lawyers?

A Yes.

Q Would McConnell be an example of that zealous representation?

A Well, let's put it this way, yes, but I don't think Rule 250 means that all appellate lawyers must challenge precedent and show why it should be overruled as a matter of course. I don't think Rule 250 means that. I don't know, unless there's some authority that says it does. I'm not aware of any such authority.

MR. QUALLS: Nothing further, Your Honor.

THE COURT: Anything further, counsel?

MR. McCARTHY: I quit. No more.

THE COURT: You may step down, Mr. Cornell.

Thank you.

Based upon the testimony, Mr. McCarthy, do you want additional time to call any other witnesses?

MR. McCARTHY: No, Your Honor.

THE COURT: Do you have any witnesses to call?

MR. McCARTHY: Not a soul. But I would ask, before we move into arguing both a motion and the merits, which is kind of odd, can we take five minutes, please?

THE COURT: Certainly. Court's in recess.

(Recess taken.)

THE COURT: Mr. McCarthy, you have a motion. You may go first on your motion.

MR. McCARTHY: Thank you. We find ourselves in the somewhat unusual procedural posture having concluded the hearing and now asking the Court to decide that we won't have a hearing. And I'm not sure of the legal significance of that. However, to make it a little bit easier, I am going to concede parts of my motion are not well founded.

Many of the claims, I would call the generic claims, I had argued were barred because they could have been raised on direct appeal. The response was to claim ineffective appellate counsel. And I had suggested that there's no need for a hearing on that because it wasn't

adequately, the ineffective appellate counsel wasn't adequately pleaded. I think I was wrong on that. I think it was adequately pleaded because we disputed the standard. So ultimately we argued about the standard, and I suggest that the two appellate witnesses agree with me on the standard. But we'll get to that in a few minutes.

So the vast majority of the claims, not the vast majority, many of the claims in fact can be heard within the context of ineffective appellate counsel. And so I guess I'll have to concede that.

And then do you want to wait and talk later about whether counsel actually was ineffective or --

THE COURT: Well, I think that Mr. Edwards has a right to proceed first on that argument.

MR. McCARTHY: That's fine.

THE COURT: Unless you want to waive your opening argument on that and just respond and get the one shot.

MR. EDWARDS: Are we done with the motion to dismiss? Did you want to hear -- this is my concern about that response, Your Honor.

MR. McCARTHY: I was going to make one other concession.

MR. EDWARDS: I'm sorry.

THE COURT: When you're getting concessions, take

them.

MR. McCARTHY: Makes life easier.

I would suggest that this Court lacks jurisdiction to consider the claim based on the Vienna Convention. I think the claim ought to be dismissed based on the other reasons stated in the motion, but not because the Court lacks jurisdiction. I saw the Supreme Court considered the merits of the claim based on a treaty, the Nevada Supreme Court, and from that I conclude that it can be heard in this courtroom. So I think the Court has jurisdiction. It should otherwise be dismissed for the failure to allege any prejudice. And then, if we get to the merits in a little bit, I would say also for the failure to show any prejudice.

THE COURT: So right now which claims are you going forward with on your motion to dismiss? Do you have the numbers?

MR. McCARTHY: Your Honor, Judge, I don't even have the motion with me, I'm sorry.

THE COURT: So you're basically, you're withdrawing everything with regard to appellate counsel?

MR. McCARTHY: I agree that can be heard. That would include all the claims that could have been presented on appeal that can be heard on the question of

whether counsel is ineffective in failing to do so. And, Your Honor, the rest of it has been adequately briefed. I can't get too excited since we've already had the hearing. So I guess I'll submit it without additional argument.

THE COURT: Okay. Now, Mr. Edwards, your motion --

MR. EDWARDS: Regarding the motion to dismiss, I agree with Mr. McCarthy, procedurally it's kind of odd that we take up this matter after we've had these hearings. So if there's any consideration of the Court to somehow compartmentalize the record that you've expanded through these hearings and not consider them substantively in support of the claims, then I would argue against that. Otherwise, I think the motion to dismiss is basically conceded that an evidentiary hearing should take place and now has been completed.

So we have -- the record is there. And unless your consideration of the motion to dismiss would somehow say I'm not going to consider the record we've made, I would request that it be denied.

THE COURT: I think there is a difference between a denial of your petition and a granting of a motion to dismiss ultimately down the road, which you all, as Mr. Cornell so succinctly put, these are all dress

rehearsals for a place somewhere else in the Ninth Circuit or beyond. So I think there can be a difference.

However, the Court, if the Court took evidence in this hearing that somehow influences the decision on a motion to dismiss, it would not be appropriate to grant a motion or deny a motion to dismiss based upon that evidence. Maybe denial in that it proved there wasn't really any basis, nothing pled and no basis to go forward. But certainly not a basis to grant a motion to dismiss based on evidence that was heard in the hearing. Then it would be a decision to deny the petition based on the evidence or lack thereof.

However, it's my experience that in the future, the presentation of evidence or the lack of presentation of evidence does somehow influence that play that you all are doing dress rehearsals for. So we've had the hearing and my order will certainly reflect whatever findings are appropriate based on the law.

So now you may argue your petition.

MR. EDWARDS: Very well, Your Honor. Thank you. Largely, I'd like to submit this on the record, I think in the pleading we submitted. But I would like to comment briefly about some of the issues that have been raised. And I believe that the evidentiary portion of this

proceeding focused on that being, number one, the Vienna Convention violations. And we also have the question of McConnell in claim two, what you see there. And, you know, I found it very interesting that Mr. Cornell said, regarding the McConnell issue, I don't know. We don't have the case yet to tell us. He's working on it. But I think you'll find that to be the case regarding the Vienna Convention claims as well. They're new to the point to where we're waiting for a decision from the United States Supreme Court to address this very claim in claim one in the Medellin case, which we've attached and provided as part of our supplement.

So when we talk about that claim, in particular, I think you have to decide, first of all, whether or not there's a factual basis for it and, secondly, if there is, is there an entitlement to a remedy and what that remedy should be.

I would submit to you that a fair reading of the claim one indicates that it is the responsibility -- let me start here. We've got the supremacy clause, and it provides very specifically, Your Honor, that the 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.

So I think a fair interpretation of that, this is not some forbidden issue for this Court to construe the application of an international covenant or an international treaty. I think you're entitled to because you're bound by the provisions under the supremacy clause, you are entitled to construe it. And you're entitled to find facts and entitled to determine what the appropriate results should be regarding this claim. But you don't have any guidance in case law. You don't have any guidance other than the arguments that were presented in an international court that resulted in an international decision, court of justice decision that we reference in our pleadings.

So we don't know what the remedy is. I disagree with Mr. McCarthy, and it's part of our argument that we even have to demonstrate prejudice. I think what you have to demonstrate, for claim one to be viable, is that my client, Mr. Vanisi, is not a citizen of the United States and he's a citizen of a country that's a signatory to the Vienna Convention on Consular Relations, and he was taken into custody and detained in one of these United States, which is also a signatory under the treaty, and was not

informed by local authorities. That's what the actual treaty says.

Local authorities must immediately notify Mr. Vanisi of his rights under the Consular Convention. I don't think local authorities necessarily mean the Federal Public Defender. I think we're talking about law enforcement or perhaps prosecution. That's the authority.

Now, again, I have no case law on that. But I would submit to you it's a reasonable interpretation of that language. So the duty belongs to the other side, not necessarily to Mr. Specchio or his office. Maybe we could get into some kind of harmless error analysis who does and doesn't matter.

But the record in this case does not demonstrate with any degree of certainty that that kind of notification took place.

So with that, you have claim one. And I would submit that there's a basis for relief pled and now by a preponderance of the evidence proven in this proceeding. What the remedy should be, obviously the only remedy I'm aware of that's been accorded in the United States was in the case of Mr. Torres from Oklahoma. It's not a written opinion. It's not -- it's not a legal decision other than it had some remedy in addressing this claim. So you're on

your own in terms of -- and like you say, it's a dress rehearsal. So maybe by the time it gets to maybe a bigger show there will be something more helpful than what I've been able to provide the Court in that regard. But at least we have the record and what took place now. And I would submit by our standard that error has been established.

And I promised I would be brief. McConnell issue, Your Honor, that also is in the record. We didn't need to have much testimony about it. It's whether or not it's retroactive and whether you can accord relief to Mr. Vanisi on the basis of that decision and whether Mr. Petty should have raised it, especially since it was floating around in his office with his co-counsel, Ms. Bond, why he didn't and he certainly had room in a brief to do so in a capital case.

THE COURT: Wouldn't be the remedy to just strike that aggravator?

MR. EDWARDS: Well, then what you do if you strike an aggravator, can you reweigh it down here? I think if you accord that remedy, then there's a new penalty phase awarded.

THE COURT: Not if you have multiple aggravators found by the jury.

MR. EDWARDS: I don't think it's permissible to do the reweighing once you strike the aggravator.

My co-counsel, Mr. Qualls, has cited me to the Ring decision, I think this Court is probably familiar with that. So that would support that kind of assertion. There are many standard claims there that I'm just going to submit on the record. They are legal claims that haven't been addressed much by the evidence other than the commentary about why they were not raised or why they were not addressed. One of them relates to the Finger decision, which, after much time, the Nevada Supreme Court decided that there actually is a constitutional right to pursue a defense of insanity in Nevada, which wasn't available at the time this case took place. That needs to be addressed, whether or not it has any application in this case.

But I think the most pressing claim in my mind, the holistic evaluation of this case, is the image created by the rulings on Mr. Vanisi's right to counsel. And when you have -- you have the Faretta issue, and it was disposed of on direct appeal and it's the law of the case. And you were sustained in your determination that it was inappropriate for Mr. Vanisi to represent himself. You have been upheld and the record is solid on that. The

flip side of that was we had a motion to withdraw by his attorneys who presented an ethical conflict to the Court, again denied. And their response to that was basically inaction, at least during the guilt phase. I think it's a fair reading of the record where you don't have an opening statement. You don't have closing arguments. You have minimal cross-examination and no presentation of any defense evidence at all that a man who is tied to representation of counsel who doesn't want to represent him or doesn't want to represent him I think was fair to say, they moved to get off the case and they felt ethically bound not to do anything.

You have that image. And whether that rises to the level of what we consider an appropriate trial, or whether that is a breakdown in this adversarial testing process, is at the heart of this case. And part of it is not before you. The threat issue really isn't before you. But the flip side of it is, which is the withdrawal of his attorneys, the attempted withdrawal of his attorneys. And whether the denial of that resulted in a breakdown of this process.

And I think that's what this case is about, when you take it completely like that, was --

THE COURT: Isn't the argument then that because

he says to his current lawyers I'm going to lie, they say I have a conflict because I can't represent you because you're telling me you are going to commit perjury, that the Court would have to remove that lawyer and the new lawyer would come on and either be compliant in the perjury or have the exact same conflict? And there's certainly case law that says that the Court is not obligated to do that.

MR. EDWARDS: I'm not challenging necessarily what, that the error would be repeated. Your Honor, I can understand that. That's a reasonable, probably, prediction. But what do you do? What is the result that you get by taking that act?

THE COURT: But if the client is the one who drives the action, how can there be error? What you're talking about is something that's brought about not by any external motivation of anyone other than Mr. Vanisi.

MR. EDWARDS: You know, we heard Mr. Cornell this morning, Your Honor, that he did not believe that this conflict necessarily required the attorneys during the guilt phase to do nothing, which is essentially what happened. His theory of the way to reconcile that problem during the trial phase was to come up with a defense that focused on what did the perpetrator do and what was in his

mind and identity of the perpetrator. And that wasn't a defense that was presented. It wasn't pursued. And it didn't conflict with the other considerations that brought the motion to withdraw and Mr. Vanisi's desire to serve a defense that possibly included false testimony.

But what we have is, in the record, we don't have any defense during the guilt phase of the trial. And we know how it got that way. And so is that a basis for relief? Does this satisfy the due process clause that that's the way it went down? I submitted in my pleadings that it didn't. And these other issues that we've claimed are also serious in nature. But I put that one at paramount as the imagery of due process in this trial.

And so I would submit it on the pleadings. I've taken more time than I promised Mr. McCarthy I would have.

THE COURT: Because now we have to recess until this afternoon. It's two minutes to 12:00. So we'll take our lunch recess now. 1:15, 1:30, your preference.

MR. QUALLS: Your Honor, just a matter of housekeeping. As the Court is aware, I believe, I'm in trial down the hall. Judge Elliott was kind enough to grant me until 1:00 today to take care of this matter. So even though Mr. Edwards is handling the closing arguments, I would not be available for the afternoon hearing. I

just wanted to have the Court's knowledge and awareness and perhaps permission for me to not be here since Mr. Edwards is handling closing argument.

MR. EDWARDS: Your Honor, if we could resume at 1:15. When we set this time I had another case across the street, and I've moved to continue it. I've had no action on it. I don't believe they're going to hold me in contempt but they might my client.

THE COURT: What time is that?

MR. EDWARDS: It's at 1:30, in front of Department 5.

THE COURT: I'll call Judge Schumacher at 1:15 right before we start this hearing, explain where you are.

MR. EDWARDS: Thank you, Your Honor. I appreciate it.

THE COURT: We'll be back at 1:15. Court's in recess.

(Recess taken.)

RENO, NEVADA, TUESDAY, MAY 18, 2005, 1:20 P.M.

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THE COURT: Mr. McCarthy, it's your turn.

MR. McCARTHY: Thank you, Your Honor. I will make an effort to identify the various claims and respond to them individually to the extent that I can. The first claim listed in the petition and the one we've discussed quite a bit alleged concerns of the violation of the Vienna Convention and Consular Relations.

Your Honor, I notice the absence of evidence that Mr. Vanisi is in fact not a citizen of the United States. I suppose he probably is Tongan. There's references in the memo and such that he's Tongan. But I haven't heard any real evidence of it. More importantly, I haven't heard any evidence that he was or was not informed of his right to contact the Consulate.

Now, there's an allegation that when he was arrested no one ever said that, but I haven't heard any evidence of it. Mr. Vanisi didn't testify. I haven't heard any Salt Lake cops here either.

So regardless of how that claim is disposed of, Your Honor, it hasn't been proved.

We have a little bit of existing law on the

subject of the Vienna Convention. We have one authoritative court that has addressed it, it's the Nevada Supreme Court, and they did so in Garcia, in which case the Court said that "neither suppression nor dismissal is an appropriate remedy." If we view this as a free-standing claim, the current state of the law is that he's not entitled to relief. If we view this as a claim of ineffective assistance of counsel, he's also not entitled to relief. And it doesn't matter how you view it. The state of the law is that Siaosi Vanisi wouldn't be entitled to relief even if he had proved up his claim, but he didn't.

I would also note that if the law develops in the future, probably something is going to happen with Medellin, the case pending before the U.S. Supreme Court. And I know I'm speculating, I just find it hard to believe that that Court would fashion a remedy that didn't call for an inquiry into the effect of a violation on the criminal prosecution.

In fact, the world court did it, says that there has to be an inquiry like that. And the Oklahoma court also said the cause should be evaluated for prejudice.

On that subject, we have the testimony of Mike Specchio and his former assistant who contacted the

Consulate and were told go away, don't bother us anymore. I think that can be corroborated by the mere fact that the Tongan Consulate is still not here and still has no interest in providing any assistance to Mr. Vanisi.

So if there were going to be a remedy that would be of assistance to Mr. Vanisi, it would have to be a per se remedy of some sort. And that, Your Honor, is not consistent with general principles of jurisprudence in this country.

So we have the second claim involves the issue that the Court addressed in McConnell. Again, that can be viewed in several ways. The claim was -- the claim of error was not raised on appeal. According to everyone who has spoken here in this hearing, it shouldn't have been. So if it's raised as ineffective -- it's barred because it could have been raised on appeal. To the extent that one seeks to overcome the bar by showing ineffective assistance of appellate counsel, that claim is untrue.

Now we heard from two appellate lawyers, Mr. Petty and Mr. Cornell, and not one of them thought that surveying the Reno landscape as it existed at the time would lead a reasonable lawyer to bring that claim to the attention of the Court.

If it is viewed as a free-standing claim, because

McConnell -- by the way, I'm calling this the dicta in McConnell because it didn't affect their judgment. But if that dicta in McConnell is applied retroactively, there's still no relief, for the very reasons that the McConnell court gave. When the conviction is clearly grounded in a premeditated and intentional murder, there's no point in inquiring into the effect of the felony murder.

Now on that subject, Your Honor, you may wish to -- you may find it interesting in the closing arguments of trial counsel, the prosecutor made nary a mention of the felony rule. No one asked this jury to convict on the felony murder rule. He was convicted because he took a hatchet and he killed this police officer.

There is a claim, as I understand it, regarding the response to the motion to withdraw. And one of them is should have raised as error on appeal. And, again, we have a couple of different appellate lawyers who just saw no point in doing it. Partly because the record at that time was, is not adequate. It doesn't show any prejudice. So there was no point in doing that. If that's a free-standing claim of error, it's barred. If it's a claim of ineffective assistance, it's just wrong. But then we have related to that is the response, defense counsel's response to the denial of the motion to

withdraw. And there is a claim that counsel is ineffective in, I want to see how it's phrased. Actually, it's my motion I would be paraphrasing it. But basically paraphrasing it in by failing to develop a defense. May I ask, Your Honor, what defense?

This is the time to present it. If you have an allegation that counsel could have presented a different defense under the circumstances, or that some objective standard of reasonableness required counsel to present a defense under the circumstances, then present it. There's been zero evidence here of any available defense. Now, there's been generic discussions: Well, he should have cross-examined witnesses.

Your Honor, cross-examination doesn't exist for a sport. It exists to garner evidence. So I ask: What evidence would have been garnered by additional cross-examination of anyone? And the answer is I don't know, because there's been no evidence, additional evidence presented here.

So the suggestion that counsel could have or should have presented a different type of defense, should have done something differently, is just incomplete because it still hasn't been done.

More importantly, now Mr. Cornell was suggesting

that maybe counsel could have done something with the evidence that still doesn't exist and fashioned a defense that incorporated both what Mr. Vanisi proposed to testify to and the irresistible type of defense that the lawyers want to go with. The problem here, Your Honor, is -- I'm sorry, I lost my train of thought here.

The problem here is Mr. Cornell voiced that opinion without knowing the true facts. The true facts, unrebutted testimony, that Siaosi Vanisi said I got many defenses and I'm not telling you what they are. One of them was the proposed perjury defense, what people call "some other dude did it." But then he told his lawyers "I got other defenses and I'm not telling you what they are."

So lawyers confronted with that difficulty, and it is admittedly a difficulty, took a reasonable step: Consulted with other people in the field, consulted with ethical experts, and were told and decided do not undermine whatever he eventually decides he wants to be true.

So I suggest they did the only thing reasonable under the circumstances created by Vanisi. He created the circumstance by which his lawyers' hands were tied, and he lives with it. The State provided him with reasonably effective counsel. He chose not to take advantage of it.

That's his decision. And it doesn't affect the validity of his conviction. But even if the decision to do very little was wrong, I still have to ask: What more could be done? Nothing more has been shown here. There is a claim regarding insanity, based on the relative timing of the statute abolishing insanity as a defense and then the decision later on that reinstates the defense. I think we can ignore that, Your Honor, because the unrebutted evidence is that counsel had nothing to present.

They looked. They inquired. They hired a psychiatrist and they had the psychiatrist inquire into several factors, including insanity, competency, mitigation, and got nothing.

So with that, Your Honor, we're talking merely hypothetical stuff. So whether this argument about insanity is viewed as ineffective appellate counsel, ineffective trial counsel or a free-standing claim, it is without foundation. There's still no evidence that Siaosi Vanisi at the time of his crime met the legal definition of insanity. It may have been goofy. I don't doubt that. But not insane.

There are a series of claims that I've called generic attacks. Series of claims that the death penalty is unconstitutional in all respects in every case. I

suggested earlier that those are barred because they could have been raised on direct appeal. That's true. That bar, however, can be overcome sometimes by pleading and proving that counsel was ineffective in failing to advance these arguments.

I suggest to you, Your Honor, that that bar has not been overcome. Now that we've had the hearing, we know that counsel was not ineffective.

Remember, we're not talking the general standard of a subjective standard of reasonableness, we're talking about the objective standard. I asked Mr. Cornell if he could identify an objective standard by which lawyers pick and choose what arguments to advance on appeal. There isn't one.

He didn't have one. That's because there isn't one. What is the standard is you should not shotgun, appellate lawyers ought not to take the shotgun approach because it is ineffective. Instead, according to the guidance from our Supreme Court in Hernandez, and from the U.S. Supreme Court in Jones versus Barnes, in which they quote various scholars and appellate practitioners, the best approach is to do just what John Petty did: You ride your fastest pony and you take your best argument and you present it and take your best shot.

Now, according to Mr. Petty, the way he does things is just that. When he has nothing, which is going to happen from time to time, then he reaches into his arsenal of standard but repeatedly rejected arguments and throws them out, because that's the best he can do under those circumstances. But in this case, his professional opinion was that his client would be best served by raising the arguments that he raised on direct appeal and not by throwing in the kitchen sink.

In order to obtain relief, the petitioner would have to show by a preponderance of the evidence that some objective standard of reasonableness required him to do otherwise. That there's an objective standard somewhere and it says throw everything in and see what happens. That is not the standard.

We now know there's a standard, and as identified by John Petty, by Rick Cornell, by the Nevada Supreme Court and by the United States Supreme Court, and that standard is to be choosey. That is just what he did.

So I suggest that the series of generic claims are barred and the bar has not been overcome by a demonstration that appellate counsel was ineffective. If appellate counsel -- if the ineffectiveness of appellate counsel is also raised as an independent claim, a

substantive claim for relief then that's subject to -- then it should be denied on the same grounds because it hasn't been proved.

Your Honor, there's two ground 19s in the supplemental petition. So ground 19-A, I'm calling it, is counsel's failure to investigate potential mitigating evidence. None has been presented. What we have is the testimony of Mr. Bosler and Mr. Gregory, Mr. Specchio, about devoting enormous resources in trying to defend their client. That was reasonable. And they're supposed to make a reasonable investigation. No one can have everything.

But more importantly, here, now, at the end of the hearing, there has been no additional mitigating evidence presented; therefore, this Court has no reason to believe that any additional mitigating evidence exists.

I think I have identified all the claims. I think I've responded to them all.

I would like to mention briefly that much of what we talked about in dealing with the Court's ruling on the motion to withdraw has been phrased in terms as though counsel had a conflict. They didn't. What they had is the limitations attending to any lawyer who handles any case. You're not allowed to present perjured testimony,

for instance. It's not a conflict of interest. It's a bound, a boundary.

A lawyer's duty is to be a zealous advocate within the bounds of the law, not exceed the bounds of the law. That limitation, that bounds of the law is not a conflict. It is just what a lawyer is supposed to do.

So I agree, these lawyers were hampered. They had a hard time defending their client, but that hard time was solely the product of Siaosi Vanisi's decisions, first to announce his intent to perjure himself and second to say I'm not telling you what defense I wish to present. Under those circumstances, they did the best they could. But that is not a conflict of interest.

In Cuyler versus Sullivan -- there's been some mention of it earlier -- the Court described, in fact, the conflict of interest that it was concerned with. That conflict exists when a lawyer is actively representing competing interests. When a lawyer is trying to sell a book on a case at the same time he's trying to defend. When the lawyer represents codefendants, pointing fingers at each other, he has competing obligations, competing duties to each of those clients that cannot be reconciled. That's not so here. These lawyers had one duty, with a boundary. And the duty was to be a zealous advocate

within the bounds of the law. They did just that.

Accordingly, the petition ought to be denied.

THE COURT: Thank you.

Mr. Edwards.

MR. EDWARDS: Your Honor, I just have a few comments in response to that argument.

Why did this alleged contact with the Tongan Consulate take place if Mr. Vanisi wasn't a Tongan citizen? Why did every witness besides Mr. Cornell who testified in these days of proceedings mention that? I think I haven't had an opportunity right this minute to look back through the actual trial record, but I seem to believe there's some reference to Mr. Vanisi's Tongan nationality in there as well.

We have the burden of proving our allegations and the factual underpinnings to them.

THE COURT: I don't think there's any question that he was of Tongan descent. But I don't necessarily remember any evidence that he wasn't a United States citizen.

MR. EDWARDS: In the trial?

THE COURT: In the trial. There may be.

MR. EDWARDS: I can't make any representations about that right now.

But it doesn't make any sense, I don't think, that you have these people who allegedly made contact and had tried to address this Vienna Convention issue. Ms. Bielser who testified at the last hearing said she did so on the basis of the understanding that Mr. Vanisi was Tongan.

So I would submit to you by the preponderance of the evidence standard, whether that's circumstantial or direct enough, we have that. The real issue, and this comment that the Tongan Consulate has no interest, we don't have any proof they don't have an interest. We don't have any proof they have an interest. We don't have any proof regarding the Tongan Consulate at all. We don't have any written proof from any of the witnesses who were here. We don't have any from the state. We don't have any from me. So that's really an ungrounded and unfounded claim and criticism of that factually.

Mr. McCarthy said that there's no conflict of interest, there was no conflict of interest between Mr. Gregory, Mr. Bosler and Mr. Vanisi. Well, what did we have this morning on the witness stand? I think Mr. Specchio himself acknowledged that he wrote the words "conflict of interest." The record reflects that the trial counsel approached bar counsel, Mr. Bare, I believe,

and inquired about this ethical issue and their response was conflict of interest.

And so I guess we'll see on appeal whether or not that qualifies as a conflict of interest. I think it's more a question of whether it was appropriately addressed. And that was the determination this Court made at the time it addressed their motion to withdraw. That's all. I don't think your ruling was that doesn't exist. I think, as you spoke earlier this morning, that error would likely to be perpetrated or perpetuated with the replacement of counsel. So granting a motion to withdraw wouldn't necessarily address this issue. It would just be done over and over again. So I don't think that's valid to say that there is no legal conflict of interest.

Ground 19-A, I guess we did make a numerical error there. I'll acknowledge that. And that related to a claim that -- well, we have in our record here, our claim 19 is that Mr. Vanisi had no access to the Finger decision, meaning the insanity defense. I don't know if that was what Mr. McCarthy was referring to.

But aside from that, Your Honor, I'll stand by the comments I made earlier. I believe that this issue about Tongan nationality is established at least by the standard that we're required to pose here. And you don't

have any guidance on what to do with this. I can predict, it's my understanding that the decision in the Medellin case from the United States Supreme Court should issue next month or no later than July, just knowing that opinions come down at a certain time after argument, which was I believe in March of this year on that case.

But there is no authoritative precedent on the issue of prejudice. There is no authoritative precedent on the issue of remedy either. So I apologize for bringing an issue without sufficient possible resolution to the Court, but we're here and I feel that was my duty.

So with that, I'll submit the matter on the pleadings.

THE COURT: Thank you, counsel. I'll take this matter under submission. I'm not going to promise any particular time frame for the decision. We'll get to it. Court's in recess.

(Recess taken at 1:45 p.m..)

STATE OF NEVADA,)
)
COUNTY OF WASHOE.)

I, DENISE PHIPPS, Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department No. 4 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 18th day of May, 2005.

Denise Phipps

DENISE PHIPPS, CCR NO. 234

Exhibit 41

Exhibit 41

Code No. 4185

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

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SIAOSI VANISI, Petitioner, vs. STATE OF NEVADA, Respondent.	Case No. CR98P0516 Dept. No. 4

TRANSCRIPT OF PROCEEDINGS

POST CONVICTION HEARING

April 2, 2007

RENO, NEVADA

Reported By: DENISE PHIPPS, CCR No. 234

APPEARANCES:

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For the Respondent:
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RENO, NEVADA, MONDAY, APRIL 2, 2007, 1:30 P.M.

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THE COURT: This is the time set for oral argument. And it's a little unusual to have another oral argument. But given the Supreme Court's most recent decisions and what's happening with the Supreme Court decisions, I thought it was appropriate to have another argument with regard to the change.

I didn't expect to get a brief. I did get 16 pages, which we found this morning. We didn't get a courtesy copy, so we didn't know about it until this morning. But we did find it, and we do have it.

But I don't think you've responded, Mr. McCarthy.

MR. McCARTHY: I have not, Your Honor. I have been out of the office lately. When I returned, there was a note on my calendar saying I have oral argument, and that's all I knew about it, until quite recently.

I also received a somewhat voluminous document. And in the absence of an order from the Court saying file that document, it's inappropriate, I'd ask the Court to strike it. On the other hand, if you've already read it, what do I care?

THE COURT: Well, it wasn't really anticipated.

If you want an opportunity after the argument today to supplement your remarks and reply to this, I will give you that opportunity.

But Mr. Edwards, you're up.

MR. EDWARDS: Your Honor, we certainly wouldn't object to that. We filed this brief once we understood what the argument would be about today to be of assistance to the Court.

Mr. Qualls will be presenting the argument that we've set forth both in our brief and we intend to make to you today.

It's my understanding that the message I received from your department was your law clerk said, in light of recent holdings in Bejarano and Rippo and other cases regarding a claim that we have supplemented in our petition regarding McConnell error, is what we've called it, you'd like to hear what the appropriate approach at this point in time for you to do is.

THE COURT: Right. Although I don't like to call it McConnell error. I prefer to call it McConnell. In other words, the Supreme Court actually changed the rules. It's not like we missed a rule.

MR. EDWARDS: That's correct, Your Honor.

And now in light of those cases we know about its

retroactivity, which was a procedural issue that you have to address given our pleading, I'll let Mr. Qualls address the substantive remedy in this case.

THE COURT: Mr. Qualls.

MR. QUALLS: Thank you, Your Honor. And essentially, just to echo Mr. Edwards' points about the memorandum of law, this was provided simply because there were changes in the law from the time that we filed our supplement in this case and on this issue and today's date, and we felt like it would be helpful both to the Court to hear our position on those new changes and also to get Mr. McCarthy, the State, notice of what our position would be here today.

And so that was the reason for the memorandum. We certainly think that it's appropriate given the changes in the law and given the interpretations that the Nevada Supreme Court has published over the last couple of years, and given the ongoing dynamic nature of death penalty litigation in the United States Supreme Court, coming out of the Ring decision.

But the bottom line, and I will try to sum this up fairly quickly for the Court, because I think our memorandum adequately covers our position. But we think that Mr. Vanisi is entitled to a new penalty hearing based

upon the McConnell decision and this is why:

Essentially, the jury found three aggravating circumstances in Mr. Vanisi's case. One of those aggravating circumstances was a, as we've deemed it, a McConnell aggravator. It was based upon the aggravator was that the murder occurred during the commission of or in an attempt to commit a robbery.

The State in this case filed the alternative theories of murder, both the first degree, premeditated and deliberated murder, and that the murder happened in the course of a felony.

So they pled the felony murder alternative theory as well. It was not clear from the jury's verdict as to which one the jury picked. And under the authority of McConnell, McConnell one and two, Bennett, Bejarano and Rippo, those are the five major decisions interpreting that rule that was originally made in McConnell, that aggravator not only should be invalidated, but based upon Bejarano and Rippo, that is retroactive to Mr. Vanisi's case.

So the question then for the Court is: What's the remedy? What do we do? We have three aggravating circumstances. Now we've got two.

The Nevada Supreme Court in Bejarano and in Rippo

has taken it upon itself to reweigh the aggravating and mitigating factors.

It's our position that based upon the U.S. Supreme Court case in Ring v. Arizona cited in 2002, that reweighing or harmless error analysis is improper.

Just to back up and refresh everyone's memories a little bit. Apprendi v. New Jersey was decided by the U.S. Supreme Court in 2000. And essentially that decision said that any penalty enhancement has to be decided by a jury.

Ring came down, Ring v. Arizona came down in 2002 and applied the Apprendi reasoning to death cases. Backing up a little bit, in 1990, there were two cases, Walton and Clemons. Walton essentially said there's no Sixth Amendment violation for a judge to impose a death penalty. And Clemons said there's no Sixth Amendment violation if a judge reweighs the decision in the death penalty case, after an aggravator is found invalid and finds the death penalty again. Apprendi left alone the Walton decision which said that a judge could impose the death penalty.

Then Ring came over and overturned Walton. Walton and Clemons, in our opinion, are based upon the same exact reasoning.

We believe that it's only a matter of time until the Supreme Court explicitly and expressly says what we believe it's already essentially said in Ring, that the reweighing is the same thing; that the reasoning in Clemons and Walton are the same and eventually it's going to come out Clemons, too, is a violation of the Sixth Amendment.

We understand we're not exactly there and that the Nevada Supreme Court's position is different at this point.

But we also believe reweighing and harmless error analysis in the state of Nevada is improper just based upon the way that the discretion that the jury is given and the way in which death penalty litigation or a death penalty penalty phase is undertaken. There's the two steps. There's the eligibility phase. And then there's the decision as to whether to apply the death penalty or not.

As the Court knows, as we know, aggravators and mitigators are not a numbers game. In other words, it's not that we found three aggravators and two mitigators, so therefore we have to impose the death penalty. It's also not we found five mitigators and one aggravator so we don't get the death penalty.

The jury's given a tremendous amount of discretion. They can find 10 aggravators and no mitigators and they still don't have to find the death penalty.

They can still cite the only mitigator as being mercy. So it's impossible for us to look back and say what was in the hearts and minds of those jurors. The jury collectively, and the individual jurors, and how much weight has one aggravator held for any of them. Because all it takes is one juror for which this held an immense weight or even which it just held the hair that tips the scale.

There's no way for us to know. So there's no way for us to honestly go back and say, yeah, that aggravator is gone but that's harmless.

We know that those jurors didn't decide the death penalty based upon that aggravator. So that's one of our primary points here. In addition to the legal decision and the legal opinions in Ring.

Finally, we want to remind the Court that in this case there was a substantial amount of mitigation evidence put forth. The defense put on 23 witnesses in mitigation, I believe, was my count.

They all gave compelling testimony about what a

generous, kind, nonviolent person they knew Siaosi Vanisi to be. And I think that's relevant when the Court considers the last two decisions of Bejarano and Rippo.

In Bejarano, because of the McConnell aggravators, two of six aggravators were taken out of the mix. In Rippo, I think it was three of the six were taken out. But the Court commented in both cases about the slight amount of mitigation that was presented and the overwhelming extreme aggravating circumstances that were there.

As a matter of fact, in Bejarano, the Court noted that the most damning testimony came from Bejarano himself. He absolutely scoffed at the jury. He told the jury, quote, "You're sicker than I am when you sit back and giggle. Believe me you're sick." He said, "I'll probably laugh at you guys."

His comments to the jury were incredibly offensive, and he had a number of aggravating circumstances, including the prior murder of a police officer prior to the conviction and death sentence in that case.

So the bottom line is that the finding that is required is that, in order for a Court to reweigh, it has to be found beyond a reasonable doubt that absent that

invalid aggravator the jury would still have imposed a sentence of death, beyond a reasonable doubt.

We would argue that it's simply speculative in this case based upon the immense amount of mitigation that was presented. And we submit that when the thumb is taken off the scale, the thumb of this one invalid aggravator in this case, it cannot be said that beyond a reasonable doubt a jury would still find a sentence of death in this case.

So we'll pass argument to the State.

THE COURT: Mr. McCarthy.

MR. McCARTHY: Thank you, Your Honor. There were indeed three aggravating circumstances. One of them was indeed felony murder.

The felony was robbery. And I don't know if the Court recalls what the robbery consisted of, stealing the gun of the police officer.

The other aggravating circumstance involved murdering a police officer who was performing his duties when the defendant knew he was a police officer or had reason to believe -- sufficient notice that he was performing his duties as a police officer. That will come up again in a minute.

I also agree that the question before this Court

is what to do now. I agree the law has changed. Let me preface this by saying I don't expect any action by the Court. It is my position, nonetheless, that McConnell was wrong and Bejarano -- or however we're pronouncing that -- itself is wrong. I intend to raise that again. And now having made my record, I'll move on.

I don't think reweighing is necessary at all. But that is the appropriate response. It is not some mystical process. It is the traditional role of a court in a habeas corpus to evaluate prejudice. That's all it is.

That was made clear recently last year. U.S. Supreme Court in Brown versus Sanders. I know you're going to want to read this. It will be the focal point of my argument. It's 546 United States 212.

Interesting you'll find the concurring opinion cited in that recent brief that was filed by my colleagues but no reference to the prevailing majority.

I will have some comments about the prevailing majority.

The Brown decision makes it clear that there's nothing wrong with this traditional role of the Court in a habeas corpus action of evaluating prejudice because it arises for various reasons, including society's interests

in the finality of judgments and things like that.

But it is clear enough that both U.S. constitutional law and Nevada law allows this Court to engage in a process of evaluating prejudice. Whether we term that reweighing or the traditional role or anything else, certainly you can do it.

We know it under Nevada law because the cases relied on by the petitioner, including Bejarano, did just that.

So it is interesting to say: We should rely on Bejarano to note that McConnell was retroactive, but then ignore the rest of the whole thing that says what you should do about that. I say rely on the whole case, if you're going to do anything at all, including the process of what happens now.

I also agree that the evaluation of mitigation and aggravation is not a numbers game. That's going to be very important because that's precisely what the Court was talking about in Brown, Brown versus Sanders.

By the way, what Mr. Qualls said about prejudice is not exactly correct. That is a direct appeal standard. That is any error is considered prejudicial unless the Court is convinced beyond a reasonable doubt that it wasn't prejudicial is a direct appeal standard. The Court

may have noticed, you are not the Supreme Court and this is not on direct appeal.

The appropriate standard is spelled out in Brown and it's not quite that significant.

And furthermore, because of this procedural posture being here on a petition for writ of habeas corpus, there's a presumption that any error is not prejudicial and petitioner must demonstrate that he's entitled for relief.

So having said all that, let me jump right to the pertinent passage, pertinent part of Brown.

They're talking about the skewing process, removing the weight of the thumb from the scale, so to speak.

And the Court said: "As we have explained, such skewing will occur and give rise to constitutional error only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other valid sentencing factor."

You may recall a moment ago when I started out reciting what the aggravating circumstances were. One of them is that Mr. Vanisi killed a police officer who was in fact performing his duties and under circumstances that let him know that the police officer, that he was a police

officer.

Don't you think, Your Honor, that stealing the officer's service weapon kind of enters into that just the tiniest bit? That is, could not the jury consider all the evidence relating to the murder of a police officer as including stealing the officer's gun?

Now, it is not a number's game. The Court has made that clear in Brown. It's about weight. I think we have a similar one in Geary, where, in essence, the legal conclusion that flows from facts and circumstances is not terribly significant; that is, when he stole the officer's gun, if the legal conclusion is that was a felony murder that made it a felony murder, or the legal conclusion is just that it happened, that he killed a police officer in the performance of his duties, the weight remains unchanged.

An aggravating circumstance has been proven. Actually, two. We also have the mutilation, because they pulled teeth out of the officer's throat.

But there are two valid aggravating circumstances, and the fact of stealing the officer's gun is still properly considered under the rubric of the valid aggravating circumstance.

The legal conclusion that there was a robbery may

have changed via McConnell. But all that the jury was to weigh is still there. The balance is unchanged. That's what the Brown court says. We have no constitutional error at all. There's no point in reweighing because the weight is unchanged.

If the Court disagrees and thinks that we should undertake the analysis, then I think the conclusion is fairly clear.

And I did forget to mention one little thing. That is the question of whether McConnell should apply here at all.

Your Honor may recall that the so-called McConnell rule was not applied in McConnell. The Court said the reason we're doing that is because in that case the case was clearly prosecuted as a premeditated murder and not as a felony murder. That is, they undertook the prejudice analysis before deciding whether it would be error. Somewhat unusual. Not the usual course of business. But that's what the court did.

That happened here as well, Your Honor. There is indeed a nominal change involving felony murder. It's pleaded in the charging instrument.

I must admit I haven't pulled the trial file in the last couple of years. My notes, however, from the

last time I happened to look at it a couple of years ago was that the felony murder theory was never argued by anyone. That is, I think this Court can say as a matter of fact that there can be no prejudice.

You can do as much as the McConnell court did and say we're not going to apply the McConnell rule to this fellow, to McConnell or to Vanisi because it was clearly tried as a premeditated murder case.

But even if you do, if you apply the McConnell decision, also apply that passage I read from Brown and realize that the felony murder, the facts of the felony murder remain available, the balance is unchanged because the felony murder was, the facts of the felony murder were part and parcel of the facts of the other valid aggravating circumstance that Vanisi killed a police officer in the performance of his duties and that he knew he was a police officer.

His stealing his gun is at least relevant to that decision. Therefore, the facts remain available, would have been available to the jury to consider it under the rubric of the valid aggravating circumstance.

So to answer the question: What do we do now? My answer is nothing.

There are quite a few claims. We've had a

hearing on them, and in my opinion the matter is ripe for a decision and the Court ought to deny the petition.

THE COURT: Mr. Qualls, anything further?

MR. QUALLS: Thank you, Your Honor.

With due respect, since the McConnell decision, the State has posited every single argument to the Nevada Supreme Court to try to slip out from underneath it. The Nevada Supreme Court has consistently said no, no, no, we told you this. We told you this.

Down to the last decision in Rippo, which is November 16th, 2006, in which -- my apologies if Bejarano was cited after. They were decided on the same day. And I'll quote:

"We address first the State's argument that the theory of felony murder in this case can be disregarded under McConnell, because there is 'ample evidence that Rippo committed premeditated murder.' This approach has no basis in McConnell. The holding and rationale in McConnell do not involve determining the adequacy of the evidence of deliberation and premeditation, rather, they're concerned with whether any juror could have relied on the theory of felony murder in finding a defendant guilty of first degree murder."

That is, for the record, Rippo v. State, 122

Nevada Advanced Opinion 93, 146 Pacific 3rd, 279. And it is found at page 283.

And the Nevada Supreme Court, again in Bejarano and Bennett and McConnell, too, in which the State asked the Court to reconsider his decision, have made similar statements.

So the fact of the matter is that the State pursued alternative theories and then sought the death penalty based in part upon a McConnell aggravator, that the murder was committed during the commission of a robbery and the jury found that aggravator.

So the Nevada Supreme Court has simply said you can't have it both ways. Unless there's a clear statement from the jury as to which theory they picked, then that aggravator is invalid. And that's -- they've been repeatedly clear about that.

Second, the stealing -- and I think the impression that I got was counsel for the State was trying to belittle the significance of the stealing of the police officer's gun as that aggravator wasn't all that important.

I think that takes on immense symbolic value in the murder of a police officer to steal the police officer's weapon, to steal the officer's gun, issued

police revolver. That to me seems incredibly symbolic.

And I don't think we can say beyond a reasonable doubt. And I believe that is -- I will dispute the State's argument about that as well. I believe that is still the standard on this issue, that we have to find beyond a reasonable doubt that that aggravator did not tilt the scale.

Third, again, I feel like this is another one of the State's arguments to try to really split the hairs to get around this. But the robbery, the stealing of the officer's weapon has to be removed from the actual aggravator of killing the police officer. It is not a necessary act.

You don't have to take the gun in order to kill the officer. And so when Brown talks about -- and I mean the irony here is that Mr. McCarthy and I are relying on the same exact same phrase here.

And the full phrase that the U.S. Supreme Court relied out in Brown actually starts with a cite to another U.S. Supreme Court case that says: "When the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale."

Then it moves into: "As we have explained, such skewing will occur and give rise to constitutional error only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other valid sentencing factor."

The State wants you to say that you can consider the stealing of the weapon under the aggravating factor of killing the police officer. And I say those two are different acts, different entities, and if you're going to use one, if you're going to use the fact of taking the gun to seek murder under the felony murder rule, you cannot use that fact.

And this is what Brown says and this is what McConnell says. You cannot use that fact to then seek the death penalty.

So that fact has to be removed. And it is not necessary to the act of killing the police officer. So those two are completely separate. Under McConnell and Brown, they have to be separate. And there's no reason to consider that fact under any other factor.

So I think that point in Brown is incredibly important and I think it falls down on our side of the argument. And we'll submit it.

THE COURT: Mr. McCarthy, I would like to hear

from you about the State's position with regard to the failure to raise the McConnell issue in the appellate brief, I guess, on direct appeal.

MR. McCARTHY: Your Honor, you're familiar with the phrase, the distinction between dazzling and baffling. I don't intend to baffle you.

The issue is properly before the Court. Although I think it is clear enough that Mr. Petty was not ineffective in any way in the way he advanced his issues, the claim all by itself would be barred in this action because it was not raised on direct appeal and it was a reasonable tactical decision -- actually, probably wasn't because it wasn't available. But in Pellegrini and other cases, the Court has said that that bar can be overcome if the claim was not legally available.

And in Bejarano, the Court seems to have ruled that the merits of the claim is properly before the Court with regard to a vehicle.

So petitioner doesn't need to show ineffective assistance. If he did, I think counsel clearly was effective. I think the testimony at the hearings we had previously showed he got the best appellate representation in the business.

But I don't think it's necessary for the

petitioner to show that.

THE COURT: The other question I have for you is you really didn't address -- I understand you addressed it in your own way, but you didn't address it directly, the issue of whether or not I can reweigh the factors. You've given me some reasons why under the Brown decision maybe I'm not doing that, maybe there's another thing I can be doing.

But assuming their argument is that bottom line, even though the Supreme Court reweighed in Rippo and Bejarano, I can't. Or the Supreme Court shouldn't have. Your position on that.

MR. McCARTHY: Whether they should have or shouldn't have, I suppose, is a debate for somewhere else.

THE COURT: Not for me.

MR. McCARTHY: What is it they say about infallibility in the Supreme Court? They're not the Supreme Court because they're infallible. They're infallible because they're the Supreme Court. And they have told us this is what to do.

Now, the traditional role of an Appellate Court is to review the decisions of trial courts.

Now, they take on that weighing process, most often it seems like in the first instance, at least in the

last couple of years.

But I would think it would be more in keeping with the normal process for this Court to first rule and for the Supreme Court to tell us if you ruled correctly or not.

So my discussion of Brown was designed to say that, whether we do it under the guise of harmless error analysis, prejudice or reweighing, it doesn't really matter because the weight has not changed. All that has changed is the number. The number of aggravators has changed. The aggravating facts have not.

Furthermore, the Court in Brown did not say there is no mention that the evidence of the invalid aggravator must be absolutely necessary, it says it must be available.

I think it's clear that the fact that someone stole a police officer's gun that is still available as part of the evidence of res gestae, if you will, of knowing that a police officer is in the performance of his duties. So clearly it's available.

So the factual balance remains unchanged according to the Brown decision.

When all that changes is the legal conclusion of how many aggravators there are, and the evidence of those

aggravators remains unchanged, and according to Brown, there's nothing left to do. You may notice they used the phrase there's no constitutional error here because of that.

Now Brown was a California decision. It was out of the State of California. Their capital sentencing process is somewhat different than ours. Not greatly. But they have a distinction. They talk about the variance between weighing states and non-weighing states and all that. But they're pretty much telling us how you, Your Honor, should undertake this process in evaluating prejudice.

And they're saying if all that has changed is the number of aggravating circumstances, then there is no constitutional error.

I recommend that approach to you.

THE COURT: Okay. Thank you. Mr. Qualls, do you have anything you'd like to say based upon my questioning of the State?

MR. QUALLS: Just very briefly, Your Honor. And thank you. The State wants to reduce the aggravators simply to numbers. The State wants to say that -- I mean kind of playing both sides of the fence, that the stealing of the weapon doesn't matter, that that's just a number.

If you take out that factor -- and we're talking about sentencing factors here. That's what Brown is talking about. And there is no way that the stealing of the officer's gun was the res gestae of the crime in that you couldn't describe the murder without talking about stealing of the weapon.

But when we break them down in a penalty phase -- and counsel is right, there's a whole lot to the Brown decision, but the essence we're talking about isn't very different than what we're talking about in McConnell.

And that's why I brought it back to that. When you take out that factor, that sentencing factor of stealing the weapon, then, number one, it does matter when it's in the matrix. It's not just simply changing the numbers game from 3 to 2. It's not just a number. It does matter because it's a significant factor.

Number two, it is a sentencing factor that is removed, not just a description of the crime.

And that is significant when we're talking about aggravating and mitigating circumstances and factors that are involved.

Again, it's not just -- the crime is all the same, we've just removed a number as if it's this empty thing that doesn't matter. It does matter. And it is

significant.

And it was a significant act. And I think the factor -- what Brown tells us, that's a factor that has to be removed. And it can't be considered under -- it can't be we'll slip that in under killing the police officer. We can't do that. McConnell says we can't do that.

So those are the two points. Number one, it can't be done. It can't be considered under something else.

And if that is true, then you do have a constitutional error under Brown. And number two, the factor does matter. The symbolic act of taking the officer's gun matters. It's not just changing the numbers from 3 to 2.

THE COURT: Thank you. Mr. McCarthy, did you want to supplement anything? Did you want to reply to their brief?

MR. McCARTHY: If Your Honor wishes it, I would be more than glad to do it.

THE COURT: I don't want 16 pages with 200 exhibits.

MR. McCARTHY: McCarthy's rule of appellate practice: If you can't reduce it to a paragraph, it's probably because you don't understand it.

So if you give me three pages, I will --

THE COURT: I will give you three pages.

MR. McCARTHY: I will do everything I can in three pages.

THE COURT: I would like three pages.

MR. McCARTHY: I can name that tune in two notes.

THE COURT: Then you can respond to it -- 10 days is enough time?

MR. McCARTHY: That's fine. I notice you also have me preparing an order on McCaskill. I haven't gotten to that. Please forgive me.

I'll work on both of these at my earliest opportunity.

THE COURT: I understand you're just back from vacation. But if you can get that to me in 10 days. It's an interesting issue. In this particular instance I think it's given us an opportunity to really get some more case law out of the Supreme Court, that when you argued you told me it was up there. You all knew a lot more about what was going on at the Supreme Court than I did.

And you knew that there was something coming down. Now we've gotten it. We really have a complete, I don't know if it's over, but we have a pretty solid body of law now with regard to this issue from the Nevada

Supreme Court. And I think we'll be able to get it resolved.

So by way of saying that maybe in this case the delay hasn't been so bad. I still would like to get this resolved.

So if you can get that to me within about 10 days, then I'd like to move forward and get a decision out to you.

Thank you, gentlemen. Court's in recess.

(Recess taken at 3:00p.m.)

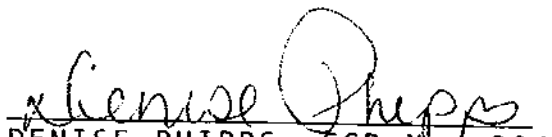
STATE OF NEVADA,)
)
COUNTY OF WASHOE.)

I, DENISE PHIPPS, Certified Shorthand Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That I was present in Department No. 4 of the above-entitled Court and took stenotype notes of the proceedings entitled herein, and thereafter transcribed the same into typewriting as herein appears;

That the foregoing transcript is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 2nd day of April 2007.



DENISE PHIPPS, CCR No. 234

Exhibit 42

Exhibit 42

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By: _____ DEPUTY CLERK

CODE: 1750

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

Dept. No. 4

WARDEN, ELY STATE PRISON, AND THE STATE OF NEVADA,

Respondents.

/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus. Petitioner Vanisi was represented by the Washoe County Public Defender on charges including murder stemming from the attack on University Police Sergeant George Sullivan. The case has a lengthy procedural history including pre-trial writs and appeals. Ultimately, the case was tried and Vanisi was sentenced to death. He appealed but the judgment was affirmed. *Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001). In the course of affirming, the Court noted, inter alia, that the evidence of Vanisi's guilt was "overwhelming."

Vanisi later filed a petition for writ of habeas corpus (post-conviction). This court appointed counsel and allowed a supplemental petition. Before counsel filed the supplement, however, counsel filed a motion in which they suggested that Vanisi was incompetent and that the cause should be stayed indefinitely until he regained competence. Counsel suggested that they should not be required to file a supplement because there could be other claims that would come to light only if Vanisi was competent. The State opposed the motion and suggested that even if Vanisi were incompetent, that would not lead to indefinitely staying the proceedings. On February 18, 2005, the court conducted a hearing on the issue. Upon considering all the evidence, the court determined as a matter of fact that Vanisi was not incompetent. Consequently, it was not necessary to decide the consequences of the alleged incompetence. The court then directed counsel to file the supplement. The original petition had no specific claims for relief and so the only claims were presented in the supplement.

The State filed its motion to dismiss, but the court held that motion in abeyance and allowed petitioner to present evidence concerning all of the claims. At the close of that hearing, the court initially took the matter under advisement. Before any ruling, however, the Supreme Court issued its ruling in *Bejarano v. State*, ___ Nev. ___, 146 P.3d 265 (2006). Accordingly, the court called for additional arguments relating to the application of that case to the instant case. Afterwards, the court again took the matter under advisement. After careful consideration of all the arguments and evidence, including the demeanor of the witnesses, the court makes these findings.

///

The first claim involved the Vienna Convention on Consular relations. Vanisi alleged that he is a Tongan national and that when he was initially arrested in Salt Lake City, officials failed to inform him of his right to contact the Tongan consulate. There was evidence in earlier proceedings establishing that Vanisi was a citizen of Tonga, and the State has not seriously disputed that allegation. However, the court notes that there was no evidence presented in the habeas corpus hearing tending to establish that he was not informed of his right to contact the consulate. He had a full and fair opportunity to present whatever evidence he wished, but made no effort to support this claim. Thus, the factual predicate for the claim remains unproven. Nevertheless, the court will address some of the other issues.

The claim concerning the Vienna Convention was raised as a stand-alone claim for relief as well as part of a claim of ineffective assistance of trial counsel and of appellate counsel. The stand-alone claim will not be considered for reasons presented in the State's motion to dismiss. The claim will be heard, however, in the context of a claim of ineffective assistance of counsel. The claim of ineffective assistance of counsel requires the petitioner to prove by a preponderance of the evidence that the specific acts or omissions by counsel fell below an objective standard of reasonableness. In addition, the petitioner must show resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In the case of trial counsel, the petitioner must show that but for the failings of counsel a different result was reasonably likely. *Id.* In the case of claims omitted by appellate counsel, the petitioner must show that the claim had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Here, the court finds that neither counsel was ineffective. Appellate counsel

testified credibly that he made a strategic choice concerning what issues to raise, and did not wish to bury what he believed to be a viable issue within a pile of less meritorious issues. The court also notes that petitioner's expert agreed that the issue was not one that would inspire reasonable counsel to raise the issue. The court also notes that the state of the law was such that reasonable counsel would not be inclined to devote any resources to developing the claim. *See Garcia v. State*, 117 Nev 124, 17 P.3d 994 (2001).

In addition, the court finds a lack of prejudice. Michael Specchio testified credibly that very early on in the litigation his office contacted the Tongan consulate but that the representative of Tonga expressed absolutely no interest in rendering any sort of assistance to Vanisi or to his counsel. The court also notes that no consular or diplomatic officials appeared at the habeas corpus hearing. There was no evidence presented tending to show that this case would have been affected in any way if Vanisi had been told upon his arrest that he had the right to contact the consulate that had no interest in assisting him. Accordingly, this court finds as a matter of fact that Vanisi was not prejudiced in any way due to the alleged lack of advisement of his right to contact his consulate, or due to the failure of counsel to raise an issue concerning the Vienna Convention in the trial court or on appeal.

Vanisi next claims that the death sentence must be set aside because the charging document included a felony-murder theory and the jury found that same underlying felony as an aggravating circumstance. The argument is dependent on a change in the law occurring after the direct appeal in this matter. *McConnell v. State*, 120 Nev. ___, 102 P.3d 606 (2004), *rehearing denied*, 120 Nev. ___, 107 P.3d 1287 (2005), marked a distinct change in the law. Nevertheless, the Supreme

Court subsequently ruled in *Bejarano* that the *McConnell* decision would be applied retroactively.

There is little question that *McConnell* applies. The court finds however, that application of the *McConnell* decision does not affect the outcome of this case.

The charging instrument alleged both premeditated murder and felony murder. The felony murder stemmed from the robbery charge. The robbery charge arose because when Vanisi attacked Sergeant Sullivan, he stole the officer's service weapon. The jury did not return a special verdict. At sentencing, the jury found that the aggravating circumstances included the same robbery allegation as was alleged in the portion of the charging instrument alleging the felony-murder theory. In *Bejarano*, however, the Court ruled that the error can be harmless. In *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006), the Court indicated that the analysis of harmlessness is akin to the traditional analysis of prejudice commonly applied by Nevada trial courts in post-conviction actions. The Court ruled that where the facts concerning the invalid aggravating circumstance are nevertheless available to be considered when weighing a valid aggravating circumstance, then the invalidation of the aggravating circumstance ought to be seen as non-prejudicial. Here, the invalid aggravator involved robbery. The nature of the robbery involved the theft of the service weapon of a uniformed police officer. Those facts were still available to the jury even after eliminating the aggravating circumstance of robbery. The facts concerning the invalid aggravator (robbery) could nevertheless be given aggravating weight under the rubric of a valid aggravator (killing and mutilating an officer). The ferocity of the attack, and its attendant mutilation, rendered Sergeant Sullivan unable to resist the theft of his service weapon. The theft was part and parcel of the

killing and the killing included the theft. The theft, the killing and the mutilation were all temporally and geographically contemporaneous and so the jury, in considering what weight to assign to the valid aggravators, could certainly have considered the facts and circumstances of those valid aggravators as they included the theft and the officer's inability to resist the theft. The court also notes that the aggravator involving the killing of a police officer required the State to prove that the defendant knew or should have known that the victim was a police officer performing his duties. The theft of the service weapon certainly is available as part of the proof that Vanisi knew he was killing a police officer who was performing his duties. Thus, under the analysis of *Brown v. Sanders*, this court finds that there is no likelihood of a different result by the retroactive application of *McConnell*. Whether the nature of the crime amounted to one aggravating circumstance or a dozen, the facts and the attending weight remain unchanged. Therefore, the claim concerning the retroactive application of *McConnell* is denied.

Vanisi next argues that this court erred in denying his motion for self-representation. That claim was considered and rejected on direct appeal and thus is barred under the "law of the case." *See Hall v. State*, 91 Nev. 314, 535 P.2d. 797 (1975).

The next claim is that counsel operated under a conflict of interest. Ordinarily that would be a troubling allegation. In the instant case, however, petitioner goes on to identify the alleged conflict as being nothing more than the fact that the lawyers felt bound by the rules of ethics. That is, he contends that a lawyer who feels bound by the rules of ethics has a conflict of interest and cannot stay on a case. In other words, Vanisi contends that he is entitled to an attorney who feels that the rules of

ethics do not apply to him. There is no such right. *See Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986). A lawyer is bound to zealously advocate within the bounds of the law but there is no right to be represented by a lawyer who is willing to operate beyond the bounds of the law.

The Court also finds that the claim is based entirely on the record and therefore could have been raised on direct appeal. There are no specific facts alleged or proven that would lead to the conclusion that reasonable appellate counsel would have raised this argument to the Supreme Court and so the claim is denied.

The next claim concerns trial counsel's motion to withdraw. According to the petition, at some point Vanisi admitted to his attorneys that he had indeed killed Sgt. Sullivan, but that he proposed to testify that someone else had committed the crime. Petitioner alleges that counsel revealed that little problem in chambers in an effort to withdraw. There is nothing wrong with that procedure. *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986). The court also notes that defense counsel was advised by bar counsel to reveal the nature of the problem to the court *in camera* and did just that. To the extent that he claims that the procedure inhibited his ability to commit perjury with impunity, the court holds that there is no right to commit perjury and there is no right to a lawyer who will facilitate perjury. To the extent that petitioner contends that defense counsel revealed confidential information to the prosecution, that claim is untrue. The record reveals that the *in camera* conference was sealed and was not made available to the prosecution. There was no evidence introduced to contradict the record and so this court finds the allegation to be untrue.

Vanisi next makes a somewhat generic argument that counsel failed to investigate and develop a defense. However, he failed to show what evidence might have been uncovered through additional investigation, or what defense might have been developed. The record reveals that defense counsel did little during the guilt phase of the trial, but Mr. Gregory explained that they were hampered because Vanisi kept insisting that he had many defenses but that he would not reveal them to his attorneys. However, once the trial entered into the penalty phase, counsel was able to become much more aggressive. The court finds that trial counsel in the guilt phase did the best they could with what they had to work with. They were hampered because Vanisi would not allow them to pursue any defense based on the premise that he had committed the homicidal act, but then would not help in pursuing any other line of defense. Because Vanisi has not shown that any additional evidence was available, or that any additional questioning would have had any impact on this case, this claim is denied.

Ground 7 consists of a series of brief assertions that Nevada's death penalty scheme is unconstitutional. To the extent that these are stand-alone claims, each is barred for failure to raise it on direct appeal. NRS 34.810. To the extent that the claim is a claim of ineffective assistance of appellate counsel, the Court first notes that the mere existence of an argument, even a non-frivolous argument, does not mean that appellate counsel is required to raise the argument. Instead, reasonable lawyers may, and should, pick their best arguments and take their best shot. *Hernandez v. State*, 117 Nev. 463, 24 P.3d 767 (2001). Appellate counsel, John Petty, testified credibly that he was familiar with the various arguments but that he made a tactical decision to focus his efforts on the assertion that the court erred in

denying self-representation. Strategic and tactical decisions are virtually unchallengeable absent extraordinary circumstances. *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Vanisi has not proved any facts that would lead to the conclusion that some extraordinary circumstance exists that would allow the court to second-guess appellate counsel and so the court will not do so. Instead, the court finds that Mr. Petty made reasonable, tactical decisions concerning what issues to raise.

Furthermore, each argument has been repeatedly rejected. *See McConnell v. State*, *supra*; *Hernandez v. State*, 118 Nev. 513, 50 P.3d 1100 (2002); *Rhyne v. State*, 118 Nev. 1, 38 P.3d 163 (2002); *Evans v. State*, *supra*; *Leonard v. State*, 117 Nev. 53, 17 P.3d 397 (2001)(and cases cited therein); *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997). Thus, the court also finds that the various arguments were not likely to succeed.

Ground 8 is a contention that the death penalty is unconstitutional in all cases as it is cruel and unusual. That claim suffers from all the same defects as ground 7. It is also incorrect. *McConnell v. State*, *supra*.

Ground 9 includes the assertion that the death penalty violates the International Covenant on Civil and Political Rights. That claim suffers the same deficiencies as grounds 1, 7 and 8. In addition, the court notes that the Covenant does not preclude the death penalty for adults. Finally, there is a debate about whether the United States is a signatory to the Covenant. *See Roper v. Simmons*, 125 S.Ct. 1183, 1226 (2005)(Scalia, J., Dissenting). The Covenant was drafted in a manner by which each country must either accept it or reject it. The Senate "reserved" a clause but attempted to ratify the rest. It is at least arguable, therefore,

that the Covenant has never been ratified in this country. Either way, no relief is warranted.

Ground 10 is a claim that the sentence calling for death by lethal injection must be vacated because the death penalty might be applied in a manner that could be more serene. That argument has also been rejected by the Nevada Supreme Court. *McConnell, supra*. The court finds that appellate counsel was not ineffective in failing to raise this argument and that the argument was not likely to succeed. The court is aware that both the United States Supreme Court and the Nevada Supreme Court have agreed to examine the question, but the court finds that the fact that a reviewing court has agreed to hear a case has no precedential value. Accordingly, that claim is denied.

Ground 11 mentions that Vanisi might someday become incompetent to be executed but he seeks no relief based on that allegation. Therefore, no relief is warranted.

Ground 12 is an assertion that the conviction and sentence are invalid because the judicial officer presiding over the trial was an elected judge. The court finds that counsel was not ineffective in failing to raise this issue and that it had no reasonable likelihood of success. *See McConnell, supra*. Accordingly, that claim is denied.

Vanisi next claims that the death sentence must be set aside because there is a possibility that an innocent person might be executed. The court notes that there is no doubt that Vanisi is not one of those innocent persons. The court finds that counsel was not ineffective in failing to raise this issue and that it had no reasonable likelihood of success. Accordingly, that claim is denied.

The 14th claim is an argument that the death penalty is prohibited by the Due Process clause because it is not rationally related to any legitimate government goal. This claim suffers from all the defects found in parts 7 through 13. It is also legally wrong. In addition to the other factors, our legislature could legitimately determine that the death penalty is a way to advance society's interests in deterring others, in preventing future crimes by the murderer and in punishing the wrongdoer.

The 15th claim is a compilation of some of the arguments already discussed. No further discussion is warranted.

Ground 16 includes the defects found in parts 7 through 15. The court finds that counsel was not ineffective in failing to raise these arguments and that they had no reasonable likelihood of success.

Ground 17 fairs no better than grounds 7 through 16. It is an argument to the effect that a "death qualified" jury, a jury that agrees to follow the law, prevents a fair trial. This claim has been repeatedly rejected by the courts that have considered it. The constitution does not demand that the jury pool be limited to those who will not agree to follow the law presented by the judge. *See McKenna v. State*, 103 Nev. 227, 737 P.2d 508 (1987). Vanisi has not directed any of his arguments to the jury that actually heard this case. He presents only generic arguments that ought to be presented to the legislature. The Court finds that counsel was not ineffective in failing to advance this argument and that it was not reasonably likely to be successful.

Ground 18 is a claim that the death sentence was imposed due to passion, prejudice or some arbitrary factor. That claim was considered and rejected on direct appeal. This claim is barred by the doctrine of the law of the case.

Ground 19 of the supplement is a claim that the conviction must be set aside because the statutes in effect at the time of the trial precluded a defense based on insanity and the decision of the Supreme Court invalidating that statute was not issued until after Vanisi's trial. Trial counsel testified, however, that they were aware of the potential challenges to the statute but did not attempt to present an insanity plea because they had no basis for the plea. Furthermore, there was no evidence presented in the habeas corpus hearing supporting such a defense. There was some evidence that Vanisi was bi-polar, but nothing supporting a potential defense of insanity. Therefore, the court remains confident of the verdict and finds that neither trial counsel nor appellate counsel were ineffective. The court further finds that Vanisi was not prejudiced by the alleged failings of counsel.

The next claim in the supplement asserts a claim of ineffective assistance of counsel in that it is framed in terms of counsel's failure to investigate potential mitigating evidence. The court finds that there was no significant additional mitigating evidence presented in the habeas corpus hearing and thus finds that there is no reason to believe that counsel could have obtained additional evidence or that Vanisi was prejudiced by the alleged failure to investigate.

Vanisi also suggests that trial counsel should have retained a mitigation specialist. However, there was no evidence presented tending to show that such a person could have done more than was already done. Trial counsel testified to a fairly extensive investigation and the court finds that there is no reason to believe that someone else would have conducted the investigation differently or would have discovered additional mitigating evidence. The record reveals that the defense presented the testimony of Dr. Ole Theinhaus at sentencing. That witness

discussed Vanisi's mental illness. Other witnesses discussed his drug and alcohol abuse and his declining condition in the months preceding the murder. However, there is still no new significant mitigating evidence and so this claim is also denied.

The next claim is an assertion that but for the collective failures of counsel, Vanisi would have mounted a more meaningful defense, although the nature of that defense is still not identified. The court notes that Vanisi did not testify in the habeas corpus hearing and thus there is no evidence tending to support this claim. Instead, the testimony established that Vanisi prohibited any defense such as self-defense, provocation and coercion and refused to cooperate in presenting any defense except his false claim that he did not participate in the killing of Sergeant Sullivan. The court finds no evidence supporting the notion that counsel's alleged failings were the cause for the lack of a viable defense. Instead, the cause for the lack of any viable defense was that no such defense existed and Vanisi refused to cooperate in presenting any defense.

Ground 22 is a catch-all assertion that counsel was ineffective on appeal in failing to raise each and every issue raised in the supplement. The court finds, again, that appellate counsel made reasonable tactical decisions concerning the issues to raise, and that none of the various potential issues were reasonably likely to succeed.

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