

1 certainly affect the decision of where counsel should focus their energies. Thus, at the end of the
2 hearing, the court remained unpersuaded that some as yet unidentified objective standard required
3 counsel to take a different approach.

4 Vanisi suggested that some objective standard required counsel to undertake the
5 investigation of mitigating circumstances in order to provide the mitigating information to the
6 mental health professionals to assist them in their efforts in determining whether Vanisi is
7 presently incompetent. The court finds no reason to believe that prevailing professional norms
8 require that approach. Instead, the court agrees with Edwards, who testified that the customary
9 approach is to ask the mental health professionals what information they need to render an
10 opinion about the present competency of the subject. Doctors Bittker and Amazaga apparently
11 were able to render opinions, to their own satisfaction, without the need for additional evidence
12 of the sort described in the various exhibits admitted in the post-conviction hearing. The court is
13 not persuaded that there is some standard, some prevailing professional norm, that required a
14 different approach.

15 Accordingly, the court finds that Vanisi has failed to prove that specific decisions, acts or
16 omissions of post-conviction counsel were deficient. Thus, the alleged deficiency does not
17 overcome the procedural bars. Therefore, the petition is dismissed.

18 DATED this 10 day of April, 2014.

19
20 Connie J. Steinheimer
21 DISTRICT JUDGE
22
23
24
25
26

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 10th day of April, 2014, I filed the attached document with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

X **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

Terrence McCarty, Esq.
Chief Deputy District Attorney

Gary Taylor, Esq.
Deputy Federal Public Defender

Tiffani Hurst, Esq.
Deputy Federal Public Defender

X **Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada:**

Siaosi Vanisi
Inmate no. 63376
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

 Placing a true copy thereof in a sealed envelope for service via:

 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

 Inter-Office Mail [NONE]

DATED this 10th day of April, 2014.



1 CODE: 2540
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8 ***

9 SIAOSI VANISI,

Petitioner,

CASE NO: CR98-0516

11 vs.

DEPT. NO: 4

12
13 E.K. McDANIEL, WARDEN and
14 CATHERINE CORTEZ MASTO,
15 ATTORNEY GENERAL OF
THE STATE OF NEVADA,
Respondents.

16 _____/

17 **NOTICE OF ENTRY OF ORDER**

18 PLEASE TAKE NOTICE that on the 10th day of April, 2014 the Court entered a
19 decision or order in this matter, a true and correct copy of which is attached hereto.

20 You may appeal to the Supreme Court from the decision or order of the Court. If
21 you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-
22 three (33) days, after the date this notice is mailed to you. This notice was mailed on the
23 25th day of April, 2014.

24
25 JOEY ORDUNA HASTINGS
26 Clerk of the Court

27 By /s/ Janelle Yost
28 Deputy Clerk

1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR98-0516

3 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial
4 District Court of the State of Nevada, County of Washoe; and that on the 25th day of April,
5 2014, I electronically filed the Notice of Entry of Order with the Clerk of the Court by using
6 the ECF system which will send a notice of electronic filing to:

7 Gary Taylor, Esq.
8 Tiffany Hurst, Esq.
9 Terrence McCarthy, Esq.

10 I further certify that on the 25th day of April, 2014, I deposited in the Washoe County
11 mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a
12 true and correct copy of the Notice of Entry of Order, addressed to:

13 Attorney General's Office
14 100 N. Carson St.
15 Carson City, NV 89701-4717

16 Siaosi Vanisi, #63376
17 Ely State Prison
18 P O Box 1989
19 Ely, NV 89301

20 /s/ Janelle Yost
21 Janelle Yost
22
23
24
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28

1 CODE #1750

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

8 * * *

9 SIAOSI VANISI,

10 Petitioner,

11 v.

Case No. CR98-0516

12 E.K. McDANIEL, WARDEN and
13 CATHERINE CORTEZ MASTO,
14 ATTORNEY GENERAL OF
15 THE STATE OF NEVADA,

Dept. No. 4

16 Respondents.
17 _____/

18 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
19 DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

20 Petitioner Vanisi was represented by senior members of the Washoe County Public
21 Defender's office when he stood trial for the murder of Sgt. Sullivan of the University of Nevada
22 Police Department. The jury found Vanisi guilty and found aggravating circumstances and
23 imposed a sentence of death. Vanisi appealed but the judgment was affirmed. *Vanisi v. State*, 117
24 Nev. 330, 22 P.3d 1164 (2001). He filed his first post-conviction petition in 2002. This court
25 appointed counsel to represent him in that action. At first the lawyers were Marc Picker and Scott
26 Edwards. Picker later had to withdraw and Edwards assumed the helm. Edwards had been
assisted by Tom Qualls. Qualls had graduated from law school some years earlier but had not been
licensed to practice law. In the capacity of a para-legal, he had extensive experience in the capital

1 post-conviction arena. Once he was licensed, at the request of Edwards, he was appointed as the
2 second attorney in that first post-conviction case.

3 While the petition was pending, the lawyers filed a motion for an indefinite stay of the
4 proceedings, asserting that Vanisi was incompetent at that time. Eventually, the court ordered an
5 evaluation by one psychiatrist and one psychologist. The psychiatric reports differed somewhat
6 and the court ordered a hearing on the motion. Months before the hearing, the court alerted
7 counsel to be ready to file their supplemental petition. At the conclusion of the hearing, the court
8 found that Vanisi was in fact competent. Counsel then filed their supplemental petition.

9 One of the claims was that trial counsel were ineffective in failing to gather additional
10 mitigating evidence. However, counsel did not present much mitigating evidence and so that claim
11 was denied along with each other claim in the petition. Vanisi again appealed, and the Supreme
12 Court again affirmed, noting the evidence that Vanisi had the ability to cooperate with his lawyers
13 but that he was refusing to cooperate due to his mental illness. *Vanisi v. State*, Docket No. 50607,
14 Order of Affirmance (April 20, 2010). The remittitur issued on July 19, 2010.

15 Vanisi filed his second petition on May 4, 2011. The petition was filed beyond the time
16 allowed by NRS 34.726 and included claims that were raised before and that could have been
17 raised in prior proceedings, as prohibited by NRS 34.810. Vanisi sought to overcome these bars
18 by asserting, *inter alia*, that post-conviction counsel was ineffective in failing to adequately
19 investigate the claims that trial counsel failed to adequately investigate and present mitigating
20 evidence.

21 That assertion, if proved, might overcome the bars of NRS 34.810 and allow some of the
22 new claims to be heard. Accordingly, the court scheduled a hearing to allow Vanisi the opportunity
23 to prove that his post-conviction lawyers were ineffective. That hearing took place on December
24 5 and 6, 2013. The only witnesses were post-conviction counsel, Qualls and Edwards. Vanisi also
25 offered many documents in evidence. In each case, they were not offered or admitted for the truth
26 of the matter asserted.

1 The focus of the hearing was the performance of post-conviction counsel. It has long been
2 the rule of law in Nevada that, in a capital case, where appointment of post-conviction counsel is
3 mandated by NRS 34.820(1)(a), a procedural bar can sometimes be overcome if the petitioner can
4 plead and prove that the claim was not previously heard in a timely post-conviction action, due to
5 the ineffective assistance of counsel. *McKague v. Warden*, 112 Nev. 159, 165 n. 5, 912 P.2d 255,
6 258 n. 5 (1996). There first arises the question of what standard should be applied when
7 evaluating the claim of ineffective post-conviction counsel. The court concludes that the standard
8 is the standard described in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). As
9 the Court ruled in that case:

10 First, the defendant must show that counsel's performance was
11 deficient. This requires showing that counsel made errors so serious
12 that counsel was not functioning as the "counsel" guaranteed the
13 defendant by the Sixth Amendment. Second, the defendant must
14 show that the deficient performance prejudiced the defense. This
15 requires showing that counsel's errors were so serious as to deprive
16 the defendant of a fair trial, a trial whose result is reliable. 466 U.S. at
17 687.

18 As applied, the standard must be modified a bit, in that the issue is whether post-conviction
19 counsel made such serious errors that the court can conclude that post-conviction counsel was not
20 functioning as "counsel." The standard would require asking if the performance of the
21 post-conviction lawyers was so deficient as to deprive the petitioner of a post-conviction hearing
22 whose result is reliable.

23 In making that evaluation, "Judicial scrutiny of counsel's performance must be highly
24 deferential. It is all too tempting for a defendant to second-guess counsel's assistance after
25 conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after
26 it has proved unsuccessful, to conclude that a particular act or omission of counsel was
unreasonable." 466 U.S. at 698.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the
defendant must show that counsel's representation fell below an objective standard of

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SIAOSI VANISI,

Appellant,

vs.

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

Respondents.

No. 65774

Volume 25 of 26

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APPELLANT'S APPENDIX

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

Second Judicial District Court, Washoe County

RENE L. VALLADARES
Federal Public Defender

TIFFANI D. HURST
Assistant Federal Public Defender
Nevada State Bar No. 11027C
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
(702) 388-6577
danielle_hurst@fd.org

Attorneys for Appellant

INDEX

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
22	Answer to Petition for Writ of Habeas Corpus (Post-Conviction) July 15, 2011	AA05476-AA05478
26	Case Appeal Statement May 23, 2014	AA06257-AA06260
1	Exhibits to Amended Petition for Writ of Habeas Corpus (list) May 4, 2011	AA00238-AA00250

EXHIBIT

2	1. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Justice Court of Reno Township No. 89.820, Criminal Complaint January 14, 1998.....	AA00251-AA00255
2	2. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Justice Court of Reno Township No. 89.820, Amended Complaint February 3, 1998	AA00256-AA00260
2	3. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Second Judicial Court of the State of Nevada, Washoe County, No. CR98-0516, Information February 26, 1998	AA00261-AA00269
2	4. ABA Section of Individual Rights and Responsibilities, Recommendation February 3, 1997	AA00270-AA00294
2	5. Declaration of Mark J.S. Heath, M.D., dated May 16, 2006, including attached Exhibits	AA00295-AA00420

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
2	6. Birth Certificate of Siaosi Vanisi, District of Tongatapu June 26, 1970	AA00421-AA00422
2	7. Immigrant Visa and Alien Registration of Siaosi Vanisi May 1976	AA00423-AA00424
2	8. <u>Siaosi Vanisi vs. The State of Nevada</u> , Nevada Supreme Court Case No. 35249, Appeal from a Judgment of Conviction, Appellant's Opening Brief April 19, 2000	AA00425-AA00462
2	9. <u>Siaosi Vanisi v. The State of Nevada</u> , Nevada Supreme Court Case No. 35249, Appeal from a Judgment of Conviction, Appellant's Reply Brief November 6, 2000.....	AA00463-AA00475
2	10. <u>State of Nevada v. Siaosi Vanisi, et al.</u> , Justice Court of Reno Township No. 89.820 Amended Criminal Complaint February 3, 1998	AA00476-AA00480
2-3	11. <u>State of Nevada v. Siaosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516, Juror Instructions, Trial Phase September 27, 1999.....	AA00481-AA00520
3	12. <u>State of Nevada v. Siaosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516, Juror Instructions, Penalty Phase October 6, 1999.....	AA00521-AA00540

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
3	13. Confidential Execution Manual, Procedures for Executing the Death Penalty, Nevada State Prison, Revised February 2004	AA00541-AA00584
3	14. Leonidas G. Koniaris, Teresa A. Zimmers, David A. Lubarsky, and Jonathan P. Sheldon, Inadequate Anaesthesia in Lethal Injection for Execution, Vol. 365 April 6, 2005, at http://www.thelancet.com	AA00585-AA00588
3	15. <u>David Larry Nelson v. Donald Campbell and Grantt Culliver</u> , United States Supreme Court Case No. 03-6821, October Term, 2003 Brief of Amici Curiae in Support of Petitioner	AA00589-AA00614
3	16. <u>The State of Nevada v. Siasosi Vanisi Defendant In Proper Person</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion to Dismiss Counsel and Motion to Appoint Counsel June 16, 1999	AA00615-AA00625
3	17. <u>The State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Court Ordered Motion for Self Representation August 5, 1999	AA00626-AA00629
3	18. <u>The State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Ex-Parte Order for Medical Treatment July 12, 1999	AA00630-AA00632

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
3	19. <u>The State of Nevada v. Siaoosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516, Order August 11, 1999.....	AA00633-AA00643
3	20. <u>The State of Nevada v. Siaoosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516, Transcript of Proceedings June 23, 1999	AA00644-AA00687
3	21. <u>The State of Nevada v. Siaoosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Transcript of Proceedings August 3, 1999	AA00688-AA00730
3-4	22. <u>The State of Nevada v. Siaoosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Reporter's Transcript of Motion for Self Representation August 10, 1999.....	AA00731-AA00817
4	23. <u>The State of Nevada v. Siaoosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 In Camera Hearing on Ex Parte Motion to Withdraw August 26, 1999.....	AA00818-AA00843
4	24. <u>The State of Nevada v. Siaoosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Amended Notice of Intent to Seek Death Penalty February 18, 1999	AA00844-AA00852

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
4	25. Phillip A. Rich, M.D., Mental Health Diagnosis October 27, 1998.....	AA00853-AA00856
4	26. Various News Coverage Articles	AA00857-AA00951
4	27. Report on Murder and Voluntary Manslaughter- Calendar Years 2005 and 2006 Report to the Nevada Legislature In Compliance with Nevada Revised Statutes 2.193 and 178.750, March 2007.....	AA00952-AA00958
4	28. Report on Murder and Voluntary Manslaughter Calendar Years 2003-2006	AA00959-AA00987
4	29. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Verdict, Guilt Phase September 27, 1999.....	AA00988-AA00993
4-5	30. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Verdict, Penalty Phase October 6, 1999.....	AA00994-AA01001
5	31. Photographs of Siasosi Vanisi from youth	AA01002-AA01006
5	32. <u>The State of Nevada v. Siasosi Vanisi Defendant In Proper Person</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Ex Parte Motion to Reconsider Self-Representation August 12, 1999.....	AA01007-AA01011

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
5	33. <u>The State of Nevada v. Siaosi Vanisi</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Defense Counsel Post-Trial Memorandum in Accordance with Supreme Court Rule 250 October 15, 1999.....	AA01012-AA01103
5	34. <u>Siaosi Vanisi v. Warden, et al.</u> , Washoe County Second Judicial District Court Case No. CR98P0516 Petition for Writ of Habeas Corpus (Post-Conviction) January 18, 2002.....	AA01104-AA01115
5	35. <u>Siaosi Vanisi v. Warden, et al.</u> , Washoe County Second Judicial District Court Case No. CR98P0516 Ex Parte Motion to Withdraw August 18, 1999.....	AA01116-AA01124
5-6	36. <u>Siaosi Vanisi v. Warden, et al.</u> , Washoe County Second Judicial District Court Case No. CR98P0516 Supplemental Points and Authorities to Petition for Writ of Habeas Corpus (Post-Conviction) February 22, 2005	AA01125-AA01318
6	37. <u>Siaosi Vanisi v. Warden, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Reply to State's Response to Motion for Protective Order March 16, 2005.....	AA01319-AA01325

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
6-7	38. <u>Siaosi Vanisi v. Warden, et al., Washoe County Second Judicial District Court Case No. CR98P0516</u> Memorandum of Law Regarding McConnell Error March 28, 2007.....	AA01326-AA01589
7	39. <u>Siaosi Vanisi v. Warden, et al., Washoe County Second Judicial District Court Case No. CR98P0516</u> Transcript of Proceedings Post-Conviction Hearing May 2, 2005	AA01590-AA01691
7-8	40. <u>Siaosi Vanisi v. Warden, et al., Washoe County Second Judicial District Court Case No. CR98P0516</u> Transcript of Proceedings Continued Post-Conviction Hearing May 18, 2005	AA01692-AA01785
8	41. <u>Siaosi Vanisi v. Warden, et al., Washoe County Second Judicial District Court Case No. CR98P0516</u> Transcript of Proceedings April 2, 2007	AA01786-AA01816
8	42. <u>Siaosi Vanisi v. Warden, et al., Washoe County Second Judicial District Court Case No. CR98P0516</u> Findings of Fact, Conclusions of Law and Judgment November 8, 2007.....	AA01817-AA01832
8	43. <u>Siaosi Vanisi vs. The State of Nevada, Nevada Supreme Court Case No. 50607</u> Appeal from Denial of Post-Conviction Habeas Petition Appellant's Opening Brief August 22, 2008.....	AA01833-AA01932

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
8	44. <u>Siaosi Vanisi vs. The State of Nevada,</u> Nevada Supreme Court Case No. 50607 Appeal from Denial of Post-Conviction Habeas Petition Reply Brief December 2, 2008	AA01933-AA01990
8-9	45. <u>Siaosi Vanisi vs. The State of Nevada,</u> Nevada Supreme Court Case No. 50607 Appeal from Denial of Post-Conviction Petition Order of Affirmance April 20, 2010	AA01991-AA02002
9	46. <u>Siaosi Vanisi vs. The State of Nevada,</u> Nevada Supreme Court Case No. 50607 Appeal from Denial of Post-Conviction Petition Petition for Rehearing May 10, 2010	AA02003-AA02013
9	47. Washoe County Sheriff's Office, Inmate Visitors Reports and Visiting Log	AA02014-AA02019
9	48. <u>State of Nevada v. Siaosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Order for Competency Evaluation December 27, 2004	AA02020-AA02023
9	49. Thomas E. Bittker, M.D., Forensic Psychiatric Assessment January 14, 2005.....	AA02024-AA02032
9	50. A.M. Amezaga, Jr., Ph.D., Competency Evaluation February 15, 2005	AA02033-AA02048

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
9	51. <u>State of Nevada v. Vernell Ray Evans,</u> Clark County Case No. C116071 Sentencing Agreement February 4, 2003	AA02049-AA02054
9	52. <u>State of Nevada v. Jeremy Strohmeyer,</u> Clark County Case No. C144577 Court Minutes September 8, 1998.....	AA02055-AA02057
9	53. <u>State of Nevada v. Jonathan Daniels,</u> Clark County Case No. C126201 Verdicts November 1, 1995.....	AA02058-AA02068
9	54. <u>State of Nevada v. Richard Edward Powell,</u> Clark County Case No. C148936 Verdicts November 15, 2000.....	AA02069-AA02089
9	55. <u>State of Nevada v. Fernando Padron Rodriguez,</u> Clark County Case No. C130763 Verdicts May 7, 1996	AA02090-AA02092
9	56. <u>State of Nevada v. Siaosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Order finding Petitioner Competent to Proceed March 16, 2005.....	AA02093-AA02097
9	57. Omitted.....	AA02098
9	58. Rogers, Richard, Ph.D., “Evaluating Competency to Stand Trial with Evidence-Based Practice”, J Am Acad Psychiatry Law 37:450-60 (2009)	AA02099-AA02110

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
9	59. Thomas E. Bittker, M.D., Sanity Evaluation June 9, 1999	AA02111-AA02118
9-10	60. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Preliminary Examination February 20, 1998	AA02119-AA02352
10	61. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Arraignment March 10, 1998.....	AA02353-AA02363
10	62. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Status Hearing August 4, 1998	AA02364-AA02402
10	63. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Status Hearing September 4, 1998.....	AA02403-AA02412
10	64. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Status Hearing September 28, 1998.....	AA02413-AA02422
10	65. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Report on Psychiatric Evaluations November 6, 1998.....	AA02423-AA02436

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
10	66. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Hearing Regarding Counsel November 10, 1998.....	AA02437-AA02444
10	67. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Pretrial Hearing December 10, 1998	AA02445-AA02461
10	68. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Final Pretrial Hearings January 7, 1999.....	AA02462-AA02477
10-11	69. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Hearing to Reset Trial Date January 19, 1999.....	AA02478-AA02504
11	70. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Pretrial Motion Hearing June 1, 1999	AA02505-AA02522
11	71. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion Hearing August 11, 1999.....	AA02523-AA02564

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
11	72. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Decision to Motion to Relieve Counsel August 30, 1999.....	AA02565-AA02573
11	73. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 In Chambers Review May 12, 1999	AA02574-AA02593
11	74. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Trial Volume 5 January 15, 1999.....	AA02594-AA02621
11-12	75. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Preliminary Examination February 20, 1998	AA02622-AA02855
12	76. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Arraignment March 10, 1998.....	AA02856-AA02866
12	77. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion to Set Trial March 19, 1998.....	AA02867-AA02873

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
12	78. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Status Hearing August 4, 1998	AA02874-AA02912
12	79. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Status Hearing September 4, 1998.....	AA02913-AA02922
12	80. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Status Hearing September 28, 1998.....	AA02923-AA02932
12	81. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Report on Psych Eval November 6, 1998.....	AA02933-AA02946
12	82. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Hearing Regarding Counsel November 10, 1998.....	AA02947-AA02954
12-13	83. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Pre-Trial Motions November 24, 1998.....	AA02955-AA03082

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
13	84. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Pretrial Hearing December 10, 1998.....	AA03083-AA03099
13	85. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Telephone Conference December 30, 1998.....	AA03100-AA03113
13	86. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Hearing January 7, 1999.....	AA03114-AA03129
13	87. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Continued Jury Selection January 7, 1998.....	AA03130-AA03137
13	88. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Jury Selection January 8, 1999.....	AA03138-AA03146
13-14	89. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Trial, Volume 4 January 14, 1999.....	AA03147-AA03375

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
14	90. <u>State of Nevada v. Siaosi Vanisi, et al., Washoe County Second Judicial District Court Case No. CR98-0516 Order (Granting Motion for Mistrial) January 15, 1999.....</u>	AA03376-AA03379
14	91. Omitted.....	AA03380
14	92. Declaration of Paulotu Palu January 24, 2011.....	AA03381-AA03389
14	93. Declaration of Siaosi Vuki Mafileo February 28, 2011	AA03390-AA03404
14	94. Declaration of Sioeli Tuita Heleta January 20, 2011.....	AA03405-AA03418
14	95. Declaration of Tufui Tafuna January 22, 2011.....	AA03419-AA03422
14	96. Declaration of Toeumu Tafuna April 7, 2011	AA03423-AA03456
14	97. Declaration of Herbert Duzan’s Interview of Michael Finau April 18, 2011	AA03457-AA03464
14	98. Declaration of Edgar DeBruce April 7, 2011	AA03465-AA03467
14	99. Declaration of Herbert Duzan’s Interview of Bishop Nifai Tonga April 18, 2011	AA03468-AA03473
14	100. Declaration of Lita Tafuna April 2011.....	AA03474-AA03476

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
14	101. Declaration of Sitiveni Tafuna April 7, 2011	AA03477-AA03486
14	102. Declaration of Interview with Alisi Peaua conducted by Michelle Blackwill April 18, 2011	AA03487-AA03489
14-15	103. Declaration of Tevita Vimahi April 6, 2011	AA03490-AA03514
15	104. Declaration of DeAnn Ogan April 11, 2011	AA03515-AA03523
15	105. Declaration of Greg Garner April 10, 2011	AA03524-AA03531
15	106. Declaration of Robert Kirts April 10, 2011	AA03532-AA03537
15	107. Declaration of Manamoui Peaua April 5, 2011	AA03538-AA03542
15	108. Declaration of Toa Vimahi April 6, 2011	AA03543-AA03566
15	109. Reports regarding Siaosi Vanisi at Washoe County Jail, Nevada State Prison and Ely State Prison, Various dates	AA03567-AA03744
15	110. Declaration of Olisi Lui April 7, 2011	AA03745-AA03749
15-16	111. Declaration of Peter Finau April 5, 2011	AA03750-AA03754
16	112. Declaration of David Kinikini April 5, 2011	AA03755-AA03765

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
16	113. Declaration of Renee Peaua April 7, 2011	AA03766-AA03771
16	114. Declaration of Heidi Bailey-Aloi April 7, 2011	AA03772-AA03775
16	115. Declaration of Herbert Duzant's Interview of Tony Tafuna April 18, 2011	AA03776-AA03780
16	116. Declaration of Terry Williams April 10, 2011	AA03781-AA03786
16	117. Declaration of Tim Williams April 10, 2011	AA03787-AA03790
16	118. Declaration of Mele Mavani Vakapuna April 5, 2011	AA03791-AA03793
16	119. Declaration of Priscilla Endemann April 6, 2011	AA03794-AA03797
16	120. Declaration of Mapa Puloka January 24, 2011	AA03798-AA03802
16	121. Declaration of Limu Havea January 24, 2011	AA03803-AA03812
16	122. Declaration of Sione Pohahau January 22, 2011	AA03813-AA03815
16	123. Declaration of Tavake Peaua January 21, 2011	AA03816-AA03821
16	124. Declaration of Totoa Pohahau January 23, 2011	AA03822-AA03844

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
16	125. Declaration of Vuki Mafileo February 11, 2011	AA03845-AA03859
16	126. <u>State of Nevada v. Siaosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 State's Exhibits 4B-4L (Photographs) with List	AA03860-AA03872
16	127. Declaration of Crystal Calderon April 18, 2011	AA03873-AA03878
16	128. Declaration of Laura Lui April 7, 2011	AA03879-AA03882
16	129. Declaration of Le'o Kinkini-Tongi April 5, 2011	AA03883-AA03886
16	130. Declaration of Sela Vanisi-DeBruce April 7, 2011	AA03887-AA03902
16	131. Declaration of Vainga Kinikini April 12, 2011	AA03903-AA03906
16	132. Declaration of David Hales April 10, 2011	AA03907-AA03910
16	133. Omitted.....	AA03911
16	134. Omitted.....	AA03912
16	135. <u>State of Nevada vs. Siaosi Vanisi</u> , SCR250 Time Record Michael R. Specchio January 1998-July 1999	AA03913-AA03934
16	136. Correspondence to Stephen Gregory from Edward J. Lynn, M.D. July 8, 1999	AA03935-AA03937

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
16	137. Memorandum to Vanisi File from MRS April 27, 1998.....	AA03938-AA03940
16	138. Omitted.....	AA03941
16	139. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion to Limit Victim Impact Statements July 15, 1998	AA03942-AA03946
16	140. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Defendant's Offered Instruction A, B, & C, Refused September 24, 1999.....	AA03947-AA03950
16	141. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Order November 25, 1998.....	AA03951-AA03954
16	142. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Order August 4, 1998	AA03955-AA03965
16	143. Memorandum to Vanisi File From Mike Specchio July 31, 1998	AA03966-AA03968
16	144. Correspondence to Michael R. Specchio from Michael Pescetta October 6 1998	AA03969-AA03970

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
16	145. Correspondence to Michael Pescetta from Michael R. Specchio October 9, 1998.....	AA03971-AA03973
16	146. Index of and 3 DVD's containing video footage of Siaosi Vanisi in custody on various dates	AA03974
16-17	147. Various Memorandum to and from Michael R. Specchio 1998-1999	AA03976-AA04045
17	148. Memorandum to Vanisi file Crystal-Laura from MRS April 20, 1998.....	AA04046-AA04048
17	149. Declaration of Steven Kelly April 6, 2011	AA04049-AA04051
17	150. Declaration of Scott Thomas April 6, 2011	AA04052-AA04054
17	151. Declaration of Josh Iveson April 6, 2011	AA04055-AA04057
17	152. Declaration of Luisa Finau April 7, 2011	AA04058-AA04063
17	153. Declaration of Leanna Morris April 7, 2011	AA04064-AA04068
17	154. <u>State of Nevada v. Siaosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 State Exhibit 45 - Sullivan Family Video	AA04069
17	155. Declaration of Maile (Miles) Kinikini April 7, 2011	AA04071-AA04076

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
17	156. Declaration of Nancy Chiladez April 11, 2011.....	AA04077-AA04079
17	157. University Police Services Web Page Memorial of George D. Sullivan http://www.unr.edu/police/sullivan.html#content last modified February 8, 2010	AA04080-AA04082
17	158. Motion in Limine to Exclude Gruesome Photographs November 25, 1998.....	AA04083-AA04088
17-18	159. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Reporter's Transcript Trial Volume 1 January 11, 1999.....	AA04089-AA04341
18-19	160. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Reporters Transcript Trial Volume 2 January 12, 1999.....	AA04342-AA04617
19-20	161. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Reporter's Transcript Trial Volume 3 January 13, 1999.....	AA04618-AA04786
20	162. <u>State of Nevada v. Siasos Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Juror Chart-Peremptory Sheet.....	AA04787-AA04788

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
20	163. Neuropsychological and Psychological Evaluation of Siasosi Vanisi Dr. Jonathan Mack April 18, 2011	AA04789-AA04859
20	164. Independent Medical Examination in the Field of Psychiatry, Dr. Siale 'Alo Foliaki April 18, 2011	AA04860-AA04984
20-21	165. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Juror Questionnaires September 10, 1999.....	AA04985-AA05165
21	166. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Minutes September 21, 1999.....	AA05166-AA05167
21	167. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion for Individual Voir Dire of Prospective Jurors June 8, 1998	AA05168-AA05172
21	168. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion for Individual Sequestered Voir Dire April 15, 1999	AA05173-AA05223
21	169. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Order December 16, 1998	AA05224-AA05228

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
21	170. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion for Additional Peremptory Challenges June 1, 1998	AA05229-AA05233
21	171. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion to Renew Request for Additional Peremptory Challenges April 13, 1999	AA05234-AA05236
21	172. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion for Change of Venue July 15, 1998	AA05237-AA05242
21	173. Declaration of Herbert Duzant's Interview with Tongan Solicitor General, 'Aminiasa Kefu April 17, 2011	AA05243-AA05246
21-22	174. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Defendant's Proposed Juror Questionnaire December 14, 1998	AA05247-AA05251
22	175. <u>Siasosi Vanisi vs. The State of Nevada</u> , Nevada Supreme Court Case No. 50607 Appeal from Denial of Post-Conviction Petition Order Denying Rehearing June 22, 2010	AA05252-AA05253

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
22	176. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Motion for Jury Questionnaire (Request for Submission) August 12, 1999.....	AA05254-AA05283
22	177. <u>State of Nevada v. Siasosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98-0516 Order September 10, 1999.....	AA05284-AA05291
22	178. Declaration of Thomas Qualls April 15, 2011	AA05292-AA05293
22	179. Declaration of Walter Fey April 18, 2011	AA05294-AA05296
22	180. Declaration of Stephen Gregory April 17, 2011	AA05297-AA05299
22	181. Declaration of Jeremy Bosler April 17, 2011	AA05300-AA05303
22	182. Birth Certificates for the children of Luisa Tafuna Various dates.....	AA05304-AA05310
22	183. San Bruno Police Department Criminal Report No. 89-0030 February 7, 1989	AA05311-AA05314
22	184. Manhattan Beach Police Department Police Report Dr. # 95-6108 November 4, 1995.....	AA05315-AA05319

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
22	185. Manhattan Beach Police Department Crime Report August 23 1997.....	AA05320-AA05322
22	186. <u>State of Nevada v. Siasosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Notice of Intent to Seek Death Penalty February 26, 1998	AA05323-AA05329
22	187. <u>State of Nevada v. Siasosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Judgment November 22, 1999.....	AA05330-AA05332
22	188. <u>State of Nevada v. Siasosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98-0516 Notice of Appeal November 30, 1999.....	AA05333-AA05335
22	189. <u>State of Nevada v. Siasosi Vanisi, et al.,</u> Washoe County Second Judicial District Court Case No. CR98P-0516 Notice of Appeal to Supreme Court (Death Penalty Case) November 28, 2007.....	AA05336-AA05339
22	190. Correspondence to The Honorable Connie Steinheimer from Richard W. Lewis, Ph.D. October 10, 1998.....	AA05340-AA05342

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
22	191. <u>People of the State of California v. Sitiveni Finau Tafuna</u> , Alameda Superior Court Hayward Case No. 384080-7 (Includes police reports and Alameda County Public Defender documents) May 4, 2005	AA05343-AA05355
22	192. Cronin House documents concerning Sitiveni Tafuna May 5, 2008	AA05356-AA05366
22	193. <u>People of the State of California v. Sitiveni Finau Tafuna</u> , Alameda Superior Court Hayward Case No. 404252 Various court documents and related court matter documents August 17, 2007.....	AA05367-AA05398
22	194. Washoe County Public Defender Investigation Reports Re: <u>State of Nevada v. Siaosi Vanisi, et al.</u> , Washoe County Second Judicial District Court Case No. CR98P-0516	AA05399-AA05457
22	195. Declaration of Herbert Duzant's Interview of Juror Richard Tower April 18, 2011	AA05458-AA05460
22	196. Declaration of Herbert Duzant's Interview of Juror Nettie Horner April 18, 2011	AA05461-AA05463
22	197. Declaration of Herbert Duzant's Interview of Juror Bonnie James April 18, 2011	AA05464-AA05466

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
22	198. Declaration of Herbert Duzant’s Interview of Juror Robert Buck April 18, 2011	AA05467-AA05469
25	Findings of Fact, Conclusions of Law and Judgment Dismissing Petition for Writ of Habeas Corpus April 10, 2014	AA06240-AA06245
22	Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) July 15, 2011	AA05470-AA05475
25-26	Notice of Entry of Order April 25, 2014	AA06246-AA06253
26	Notice of Appeal May 23, 2014	AA06254-AA06256
25	Objections to Proposed Findings of Fact, Conclusions of Law and Judgment Dismissing Petition for Writ of Habeas Corpus March 31, 2014.....	AA06231-AA06236
22-23	Opposition to Motion to Dismiss September 30, 2011	AA05483-AA05558
24	Order March 21, 2012.....	AA05943-AA05945
23	Petitioner’s Exhibits in Support of Opposition To Motion to Dismiss (list) September 30, 2011	AA05559-AA05563

EXHIBIT

23	101. <u>Michael D. Rippo v. E.K. McDaniel, et al.,</u> Clark County Eighth Judicial District Court Case No. C106784
----	---

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
	Reporter's Transcript of Hearing September 22, 2008.....	AA05564-AA05581
23	102. In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, Nevada Supreme Court Case No. 411 October 16, 2008.....	AA05582-AA05643
23	103. In the Matter of the Review of the Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, Nevada Supreme Court ADKT No. 411 January 4, 2008.....	AA05644-AA05653
23	104. <u>Farmer v. Director, Nevada Dept. of Prisons,</u> No. 18052 Order Dismissing Appeal March 31, 1988.....	AA05654-AA05660
23	105. <u>Farmer v. State, No. 22562</u> Order Dismissing Appeal February 20, 1992	AA05661-AA05663
23	106. <u>Farmer v. State, No. 29120</u> Order Dismissing Appeal November 20, 1997.....	AA05664-AA05669
23	107. <u>Feazell v. State, No. 37789</u> Order Affirming in Part and Vacating in Part November 14, 2002.....	AA05670-AA05679
23	108. <u>Hankins v. State, No. 20780</u> Order of Remand April 24, 1990	AA05680-AA05683

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
23	109. <u>Hardison v. State</u> , No. 24195 Order of Remand May 24, 1994AA05684-AA05689	
23	110. <u>Hill v. State</u> , No. 18253 Order Dismissing Appeal June 29, 1987AA05690-AA05700	
23	111. <u>Jones v. State</u> , No. 24497 Order Dismissing Appeal August 28, 1996.....AA05701-AA05704	
23	112. <u>Jones v. McDaniel, et al.</u> , No. 39091 Order of Affirmance December 19, 2002AA05705-AA05720	
23	113. <u>Milligan v. State</u> , No. 21504 Order Dismissing Appeal June 17, 1991AA05721-AA05723	
23	114. <u>Milligan v. Warden</u> , No. 37845 Order of Affirmance July 24, 2002AA05724-AA05743	
23-24	115. <u>Moran v. State</u> , No. 28188 Order Dismissing Appeal March 21, 1996.....AA05744-AA05761	
24	116. <u>Neuschafer v. Warden</u> , No. 18371 Order Dismissing Appeal August 19, 1987.....AA05762-AA05772	
24	117. <u>Nevius v. Sumner (Nevius I)</u> , Nos. 17059, 17060 Order Dismissing Appeal and Denying Petition February 19, 1986AA05773-AA05777	

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
24	118. <u>Nevius v. Warden (Nevius II)</u> , Nos. 29027, 29028 Order Dismissing Appeal and Denying Petition for Writ of Habeas Corpus October 9, 1996.....AA05778-AA05791	
24	119. <u>Nevius v. Warden (Nevius III)</u> , Nos. 29027, 29028 Order Denying Rehearing July 17, 1998AA05792-AA05796	
24	120. <u>Nevius v. McDaniel</u> , D. Nev. No. CV-N-96-785-HDM-(RAM) Response to Nevius' Supplemental Memo at 3 October 18, 1999.....AA05797-AA05804	
24	121. <u>O'Neill v. State</u> , No. 39143 Order of Reversal and Remand December 18, 2002AA05805-AA05811	
24	122. <u>Rider v. State</u> , No. 20925 Order April 30, 1990.....AA05812-AA05815	
24	123. <u>Riley v. State</u> , No. 33750 Order Dismissing Appeal November 19, 1999.....AA05816-05820	
24	124. <u>Rogers v. Warden</u> , No. 22858 Order Dismissing Appeal May 28, 1993 Amended Order Dismissing Appeal June 4, 1993AA05821-AA05825	
24	125. <u>Rogers v. Warden</u> , No. 36137 Order of Affirmance May 13, 2002AA05826-AA05833	

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
24	126. <u>Sechrest v. State</u> , No 29170 Order Dismissing Appeal November 20, 1997.....	AA05834-AA05838
24	127. <u>Smith v. State</u> , No. 20959 Order of Remand September 14, 1990.....	AA05839-AA05842
24	128. <u>Stevens v. State</u> , No. 24138 Order of Remand July 8, 1994	AA05843-AA05850
24	129. <u>Wade v. State</u> , No. 37467 Order of Affirmance October 11, 2001.....	AA05851-AA05856
24	130. <u>Williams v. State</u> , No. 20732 Order Dismissing Appeal July 18, 1990	AA05857-AA05860
24	131. <u>Williams v. Warden</u> , No. 29084 Order Dismissing Appeal August 29, 1997.....	AA05861-AA05865
24	132. <u>Ybarra v. Director</u> , Nevada State Prison, No. 19705 Order Dismissing Appeal June 29, 1989	AA05866-AA05869
24	133. <u>Ybarra v. Warden</u> , No. 43981 Order Affirming in Part Reversing in Part, and Remanding November 28, 2005.....	AA05870-AA05881
24	134. <u>Ybarra v. Warden</u> , No. 43981 Order Denying Rehearing February 2, 2006	AA05882-AA05887

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
1	Petition for Writ of Habeas Corpus (Post-Conviction) May 4, 2011	AA00001-AA00237
22	Reply to Answer to Petition for Writ of Habeas Corpus (Post-Conviction) August 29, 2011.....	AA05479-AA05482
25	Response to “Objections to Proposed Findings of Fact, Conclusions of Law and Judgment Dismissing Petition for Writ of Habeas Corpus” April 7, 2014.....	AA06237-AA06239
24	Response to Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) October 7, 2011.....	AA05888-AA05891
24	Transcript of Proceedings Hearing-Oral Arguments February 23, 2012	AA05892-AA05942
24-25	Transcript of Proceedings Petition for Post Conviction (Day One) December 5, 2013	AA05946-AA06064
EXHIBITS		
Admitted December 5, 2013		
25	199. Letter from Aminiask Kefu November 15, 2011.....	AA06065-AA06067
25	201. Billing Records-Thomas Qualls, Esq. Various Dates.....	AA06068-AA06089
25	214. Memorandum to File from MP March 22, 2002.....	AA06090-AA06098

<u>VOLUME</u>	<u>DOCUMENT</u>	<u>PAGE</u>
25	215. Client Background Info Summary	AA06099-AA06112
25	216. Investigation-Interview Outline.....	AA06113-AA06118
25	217. Table of Contents “Mitigating Circumstances”	AA06119-AA06122
25	218. Publication “Defense Resources in Capital Cases”	AA06123-AA06132
25	219. Communication between Center for Capital Assistance and Marc Picker, Esq. Undated.....	AA06133-AA06135
25	220. Communication between Marc Picker, Esq. and Roseann M. Schaye March 12, 2012.....	AA06136-AA06138
25	Transcript of Proceedings Petition for Post Conviction (Day Two) December 6, 2013	AA06139-AA06219
EXHIBITS		
Admitted December 6, 2013		
25	200. Declaration of Scott Edwards, Esq. November 8, 2013.....	AA06220-AA06221
25	224. Letter to Scott Edwards, Esq. From Michael Pescetta, Esq. January 30, 2003.....	AA06222
25	Transcript of Proceedings Decision (Telephonic) March 4, 2014.....	AA06223-AA06230

CERTIFICATE OF SERVICE

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

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

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

1 different grounds and then deny the petition. On page 14.

2 Q Okay. The judge basically took the issues that
3 were presented in your amended pleading and denied them.

4 A Yes.

5 Q Okay. On page eight of those findings, we have
6 an ineffective assistance of trial counsel claim. Do you
7 recognize that?

8 A Is it --

9 Q First paragraph.

10 A Yes, I recognize it.

11 Q Okay. And I think the judge described your claim
12 as a generic argument that counsel failed to investigate
13 and develop a defense.

14 A Yes. You know, obviously our claim at least in
15 part is based upon the fact that defense counsel didn't do
16 anything.

17 Q Well, we talked about that.

18 A Yeah.

19 Q That they, for whatever strategic reason or
20 concern for inconsistent defenses, essentially did nothing
21 during the guilt phase of the trial.

22 A Right.

23 Q And I think you attacked some of the penalty
24 phase as well, their failure to come up with a cogent

1 defense; is that true?

2 A Correct.

3 Q Look at the last sentence of that paragraph, if
4 you would. The Court denies that basically for the reason
5 that no additional evidence was presented regarding what
6 defense or evidence could have been discovered; is that a
7 fair statement?

8 A Yeah.

9 Q Does that finding directly impact or a result of
10 your inability to investigate?

11 MR. MCCARTHY: Your Honor, I think that calls for
12 this witness's speculation about what he would have
13 uncovered when turning over all those rocks.

14 MR. TAYLOR: We're fixing to help him with that.

15 THE COURT: Well, then, you should do that before
16 you have him reach a conclusion. I'm going to sustain the
17 objection.

18 MR. TAYLOR: Thank you, Your Honor.

19 BY MR. TAYLOR:

20 Q Turn to page 12, if you would.

21 A (Witness complies.)

22 What am I looking at?

23 Q The second -- last paragraph, third sentence.
24 Again, the Court makes reference to what available

1 evidence -- there's no evidence to show that anything was
2 available to be found.

3 A The third sentence in the last paragraph?

4 Q The Court finds that there is no reason to
5 believe. Do you see that portion of the sentence?

6 A Oh, the second paragraph.

7 Q Yeah. It's the same thing --

8 A Oh, I see, yeah, okay. Right.

9 Q Do you think that had -- or I guess I'm in the
10 same situation. Your intent to investigate is to avoid a
11 finding such as this.

12 A Well, okay. My intent to investigate is to put
13 on a thorough case to avoid this, but yeah.

14 Q Did you feel you did so? Do you feel you put on
15 a thorough case?

16 A No.

17 Q Let's turn to Exhibit 92. Give you a chance to
18 look at Exhibit 92.

19 A Okay.

20 Q Do you find that the declaration by this witness
21 is relevant to the family dynamics of Mr. Vanisi's family?

22 A Yes. Appears to be.

23 Q Do you find that it's relevant to -- I think we
24 discussed issues of domestic violence or abuse.

1 A Yes.

2 Q Does it suggest that there was a death of close
3 family members that Mr. Vanisi encountered?

4 A Yes, his uncle.

5 Q Does it provide some insight in the Tongan
6 culture?

7 A Some.

8 Q Is this the type of evidence that you would have
9 used or like to have discovered in your investigation?

10 A Sure.

11 Q Do you believe that you would have presented this
12 evidence to the Court had you found it?

13 A It's likely.

14 MR. TAYLOR: Your Honor, I'd offer Exhibit 93 for
15 the purpose of this hearing only. Excuse me, 92.

16 THE COURT: Mr. McCarthy?

17 MR. MCCARTHY: Understanding it's not being
18 offered for the truth of something that Mr. Qualls would
19 have found interesting, then with that understanding, I
20 have no objection.

21 THE COURT: Okay. 92 is admitted.

22 (Exhibit No. 92 admitted.)

23 MR. TAYLOR: Judge, with each of these, I'm not
24 trying, nor would I ever try to deny Mr. McCarthy an

1 opportunity to impeach these statements at some point, but
2 for the purposes of this hearing, I'm just asking the
3 witness to assume they were true, and would he -- would it
4 have been relevant or would he have used it, would it have
5 fit those criteria we've discussed.

6 THE COURT: Are you going to lead him through
7 that litany you just did on every one of these witnesses?

8 MR. TAYLOR: A good many of them.

9 THE COURT: Because it would be probably better
10 not to lead him through that all, just ask that question
11 that you were going to ask.

12 MR. McCARTHY: If we have generally the agreement
13 that was just announced, that all of these things we're
14 about to hear from are not offered for the truth, just for
15 Mr. Qualls's opinion on what he would have liked if he
16 were king of the forest, then I'll have no objection on
17 any of them.

18 MR. TAYLOR: Could I have a minute, Your Honor?

19 THE COURT: Okay. Go ahead.

20 (Discussion off the record
21 between defense counsel.)

22 MR. TAYLOR: Judge, I think we have essentially a
23 stipulation to admit those. We are assuming for the
24 purposes of this hearing that they are true. Obviously

1 Mr. McCarthy has the ability to challenge them at any
2 later hearing. I won't go each through individual
3 exhibit, but I am going to make a representation to the
4 Court what I think they're relevant to as far as which of
5 those areas that Mr. Qualls has identified.

6 THE COURT: Well, isn't it important whether or
7 not he would have used it?

8 MR. TAYLOR: Well, that's what we're going to,
9 Judge.

10 MR. MCCARTHY: That's the big question.

11 MR. TAYLOR: That's where we're going.

12 THE COURT: Okay. So why do you think it's
13 relevant?

14 MR. TAYLOR: Well, that's what I'm asking him.
15 I'm making a represent -- I don't want to go through each
16 individual thing. I'm trying to avoid --

17 THE COURT: Okay. Let's see how we can do this.
18 So that's your stipulation, Mr. McCarthy?

19 MR. MCCARTHY: Gosh, I don't even remember what
20 it was.

21 THE COURT: I think that it's nobody is offering
22 these for the truthfulness of the matters contained
23 therein, but asking the witness to assume that they are
24 truthful, and would that make a difference in his

1 presentation.

2 MR. McCARTHY: Oh, sure, I think that's --

3 THE COURT: Isn't that what you're asking?

4 MR. TAYLOR: Yes.

5 MR. McCARTHY: I think that's an appropriate
6 question.

7 THE COURT: So that stipulation will be allowed
8 in. Does that relate to all the declarations?

9 MR. TAYLOR: It relates to --

10 THE COURT: Is there any exhibit that we
11 currently have that --

12 MR. TAYLOR: It doesn't.

13 THE COURT: -- it doesn't relate to?

14 MR. TAYLOR: Your Honor, I think it would relate
15 to the declarations or letters up No. 199, and we'd offer
16 them with that stipulation.

17 THE COURT: Mr. McCarthy? With the
18 stipulation --

19 MR. McCARTHY: Yeah, sure.

20 THE COURT: Okay. The exhibits that are marked
21 42, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103,
22 104, 105, 106, 107, 108, 110, 111 through 129 are
23 admitted. 130 through 132 are admitted. 149 through 153
24 are admitted. 155, 163, 164, 173, 179, 180, 181, 195,

1 196, 197, 198, 199 are all admitted.

2 (Exhibit Nos. 42, 92, 93, 94, 95, 96, 97,
3 98, 99, 100, 101, 102, 103, 104, 105, 106,
4 107, 108, 110, 111, 112, 113, 114, 115, 116,
5 117, 118, 119, 120, 121, 122, 123, 124, 125,
6 126, 127, 128, 129, 130, 131, 132, 149, 150,
7 151, 152, 153, 155, 163, 164, 173, 179, 180,
8 181, 195, 196, 197, 198, 199 admitted.)

9 MR. TAYLOR: Your Honor, maybe I heard it wrong.
10 No. 131 and No. 156 are included?

11 THE COURT: Yes, they are included. Oh, 156 is
12 not marked on my list. Maybe it is on --

13 MR. TAYLOR: It's on mine.

14 THE COURT: Okay.

15 MR. TAYLOR: But it's a declaration by Nancy
16 Chaidez, Your Honor.

17 THE COURT: So 156 is also admitted.

18 (Exhibit No. 156 admitted.)

19 MR. TAYLOR: May I continue? I'm sorry, Judge.

20 THE COURT: You may. I'm sorry.

21 BY MR. TAYLOR:

22 Q Mr. Qualls, we went through a number of these.
23 In fact, through -- all through 199, did we not?

24 A I believe that's a correct statement.

1 Q And so are you familiar with the evidence that's
2 contained within those exhibits?

3 A Yes.

4 Q And we also just a few minutes ago went through
5 issues such as family dynamics, domestic abuse, a number
6 of issues that you called rocks that you had to turn over,
7 that you needed to investigate.

8 A Correct.

9 Q During your review of those exhibits, up through
10 199, would you agree that they fit the -- do they appear
11 to reflect the same information that you would have
12 investigated for?

13 A Yes. Yes. They appear to be relevant to what I
14 would want to know with regard to my investigation.

15 Q Do they provide evidence, each of those exhibits,
16 that you would have used with regard to Mr. Vanisi's --
17 would have presented in some manner with regard to
18 Mr. Vanisi's petition had you had that evidence available
19 to you?

20 A That's a big question. Let me answer it this
21 way: Each of them were pieces of information that would
22 have been relevant and helpful to me in deciding what I
23 was going to put forward with the judge. I cannot say
24 definitively that each one of them I would have definitely

1 included as a -- you know, as a pillar of the case or
2 declarations or witnesses I wanted to put on, but it was
3 all relevant and important to the investigation.

4 Most of it, I'm sure I would have -- I hope I'm
5 not shooting myself in the foot here -- wanted to put on
6 to present a complete picture of Mr. Vanisi and a complete
7 picture of what was out there because, again, the idea
8 being that you can't make a strategic decision about what
9 information to put either before a judge or a jury unless
10 you have that information to review.

11 So from a post-conviction habeas standpoint of
12 alleging IAC of trial counsel, I would have wanted it all
13 to show that defense counsel could not have made a
14 strategic decision about what story to put on about
15 Mr. Vanisi without having the complete story.

16 Q And you would agree with me, I assume, that it
17 would be next to impossible for you to attack trial
18 counsel's investigation without conducting your own
19 investigation.

20 A Absolutely, and I think that was made clear in
21 the judge's order.

22 Q So that's the way you relate that order to the
23 evidence that we have before us today.

24 A Yes.

1 Q Now, we are obviously, rather than going through
2 the individual circumstances in each one of these 150
3 exhibits, we're going to have to rely upon the Court to
4 review them, obviously.

5 A Sure.

6 Q But do you believe that these are the type of
7 issues you would have investigated?

8 A Yes. I think they fall under the rubric of all
9 of the things that we've discussed, cultural issues,
10 mental health issues, family dynamics, previous violence,
11 drug use, et cetera.

12 Q And you have used the word "story" a few times in
13 your testimony today. Do you believe that an accurate
14 representation of Mr. Vanisi's circumstances was presented
15 to the jury in this case, based on your review of the
16 declarations that we now have admitted into evidence?

17 A Well, again, there was no case put on at the
18 guilt phase. And my memory of what was put on at the
19 penalty phase, although there were certainly a number of
20 witnesses presented, I think it was a pretty
21 one-dimensional story, that Vanisi was a nice guy and a
22 gentle guy.

23 Q Who kind of acted strange in one way.

24 A Yeah, there was some of that. But, you know, I

1 mean, for -- very objectively, for good or bad, it was not
2 the full story of Vanisi.

3 Now, whether there were any strategic decisions
4 behind that, I don't know, other than it would have been
5 our intention to argue that you can't make a strategic
6 decision without all of the information.

7 Q Do you agree with me that the Court never learned
8 the full story, Mr. Vanisi's full story or complete
9 circumstances either during the state habeas proceedings?

10 A Well, to the extent that the Court did not have
11 these 150 exhibits, the Court was not aware of that full
12 story, no.

13 Q If I were to represent to you that of these
14 exhibits, the petition involves 56 outside-the-record
15 interviews, these exhibits, 56 declarations themselves --

16 A Mm-hmm.

17 Q -- that 31 of these people indicated in those
18 declarations they were never interviewed by trial counsel.

19 A What's your question?

20 Q Would that impact or would that have relevance to
21 the ineffective assistance of counsel claim that you
22 raised?

23 A Again, from the very basic standpoint of you
24 can't make a strategic decision without having -- you

1 can't -- you have to do the investigation before you can
2 decide whether or not to use it, so yes.

3 Q And then on top of that, a number of those, a
4 number of the people who were interviewed by trial counsel
5 indicated that they were never asked about Mr. Vanisi's
6 social history. Is that of concern to you as state habeas
7 counsel?

8 A Yes, for all the reasons we've discussed.

9 Q So would you agree with me that those 31 people
10 are directly relevant to the Court's findings in
11 Exhibit 42?

12 A You mean to the finding that we didn't put up any
13 investigation to show what investigation should have --

14 Q Yes.

15 A Sure. That's directly relevant.

16 Q And of those 56 interviews, some obviously
17 weren't available to you. Would that be a fair statement?
18 Like our experts. You had your own. But 49 of those that
19 were available to you indicated that they were never
20 contacted by state writ counsel. You don't dispute that?

21 A If you're talking about family and friends and
22 church members that existed and were available at the
23 time, yes.

24 THE COURT: Okay. Let's take a short recess now.

1 We'll be back by 3:30.

2 Court's in recess.

3 (Recess taken 3:15 p.m. to 3:35 p.m.)

4 THE COURT: Thank you. Please be seated.

5 Counsel, you may proceed.

6 MR. TAYLOR: May I approach the clerk, Your
7 Honor? I have got her marking something else right quick.

8 THE CLERK: Exhibit 223 marked.

9 (Exhibit No. 223 marked.)

10 BY MR. TAYLOR:

11 Q Mr. Qualls, I am handing you what has been marked
12 as Exhibit 223. Would you review that or have you
13 reviewed it previously?

14 A I reviewed this during the break.

15 Q Okay. And can you tell the judge what that is?

16 A It is a declaration of Shaylene Grate, who
17 apparently was one of the jurors on the Vanisi trial.

18 Q Now, is one of the things that you would have
19 done had you been able to conduct an investigation, would
20 you have interviewed jurors in this case?

21 A I would have wanted to do that, yes.

22 Q And, thus, you would have wanted to conduct the
23 investigation that's reflected by this exhibit?

24 A Yes.

1 Q And do you think that this exhibit is relevant to
2 any of the claims that were presented in your petition or
3 maybe additional claims?

4 A I think it's relevant for two reasons. One, it's
5 relevant I believe to our -- at least one of our claims
6 regarding the content of the jury regarding death
7 qualification, and it's also relevant from the standpoint
8 there's at least an indication that a thorough
9 presentation of Mr. Vanisi's mental health history and
10 cultural background may have had a positive impact on the
11 juror.

12 Q Are we talking in particular about a --
13 paragraphs eight and nine on the second page?

14 A Yes, that's what I was referring to.

15 Q And not trying to belabor the point, but the
16 mental illness that Mr. Vanisi suffered, that is something
17 that you have identified that you would have investigated
18 had you had the opportunity?

19 A Yes. Obviously we believed that was an issue.
20 One of the legal issues that we raised was related to the
21 *Finger* case, and then obviously we raised additional
22 mental health issues with respect to the *Rohan* issue.

23 MR. TAYLOR: Your Honor, we'd offer 223.

24 MR. MCCARTHY: This one is quite a bit different

1 and I do in fact object. A juror may not impeach his or
2 her verdict. This does nothing more than that. So I
3 object to it being considered for any reason at all.

4 MR. TAYLOR: Just to make the record clear, Your
5 Honor, it's also offered to demonstrate the
6 appropriateness or the qualifications of the jurors to
7 serve in a death penalty trial, not anything to do with
8 the verdict, but as well as her qualifications to be sworn
9 as a juror.

10 MR. McCARTHY: That is -- it's undistinguishable
11 to me. That is the same. I return a verdict because I'm
12 a bad juror? No, I don't think so, Your Honor.

13 THE COURT: The record would clearly reflect what
14 she says she said and what her rehabilitation or lack
15 thereof was. And anything that she didn't tell the Court
16 at the time of the selection would probably be an attempt
17 to impeach her decision, which is improper in the state of
18 Nevada.

19 MR. TAYLOR: I understand, Your Honor. We're
20 offering to show to that she was not qualified at the
21 time.

22 THE COURT: Well, the transcript would show
23 whether she's qualified or not. That's the evidence that
24 was before the Court.

1 Do you have anything further, Mr. McCarthy?

2 MR. McCARTHY: No. I repeat my suggestion that
3 this affidavit is a juror attempting to impeach a verdict,
4 and that's not appropriate.

5 THE COURT: I'm going to sustain the objection.

6 MR. TAYLOR: May I have one minute, Your Honor?

7 THE COURT: Yes, you may.

8 (Discussion off the record
9 between defense counsel.)

10 BY MR. TAYLOR:

11 Q I think we've kind of established this,
12 Mr. Qualls, but since there's apparently no mule, I won't
13 kick two or three times.

14 Would you have taken this type of evidence that
15 we talked about -- and you said you'd investigate. Would
16 you also share it with your mental health experts?

17 A Yes, is the short answer to that.

18 Q And I think a number of them that have testified
19 in this case but -- I'm trying to find my...

20 163 and 164, if you could look at those, please.

21 A (Witness complies.)

22 Q If I'm not mistaken, 163 should be a report by
23 Dr. Jonathan Mack?

24 A Correct. That's what it appears to be.

1 Q And 164 should be a report by a Dr. Siale
2 Foliaki.

3 A Correct.

4 Q Okay. Have you seen these reports before?

5 A I don't recall seeing them, no.

6 Q Have you discussed them with any person?

7 A No. I don't recall that, no.

8 Q If we can just real quickly -- and I'm not going
9 to belabor this point anymore. Would you look at page
10 two.

11 A Of?

12 Q Of Exhibit 163, I'm sorry.

13 A (Witness complies.)

14 Okay.

15 Q And on page two, does it appear that Dr. Mack
16 starts to list and provide information from the records he
17 received in order to make his assessment in this case?

18 A Yes.

19 Q Does that review and list of records end on page
20 37?

21 A Yes. It appears very thorough.

22 Q And then on page 37, he talks about the social
23 history that was prepared by the federal public defender.

24 A Yes.

1 Q And describes that information; is that correct?

2 A Mm-hmm.

3 Q And does that continue until page 43?

4 A It appears, and then it moves into interview of
5 client.

6 Q So when we get to page -- well, and then after
7 the interview of the client, do we, on page 48 and 49, go
8 into his neurological testing?

9 A Yes.

10 Q And that would continue until page, I believe,
11 66? Is that about right?

12 A Yes. It's not clear whether it ends there. The
13 end of 66 goes into formulations and impressions.

14 Q Okay. Would that -- if you look at those,
15 starting at that section and look through 69 and 70, does
16 that appear to be Dr. Mack's conclusions?

17 A Yes.

18 Q And in an attempt to speed this along, Dr. Mack
19 found that Mr. Vanisi suffered a psychotic break on page
20 67?

21 A Yes. It was -- he indicates that in the top
22 paragraph.

23 Q Diagnosed him as suffering from schizoaffective
24 disorder?

1 A Yes.

2 Q Are you familiar with that diagnosis?

3 A Yes, somewhat.

4 Q Can you tell us what your understanding of it is?

5 A Well, schizophrenia is often diagnosed along with
6 other disorders, including bipolar disorder, and it can --
7 both of them kind of have the sliding scale of, in my
8 understanding of -- I'm not an expert, but of behavior and
9 psychosis, if you will.

10 Often, in my understanding and experience, again,
11 schizophrenia and bipolar overlap, especially when bipolar
12 disorder is on the extreme end. It involves a number of
13 the things that we have discussed regarding Mr. Vanisi's
14 behavior, his delusions of grandeur, his acting out, his
15 inability to track, his -- I believe a number of the
16 witnesses in the declarations talked about scribbling all
17 over the walls and dressing up as different characters and
18 sometimes, again, overlaps with multiple personalities.

19 Q And you've described writing on the walls,
20 dressing up as characters. I mean, are these the type of
21 bizarre behaviors you would have further investigated and
22 presented to your expert --

23 A Sure. Again, we were aware of several of those
24 kinds of behaviors, just from reviewing trial files and

1 speaking with the trial lawyers and whatnot.

2 Q Regarding the diagnosis of schizoaffective, is it
3 kind of your limited -- I'm not trying to qualify you as
4 an expert, but that often occurs when people have
5 overlapping symptoms of schizophrenia and bipolar. Is
6 that your understanding?

7 A That's what I was discussing, yes.

8 Q Did Dr. Mack, on page 67, investigate or evaluate
9 whether or not Mr. Vanisi was malingering?

10 A Yes. Pardon me. I'm reading the sentence right
11 now.

12 Essentially he says any opinion of malingering or
13 prior opinion of malingering of Mr. Vanisi is, quote, both
14 counterintuitive and completely unsupportable, end quote.

15 Q Okay. On pages 67 and 68, did he also diagnose
16 Mr. Vanisi with attention deficit hyperactivity disorder?

17 MR. MCCARTHY: Your Honor, once again, I haven't
18 objected up to this point. This witness said he's never
19 seen this report. He didn't author it. And then having
20 him read to the Court from that report doesn't seem
21 productive. So again, my objection is undue waste of
22 time.

23 MR. TAYLOR: Okay. Your Honor, I'd make the same
24 offer of stipulation as I made last time. This report was

1 attached to the petition, and I'll ask him about the
2 relevance, assuming it to be true. And Dr. Mack is fully
3 available to present his own opinion.

4 THE COURT: You want to offer it -- assuming that
5 it is true, you want him to testify as to what he would
6 have done with it had he had it?

7 MR. TAYLOR: Yes. And how it would have
8 influenced his actions.

9 THE COURT: If at all.

10 MR. TAYLOR: If at all.

11 MR. McCARTHY: I don't object to that. I just
12 object to having him read stuff from it.

13 THE COURT: Right.

14 MR. TAYLOR: Then I'll offer it at this point.
15 Exhibit 163, for that limited purpose, assuming that it's
16 true.

17 MR. McCARTHY: Sure, no problem.

18 THE COURT: Okay. For that purpose, 163 will be
19 admitted.

20 MR. TAYLOR: And just to knock another stone off
21 the thing, 164 as well, which is a psychiatrist named
22 Dr. Foliaki.

23 THE COURT: Those were admitted. We have
24 admitted them.

1 MR. TAYLOR: That's true. I'm just making sure
2 I'm not in trouble.

3 THE COURT: It's all there.

4 BY MR. TAYLOR:

5 Q Having reviewed that report -- and I asked you as
6 well to review page 68 and 69 very quickly regarding brain
7 damage and when these problems originated.

8 A Right. Well, the relevance obviously to the case
9 is that he opines that it -- that the mental illness has
10 been occurring since before the onset of the charged
11 offense.

12 Q Is this the type of evidence that you would
13 likely have evaluated and used in your investigation and
14 preparation of Mr. Vanisi's state habeas petition?

15 A I believe it's relevant for two reasons. Number
16 one, it supports our *Finger* claim, and number two, it
17 supports our efforts with respect to *Rohan*, and
18 specifically countering the opinion of Amezaga regarding
19 the malingering, which we believed at the time was
20 unsupported.

21 Q Okay. And I'll get directly to that, but first,
22 I want to ask you: Is this the type of evidence you would
23 have wished to present with a -- through your own
24 investigation had you had that opportunity?

1 A Yeah. In short, yes.

2 Q Now, Dr. Amezaga is a psychologist; is that
3 correct?

4 A That's my understanding.

5 Q That was appointed by the Court to evaluate
6 Mr. Vanisi's competency to proceed at habeas corpus.

7 A Correct. I believe the order from the Court was
8 that they were appointed both to assess competency to
9 assist counsel and competency as a witness.

10 THE WITNESS: I just read that, Terry. I don't
11 remember that from ten years ago.

12 MR. MCCARTHY: Ah-ha. I believe you.

13 BY MR. TAYLOR:

14 Q Dr. Amezaga is a local psychologist?

15 A He was at the time.

16 Q And was it your understanding that Dr. Mack, at
17 least from your review of the report today, is a
18 neuropsychologist?

19 A Yes, that's what it states here.

20 Q So the evaluations, the neuropsychological
21 examination, it's your understanding that's somewhat more
22 comprehensive?

23 A Certainly.

24 Q And had this evidence, similar to what we

1 presented in the exhibits up through, say, 199 had been
2 available, is that the type of evidence you might have
3 provided your expert?

4 A Certainly. It was very relevant.

5 Q So your expert, essentially Dr. Amezaga, was --
6 and I'm talking about Dr. Bittker as well, was denied this
7 information in their evaluation of Mr. Vanisi and their
8 opinion that they provided the Court.

9 A I can't -- I don't have an independent
10 recollection of what information was provided to both
11 Amezaga and Bittker. But clearly, they didn't have these
12 reports as they were prepared long after that hearing.

13 Q Is it fair to say that you didn't provide it to
14 them?

15 A These two reports?

16 Q No. All the other information we've talked to
17 and the exhibits through 199.

18 A Yes, that's fair to say.

19 Q So it might have been -- now, just for the sake
20 of identifying, Dr. Amezaga was a psychologist who
21 performed, if I remember right, two tests in this case?

22 A I don't -- I don't recall. I recall one of the
23 tests was a secret.

24 Q Okay. But as I recall, and the Court can

1 remember the hearing, I'm sure, very well herself, the
2 test dealt with trial competency versus competency in a
3 habeas. Dr. Amezaga did not really distinguish between
4 those situations?

5 A I'll take your word on that. I don't remember
6 exactly.

7 I remember the key issue being -- the key issue
8 at the time having to do with his competency to assist
9 counsel based upon the medication that he was on at the
10 time, and that was Bittker's main point was that a more
11 thorough evaluation was not possible until his meds were
12 changed.

13 And obviously Dr. Amezaga is not able to make any
14 kind of assessment of the effect of medications because
15 he's a psychologist and not a psychiatrist.

16 So that was one of the key and, I still think,
17 relevant issues regarding to that *Rohan* issue. There were
18 other underlying issues, obviously all kinds of mental
19 health issues there, but the -- but that crux issue that
20 we believed we were going to be able to pursue further,
21 the *Rohan* issue, had to do with effect of the medications
22 on Vanisi's competency.

23 Q Fair to say that's a matter which you disagreed
24 with the Court's ruling on?

1 A Yes, respectfully, and I think the weight of the
2 evidence is contrary to that.

3 Q And on page 67, Dr. Mack reviews the test that
4 Dr. Amezaga relied upon in his findings regarding the
5 chance of malingerer; is that correct?

6 A I believe that's what he was referring to, yes.

7 Q And just one more thing real quickly. If you
8 will look at Exhibit 202 and look at the bottom right,
9 you'll see -- I think these are already in, but you'll see
10 some page numbering, and the last three numbers will be
11 514.

12 A 514?

13 Q Yes.

14 A Or 541?

15 Q 514.

16 A In Exhibit 202?

17 Q 202, which I believe is Mr. Edwards' billing
18 records. And look down at the lower right-hand corner,
19 and there is a --

20 A It may not be sequential.

21 Q -- a Bates label.

22 A I see.

23 Q It's a letter from Dr. Amezaga?

24 A Yes.

1 Q And it's where he billed the Court for his
2 testimony and evaluation? Does that sound correct?

3 A Looks to be.

4 Q The second page listing what he did?

5 A Correct.

6 Q And then at the footer on both those pages, he
7 runs a business apparently: www.askapsych.com?

8 A That appears -- yeah, that's the -- that's the
9 website at the bottom of his billing.

10 Q Okay. If you would, go to the next Exhibit, 164.
11 That's Dr. Foliaki's report.

12 A Okay.

13 Q Dr. Foliaki in section one, I believe, and
14 section two, provides his conclusions. Could you take a
15 minute, starting at page five, to just look at that.

16 A Okay.

17 Q If you would turn to page 120, and I believe that
18 includes the information that was provided to Dr. Foliaki.

19 A Several-page inventory. Looks like it goes from
20 120 to 123, and then there's some legal declarations.

21 Q It's the Appendix B, I believe, is it entitled on
22 page 120?

23 A I'm sorry, what was your question? Appendix B is
24 on 119.

1 Q Okay. That's the information that Dr. Foliaki
2 reviewed. And finally, if you look at page one, would you
3 tell me, where is Dr. Foliaki from?

4 A Manukau City, New Zealand.

5 Q Are you familiar with the relationship between
6 New Zealand and -- as far as graphical relationship -- and
7 Tonga?

8 A My rudimentary geography says that they are both
9 somewhere in the South Pacific.

10 Q Okay. The information that was provided to
11 Dr. Foliaki that you reviewed, is that the type of
12 information that you would have wanted to provide to your
13 experts?

14 A Yes.

15 Q Looking at the evaluation that Dr. Foliaki did,
16 the matters that he considered, and the diagnoses that he
17 came out with, is that the type of the information you
18 would have used in presenting your claims to the Court?

19 A Yes.

20 Q Was it important to have that kind of
21 information?

22 A Yes.

23 Q Do you feel that your inability to complete an
24 investigation impacted your abilities to present that type

1 of evidence?

2 A Sure.

3 Q Okay. Turning to page -- Exhibit 120, very
4 quickly. And I'd just ask you to quickly look at that, if
5 you would.

6 A Okay.

7 Q You and I had a discussion about mental illness
8 as well as Tongan culture. Is this the type of
9 information you think is relevant to the investigation of
10 a death penalty case?

11 A Sure. Well, it folds into a lot of other things
12 we've talked about, importance of cultural role, the
13 misunderstanding and sort of hiding of mental illness in
14 the culture, the prevalence of certain kinds of mental
15 illness.

16 Q Is it also relevant, do you believe, to you in
17 your investigation about the availability of mental
18 healthcare within Tonga to this family?

19 A It has some relevance, yes.

20 Q And the Tongan perspectives or views about mental
21 illness, is that relevant to your investigation?

22 A Yes.

23 Q Probably make it more difficult, those views?

24 A I suppose that could be possible.

1 Q And you talked a minute ago -- and I don't want
2 to belabor the point -- about the writing on walls and
3 some bizarre behavior.

4 Was there some historical evidence that you
5 became familiar with just generally in these exhibits
6 regarding Mr. Vanisi's father?

7 A Yes.

8 Q And his father's behaviors?

9 A Yes. His father, according to a number of the
10 declarations, anyway, was quite mentally ill and exhibited
11 quite a number of bizarre behaviors. Continually had
12 substance abuse issues, never held down a job, et cetera.

13 Q Were some of those behaviors, such as dressing up
14 in outfits and marching around with swords or things like
15 that similar to behaviors that have been documented
16 regarding Mr. Vanisi?

17 A Yeah. I saw multiple similarities in behaviors.

18 Q Is this information that, one, you would have
19 liked to have known?

20 A Yes. Certain aspects of mental illness are
21 believed to be genetically passed.

22 Q Is this the type of evidence that you would have
23 sought had you been given the opportunity to complete an
24 investigation?

1 A Yes.

2 Q There were, Mr. Qualls, a number of different
3 deadlines in this case. Is that your memory?

4 A My memory is fuzzy about deadlines. The thing
5 that stands out the most is the Tuesday deadline.

6 Q I'm sure. But I guess what I'm asking is, as
7 lawyers, we routinely encounter deadlines?

8 A Sure.

9 Q And there were previous deadlines for filing the
10 amended petition prior to that Thursday order, were there
11 not?

12 A I don't know that deadline is the right thing.
13 You made me aware that --

14 Q Or dates?

15 A -- that Mr. McCarthy had been requesting for some
16 time that we file our supplemental petition, and in due
17 fashion, Mr. Edwards and I had been resisting the same.
18 That's not uncommon in death penalty practice. The State
19 wants to move it along; the defense wants more time.
20 That's generally how it goes.

21 Q Did you -- I guess why I'm asking this, did you
22 anticipate that the Court would have a hard and fast
23 four-day time for you to file your petition?

24 A Whether it was reasonable or not, I did not

1 foresee that coming.

2 Q So you expected you would have at least some time
3 to complete your investigation and draft a petition?

4 A Yeah. Again, our plan was *Rohan* first and then
5 we'll have plenty of time to do our investigation while it
6 is stayed. We didn't think that there was any issue about
7 Mr. Vanisi's mental health issues again. That could have
8 been a mistake, but we obviously believed in the *Rohan*
9 motion. We knew the mental health issues were real, and
10 we thought we would have some kind of stay to continue to
11 work on the case. So we were surprised both by the denial
12 of the *Rohan* motion and by the order to file our
13 supplement.

14 MR. TAYLOR: Begging the Court's indulgence for
15 one moment.

16 THE COURT: Yes.

17 (Discussion off the record
18 between defense counsel.)

19 MR. TAYLOR: Your Honor, do we show Exhibit 201
20 has been admitted or that you took judicial notice of it?

21 THE CLERK: 201 has been admitted.

22 MR. TAYLOR: 202?

23 THE COURT: No.

24 THE CLERK: No.

1 MR. TAYLOR: Okay.

2 BY MR. TAYLOR:

3 Q Just very quickly, Mr. Qualls -- and I thank you
4 for your patience with me today.

5 Exhibits 221 and 222, are you familiar with those
6 exhibits at all?

7 A Yeah. They look familiar.

8 Q Are these related to a claim that you and
9 co-counsel presented regarding the Vienna Convention?

10 A This is a claim that Mr. Edwards was handling,
11 yes, regarding a Vienna Convention. It's a -- 221 is a
12 letter to the consulate general from Mr. Edwards regarding
13 Vanisi with respect to that being a convention code.

14 Q Okay. And 222, is that just a copy of the
15 website of the consulate in San Francisco?

16 A That's what it appears to be. It says: Welcome
17 to our website. Yes.

18 Q Have you had an opportunity to just quickly look
19 at Exhibits 173 and 199, which are from the solicitor
20 general of Tonga?

21 A 173, and what was the other one?

22 Q 199.

23 A I believe you showed me those yesterday.

24 Q Okay. And are they, as well, related to that

1 claim that you and co-counsel identified and raised
2 regarding the Vienna Convention and the failure to notify
3 Tongan Consulate upon Mr. Vanisi's arrest?

4 A It appears to be related to that, yes. I'm
5 sorry, I'm reading.

6 Q I apologize.

7 A Yes.

8 Q 173 is a declaration by my investigator, and 199
9 is a draft letter from Solicitor General Kefu?

10 A Correct. And it appears to be saying that they
11 would have offered assistance.

12 Q In other words, had the connection been made
13 between the government of Tonga and you had been provided
14 or had the opportunity to complete your investigation,
15 they would have assisted?

16 A Meaning that contacting the solicitor general
17 directly as opposed to the consulate --

18 Q I mean, that's all I'm saying, is had you made
19 contact with the solicitor general --

20 A Yeah, they appear to say that they would have
21 offered assistance.

22 Q I think it's fair -- I mean, I'm not trying to
23 make the record anything other than what it is. If the
24 record reflects that you contacted the San Francisco

1 consulate --

2 A Correct.

3 Q -- and they say that was not the one you were
4 supposed to contact.

5 A Right.

6 Q Essentially. All right. But as far as
7 assistance in locating witnesses and locating records in
8 Tonga, things of that nature, you might have had it.

9 A If we had more time, I don't know. Yeah.

10 Q Is it something that you at least would have used
11 to consider presenting to the Court --

12 A If we had --

13 THE REPORTER: I'm sorry, I didn't hear the end
14 of the question.

15 MR. TAYLOR: Let me repeat the question.

16 BY MR. TAYLOR:

17 Q Is it something that you would have at least
18 considered presenting in your state habeas presentation?

19 A If we had this information, yes.

20 MR. TAYLOR: At this point, we'll pass the
21 witness, Your Honor.

22 THE COURT: Okay. Mr. McCarthy?

23 ///

24 ///

1 **CROSS-EXAMINATION**

2 BY MR. MCCARTHY:

3 Q When the Court gave just those few days to file
4 the supplement, that wasn't the first time you were on
5 notice that you might have to prepare a supplement, was
6 it?

7 A No. It came to my attention -- and I did not
8 remember this, but it came to my attention yesterday that
9 in November, there was a hearing in which you again asked
10 for us to file the supplement. The Court said, "No, I'm
11 not going to make them file it right now, but depending on
12 my order in the *Rohan* case, you should be prepared to file
13 it then."

14 Q And when the Court said -- when the Court denied
15 the motion, you did file a supplement.

16 A Yes, we did.

17 Q Rather thorough. Do you know how many claims
18 were in there?

19 A I'm sorry, I don't recall the number of claims.
20 We did the best we could in the circumstances. And again,
21 it's not like we started working on the supplement that --
22 that Friday or something.

23 Q No. You had been anticipating the need for a
24 supplement all along.

1 A Sure. It had been outlined from the beginning,
2 and we had been drafting it as we went, yes.

3 Q And one of the barriers to a more thorough
4 investigation was your client's failure to communicate
5 with you.

6 A That was a major barrier.

7 Q Right.

8 A Yeah.

9 Q And the finding of the Court was that he was
10 simply unwilling; is that correct?

11 A That's my memory, based upon Amezaga's opinion
12 that he was malingering and that he was unwilling as
13 opposed to unable. The Court adopted that and that was
14 the finding.

15 Q Do you recall Dr. Bittker also said something
16 like your client is delusionally unwilling? Because of
17 his delusion, he was unwilling to cooperate, something
18 like that?

19 A I don't recall that. I believe it if you tell me
20 that's in the record.

21 Q Does it sound at all familiar?

22 A The delusional part sounds familiar. I remember
23 some sparing that went back and forth between you and he.

24 Q Yeah.

1 A And it seemed that he was pretty adamant about
2 the psychosis.

3 Q Is that the one that had the nihilistic delusions
4 was his --

5 A Yes, I recall that phrase.

6 Q I remember that, too.

7 A And I recall you arguing that his letter might
8 have indicated some awareness of his mental illness, but I
9 don't think that flew.

10 Q Okay. Now, between the time you and Mr. Edwards
11 decided to pursue what we're calling this *Rohan* motion,
12 and the time the Court rules, you got four days to file
13 your supplement. How much time was in between there, your
14 decision to file the motion and the ruling on the motion?

15 A Oh, I don't know that.

16 Q A year or two?

17 A Anything that I said would be purely speculative.
18 I apologize. I did not look at the date that we filed the
19 motion.

20 Q Well, let me ask this: You decided to file it
21 before it was actually filed, I assume. You didn't knock
22 it off in one day.

23 A No, that's true.

24 Q You and Mr. Edwards discussed it. You talked

1 about it.

2 A Sure. We had to do the research and -- yeah.

3 Q Okay. Now, in that time between when the motion
4 was filed and -- did you meet with your client?

5 A We had met with Mr. Vanisi, and my memory is at
6 least twice prior to that motion.

7 Q After. I mean, after you filed the motion and
8 when it was heard.

9 A I believe we met with him in that interim.

10 Q Okay. Did you ask him in that time about any of
11 these rocks we've been discussing?

12 A I don't have any specific memory of that. I
13 remember -- I remember the meetings with Vanisi, depending
14 on when his medications had been administered, we found
15 out later, he was either very manic and exhibiting all of
16 the behaviors that we've discussed throughout, or he was
17 essentially drooling on himself if it were right after the
18 Depakote or Haldol shots. And so we didn't know what we
19 were going to get anytime we saw him.

20 Q Okay. Were you trying to do the necessary
21 investigation in that time period while the motion was
22 pending?

23 A Our focus at that time was not on outside
24 investigation. It was pursuing the *Rohan* motion. That

1 was our focus.

2 Q And would it have supported the motion, the *Rohan*
3 motion, if prison records showed extensive conversation
4 between you and your client?

5 A Would it have supported the *Rohan* motion?

6 Q Yes.

7 A I suppose, if we're offering hypotheticals. I
8 mean, if we sat in a room for several hours with Vanisi,
9 which we did on occasion, and talked, that doesn't mean
10 that we got anything --

11 Q Okay.

12 A I would be especially interested if those
13 conversations were recorded.

14 Q I'm not saying I have -- I don't --

15 A You know, what I had testified to was true. We
16 did not get any substantive coherent information from
17 Vanisi.

18 Q Right. I guess what I'm asking is: Did you not
19 try to get any because you didn't want to undercut your
20 motion?

21 A Oh, absolutely not. No. No, we tried. We tried
22 to get the information, and that is the thing that
23 prompted the *Rohan* proceedings.

24 Q I meant in the interim --

1 A After the motion?

2 Q -- after the motion was filed.

3 A I can't -- I can tell you this: There was no
4 specific decision on our part to not seek additional
5 information from Vanisi because of *Rohan*. We wouldn't
6 have done that.

7 Q Okay. Now, you also knew there was at least some
8 possibility that your motion would be denied, but on a
9 legal analysis, not on a factual analysis.

10 A Meaning your argument that the Ninth Circuit case
11 didn't apply here?

12 Q Yeah.

13 A I suppose there's always a chance. We believed
14 very strongly in our *Rohan* motion, both legally and
15 factually. I mean, obviously, you never know what's going
16 happen.

17 Q You don't file frivolous motions. I know that.
18 Now, you asked a lot about the potential for
19 additional mitigating evidence. How do you define
20 mitigating evidence?

21 A I think pursuant to the *Wiggins* line of cases,
22 mitigating evidence is a very broad scope. It contains
23 almost anything that humanizes your client in the eyes of
24 the jury.

1 Q Whatever a juror decides is mitigating is
2 mitigating.

3 A Correct.

4 Q Do you know, has there ever been a jury that has
5 heard all possible mitigating evidence?

6 MR. TAYLOR: Your Honor, I'm going to object.
7 First, it's speculating. Two, that's not the standard
8 before --

9 THE COURT: It is argumentative, so I'll sustain
10 it.

11 MR. McCARTHY: Of course it is.
12 BY MR. McCARTHY:

13 Q Now, when you filed the supplement, you got a
14 hearing on all the pleaded claims, didn't you?

15 A I believe that's true, yes.

16 Q Okay. And --

17 A We at least had oral argument on the claims. I
18 mean, some of them are legal based upon the record, right.

19 Q Right. In a death penalty case, when you're
20 representing a person who has been sentenced to die, do
21 you generally find delay to be a desirable objective?

22 A As I stated before, within ethical boundaries,
23 typically, the State wants to move it along and
24 petitioner's counsel wants as much time as possible.

1 Q Right. Your client stays alive.

2 A Every day is a win.

3 Q Okay. All right. And the existence of
4 additional mitigating evidence becomes pertinent only if
5 you can also demonstrate that trial counsel was
6 ineffective in some way in failing to gather that; is that
7 correct? Does that seem right?

8 A As I have stated, from a post-conviction
9 petitioner's counsel's standpoint, the goal is present the
10 evidence and then make the claim that there can't possibly
11 be a strategic decision by trial counsel not to put it up
12 if they didn't know it was there. That's the fundamental
13 of that.

14 Q But that's not the entirety of the claim, though.
15 You have to show that counsel is --

16 MR. TAYLOR: Object, Your Honor. That is
17 argumentative.

18 MR. McCARTHY: Well, I'm not done yet.

19 THE COURT: Go ahead and restate your question.
20 BY MR. McCARTHY:

21 Q Is there more to the argument that trial counsel
22 is ineffective?

23 A Well, sure. There's a prejudice --

24 Q Can you show ineffective assistance simply by

1 showing the existence of mitigating evidence?

2 A Are you saying can you show the prejudice prong?

3 Q No. Can you show that counsel's performance was
4 deficient by simply showing the existence of additional
5 mitigating evidence?

6 A I believe you can show that counsel was
7 ineffective because they -- regarding the investigation or
8 the lack thereof, you can show that they were ineffective
9 because they can't make a strategic decision not to
10 present something that they didn't find.

11 MR. TAYLOR: Judge, can I interpose --

12 THE WITNESS: I don't know if I said that right.

13 MR. TAYLOR: I'm sorry. Can I interpose an
14 objection? I understand what Counsel's trying do, but
15 ultimately what the law is and what you have to show is
16 something that this Court has to determine, not something
17 that Mr. Qualls is charged with.

18 So I think it goes to the ultimate issue before
19 the Court and not Mr. Qualls's opinion of what has to
20 happen.

21 THE COURT: What's the purpose of the line of
22 questioning?

23 MR. McCARTHY: To try to determine the witness's
24 understanding of his role. He's been asked over and over

1 again: Wouldn't you do something with this?

2 THE COURT: Okay. With regard to
3 cross-examination in that regard, I will allow you to
4 inquire.

5 BY MR. McCARTHY:

6 Q Did you answer the last question?

7 A Could you rephrase?

8 Q You did. You said that --

9 THE COURT: He answered it.

10 BY MR. McCARTHY:

11 Q -- you would show the evidence -- the decision
12 couldn't be strategic if it wasn't based on complete
13 evidence, right?

14 A Yeah. The first prong is: Were they ineffective
15 in failing to look for available evidence?

16 Q Right.

17 A Yes. And then --

18 Q To show that a failure wasn't strategic, does
19 that mean it was necessarily deficient?

20 A I think that's for the Court to decide.

21 Q Okay. What do you think, though? What's your
22 opinion on it?

23 MR. TAYLOR: Objection.

24 MR. McCARTHY: I'm trying to get his

1 understanding of his role, Your Honor.

2 THE COURT: I'm going to overrule it just for
3 purposes of not whether or not he's allowed to make an
4 expert opinion about the ultimate outcome.

5 MR. McCARTHY: Well, I'm not offering Tom Qualls
6 as an expert witness.

7 THE COURT: I understand that.

8 MR. McCARTHY: Not that you wouldn't be
9 qualified.

10 THE COURT: I'm allowing the inquiry as it
11 relates to the direct examination.

12 MR. McCARTHY: Okay.

13 BY MR. McCARTHY:

14 Q So the question then was: Do you think that the
15 claim of deficient performance is made out just by showing
16 that it's not -- that the decisions of counsel were not
17 strategic?

18 A I think deficiency is shown by the omission to do
19 something which is understood to be a reasonable standard
20 of trial counsel in death penalty cases.

21 Q Okay. Now, in your dealings with Mr. Vanisi, did
22 he appear to understand he was in prison?

23 A I suppose that depended on the day because he --
24 because he also did a lot of things that would appear

1 contrary to that, and he spoke of where he was
2 differently. Kind of made up his own rules there.

3 Q He managed to survive, though, didn't he?

4 A He did. I don't know that I'm qualified to
5 answer that. I can't get inside his head, but I can tell
6 you that from indications that we had, both stories that
7 he would tell us or things he would act out and reviews of
8 the prison record, it's not clear that at least he always
9 understood that that's where he was.

10 Q Okay. When he understood that he was in prison,
11 did he seem to understand in general terms why he was in
12 prison?

13 A I would have to say I'm unsure about that
14 because, again, communication with him was so difficult,
15 and when we would approach the charged offense, there was
16 not coherent communication and there were lots of stories
17 involved that weren't, in my opinion, grounded in reality.

18 So I don't -- I can't answer that question,
19 Mr. McCarthy. And I'm not trying to be evasive. I don't
20 know is the answer to that. And that was part of our
21 difficulty.

22 Q All right. Did you ever have any discussions
23 with Mr. Vanisi about the nature of the defense that he
24 wanted to offer versus the nature of the defense that was

1 actually offered at the trial?

2 A At trial?

3 Q Yes.

4 A We never had any coherent conversations with him
5 about that.

6 Q Okay.

7 A We attempted.

8 Q You tried to ask him: Did you want to defend by
9 saying you didn't do it?

10 A I don't know that that was the exact words,
11 but --

12 Q Something like that.

13 A But yes, there was -- yeah. There were -- the
14 closest that we got were kind of veiled references to
15 Tongan warrior culture.

16 Q Okay.

17 A That he may have believed he was in a battle.
18 That's the closest I can -- but that's not specifically
19 related to your question about the antagonistic nature of
20 the defense that we got from the sealed hearings in which
21 his trial lawyer said that they wanted to put this defense
22 on and he wanted to put a separate defense on. We didn't
23 ever get close to that kind of coherent conversation with
24 him.

1 Q Anything as simple as he knew or that he
2 demonstrated that he knew another person had died at his
3 hand?

4 A No.

5 Q There was an allegation somewhere in the petition
6 that you and Mr. Edwards believed you were limited to the
7 record in creating your post-conviction claims; is that
8 correct?

9 A I'm not sure where that would have -- I don't
10 understand the context of that.

11 Q You know you're --

12 A Is that in my declaration?

13 Q No, no. You knew, didn't you, that you're not
14 limited to the record when creating your claims on
15 post-conviction actions?

16 A Sure. Of course. The goal is to -- as I said
17 earlier, what differs from a direct appeal is you must go
18 outside the record. Whether we -- whether we did that
19 based upon time was another thing. I think, essentially,
20 what we were left with were claims that were on the
21 record.

22 Q All right.

23 THE COURT: Based on time?

24 THE WITNESS: Based -- yeah, based upon at least

1 our time plan for the case.

2 BY MR. MCCARTHY:

3 Q Do you mean the relatively short period after the
4 motion hearing and the time you filed the supplement?

5 A Yes. I mean, I had essentially done the mea
6 culpa as far as, quite obviously, it was a mistake for us
7 to not pursue investigation sooner. Our plan was the
8 *Rohan* proceedings and then the outside investigation.

9 We reviewed the record. We did the *Rohan* stuff.
10 I don't really remember what investigation was done when
11 Mr. Picker and Mr. Edwards had the case before I got
12 involved. But as far as further investigation that we had
13 discussed, we were not able to include any claims because
14 of the order to file the supplement before we conducted
15 that investigation. It's not my place to say whose fault
16 that was. That's just the facts.

17 Q Okay.

18 THE COURT: Do you remember that in November, you
19 were ordered to prepare the supplemental petition?

20 THE WITNESS: Mr. McCarthy and I discussed that,
21 yes. Again, that's --

22 THE COURT: And it was in April when you were
23 ordered -- April 25th when you were ordered to get it on
24 file ultimately. Is that the five days you're talking

1 about?

2 THE WITNESS: Okay. I'll take your word on that.

3 THE COURT: All right.

4 BY MR. McCARTHY:

5 Q What remedy do you think you would have got if
6 you're right? If the *Rohan* motion was granted, what
7 remedy do you get?

8 MR. TAYLOR: Objection, Your Honor. I'm not sure
9 how that's relevant to the issue before the Court right
10 now.

11 THE COURT: Well, if his -- if it's relevant that
12 he did not investigate because he didn't have enough time,
13 and that that somehow was impacted by his filing of the
14 *Rohan* motion, then it is relevant if the *Rohan* motion
15 wouldn't have -- the answer -- we all know the answer as
16 to what the remedy would have been if the *Rohan* motion
17 would have been granted.

18 MR. TAYLOR: Arguably, the matter would have been
19 stayed --

20 THE COURT: Exactly. No remedy. Just delay.

21 MR. TAYLOR: I understand that that's --

22 THE COURT: I think that's the question he's
23 asking, what other thing did Mr. Qualls think. Right?

24 MR. McCARTHY: Well, I'm asking his understanding

1 of it.

2 THE COURT: And we just told him.

3 MR. McCARTHY: Well, let's find out, if he's
4 allowed to answer.

5 THE COURT: Yes. Overruled.

6 THE WITNESS: *Rohan* was a relatively new
7 precedent, and so our understanding was that there would
8 be a stay for as long as it took to come to either a
9 determination that he was permanently exempt or for them
10 to get him to the state where he was competent to assist
11 counsel. So it was -- the future was very unknown as far
12 as how long the stay would be.

13 We believed that there would -- there would be
14 two things. There would at least be the 90 days that
15 Bittker was requesting in order to do another evaluation
16 once they had removed the medications, Haldol and
17 Depakote. And then we believed that would there would be
18 additional proceedings after that, that we would have new
19 evaluations. We believed it was likely that we would have
20 new evaluations.

21 Again, our experience with Vanisi was that he was
22 fairly severely mentally ill, and we thought that there
23 was a chance that this could be stayed out indefinitely.
24 ///

1 BY MR. McCARTHY:

2 Q To avoid the death penalty forever if you win.

3 A Well, obviously, that's the best case scenario.

4 Q Did you have that in mind?

5 A We had that in mind as a possibility, you know.
6 The record that they are presenting here, I believe,
7 supports that to a large degree.

8 And so, you know, remedy, as far as your normal
9 remedy from a post-conviction habeas case, that's not
10 exactly what we were thinking of, but we thought, well,
11 we'll buy more time, which we believed was Vanisi's
12 friend. We'll buy more time legitimately, and we'll
13 continue to build this case.

14 As my notes reflected, we discussed many things.
15 There were plans for the mitigation expert. There were
16 plans for interviewing family and friends, perhaps even
17 requesting -- obviously, we would have requested it to
18 begin with, to be able to go to Tonga and/or to enlist the
19 assistance of a cultural expert, et cetera.

20 In hindsight, we should have been doing that at
21 the same time we were doing this *Rohan* thing.

22 It's a different world being on that side of the
23 bar versus being on this side of the bar.

24 Q I suppose it is.

1 A My experience prior to Vanisi, although fairly
2 extensive in capital cases, was not the same thing as
3 being on this side of the bar. And again, we learn as we
4 go. I know way more ten years down the road than I did
5 then. And so, live and learn.

6 But that was the plan, and obviously it was a
7 mistake not to do the investigation at the same time.

8 Q As far as you know, were you the first
9 post-conviction lawyers in this county to bring such a
10 motion?

11 A Yes. *Rohan* was brand new.

12 MR. MCCARTHY: I'm done. Thanks.

13 THE COURT: Counsel?

14 MR. TAYLOR: May I --

15 THE COURT: You may inquire, but I encourage you
16 to try to finish your redirect --

17 MR. TAYLOR: With this witness, yes.

18 THE COURT: -- with this witness so we don't have
19 to have him come back tomorrow.

20 MR. TAYLOR: I think I'll be able to do that.

21
22 **REDIRECT EXAMINATION**

23 BY MR. TAYLOR:

24 Q I'm a little concerned, Mr. Qualls, because what

1 I was hearing was a suggestion that maybe -- maybe it was
2 an inference that was coming through that you made some
3 strategic decision not to investigate just so you could
4 get some sort of indefinite stay in this case. Is that
5 true?

6 A No. That's not true.

7 Q Is --

8 A I don't believe that's what I said.

9 Q Well, and I don't either. Is --

10 MR. MCCARTHY: I don't think that's what I asked.

11 MR. TAYLOR: If that inference is out there, it's
12 correct.

13 BY MR. TAYLOR:

14 Q Is there some reason that conducting an adequate
15 investigation is mutually exclusive when you're raising a
16 *Rohan* motion?

17 A Is there some reason why I couldn't do both at
18 the same time?

19 Q Yes, yes. Or do both sequentially, period.

20 A I'll answer your first question. They're not
21 mutually exclusive.

22 Q Is there something about conducting an
23 investigation in a capital case that detracts from a *Rohan*
24 motion, so to speak, that you can think of?

1 A No. In the sense that the primary issue in the
2 *Rohan* was the inability of our client to assist counsel,
3 no.

4 Q So the reality is, is obtaining the competence of
5 your client actually assists you in your investigation,
6 does it not?

7 A It's essential to be able to communicate and work
8 with your client. You've got to be able to have a
9 coherent conversation, I mean, obviously because there are
10 things that only they know, that friends and family aren't
11 going to be able to tell you, but also just because that's
12 an essential part of the -- you can't have an
13 attorney/client relationship if you can't communicate.

14 Q But if you were forced to conduct that
15 investigation, we've looked at a number of exhibits and
16 memos involving Marc Picker and the trial record and
17 things that at least gave you a starting place to do it
18 when you got ready. Would you agree with that statement?

19 A Yes.

20 Q You have the family information, the schools, the
21 address, that kind of stuff?

22 A We had some starting points, yes.

23 Q But as far as the *Rohan* motion -- and you were
24 asked the question regarding remedy. Dr. Bittker's

1 recommendation to this Court, was it an indefinite stay?

2 A No, not at the time, it was not. It was -- I
3 believe, memory serves, he was asking for 90 days to
4 remove the medications so that he could reevaluate him
5 pursuant to the request regarding *Rohan*.

6 Q Would you agree with me that it was a proactive
7 recommendation? In other words, let's mess with the meds
8 and see if we can get him competent.

9 A I believe that was it. It was two step. He's
10 not competent now. Let's take him off the meds and see
11 what effect that has.

12 Q So in some ways, not only did it not preclude you
13 from conducting an investigation, it could have assisted
14 you in your investigation had the Court adopted that
15 recommendation.

16 A Well, that was our plan.

17 Q You said something about Tongan warrior. Do you
18 remember different instances -- I guess they were called
19 Lamanite warriors and Tongan warriors, discussions of
20 that?

21 A Amongst the declarations you showed me?

22 Q Yes, as well as your interactions with
23 Mr. Vanisi.

24 A I don't remember him discussing those exact

1 words, Lamanite.

2 Q Maybe I should ask it this way: Did some of the
3 illustrations and the declarations that the judge will
4 review, did they kind of ring true to you, to what you had
5 observed?

6 A Absolutely. They were very much in sync with
7 what little we knew.

8 Q And like I remember someone talking about
9 Mr. Vanisi went to talk to the doctor, and they found him
10 talking to a Dr. Pepper bottle. Does that ring true with
11 anything you observed?

12 A Yes. I believe we presented that, and maybe even
13 in affidavits to the Court regarding the *Rohan* motion that
14 one of our visits with Mr. Vanisi during which he would
15 break out in song and whatnot, he told us that he wanted
16 to be Dr. Pepper.

17 Q This evidence that you and Mr. McCarthy and you
18 and I all day have been discussing, is it relevant only to
19 an ineffective assistance of counsel claim, or can it be
20 relevant to any number of claims?

21 A Well, I suppose there's crossovers, again, with
22 the mental health issues and whatnot.

23 Q Kind of like you have testified to all day, is
24 there any way to know what claim you're actually

1 developing until you start the investigation?

2 A No, and there's -- you don't really know what
3 you're going to use until you have it.

4 Q Likewise, if some of this evidence had been
5 discovered in the DA's file, it might be an entirely
6 different claim if it was not disclosed.

7 A Sure, yeah. There'd be *Brady* issues then.

8 Q And as we talk, you mentioned the *Wiggins* case.
9 Is that one of your guiding -- *Wiggins vs. Smith*, I
10 believe, is it not?

11 A Well, it's certainly a guidepost as far as
12 post-conviction habeas counsel goes for mitigation.
13 Should be a guidepost for trial lawyers for penalty phase
14 mitigation.

15 Q Did *Wiggins* not discuss the need that -- or the
16 requirement that a decision not to investigate be informed
17 itself?

18 A Can you repeat that? I'm sorry.

19 Q I think you said this in another way. But I
20 think you support, the case you cite actually supports
21 that.

22 But does the decision you make regarding
23 investigation need to be an informed decision?

24 A Yes, as we're talking about the omissions and

1 whatnot.

2 Q And did you make an informed decision in this
3 case not to investigate?

4 A Did we make an informed decision not to
5 investigate?

6 Q Yes. Considering knowing what was out there and
7 knowing what evidence or proceeding to the point that you
8 had something to tell you that an investigation wasn't
9 needed, was any of that available to you?

10 A Obviously we didn't know what we didn't know.

11 Q I guess what I'm asking is, there was nothing to
12 suggest to you that you shouldn't investigate in this
13 case.

14 A No. We didn't know anything that told us not to
15 investigate.

16 Q In fact, you intended and contemplated that you
17 would conduct an investigation.

18 A As my notes from my file indicated, yes.

19 Q And lastly, the only question I would ask is: Do
20 you continue, after all our conversations today, to
21 believe that the jury nor the Court received an accurate
22 picture of Mr. Vanisi's problems through either the trial
23 or the state habeas?

24 A I believe that's true. I didn't have a complete

1 picture until now.

2 MR. TAYLOR: We'll pass, Your Honor.

3 THE COURT: Anything further, Mr. McCarthy?

4 MR. McCARTHY: No, thank you.

5 THE COURT: May this witness be excused?

6 MR. TAYLOR: Sure, Your Honor, subject to maybe
7 if I need him, I can call him. But that depends on the
8 other witness. I don't anticipate it.

9 THE COURT: Well, I don't know where he's going
10 to be tomorrow.

11 THE WITNESS: I'll tell you where I'm going to
12 be. I'm going to be in my office finishing up
13 post-hearing briefs.

14 THE COURT: Okay. You may step down. Since you
15 don't -- aren't excusing him, he won't be excused. He has
16 to remain in contact with you.

17 MR. TAYLOR: And I would represent to the Court I
18 don't anticipate that we would use him.

19 THE COURT: Okay. It's 5:00 o'clock. So we will
20 be recessing until tomorrow morning.

21 (Discussion off the record between
22 the clerk and the Court.)

23 THE COURT: We have a little quick hearing
24 tomorrow morning before we start this hearing at 9:00.

1 They're both called for 9:00, but the other hearing will
2 take five minutes or so. So we'll plan on starting
3 tomorrow morning at 9:00.

4 MR. MCCARTHY: Can we leave our junk here?

5 THE COURT: Leave your stuff. There won't be
6 anybody here.

7 MR. TAYLOR: Thank you, Your Honor.

8 THE COURT: See you in the morning. Court's in
9 recess.

10 (Proceedings concluded at 4:54 p.m.)
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23
24

1 STATE OF NEVADA)
2 COUNTY OF WASHOE)

3
4 I, STEPHANI L. LODER, Certified Shorthand
5 Reporter of the Second Judicial District Court of the
6 State of Nevada, in and for the County of Washoe, do
7 hereby certify:

8 That I was present in Department No. 4 of the
9 above-entitled Court and took stenotype notes of the
10 proceedings entitled herein, and thereafter transcribed
11 the same into typewriting as herein appears;

12 That the foregoing transcript is a full, true
13 and correct transcription of my stenotype notes of said
14 proceedings.

15 DATED: At Reno, Nevada, this 6th day of
16 December, 2013.

17
18 /s/ Stephani L. Loder
19 STEPHANI L. LODER, CCR No. 862
20
21
22
23
24

EXHIBIT 199

EXHIBIT 199

THE SOLICITOR GENERAL
Crown Law Department
P.O. Box 85
Nuku'alofa
KINGDOM OF TONGA



Telephone: (676) 24 055
24 007
Fax : (676) 24 005
Office Hours : 8:30 am-4:30 pm
Mon - Fri

Our Reference: AK 992/11 – SG/c.13(e)

15 November 2011

Mr Ben Scroggins
Assistant Federal Public Defender
Law Offices of the Federal Public Defender
411 E. Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
UNITED STATES OF AMERICA

BY EMAIL AND POST

Dear Mr Scroggins

Mr Siaoisi Vanisi

I refer to your enquiries regarding any contact made to the Tongan Government regarding Mr Vanisi's prosecution and eventual conviction for murder in the State of Nevada, and his subsequent sentencing to death.

As discussed, I am the Solicitor General of the Government of the Kingdom of Tonga, and the head of the Government's Crown Law Department. In that role I provide to the Tongan Government all legal services, including legal advice, legal representation in civil and land matters, criminal prosecution and also legislative drafting. I am accountable to the Attorney General of the Kingdom of Tonga, who is appointed by His Majesty the King.

I was unaware of the circumstances of Mr Vanisi until you and Mr Herbert Duzant of the Federal Public Defender office contacted me in January 2011. I was never contacted by Mr Vanisi's previous attorneys nor any authorities within the US government.

After speaking with you, I conducted a thorough search of the records in my office here in Tonga, and also requested a search of records at our consular offices in San Francisco, California and Honolulu, Hawaii, and also our embassy in New York City.

I can confirm that the Tongan Government does not have any record that it was informed by any US law enforcement or diplomatic authority that Mr Vanisi was charged with and tried for murder, or was convicted for murder and sentenced to death.

For completeness, I should state that the records in the Crown Law Department only start from 2007 because we lost most of our documents in a fire that destroyed our office premises in November 2006. The records at our foreign missions in the United States should therefore contain any contact regarding Mr Vanisi from any US authority.

Had the Tongan Government been contacted about Mr Vanisi's case, it would have provided consular assistance to Mr Vanisi, and also considered engaging legal counsel to make amicus submissions to the US Federal Courts or make representations to State authorities or through diplomatic channels.

The Tongan Embassy in New York City, New York is the appropriate office to contact for matters concerning the arrests of any Tongan national within the United States. The matter would then be dealt with by either the New York mission, or one of the Tongan Consulate offices in San Francisco or Honolulu, depending on the location of the Tongan national.

AA06066

Further to any consular assistance or legal assistance, the Tongan Government also would have facilitated any investigation in Tonga that Mr Vanisi's counsel would have wanted to carry out. The Tongan Government would have facilitated Mr Vanisi's counsel to obtain background information by providing and arranging for a liaison officer, an interpreter, meetings with relevant people and authorities, access to Government information and also information on where to source other information not in Government possession.

You should also be made aware that I had referred this matter to His Majesty's Cabinet in March 2011, and Cabinet decided that appropriate action be taken on the matter. We are still assessing our options and would be grateful for you to update us on the status of Mr Vanisi's matter before the US Federal Courts.

Please do not hesitate to contact me if you need any further information.

Sincerely


Aminiasi Kefu
Solicitor General



cc: Secretary for Foreign Affairs

SVan1512JDC05928

CODE: 4260
THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 E. Liberty St., Reno, NV 89501
(775) 333-6633
Co-counsel for Petitioner,
SIAOSI VANISI

2005 JAN 14 PM 3:00

[Signature]
J.R.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

EX PARTE CLAIM FOR ATTORNEY COMPENSATION

COMES NOW, THOMAS L. QUALLS, ESQ., counsel heretofore appointed to represent the
Petitioner above-named, who hereby submits the following Claim for Compensation pursuant to
NRS 7.125 and NRS 7.135. This Claim for Compensation is supported by the Affidavit of
THOMAS L. QUALLS, ESQ.

Respectfully submitted this *14th* day of January, 2005.

[Signature]
THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 East Liberty St.
Reno, Nevada 89501
(775) 333.6633

Co-counsel for Petitioner,
SIAOSI VANISI

EXHIBIT

201
CR98-0516

2JDC05928

AA06068

**AFFIDAVIT OF COUNSEL IN SUPPORT OF
CLAIM FOR COMPENSATION**

STATE OF NEVADA)
COUNTY OF WASHOE)

THOMAS L. QUALLS, ESQ., being first duly sworn, deposes and says:

1. That he is an attorney duly appointed by the Court in the above entitled case to represent
SIAOSI VANISI, in regards to the instant proceedings, to wit: Post Conviction Proceedings.

2. That he has expended time in the matter of the representation of the said SIAOSI VANISI,
as set forth following; and that the this affidavit is true and correct and made and sworn to according
to the best of his knowledge, information and belief:

SUMMARY OF ATTORNEY'S TIME:

<u>date</u>	<u>description</u>	<u>time</u>	<u>amt</u>
08.08.03	Telephone conference with attorney Edwards. [@\$60]	.25	\$15
08.22.03	Meeting with attorney Edwards. [@\$60]	1.25	\$75
02.13.04	Meeting with co-counsel Edwards to discuss status of case. [@\$125]	1.0	\$125
02.18.04	Draft partial section regarding ineffective assistance of counsel. [@\$125]	3.0	\$375
02.25.04	Draft partial claim regarding structural error. [@\$125]	2.0	\$250
02.26.04	Draft partial claim regarding <u>Faretta v. California</u> issue. [@\$125]	4.0	\$500
03.03.04	Draft partial claim regarding conflict of counsel. [@\$125]	4.0	\$500
03.04.04	Draft partial claim regarding <u>Finger v. State</u> , competence, and voluntary intoxication. [@\$125]	5.0	\$625
03.05.04	Meet with Co-counsel Edwards to discuss case. [@\$125]	1.0	\$125
03.16.04	Draft updated outline of claims based upon record and research to-date. [@\$125]	3.0	\$375
03.16.04	Meet with Co-counsel Edwards to discuss outline and progress of case. [@\$125]	1.0	\$125
03.19.04	Legal research re: mitigation experts and draft partial claim regarding same. [@\$125]	6.0	\$750

SVan1s12JDC05930

1	04.09.04	Review federal habeas briefs on capital cases. [@\$125]	4.0	\$500
2	05.19.04	Teleconference with Co-counsel Edwards to arrange a date to travel to Ely to interview Vanisi; discuss interview topics and strategy. [@\$125]	1.0	\$125
3				
4	06.08.04	Travel to Ely, Nevada with co-counsel Edwards for interview with Petitioner Vanisi. [@\$125]	6.0	\$750
5	06.08.04	Prepare for interview with Vanisi with co-counsel Edwards. [@\$125]	2.0	\$250
6				
7	06.09.04	Visit Ely State Prison and Interview Vanisi. [@\$125]	4.0	\$500
8	06.09.04	Return travel from Ely to Reno, Nevada. [@\$125]	6.0	\$750
9	06.16.04	Discuss competency issue with Michael Pescetta; research same. [@\$125]	4.0	\$500
10				
11	06.18.04	Review emails and research from co-counsel Edwards re: consular issue. [@\$125]	1.0	\$125
12	06.29.04	Draft e-mail to co-counsel Edwards regarding consular issue and <u>Rohan</u> and read e-mail from Edwards. [@\$125]	0.5	\$62.50
13				
14	07.15.04	Legal research re: competence during post-conviction proceedings. [@\$125]	5.0	\$625
15	07.19.04	Draft letter to authorities at Ely State Prison requesting medical and disciplinary records. [@\$125]	1.0	\$125
16				
17	10.19.04	Draft e-mail to co-counsel Edwards re: Rohan and other related legal issues for supplement. [@\$125]	0.25	\$31.25
18	10.25.04	Draft e-mail to co-counsel Edwards re: Rohan and other related legal issues for supplement. [@\$125]	0.25	\$31.25
19				
20	10.26.04	Draft e-mail to co-counsel Edwards and read e-mail from Edwards. [@\$125]	0.5	\$62.50
21	10.27.04	Additional legal research re: competency and <u>Rohan v. Gates</u> ; draft partial Motion for Stay and for psych. evaluation. [@\$125]	7.0	\$875
22				
23	10.27.04	Read e-mail from co-counsel Edwards. [@\$125]	0.25	\$31.25
24	10.28.04	Draft e-mail to co-counsel Edwards. [@\$125]	0.25	\$31.25
25	10.28.04	Revise and finalize Motion for Stay of Post-conviction Habeas Corpus Proceedings and for Transfer of Petitioner to Lakes Crossing for Psychological Evaluation and Treatment ("Motion for Stay"). [@\$125]	3.0	\$375
26				
27	10.29.04	Read e-mail from co-counsel Edwards. [@\$125]	0.25	\$31.25
28				


SVan112JDC05931

11.15.04	Read e-mail from Edwards, draft reply e-mail. [@\$125]	0.5	\$62.50
11.16.04	Review State's Response to Motion for Stay and legal research re: authorities cited therein; e-mails to and from and teleconference with co-counsel Edwards. [@\$125]	4.0	\$500
11.21.04	Review State's Notice of Supplemental Authorities and prepare for hrg on November 22, 2004. [@\$125]	5.0	\$625
11.22.04	Hearing on Motion for Stay. [@\$125]	2.0	\$250
11.23.04	Assist co-counsel in drafting Order. [@\$125]	1.0	\$125

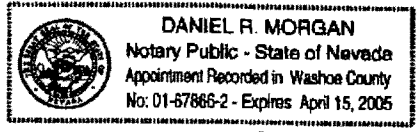
total hrs. @\$60/hr. 1.5 = \$90.00
total hrs. @\$125/hr. 88.75 = \$11,093.75

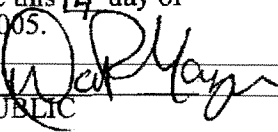
TOTAL AMOUNT DUE \$11,183.75

Dated this 14TH day of January, 2005.


THOMAS L. QUALLS, ESQ.
Nevada State Bar No. 8623
216 East Liberty
Reno, Nevada 89501
(775) 333.6633
Co-counsel for Petitioner,
SIAOSI VANISI

Subscribed and Sworn to
Before me, the undersigned
Notary Public this 14th day of
November, 2005.



January 
NOTARY PUBLIC

My Commission Expires: April 15, 2005

ORIGINAL FILED

CODE: 3105

FEB 04 2005

RONALD A. HENDERSON, JR., CLERK
By [Signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

ORDER ALLOWING CLAIM FOR COMPENSATION

An application for compensation having been filed herein by THOMAS L. QUALLS, ESQ.,

Court-appointed counsel for SIAOSI VANISI, the above-named Petitioner, and the Court having reviewed the claim and finding it is appropriate in view of NRS 7.125 and NRS 7.135, et seq., and GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED that the application be allowed and that the State Public Defender's Office pay to THOMAS L. QUALLS, ESQ., 216 E. Liberty Street, Reno, Nevada 89501, the sum of: \$11,183.75 (Eleven Thousand One Hundred Eighty-Three Dollars and 75/100).

DATED this 31 day of January, 2005.

Connie J. Steinheimer
DISTRICT JUDGE

2JDC05942

AA06072

ORIGINAL

CODE: 4260

THOMAS L. QUALLS, ESQ.

State Bar No. 8623

216 E. Liberty St., Reno, NV 89501

(775) 333-6633

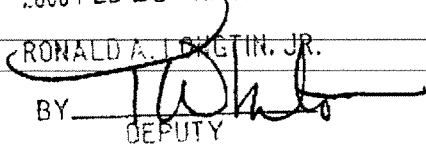
Co-counsel for Petitioner,

SIAOSI VANISI

FILED

2005 FEB 28 AM 11:03

RONALD A. LORTIN, JR.

BY  DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

EX PARTE CLAIM FOR ATTORNEY COMPENSATION

(Second Interim Billing)

COMES NOW, THOMAS L. QUALLS, ESQ., counsel heretofore appointed to represent the
Petitioner above-named, who hereby submits the following Claim for Compensation pursuant to
NRS 7.125 and NRS 7.135. This Claim for Compensation is supported by the Affidavit of
THOMAS L. QUALLS, ESQ.

Respectfully submitted this 25TH day of February, 2005.


THOMAS L. QUALLS, ESQ.

State Bar No. 8623

216 East Liberty St.

Reno, Nevada 89501

(775) 333.6633

Co-counsel for Petitioner,
SIAOSI VANISI

2JDC05520

AA06073

**AFFIDAVIT OF COUNSEL IN SUPPORT OF
CLAIM FOR COMPENSATION**

STATE OF NEVADA)

COUNTY OF WASHOE)

THOMAS L. QUALLS, ESQ., being first duly sworn, deposes and says:

1. That he is an attorney duly appointed by the Court in the above entitled case to represent SIAOSI VANISI, in regards to the instant proceedings, to wit: Post Conviction Proceedings.

2. That he has expended time in the matter of the representation of the said SIAOSI VANISI, as set forth following; and that the this affidavit is true and correct and made and sworn to according to the best of his knowledge, information and belief:

SUMMARY OF ATTORNEY'S TIME:

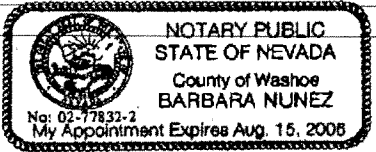
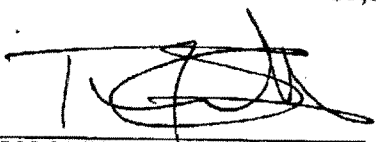
<u>date</u>	<u>description</u>	<u>time</u>	<u>amt</u>
01.14.05	Conference call with Dr. Bittker and meeting with co-counsel Scott Edwards.	1.5	\$187.50
01.21.05	Review evaluation report from Dr. Bittker.	1.0	\$125
01.24.05	Meeting in chambers on competency issue.	1.0	\$125
01.25.05	Teleconference with co-counsel Scott Edwards.	0.25	\$31.25
01.26.05	Travel to Nevada State Prison @ Carson City and meet with Petitioner Vanisi and return.	4.0	\$500
01.26.05	Teleconference with Dr. Amezaga.	0.25	\$31.25
01.27.05	Attend partial competency hearing in District Court.	0.5	\$62.50
02.17.05	Review Dr. Amezaga's report and prepare for second part of bifurcated competency hearing.	2.0	\$250
02.18.05	Continue preparation for argument at competency hearing and meet with co-counsel Scott Edwards to review.	3.0	\$375
02.18.05	Attend second part of bifurcated competency hearing.	2.5	\$312.50
02.19.05	Draft partial Supplemental Petition for Writ of Habeas Corpus.	6.0	\$750
02.20.05	Continue drafting Supplemental Petition for Writ of Habeas Corpus.	6.0	\$750

SVanisi12JDC05522

2	02.21.05	Continue drafting Supplemental Petition for Writ of Habeas Corpus.	8.0	\$1,000
3	02.22.05	Teleconference with Attorney Michael Pescetta.	0.5	\$62.50
4	02.22.05	Continue drafting partial Supplemental Petition for Writ of Habeas Corpus and finalize.	6.0	\$750
5	02.23.05	Review order of District Court finding Vanisi competent to proceed; conference with co-counsel Edwards.	1.5	\$187.50
6	02.23.05	Research and draft Motion for Protective Order.	3.0	\$375
8				
9		total hrs. @\$125/hr.	47.0	= \$5,875.00

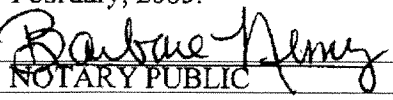
TOTAL AMOUNT DUE \$5,875.00

Dated this 25TH day of February, 2005.



THOMAS L. QUALLS, ESQ.
Nevada State Bar No. 8623
216 East Liberty
Reno, Nevada 89501
(775) 333.6633
Co-counsel for Petitioner,
SIAOSI VANISI

Subscribed and Sworn to
Before me, the undersigned
Notary Public this 25 day of
February, 2005.


NOTARY PUBLIC

My Commission Expires: August 15, 2006

ORIGINAL

FILED

CODE: 3105

MAR 09 2005

RONALD A. BENTON JR. CLERK
BY: [Signature] DEPUTY

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

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

ORDER ALLOWING CLAIM FOR COMPENSATION

An application for compensation having been filed herein by THOMAS L. QUALLS, ESQ., Court-appointed counsel for SIAOSI VANISI, the above-named Petitioner, and the Court having reviewed the claim and finding it is appropriate in view of NRS 7.125 and NRS 7.135, et seq., and GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED that the application be allowed and that the State Public Defender's Office pay to THOMAS L. QUALLS, ESQ., 216 E. Liberty Street, Reno, Nevada 89501, the sum of: **\$5,875.00** (Five Thousand Eight Hundred Seventy-Five Dollars and no/100).

DATED this 8 day of March, 2005.

Conrad J. Steinhilber
DISTRICT JUDGE

8VAN1S12JDC05276

1 CODE: 4260
2 THOMAS L. QUALLS, ESQ.
3 State Bar No. 8623
4 216 E. Liberty St., Reno, NV 89501
5 (775) 333-6633
6 Co-counsel for Petitioner,
7 SIAOSI VANISI

3610-0 19:35

K. Williams

8 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

9 **IN AND FOR COUNTY OF WASHOE**

10 SIAOSI VANISI,

11 Petitioner,

Case No. CR98P0516

12 vs.

Dept. No. 4

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

DEATH PENALTY CASE

15 Respondents.
16 /

EX PARTE CLAIM FOR ATTORNEY COMPENSATION

(Third Interim Billing)

17 COMES NOW, THOMAS L. QUALLS, ESQ., counsel heretofore appointed to represent the
18 Petitioner above-named, who hereby submits the following Claim for Compensation pursuant to
19 NRS 7.125 and NRS 7.135. This Claim for Compensation is supported by the Affidavit of
20 THOMAS L. QUALLS, ESQ.

21 Respectfully submitted this 6TH day of May, 2005.

[Signature]

22 THOMAS L. QUALLS, ESQ.
23 State Bar No. 8623
24 216 East Liberty St.
25 Reno, Nevada 89501
26 (775) 333.6633

27 Co-counsel for Petitioner,
28 SIAOSI VANISI

**AFFIDAVIT OF COUNSEL IN SUPPORT OF
CLAIM FOR COMPENSATION**

STATE OF NEVADA)

COUNTY OF WASHOE)

THOMAS L. QUALLS, ESQ., being first duly sworn, deposes and says:

1. That he is an attorney duly appointed by the Court in the above entitled case to represent

SIAOSI VANISI, in regards to the instant proceedings, to wit: Post Conviction Proceedings.

2. That he has expended time in the matter of the representation of the said SIAOSI VANISI, as set forth following; and that the this affidavit is true and correct and made and sworn to according to the best of his knowledge, information and belief:

SUMMARY OF ATTORNEY'S TIME:

<u>date</u>	<u>description</u>	<u>time</u>	<u>amt</u>
02.24.05	Preliminary research re: extraordinary writs.	1.0	\$125
03.10.05	Email to and from Scott Edwards re: response to motion for protective order.	.25	\$31.25
03.15.05	Review State's Response to Motion for Protective Order; legal research re: authorities in the State's brief and the protective order issues; draft, revise and finalize reply.	6.5	\$687.50
03.16.05	Conference with Scott Edwards re: review of written order of competency and discuss writ of mandamus/prohibition.	2.0	\$250
03.17.05	Review Supplemental Response to Protective Order.	.25	\$31.25
03.17.05	Email from Scott Edwards re: motion protective order.	.25	\$31.25
03.17.05	Legal research re: rules governing writs of prohibition and mandamus and related case law.	2.5	\$312.50
03.28.05	Email from Scott Edwards re: writ of mandamus.	.25	\$31.25
04.06.05	Email (x2) from Scott Edwards re: draft of mandamus writ petition.	.25	\$31.25
04.07.05	Emails (x3) re: communication with Tongan consulate.	.25	\$31.25

///


1	04.08.05	Read draft of mandamus writ petition from Scott Edwards		
2		Legal research, review record and edit work on writ of		
3		mandamus / prohibition petition.	3.5	\$437.50
4	04.09.05	Continue working on petition for writ of mandamus /		
5		prohibition; legal research and draft Motion for		
6		Emergency Stay.	4.0	\$500
7	04.10.05	Email from and to Scott Edwards re: mandamus writ		
8		petition and strategy for moving forward.	.25	\$31.25
9	04.12.05	Finalize petition for writ of mandamus / prohibition		
10		and conference with Scott Edwards re: strategy,		
11		evidentiary hearing and status of ongoing matters.	3.0	\$375
12	04.18.05	Review State's Response re: Motion for Emergency Stay.	0.5	\$62.50
13	04.19.05	Review Order from Nevada supreme Court denying		
14		extraordinary writ petition.	.25	\$31.25
15	04.20.05	Email from Scott Edwards re: evidentiary hearing.	.25	\$31.25
16	04.22.05	Emails to and from Scott Edwards re: scheduled tele-		
17		conference, motion to continue, scheduling and other		
18		substantive matters re: the evidentiary hearing.	0.5	\$62.50
19	04.25.05	Review case status and outstanding issues; legal research		
20		re: motion for continuance.	3.5	\$437.50
21	04.25.05	Teleconference with Court and counsel for State re:		
22		scheduling issues and continuance motion.	.25	\$31.25
23	04.25.05	Teleconference with Scott Edwards re: hearing.	.25	\$31.25
24	04.25.05	Receive and review State's Answer to Petition for Writ		
25		of Habeas Corpus and State's Motion to Dismiss; begin		
26		legal research.	1.5	\$125
27	04.26.05	Conference with Scott Edwards, draft and revise		
28		motion for continuance, discuss other issues including		
29		possible recusal.	2.5	\$312.50
30	04.26.05	Legal research re: recusal, judicial cannons, and proper		
31		procedures, teleconference with Scott Edwards re:		
32		findings and strategy.	3.5	\$437.50
33	04.27.05	Review Supplement and record and start working on		
34		Opposition to Motion to Dismiss.	6.0	\$750
35	04.28.05	Continue research for Opposition to Motion to Dismiss.	4.0	\$500
36	04.29.05	Review record and claims and start preparation for		
37		Evidentiary Hearing.	4.0	\$500
38	///			

SVan1512JDC05279

1	04.30.05	Meet with Scott Edwards; go over examination of witnesses for Evidentiary Hearing; continue prep.	3.0	\$375
2	05.01.05	Review death penalty claims and prepare examination; Work on Opposition to Motion to Dismiss.	3.0	\$375
3				
4	05.02.05	Meet with Vanisi prior to court and Evidentiary Hearing on Petition for Writ of Habeas Corpus.	3.5	\$437.50
5	05.04.05	Continue drafting Opposition to Motion to Dismiss.	4.5	\$625
6	05.06.05	Review arguments from Scott Edwards and Continue drafting Opposition to Motion to Dismiss; revise, finalize and file.	4.0	\$500
7				
8				
9		total hrs. @\$125/hr.	69.25 =	\$8,656.25

10 TOTAL AMOUNT DUE \$8,656.25

11 Dated this 6TH day of May, 2005.

12 
13 THOMAS L. QUALLS, ESQ.
14 Nevada State Bar No. 8623
216 East Liberty
16 Reno, Nevada 89501
(775) 333.6633
Co-counsel for Petitioner,
SIAOSI VANISI

17 Subscribed and Sworn to
18 Before me, the undersigned
19 Notary Public this 6th day of
May, 2005

20 
NOTARY PUBLIC

My Commission Expires: April 8, 2008



SVANIS12JDC05275

ORIGINAL

FILED

MAY 12 2005

RENEA A. LONGTIN, JR. CLERK
By: [Signature] DEPUTY

CODE: 3105

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

ORDER ALLOWING CLAIM FOR COMPENSATION

An application for compensation having been filed herein by THOMAS L. QUALLS, ESQ., Court-appointed counsel for SIAOSI VANISI, the above-named Petitioner, and the Court having reviewed the claim and finding it is appropriate in view of NRS 7.125 and NRS 7.135, et seq., and GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED that the application be allowed and that the State Public Defender's Office pay to THOMAS L. QUALLS, ESQ., 216 E. Liberty Street, Reno, Nevada 89501, the sum of: **\$8,656.25** (Eight Thousand Six Hundred Fifty-Six Dollars and 25/100).

DATED this 11 day of May, 2005.

Connie J. Steinheimg
DISTRICT JUDGE

ORIGINAL

CODE: 4260
THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 E. Liberty St., Reno, NV 89501
(775) 333-6633
Co-counsel for Petitioner,
SIAOSI VANISI

20051207 01 12:19:02

[Signature]

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

EX PARTE CLAIM FOR ATTORNEY COMPENSATION
(Third Interim Billing)

COMES NOW, THOMAS L. QUALLS, ESQ., counsel heretofore appointed to represent the
Petitioner above-named, who hereby submits the following Claim for Compensation pursuant to
NRS 7.125 and NRS 7.135. This Claim for Compensation is supported by the Affidavit of
THOMAS L. QUALLS, ESQ.

Respectfully submitted this 27 day of May, 2005.

[Signature]

THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 East Liberty St.
Reno, Nevada 89501
(775) 333.6633

Co-counsel for Petitioner,
SIAOSI VANISI

SVAN1S12JDC05172

AFFIDAVIT OF COUNSEL IN SUPPORT OF
CLAIM FOR COMPENSATION

STATE OF NEVADA)
 §
COUNTY OF WASHOE)

THOMAS L. QUALLS, ESQ., being first duly sworn, deposes and says:

1. That he is an attorney duly appointed by the Court in the above entitled case to represent
SIAOSI VANISI, in regards to the instant proceedings, to wit: Post Conviction Proceedings.

2. That he has expended time in the matter of the representation of the said SIAOSI VANISI,
as set forth following; and that the this affidavit is true and correct and made and sworn to according
to the best of his knowledge, information and belief:

SUMMARY OF ATTORNEY'S TIME:

<u>date</u>	<u>description</u>	<u>time</u>	<u>amt</u>
05.09.12	Discuss expert with Scott Edwards and teleconference with Rick Cornell, prepare materials for delivery to Mr. Cornell.	2.0	\$250
05.12.05	Teleconference with Rick Cornell re: additional materials.	0.25	\$31.25
05.16.05	Review death penalty claims and prepare to meet With <i>Strickland</i> expert Rick Cornell.	1.5	\$187.50
05.17.05	Meeting with <i>Strickland</i> expert Rick Cornell re: Evidentiary hearing.	2.0	\$250
05.18.05	Continued Evidentiary Hearing.	2.0	\$250
total hrs. @\$125/hr.		7.75	= \$968.75

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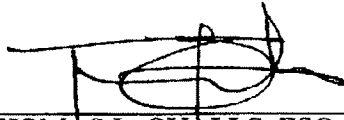
Svanisi2JDC05173

1 ///

2 ///

3 TOTAL AMOUNT DUE \$968.75

4
5 Dated this 27 day of May, 2005.

6 

7 THOMAS L. QUALLS, ESQ.
8 Nevada State Bar No. 8623
9 216 East Liberty
10 Reno, Nevada 89501
11 (775) 333.6633
12 Co-counsel for Petitioner,
13 SIAOSI VANISI

10 Subscribed and Sworn to
11 Before me, the undersigned
12 Notary Public this 27 day of
13 May, 2005.

14 
15 NOTARY PUBLIC

My Commission Expires: April 8, 2008



SVan1s12JDC05161

ORIGINAL

FILED

CODE: 3105

JUN 14 2005

RONALD A. ... JR., CLERK
By: [Signature]
DEPUTY

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

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

ORDER ALLOWING CLAIM FOR COMPENSATION

An application for compensation having been filed herein by THOMAS L. QUALLS, ESQ.,
Court-appointed counsel for SIAOSI VANISI, the above-named Petitioner, and the Court having
reviewed the claim and finding it is appropriate in view of NRS 7.125 and NRS 7.135, et seq., and
GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED that the application be allowed and that the State Public
Defender's Office pay to THOMAS L. QUALLS, ESQ., 216 E. Liberty Street, Reno, Nevada 89501,
the sum of: \$968.75 (Nine Hundred Sixty-Eight Dollars and 75/100).

DATED this 8 day of June, 2005.

Connie J. Steinhilber
DISTRICT JUDGE

ORIGINAL

FILED

2007 APR -6 PM 9:08

RONALD A. LONGTIN, JR.

BY  DEPUTY

CODE: 4260
THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 E. Liberty St., Reno, NV 89501
(775) 333-6633
Co-counsel for Petitioner,
SIAOSI VANISI

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

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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


DEATH PENALTY CASE

Respondents.

EX PARTE CLAIM FOR ATTORNEY COMPENSATION
(Fifth Interim Billing)

COMES NOW, THOMAS L. QUALLS, ESQ., counsel heretofore appointed to represent the
Petitioner above-named, who hereby submits the following Claim for Compensation pursuant to
NRS 7.125 and NRS 7.135. This Claim for Compensation is supported by the Affidavit of
THOMAS L. QUALLS, ESQ.

Respectfully submitted this 5 day of April, 2007.


THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 East Liberty St.
Reno, Nevada 89501
(775) 333.6633

Co-counsel for Petitioner,
SIAOSI VANISI

**AFFIDAVIT OF COUNSEL IN SUPPORT OF
CLAIM FOR COMPENSATION**

STATE OF NEVADA)

COUNTY OF WASHOE)

THOMAS L. QUALLS, ESQ., being first duly sworn, deposes and says:

1. That he is an attorney duly appointed by the Court in the above entitled case to represent

SIAOSI VANISI, in regards to the instant proceedings, to wit: Post Conviction Proceedings.

2. That he has expended time in the matter of the representation of the said SIAOSI VANISI, as set forth following; and that the this affidavit is true and correct and made and sworn to according to the best of his knowledge, information and belief:

SUMMARY OF ATTORNEY'S TIME:

<u>date</u>	<u>description</u>	<u>time</u>	<u>amt</u>
03.20.07	Review case re: aggravators and mitigators, review penalty hearing; legal research re: McConnell and Ring and Appendi, as well as 1990 cases; teleconference with federal Public Defender's office; begin drafting Memorandum of Law for Court.	5.5	\$687.50
03.21.07	Continue drafting Memorandum and investigate and marshal documentation re: other murders and other similarly situated cases.	2.5	\$312.50
03.22.07	Continue drafting Memorandum of Law re: McConnell issue, including gathering information and documentation on similar cases; Conference with Scott Edwards re: preparing Memorandum of Law additional materials and review draft; additional teleconference with Vegas office.	6.0	\$750
03.23.07	Review Memorandum and discuss with Scott Edwards, revise document.	1.5	\$187.50
03.27.07	Finalize and prepare for filing Memorandum of Law regarding the McConnell issue.	1.5	\$187.50
04.02.07	Prepare for hearing on McConnell issue.	4.0	\$500
04.02.07	Hearing re: McConnell issue.	1.0	\$125
///	total hrs. @\$125/hr.	22.0	\$2,750

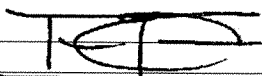
SVANIS12JDC05602

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TOTAL AMOUNT DUE \$2,750.00

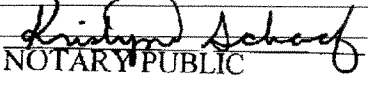
Dated this 5 day of April, 2007.



THOMAS L. QUALLS, ESQ.
Nevada State Bar No. 8623
216 East Liberty
Reno, Nevada 89501
(775) 333.6633
Co-counsel for Petitioner,
SIAOSI VANISI



Subscribed and Sworn to
Before me, the undersigned
Notary Public this 5 day of
April, 2007.


NOTARY PUBLIC

My Commission Expires: 4/8/08

ORIGINAL

FILED

CODE: 3105

JUN 04 2007

RONALD A. LONGTIN, JR., CLERK
By: [Signature]
DEPUTY CLERK

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

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516

vs.

Dept. No. 4

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

DEATH PENALTY CASE

Respondents.

ORDER ALLOWING CLAIM FOR COMPENSATION

An application for compensation having been filed herein by THOMAS L. QUALLS, ESQ.,
Court-appointed counsel for SIAOSI VANISI, the above-named Petitioner, and the Court having
reviewed the claim and finding it is appropriate in view of NRS 7.125 and NRS 7.135, et seq., and
GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED that the application be allowed and that the State Public
Defender's Office pay to THOMAS L. QUALLS, ESQ., 216 E. Liberty Street, Reno, Nevada 89501,
the sum of: **\$2,750.00** (Two Thousand Seven Hundred Fifty Dollars and 00/100).

DATED this 4 day of June, 2007.

Connie J. Steinheim
DISTRICT JUDGE

March 22, 2002

MEMORANDUM

TO: VANISI FILE

FROM: MP

RE: HABEAS INVESTIGATION SUMMARY

1. Identifying information for client.

Name: Siasosi Vanisi

DOB: [REDACTED]

SSN: [REDACTED]

FBI#:

CII#:

Current address: Nevada State Prison

Address at time of crime: 1913 Dufour Ave. Redondo Beach, CA 90278

2. Identifying information for offense.

Victim: George Daniel Sullivan

Date of offense: January 13, 1998

Place of offense: UNR Campus, Reno, Nevada

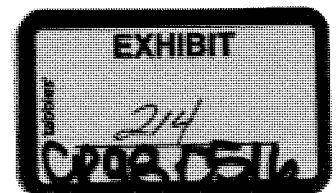
3. Identifying information for criminal proceedings.

Arrest date: 1/14/98

Co-defendants: None

Information filed: 2/26/98

Notice of Intent to Seek Death Penalty Filed: 2/26/98



AA06090

Conviction date:

10/6/99

Trial court: Criminal case No. CR 98-0516, Washoe County, NV; Honorable Connie Steinheimer, presiding.

Defense attorney: Stephen Gregory & Jeremy Bosler, Deputy Public Defenders.

Prosecutor: Richard Gammick, Washoe County District Attorney, and David Stanton, Deputy District Attorney.

Appeal: Vanisi v. State, 117 Nev. Adv. Op. No. 32, 22 P.3d 1164 (2001) (opinion affirming conviction and penalty).

Appellate attorney: John Reese Petty, Appellate Deputy PD

4. Residences for Vanisi family:

Nu'Kualofa, Tonga (same house)

Age 6 to 20 lived in San Bruno, CA at 1880 Crestwood Dr. 94066

Age 20 lived in Redondo Beach

Age 20 to 22 lived in Mesa/Tempe at a number of residences

Age 22-27 moved back to Redondo Beach

Age 27 came to Reno

5. Family members.

Biological Mother- Luisa Tafuna (maiden) (deceased July 2000)

Aunt (mom) - Toeumu Tafuna

Father- Afa Vanisi

Half brother - Steven

Half sister - Caroline Tukuafu

Full sister - Sela DeBruse

Full brother - Tevita Vanisi (deceased 1987)

Half brother - Tupou Uluave

6. Vanisi's schooling.

Head Start program? No

Elementary School? 1st grade in San Bruno Carl Sandberg Elementary, 2nd-6th grade at Rolling Wood Elementary

Junior High School? Parkside JHS

High School? Capuccino HS Graduated in 1989 (Line backer & offensive lineman for football)

7. School personnel who identified Vanisi's educational, mental, and family difficulties.

None

8. Vanisi's friends, neighbors, and associates.

ROOMMATES: Gregory Garner, Redondo Beach - closest

David Goodman, Hacienda Heights - sales rep/ copiers

Michael Finau, cousin, Redondo Beach - waiter

9. Employment history.

Worked as an actor in Los Angeles

- while acting, he was also an electrician (key grip) and a waiter.

- Non-Screen Actors Guild (SAG qualified but no card)

Was unemployed after he moved to Reno

10. Drug use.

Marijuana - when he was 26, smoked a lot for one year prior to crime.

11. Custodial institutions

Washoe County Jail

Nevada State Prison, Carson City

Ely State Prison (Death Row)

LA County Jail - Traffic Violations (processed only)

Salt Lake City Jail - 1988-1989 for Traffic Violations

- 1998 for 1 week

12. Defense attorneys who had contact with case at trial:

Michael Specchio, Washoe County Public Defender (1st trial)

Walter Fey, Deputy Public Defender (Pre-trial Motions)

Stephen Gregory, Deputy Public Defender (1st & 2nd trials)

Jeremy Bosler, Deputy Public Defender (1st & 2nd trials)

13. Defense Attorney who represented Smith on appeal.

John Reese Petty, Appellate Deputy PD

14. Defense investigators.

Crystal Cauldron

15. Defense experts who had contact with case at trial:

Ole Thienhaus, MD, UNR Psychiatrist (Trial/Penalty Phase)

Richard Lewis, Ph.D. (2nd Psych eval)

Philip Rich, MD (2nd Psych eval)

Edward Lynn, MD (lithium order)

Thomas E. Bittker, MD (1st Psych eval)

Frank Evarts, Ph.D. (1st Psych eval)

Edward J. Bronson, JD, LLM, Ph.D., Chico State Pol. Sci professor (Jury expert)

16. Victim information – George Daniel Sullivan

DOB:

SSN:

Spouse: Carolyn Sullivan

Children: Meghan Sullivan

Employer: University of Nevada Police Department

17. Newspapers covering crime and trial.

Reno Gazette Journal

The Daily Sparks Tribune.

Siaosi talked to Victoria Campbell at Channel 4 one time, several months after arrest. (Victoria contacted Siaosi)

18. First Trial jurors. (January 11, 1999-January 15, 1999)

Shelby Y. Denton	Cheryl L. Kominek	George A. Decker
Daniel M. Gerbatz	William V. King	Gordon D. Berg
James A. Stephenson	Victoria A. Lyman	Benilda G. Viernes
Randall A. McCargar	Lawrence L. Jones	Doris E. Roberts

Alternates – Jerome A. Moss, Susan M. Frankel, Peter G. Thomas, James H. Dunn

19. Second Trial Jurors. (September 20, 1999-October 6, 1999)

Bonnie K. James	Lauren Ziler (exc. day 1)	Nettie Horner
Shaylene J. Grate	Jeannette L. Minassian	Larry F. Mullins
James D. McMorran	Michael Sheahan	Alice J. Bell
Leslie C. Johnson	James L. Ayers (foreperson)	Robert T. Buck

Alternates – Richard A. Tower, Shaun L. Carmichael, Pete S. Costello, Lori T. Frazier

20. Crime witnesses.

UNR Sargeant Lou Lepera	Gustavo Ceron (1098 N. Rock Blvd #A)	Metuisela Tauveli
		Maria Losa Louis/ Corina Louis
		Ellen G.I. Clark, M.D.
	Patricia Mary Misito (7-11)	Kaleb
	Lee Bartlehem (7-11)	Diana Lynn Shouse
	(Jackson)	

21. Co-defendant information.

No Co-Defendant

22. Jailhouse snitch information

Name:

DOB:

SSN:

FBI#:

CII#:

Defense attorney:

Prosecutor:

Judges:

Former addresses.

23. Law enforcement personnel connected with investigation.

Richard Gammick, Washoe County District Attorney (both trials)

David Stanton, Deputy District Attorney (both trials)

Detective Jenkins, RPD

UNR Sargeant Lou Lepera

Detective Jim Duncan, RPD

Kevin Browing, SPD

24. Prison and Washoe County jail personnel in contact with Vanisi. None of these individuals testified. Need to determine why, and whether there was pressure not to assist the defense.

25. Washoe County special circumstances and death sentence cases from 1990-present.

26. Judges who had contact with the case.

Connie Steinheimer, District Judge (both trials)

Edward Dannan, Justice of the Peace (prelim)

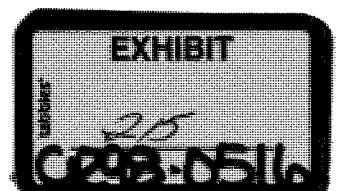
CLIENT BACKGROUND INFO

PRELIMINARY DATA

1. NAME: Siasosi Vanisi (Siasosi is translated "George") Used the name "Tafuna" growing up rather than Vanisi
2. DATE OF BIRTH: [REDACTED]
PLACE OF BIRTH: Nu' Kualofa, Tonga
3. PRISON NUMBER 63376
DATE OF OFFENSE: 1/13/98
DATE OF CONVICTION: 10/6/99
DATE OF SENTENCE: 11/22/99
4. Material facts of offense and theory of defense (based on facts adduced by the prosecution or introduced by defendant):

BIRTH, GROWTH AND DEVELOPMENT

5. Any known complications with mother's pregnancy (eg., bleeding, maternal illness or disease, toxemia, etc.): No
6. Any complications at birth (e.g., full term or premature, respiratory difficulties, jaundice, known defects, etc.): No
7. Any perceived difficulty in achieving early developmental tasks:
8. Approximate age at which each of the following was first accomplished:
 - (a) responsive smile
 - (b) rolling over.
 - (c) crawling:
 - (d) pulling to stand:



AA06099

(e) walking:

ENVIRONMENTAL FACTORS

8. Provide the name, age and address (where available) of every member of client's family or household, including all those with whom the client lived prior to leaving home; include relation to client: 5 Siblings: Steven Tafuna 510/276-1598 (half brother on mom's side), 10 years older, Lives in San Leandro, is on disability before as a messenger; Caroline TuKuaifu (half sister on mom's side), 5 years older, Lives in San Bruno as a housewife, Contact person: Sela DeBruse 650/875-6829 (full sister), 3 years older, Lives in San Bruno as an office manager/ Physicians Assistant; Tevita Vanisi (full brother); 1.5 years older, Deceased as of 1987 from heart problems possibly due to drugs; Moale Tafuna (half brother); two years younger; was left in islands as a baby with paternal relatives and; Tupou Uluave (half brother on mom's side), 4-5 years younger, lives in San Bruno. Biological Mother's name is Luisa Tafuna (maiden), married to Afa 5 years, Vanisi lived with her after divorce when Vanisi was less than 6 years old, lived in San Francisco until she became deceased from heart failure/ Renal failure in July of 2000. Vanisi's grew up in his Aunt Toeumu Tafuna's (650/588-8088) home near his mother and siblings she lives in San Francisco. Vanisi's estranged Father is Afa Vanisi, he live is Honolulu, HI. Uncle Maile is a strict person.

Describe the physical conditions in which the family lived, including any change in conditions, over this period of time: Lived in Tonga in same home from ages 1 to 6. Moved to San Bruno, CA at age 6 where he lived with his aunt near his mother and 3 siblings (Sela, Tevita, Tupou) and his other uncle and aunt and 2 other siblings (Steven and Caroline). All went to the same school and grew up together. ToeUmu moved to the US first and Siaoisi felt she was his real mother because she cared for him from birth.

10. With reference to item 9, describe how these conditions compared to the conditions under which neighbors and/or nearby relatives lived: Same except he lived with spinster aunt instead of mother. ToeUmu and Siaoisi plus sister Caroline and Aunt Lose and Uncle Mole in a three bedroom house.

11. Describe the kind of medical attention the client and his or her family received:

Defendant was injured at church when he accidentally flew out of a window breaking his arm.

Defendant was bit by a dog two times in the face at 6 years of age in Tonga.

Knee problems from football.

Uncle Mole always disabled.

12. Was there adequate food in the house? Who provided it?

Yes there was adequate food and his aunt provided it.

13. Describe the jobs held by the client's parents or other caretakers:

The Aunt was a caregiver for Uncle Mole and the mother was a Certified Nursing Assistant at a care home. The father was a pipefitter/ welder in Alaska and elsewhere.

14. Describe any moves made by the client's family (household) from one locale to another during the period of time referred to in item 8, including the reason(s) why such moves were made:

Moved to the United States at age 6. At age 20 he moved from San Bruno to Redondo Beach for a period of months, then move to Mesa/Tempe, AZ, where he went to go to school and then back to LA for school. He then returns to Redondo Beach at age 22. At age 27 he moved to Reno. Ages 20-22 "rolling stone". Went on Mission to NYC for a few months, then was sent back when he got his first cousin on paternal side pregnant, Siaoisi was 18 or 19 years of age. Didn't know they were cousins. They had a daughter Cousin is using her mother's name not Vanisi. There is no contact. It was very devastating news to everyone.

Describe fully the relations between the client and his/her parents or parental figures, with reference to

(a) emotional support and nurturing expressions and feelings of love

In regards to the mother: "Why did you give me away?" She explained that it was because of attachment. He did not want to be raised separately.

His Aunt was very supportive but guillible.

Father - No relationship at all. Siaoisi had no father figure, he was only around women.

(b) praise for positive accomplishments or behavior:

(c) discipline (techniques, whether use seemed excessive or appropriate to the "offense, whether administered fairly as between siblings): Nothing extraordinary per client.

(d) the infliction of physical harm or pain (by burning, beating, cutting, whipping, etc.) that was

apparently not associated with culture-appropriate discipline, including patterns of behavior as well as specific incidents:

None per client...Normal physical discipline

(e) Sexual abuse (whether or not associated with discipline) or harassment, or aberrant sexual

modeling: None per client

(f) any other factor not already covered:

16. Describe any major disruptions of or trauma to any member of the household:

17. Describe fully the relationships between the client's siblings and his or her parents or parental

figures, with reference to the six specific areas detailed in item 15:

Close feelings with all siblings. Only real relationships are with his Aunt (mom), his sister Sela and cousin Michael Finau.

Describe fully the relationship between the client and his siblings, with particular attention to

sexual relations (voluntary or coerced), the infliction of physical harm, and the manipulation of parental authority to the benefit or detriment of other siblings:

Nothing

extraordinary per client.

19. Describe the client's relationships (in general) within the household in which he or she grew up,

with

(a) nonparent adults: Lived with Aunt as mother (calls her mom), but nearby to biological mother. Says it was positive.

(b) age-group peers: Popular with school friends, involved in school activities and sports.

According to Sela he was a social butterfly and very well liked.

(c) older children:

(d) younger children:

20. is the client married? Name spouse(s) and briefly describe the marriage:

Recently divorced from Deann Faye DeSoto. She was 19 and he was 22 when they met at Lak Havasu. They dated six months before cohabitation. They dated for one year before their small wedding at Manhattan Beach. Deann lives in Simi Valley, CA. She works for Nationwide Home loans.

Uncle Maile opposed to marriage because Deann is not Tongan.

According to Sela, none of Siaoisi's family members knew of wedding before hand.

21. Give name, age and address of each of client's children:

Forest Quintano Vanisi, 5/28/94

Moleni Areztie Vanisi, 5/16/96

Maintains contact every few months, last saw his children in 1997 before incarceration.

22. Give names and addresses of any people other than family members with whom client has lived as an adult:

Gregory Garner and Michael Finau, Redondo Beach.

23. Give name and address of significant friends or mentors in childhood or adulthood (excluding family members, teachers, or employers):

Garner,

Finau, David Goodman, all Redondo Beach.

INSTITUTIONAL

24. With respect to school,

(a) how old was client when he or she began school? 6 years old

(b) did client progress from one grade to the next without being held back? if not, explain:

(c) did client demonstrate unusual academic, vocational, or avocational strengths or weaknesses (detail)?

He received a failing grade in Physical Education.

(d) did client demonstrate any behavioral difficulties (detail)?

No

(e) were parents consulted on any regular basis concerning the client's behavior or performance?

(f) what was the highest level of school completed successfully? Graduated High School in 1989

(g) provide details of all schools attended (elementary, junior high, high, post-high), including addresses and year of attendance? Carl Sandburg Elementary School, Rolling Wood Elementary School, Parkside Junior High School, Capuccino High School...all in San Bruno.

(h) provide names and addresses of any school personnel who knew the client well:

25. With respect to juvenile agencies,

(a) was the client ever charged as a juvenile? if so, for what?

No

(b) what were the dispositions of such charges (e.g. probation, commitment)? include length of time actually

served: He used to "steal" Sela's car to take to San Francisco as a teenager.

(c) what was the character of the acts or circumstances underlying the charges or adjudications?

26. With respect to the client's involvement with the criminal justice system as an adult,

(a) was the client ever previously charged? if so, for what?

Traffic violations, LA County Jail (Overnight or 2-3 nights)

Salt Lake City 1988/19889 for traffic FTA (Overnight/ 12 hours)

Salt Lake City 1998, 1 week murder

(b) what were the dispositions of such charges (e.g. probation, commitment)? include length of

time actually served:

(c) what was the character of the acts and circumstances underlying the charges or convictions?

(d) describe the disposition ordered for each conviction (e.g., probation, incarceration, etc.) and what the client's behavior was like to him or her during the disposition

period:

27. With respect to the military, NONE

(a) was the client rejected from service? if so, state why

(b) if the client served, name branch and dates of service:

(c) state the type of discharge:

(d) describe any significant experiences while in the military

(e) describe any post-military trauma related to service:

MEDICAL AND MENTAL HEALTH HISTORY

28. Describe generally the client's prior access to medical and mental health care:

Does not approve and says has no problems.

29. Has the client suffered serious medical problems (disease, trauma related) for which he or she has received treatment? if so, describe: NO

30. Describe in as much detail as possible any head trauma suffered by the client, including severe blows to the head (any part, including nose), car accidents, falls, and any occasions of loss of consciousness:

Facial bruises and contusions when shoved to ground by police in Los Angeles.

Describe any childhood illnesses:

32. Has the client suffered mental illness or disorder that has been

Siaosi was carrying a mask and a wig. His appearance totally changed, he never slept. According to Sela, she never saw him smoke or drink (an act or

what??).

Siaosi had unusual behavior when he returned from LA in 1996 and again in 1997 (mental problems and he won't talk about it).

Talked by phone to Sela because he was depressed because his wife was going to leave him and take children. Sela asked him to come home but Siaosi said he wanted to stay with children.

Siaosi wanted telephone number for father because he wanted to ask why he left his mother and how he dealt with it. Siaosi needed someone to talk to, so he called father for help.

Last time Sela saw Siaosi, before the crime, he was dirty and way off subject when talking. He was not listening, just rambling. He was always clean before. Then he was looking for his Visa to go to Hong Kong or Japan. He wouldn't elaborate about marriage problems.

Sela received a letter after arrest from Siaosi that was animalistic in the way it was written.

No psychological treatment or medication prior to arrest.

(a) recognized by others (list diagnoses and describe symptoms)?

Lynn/ Lewis - Bipolar

Rich/ Bittker/ Evarts

(b) evaluated by mental health professionals (describe illness and name professional who diagnosed it)?

Same as Above

(c) treated (describe)?

No, except Lynn placed Vanisi on Lithium. Prison has him placed on Paxil because it makes him Mellow as opposed to Lithium which made him too emotional.

33. Has the client ever received medication for a mental illness or disorder? If so, list medications and disorders as well as prescribing physicians:

34. Has the client ever been committed (voluntarily or involuntarily) to a mental health facility? If so, describe the circumstances; if not, but commitment was considered or proceedings were instituted, describe the circumstances:

NO

35. Was the client evaluated by staff or defense mental health experts prior to the capital trial? If so, list experts and findings: Yes, see prior list.

36. Did client undergo similar evaluations in connection with prior offenses? if so, explain:

NO

37. List results of any mental health exams performed on the client (e.g. I.Q. test, MMPI):

See notes

38. Describe the results of any test for neuropsychological or organic brain damage (e.g., x-ray, CAT scan, MRI (Magnetic Resonance Imagery):

39. Has the client ever been deemed incompetent (e.g., in prior court proceedings, by mental health officials, by military)? if so, explain:

NO

VOCATIONAL AND AVOCATIONAL PURSUITS

Detail the client's entire employment record, including employers' names and addresses whereavailable:

Unemployed from arrival in Reno until incident.

Was the client underemployed? Explain:

42. If the client sustained lengthy periods of unemployment, explain why

43. Prior to her or his commitment to death row, did the client have avocational pursuits? what were they?

44. Did the client attend a church as a child or an adult? If so, list church name(s), church personnel, and client's religious interests or activities: Family is devout Mormon. His aunt and mom remained so. Vanisi quit upon leaving home at age 20.

SUBSTANCE ABUSE

Has the client ingested quantities of alcohol or drugs in such a way as to suggest substance abuse?

If so, describe: Binge drinker (beer) for a number of years. Would drink entire paycheck and then not drink for months or 1-2 years. Heavy Marijuana use for 1 year prior to incident.

46. Was the client ever treated for alcohol or drug abuse? If so, when, where and for how long?

NO

47. What were the circumstances of the client's initiation into alcohol or drug use?

First started his Senior year of high school. Continued off and on thru age 27.

48. Whether a substance abuser or not, was the client under the influence of alcohol or drugs at the time of this offense? If so, describe: YES, Heavy drinking & Marijuana use prior to high school.

PERCEPTUAL EXPERIENCES AND SELF-PERCEPTIONS

49. Has the client ever experienced any of the following (if so, explain when, how often, and describe the experiences): NO

(a) hallucinations (auditory, visual, olfactory)?

(b) deja vu (feeling he or she has experienced something before)?

(c) opposite of deja vu (having an experience which he or she has had before but *feeling as if* he or she has never had the experience before)?

(d) macropsia (seeing objects become larger)?

(e) micropsia (seeing objects become smaller)?

(f) tics or repetitive nervous, moments

(g) feelings of persecution?

(h) feelings about self or others that clearly have no basis in reality (e.g., delusions that are grandiose or paranoid)?

50. Ask the client to describe himself or herself as completely as possible (record here):

PRISON RECORD/TIME

51. Has the client incurred any disciplinary punishment?

No write ups, but before he was sentenced he dug a hole by the fence which put him on discipline watch

52. Since the client's death row incarceration,

(a) how has the client spent his or her time (eg., does he or she read, write letters, watch television, attend religious services)? LAZY He sleeps a lot. He does not like to read because it frustrates him, it gives him "ideas" and dreams, so he stopped. Watches Sports on television, he used to watch everything but politics, etc. is unpopular to discuss. Usually does not eat lunch.

(b) has the client had any serious health problems (describe)?

(c) has the client been evaluated and/or "treated" by the prison's mental health staff (describe)?

Yes for prescription for Paxil.

(d) has that treatment included medication (describe medications and dosages)?

Yes, Paxil...was prescribed Lithium prior to Paxil, but he likes Paxil better because it mellows him.

53. Since the client's death row incarceration, who are the people who have come to know him, or have maintained contact with him the best (give addresses and telephone numbers)?

Aunt, sister Sela, cousin Michael Finau

54. Does the client have noteworthy relationships with prison officials or other inmates?

55. With respect to any prior incarcerations, N/A

(a) did the client incur any disciplinary punishment or attempt escape? if so, explain:

He received disciplinary write ups at the jail and Nevada State Prison prior to conviction, but none after.

(b) did the client form relationships with guards or other inmates?

(c) was the client on medication or treated for any physical or mental disorder?

FAMILY HISTORY

56. Have any family members ever been diagnosed or treated for mental illness or disorder (including epilepsy)? if so, provide all known details (illness or disorder, treating physician or agency, address, course of treatment):

(a) mother:

(b) father: Dad's side has mental illness.

(c) siblings:

(d) grandparents:

(e) aunts or uncles:

(f) spouse or children:

57. Have any family member ever been suspected of having mental illness, disorder, or dysfunction (e.g., uncontrolled temper or rages of anger, periods of significant memory loss, seizures, 'crazy' behavior, signs of retardation or other limited mental capacity)? if so, describe fully as possible:

58.

Describe the criminal records of any other family members (among those listed in item 57) as fully as possible:

Dad's side of family has a lot of criminal activity.

Tevita was in and out of juvenile hall due to criminal activity. He was into drugs- using all kinda and experimenting.

59.

Is there any evidence that members of the client's family have used alcohol or drugs?

Yes, Vanisi suspects his brother's death to be drug related. Tevita died in 1987 of "heart problems" but he was a heavy drug user at the time. (Sela Agrees)

OTHER RELEVANT INFORMATION

60.

Describe any other significant experiences, relationships, or characteristics of the client not detailed above:

INVESTIGATION-INTERVIEW OUTLINE

I. PRENATAL PERIOD

A. Mother:

Family history constellation residential pattern, living environment employment patterns criminal involvement patterns of abuse (physical, sexual, etc.)

Family health history alcohol/substance abuse mental health problems physiological problems

Personal history born, raised, school, marriages (significant relationships), other children employment history history of victim of abuse (physical, sexual, psych) criminal history

Health history developmental abnormalities alcohol/substance use and abuse treatment history, records smoking, diet serious illnesses, injuries, surgeries treatment history, records

During pregnancy doctor's care: who, where, records medical course: diet, injuries, illnesses, abuse, toxemia, etc. family responsibilities: siblings, parents, others financial circumstances living environment employment

Bonding factors primary relationship, recent deaths, finances, ambivalence, career, etc.

B. Father:

Family history (see above)

Family health history (see above) Personal history (see above) Health history (see above) During pregnancy father's presence, alc/substance abuse, criminal activity, employment, medical treatment, psych treatment, attitude toward pregnancy, violence

C. Extended Family: Grandparents, aunts, uncles, cousins alc/substances/psych histories residence, employment, criminal histories involvement with parents and siblings

II. BIRTH

A. Circumstances:

Date, time, place

Attending physicians-primary, anesthesiologist

Hospital staff-nurses, social services

Records

Home birth (who was present, physical environment, etc.)



B. Birth Process

Labor-length, drug induced

Birth weight and length

Normal-records

Complications-breach, C-section, oxygen deprivation, placenta previa, etc.

Emergency services

Length of hospital stay

Private or public pay for services

C. In-Hospital Care

Nursery-special services, incubator, etc. (lead based paint)

Trauma signs-hyperactivity, sleeplessness, inability to be comforted, rigidity

Detoxification signs

D. Hospital Pre-release and Home care Plan

Destination of mother and child

Adoption or foster care

Extended medical needs

AFDC or equivalent

CPS or equivalent referral

III. Birth to Six Months

A. Home Environment

Natural parent(s), foster, adoption Parental figures-alc/substance abuse, mental problems, criminal activity, employment, medical problems and treatment Siblings or equivalent-age, activities, alc/substance abuse, criminal activity, employment, care of parents Others in home-same

Physical environment Home location, neighborhood, socioeconomic description, type of residence (house, apartment, etc.), furnishings, high crime area Residential changes-reason, how often

Income source-employment, extended family, welfare, trust, etc.

Neighbors-who, locatable?, influence on family, deviance history, observations

Daily contact with whom-parent(s), day care (who, reliable, etc.), in-home babysitters, extended family, other

B. Health

Medical care - physicians, clinics, hospitals

. requery of exams - where, who, records

Extraordinary medical findings or care - type, by whom, hospitalization, medications, etc.

Traumas - physical (injuries, head traumas, high fevers), psychological, sexual (ritualistic or otherwise), accidents (with or without apparent injury)

Parental or other observations - withdrawn, rigid, injuries not reported, agitated, sleeplessness

Developmental signs - rolling over, alertness, responsiveness, eating, weight gain or loss

C. Social Environment

Separations from primary care-giver(s)

Custody disputes court records, attorneys, psychologists, official interventions - CPS, Juvenile Court, police - records, wardships, etc.

IV. Six Months to Three Years

A. Repeat III A to C

B. Changes in family and home environment - new siblings, separations, divorces, deaths, residence, income, employment

C. Health changes - traumas (head, other), illnesses, injuries, fevers, accidents, (with or without apparent injury)

Medical treatment and exams - who, where, etc.

D. Age appropriate developmental signs - crawling, speech, walking, general neurological signs, social interactions, responsiveness

V. Three to Five Years

A. Repeat IV A to C

B. Age appropriate developmental signs - speech, motor skills (fine, gross), social

C. Pre-school or day-care Observations of care-providers Social interactions, hyperactivity, withdrawn, attention deficit, bladder or bowel control, eating, physical development, napping, accidents, speech, aggressiveness, interaction with parents

VI. Five to Twelve Years

A. Repeat IV A to C

e appropriate developmental signs - physical development (growth, motor skills), language, judgment, enuresis

... School(s) Name, location, number of changes, teachers, counselors, principals, etc. Assessment

Academic performance standardized testing grades learning disabilities special education programming grade promotions Social development behavior in class and school grounds disciplinary actions unusual behavior - withdrawn, sexual, aggression, etc. referral for evaluation or treatment commendations, etc. peer group after-school activities supervisors, nature, observations

D. Community Activities

Girls or boys clubs, sports, church, CYO, scouts, employment, volunteer work Adult supervisor's assessment

E. Alcohol/Substance Use or Abuse

Age it began

Alcohol or substance used frequency, duration, with whom

Treatment or evaluation referral

F. Sexual experiences

Age, nature, partner, etc.

VII. Twelve to Eighteen Years

A. Repeat IV A to C

B. Age appropriate developmental signs puberty, sexual interest and activity, physical growth

Sexual development onset of menses nocturnal ejaculation apparent sexual dysfunction first sexual experiences hetero/homosexual, age, partner, sex act, frequency

Social relationships – peers significant other relationships same/other sex mentor

C. Health

Illnesses, injuries, surgeries nature, physicians, hospitals, medication, records, duration

Alcohol/substance use or abuse onset, duration, amount, method of use, treatment, records, family and others observations, schools

Pregnancies course, abortion, birth process, complications, father

Psychological behavior, symptoms, withdrawn, odd, aggressive, dissociate, speech pressure, hyperactive, depressed, suicidal Records, evaluations, treatment

D. Official Interventions

Police offenses, arrests, reports, referrals to probation and courts, diversions, custody

Probation jurisdictional and dispositional reports, supervision reports juvenile hall probation officer and hall staff evals, treatment programs probation operated privately operated intake evals, progress reports, staff perceptions aside from reports

Courts jurisdictional and dispositional records, commitment or probation orders conditions, reviews

Correctional Institutions intake evals, progress reports, disciplinary reports, psychological evaluations, staff evaluations and observations

E. Family and economic responsibilities

Employment

Care of others in immediate family

Parenting responsibilities

F. Education Jr. High - grad/non-grad, dates Sr. High -grad/non-grad, dates School, location, teachers, counselors, admin staff, records Year by year evaluations Academic, special classes, tracking, attention deficits, slow progress Behavior, attendance, disciplinary incidents, staff observations Extracurricular activities clubs, sports, government

VIII. Adulthood

A. Residences number of moves with whom living types of residences, addresses, etc.

B. Primary relationships sexual cohabit peers co-workers, crime partners major influences, mentors

C. Family responsibilities spouse, children, parents, other health of family financial condition

D. Health

Physical description illnesses, injuries, surgeries physicians, hospitals treatment, medications, prognosis chronic conditions, disabilities seizures, scars, etc. alcohol/substance use or abuse nature, source, onset, duration, amount, treatment, current condition

E. Psychological adult history of symptoms dissociating, bizarre behavior, withdrawn, voices, ticks, impulse control problems, violence diagnosis, treatment history clinics, psychologists, hospitals, correctional facilities, etc.

F. Education schools, curricula, dates, locations, reports, transcripts, faculty and staff evals, degrees

Employment employer, location, dates, how obtained positions held, salary, promotion, dismissal, training responsibilities, evaluations,

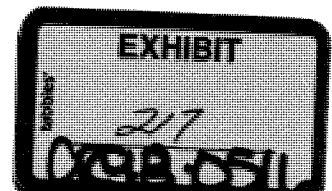
Relationships

1. Criminal History offense, date, location, arresting agency, court action, dispositions, crime partners, circumstances police and probation reports
institutional evaluations, staff evals parole reports, evals

MITIGATING CIRCUMSTANCES

Table of Contents

In General/Non-Statutory Mitigating Factors	1
Turbulent Family History/Child Abuse	2
Difficult Personal History and Life Experiences	5
Prison Adjustment	8
Prospects for Rehabilitation	11
Mental Retardation/Mental Disability	13
No Significant Prior Criminal History	15
Caring Parent/Family Member	17
Voluntary Intoxication/Diminished Capacity	19
Substance Use/Abuse	21
Commutations/Parole/Length of Prison Term	23
Beloved Individual and Mercy	24
Youth/Age	25
Remorse	29
Artistic Abilities	30
Sentence of Co-Participants	30
Provocation by Victim	32
Domestic Relationship Between Victim and Defendant	32
Post Traumatic Stress Disorder	32



Mental or Emotional Disturbance	33
Domination of Another	39
Residual/Lingering Doubt About Guilt	40
Co-Perpetrators	42
Limited Participation	43
Proclamation of Innocence	45
Polygraph Results	46
Plea Bargain Offers	46
Cooperation With Law Enforcement	46
Evidence in Mitigation of Prior Conviction of Felony Involving Violence	47
Sympathy	47
Coercion	48
Good Employment History	48
Positive Character Traits	49
Military Service	50
Heat of Passion	51
Limited Education	51
Mistaken Belief that One's Actions are Morally Justified	51
Courtroom Demeanor	52
Medical Conditions/Poor Health	52
Unarmed at Onset of Altercation	52
Religious Beliefs	53

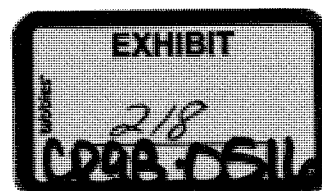
Capital Punishment	53
Future Behavior During Incarceration	54
Organic Brain Damage	54
Statements of Co-Participants	55
Victim Participated/Consented to Defendant's Conduct	55
Defendant's Impaired Capacity to Appreciate the Criminality of His/Her Conduct	55
Conduct Not as Egregious as Portrayed in Guilt Phase	56
Good Deeds	56
Isolated Incident of Violent Behavior	56
Grant of Immunity to Witnesses/Co-Participants	57
Lack of Intent to Kill	57
Duress	58
Peaceful/Non-violent	58
Intoxication of Victim	58
Victim's Character	58
Self-Defense	58
Victim's Death Was Instantaneous	59
Friendship Between Victim and Defendant	59
Injuries Suffered Through Accidents	59
Easily Influenced by Others	59
Severe Head Injury	59
Poverty	60

Good Student	60
Difficulties Faced by Immigrants	60
Suicidal Tendencies	61
Supportive Family	61
Bibliography	61

DEFENSE RESOURCES IN CAPITAL CASES

A PUBLICATION OF THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS' DEATH PENALTY RESOURCE COUNSEL

1999 - 77



AA06123

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THIS CATALOG IS INTENDED AS AN AID TO DEATH PENALTY DEFENSE ATTORNEYS.
IT DOES NOT CONSTITUTE AN EXHAUSTIVE LIST OF POSSIBLE RESOURCES.
ADDITIONAL MATERIALS MAY BE AVAILABLE THROUGH LOCAL ORGANIZATIONS. A
LIST OF SUCH ORGANIZATIONS IS INCLUDED.

◆

GENERAL INFORMATION

MANUALS

ALABAMA CAPITAL DEFENSE TRIAL MANUAL, Equal Justice Initiative of Alabama, 643 South Perry Street, Montgomery, AL, 36104, 334/269-1803.

ALABAMA CAPITAL POST-CONVICTION MANUAL, Equal Justice Initiative of Alabama, 643 South Perry Street, Montgomery, AL, 36104, 334/269-1803.

ARIZONA CAPITAL CASE DEFENSE MANUAL, Vols. I-IV, Arizona Capital Representation Project, P.O. Box 3073, Tempe, AZ, 85280-3073, 602/967-5857, 602/967-5857 (fax).

CALIFORNIA DEATH PENALTY DEFENSE MANUAL, Vols. I-V (1994-1997 updates), California Attorneys for Criminal Justice/California Public Defenders Association, 3273 Ramos Circle, Sacramento, CA, 95827, 916/362-1686.

THE DEATH PENALTY IN NEW JERSEY: AN OUTLINE FOR DEFENSE ATTORNEYS, Office of the Public Defender, Appellate Section, 31 Clinton Street, Ninth Floor, P.O. Box 46003, Newark, NJ, 07101, 201/877-1200, 201/877-1239 (fax).

DEFENDING A CAPITAL CASE IN GEORGIA, Southern Center for Human Rights, 83 Poplar Street, NW, Atlanta, GA, 30303, 404/688-1202, 404/688-9440 (fax), rights@schr.org.

DEFENDING A CAPITAL CASE IN TEXAS, The Texas Resource Center, 205 West 9th Street, Suite 201, Austin, TX, 78767-0280, 512/320-8300, 512/477-2153 (fax).

FEDERAL DEATH PENALTY DEFENSE MANUAL, National Association of Criminal Defense Lawyers, 83 Poplar St. NW, Atlanta, Ga 30303 404/688-1202, 404/688-9440 (fax). [see ■ below]

ILLINOIS DEATH PENALTY MANUAL, Office of the Cook County Public Defender, 69 West Washington, 16th floor, Chicago, IL, 60602, 312/603-0700, 312/603-9878 (fax).

KENTUCKY DEATH PENALTY MANUAL, Department of Public Advocacy, Capital Trial Unit, 100 Fair Oaks Lane, Suite 302, Attn: George Sornberger, 502/564-8006.

KENTUCKY POST-CONVICTION MANUAL, Department of Public Advocacy, Capital Post-Conviction Unit, 100 Fair Oaks Lane, Suite 301, Frankfort, KY 40601, Attn: Julia Pearson, 502/564-3948, 502/564-3949 (fax).

LOUISIANA DEATH PENALTY DEFENSE MANUAL 1994, Louisiana Crisis Assistance Center, 636 Baronne Street, New Orleans, LA, 70113, 504/558-9867, 504/558-0378 (fax); or Loyola Death Penalty Resource Center, 636 Baronne Street, Third Floor, New Orleans, LA, 70113, 504/522-0578, 504/586-8155 (fax).

MISSOURI CAPITAL CASE RESOURCE MATERIALS, Public Interest Litigation Clinic, 5319 Rockhill Road, Kansas City, MO, 64110, 816/363-2795, 816/363-2799 (fax).

NATIONAL DEATH PENALTY INFORMATION BANK INDEX, California Appellate Project, One Ecker Place, Suite 400, San Francisco, CA, 94105, 415/495-0500, 415/495-5616 (fax).

POST-CONVICTION LITIGATION: A NORTH CAROLINA MANUAL, Center for Death Penalty Litigation, 123 West Main St. 5th fl., Durham, NC 27701.

TENNESSEE DEATH PENALTY DEFENSE MANUAL -- TOOLS FOR THE ULTIMATE TRIAL, third ed., prepared by the Capital Case Resource Center; distributed by Tennessee Association of Criminal Defense Lawyers, 207 3rd Avenue N., Nashville, TN 37201-1610, 615/726-1225, 615/726-2560 (fax) contact: David Freedlander.

TRIAL MANUAL, Public Defender Service of Washington, DC, 451 Indiana Avenue, NW, Washington, DC, 20001, 800/341-2582.

VIRGINIA CAPITAL CASE CLEARINGHOUSE TRIAL MANUAL, Virginia Capital Case Clearinghouse, Washington and Lee University School of Law, Lexington, VA, 24450, 540/463-8028.

■ *for assistance of federal death penalty cases*, contact Federal Death Penalty Resource Counsel, David Bruck 803/765-1044, Richard Burr 713/227-0200, or Kevin McNally 502/227-2142

CASE LISTS

Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, Georgetown Law Journal, 600 New Jersey Avenue, NW, Washington, DC, 20001, 202/662-9240.

Death Penalty Outline: A Compilation of Case Holdings, Office of the Cook County Public Defender, 69 West Washington, 16th floor, Chicago, IL, 60602, 312/603-0700, 312/603-9878 (fax).

Federal Habeas Corpus Update, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

Georgia Case Listing: Selective Listing of Georgia, Eleventh Circuit and U.S. Supreme Court Cases, Southern Center for Human Rights, 83 Poplar Street, Atlanta, GA, 30303, 404/688-1202, 404/688-9440 (fax), <http://www.schr.org>.

Incompetency to Be Executed: Summaries of Cases Discussing Ford v. Wainwright, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

Incompetency to Stand Trial: Summaries of Successful Cases, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

An Incomplete Topical List of Death Penalty Decisions From the Eleventh Circuit, Southern Center for Human Rights, 83 Poplar Street, Atlanta, GA, 30303, 404/688-1202, 404/688-9440 (fax), <http://www.schr.org>.

Recent Batson Cases, Southern Center for Human Rights, 83 Poplar Street, NW, Atlanta, GA, 30303, 404/688-1202, 404/688-9440 (fax), <http://www.schr.org>.

Significant U.S. Supreme Court Decisions in Capital Cases Since 1970, July 1996, Southern Center for Human Rights, 83 Poplar Street, Atlanta, GA, 30303, 404/688-1202, <http://www.schr.org>.

Successful Cases Under Ake v. Oklahoma or Analogous to Ake, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

Successful Cases Under Brady v. Maryland, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

Successful Cases Under Johnson v. Mississippi, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

Successful Cases Under Massiah v. United States or United States v. Henry, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

Successful Ineffective Assistance Claims Since Strickland v. Washington, The Habeas Assistance and Training Project, P.O. Box 11311, Columbia, SC, 29211, 803/765-1044, 803/765-1143 (fax) or 1900 Centre Pointe Blvd., Number 80, Tallahassee, FL, 32308, 850/877-0829, 850/671-7210 (fax).

1995 Term Eighth Amendment & Habeas Corpus Opinions & Orders (Olive, Young, & Matulka, editors), The Habeas Assistance & Training Counsel, 320 West Jefferson St., Tallahassee, FL, 32301, 850/224-0004, 850/224-3331 (fax); Meolive@aol.com

NEWSLETTERS AND PERIODICALS

ACLU Abolitionist, Capital Punishment Project, 122 Maryland Avenue, NE, Washington, DC, 20002, 202/675-2319, 202/546-0738 (fax).

Advocate, Kentucky Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY, 40601, 502/564-8006.

Capital Report, National Legal Aid & Defender Association, Death Penalty Litigation Section, 1625 K Street, NW, Suite 800, Washington, DC, 20006, 202/452-0620.

Capital Update, Center for Death Penalty Litigation, Inc., 200 Meredith Drive, Suite 201, Durham, NC, 27713-2287, 919/544-4650.

D.P. Exchange, National Coalition to Abolish the Death Penalty, 918 F Street, NW, Suite 601, Washington, DC, 20004, 202/347-2411, 202/347-2510 (fax).

Death Penalty Information Center Fact Sheet, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

The EJI Legal Quarterly, Equal Justice Initiative of Alabama, 643 South Perry Street, Montgomery, AL, 36104, 334/269-1803.

For the Defense, Office of the Cook County Public Defender, 69 West Washington, 16th floor, Chicago, IL, 60602, 312/603-0700, 312/603-9878 (fax).

For the Defense, Tennessee Association of Criminal Defense Lawyers, 207 Third Avenue North, 2nd Floor, Nashville, TN, 37201-1610, 615/726-1225, 615/726-2560 (fax).

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NCADP National Execution Alert, National Coalition to Abolish the Death Penalty, 918 F Street, NW, Suite 601, Washington, DC, 20004, 202/347-2411, 202/347-2510 (fax).

Newsletter, Nebraskans Against the Death Penalty, P.O. Box 81455, Lincoln, NE, 68501, 402/474-6575.

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Thin Blue Line

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Jonathan Abernathy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379 (Winter 1996).

Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849 (1992).

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Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

Killing Justice: Government Misconduct and the Death Penalty, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

On the Front Line: Law Enforcement Views on the Death Penalty, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

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Racial Disparities in Federal Death Penalty Prosecutions 1988-1994, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

Sentencing for Life: Americans Embrace Alternatives to the Death Penalty, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

Twenty Years of Capital Punishment: A Re-evaluation, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

With Justice for Few: The Growing Crisis in Death Penalty Representation, Death Penalty Information Center, 1320 18th Street NW, 5th floor, Washington, D.C., 20036, 202/293-6957, 202/822-4787 (fax), dpic@essential.org.

BRIEF BANKS

NACDL Death Penalty Brief Bank, Tanya Greene, Southern Center for Human Rights, 83 Poplar St. NW, Atlanta, Ga 30303; 404/688-1202; 404/688-9440 (fax).

ABA Death Penalty Brief Bank, 50 F Street NW, Suite 8250, Washington D.C., 20001; 202/661-6820; 202/661-6822 (fax).

RESEARCH ASSISTANCE

Harvard Law School Civil Liberties Union, 23 Everett Street, Cambridge, MA 02138, 617/495-9611.
Contact: Death Penalty Project Director.

NATIONAL SEMINARS/TRAININGS INFORMATION

Federal Defender Training Group, 529 14th Street, Suite 200, Washington D.C. 20045, 202/208-0262, 202/628-4094 (fax). Contact: Linda McGrew.

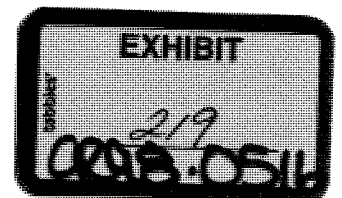
National Association of Criminal Defense Lawyers Death Penalty Resource Counsel, 83 Poplar St. NW, Atlanta, GA 30303, 404/688-1202, 404/688-9440 (fax). Contact: Tanya Greene.

Center for Capital Assistance
529 Castro Street
San Francisco, CA 94114
(415) 621-8860
Contact: Scharlette Holdman

Scharlette@mitigate.com

Habeas Corpus Resource Center
50 Fremont Street, Suite 180
San Francisco, CA 94105
(415) 438-3800
Contact: Michael Laurence

mdl@cris.com



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Scharlette

I don't know if you remember me, but we worked on the Cary Williams habeas together about 10 years ago here in Reno. Your work on Cary's case, regarding his social and family history, was terrific, and I am in need of someone to do the same kind of work on a new state habeas I have been appointed to handle. I don't know if you are willing/available, but I could use the help if you are. If not, maybe you can suggest some other people to help. Also, I am going to need a forensic psychiatrist/psychologist for this case and would like to discuss that with you also. If you don't mind, please e-mail me with a date and time we can talk by telephone, and I will give you a call on my dime. Thanks for any help you can provide.

Marc Picker, Esq.

Marc Picker, Esq., Ltd.

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mpickesq@msn.com

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Michael

Long time no see! I hope all is well, I know you are still fighting the good fight.

I have been appointed to a particularly nasty death penalty state habeas here in Reno, and would like to discuss some ideas with you. The issues deal with lack of presentation of mitigating evidence in the penalty phase, and a question of insanity/competency at trial. If you have the time, please let me know when I can give you a call to discuss this. Thanks for any help you can give.

Marc Picker, Esq.

Marc Picker, Esq., Ltd.

691 Sierra Rose Drive, Suite A

Post Office Box 3344

Reno, Nevada 89505

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Roseann M Schaye

1601 N Tucson Blvd

Tucson, AZ 85716

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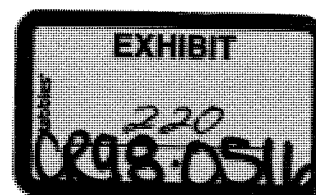
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Sorry I gave you Roseanne's old email on the first response. her current email is rschaye@earthlink.net

----- Original Message -----

From: Scharlette Holdman <scharlette@mitigate.com>

To: Marc Picker <mpickesq@msn.com>

Cc: Roseanne Schaye <schayeglos@juno.com>

Sent: Tuesday, March 12, 2002 7:19 AM

Subject: Re: Assistance

> Mark -- we're up to our ears with a trial starting in two weeks that will
 > last three - four months, so we can't be much use to anyone for awhile.
 > However, I'd love for you to have the chance to work with Roseanne Schaye
 > from Tucson. I've worked on several cases with her for the past four
 > years
 > and think very highly of her work, insight, commitment, and ability to
 > understand the vagueries of capital litigation.
 > In order to figure out the best psych for your case, you'll want to know
 > the
 > major psychiatric themes in his life, such as brain damage,
 > abuse/abandonment, schizophrenia, depression, fetal alcohol syndrome,
 > trauma. Roseanne can do that kind of preliminary investigation and then
 > we
 > can talk about who to bring on board for an assessment. We have learned
 > that we want a neuropsychologist in almost all cases. A neuropsych is a
 > psychologist who determines the presence, severity and effect of brain
 > damage by administering a battery of tests that far exceed the kind of
 > standardized personality tests psychologists administer. Roseanne's no.
 > is
 > 520 670 0014.
 > ----- Original Message -----
 > From: Marc Picker <mpickesq@msn.com>
 > To: <Scharlette@mitigate.com>
 > Sent: Monday, March 11, 2002 5:02 PM
 > Subject: Assistance
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 >
 > > Scharlette
 > > I don't know if you remember me, but we worked on the Cary Williams
 > habeas
 > > together about 10 years ago here in Reno. Your work on Cary's case,
 > > regarding his social and family history, was terrific, and I am in need
 > of
 > > someone to do the same kind of work on a new state habeas I have been
 > > appointed to handle. I don't know if you are willing/available, but I
 > could
 > > use the help if you are. If not, maybe you can suggest some other
 > people
 > to

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> > help. Also, I am going to need a forensic psychiatrist/psychologist for
> > this case and would like to discuss that with you also. If you don't
> mind,
> > please e-mail me with a date and time we can talk by telephone, and I
will
> > give you a call on my dime. Thanks for any help you can provide.
> >
> > Marc Picker, Esq.
> > Marc Picker, Esq., Ltd.
> > 691 Sierra Rose Drive, Suite A
> > Post Office Box 3344
> > Reno, Nevada 89505
> > 775/324-4533
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-oOo-

STATE OF NEVADA,)	
)	Case No. CR98-0516
Plaintiff,)	
)	Dept. No. 4
vs.)	
)	
SIAOSI VANISI,)	
)	
Defendant.)	
<hr/>)	

TRANSCRIPT OF PROCEEDINGS
Petition for Post Conviction
Day Two
Friday, December 6, 2013
Reno, Nevada

Reported By: SUSAN CULP, CCR No. 343

A P P E A R A N C E S

For the Plaintiff:

TERRENCE MCCARTHY
Deputy District Attorney
P.O. Box 30083
Reno, Nevada 89520
tmccarth@mail.co.washoe.nv.us

For the Defendant:

Gary Allen Taylor
Deputy Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
Gary_taylor@fd.org

TIFFANI D. HURST
Deputy Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101
Danielle_hurst@fd.org

The Defendant:

Not Present

I N D E XWITNESSPAGE**SCOTT EDWARDS**

DIRECT EXAMINATION BY MR. TAYLOR	4
CROSS-EXAMINATION BY MR. MCCARTHY	27
REDIRECT EXAMINATION BY MR. TAYLOR	33
RECROSS-EXAMINATION BY MR. MCCARTHY	57

E X H I B I T SNO.DESCRIPTIONPAGE

224	EXHIBIT 224 MARKED FOR IDENTIFICATION	38
224	EXHIBIT 224 ADMITTED INTO EVIDENCE	41

1 RENO, NEVADA, FRIDAY, DECEMBER 6, 2013, 9:15 A.M.

2 -oOo-

3
4 THE COURT: We'll move into the case of Mr. Vanisi
5 versus the State of Nevada.

6 Okay. We concluded with Mr. Qualls yesterday. I
7 think you have another witness to call?

8 MR. TAYLOR: Yes, Your Honor. We call Scott Edwards,
9 please.

10 THE COURT: Okay you may proceed.
11 (The witness was sworn.)

12 THE COURT: Okay. You may proceed.

13
14 SCOTT EDWARDS,
15 having been first duly sworn, was examined
16 and testified as follows:

17
18 DIRECT EXAMINATION

19 BY MR. TAYLOR:

20 Q Mr. Edwards, would you state your full name?

21 A Scott Wesley Edwards.

22 Q Are you an attorney?

23 A Yes, I am.

24 Q And can you give us a synopsis of your experience?

25 A I was -- I graduated from law school in 1987, passed

1 the Colorado bar that same year, moved to Nevada at the end of
2 the year, passed the Nevada bar in 1988, and I've been licensed
3 since then, and I've had work experience primarily in the area
4 of criminal law.

5 Q Okay. And did you have any connection with
6 Mr. Vanisi's case?

7 A I did.

8 Q Okay. Were you appointed as an attorney in his case?

9 A I was.

10 Q And what was your role?

11 A Initially, I was second chair to Marc Picker who was
12 first chair. We represented him in state postconviction
13 proceedings in this court.

14 Q And Mr. Picker withdrew?

15 A Mr. Picker withdrew.

16 Q And then what became your role?

17 A We came before the Court and had a hearing, because I
18 had not been formally Rule 250 certified, and we discussed that
19 in this court, and the judge said after hearing us that it was
20 appropriate for me to remain on the case as lead counsel.

21 Q Okay. And at that point, was co-counsel appointed?

22 A At that point, there was not co-counsel appointed.
23 Mr. Qualls came on because he had not yet passed the Nevada
24 bar. So he came on as basically assistant to me, a paralegal
25 assistant. Although he had graduated from law school and been

1 working in the legal profession for quite some time, he had not
2 secured his license yet. So upon his licensing here in Nevada,
3 I moved to have him formally appointed as co-counsel.

4 Q You were comfortable with that arrangement, I take it?

5 A I was very comfortable.

6 Q Okay. And ultimately, you filed a petition or an
7 amended petition, I think, and then the Court denied and we are
8 here today. Let's talk about that.

9 A Okay.

10 Q Okay. I'll show you, if you would, Exhibit 200.

11 A Okay. I've got it.

12 Q Do you recognize that document?

13 A This is a declaration that you and I worked out a few
14 weeks ago at the Wolf Den Restaurant.

15 Q Okay. And did you sign this declaration?

16 A I did.

17 Q I notice there's quite a bit of handwriting on there.
18 Were there changes that you suggested?

19 A Yes. The handwriting is yours. The initials are
20 mine, as is the signature.

21 Q In other words, you approved the changes?

22 A I did.

23 Q Okay.

24 A As I recall, these were -- yes, these were the changes
25 that I requested you make.

1 Q Okay. And obviously the declaration was true and
2 correct?

3 A Yes.

4 Q Okay.

5 A Yes.

6 MR. TAYLOR: Your Honor, we would offer Exhibit 200.

7 MR. MCCARTHY: It's hearsay.

8 THE COURT: He's objecting on the grounds it's
9 hearsay, Counsel.

10 MR. TAYLOR: Your Honor, the witness is before the
11 Court. I mean, it may be an out-of-court statement, but it is
12 relative to the proceedings before us today, and it's
13 definitely relevant to his memory of what occurred on that day
14 or what had occurred previous to that day.

15 MR. MCCARTHY: I didn't say it's not relevant. I said
16 it's hearsay. It's a prior statement of the witness. If you
17 want to know during my representation of Vanisi, I was
18 primarily concerned about something, ask him, and he can
19 testify to it.

20 THE COURT: I'm going to sustain the objection. You
21 may be able to use it if you want to impeach the witness if he
22 can't remember something. But for right now, it's hearsay.

23 BY MR. TAYLOR:

24 Q Would you look at Exhibit 202, Mr. Edwards?

25 A 202?

1 Q Yes.

2 A Okay. Yes. I see it.

3 Q And what is that exhibit?

4 A It's an ex parte motion for payment of attorney's fees
5 and costs to appointed counsel and an affidavit.

6 Q Is it a series of motions?

7 A I see. Yes, there are a series of ex parte motions it
8 appears.

9 Q Okay. Would you look to the exhibit. Does it appear
10 to be your billings and the payments from the Court to you for
11 representation of Mr. Vanisi's case?

12 A Yeah, it sure does. That's what they all appear to
13 be, my motions for fees, either for myself, Mr. Picker or
14 Mr. Qualls, or I guess there were some doctors.

15 Q Dr. Baker, Dr. Amazaga who were appointed by the
16 Court. You submitted their billings for them as well?

17 A That's correct. I processed them for them.

18 Q And along with your motions, did you provide a
19 detailed explanation of the services you provided?

20 A Yes.

21 Q Okay. And is that true and accurate?

22 A Yes. As I recall, it was done relatively
23 contemporaneously with the events that are recorded there.

24 Q And so the work that you accomplished in this case, it
25 is accurately reflected in your billing?

1 A Yes, I believe so.

2 MR. TAYLOR: Your Honor, we would offer Exhibit 202.
3 It's a matter of record with the Court, but separately as well.

4 THE COURT: Okay.

5 MR. MCCARTHY: I have no objection.

6 THE COURT: Exhibit 202, the Court will take judicial
7 notice of.

8 MR. TAYLOR: Can I beg the Court's indulgence one
9 minute?

10 BY MR. TAYLOR:

11 Q Turning back to Exhibit 200, Mr. Edwards, and I guess
12 I'm just going to ask you some questions relative.

13 What was your primary concern during at least the
14 initial part of your representation of Mr. Vanisi?

15 A My primary concern was to avoid the imposition of the
16 death penalty.

17 Q Okay.

18 A That was my overriding concern in this case. And to
19 that end, we undertook a lot of activity, as you can see
20 reflected in the billing statements.

21 If you're talking about my primary concern in a legal
22 sense, we did have a concern as you've heard from Mr. Qualls
23 and the record reflects about Mr. Vanisi's competency, his
24 mental health, his ability to assist us. And so we undertook
25 certain actions to flesh that out, mainly the Rohan motion that

1 we've talked about or you've talked about extensively. But we
2 had an overall plan of attack which ultimately resulted in an
3 amended petition and a hearing on it, and we raised numerous
4 legal issues, many of them, I feel, had substantial merit in
5 his petition.

6 But we did have a concern about his competency, we
7 litigated that in the Rohan hearing, and unfortunately for us,
8 we were not successful, which would have, if we had been
9 successful, would have created some kind of time window,
10 therefore, further work on the case.

11 I would like to say this: I don't know whether there
12 was the impression given in your examination of Mr. Qualls
13 yesterday that somehow our amended petition was spawned in a
14 three-day period between the Rohan motion and the --

15 Q I'm going to specifically ask you about it,
16 Mr. Edwards --

17 A All right.

18 Q -- if that's okay.

19 And I don't want to leave any misimpression today in
20 anything.

21 A Okay.

22 Q Okay. But, going back over your response to my
23 question, when you stated on that date three weeks ago your
24 primary concern was Mr. Vanisi's competency to proceed, that is
25 correct?

1 A There was a -- that was a big concern of ours, yes.

2 Q And you did focus your efforts on litigating the
3 competency issue?

4 A Yes. But as I've said in my declaration, from that
5 point forward, I focused my efforts on litigating the
6 competency issue, but I didn't say all my efforts.

7 Q That's true. And that was a change you suggested?

8 A Yes, because as I was saying, it was no surprise that
9 this petition would eventually have to be filed. Now,
10 Mr. Qualls related our desire not to rush it because --

11 Q Well, do you agree with that?

12 A Every day that Mr. Vanisi is not under a death warrant
13 would be a success in this kind of litigation, so yes, I mean,
14 we weren't doing it merely for the purposes of delay, but in a
15 tactical sense -- you know, our petition was -- our amended
16 petition was crafted well over time. We put together --

17 Q Okay, I agree.

18 A We put together pieces of it, but from a tactical
19 standpoint, the first and most important thing to do was
20 litigate the Rohan issue.

21 Q Well, and I guess to summarize or to repeat, to make
22 sure I understand the statements you've made, you're not
23 suggesting that your Rohan motion was filed in bad faith, are
24 you?

25 A Oh, absolutely not.

1 Q Did you think Mr. Vanisi was competent and just filed
2 the motion so you could get the stay?

3 A No.

4 Q So you felt it had merit?

5 A I felt it had merit, yes, I did.

6 Q You were present during Mr. Qualls' testimony
7 yesterday, and he testified that he was surprised and fully
8 thought that you were going to win the Rohan motion. Did you
9 share that belief?

10 A I was the one who conducted the examination of the
11 doctors in that case, and the responses I received I thought
12 factually were in our favor. And to the extent that we were
13 not successful with that, I even, I believe, took an
14 extraordinary writ to the Supreme Court to challenge the
15 ruling.

16 Q So you did believe you were going to win this?

17 A It was sincere, yes. It wasn't merely for delay. And
18 I feel it was factually based. I had interactions with
19 Mr. Vanisi that I've heard, you've seen in the affidavits, his
20 activities and the way he reacted when we interacted with him.
21 And although I'm no psychologist or psychiatrist, certainly
22 suggested to me, real mental health issues there.

23 Q And even though you're not a psychologist or
24 psychiatrist, you have been working with criminal clients, and
25 a certain portion of those are mentally ill, correct?

1 A Yes.

2 Q You've litigated competency in other cases?

3 A I have.

4 Q You've worked with experts in mental health over what
5 now, over 20-something years?

6 A Sure, yes.

7 Q So you were seeing signs that suggested mental
8 illness?

9 A Yes.

10 Q And you filed the motion?

11 A Yes. And there was a problem with our ability to
12 interact with him as the Rohan proceeding called for.

13 Q But that was just one part of your defense; Is that a
14 fair statement?

15 A That's a fair statement.

16 Q And you made or you told me that you intended to
17 conduct a complete investigation?

18 A Yes. A complete investigation, that's right, into the
19 things that you've developed now in your work on this case.

20 Q But you were unable to complete an investigation?

21 A We did not get to it.

22 Q Okay.

23 A A complete investigation.

24 Q All right. And are you suggesting that you -- I think
25 you said, you filed some claims on his behalf and you had faith

1 in those claims?

2 A We did.

3 Q One of those claims, and we had some exhibits
4 yesterday, dealt with the Vienna Convention?

5 A That's correct.

6 Q And I think Mr. Qualls testified you were primarily
7 responsible for that?

8 A I was. I did the research on that. I contacted an
9 attorney, you and I both know that attorney who was basically
10 the leading edge of that kind of claim.

11 Q Sandra Babcock?

12 A Sandra Babcock. And Ms. Babcock provided material on
13 it. I think there was a case, the Medallion case, which was
14 pending before the United States Supreme Court at that time. I
15 believe it had merit and I was trying to flesh out the factual
16 basis for it. It later turned out that it might not have been
17 there at all as I recall.

18 Mr. Specchio, who at one point served as trial counsel
19 for Mr. Vanisi, I believe testified at the trial hearing on the
20 petition that he had made contact with the consulate.

21 Q Or attempted?

22 A Yes, in the initial phase of the representation.

23 Q And that record will obviously speak for itself.

24 A Yes.

25 Q You will agree with me the record is probably more

1 accurate than yours and my memory at this point?

2 A What it says is what it says. I just recall not being
3 successful with that.

4 Q The things that you were talking about that you heard
5 yesterday, and you've had a chance to look at the petition on
6 the record now; is that correct?

7 A It's been a while since I reviewed the whole petition,
8 but yesterday I did have an opportunity to go through some of
9 the exhibits that you referenced with Mr. Qualls about things
10 you've uncovered in your investigation in Tonga and other
11 places. So I've seen that. That wasn't something that we've
12 uncovered or even got to attempt.

13 Q Okay. And that's all I want to focus on right now.
14 Is that an investigation you wanted to conduct?

15 A Eventually, yes.

16 Q And it is an investigation you were unable to
17 complete?

18 A That's correct.

19 Q And would you agree with me that that's the type of
20 evidence that you would have been looking for?

21 A Had we reached that stage of the process, yeah.

22 Q And I -- and we can turn to Exhibit 42. Page 8, I
23 believe.

24 A Are you referring to 142, perhaps?

25 Q No. Exhibit 42 is I believe the findings of facts

1 entered by the Court. It should be the first exhibit in the
2 notebook.

3 A I see it, yes.

4 Q On page 8 -- I believe on page 11 and 12, the Judge
5 made references to a couple of claims that were within your
6 amended petition. If you'll look at them, please?

7 A Page 12?

8 Q Look at page eight first the last sentence in the
9 first paragraph.

10 A Okay.

11 Q Is that precisely why you had wanted to complete an
12 investigation was the likelihood or the chance that that
13 finding would come forth?

14 A To avoid that kind of finding.

15 Q And basically the Court says, you know, we just don't
16 have any new evidence?

17 A Uh-huh.

18 Q Okay. You were unable to conduct the investigation.
19 Was that because the Judge overruled your Rohan motion?

20 A I guess timing wise, yes. I mean we had talked about
21 going to Tonga, but priority-wise in the litigation of this,
22 that wasn't the top priority. We investigated somewhat the
23 case. We had talked to Mr. Specchio, Mr. Bosler, Mr. Gregory,
24 those in the know about the case and their litigation of it.
25 And we weren't presented with a, "Wow, here is the key to the

1 overturning of his conviction of his sentence" in the trip to
2 Tonga. So we focused more on legal issues, and this became
3 less of a priority. And when the Rohan motion was denied, we
4 were left without that as an option. We included it as a
5 claim. It would apply -- it was applying to Mr. Bosler and
6 Mr. Gregory, Mr. Specchio as well.

7 Q Did you -- you said you did speak to some people. You
8 spoke to previous trial counsel?

9 A Yes, we did.

10 Q Did you speak to any other witnesses than previous
11 trial counsel?

12 A Any other witnesses, perhaps police officers. I don't
13 think -- I don't recall any specific interviews with people
14 other than trial counsel.

15 Q Did you speak with Mr. Vanisi's family?

16 A I don't recall that.

17 Q Did you retain an investigator?

18 A I don't believe so, at least to do investigative work.
19 I know somebody had to serve the subpoenas and stuff, but maybe
20 that was done by the State.

21 Q Looking through your files, we found yesterday some
22 information that ya'll have for Marc Picker that talked about
23 or provided you information about his family. Do you remember
24 that?

25 A Yes. Early on in the case when it was Mr. Picker and

1 I representing Mr. Vanisi, we traveled down to Las Vegas and we
2 met with your office, Mr. Pescetta in your office and asked for
3 some assistance basically.

4 Q Some resource?

5 A Yeah, some resources. You know, I remember consulting
6 The Death Penalty Resource Center primarily looking for some
7 new issues that perhaps hadn't been litigated or were being
8 litigated. Mr. Pescetta provided us some information, I
9 believe that's where Picker got the Rohan case information.

10 Q And Scharlette Holdman?

11 A Yes. Those names I think went to Mr. Picker. And I
12 believe that was his kind of, you know, division of labor in
13 the case. He was working that or whatever he was doing on it.
14 But it never reached the stage of appointing one or hiring one
15 or -- a mitigation specialist is what I'm talking about.

16 Q Once Mr. Picker withdrew, you had not at that time
17 retained an investigator; is that correct?

18 A I don't think so.

19 Q And it's a fair statement you didn't retain an
20 investigator after that time?

21 A That's correct. I believe so, yeah.

22 Q It's also a fair statement, is it not, that no
23 investigation into his family, into his social history, into
24 his background was ever conducted?

25 A That's correct, by us.

1 Q By you?

2 A By me or Mr. Qualls.

3 Q We are not talking about trial counsel. Those claims
4 will rise or fall on their own merit, but we are just talking
5 about your own representation.

6 A Yeah. There was some of that information in the
7 record that we received, and I believe they were -- although
8 there wasn't much information at all presented by the defense
9 during the guilt phase, there was a rather substantial number
10 of witnesses called on his behalf during the penalty phase as I
11 recall. The record speaks for itself.

12 Q You made reference to the fact you didn't hire an
13 investigator and you didn't seek funds go to Tonga, right?

14 A That's correct.

15 Q Now, you had the opportunity to review all of these
16 exhibits, you said?

17 A All the --

18 Q The mitigation information and evidence that's before
19 the Court now.

20 A I don't know how to answer that.

21 Q You said you looked through it yesterday?

22 A I went through some documentation that I believe you
23 faxed to Mr. Qualls.

24 Q Okay.

25 A So during the lunch hour yesterday, we met and there

1 were some documents that you had provided him.

2 Q Okay.

3 A So I had a gaze at those.

4 Q And you had looked at the petition?

5 A I -- yes, I read the petition long ago.

6 Q And are you aware that as far as those interviews we
7 are talking about, there's, say, approximately 56 of those
8 interviews?

9 A If that's what you have, yeah.

10 Q And --

11 A And I know in discussing with you -- you know, what
12 investigation you've performed.

13 Q Okay.

14 A So some of it.

15 Q And if those declarations themselves reflect that in
16 over, say, approximately 50 of them, they were never
17 interviewed by you or Mr. Qualls, would that be accurate?

18 A That would be accurate.

19 Q Also, if you look at those declarations carefully, you
20 would find that only six of those 56 interviews were actually
21 from Tongan citizens, from people who were in Tonga. Do you
22 have any reason to dispute that?

23 A I don't have any reason to dispute that.

24 Q And a large majority of them came from residents of
25 Nevada, indeed Reno, and residents of California. Did you

1 conduct any investigation of these witnesses in either Nevada
2 or California?

3 A No.

4 Q Okay. Or Utah?

5 A No.

6 MR. TAYLOR: I'm sorry. One second.

7 BY MR. TAYLOR:

8 Q Given the opportunity, would you have conducted that
9 investigation?

10 A Yes, or we would have attempted it.

11 Q Okay. You had no strategic or tactical reasons for
12 not doing an investigation in this case?

13 A No. We didn't rule it out.

14 Q And you didn't start an investigation, and nothing led
15 you to believe that it would not be fruitful or anything like
16 that?

17 A We didn't start an investigation, put it that way.

18 Q Okay.

19 A We didn't hire an investigator. We didn't do those
20 things. That wasn't our priority at that time.

21 Q You were somewhat concerned with the cost of doing the
22 investigation?

23 A Yes. That's what I mean in terms of priority. You
24 know, I had envisioned a situation where if it reached that
25 stage where we were making application to the Court for what

1 appeared to be somewhat extraordinary expenses, I might need
2 some justification for it. And I hadn't been -- you know, put
3 on notice about that, other than -- you know, this is a good
4 thing to do, Mr. Pescetta suggested it and a mitigation
5 specialist would have insisted on it, I imagine.

6 Q Would you agree with me that you probably did need
7 extraordinary support to investigate the witnesses who lived in
8 Washoe County?

9 A No -- well, I don't know.

10 Q Or probably not? In fact, probably could have
11 interviewed them yourself?

12 A Yeah.

13 Q You didn't necessarily need it for witnesses that
14 lived in Utah, Salt Lake City?

15 A Probably not.

16 Q Or California?

17 A It probably would have helped, but, yeah.

18 Q And the -- obviously your experience leads you to
19 believe that what you obtain from the initial interviews
20 sometimes will provide that justification to go further?

21 A That could be true.

22 Q You just don't know unless you try, right?

23 A You don't know until you do it. But I hadn't been
24 provided with anything that told me right off the bat, "Boy,
25 this is the key to your case." So that's not where I was

1 heading.

2 Q So you prioritized it lower than some of the other
3 things?

4 A That's exactly the point.

5 Q But you intended to do it?

6 A Eventually.

7 Q Okay. And did you suspect that you were going to have
8 such a short period to file an amended petition?

9 A Suspect? I mean, we had the case for years.
10 Eventually, it was going to have to be filed, but that's what I
11 meant, this petition -- the amended petition was not created,
12 so to speak, over that weekend. But in terms of doing the
13 investigation when we lost the Rohan motion, I didn't think,
14 "Oh, I need," you know -- it's time to file the petition. We
15 had been put on notice. The Court in their orders and in
16 the -- you know, some of which I suppose were not necessarily
17 faithfully obeyed about time limits and things like that,
18 but -- you know, we knew there would come a time we would have
19 to file the petition. But we didn't get around to the
20 investigation of these witnesses that you -- that you have.

21 Q Did you tell me a few weeks ago, November the 7th, I
22 believe, that if you had suspected the trial judge was going to
23 order an amended petition so quickly would not have postponed
24 your factual investigation?

25 A I suppose that's true. I suppose that's true.

1 Q Now, at the time you and I had this interview, and
2 that's the only interview, the only opportunity we've discussed
3 this; is that correct?

4 A Yes.

5 Q At the time we had this interview, it was
6 approximately on November 7th, and there was another person
7 present, was there not?

8 A Right. Mr. Gazant.

9 Q From our office?

10 A Yeah.

11 Q Did you also make the statement that deadlines were
12 routinely ignored or routinely bypassed in Washoe County?

13 A Oh, man, if I did, I mean, that sounds like I'm
14 intentionally violating a court order. But, I did say
15 something along those lines like, you know -- but this was a
16 different nature. This was in open court, and she said, "Have
17 your petition on file by this time on that date," and that was
18 that.

19 Q And that's what we were discussing on that -- the
20 other day, was it not?

21 A Yeah. I mean, that was -- you know, there -- I don't
22 recall the record exactly, but in my practice, especially in my
23 practice, postconviction practice and prior years in this
24 court, the order would come down initially upon an appointment,
25 and have this done by this time and that done by that time.

1 And, yes, those were not necessarily obeyed.

2 Q They would frequently change?

3 A Yes.

4 Q And is that, perhaps, why you didn't suspect you were
5 going to have to file the amended petition in such a short
6 period?

7 A I guess.

8 Q Okay.

9 A Yeah.

10 Q Now. If you'll turn back to Exhibit 202.

11 A All right.

12 Q Just peruse your billings. And if you would --

13 A Is there something in particular you would like me to
14 look at?

15 Q Well, I'm kind of looking at number 117 -- 6117 is on
16 the bottom Bates label.

17 A 6117, okay.

18 Q We are looking at it, and the next page is 6118,
19 correct?

20 A Okay.

21 Q Does that accurately reflect work that you were doing
22 on this petition?

23 A Yes.

24 Q Over a period of time?

25 A Uh-huh, yeah. Yeah, see -- yeah. Discussion of the

1 case with Michael Pescetta. E-mail with Michael Pescetta.
2 Correspondence with Rebecca Blakeley of the Federal Public
3 Defender. Sandra Babcock. These were all things that I recall
4 doing.

5 Q As I look at your billing, and maybe you can tell me
6 before -- I mean, you can tell me if I'm incorrect. I see
7 31 hours of attorney work on the petition or on -- before the
8 Rohan motion was filed?

9 A I imagine so, yes. Like I said, it wasn't created
10 that weekend.

11 Q After the Rohan motion was filed, I see eight hours of
12 time billed. Does that sound fair?

13 A Yeah.

14 Q And then once the Court denied your Rohan motion, I
15 see that you put in 24 hours of work in the next four days.
16 Was that accurate as well?

17 A Mr. Qualls and I had divided up work on separate
18 claims, so we spent that weekend merging our separate research
19 and writing into the petition, so we sent it back and forth to
20 each other that weekend pretty intensely. But, it had been
21 completed, it just hadn't been presented.

22 Q And out of that 24 hours, that was also the time you
23 spent litigating the extraordinary petition that you filed as
24 well?

25 A Is that right?

1 Q That's the same period.

2 A Is that what I billed? That could be. I don't know
3 if we had the record available for that at that point in time.
4 But I recall doing that.

5 Q Let's just say, and I don't want to misrepresent
6 anything, if that extraordinary petition was filed during that
7 same time period, it would be reflected in your hours, correct?

8 A What I billed for, yeah, would be when I did it.

9 MR. TAYLOR: I'll pass the witness, Your Honor.

10 THE COURT: Mr. McCarthy?

11 MR. MCCARTHY: Thank you, Your Honor.

12

13 CROSS-EXAMINATION

14 BY MR. MCCARTHY:

15 Q Mr. Edwards, you've been both a prosecutor and defense
16 attorney, correct?

17 A Yes, sir.

18 Q And capital cases in both of those roles?

19 A I have.

20 Q And you've also been an appellate lawyer and
21 postconviction?

22 A I've done both of those.

23 Q Capital cases in both of those?

24 A Yes.

25 Q And do I understand correctly that at some point, you

1 decided to devote your energies to the Rohan issue and put off
2 the investigation until later; is that fair?

3 A That's fair.

4 Q Okay. Now, the investigation that we are talking
5 about that was delayed, it mostly concerns mitigation; is that
6 correct?

7 A Yes. The witnesses that Mr. Taylor has been
8 referencing.

9 Q Right. Now, is there a reason why you would find the
10 gathering of mitigation evidence to be less important or less
11 urgent than working on the legal questions in this case?

12 A Well, I did. I mean --

13 Q Why is that?

14 A My reason for it?

15 Q Yeah.

16 A Well, in my practice, in my appellate and
17 postconviction practice, I had most success with solid legal
18 issues. And the mitigation evidence is a factual matter.
19 And -- you know, I don't want to make an assessment of his
20 proposed evidence.

21 Q No.

22 A But from what I've been made known to about the facts
23 of the case, the record as it was, my contact with counsel,
24 this wasn't like, "Boy, I really -- this has got to be my
25 priority." So while I understand it's important to look into

1 these things and leave everything uncovered, it didn't sound to
2 me like this was the real nugget in the case. There were many
3 other legal issues that Mr. Qualls related, that the record
4 reflects, that just compelled our attention. And so, we didn't
5 take this and we didn't do it at the same time. And -- you
6 know, I just -- I didn't want this to be what's holding up the
7 case.

8 Q You knew that there were some pretty significant
9 aggravators?

10 A Yes, I did. This case was, upon initial appointment,
11 was almost hopeless feeling you get when you read the record.
12 You know, you understand it. I lived here when this went on.
13 You know, in a personal sense, you know, I really understood
14 the magnitude of this case. Aggravator, number one, we have a
15 slain police officer. You know, I remember the time this case
16 was going on. I was involved in it, but there's just some
17 energy and impetus to it that puts me in a -- a position way
18 different than, "Wow, he didn't do it," or, "This can be
19 explained away by something."

20 Now, the mental health issue was the one issue that I
21 thought was -- you know worthy of further investigation right
22 off the bat.

23 Q And why? Why is that?

24 A The mental health issue as perhaps a mitigating
25 factor. And in the Rohan sense as well.

1 Q Okay.

2 A But, that's a different thing than saying I'm looking
3 for classic mitigation witnesses that have been developed by
4 Mr. Taylor.

5 Q Your evaluation at the time, correct me if I'm wrong,
6 the evaluation at the time led you to think that additional
7 mitigating evidence is not likely to be what wins your case?

8 A Yes.

9 Q Okay. Did you have unlimited resources and unlimited
10 time?

11 A No. I mean, Mr. Qualls joked, "Oh, boy, maybe we'll
12 get a trip to Tonga out of this or something."

13 Q Did you find that attractive?

14 A But it couldn't really pass the giggle test in my
15 motion at that point in time with my understanding of what was
16 there. And bless them for undertaking it.

17 Q You're pointing at my colleagues from the FPD?

18 A Yeah.

19 Q Okay.

20 A But there were just other things in this case. And
21 the case as I knew it and -- you know kind of experienced it
22 that cried out for my attention more.

23 Q Well, did you talk to others about where you should be
24 devoting your attention? Did you talk to Pescetta about that?

25 A All the time.

1 Q How about local lawyers?

2 A And I can't say -- I won't say this. Mr. Pescetta did
3 not say to me, "Don't do this."

4 Q Well, of course not.

5 A Don't investigate this. And he provided resources
6 about mitigation specialists, but he did that primarily with
7 Marc Picker. And in our division of labor, that was going to
8 be Marc Picker's stuff. And when I took the case, I guess I
9 took a different angle on it.

10 Q Okay.

11 A I did not make that my priority.

12 Q I notice in your bill you had at least one
13 conversation with Rick Cornell fairly early on. Do you
14 remember what that might be about?

15 A Well, Mr. Cornell is a very experienced appellate
16 lawyer with a vast knowledge, legal knowledge. I can't recall
17 exactly what that was about.

18 Q Okay.

19 A But there were -- I don't know whether -- I can't tell
20 you.

21 Q Okay.

22 A I don't remember.

23 Q On your -- the time records have been discussed here,
24 is that necessarily complete?

25 A I wish it was, but . . .

1 Q Did you write down every time you had a conversation
2 with somebody?

3 A I can't do that. You know, it's just too disruptive.
4 But I try to capture to the best of my abilities the time I
5 expend on a case.

6 Q Okay. And you -- so as I understand it, during the
7 first years that you had the case, until the end of the ruling
8 on the Rohan motion, you were preparing a supplement all that
9 time.

10 A Yeah, we were.

11 Q Hoping it to be extensive?

12 A It was a priority issue. Maybe I'm seduced by neat
13 legal issues, the consulate issue, the Faretta canvass, the
14 actual factual trial itself and how all that worked in. Those
15 things were really -- you know, kind of juicy issues to
16 Mr. Qualls and I.

17 Q That's a good word. Seduced. What do you mean by
18 that? Tell me your thoughts on the subject.

19 A I don't mean it in some kind of awkward way, but you
20 know, those drew my attention as my focus in the case, you
21 know. These -- let's not drop the ball on this. Let
22 Tom -- you know look at this consular issue. Hey, look at
23 what's going on in the U.S. Supreme Court over it. Let's make
24 sure this one flies, you know. That kind of seduction by the
25 issue that arises from the -- whatever you've investigated.

1 Q And that's --

2 A And in this case, it was primarily the record and the
3 conversation with the trial counsel. I mean, we had -- I
4 thought really interesting issues, the more we got into it,
5 other than here are the facts of the case. Here are the
6 factual guilt basis of the case.

7 Q I take it you found the proposition of having Judge
8 Steinheimer waive mitigation and aggravation to be less
9 attractive?

10 A Well, she had been there when it was done before, and
11 she presided over it. She heard it. It's, you know, her call.
12 We put it in the petition because there hadn't been a
13 substantial amount of it over -- you know, it hadn't been as
14 exhaustively done as Mr. Taylor has done by trial counsel. And
15 so it was in there, but like the Judge ruled, we didn't have
16 anything to back it up.

17 MR. MCCARTHY: Okay. I have no other questions.

18 THE COURT: Counsel?

19 MR. TAYLOR: Thank you.

20

21 REDIRECT EXAMINATION

22 BY MR. TAYLOR:

23 Q Would it be a fair statement, Mr. Edwards, that you
24 don't know, and you never discovered what trial counsel didn't
25 know?

1 A I wouldn't know what they don't know.

2 Q That's right.

3 A That would be fair.

4 Q And unless you investigated yourself, you would never
5 know how good their investigation was, would you?

6 MR. MCCARTHY: Your Honor, yesterday there was an
7 objection about argumentative. I'll raise that one.

8 THE COURT: Okay. Sustained.

9 BY MR. TAYLOR:

10 Q Is it a fair statement that one of the
11 responsibilities of habeas counsel is to investigate the
12 representation that your client receives at trial?

13 A In a general sense, yes.

14 Q Okay. And in order to know or to learn what issues,
15 constitutional issues, surround that representation at trial,
16 you've got to look into it to some extend?

17 A Okay.

18 Q So, unless you speak to someone more than trial
19 counsel, you'll never learn that, will you?

20 A I don't know if that's necessarily true.

21 Q Okay.

22 A I mean, trial counsel has a responsibility to look
23 into these very things and probably to a greater extent than I
24 do as habeas. And -- you know, in my discussions with them,
25 this is not what they told me the central focus of this case

1 was about.

2 Q You're right. They have a greater responsibility --
3 or a great responsibility. I mean, we can agree on that. We
4 can also agree that of the 56 witnesses that are before the
5 Court now, you didn't interview at least 49 of them, and trial
6 counsel missed over 31 of them, and you never would have
7 learned that; is that a fair statement?

8 A I don't --

9 MR. McCARTHY: That's not a fair statement.

10 THE COURT: Sustained.

11 MR. McCARTHY: There are 300 million Americans and
12 none of them have been interviewed by Scott Edwards.

13 THE WITNESS: Some of them have.

14 MR. McCARTHY: Right. Except for a few.

15 THE COURT: I will sustain the objection.

16 MR. TAYLOR: All right, Your Honor.

17 BY MR. TAYLOR:

18 Q You're reviewed the declaration or you've had an
19 opportunity?

20 A Yes, I have.

21 Q And I don't think there's real disagreement between
22 you and I, if trial counsel missed it, you didn't learn it?

23 A That's correct.

24 Q You didn't look for it?

25 A No.

1 Q We don't have any disagreement on that, do we?

2 A No.

3 MR. TAYLOR: Your Honor, at this point in light of the
4 testimony, I think we would offer 200, or reoffer 200 again for
5 the purposes of impeachment as it exists.

6 THE COURT: You think the whole document impeaches his
7 testimony?

8 MR. TAYLOR: Well, I just want to use it is. What I'm
9 saying, Judge, I want to refer to it. It's before the Court.
10 I just didn't want to get in trouble with you at all.

11 MR. MCCARTHY: I think if counsel believes there's
12 something inconsistent in a prior statement of the witness, he
13 can ask about it.

14 THE COURT: Yes.

15 MR. MCCARTHY: If he thinks it's consistent and
16 offered to rebut a recent claim of fabrication which I am not
17 making, then it's also admissible, but it's still hearsay.

18 THE COURT: So --

19 MR. TAYLOR: If I can refer to it.

20 THE COURT: Yes. Go ahead and refer and ask him. You
21 can certainly do that.

22 MR. TAYLOR: That would be fine.

23 BY MR. TAYLOR:

24 Q Mr. Edwards, looking at paragraph 8.

25 A Eight. Of my declaration.

1 Q Of your declaration, Exhibit 200?

2 A Uh-huh.

3 Q You stated on in a date that if you had any suspicion
4 that the trial judge was going to order the amended petition,
5 you would not have postponed your investigation; is that
6 correct?

7 A Correct.

8 Q In other words, it wasn't a priority type thing to
9 where it just, if you didn't get to it, no big deal, you
10 planned on doing an investigation?

11 A Eventually, yeah.

12 Q Okay. And your next sentence says if you had to do it
13 over today, you would have done things differently then because
14 you wanted that investigation?

15 MR. MCCARTHY: Your Honor, I will object to questions
16 that call for hindsight.

17 THE COURT: Sustained.

18 THE WITNESS: And that's not what I said. You
19 originally prepared this declaration where it said if I were
20 handling this case today, but that's crossed out.

21 BY MR. TAYLOR:

22 Q If you made the decision to postpone your -- if you
23 had made a decision to postpone your investigation, you would
24 have insisted that the trial judge give you the time to
25 complete the investigation. Doesn't that contradict your

1 previous testimony?

2 A If I had made that -- I would have postponed -- yeah.
3 I wanted -- I guess what this is saying I wanted to do a
4 factual investigation, but I did not get to it. And --

5 Q Actually what I --

6 A And I didn't actually move to ask for more time once
7 the order to file the amended petition. We just didn't get to
8 it, this factual investigation that you've done. I mean, I
9 commend you for it. And this will probably go on forever. You
10 know, somebody will probably say that Tonga wasn't enough, you
11 know. There should have been somebody else. I don't know.

12 Q Nor Utah or California?

13 A California.

14 Q Nevada?

15 A Right.

16 MR. TAYLOR: Can I approach the clerk, Your Honor?

17 THE COURT: Yes.

18 BY MR. TAYLOR:

19 Q You did seek assistance from several places including
20 our office, The Capital Research Center, Michael Lawrence; is
21 that correct?

22 THE COURT CLERK: Exhibit 224 marked.

23 (Exhibit 224 marked for identification.)

24 THE WITNESS: Maybe you could refresh me on Michael
25 Lawrence.

1 BY MR. TAYLOR:

2 Q With the Capital Center in California.

3 A Okay. That kind of rings a bell. I don't recall what
4 that was about.

5 MR. MCCARTHY: Thank you.

6 MR. TAYLOR: You bet.

7 BY MR. TAYLOR:

8 Q You don't deny talking to a number of folks?

9 A No. Yeah, we reached out. Let's see.

10 Q And, in fact, that's where Scharlette Holdman's name
11 and the other investigator, Ms. Schaye, the call came from
12 these experts you were talking to, correct?

13 MR. MCCARTHY: You gave me two.

14 THE WITNESS: Yeah, I believe Mr. Pescetta provided us
15 those names. That's my recollection, but . . .

16 Q In fact, in this letter from Mr. Pescetta to you where
17 you're talking to him, he's talking about the need to have
18 investigation, wasn't he?

19 A He says, "I don't know how much investigation was
20 conducted to obtain the details of his life from native
21 sources, but this is sort of mitigation investigation that
22 Ms. Holdman does."

23 Q And before that, he's given you an article about how
24 to do a successful penalty phase investigation as well?

25 A Yes, he's providing one.

1 Q So these experts are telling you you need to
2 investigate, weren't they?

3 A They were suggesting things.

4 Q Including an investigation?

5 A He says, "I don't know how much investigation was
6 conducted, but it worked in another case."

7 Q You didn't have -- you believe you didn't have
8 unlimited resources in this case?

9 A Yes, I -- no case has unlimited resources.

10 Q But you didn't seek resources, did you?

11 A No, not on -- no not -- no.

12 Q So there was nothing to lead you to believe that this
13 judge would have denied you the services of an investigator?

14 A Not the service of an investigator I don't think.

15 Q Would have denied an investigation of witnesses who
16 lived in Washoe County?

17 A Probably not.

18 Q Or Salt Lake City, Utah?

19 A I don't know. Maybe.

20 Q California?

21 A Probably, okay. Depending on where.

22 Q Especially if the Defendant had grown up at least part
23 of the time in California?

24 A Down in San Diego as I recall.

25 Q I think he grew up in San Bruno or something like

1 that.

2 A Oh, is that right?

3 Q Yeah.

4 A I remember some time he spent in southern California
5 in the movie business.

6 Q If you would, look at Exhibits 163 and 164,
7 Mr. Edwards.

8 MR. TAYLOR: Judge, while he's doing that, we would
9 offer 224, I believe the latest exhibit.

10 THE COURT: Okay.

11 MR. MCCARTHY: The letter, yeah, I have no objection
12 to that.

13 THE COURT: Exhibit 224 is admitted.

14 (Exhibit 224 admitted into evidence.)

15 THE WITNESS: Okay. What I have as 163, the
16 confidential report from Benjamin Scroggins or to Mr. Benjamin
17 Scroggins.

18 BY MR TAYLOR:

19 Q From Jonathan Mack, neuropsychologist?

20 A Yes. Jonathan Mack.

21 Q As you look through that and we went through
22 yesterday, how many records Dr. Mack reviewed, but let's turn
23 towards, say, page 66 through page 70.

24 A You're talking 66 of exhibit --

25 Q Of his report.

1 A Oh, okay.

2 Q I think it's at the top left, I believe, that the page
3 numbers --

4 A Okay. 66, yes.

5 Q And is that --

6 A The sorting test.

7 Q Where Dr. Mack is giving his impressions?

8 A General measures of neuropsychological functioning.

9 Q Formulations and impressions. And 66 through 70
10 details his findings?

11 A Okay.

12 MR. MCCARTHY: Your Honor, I remind the Court this was
13 not offered for the truth of the matter asserted.

14 THE COURT: Right.

15 MR. TAYLOR: I understand, Your Honor.

16 MR. MCCARTHY: So if it's offered now to prove he in
17 fact did these tests or reached these conclusions, that's
18 inappropriate.

19 THE COURT: Okay.

20 MR. TAYLOR: Judge, it's not been offered or we'd go
21 on it.

22 THE COURT: Okay.

23 BY MR. TAYLOR:

24 Q Have you had an opportunity look at that, Mr. Edwards?

25 A I've scanned it. I mean, it's substantial documents.

1 Is there something in particular you would like me to direct my
2 attention to?

3 Q As you were focussing on your Rohan litigation, is
4 that the type of evidence you would have liked to have had?

5 A If it comports with what Dr. Bitker provided. Are you
6 saying this is better than what we came up with.

7 Q I'm asking you if it's evidence you would have liked
8 to have had.

9 A I suppose.

10 Q And would you agree with me that you expert, whether I
11 consulted Jonathan Mack or you consulted Dr. Bitker, your
12 expert is better prepared if you're able to give them more
13 information to base their opinion on. Is that a fair
14 statement?

15 A Sometimes I suppose that could be true.

16 Q And looking back at Dr. Mack's report, he was provided
17 substantial information to come to his conclusions, was he not?

18 A I guess, if you say so.

19 Q And look at Dr. 'Alo Fokiaki's report at 164. I
20 believe it's under Section 1 and 2. He's got an exhibit -- I
21 mean an index at the first of it?

22 A Right.

23 THE COURT: I'm going to ask you a quick question.
24 Did you bring this doctor from New Zealand to the Nevada State
25 Prison?

1 MR. TAYLOR: We sure did. And I've got a -- I'd love
2 an opportunity to explain to the judge why we did that.

3 THE COURT: No, no. You don't have to explain it to
4 me. I'm not paying your bills.

5 MR. TAYLOR: No, no. It was an extremely unusual
6 request.

7 THE COURT: Yes.

8 MR. TAYLOR: Which required quite a bit different
9 justification than we normally have to provide, but Dr. --
10 because of our unfamiliarity with the Tongan culture.

11 THE COURT: That's okay. I didn't want you to have to
12 go into too much detail. It was a quick question because the
13 issue here --

14 MR. TAYLOR: The expense.

15 THE COURT: -- there's issues with regard to the norms
16 of practice has something to do with ineffectiveness.

17 MR. TAYLOR: I agree. I haven't suggested that
18 counsel was required to go to that extreme.

19 THE COURT: Okay. Go ahead.

20 BY MR. TAYLOR:

21 Q You would agree with me that Dr. 'Alo Foliaki was
22 provided a great deal of information on which to provide his
23 opinion.

24 A His report.

25 MR. MCCARTHY: Your Honor, the question assumes the

1 truth of the report. And while I don't dispute it, I have no
2 reason to dispute it because I've never met the author of the
3 report, it's not been admitted for that purpose.

4 MR. TAYLOR: We said --

5 THE COURT: It isn't being admitted for that purpose,
6 plus I'm having a great deal of difficulty when you ask the
7 question and the witness says, "Well, if you tell me that."
8 You might as well be testifying, Mr. Taylor.

9 MR. TAYLOR: Obviously I'm not trying to testify.

10 THE COURT: I know you're not. So let's clean up and
11 get right to what you want me to look at.

12 MR. TAYLOR: We admitted it yesterday. We are
13 assuming the truth for the purposes of this hearing only.

14 MR. MCCARTHY: The question to this witness doesn't
15 assume anything. It isn't based on the assumption. It's,
16 "Didn't this doctor have this material?" Well, if you want to
17 ask that, ask the doctor. This witness, all he can do is read
18 the report which has not been admitted for the truth of the
19 matter.

20 MR. TAYLOR: I'll ask it a different way.

21 THE COURT: Okay.

22 BY MR. TAYLOR:

23 Q Mr. Edwards, wouldn't you agree with me that an
24 expert's opinion, whatever expert you hire is generally better
25 if you provide them more information to consider?

1 A I don't know if quantity is quality. I would like
2 them to focus on what I'm asking them to be expert in.

3 Q Okay. So as I understand what you're saying is you
4 can bring a mental health expert to see any client for a period
5 of 30 minutes and it doesn't make any difference to you or to
6 that expert's opinion how much information they have?

7 A No, I didn't say that. You said the more information
8 you provide, the better. Kind of like -- you know limitless
9 mitigation evidence is -- improves your situation. I believe
10 that I provided Dr. Bitker with enough information to focus on
11 the issue that --

12 Q What did you provide Dr. Bitker?

13 A Well, I reviewed the case with him.

14 Q Okay.

15 A I informed him factual circumstances, any mental
16 health stuff I had.

17 Q And what did you have?

18 A I don't recall, but I had stuff. And then he did his
19 review of the medical records that we had. All right. And he
20 interviewed Mr. Vanisi.

21 Q Would it be important to you to know if Mr. Vanisi had
22 been exhibiting signs of a mental illness in the months and
23 weeks prior to the offense?

24 A It might have helped. I don't know.

25 Q Would it have helped your expert?

1 A Could have. I don't know.

2 Q Would it have been important to you to know if your
3 client had certain cultural prejudices against mental --
4 treatment for mental illness?

5 A I don't know. I don't know the answer to that.

6 Q Okay. Would it have helped you to know that your
7 client had a number of traumatic events in his life and
8 exhibited bizarre behavior surrounding that event?

9 A I think we knew a little bit about his bizarre
10 behavior.

11 Q But would it help?

12 A To know more about it?

13 Q Yeah.

14 A The more bizarre, the more bizarre, I guess.

15 Q Would it help your expert in evaluating his mental
16 health?

17 A I thought my expert -- I don't remember Dr. Bitker
18 complaining to me he needed more information to make an opinion
19 in this case.

20 Q I understand. But would it generally? We are not
21 talking about Dr. Bitker. Generally would it help your expert?

22 A Dr. Bitker is my expert.

23 Q In any case, I'm talking generally. When you hire an
24 expert, a mental health expert, would you want to give him
25 information about your client?

1 A I do give them information about my client.

2 Q And if there was information surrounding your client's
3 -- a major even in your client's life and bizarre behavior by
4 your client at different times in your client's life, is that
5 information you think your expert should know?

6 A Perhaps.

7 Q At least you think you ought to know it so you can
8 make some informed decision about whether to give it to your
9 expert?

10 A When I ask for a competency evaluation in the course
11 of representation of my clients, okay, I provide the people at
12 Lakes Crossing with some factual understanding of their
13 circumstances in terms of police reports, and sometimes if I
14 have mental health history, I'll include that. But I don't --
15 I don't give them my box of discovery.

16 Q Okay.

17 A And I don't send an investigator out beforehand. So,
18 if I receive information from the expert, the one who is making
19 the evaluation that they cannot do so or their opinion is
20 undermined or unreliable because they don't have certain
21 information, I would undertake that. But as a matter of
22 course, just to go to New Zealand because Mr. Vanisi, you know,
23 is from Tonga, you know this -- this really didn't cross my
24 mind.

25 Q And I don't want to sit here and fuss with you about

1 this.

2 So if Dr. Bitker had asked for something else, you
3 would have gone out and found it?

4 A Yes. If he had asked me, "You know what, I just don't
5 understand this Tongan whatever," well let's see what we can do
6 about that. If you can't render an opinion regarding this
7 issue because of some lack of factual basis, fine. Now, you
8 know, flip side of that is -- you know, if you want to
9 discredit the opinion, you're going to come up with something
10 that he hadn't reviewed. It's just a game.

11 Q I'm sorry?

12 A No, it's just the nature of the beast, in my opinion.

13 Q Another one of the statements you made to Mr. McCarthy
14 is you were well aware of the kind of notorious history of this
15 case, in your representation of Mr. Vanisi; fair statement?

16 A I remember when the crime took place. I was shocked
17 by it. The whole community was. This -- you know, it's not a
18 big town. This took place at our university, you know. My
19 child went to that university. You know, this is just
20 horrific. You and I --

21 Q I'm sorry?

22 A -- sat up there. My fiance plays at Nightingale Hall,
23 and every time I walk to her performance there, there is
24 Mr. Sullivan's plaque on the wall.

25 Q There's a memorial at the University of Nevada,

1 correct?

2 A Yeah, yes.

3 Q And in fact when we met, you said for us to meet there
4 across the street from the memorial?

5 A Yeah. It's also across the street from the crime
6 scene, which I don't think you had been to before that.

7 Q And the reality is, this was a hopeless case to you?

8 A Initially, there -- when I say hopeless, I mean you do
9 get a feeling of hopelessness, when you know what had occurred.
10 When -- you know, I monitored what took place in the courtroom,
11 I've reviewed the record. That just made it all the more
12 shocking. The first contact with the evidence in the case, the
13 police reports, the photographs for goodness sakes. This was a
14 horrendous circumstance. So my natural reaction, I don't know
15 whether it's self-preservation or whatever, "Hey, let's look at
16 the legal issues here and maybe not so much on the facts of
17 what occurred." I don't think this was a case where I was
18 going to get a DNA expert to come forward and say, couldn't
19 have been Mr. Vanisi.

20 Q There was -- you know, I mean, it was a tough case,
21 right?

22 A It was. Factually the evidence was very, very strong.

23 Q Okay.

24 A And it was made even more compelling by the fact that
25 Mr. Vanisi hadn't been able to mount, really, any kind of

1 factual defense during the guilt phase due -- due -- due to the
2 issues with his attorneys.

3 Q And I'm sure it was made even more difficult by your
4 inability to communicate with Mr. Vanisi?

5 A Mr. Vanisi, I mean, it wasn't -- there were times when
6 Mr. Vanisi was somewhere else when we met with him. There were
7 times, depending on his medical regimen, medical dosage,
8 whatever. I can remember standing here at one time at one
9 hearing and Mr. Vanisi basically just leaning over on me
10 because he had been medicated recently. So there wasn't -- I
11 mean, we attempted interaction with Mr. Vanisi, but there --
12 you know, sometimes -- you know, you can only do so much.

13 Q It's fair to say it was difficult?

14 A Yes.

15 Q And so it's fair to say that all these matters
16 probably were behind statements you made about sometimes this
17 -- it was just a hopeless case?

18 A Yeah, factually there was some hopelessness to it.

19 Q All right.

20 A You know, I mean, I don't think if we had even been
21 successful that in a retrial of this case you would get a
22 particularly different result.

23 THE COURT: We are going to take a short recess now.
24 We will be in recess about 10 or 15 minutes.

25 Court is in recess.

1 (A break was taken.)

2 THE COURT: Thank you. Please be seated.

3 I know it's cold in here. I hope you all walked
4 around and warmed up. Are you ready to proceed?

5 MR. TAYLOR: Yes, Your Honor.

6 THE COURT: Go ahead.

7 BY MR. TAYLOR:

8 Q Mr. Edwards, I'm going to try to go ahead and wrap
9 this up just by asking you just a few statements.

10 We talked about before, you primarily, or at least one
11 of your primary concerns was Mr. Vanisi's competency; is that a
12 fair statement?

13 A That's correct.

14 Q Do you agree that to effectively represent Mr. Vanisi,
15 it was necessary to conduct a factual investigation?

16 A Yes. Part of it, yeah.

17 Q Which part do you disagree with?

18 A No. I said part of the effective representation would
19 be to conduct a --

20 Q And did you plan to investigate all of this, you said
21 trial counsel maybe didn't even investigate themselves?

22 A That's hard to say. I mean -- no, I can't say that,
23 for sure. If I was aware of an issue in that I thought merited
24 investigation, I planned to investigate it.

25 Q On November the 7th, did you state, "Our plan was to

1 investigate all of the issues that trial counsel were
2 ineffective for failing to pursue"?

3 A Is this my declaration that you --

4 Q Did you make that statement on November the 7th?

5 A If that's what it says.

6 Q Your declaration?

7 A Yeah, I signed that declaration.

8 Q Would it have been useful for you to travel to Tonga
9 to interview government officials, like history, witnesses,
10 cultural people?

11 MR. MCCARTHY: Calls for the witness's speculation of
12 what he would have discovered.

13 THE COURT: Actually, it calls for the witness to give
14 an opinion about what would be useful to him, so I'll sustain
15 in that regard as speculative.

16 BY MR. TAYLOR:

17 Q Did you request resources from the Court to travel to
18 Tonga to make an investigation regarding Mr. Vanisi's life
19 history?

20 A No, I did not.

21 Q Did you believe that would simply be a wasted effort?

22 A Yeah, I suppose it would have. It certainly -- it was
23 something I talked about, but didn't think it would be fruitful
24 at all, so I didn't pursue it.

25 THE COURT: What part was not fruitful? You didn't

1 think you would get the permission to go or you didn't think
2 you would find anything fruitful once you went?

3 THE WITNESS: I didn't think I pursued the request
4 because I didn't have a basis for it.

5 THE COURT: Okay.

6 BY MR. TAYLOR:

7 Q Along that lines, on November the 7th did you not
8 state that, "These types of undertakings are rarely funded by
9 the Court, and I did not ask for this funding because I knew it
10 would have been a wasted effort"?

11 A Yes, I said that.

12 Q Did you plan to conduct a thorough investigation of
13 this -- Mr. Vanisi's life?

14 A I planned to conduct an investigation of it. Thorough
15 is a term.

16 Q After talking with me on November the 7th, didn't you
17 tell me you believed it would have been useful for you to
18 travel to Tonga in order to seek this kind of information?

19 A Yeah, I did, after you told me what you found.

20 Q Okay.

21 A I thought it would have been something to put in.

22 Q Did you plan to provide your experts an in-depth
23 social history including medical, employment, and educational
24 records?

25 A Mr. -- Dr. Bitker are you referring to?

1 Q Well, I mean, did you tell me on November 7th that, "I
2 plan to provide my experts this information"?

3 A I don't recall that.

4 Q Okay. Would you look at Exhibit 200 and see if you
5 made that statement. Paragraph five.

6 A Yeah, I signed this.

7 Q And, in fact, you were aware that there were witnesses
8 related to this case in California, Utah, and Reno, were you
9 not?

10 A I think they were disclosed in the record that we had
11 been provided.

12 Q Okay. So you were aware?

13 A Of some witnesses, I suppose.

14 Q And you didn't investigate those witnesses or
15 interview those witnesses, correct?

16 A No, I didn't.

17 Q And you didn't do this investigation of these
18 witnesses or your plans to investigate these witnesses didn't
19 come to fruition because of the Court's scheduling order; is
20 that correct?

21 A Right, right.

22 Q Okay. You didn't on November the --

23 A That's not the only reason, but, yes, that's true.

24 Q Is it fair to say that on November the 7th, you
25 attributed to the scheduling order and not to some list of

1 priorities?

2 A Well, I mentioned that to you many times during this
3 conversation.

4 Q Okay. But as far as what you told me and what you
5 signed, that's what you said, right?

6 A That's what I signed.

7 Q Okay. You never conducted a complete investigation of
8 Mr. Vanisi's case; is that correct?

9 MR. MCCARTHY: It's been asked and answered over the
10 last several --

11 THE COURT: Sustained.

12 BY MR. TAYLOR:

13 Q Is it true that it was only the cost of this
14 investigation and the refusal of the Court to give you
15 additional time to investigate that prevented you from
16 completing the investigation in this case?

17 A Is that what I signed?

18 Q Paragraph 6.

19 A Well, I did sign this, but I don't know if I would
20 agree with it right now.

21 MR. TAYLOR: Judge, we would offer Exhibit 200 at this
22 point.

23 MR. MCCARTHY: It's at least partially inconsistent
24 with partial parts of the testimony.

25 THE COURT: Right.

1 MR. McCARTHY: So, okay.

2 THE COURT: It's admitted.

3 BY MR. TAYLOR:

4 Q You were given the opportunity, in fact, Mr. Edwards,
5 you took the opportunity to make any changes you wanted to this
6 declaration, is that true?

7 A Well, I could give you some description how that
8 occurred. I mean -- this is your handwriting.

9 Q It is.

10 A And you're suggesting these changes when I disagreed
11 with things that I read there, you suggested alternative
12 language.

13 Q Something that would be more accurate to your memory?

14 A Yes.

15 MR. TAYLOR: We'll pass, Your Honor.

16 THE COURT: Mr. McCarthy?

17

18 RE CROSS-EXAMINATION

19 BY MR. McCARTHY:

20 Q The paragraph 6 of Exhibit 200 --

21 A Yes, sir.

22 Q -- begins with a comment of your focus.

23 A Yes.

24 Q When you were focused on competency, you were aware
25 that that wasn't going to be the end of the litigation?

1 A True.

2 MR. McCARTHY: Okay. That's all.

3 THE COURT: Anything further? May this witness be
4 excused?

5 MR. McCARTHY: It's okay with me.

6 MR. TAYLOR: I have nothing, Your Honor.

7 Yes, you may.

8 THE COURT: Thank you, Mr. Edwards. You may step
9 down.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: You can leave that. I think you're the
12 last one. Maybe not. I don't know.

13 MR. TAYLOR: Thank you, sir.

14 THE COURT: Counsel?

15 MR. TAYLOR: I was going to -- I don't know what the
16 Court plans as far as scheduling or desires at this point. I
17 was going to suggest to the Court that rather than argue to
18 you, perhaps we could make arguments in writing.

19 THE COURT: Is that -- I don't know if that's really
20 necessary.

21 MR. TAYLOR: Well --

22 THE COURT: Mr. McCarthy?

23 MR. McCARTHY: I'm guessing that means that the
24 Petitioner has rested at this point?

25 THE COURT: That's what I'm kind of hearing.

1 MR. TAYLOR: Well, one of the reasons I did this, I
2 was under the impression from the Court's previous ruling when
3 I wasn't here that those were the two witnesses you wanted to
4 hear from, and we had those. Now obviously --

5 THE COURT: Well, what we did was we had a hearing on
6 a Motion to Dismiss and the issue before the Court that I
7 allowed you to present evidence on was whether or not there was
8 a good cause for the delay in filing this.

9 MR. TAYLOR: Yes, ma'am.

10 THE COURT: And so that's what we -- you choose. I
11 never told anyone what evidence they wanted to put on. The
12 Court did not make a comment in that regard specifically except
13 for it went to the effectiveness of counsel was an issue.

14 MR. TAYLOR: I misspoke. I apologize, Your Honor.

15 THE COURT: Oh, that's okay.

16 MR. MCCARTHY: I would be prepared to argue today,
17 orally, whether we should go forward, and that would be my
18 preference. And by the way, the State has no more evidence to
19 present at this time.

20 THE COURT: So the evidence is closed at this time
21 from both the Petitioner and the State.

22 I think oral argument would be fine. If, after I
23 heard your oral argument, I need some briefing, I can certainly
24 give you that opportunity. I don't know how long you would
25 take for oral argument. Is that the problem?

1 MR. TAYLOR: Well, Your Honor, I mean, if I can
2 respond in two ways. First off is obviously you were looking
3 for cause or you were looking specifically at the cause for the
4 late filing or the time of the filing of the current successor
5 petition. And under Crump, if I'm on the same page with the
6 Court, we have an obligation to show the prejudice as well as
7 the failure to comply with the standard as we discussed. So we
8 would like to have the opportunity, obviously, to show you the
9 prejudice in addition to the declaration that we have. We
10 would like to present these witnesses to you. Because we
11 believe that the evidence that's since been developed
12 demonstrates prejudice to the Court. I'm happy to argue that,
13 but inasmuch as I was unable to go through the specific
14 instance in every declaration which would have been tedious for
15 everybody involved, I'm sure, that's one of the reasons I
16 suggested to you that maybe we should do it in writing, because
17 I can do it in writing and conserve time in that way. So
18 that's where I'm at. I would like to present evidence on the
19 merits of the harm, the prejudice in this case. I'd like -- I
20 believe we've gotten passed the Crump bar, but I also would
21 like --

22 THE COURT: Why don't we -- it's Mr. McCarthy's
23 motion. So it was his Motion to Dismiss, but I allowed you to
24 put evidence on. So I'll let him argue, and then you can
25 respond, and then we'll decide where to go from there. S this

1 is really a continued Motion to Dismiss.

2 MR. MCCARTHY: I suppose it is. I suppose it's
3 Haloman like. So I'll go ahead.

4 You know, ordinarily in these types of situations on
5 making this motion, I started out with a standard. Rather
6 difficult in this case because I'm not sure what it is. It's
7 arguable. But we know since 1997, the Crump decision, Nevada
8 law allowed a prisoner to escape or overcome procedural bars if
9 the procedural bar was caused by the ineffective assistance of
10 postconviction counsel. Since then, we haven't really explored
11 that, what it means.

12 Now, I have always assumed it was fairly a
13 Strickland-type standard as modified for postconviction
14 counsel. Did counsel act reasonably contrary to prevailing
15 professional norms and the like? And that probably is the
16 standard.

17 And then we find ourselves over the last year or so
18 with a couple of U.S. Supreme Court decisions about -- on the
19 same subject. The U.S. Supreme Court has recognized an
20 equitable tolling, if you will, on the same grounds of
21 ineffective assistance of postconviction counsel. They didn't
22 discuss the standard that much, but there may be some
23 difference. In those cases, and I'm talking about Martinez
24 versus Ryan and there was -- excuse me. Maples versus Thomas.
25 And the more recent one, the Texas one, is Trevino versus

1 Thaylor, that's 133 Supreme Court 1991 decided this year. And
2 in each of those, it seems like the Court seems to say the big
3 question here is whether you get -- the Petitioner managed to
4 get some aspect of trial counsel's performance reviewed by
5 somebody. So in Maples, I think it was, the Petitioner was
6 completely abandoned by his lawyers. His lawyers left the law
7 firm and never notified the Court, and they did absolutely
8 nothing on the prisoner's behalf. And then likewise in
9 Martinez versus Ryan, it is because of the way the lawyers --
10 postconviction lawyers kind of screwed up, there was no review
11 at all of any aspect of counsel's performance. So, perhaps, it
12 is a standard akin to that, that there has to be some sort of
13 review if the lawyer screwed up. So there's no review at all,
14 then that will overcome the procedural bars.

15 On the other hand, the other end of the scale of
16 potential standards, we have a basic Strickland standard that
17 is -- you know, an objective standard of reasonableness
18 measured by reasonable prevailing professional norms. And in
19 fact, I don't know where we will come down on that debate. The
20 federal courts, of course, aren't binding, the extent to which
21 Nevada laws allows collateral review is determined by state
22 law. I would note I'm arguing a case next week in Carson City
23 or next month that's going to have some impact here, but that
24 doesn't help all that much. We haven't gotten a ruling and I
25 don't expect one in the immediate future.

1 So somewhere in that range, between Strickland and the
2 total abandonment, is an appropriate standard for measuring the
3 effectiveness of postconviction counsel.

4 I suggest to you, Your Honor, that you needn't decide
5 where in that range we will find the appropriate standard for
6 measuring the standard of postconviction counsel, because I
7 suggest that it hasn't been shown that counsel fell below any
8 standard at all. There is no doubt that we now have reason to
9 believe there is additional mitigating evidence. And you know
10 what, I think one of these witnesses, I'm not sure which one,
11 maybe Mr. Edwards suggested when this is all done, there's
12 still going to be more because it is true that no jury has ever
13 seen all potential mitigating evidence, because the way the
14 term is defined, no jury can see all mitigating evidence.
15 You're never going to see it either. When we are done, there
16 will be more.

17 So, the question is, is there some objective standard
18 of reasonableness measured by a prevailing professional norms
19 that prohibited the decision to focus on the legal issues with
20 the hopes of looking into the secondary issues, what these
21 lawyers consider to be secondary, when the time arose? I don't
22 know of any such standard that prohibits that. You've seen it.
23 You've been sitting here as a trial judge for longer than I've
24 been doing my job and you've seen it. You've seen somebody
25 that focused their trial strategy on the assumption that the

1 motion to suppress is going to be denied, or a motion it going
2 to be granted and it's denied, and they have to soldier on the
3 best they can. It doesn't mean they're ineffective. It means
4 he had allocated their resources, and in retrospect, they wish
5 they allocated them differently.

6 Well, among the resources allocated is time. We have
7 to do that. Everyone has to allocate their resources.
8 Everyone has to allocate their time to decide how to best
9 represent the client. And I think Mr. Edwards said it pretty
10 well. This case is not going to rise and fall with additional
11 mitigating evidence. You've got a defendant that killed a cop.
12 He hit him in the face with a hatchet and they had to dig his
13 teeth out of his throat. You can have buckets of mitigating
14 evidence, and nothing is going to overcome that. It has to be
15 done. You have to go out and find the mitigating evidence
16 anyway. But the focus, the primary focus is what's going to
17 help, at least what has a chance of helping, a better chance of
18 helping. That's what we do. We try to marshal our resources
19 to best help the client. You can't have everything. And I
20 think I once mentioned to -- I quoted to the Nevada Supreme
21 Court the eminent British philosopher who says, "You can't
22 always get what you want." It's true. And when you can't, you
23 take the best of what you've got. And that's what they did.

24 Now, this supplemental petition, I -- actually I don't
25 know the number offhand but 19, 20 claims, something like that.

1 A significant number. Mostly legal. And that's where these
2 lawyers focused their attention. Because that's where they
3 thought they had the best shot of obtaining relief for their
4 client. They may ultimately have been wrong. I don't think
5 so. I still think they are right. They had the best shot by
6 focusing their attention on these legal issues. There is a
7 McConnel-type issue. There's a -- the incompetency, the
8 present incompetency. I mean, geeze, as a practical matter,
9 they are going to win the case if they win that. They are
10 going to avoid the death penalty perhaps forever. So they
11 focus there attention on it. It turns out they said, "If we
12 had unlimited resources, we also would have done this
13 investigation." I have no doubt that's true. I wouldn't have
14 disputed that. But when you have limited time, limited
15 resources because the Court says lawfully with no abuse of
16 discretion, your 30 days to supplement passed some years ago
17 and now your supplement is due, so file it, that's what you do,
18 you file the petition as the Court has ordered.

19 I would note, Your Honor, that the law does not
20 require that postconviction counsel have unlimited time and
21 resources to prepare a supplement. The statute allows for
22 30 days. Counsel is appointed, and they are supposed to file
23 that supplement within 30 days. Now, I'm not denying that we
24 routinely stipulate for additional time, but not unlimited
25 time. So the notion that the -- some law required more, that

1 required that the Court allow more time, more resources is
2 incorrect for a couple of reasons. One of them is your
3 judgment has been reviewed and affirmed. The Court -- the
4 Supreme Court found no error in denying the first petition.

5 Now there's no specific issue about the time allowed
6 for the supplement, but the fact of the matter is, we now know
7 that your judgment has been reviewed and affirmed.

8 And finally, one additional thing I want to mention,
9 you already found that Vanisi had the ability, if he wished, to
10 communicate with and assist his lawyers and that he was
11 refusing to do so. That finding has not been attacked. And
12 you may recall over and over again, we've been saying that
13 these new -- this new evidence is not admitted for the truth.
14 Even so, there is nothing calling that finding into question.

15 So I suggest to you the findings of this Court are
16 one, res judicata, and two, they imply -- they don't imply,
17 they establish that the inability to talk to Siaosi Vanisi to
18 gather more information from that source was due to his willful
19 misconduct, his refusal to communicate with his lawyer. That
20 appears to be true simply because you had previously ruled that
21 is true.

22 So, I guess to summarize, regardless of what standard
23 we apply when measuring the performance of postconviction
24 counsel as an excuse to overcome the procedural bars, it has
25 not been made out here. It has not been shown that counsel was

1 ineffective in their allocation of resources including their
2 allocation of time, that time was short, but not unlawfully so.
3 It's not an abuse of discretion because they are only entitled
4 to 30 days in the first place and they had years to draft the
5 supplement. In fact, we now know from having seen that
6 supplement and having heard from Mr. Edwards they took way more
7 than the 30 days, and in fact they were working on it
8 throughout the period. They would have done more. That's not
9 the standard. In fact, I would be hard pressed to ever find a
10 lawyer who, having tried a case, would stand up and say there
11 was nothing more that anyone could do. That person doesn't
12 exist I've learned. That's not true. I wouldn't -- no
13 realistic lawyer, no reasonable lawyer would ever say there was
14 nothing more that could be done. And that's not the standard.
15 We needn't just show there was something more that could be
16 done. We need to show at least that these lawyers, the
17 decision of allocation of resources fell below an objective
18 standard of reasonableness as measured by prevailing
19 professional lawyers.

20 One thing the Court ought to consider when considering
21 those prevailing professional norms, this was the first Rohan
22 motion that had been filed in this region ever. There is no
23 guidance. No one knew what's going to happen after. I sure
24 didn't. I suspect the Court didn't know either. So I don't
25 think there is a prevailing professional norm that required

1 counsel to have a Plan B. If there is such a norm, I haven't
2 heard evidence of it.

3 So I would ask that you rule now that it has not been
4 shown that these two lawyers fell below the objective standard
5 of reasonableness and that is the good cause to excuse the
6 untimely abuse of an excessive petition, and so the petition
7 ought to be dismissed as being untimely abusive and excessive.

8 THE COURT: Thank you.

9 Counsel?

10 MS. HURST: Good afternoon, Your Honor. Your Honor,
11 the standard that is applicable to what you're ruling upon
12 today and we are addressing today is found in the line of cases
13 involving Wiggins, Rompilla, Williams V Taylor, the ABA
14 standards and the reasonable professional norms in connection
15 with whether postconviction counsel is required to conduct an
16 extra record investigation as part of their duties in
17 representing a defendant in postconviction proceedings. The
18 case law is very clear. Counsel is required to conduct an
19 extra record investigation. That's the point of habeas
20 proceedings. So whether their plan is to start it the day they
21 are appointed or after ruling on a particular motion, that has
22 to be done in order for counsel to be effective. And the
23 reason is because if they do not conduct an extra record
24 investigation, then they do not have enough information in
25 front of them to make a strategic decision about the proper way

1 to proceed in representing a postconviction defendant in terms
2 of what to put into a petition. They cannot decide we've seen
3 enough -- we've heard enough information from one source, so we
4 are not going to pursue this line of mitigation any further.
5 They can't make that determination if they've done no
6 investigation into that particular line of investigation. And
7 in this context, we are talking specifically about Mr. Vanisi's
8 mental health and his history of mental health issues, his
9 history of -- his developmental history, his childhood history
10 that might have contributed to his mental health issues. His
11 behavior leading up to the offense and for the purposes of the
12 Rohan motion, his behavior in between the offense and the time
13 that that postconviction counsel began their interaction with
14 him. So in order for counsel to determine that, interviewing
15 family members would be unhelpful to their petition, they have
16 to conduct some interviews, that of family members, that inform
17 them, this line of proceeding is not going to be fruitful.
18 They did not do that in this case. The only people who were
19 interviewed were prior trial counsel. And, of course, you
20 can't ascertain whether the interviews or the investigation
21 done by prior trial counsel was effective if you don't see what
22 else was available that trial counsel failed to do. And the
23 easiest way that they could have done that was simply to start
24 by talking to the witnesses that trial counsel initially called
25 on Mr. Vanisi's behalf to make sure that trial counsel actually

1 obtained all of the relevant information they could have
2 obtained to effectively represent Mr. Vanisi. They did not do
3 that. Had they done that, then they would have learned the
4 majority of the information that we have put before this Court
5 and attached to the petition in the form of declaration from
6 these same witnesses that were originally presented by trial
7 counsel, but who were not asked about various -- the various
8 topics that we determined through postconviction counsel would
9 have been important to include in a petition. So, for example,
10 the domestic abuse that Mr. Vanisi experienced. The ongoing --
11 the abandonment issues. The ongoing bizarre behaviors that
12 were reflected in high school and which when he became an adult
13 turned into full-blown psychosis. There was a multitude of
14 signs and signals that would have been relied upon by a mental
15 health professional to come to an accurate diagnosis of
16 Mr. Vanisi's condition that could have been provided by the
17 very family members that trial counsel interviewed; however,
18 trial counsel failed to ask these witnesses anything other than
19 was Mr. Vanisi a nonviolent person. Was -- good-guy questions
20 about Mr. Vanisi. And that's what they presented at trial.
21 Mr. Vanisi was a kind person who hadn't been violent prior to
22 this act who then behaved really strangely at a wedding. That
23 was the -- they presented multiple witnesses, all of whom
24 repeated that same theme. And in fact, there was an objection,
25 because it was so repetitive. Good guy, strange behavior at a

1 wedding. Instead of hiring someone who could speak the Tongan
2 language, a translator who would assist in finding out in-depth
3 information about Mr. Vanisi's strange and bizarre behavior and
4 enable them to state this, using their own language in an
5 effective way that would enable them to communicate the strange
6 instances of wearing wigs and multiple personality disorder --
7 multiple -- behaving in a -- behaving as different characters
8 when he's wearing different wigs. Just this immensely bizarre
9 cache of strange and psychologically disturbing behaviors.

10 Instead of being able to draw that out using an interpreter and
11 find out exactly what made this person who had not had a
12 history of this type of behavior completely fly off the
13 reservation, trial counsel focused their investigation on good
14 guy stuff and did not do -- ask the probing questions of their
15 witnesses that they should have asked and could have asked, and
16 postconviction counsel could have easily started there. But
17 not only did they not start there, they didn't start at all.
18 And that's the problem in this case. You can't not perform an
19 investigation and be considered an effective postconviction
20 attorney, you just can't, under the case law, and under the ABA
21 standard. They were deficient. And there's just -- the
22 testimony does not reflect anything other than that.

23 Your Honor told them to file a petition, to be
24 prepared to file a petition when you gave your order on the
25 Rohan motion. And so at that time, I guess that was in

1 November, and the order came out several months thereafter.
2 They didn't do it. They didn't conduct the investigation when
3 you gave them that order. For whatever reason, they didn't,
4 and they should have. They were deficient. We can't -- we --
5 we -- there's nothing else in this record other than the fact
6 that they were deficient for failing to investigate because
7 they failed to believe that they really had to file that
8 petition on the day that you gave them the order on the Rohan
9 motion. So that was just plain old deficiency.

10 So the question before you at this point is not
11 deficiency, I would argue. I would argue that's a closed door.
12 They were deficient. The question before you is, was their
13 deficiency prejudicial to Mr. Vanisi? And I would suggest the
14 only way that question can be answered is with a full-blown
15 evidentiary hearing, because contrary to the way the State has
16 phrased the left-out information that we have revealed through
17 our investigation to be present, it's not just mitigation
18 information. The information that we have uncovered goes
19 towards mitigation, but it also goes towards the Rohan motion.
20 Had that -- had his history -- his mental health history and
21 all of the details of his bizarre behavior prior to -- leading
22 up to the crime, the break -- when he actually had the
23 full-blown psychotic break in his early 20s which is consistent
24 with forms of schizophrenia, the fact that he had challenges
25 prior to his full-blown schizophrenic break all of that

1 information would have been extremely relevant to Dr. Bitker's
2 analysis, but also to Dr. Amazaga's analysis. And experts can
3 only render as good of an opinion as the information provided
4 to them. So there's one expert I like to quote, he said,
5 "Garbage in, garbage out." If you don't provide -- if you
6 don't conduct the investigation to give the proper background
7 of the defendant to the expert, then the expert doesn't have
8 the information they need to rely upon to ascertain the full
9 brunt of the person's psychosis if they have it, or whether or
10 not they have psychosis. They cannot render an effective
11 conclusion without the type of information that we uncovered,
12 which was not even attempted by initial postconviction counsel.
13 That's the problem here in terms of counsel's Finger claim.
14 Once again, they had a limited amount of information to work
15 with on the record, but had they conducted a full-blown
16 investigation, then they would have had a wealth of
17 declarations and evidence to rely upon in support of their
18 Finger claim. This is not just about mitigation. In order to
19 conduct -- in order to be effective, you have to conduct a
20 full-blown investigation. In order to ascertain what claims to
21 present in a petition and in order to present those -- or an
22 adequate investigation -- I said effective, I meant an adequate
23 investigation -- in order to ascertain what claims should be
24 presented in a petition. They conducted no investigation short
25 of interviewing trial counsel which is the equivalent of simply

1 making a record based -- or it's barely above relying on the
2 record, because trial counsel's interviewing trial counsel is
3 going to be in connection with the record. But in order to
4 ascertain what more trial counsel should have done, you can't
5 ask trial counsel that and let it in there. You have to
6 actually go out and look at the -- interview the witnesses
7 yourself in order to ascertain whether or not trial counsel had
8 not -- had -- did not fully interview their witnesses or
9 whether they should have gone past their witnesses they
10 initially interviewed.

11 If I could just have a moment?

12 THE COURT: Yes.

13 MS. HURST: In terms of the State's argument that you
14 already indicated or made a finding that Mr. Vanisi's conduct
15 was due to willfulness and not due to psychosis, well, in this
16 context, you would be -- it would be problematic for you to
17 rely on that finding in this context, because in this context,
18 for the purposes of a Motion to Dismiss, the question is, if
19 all of the information we presented, was -- is in fact true,
20 you have to look at it from that -- it -- if all of the
21 information we presented is in fact true, then Mr. Vanisi's
22 conduct was not willful, it was the result of psychosis. And
23 if you want, I would suggest, to reject that his conduct was
24 the result of psychosis in the context of these proceedings,
25 then we would need to have a full-blown evidentiary hearing

1 where you would have the opportunity to have our experts
2 testify and -- and inform you as to why your original finding
3 of willfulness is not one that was fully informed, and it
4 wasn't fully informed because initial postconviction counsel
5 failed to conduct the necessary -- failed to conduct an
6 adequate investigation, and, in fact, conducted almost no
7 investigation except for talking to trial counsel. We need a
8 hearing on whether your findings were accurate in light of this
9 new evidence.

10 And I'm not so sure about the State's analogy that if
11 trial counsel chooses to focus all their time on a motion to
12 suppress and fails to prepare for trial, they are going to be
13 found to be effective. If they completely failed to
14 investigate their case prior to trial, and that's what we have
15 here, counsel focused -- they started off looking at the record
16 and writing claims, record-based claims, spent a good number of
17 hours on that. Then determined that they were unable to
18 communicate with their client, filed the Rohan motion, worked
19 for about eight hours on the supplemental petition while the
20 Rohan motion was being litigated. And then spent the remaining
21 four days after you denied their motion performing the bulk of
22 the rest of the writing of the supplemental petition. But
23 during no period did they actually conduct the necessary
24 investigation that is considered to be reasonable under
25 professional norms and under the case law. Even a minimal

1 investigation by writ counsel would have demonstrated the need
2 to investigate further. And, I would suggest that in this
3 case, one could even say that if you want to call their talking
4 to trial counsel a minimum amount of investigation, it should
5 have demonstrated to them the need to investigate further.
6 And, in fact, I would suggest that Mr. Qualls indicated that
7 indeed it did show them that they needed to investigate
8 further, they indented to investigate further they had plans to
9 and they simply erred in failing to do so by not paying
10 attention to this Court's deadlines. And that's deficiency.
11 And if there is any question of prejudice, I would suggest that
12 we need a full-blown hearing on that.

13 Thank you, Your Honor.

14 THE COURT: Okay. Thank you.

15 Mr. McCarthy, and we'll go until you're finished
16 arguing, so . . .

17 MR. MCCARTHY: Oh, you know I'm not going to take up
18 that much time.

19 There's -- first, it hasn't been established there was
20 no investigation. There was investigation here. Not as much
21 as they would have liked. That's not the standard. Assuming
22 the Strickland standard, that does not require all possible
23 investigation. And I suggest to you there never has been a
24 case in which there was all possible investigation. These
25 lawyers expected to prevail and expected that they would

1 therefore have more time. They allocated their resources based
2 on that anticipation. They were ultimately wrong. That's not
3 the standard either. The question is whether there is some
4 prevailing professional norm that requires taking a different
5 approach. I'd suggest that the preparation for the Rohan
6 decision -- I mean the Rohan motion was reasonable in its
7 scope. We now have more evidence, potentially, and when we are
8 done with this, there's still going to be more. Now, I think
9 Mr. Edwards described it. He said, "How do you do that? And
10 how is it ordinarily done here?" You get your psychologist,
11 your psychiatrist, and give them free reign. You say, "What do
12 you need from me in order to render an opinion about his
13 current competency? What do you need from me?" And you give
14 them that. There's no indication that that's not what they
15 did. So the -- the suggestion that counsel is ineffective in
16 failing to gather additional evidence for the Rohan motion, I'm
17 not sure that explains away -- I'm not sure that would overcome
18 the procedural bar anyway, but I suggest it hasn't been shown.
19 There's no indication that Mr. Edwards was wrong when he said
20 that's the way it's done. You ask the psychologist, the
21 psychiatrist, "What do you need from me in order to render an
22 opinion about his present competency?" And then you ask him
23 for the opinion. That seems to be a reasonable approach in the
24 prevailing professional norm.

25 And the question of insanity, once again, Your Honor,

1 I would remind you, none of these reports have been admitted
2 for the truth of the matter asserted. There is no evidence of
3 insanity before this Court. If there were, it appears to be
4 that the opinion would be something like, "He killed out of a
5 fixed delusion that killing a cop would restore his life to
6 normalcy, that he would feel better if he killed a cop."

7 That's not a defense. That's an Indictment. That's a motive
8 that the prosecutor would use. It's not defense at all.

9 In Finger, the Court told us fixed delusions, that if
10 true, would justify the crime. That's a defense. A fixed
11 delusion that that's not a cop car, but a watermelon, that
12 would be a defense. But a fixed delusion that I will feel
13 better if I simply hit this man in the head with a hatchet,
14 that's not a defense, that's an Indictment.

15 There is no standard that requires success. We do the
16 best we can with what we have. That is the appropriate
17 standard, and I suggest that's what has been shown. These
18 lawyers, like the trial lawyers, they did the best they had
19 with what was available. Among the things that was available
20 was time. While they didn't have as much as they anticipated,
21 but I suggest nothing requires counsel to have a crystal ball
22 in order to be effective. They hoped to have more time to
23 investigate. Nothing more is required.

24 As to the suggestion that this Court should schedule
25 yet another hearing to show prejudice in an effort to overcome

1 the procedural bar, today is the hearing. I also don't think
2 it's necessary. You can, based solely on this evidence, you
3 can examine the testimony of Mr. Qualls and Mr. Edwards and
4 determine that their representation in the postconviction
5 action did not fall below some prevailing professional norm,
6 some objectionable standard of reasonableness. Ultimately they
7 did not investigate as much as they would have liked to. I
8 don't deny that. That's not the standard. When you apply an
9 appropriate standard, you will find, Your Honor, that it has
10 not been proved that these lawyers were unreasonable and
11 therefore there is nothing that overcomes the procedural bars.

12 THE COURT: Counsel, there is nothing like a case
13 involving the death penalty to extenuate litigation. And when
14 I look at the case number here and it's a 98 case, and I think
15 back, I realize I've been dealing with it for a long time, and
16 there's parts of it that you reminded me of during this
17 presentation, how much delay there was at certain times. And I
18 think one of the things that kind of hit me the hardest was
19 four days to get this petition filed was just bizarre to me,
20 because I ordered in November for them to have it ready, and it
21 wasn't until April. I said, "Where is it? You've got to do
22 it."

23 So there's a way to look at all of the things that
24 happened, and I appreciate that you're doing the very best you
25 can for Mr. Vanisi.

1 I do want to review the testimony from Mr. Qualls and
2 Mr. Edwards. I want to think about that testimony in light of
3 your arguments.

4 These -- this case as well as all cases involving this
5 type of situation calls for the Court's complete evaluation of
6 your thoughts and arguments, and I will give it that. And I
7 appreciate your arguments today and efforts so far.

8 There will be a transcript prepared, I haven't talked
9 to the court reporter, I'm sure they are doing a
10 two-or-three-day turnaround, so if there is an issue you have
11 to provide the Court, because I will be using their transcripts
12 in reviewing their testimony as well as the notes as you have
13 seen I've been taking.

14 So thank you. I'll take it under advisement and I'll
15 advise you of my decision.

16 Court is in recess.

17 (Proceedings concluded.)
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1 STATE OF NEVADA

)

) ss.

2 COUNTY OF WASHOE

)

3
4 I, SUSAN CULP, an Official Reporter of the Second
5 Judicial District Court of the State of Nevada, in and for the
6 County of Washoe, State of Nevada, DO HEREBY CERTIFY:

7 That I am not a relative, employee
8 or independent contractor of counsel to any of the parties, or
9 a relative, employee or independent contractor of the parties
10 involved in the proceeding, or a person financially interested
11 in the proceedings;

12 That I was present in Department No. 4 of the
13 above-entitled Court on December 6, 2013, and took verbatim
14 stenotype notes of the proceedings had upon the matter
15 captioned within, and thereafter transcribed them into
16 typewriting as herein appears;

17 That the foregoing transcript, consisting of pages 1
18 through 81, is a full, true and correct transcription of my
19 stenotype notes of said proceedings.

20 DATED: At Reno, Nevada, this 9th day of December,
21 2013.

22 /s/ Susan Culp

23 SUSAN CULP, CCR No. 343

Declaration Of Scott Edwards

I, Scott Edwards, hereby declare as follows:

1. I am an attorney duly licensed to practice law in the State of Nevada. I was one of the attorneys appointed to represent Mr. Vanisi during his state post-conviction proceedings.

2. During my representation of Mr. Vanisi I was primarily concerned about his competency to proceed and moved for a stay of his state-post conviction proceedings in order to determine his competency. From that point forward I focused all my efforts on litigating Mr. Vanisi's competency issue.

3. To effectively ~~have~~ represented Mr. Vanisi it would have been necessary for me to have ~~been given~~ ^{the} time to conduct a complete investigation of all aspects of his case. Our plan was to investigate all of the issues that trial counsel were ineffective for failing to pursue.

4. To conduct a full investigation of Mr. Vanisi's case it would have been useful to travel Tonga for the purpose of interviewing life history witnesses, government officials and cultural experts. However, these types of undertakings are ~~never~~ ^{RARELY} funded by the court and I did not ~~bother to ask~~ ^{ask} because I knew it would have been a wasted effort.

5. I planned to conduct a thorough investigation into Mr. Vanisi's life and provide ~~competent~~ experts with an in-depth social history as well as all medical, employment and educational records I could obtain. I was aware of the witnesses in California, Utah and Reno. However, these plans never came to fruition.

6. Because I was focused on the competency litigation and ~~had no doubt~~ ^{believed} that we would win on the issue, I did not conduct an ~~investigation~~ ^{COMPLETE} on Mr. Vanisi's case. I had no strategic or tactical reason for not conducting the investigation. It was only the lack of funds and the refusal of the court to allow me enough time that prevented me from doing what was necessary. ^{FACTUAL} ^{COURT} ^{to COMPLETE A FACTUAL INVESTIGATION,}

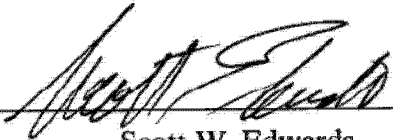
7. After the post-conviction judge denied my motion for a stay, she gave me an extremely short period of time to file an amended post-conviction petition. As a result I was left with no time to request funding for a thorough investigation and appropriate expert assistance to establish prejudice caused by Mr. Vanisi's trial counsel's ineffective ^{OR COMPLETE FACTUAL}

performance.

8.

IF I HAD SUSPECTED THE TRIAL JUDGE WAS GOING TO BORDER AN AMENDED PETITION SO QUICKLY, FACTUAL
If I were handling this case today I would not have postponed my investigation pending a competency determination. If I had made that decision I would have insisted that the post-conviction judge give me adequate time to conduct an investigation before filing an amended petition. *my*

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Washoe County, Nevada, on November 8th, 2013.



Scott W. Edwards

Law Offices of the Federal Public Defender
330 South Third Street, Suite 700

Franny A. Forsman
Federal Public Defender
District of Nevada

Las Vegas, Nevada 89101
Tel: 702-388-6577
Fax: 702-388-5819

John C. Lambrose
Chief, Appellate/Habeas Division
Michael Pescetta
Chief, Capital Habeas Division

Michael J. Kennedy
First Assistant

January 30, 2003

Scott W. Edwards, Esq.
1030 Holcomb Avenue
Reno, Nevada 89502

Re: Vanisi

Dear Mr. Edwards:

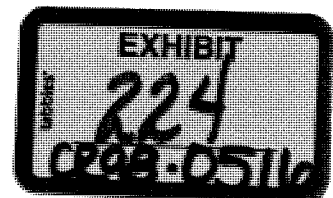
I enclose some materials I mentioned yesterday: the federal discovery motions in Williams and Bollinger and the amended petitions in Williams, Bennett, and Haberstroh. I also enclose an article from the CACJ Forum about a successful penalty phase presentation for a foreign client that I thought you might like to see. I don't know how much investigation was conducted to obtain the details of his life from native sources, but this is the sort of mitigation investigation that Ms. Holdman does.

Yours truly,



Michael Pescetta
Assistant Federal Public Defender

MP:rlc
enclosures



AA06222

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-o0o-

STATE OF NEVADA,

Plaintiff,

vs.

SIAOSI VANISI,

Defendant.

Case No. CR98-0516

Dept. No. 4

TRANSCRIPT OF PROCEEDINGS

DECISION

(TELEPHONIC)

TUESDAY, MARCH 4, 2014

RENO, NEVADA

Reported By: STEPHANI L. LODER, CCR No. 862

Captions Unlimited of Nevada, Inc. 775-746-3534

TELEPHONIC APPEARANCES:

For the Plaintiff:

TERRENCE MCCARTHY
Deputy District Attorney
Reno, Nevada

For the Defendant:

TIFFANI D. HURST
Deputy Federal Public Defender
Las Vegas, Nevada

GARY ALLEN TAYLOR
Deputy Federal Public Defender
Las Vegas, Nevada

1 RENO, NEVADA, TUESDAY, MARCH 4, 2014, 11:15 A.M.

2 -o0o-

3
4 THE COURT: Counsel, be sure to identify yourself
5 before you speak because I'm not sure the court reporter
6 will recognize all of your voices. This is the judge
7 speaking.

8 MR. MCCARTHY: This is Terry McCarthy. Good
9 morning, Your Honor.

10 THE COURT: Good morning.

11 MS. HURST: This is Tiffani Hurst. Good morning.

12 THE COURT: Good morning.

13 MR. TAYLOR: This is Gary Taylor.

14 THE COURT: Good morning. I wanted to first
15 thank you all for your presentation in this matter. I was
16 impressed by the work that was presented and the
17 thoughtfulness of the pleadings and the arguments.

18 Before the Court now is the State's motion to
19 dismiss which was filed back on July 15th, 2011, to
20 dismiss the post-conviction petition which had been filed
21 on behalf of petitioner on May 4th, 2011.

22 As you know, we had the motion to dismiss
23 initially submitted, the review by the Court, oral
24 arguments, and the Court allowed for an evidentiary

1 hearing on the issue of post-conviction counsels'
2 ineffectiveness.

3 I did move forward and hear those arguments and
4 had the hearing in December wherein it was petitioner's
5 opportunity to establish good cause to overcome the
6 procedural bars to the new petition and defeat the State's
7 motion to dismiss wherein they were arguing it was
8 untimely, abusive, and excessive.

9 After the hearing and the presentation of
10 evidence, the Court reviewed the petition as well as the
11 motion to dismiss and all related pleadings in this case
12 and took additional time to review the case law cited by
13 counsel for both sides and the testimony of the two
14 post-conviction attorneys, Mr. Qualls and Mr. Edwards,
15 specifically.

16 And I have reviewed those things again and
17 completed that review, and I'm ready to render a decision
18 today.

19 The petitioner must have shown that
20 post-conviction counsel fell below an objective standard
21 of reasonableness in their presentation and representation
22 on the petition for the petitioner when it was first filed
23 and the supplements that were filed by counsel in order to
24 allow the new petition to be heard and defeat the State's

1 motion to dismiss.

2 The Court agrees with the arguments presented by
3 the State in their pleadings and at the hearing that
4 counsels' representation in the post-conviction action did
5 not fall below prevailing norms. They did not act below
6 some objective standard of reasonableness in their
7 representation.

8 Among other testimony, Mr. Edwards testified that
9 he asked the psychological expert what the expert needed
10 from him as counsel in order to render a competency
11 opinion. This does appear to be reasonable and a
12 reasonable approach, and it is the best evidence before
13 the Court of what the prevailing professional norm is in
14 this regard in this area.

15 The Court also adopts the State's view of the
16 evidence with regard to the time spent preparing for the
17 post-conviction supplemental petition and hearings by
18 Qualls and Edwards, and, thus, I do not find that they
19 fell below the standard of professional norms in this
20 area.

21 The Court cannot find that petitioner has
22 established that any of Qualls' and Edwards' or Picker's
23 representation was unreasonable; and, therefore, it has
24 not been know shown that the representation fell below an

1 objective standard of reasonableness which would excuse
2 the untimely, abusive, and excessive petition before the
3 Court at this time.

4 Therefore, for the reasons I have just stated and
5 the arguments previously presented by the State more
6 fully, the motion to dismiss is granted, and the petition
7 before the Court is deemed to be untimely, abusive,
8 successive, and the Court finds no excuse for the delay.

9 Counsel for the State will prepare proposed
10 findings consistent with this decision as I've articulated
11 and adopted the State's position and provide to counsel
12 for the petitioner and the Court that proposed draft of
13 findings.

14 MR. MCCARTHY: I'll take care of that, Your
15 Honor, and I hope to have something out within a couple
16 weeks.

17 THE COURT: Okay. Thank you.

18 MR. TAYLOR: Would we have an opportunity to file
19 any objections?

20 THE COURT: Yes. Once he provides it to you, if
21 you find something in it that does not comport with my
22 determination, you certainly can file an objection.

23 It wouldn't be by way of rearguing your case, but
24 if you think there is something that is not appropriately

1 in that, you will have ten days to file your objections
2 once Mr. McCarthy provides it to you.

3 MR. TAYLOR: Thank you, Judge.

4 MS. HURST: Thank you, Your Honor.

5 THE COURT: Okay. Thank you, Counsel.

6 Appreciate your time.

7 MR. MCCARTHY: Okay. Bye.

8 THE COURT: Bye.

9 MS. HURST: Bye.

10 (Proceedings concluded at 11:21 a.m.)
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1 STATE OF NEVADA)
)
2 COUNTY OF WASHOE)

3
4 I, STEPHANI L. LODER, Certified Shorthand
5 Reporter of the Second Judicial District Court of the
6 State of Nevada, in and for the County of Washoe, do
7 hereby certify:

8 That I was present in Department No. 4 of the
9 above-entitled Court and took stenotype notes of the
10 proceedings entitled herein, and thereafter transcribed
11 the same into typewriting as herein appears;

12 That the foregoing transcript is a full, true
13 and correct transcription of my stenotype notes of said
14 proceedings.

15 DATED: At Reno, Nevada, this 4th day of
16 March, 2014.

17
18 /s/ Stephani L. Loder
19 STEPHANI L. LODER, CCR No. 862
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1 **2630**

RENE L. VALLADARES

2 Federal Public Defender

Nevada Bar No. 11479

3 TIFFANI D. HURST

Assistant Federal Public Defender

4 Nevada Bar No. 11027C

GARY TAYLOR

5 Assistant Federal Public Defender

Nevada Bar No. 11031C

6 411 E. Bonneville, Ste. 250

Las Vegas, Nevada 89101

(702) 388-6577

7 (Fax) 388-5819

danielle_hurst@fd.org

8 gary_taylor@fd.org

9 Attorneys for Petitioner

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

12 SIAOSI VANISI,

13 Petitioner,

14 vs.

15 RENEE BAKER, Warden, and
16 CATHERINE CORTEZ MASTO,
Attorney General of the State of
Nevada,

17 Respondents.

Case No. CR98-0516

Dept. No.: 4

(Death Penalty Habeas Corpus Case)

18 **OBJECTIONS TO PROPOSED**
19 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**
20 **DISMISSING PETITION FOR WRIT OF HABEAS CORPUS**

21 Petitioner SIAOSI VANISI objects to the proposed Findings of Fact,
22 Conclusions of Law and Judgment Dismissing Petition for Writ of Habeas Corpus
23 which respondent provided the court. These objections are based upon the specific
24 objections herein and the entire file in this matter.

25 DATED this 31st day of March, 2014.

26 RENE L. VALLADARES

Federal Public Defender

/s/ Tiffani D. Hurst

27 TIFFANI D. HURST

Assistant Federal Public Defender

/s/ Gary Taylor
GARY TAYLOR
Assistant Federal Public Defender
Attorney for Petitioner

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OBJECTIONS TO PROPOSED ORDER

Mr. Vanisi filed an amended petition for writ of habeas corpus on May 4, 2011. The state filed a motion to dismiss this petition. This Court ordered an evidentiary hearing limited to the testimony of appointed state habeas counsel, Scott Edwards and Tom Qualls. See PT 2/23/12 at 48. This Court held this hearing on December 5 and 6, 2013. On March 4, 2014, this Court orally granted the state's motion to dismiss during a telephonic hearing. This Court ordered Respondents to prepare a proposed order, and indicated that Mr. Vanisi would be allowed to submit objections to the proposed order which do not challenge the Court's resolution of the issues. Respondents submitted proposed Findings of Fact, Conclusions of Law and Judgment on March 24, 2014. In compliance with the limitations submitted by this Court, Mr. Vanisi hereby submits the following objections:

1. The proposed order indicates that initial state habeas "counsel did not present much mitigating evidence" Proposed Order at 2. This finding contradicts the testimony of state habeas counsel that they conducted no investigation and presented no mitigating evidence which was not already a part of the record in these proceedings. See PT 12/5/13 at 32 ("[W]e didn't ever complete a thorough investigation."); id. at 34 ("I don't recall talking to an investigator in this case."); id. at 42 ("There was no intention to file the supplement without any further investigation."); PT 12/6/13 at 21 ("We didn't start an investigation, put it that way. . . We didn't hire an investigator. We didn't do those things."). This Court's final order, therefore, should indicate that post-conviction counsel did not conduct any investigation or present any mitigation evidence.

2. The proposed order indicates that the Court "scheduled a hearing to allow Vanisi the opportunity to prove that his post-conviction lawyers were ineffective. . . . The only witnesses were post-conviction counsel, [Tom] Qualls and [Scott] Edwards." Proposed Order at 2. This finding is misleading. Upon scheduling the evidentiary hearing, this Court stated that "I am going to have a hearing on the

1 ineffective assistance of counsel claim as to whether or not it's been pled with
2 sufficiency and you can show it's sufficient to overcome the procedural time bar.
3 That's the only hearing that I'm going to allow on the issues presented in the motion
4 to dismiss or the petition at this stage." PT 2/23/12 at 46. Respondents' sought
5 clarification from this Court on what witnesses would be allowed: "I would envision
6 that a hearing with Qualls and Edwards . . . as witnesses and maybe Mr. Vanisi, if he
7 wanted to testify, but I can't imagine anybody else." In response, this Court stated
8 "[c]orrect." Id. at 48. This Court's final order, therefore should specify that this
9 Court ordered a hearing limited to the testimony of Mr. Vanisi and post-conviction
10 counsel.

11 CONCLUSION

12 For the foregoing reasons, Mr. Vanisi respectfully objects to the order
13 proposed by respondents and requests that this Court enter an order which is in
14 accord with the testimony and evidence currently before the Court and clearly
15 established federal law.

16 Respectfully submitted this 31st day of March, 2013.

17 RENE L. VALLADARES
Federal Public Defender

18 /s/ Tiffani D. Hurst
19 TIFFANI D. HURST
Assistant Federal Public Defender

20 /s/ Gary Taylor
21 GARY TAYLOR
Assistant Federal Public Defender

22 Attorneys for Petitioner
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AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned do hereby affirm that the proceeding document does not contain the social security number of any person.

Dated: March 31, 2014

RENE L. VALLADARES
Federal Public Defender

Tiffani D Hurst
TIFFANI D. HURST
Assistant Federal Public Defender

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Richard A. Gammick
Washoe County District Attorney
dgammick@da.washoecounty.us

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

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1 CODE #3880
RICHARD A. GAMMICK
2 #001510
P. O. Box 30083
3 Reno, Nevada 89520-3083
(775) 328-3200
4 Attorney for Respondents

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

8 * * *

9 SIAOSI VANISI,

10 Petitioner,

11 v.

Case No. CR98-0516

12 E.K. McDANIEL, WARDEN and
CATHERINE CORTEZ MASTO,
13 ATTORNEY GENERAL OF
THE STATE OF NEVADA,

Dept. No. 4

14 Respondents.
15 _____/

16 RESPONSE TO "OBJECTIONS TO PROPOSED FINDINGS OF FACT,
17 CONCLUSIONS OF LAW AND JUDGMENT DISMISSING
PETITION FOR WRIT OF HABEAS CORPUS"

18 Petitioner Vanisi objects to the finding that post-conviction counsel presented very little
19 mitigating evidence and insists that this court must find that none of the evidence presented in the
20 habeas corpus hearing had any mitigating value. "Mitigating" is defined so as to include virtually
21 everything, including mental health evidence. Indeed, the mere fact that Vanisi did not kill other
22 people can be seen as mitigating. Therefore, this court should decline to find that the habeas
23 corpus hearing included no mitigating evidence.

24 Vanisi contends that this court limited the manner in which he could prove that
25 post-conviction counsel was ineffective. There was no such order. The court may have envisioned
26 testimony from only counsel and perhaps from Vanisi, but there was no order that prohibited other

1 evidence relating to the performance of post-conviction counsel. Hence, there is nothing
2 misleading about noting that the only witnesses were attorneys Edwards and Qualls.

3 On the other hand, the proposed order is only that: proposed. If the court concludes that
4 the order does not comport with the court's true conclusions, then the court should change the
5 proposed order.

6 AFFIRMATION

7 The undersigned does hereby affirm that the preceding document does not contain the
8 social security number of any person.

9 DATED: April 7, 2014.

10 RICHARD A. GAMMICK
11 District Attorney

12 By /s/ TERRENCE P. McCARTHY
13 TERRENCE P. McCARTHY
14 Chief Appellate Deputy
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Tiffani D. Hurst, Assistant Federal Public Defender
Counsel for Petitioner Siaso Vanisi

/s/ EARLEEN RUSSELL
EARLEEN RUSSELL

1 CODE #1750

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

8 * * *

9 SIAOSI VANISI,

10 Petitioner,

11 v.

Case No. CR98-0516

12 E.K. McDANIEL, WARDEN and
13 CATHERINE CORTEZ MASTO,
14 ATTORNEY GENERAL OF
15 THE STATE OF NEVADA,

Dept. No. 4

16 Respondents.
17 _____/

18 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
19 DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

20 Petitioner Vanisi was represented by senior members of the Washoe County Public
21 Defender's office when he stood trial for the murder of Sgt. Sullivan of the University of Nevada
22 Police Department. The jury found Vanisi guilty and found aggravating circumstances and
23 imposed a sentence of death. Vanisi appealed but the judgment was affirmed. *Vanisi v. State*, 117
24 Nev. 330, 22 P.3d 1164 (2001). He filed his first post-conviction petition in 2002. This court
25 appointed counsel to represent him in that action. At first the lawyers were Marc Picker and Scott
26 Edwards. Picker later had to withdraw and Edwards assumed the helm. Edwards had been
assisted by Tom Qualls. Qualls had graduated from law school some years earlier but had not been
licensed to practice law. In the capacity of a para-legal, he had extensive experience in the capital

1 post-conviction arena. Once he was licensed, at the request of Edwards, he was appointed as the
2 second attorney in that first post-conviction case.

3 While the petition was pending, the lawyers filed a motion for an indefinite stay of the
4 proceedings, asserting that Vanisi was incompetent at that time. Eventually, the court ordered an
5 evaluation by one psychiatrist and one psychologist. The psychiatric reports differed somewhat
6 and the court ordered a hearing on the motion. Months before the hearing, the court alerted
7 counsel to be ready to file their supplemental petition. At the conclusion of the hearing, the court
8 found that Vanisi was in fact competent. Counsel then filed their supplemental petition.

9 One of the claims was that trial counsel were ineffective in failing to gather additional
10 mitigating evidence. However, counsel did not present much mitigating evidence and so that claim
11 was denied along with each other claim in the petition. Vanisi again appealed, and the Supreme
12 Court again affirmed, noting the evidence that Vanisi had the ability to cooperate with his lawyers
13 but that he was refusing to cooperate due to his mental illness. *Vanisi v. State*, Docket No. 50607,
14 Order of Affirmance (April 20, 2010). The remittitur issued on July 19, 2010.

15 Vanisi filed his second petition on May 4, 2011. The petition was filed beyond the time
16 allowed by NRS 34.726 and included claims that were raised before and that could have been
17 raised in prior proceedings, as prohibited by NRS 34.810. Vanisi sought to overcome these bars
18 by asserting, *inter alia*, that post-conviction counsel was ineffective in failing to adequately
19 investigate the claims that trial counsel failed to adequately investigate and present mitigating
20 evidence.

21 That assertion, if proved, might overcome the bars of NRS 34.810 and allow some of the
22 new claims to be heard. Accordingly, the court scheduled a hearing to allow Vanisi the opportunity
23 to prove that his post-conviction lawyers were ineffective. That hearing took place on December
24 5 and 6, 2013. The only witnesses were post-conviction counsel, Qualls and Edwards. Vanisi also
25 offered many documents in evidence. In each case, they were not offered or admitted for the truth
26 of the matter asserted.

1 The focus of the hearing was the performance of post-conviction counsel. It has long been
2 the rule of law in Nevada that, in a capital case, where appointment of post-conviction counsel is
3 mandated by NRS 34.820(1)(a), a procedural bar can sometimes be overcome if the petitioner can
4 plead and prove that the claim was not previously heard in a timely post-conviction action, due to
5 the ineffective assistance of counsel. *McKague v. Warden*, 112 Nev. 159, 165 n. 5, 912 P.2d 255,
6 258 n. 5 (1996). There first arises the question of what standard should be applied when
7 evaluating the claim of ineffective post-conviction counsel. The court concludes that the standard
8 is the standard described in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). As
9 the Court ruled in that case:

10 First, the defendant must show that counsel's performance was
11 deficient. This requires showing that counsel made errors so serious
12 that counsel was not functioning as the "counsel" guaranteed the
13 defendant by the Sixth Amendment. Second, the defendant must
14 show that the deficient performance prejudiced the defense. This
15 requires showing that counsel's errors were so serious as to deprive
16 the defendant of a fair trial, a trial whose result is reliable. 466 U.S. at
17 687.

18 As applied, the standard must be modified a bit, in that the issue is whether post-conviction
19 counsel made such serious errors that the court can conclude that post-conviction counsel was not
20 functioning as "counsel." The standard would require asking if the performance of the
21 post-conviction lawyers was so deficient as to deprive the petitioner of a post-conviction hearing
22 whose result is reliable.

23 In making that evaluation, "Judicial scrutiny of counsel's performance must be highly
24 deferential. It is all too tempting for a defendant to second-guess counsel's assistance after
25 conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after
26 it has proved unsuccessful, to conclude that a particular act or omission of counsel was
unreasonable." 466 U.S. at 698.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the
defendant must show that counsel's representation fell below an objective standard of

1 reasonableness.” 466 U.S. at 687.

2 So, as applied to the instant case, the petitioner would have the burden of demonstrating
3 that the specific acts or omissions of post-conviction counsel fell below some objective standard
4 of reasonableness as measured by prevailing professional norms. That is, the court must
5 determine if Vanisi has proved that professional norms for post-conviction counsel required
6 counsel to make some specific decision to undertake specific forms of investigation. The court
7 finds that Vanisi has proved only that different paths were available, but not that some objective
8 standard required counsel to take that path.

9 Attorney Edwards testified that he was aware that in many cases it would be wise to seek
10 out additional mitigating evidence, to support the claim that trial counsel was ineffective in failing
11 to seek out that same evidence. However, he testified that mitigation was not his priority. Indeed,
12 he testified that he thought such a claim was far from the most attractive claim in this case because
13 the aggravation was so great that it was unlikely that any amount of mitigation would be sufficient
14 to outweigh the aggravation. Thus, he testified, that he and Qualls determined to focus on
15 competency and on legal issues. They expected to prevail on the claim of incompetency and
16 expected to have additional time and resources to devote to less attractive issues. They would have
17 eventually looked at additional mitigating evidence, given sufficient time and resources, but the
18 focus was on competency and legal issues. The court is not persuaded that there is some objective
19 standard that required a different approach. Certainly some other post-conviction counsel could
20 take a different approach, but that is not the standard. In cases of appellate counsel, it seems clear
21 enough that appellate counsel need not present all non-frivolous issues but instead must make a
22 tactical decision on what issues to present. *Hernandez v. State*, 117 Nev. 463, 24 P.3d 767 (2001).
23 The court finds that should apply to post-conviction as well.

24 A claim based on additional mitigating evidence does not automatically lead to relief.
25 Instead, a reviewing court can re-weigh the aggravation and the mitigating evidence, both the old
26 and the new. *See Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2010). The standard could