

1 factual determination without considering these things, and
2 they're quite thick, so I'd like to enter them into the
3 record. I've just provided Mr. McCarthy a copy of these
4 records that I received Friday of last week.

5 Additionally, Karen Welsh from the Nevada State
6 Prison is here, and has made a copy of Mr. Vanisi's medical
7 records, and I'd like to enter those into the record, as
8 well. She can of course attest to their authenticity.

9 THE COURT: Why don't you mark what you want to
10 have the clerk mark.

11 MR. EDWARDS: Certainly. Your Honor, I've never
12 had an opportunity to review these records, and I don't think
13 Mr. McCarthy has, either. So what I'd be requesting is that
14 we have an opportunity to make copies of this entire medical
15 file. And review it, and if necessary, set this matter for
16 future argument about factual matters in the medical records,
17 which are now Exhibit A.

18 Exhibit B is the disciplinary records.
19 Mr. McCarthy has been provided a copy of those.

20 THE COURT: Okay, so let's start with the medical
21 file. Mr. McCarthy, are you going to stipulate to its
22 authenticity?

23 MR. MCCARTHY: Sure.

24 THE COURT: Okay. And you're offering it for

1 purposes of support for your motion for psychological
2 evaluation?

3 MR. EDWARDS: Yes, your Honor.

4 THE COURT: Mr. McCarthy, any objection?

5 MR. McCARTHY: Yes, your Honor. It's irrelevant.

6 It goes to the merits of the motion. And my position is --
7 my response to the suggestion that he is incompetent is: So
8 what. So --

9 THE COURT: Overruled. Exhibit A is admitted.
10 Counsel, we'll get to the argument --

11 MR. McCARTHY: We'll discuss that later.

12 THE COURT: Right, we'll get to the argument. So
13 Exhibit A is admitted, and the clerk will provide you with
14 copies of the exhibit. It will probably take about 10 days
15 to get those.

16 (Exhibit A admitted.)

17 MR. EDWARDS: Thank you, your Honor. I think our
18 motion raises the issue --

19 THE COURT: What about Exhibit B?

20 MR. EDWARDS: Exhibit B, I'd move for admission
21 of that, as well, your Honor.

22 THE COURT: Okay, with a continuing objection as
23 to relevancy, Mr. McCarthy, any other objection to Exhibit B?

24 MR. McCARTHY: I agree they're authentic, your

1 Honor.

2 THE COURT: Exhibit B is admitted for purposes of
3 today's hearing.

4 (Exhibit A admitted.)

5 MR. EDWARDS: Thank you.

6 THE COURT: Now, was there any evidence that you
7 wanted to to put on?

8 MR. EDWARDS: Not at this time, your Honor. In
9 addition to those records, you have the affidavits from
10 myself and Mr. Qualls that were attached as exhibits to the
11 original motion. According to the Rohan precedent, as far as
12 we can determine that was the type of evidence that was
13 presented to the federal court at the district court level as
14 a basis for their motion.

15 This is a novel legal issue here in Nevada, for
16 sure. And Mr. Qualls has done much of the legal research and
17 will talk to you about the case law and respond to the
18 State's position on that, but I think we need to set --
19 determine what you need to do at this point.

20 We cannot proceed on the merits of the habeas
21 petition without a determination on this motion. And given
22 the novelty, the newness of this issue, I think an adverse
23 ruling would compel interlocutory review as a duty on our
24 behalf. So we need to make a record so you can find out

1 whether or not, number one, Mr. Vanisi does have a competency
2 issue or not.

3 Whether or not factually there is a competency
4 issue with him I don't think has been established. It's
5 certainly been placed in the record and alleged by Mr. Qualls
6 and myself. The medical records, the disciplinary records
7 are corroboration of the allegations that we've made in the
8 affidavit.

9 So you need to determine, first of all, whether
10 or not there is factually a competency issue, and whether or
11 not the appropriate way to handle this is by granting a stay,
12 and evaluation and treatment pending a return to competency.

13 Now, I would submit to you, and that's the
14 purpose of our motion, that adopting the Rohan precedent is
15 the reasonable and appropriate precedent that should be set
16 here in Nevada. And we'd ask you to follow that.
17 Mr. McCarthy and the State disagree, obviously, and have
18 martialled authorities that we received Friday contrary to the
19 Rohan analysis. What you won't find in there is anything
20 from Nevada, or the Ninth Circuit, contrary to our position.

21 So we in this hearing ask to you follow the Rohan
22 precedent. Find that when competency is not there with the
23 habeas petitioner in a capital proceeding, that the
24 proceedings should be stayed, and the petitioner should be

1 evaluated, treated. And if there comes a time when he does
2 return to competency, then we can resume substantive
3 decision-making regarding his habeas claims.

4 THE COURT: Okay, thank you. Did you want to
5 wait, Mr. Qualls, and just respond to Mr. McCarthy?

6 MR. QUALLS: Yes, your Honor.

7 THE COURT: Okay, Mr. McCarthy.

8 MR. MCCARTHY: Your Honor, let me preface my
9 remarks by saying that I am not suggesting that the question
10 of competency is wholly irrelevant to this Court. I'm
11 suggesting it is not relevant to this proceeding, to this
12 habeas corpus action. If and when the State seeks a warrant
13 for the execution of Mr. Vanisi, then this Court should
14 properly inquire into the competency of Mr. Vanisi to be
15 executed.

16 This action, though, that this plaintiff
17 initiated, should go on.

18 Your Honor, the question of whether an alleged
19 incompetent person can proceed to maintain the habeas corpus
20 action presents a broader question of whether he is allowed
21 to petition the Court. Whether a person alleged to be
22 incompetent or shown to be incompetent may seek relief.

23 I suggest to you there are two reasons --
24 actually there are several reasons, for this Court to hold

1 that there is no bar to proceeding, even with the allegation
2 that Mr. Vanisi is incompetent.

3 I try generally to reduce things to a simple
4 level, so that I can understand it. Here is my simple
5 argument. An incompetent person has the same legal status as
6 a child. A child can petition for writ of habeas corpus. I
7 conclude, therefore, that an incompetent person also can.

8 In Calambro, we might get a little better vision.
9 The Court may recall the case Calambro, by and through
10 Calambro. The court said -- it was alleged in there that
11 Calambro was incompetent, and his next friend wished to
12 proceed on his behalf.

13 The court said upon a proper showing, yes, you
14 can proceed, if you show that the prisoner is incompetent,
15 then you can proceed. You can dispose of the habeas corpus
16 petition.

17 Now, we don't need a next friend in this case
18 because Mr. Vanisi was able to invoke the jurisdiction of the
19 court on his own. In a timely fashion, too. And we also
20 don't need to protect his interest, because we have two
21 lawyers charged by law with protecting his interest.

22 Although if there were some volunteer to step forward, that's
23 another question.

24 But I think the basic ruling of Calambro is you

1 can go forward and dispose of the habeas corpus claim without
2 the participation of the prisoner. Otherwise, there would be
3 no reason to inquire all those things that the Calambro court
4 inquired.

5 I agree with this much, the Rohan decision is
6 properly cited to you. That the Ninth Circuit said just what
7 Mr. Edwards says it says. I also suggest it's wrong and has
8 no application here.

9 It's very clear from Rohan, and more specifically
10 by the subsequent case of Laws -- did your Honor get the
11 additional authority that I sent today?

12 THE COURT: Yes.

13 MR. MCCARTHY: Thank you. In Laws, the Ninth
14 Circuit said they were not establishing a general
15 constitutional right to be competent during habeas corpus
16 proceedings. So it's clear to me that Rohan was
17 established -- we were talking federal procedural law, that
18 has no bearing here. I think the Rohan court had two
19 concerns; neither is applicable here.

20 First, in the context of rejecting the analysis
21 of another court, an Oklahoma court, the Ninth Circuit said
22 they would reach a different result if state law allowed for
23 a successive position when someone achieves competency.
24 Well, in Pellegrini and other cases -- which one was it --

1 Pellegrini and Ford, our supreme court has said yes, that is
2 in fact our law. That a showing of incompetency will
3 overcome a procedural bar.

4 So that concern of the Ninth Circuit has no
5 application here, because our state law would allow
6 successive petition.

7 And the second concern -- and I agree, this is a
8 legitimate concern -- they wanted to avoid the risk of the
9 execution of an incompetent person. A concern, your Honor,
10 is not the same as the existence of a law. A concern is
11 something for the legislature to consider when establishing
12 procedures governing this action. And they have.

13 Our legislature has enacted 176.425, and that was
14 interpreted in Calambro, and the upshot of those two is that
15 this Court can inquire into the competency of a person when
16 the State proposes to execute that person.

17 That day isn't here yet. I suggest that when
18 that day comes, the Court will still have the affidavit of
19 Mr. Edwards, and Mr. Qualls, and all this other evidence, and
20 can then make a proper inquiry. But that doesn't mean that
21 this habeas corpus action can't go forward. It can. We
22 learned that from Calambro, and their facts, that do allow
23 for a petition for writ of habeas corpus.

24 I also think that the Rohan reasoning is

1 strained, at best. The court notes the supreme court
2 precedent didn't support its conclusion, but also didn't
3 preclude its conclusion, and then used the lack of an
4 absolute prohibition as though it were a command.

5 Your Honor, that reasoning is wrong. Even though
6 they're only interpreting federal law, and we don't have to
7 follow that, I suggest you ought not to because their
8 reasoning is wrong.

9 One of the courts relied on by Rohan was a
10 Florida decision, Carter vs. State, in which the court held
11 that the post-conviction court should inquire into the
12 competency of the prisoner only if the pleaded claims involve
13 specific factual matters that require the testimony of the
14 prisoner. I am going to get into that in a few minutes,
15 because there are no such claims before this Court.

16 In Wisconsin, the Rohan court relied on the
17 Wisconsin decision, State vs. Debra E. And that court said
18 there should not be a stay of the proceedings. But this
19 court may inquire into the competency of the prisoner kind of
20 as an aid to future proceedings, but they should not stay the
21 habeas corpus action. Why the Rohan court found that to be
22 authority for issuing a stay, I don't know.

23 Commonwealth vs. Haag, a Pennsylvania court,
24 indicated there is no right to be competent in

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1 post-conviction proceedings. There may been a need for a
2 next friend to initiate the proceedings, but as I indicated,
3 Mr. Vanisi himself initiated the proceedings in a timely
4 manner.

5 Ex Parte Mines, the Texas criminal appeals court
6 reached the same conclusion. We now have O.K. vs. George
7 Bush, et al. And it's interesting, it involves one of the
8 prisoners in Guantanamo Bay who was taken in Afghanistan.
9 And among other things, he claimed the right to be competent
10 in order to assist in his habeas corpus action to inquire
11 into the cause of his confinement in Guantanamo Bay. And the
12 District Court of D.C. said no, there is no such right to be
13 competent. And they reviewed Rohan, and rejected it, said
14 Rohan is wrong.

15 There is the Washington case, your Honor, I
16 already cited to the Court, indicating there is no right to
17 be competent. The right at stake, when we're talking about
18 competency, is the right to defend oneself against a criminal
19 charge. That's done. The Washington court I think said it
20 most clearly, it would be unfair. If these proceedings have
21 to be stayed because of the allegation of incompetence, the
22 conclusion one reaches is that another incompetent prisoner
23 is prohibited from seeking relief. And the Washington court
24 said that just can't be. I suggest the Washington court was

1 right.

2 Your Honor, I would mention this action has been
3 pending for years, now. The original petition has no claims.
4 There are no claims pending before this Court in this habeas
5 corpus action. Today is the date for a hearing. There still
6 hasn't been a supplement. So there are no claims pending
7 before this Court. In the original petition Mr. Vanisi said
8 three or four times in part 20 of his petition, "I don't know
9 what my claims are."

10 That was three and a half years ago. There's
11 been lawyers appointed since then, and we still don't know
12 what the claims are. The judgment and conviction was five
13 years ago, the order of affirmance was three and a half years
14 ago. The petition was filed January 18th, 2002, coming up on
15 three years. Mr. Edwards and Mr. Picker were appointed May
16 11th, 2002, two and a half years ago. Additional time was
17 allowed for the supplement until October 1, 2002, more than
18 two years ago.

19 Three weeks after that deadline, counsel sought
20 another extension. This Court granted time to April 1st,
21 2003, two years ago. That time has come and gone. On
22 December 23rd of 2003 this Court appointed Mr. Qualls -- this
23 Court had previously authorized Mr. Edwards to associate with
24 Mr. Qualls, then his status changed. Congratulations, Tom.

1 That changed last December.

2 Since then, nothing. Nothing. Since this case
3 has been pending, there has been nothing happening until two
4 weeks ago, when we have this motion.

5 Your Honor may notice in the affidavit supporting
6 the motion, Mr. Qualls and Mr. Edwards said the last thing
7 they did was in June.

8 In June they went to the prison. In June they
9 saw the behavior of their client, and still did nothing until
10 two weeks ago, when they suggested that perhaps he's
11 incompetent, and that the hearing ought to be stayed.

12 I suggest that there is no need for a hearing,
13 and this case ought to be done, and it ought to be done now.
14 This Court ought to recognize -- this Court ought to deny the
15 motion for a stay, because there is no meaning to the claim
16 that Mr. Vanisi is incompetent. We're ready to go forward.

17 Upon doing that, the Court ought to recognize
18 that the pleadings are closed. The time to supplement has
19 long since passed. The Court ought to recognize there are no
20 claims to rule upon, and dismiss the petition.

21 The Court can then take up the question of the
22 competency of Mr. Vanisi if and when the State applies for a
23 warrant for his execution, whether by application of the
24 warden or the State or sua sponte. I believe Calambro says

1 this Court can do it sua sponte. I further suggest that you
2 ought to.

3 But as for today, today this Court ought to deny
4 this motion for a stay because it has no legal significance,
5 move on to the habeas corpus petition, and dismiss it,
6 because there are no claims before this Court. Thank you.

7 THE COURT: Thank you. Mr. Qualls.

8 MR. QUALLS: Your Honor, I'll take a cue from
9 counsel for the State and start by trying to simplify this.

10 We are relying upon federal constitutional rights
11 in the instant motion, and it's base upon Rohan. Rohan
12 recognizes a number of overlapping rights in this instance,
13 including due process rights under the Fifth and Fourteenth
14 Amendments; the right to counsel under the Sixth Amendment;
15 and the right not to be executed under the Eighth Amendment.

16 I don't think in this instance those can really
17 be parsed out. I know the State has spent a lot of time
18 talking about, well, there's no execution order pending, but
19 I don't think you can look at that in a vacuum. The reality
20 is, jumping a little bit forward, if this were to be
21 dismissed right now, today, then there would be an execution
22 order, and then it would be in violation of the Eighth
23 Amendment, and other case law says you can't execute somebody
24 that's possibly or is incompetent. Indeed, Rohan recognizes

1 that the right at issue is a structural error. Being a
2 fundamental breakdown in the processes here, in his
3 guaranteed constitutional rights.

4 Significantly, the Rohan court discusses not only
5 the importance of Mr. Vanisi's right to understand the
6 proceedings that we are in, and the circumstances in which he
7 is in, the death sentence which is hanging over his head, but
8 it also recognizes his right to be able to rationally
9 communicate with Mr. Edwards and myself, and to rationally
10 understand where he is. Not just in decision-making, but in
11 communication with us in the preparation of the materials to
12 be filed, the claims to be brought before this Court.

13 Rohan explains that the rights that it is talking
14 about -- even though we have discussed that this is kind of a
15 new issue for the Nevada Supreme Court or in the Nevada
16 courts -- the rights that are discussed, and the right to
17 competency that extends after trial, go all the way back to
18 the writings of Blackstone in the 1700s. So this is not a
19 new right. I mean, the State at one point in its response
20 cites to Blackstone, but only cites a portion of the quote,
21 saying that, you know, he has a right to be competent at
22 trial.

23 Rohan goes into an extensive analysis, saying,
24 you know, that the entire proceedings, from the arrest

1 through -- and the trial, through the execution of the
2 judgment, there has to be -- there's a competency
3 requirement. And it talks about the incorporation of the --
4 into the common law, and now into our Constitution.

5 Briefly, as for some of the authorities relied
6 upon by the State. The Ninth Circuit case of Laws v.
7 Mamarque. It's not exactly on point, but what it actually
8 has to do with is the tolling of the one year time period
9 under a DEPA.

10 However, interestingly, it does cite Rohan as
11 recognizing a due process right to competency proceedings.
12 Specifically, if I can read into the record. "The firmly
13 entrenched common law right to competence persisting beyond
14 trial is a strong indicator of the constitutional due process
15 right. Competency in post-conviction proceedings or to stay
16 of proceedings until competence is regained." It's citing
17 Rohan at page 813.

18 The Florida and Wisconsin cases that the State
19 discusses, Carter v. State and State v. Debra E., they're
20 actually in accord with Rohan and cited favorably therein.
21 Hews, the Washington case, is -- it's a 1987 case, out of an
22 equal state court. I don't think it's -- it may be
23 persuasive on this score, certainly not controlling.
24 Certainly not controlling over a recent Ninth Circuit case

1 that is interpreting federal constitutional rights, which is
2 what we are alleging.

3 As for Commonwealth v. Haag, the Pennsylvania
4 case; Fisher v. State, the Oklahoma case; and Ex Parte Mires,
5 the Texas case, the Rohan court considered all those and
6 expressly rejected the reasoning, or said they were in
7 apposite to the issue at hand.

8 Interestingly, the State brings up the very new
9 case of O.K. v. Bush, a D.C. circuit case which, as counsel
10 for the State explained, does deal with detainees in
11 Guantanamo. Interestingly, it has only to do a detainee's
12 right to competency -- a detainee who has not been charged
13 with any crime, and that person's right to a competency
14 proceeding.

15 So it's not on point at all, as far as that
16 concerns. But in footnote 14 -- and I can read this into the
17 record as well -- that court expressly recognizes, "There are
18 three narrow exceptions to the general rule that a habeas
19 petitioner does not have a right to determination of mental
20 competency. First, the Ninth Circuit has recognized a
21 statutory right to a determination of mental competency in
22 the habeas review of a death penalty conviction." That's in
23 Gates v. Woodford, which is Rohan. "The court indicated that
24 a determination of mental incompetency in this context will

1 stay any ongoing habeas proceeding and delay the petitioner's
2 execution."

3 That's the case that the State relies upon there.

4 As for the Calambro decision, again, I think
5 Calambro is in apposite, and doesn't really inform the
6 decision of the Court, here. It involves a mother pursuing
7 habeas relief as a next friend. Rohan, for one, specifically
8 addresses the need for a next friend in an instance where a
9 petitioner is incompetent. The next friend isn't going to do
10 any good, for one thing, because if the next friend is not
11 able to communicate with the petitioner any more than the
12 attorneys were, we're right back where we're started from.

13 Additionally, Calambro involved competency to
14 waive the right to an appeal, which is again in apposite to
15 this case, and in apposite to the precise holdings of Rohan.

16 Calambro did also deal with, as the State
17 mentioned, NRS 176.425. The problem with that, as it regards
18 a stay, is it only stays the execution, and also it requires
19 that the director of the department of prisons petition for
20 that.

21 Again, that's not the instance here, and that's
22 not on point with Rohan, and that's not what we're doing.

23 There are other statutes that provide for stays,
24 again, only of execution, in Nevada. NRS 176.415 sub 3, as

1 well as NRS 176.486 and 487. But again, that's not the exact
2 issue at hand, here.

3 As to any standard of competence, under the
4 circumstances, I -- that's somewhat premature, although we
5 have introduced some documents, our own affidavits and the
6 prison records, for the purposes of today's argument, I think
7 any argument over whether he meets any standard of competence
8 must be reserved for another day.

9 Additionally, and as is reflected in the medical
10 records provided today, we have an issue perhaps of forced
11 medication, which may become a bigger issue at another time.
12 It should be noted for the record that Riggins v. Nevada, out
13 of U.S. Supreme Court 1992, held that the Sixth and
14 Fourteenth Amendments may be violated if a petitioner or a
15 prisoner is forced to be medicated in order to achieve
16 competence.

17 The bottom line is that even if the State says
18 Rohan makes no sense, I think Rohan makes perfect sense. I
19 think what doesn't make sense is to follow the State's
20 position in this case, which is that this Court should just
21 dismiss the petition, and then again, we're in a position
22 where an incompetent prisoner is going to be executed.

23 Not to mention all of the exhaustion problems
24 that that would create. As this Court is aware, if and

1 probably when this case would end up in a federal court, it
2 would end up right back here to actually address the
3 competence issues once again. So we're wasting time,
4 resources, and whatnot, from that standpoint.

5 Simply dismissing at this point has absolutely no
6 value, and is counterproductive.

7 With regards to Mr. Edwards' and my decision not
8 to file the supplement at this time -- let me back up a
9 little bit. He commented on the fact that we went to visit
10 Mr. Vanisi in June, that's correct. After that time, we have
11 been trying to -- we wrote letters to try to get certain
12 records from the prison, and got no response there. And so
13 then resorted to subpoenas to try to bring those. Some of
14 them didn't get there until today, so we haven't been able to
15 review those.

16 Additionally, again, this kind of has been kind
17 of a complex legal issue that we've been trying to sort out.
18 Our position at this point is that filing a supplement would
19 be counterproductive and counterintuitive to the motion that
20 we have today. It might also foreclose the ability for us to
21 either expand upon claims that we already have, based upon
22 our interaction with Mr. Vanisi. It would also prevent us
23 from perhaps adding additional claims that might arise from
24 rational communication with Mr. Vanisi.

1 As to any mention of successive petitions that
2 the State brings up, that's one of the reasons why we're
3 seeking a stay right now. So we don't have to fall into the
4 procedural default situation of a successive petition or of,
5 as I mentioned, a state exhaustion problem at federal
6 court.

7 MR. EDWARDS: Your Honor, may I be heard on one
8 collateral aspect of this?

9 THE COURT: You --

10 MR. EDWARDS: I'm not going to discuss the law, I
11 left that to Mr. --

12 THE COURT: It's not really fair to Mr. McCarthy
13 if you have double time.

14 MR. EDWARDS: It just relates to this impression,
15 perhaps, that maybe Mr. Qualls and myself have not been
16 diligent in our efforts to represent Mr. Vanisi in this
17 proceeding. And I don't think that's what the Court's
18 perception is, but to dispel that notion, we will submit a
19 memorandum pursuant to Supreme Court Rule 250 that will
20 detail each and every action that we've taken in this case.
21 Our billings up to this point in time have been the framework
22 for that 250 memorandum, and we'll do that.

23 But this relates to the fact that we
24 intentionally did not file that supplement. This isn't some

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1 oversight or ineffective behavior on our part. And if that
2 decision is tactically wrong and procedurally incorrect or
3 the basis for a dismissal of the petition, then we're at
4 fault. But that was a deliberate determination made after
5 much research by Mr. Qualls and I.

6 There have been a lot of attorney hours expended
7 on the development of the substantive claims that will
8 eventually be presented to this Court in the event we're
9 required to go forward. But this as a preliminary matter has
10 to be addressed, this Rohan issue.

11 And I don't know whether you have everything you
12 need in front of you to do that right now. I know you
13 certainly haven't had the opportunity to consider some of the
14 factual record that is now just being presented to you
15 relating to the competence issue.

16 But I wanted to make a record on that, as
17 counsel -- you will be presented soon with the basis for the
18 250 memorandum, so you can see that it's not like we haven't
19 done anything in this case.

20 THE COURT: Okay.

21 Mr. -- were you through, Mr. Qualls?

22 MR. QUALLS: I would just conclude as I started
23 by reminding the Court that our motion is based upon the
24 overlapping federal constitutional rights, Fifth, Sixth,

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1 Eighth and Fourteenth Amendments, and that's what we're
2 standing by. And we're saying the Rohan court's
3 interpretation of those is controlling on the courts in the
4 State of Nevada.

5 THE COURT: Did you have anything further,
6 Mr. McCarthy?

7 MR. McCARTHY: If I may.

8 THE COURT: You may.

9 MR. McCARTHY: In the law of the case subsequent
10 to Rohan, the Ninth Circuit specifically denied they created
11 a general constitutional right to be competent in a
12 post-conviction action. They denied it. The only concern
13 that court had was the possibility of the execution of an
14 incompetent person. Our law, our state law, provides a
15 different means for addressing that concern.

16 There is no general constitutional right to be
17 competent. Calambro says, state law says, go forward. Even
18 with an incompetent petitioner. I'd ask the Court to do just
19 that.

20 THE COURT: With regard to the motion to stay the
21 habeas and transfer the defendant to Lakes Crossing for
22 evaluation and treatment, I'm going to deny that in part,
23 grant it in part. I am going to stay the proceedings to find
24 out if Mr. Vanisi is incompetent. Only for an evaluation. I

1 am not ordering him transferred to Lakes Crossing or anywhere
2 else; the evaluation will take place at the Nevada Department
3 of Prisons.

4 And I am reserving any ruling with regard to the
5 remainder of your request, whether or not a permanent stay
6 pending competency, et cetera. That's very premature, and
7 I'm not willing to do that.

8 If -- if I deny your request, we still have to
9 know if Mr. Vanisi was competent. Because, as Mr. McCarthy
10 alleges, if he was incompetent there may be a right to
11 successive petitions. But we don't know he's incompetent.

12 I am familiar with Mr. Vanisi, and I'm very
13 familiar with his activities at the trial time, and he was
14 evaluated and competent. So I'm not convinced that
15 Mr. Vanisi is incompetent. I think you've made a lot of a
16 record, but I'm not convinced that he's incompetent to
17 proceed, and I think we need to know that. And any court
18 reviewing this needs to know that. So it is appropriate to
19 make that determination.

20 I also want to find out if he's competent to
21 serve as a witness, that was an issue raised by the State.
22 We might as well have one evaluation. One whether or not
23 he's competent to assist counsel, and assist with his habeas;
24 and two, is he competent to be a witness. Then we know.

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1 If you want to move forward at that point,
2 depending on my ruling, we'll still have that determination
3 from a psychologist or psychiatrist. We need two people to
4 evaluate him. I'll enter that order, ordering that two
5 people proceed to evaluate Mr. Vanisi, and we will get a date
6 for that return of evaluation.

7 The long-term issues, we aren't even close to. I
8 know that the defense has argued that we would be back here
9 immediately. The State somewhat argued that, too, that I'd
10 be back here immediately, depending on what happens here with
11 the writ. I want to resolve the writ on any merits that
12 exist. So I'm inclined to probably not stay, even if
13 Mr. Vanisi is incompetent, but order the successive petition
14 be filed. I'm inclined to do that, I haven't decided for
15 sure, but that is my inclination.

16 MR. QUALLS: Your Honor, again, supplemental
17 petition? I apologize, you said --

18 THE COURT: Supplemental.

19 MR. QUALLS: You said successive petition.

20 THE COURT: There's two things we're concerned
21 with. One, if you were unsuccessful on the petition or the
22 supplement, and then later want to come back with a
23 successive petition.

24 Two, whether or not you're going to be allowed to

1 or ordered to file a supplement in spite of Mr. Vanisi's
2 either unwillingness to cooperate with you or inability. I'm
3 not convinced it's an inability, but I need a psychologist
4 and I want to make a record. So I think it's important to
5 have the record clear as to what's going on, here. Whether
6 or not it's an inability, or an unwillingness.

7 So counsel for Mr. Vanisi will prepare an order
8 ordering psych evaluations, ordering they take place at the
9 institution where he's housed, and we'll get a date and time
10 for return on those evaluations only. Does your client wish
11 to waive his appearance at the hearing on the psych evals?

12 MR. EDWARDS: I have not addressed that with him,
13 your Honor.

14 THE COURT: Then we'll just keep him on a
15 schedule unless you waive it.

16 MR. EDWARDS: Yes.

17 THE CLERK: January 27th at 2:00 p.m.

18 MR. EDWARDS: Your Honor, I'll draft this order
19 and present it to Mr. McCarthy for his review. I should have
20 it to you by tomorrow.

21 THE COURT: So I'm not granting any of the parts
22 of your motion with regard to the permanent stay or transfer
23 or anything of that. Mr. McCarthy, any questions?

24 MR. MCCARTHY: I do, your Honor. I would ask

1 that the Court also order any potential supplemental claims
2 that are not dependent on the incompetency of Mr. Vanisi, any
3 of those that have been available without his cooperation, be
4 filed now. It's been years. How about next week.

5 MR. QUALLS: Your Honor, I can address that as I
6 believe Rohan addresses that, which is it would be purely
7 speculative, under our argument and under the reasoning of
8 our argument, to decide which ones are -- which ones he is or
9 is not able to assist us with.

10 In the Rohan case, as a matter of fact, the
11 district court had the next friend submit a brief under seal
12 explaining exactly that, which claims the next friend needed
13 additional assistance from the petitioner on.

14 And the Ninth Circuit said that's ridiculous,
15 it's completely speculative as to what the petitioner would
16 or would not, if they were competent, be able to assist with.
17 So I'm going to oppose the State's motion.

18 THE COURT: I'm not going to make you file
19 anything, but I'm ordering you to prepare it, so that
20 depending on my ruling at the next hearing you'd be prepared
21 to file it immediately.

22 MR. EDWARDS: Very good, your Honor.

23 MR. QUALLS: Thank you.

24 THE COURT: Counsel, anything further?

1 MR. McCARTHY: I understand.

2 THE COURT: All right, court is in recess.

3 (Proceedings concluded.)

4 --o0o--

1 STATE OF NEVADA,)

2)

3 COUNTY OF LYON.)

4

5

6 I, MARCIA L. FERRELL, Certified Court Reporter of the
7 Second Judicial District Court of the State of Nevada, in and
8 for the County of Washoe, do hereby certify:

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

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

16 Dated at Fernley, Nevada, this 23rd day of
17 November, 2004.

18

19

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Marcia L. Ferrell

21

Marcia L. Ferrell, CSR #797

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RONALD W. LONGTIN, JR.

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JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-oOo-

SIAOSI VANISI,)
Petitioner,)

vs.)

CASE NO. CR98P0516
DEPARTMENT NO. 4

THE STATE OF NEVADA,)
Respondent.)

TRANSCRIPT OF PROCEEDINGS

IN CHAMBERS HEARING

WEDNESDAY, JANUARY 19, 2005

3:45 P.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

SA01954

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A P P E A R A N C E S

For the Petitioner:

SCOTT EDWARDS
Attorney at Law
1030 Holcomb Avenue
Reno, Nevada

For the Respondent:

OFFICE OF THE DISTRICT ATTORNEY
BY: TERRENCE McCARTHY
Deputy District Attorney
Washoe County Courthouse
Reno, Nevada

1 RENO, NEVADA; WEDNESDAY, JANUARY 19, 2005; 3:45 P.M.

2 -oOo-

3
4 THE CLERK: Gentlemen, this is Marcie, the Court
5 Clerk. How are you today?

6 MR. EDWARDS: Hi, Marcie.

7 MR. McCARTHY: Fine.

8 THE CLERK: I think I have Mr. Edwards and
9 Mr. McCarthy; is that correct?

10 MR. McCARTHY: Yes, ma'am.

11 THE CLERK: Is that everybody?

12 MR. EDWARDS: That is us.

13 THE CLERK: Here is the Judge.

14 THE COURT: Gentlemen, we are convened in chambers
15 with a court reporter to discuss logistics issues with regard
16 to Siaosi Vanisi.

17 MR. EDWARDS: Uh-huh.

18 MR. McCARTHY: Uh-huh.

19 THE COURT: I received a faxed letter from
20 Dr. Amazaga who is doing one of the psychological evaluations,
21 and he's requesting access to Siaosi Vanisi's medical record
22 for about an hour at the prison. But before I granted that and
23 issued an Order, I wanted to be sure neither of you had any
24 objection.

1 MR. EDWARDS: Scott Edwards here, Your Honor. First
2 of all, I don't have any objection to it. And you did in fact
3 put that in your Order of December 27th. I went back and
4 looked at that.

5 THE COURT: Okay.

6 MR. EDWARDS: It says pursuant to this Order, the
7 experts appointed pursuant to this Order should be given access
8 to review all medical records of the Petitioner held by the
9 Department of Corrections.

10 THE COURT: Well then--

11 MR. EDWARDS: When I spoke to Dr. Bittker, he called
12 day before yesterday, he was down there, they were
13 cooperating. They were providing him all the medical records.

14 THE COURT: Okay. We'll just make sure Dr. Amazaga
15 has that Order in hand.

16 I will direct the clerk to fax a copy of the Order to
17 Dr. Amazaga so he has another copy of it and make sure that he
18 has it in hand when he goes down to do the evaluation.

19 MR. EDWARDS: Great.

20 MR. MCCARTHY: By the way, the State has no interest
21 in this.

22 MR. EDWARDS: No dog in this hunt.

23 THE COURT: The other issue is, I just wanted to let
24 you both know, although I ordered the medical records be copied

1 and given to you that were provided in court, it hasn't quite
2 happened yet, but the clerk will get then to you very soon.

3 MR. McCARTHY: I have every confidence in the court
4 clerk.

5 MR. EDWARDS: Thank you, Your Honor.

6 THE COURT: The last thing that has come to my
7 attention, Dr. Bittker has communicated with the court clerk
8 and asked her if I am requiring his attendance at the hearing
9 that is scheduled next week.

10 MR. EDWARDS: I told him that it would most likely be
11 required, Your Honor.

12 MR. McCARTHY: I think, from my standpoint, it kind
13 of depends on what he says in the report. If he says the guy
14 is nuts, I am going to want to cross him.

15 MR. EDWARDS: If he said he isn't, I will probably
16 want to cross him.

17 THE COURT: Do one of you want to subpoena him, or do
18 you want or are you requesting that I enter an Order that he
19 appear?

20 MR. EDWARDS: Again, Your Honor, your Order before
21 said, "And appear at the hearing on January 27th at 2:00 P.M.,
22 and testify to the findings if requested by the Court or one of
23 the parties."

24 THE COURT: So that is my question.

1 MR. EDWARDS: I request it.

2 THE COURT: Okay.

3 MR. EDWARDS: I think Terry does too, right?

4 MR. MCCARTHY: Sure. Sure.

5 THE COURT: You want Dr. Amazaga and Dr. Bittker at
6 the hearing?

7 MR. EDWARDS: I do. And, Your Honor, here is kind of
8 part of my beef here is the reports are going to be provided
9 right on the eve of the hearing.

10 THE COURT: Right.

11 MR. EDWARDS: So I will kind of have to digest them
12 on the run. I might miss something that I can address at the
13 hearing if they are there.

14 THE COURT: Okay. What I am going to do then is we
15 will let the doctors know that they are needed, and I am going
16 to stagger them by an hour.

17 MR. EDWARDS: Great.

18 THE COURT: Then if we end up having to recess for a
19 few minutes, because it doesn't take that long, that is fine.
20 It is better than having somebody sit out there for an hour,
21 hour and a half.

22 MR. EDWARDS: That is great, Your Honor. Good idea.

23 THE COURT: Okay. Now the doctors are going to be
24 submitting requests for payment on that.

1 MR. EDWARDS: Yeah.

2 THE COURT: Which is the issue. If you are asking
3 for it, Scott, on both of them, then it comes out of the
4 Court's budget ultimately, because you have to do an
5 application for the court to pay for it.

6 If Mr. McCarthy is asking for it, it gets to come out
7 of--

8 MR. McCARTHY: The County.

9 THE COURT: Both places it comes from the County. It
10 is just whether it comes out of Dick Gammick's budget or the
11 Court's budget.

12 MR. EDWARDS: Judge, I think--

13 THE COURT: Are you post conviction?

14 MR. EDWARDS: I think it comes out of the State
15 Public Defender's budget, because they are the ones that pay me
16 for it. And this is a post conviction proceeding, and they
17 have the budgetary responsibility for it. I have had him paid
18 out of that before, Dr. Bittker, in another case.

19 THE COURT: Okay. Just make sure when Dr. Bittker
20 submits his bill to you, that you submit an order that
21 reflects it should be paid from the State Public Defender's
22 office.

23 MR. EDWARDS: Okay.

24 THE COURT: Then it won't be a problem.

1 MR. EDWARDS: I will do that.

2 THE COURT: What is going to happen now is we will
3 get a copy of the Order. Maybe, Mr. Edwards, it might be
4 quicker if you faxed that over to Dr. Amazaga.

5 MR. EDWARDS: Sure, I can do that.

6 THE COURT: Okay. And then we will notify Dr. Amaaga
7 and Dr. Bittker they do need to be at the hearing next week.

8 And I think that is all the business except for at
9 the conclusion of the hearing, Mr. Edwards, you will submit the
10 application for payment for Dr. Bittker and Dr. Amazaga and an
11 Order directing that it be paid by the State Public Defender.

12 MR. EDWARDS: On the hearing on the 26th?

13 THE COURT: That's correct, or after that hearing
14 when it comes due.

15 MR. EDWARDS: Will do. Let's see what his fax number
16 is.

17 THE COURT: Doctor Amazaga?

18 MR. EDWARDS: Yeah. 826-2743; is that right?

19 THE COURT: I think so.

20 MR. EDWARDS: Doctor Bittker's I am sure I can find.

21 THE COURT: I don't have that. I just have a copy of
22 the letter from Dr. Amazaga in front of me.

23 MR. EDWARDS: But this Order doesn't need to be faxed
24 to Dr. Bittker, so it is no problem, right?

1 THE COURT: No. What I am going to do is the faxed
2 letter we received from Dr. Amazaga I am going to direct the
3 clerk to put this in the file as an exhibit next in order
4 sealed.

5 MR. EDWARDS: Okay.

6 THE COURT: I don't know what that letter will be,
7 but it will be in the minutes of the Court.

8 MR. EDWARDS: Great.

9 THE COURT: Thank you, counsel. Is there anything
10 further for today?

11 MR. EDWARDS: None from me, Your Honor, Scott
12 Edwards.

13 MR. MCCARTHY: I am okay.

14 THE COURT: Okay. Thank you, gentlemen.

15 MR. EDWARDS: Thank you.

16 MR. MCCARTHY: Thank you.

17 MR. EDWARDS: See you, Terry.

18 (Whereupon, the proceedings were concluded.)

19 --oOo--
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24

1 STATE OF NEVADA,)
2 COUNTY OF WASHOE.) ss.

3 I, Judith Ann Schonlau, Official Reporter of the
4 Second Judicial District Court of the State of Nevada, in and
5 for the County of Washoe, DO HEREBY CERTIFY:

6 That as such reporter I was present in Department No.
7 4 of the above-entitled court on January 19, 2005, at the hour
8 of 3:45 o'clock p.m., of said day and that I then and there
9 took verbatim stenotype notes of the proceedings had in the
10 matter of THE STATE OF NEVADA vs. SIAOSI VANISI, Case Number
11 CR98-P0516.

12 That the foregoing transcript, consisting of pages
13 numbered 1- 7 inclusive, is a full, true and correct
14 transcription of my said stenotypy notes, so taken as
15 aforesaid, and is a full, true and correct statement of the
16 proceedings had and testimony given upon the trial of the
17 above-entitled action to the best of my knowledge, skill and
18 ability.

19 DATED: At Reno, Nevada this 1st day of February, 2005.
20
21
22
23
24


JUDITH ANN SCHONLAU CSR #18

CODE: 4185

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2005 JAN 27 11:04

[Signature]
CLERK OF COURT, JR.
RENO, NEVADA

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

--oo0oo--

SIAOSI VANISI,

Petitioner,

Case No. CR98P0516
Dept. No. 4

vs.

STATE OF NEVADA,

Respondent.

TRANSCRIPT OF PROCEEDINGS

IN-CHAMBERS CONFERENCE

JANUARY 24, 2005

RENO, NEVADA

Reported by: DONNA DAVIDSON, CCR #318, RMR, CRR
Computer-Aided Transcription

SVans12JDC05902

A P P E A R A N C E S

For the Petitioner:

SCOTT W. EDWARDS
Attorney at Law
729 Evans Avenue
Reno, Nevada 89512

THOMAS L. QUALLS
Attorney at Law
443 Marsh Avenue
Reno, Nevada 89509

For the Respondent:

TERRENCE MCCARTHY
Deputy District Attorney
50 West Liberty Street, #300
Reno, Nevada 89520

1 RENO, NEVADA, MONDAY, JANUARY 24, 2005, 1:48 P.M.

2 --oOo--

3
4 THE COURT: I asked for this in-chambers
5 meeting because we have our hearing tomorrow, and
6 Dr. Amezaga -- Thursday, and Dr. Amezaga could not
7 get in to see Vanisi because Vanisi would not come
8 in.

9 And I guess we should note that present in
10 chambers with the court clerk is Mr. Qualls and
11 Mr. Edwards and Mr. McCarthy.

12 So, gentlemen, my concern is how are we going
13 to get Mr. Vanisi evaluated by Dr. Amezaga?

14 MR. QUALLS: Do you want to field that?

15 MR. EDWARDS: Go ahead.

16 MR. QUALLS: Well, Scott and I have talked
17 about -- since we're on the record, I suppose I
18 should call you Mr. Edwards -- have talked about that
19 relative to -- did you receive Dr. Bittker's
20 evaluation?

21 THE COURT: Yes, I have received
22 Dr. Bittker's evaluation.

23 MR. QUALLS: And at the end of his evaluation
24 he recommends a change of medication and then a

1 reevaluation in 90 days.

2 So our thoughts very simply were if you were
3 inclined to follow that recommendation, we could see
4 at the end of 90 days if he wouldn't be more
5 cooperative with both medical professionals.

6 MR. EDWARDS: And I mean his finding now is
7 that Mr. Vanisi is not competent by the standard that
8 you asked him to evaluate him by. So if we had
9 Dr. Amezaga and he had a different opinion, then we
10 would have the split of the experts anyway, and we
11 would have to get a third evaluation, I guess, tie
12 breaker.

13 THE COURT: Not necessarily.

14 MR. MCCARTHY: They can be unanimous. It's
15 up to the Court.

16 MR. QUALLS: Sure.

17 THE COURT: Some cases we ask for the third,
18 but I'm not sure we would in this case, because it
19 has been very difficult to just get doctors willing
20 to go do this.

21 MR. EDWARDS: I understand.

22 THE COURT: Most psychologists and
23 psychiatrists don't want to be involved with
24 Mr. Vanisi. So we have Dr. Amezaga.

1 Have you talked to your client at all
2 since -- and I don't want your content of your
3 conversations, but have you discussed his
4 unwillingness to visit with Dr. Amezaga, or you do
5 you know what the basis of that was?

6 MR. EDWARDS: Not with Dr. Amezaga, I don't.
7 I talked to Dr. Bittker on the day that he examined
8 Mr. Vanisi, and there was initial uncooperativeness
9 there, too.

10 THE COURT: But at least he got out of his
11 cell apparently. He didn't leave his cell for
12 Dr. Amezaga.

13 MR. EDWARDS: Right. When I last spoke to
14 Mr. Vanisi before the hearing, not here in the
15 courtroom, but I had a telephone contact with him, I
16 emphasized the importance of cooperating with the
17 doctors that would come as a result of this. And he
18 didn't indicate to me that he wasn't going to
19 cooperate.

20 When we initially met with him, this was
21 before Tom Qualls was co-counsel, but I was on this
22 with Mr. Picker, if you recall.

23 THE COURT: Yes.

24 MR. EDWARDS: One of our first meetings with

1 Mr. Vanisi was to do some psychological workup,
2 mitigation-type analysis, and he was very reluctant,
3 outright refused to do that at that time. We tried
4 on our own to do that. And at every turn he turned
5 us down, so as time passed, you know, I was just
6 hoping that this would get better.

7 And it did, at least with Dr. Bittker, but it
8 hasn't. Now I think within two days he was back to
9 this -- and what you'll see in Dr. Bittker's report
10 is he's injected with Haldol, and when he -- and his
11 behavior goes through a cycle, depending -- I think
12 it's like a 20- or 30-day cycle.

13 MR. QUALLS: I think he gets that once a
14 month.

15 MR. EDWARDS: Once a month with this Haldol.
16 The day he appeared here in court last was a day or
17 two days after the injection, and he was -- I don't
18 know if you noticed that, but he was mute, he was
19 flat.

20 MR. QUALLS: He almost fell out of his chair.
21 He was very different from when we interviewed him.
22 But apparently he was way past the injection the last
23 time when Scott and I went to Ely.

24 MR. EDWARDS: When we went to Ely and saw

1 him, he was just the opposite of that.

2 THE COURT: Okay. So what day were you last
3 in court?

4 MR. EDWARDS: November.

5 THE CLERK: 22nd.

6 MR. EDWARDS: Yes. And I think he had been
7 injected on the 20th or 21st. And Dr. Bittker --

8 MR. QUALLS: That's in Bittker's report.

9 MR. EDWARDS: -- said that. So that kind of
10 explained his behavior.

11 THE COURT: Did Dr. Bittker indicate when he
12 was -- when he received his Haldol injection in
13 January?

14 MR. EDWARDS: I don't think he did, did he
15 Tom? I don't think so.

16 MR. QUALLS: I'm looking to see if he
17 addressed it.

18 MR. EDWARDS: I might be able to find it in
19 the medical information.

20 THE COURT: Do you have current for January?

21 MR. EDWARDS: You know, I really haven't
22 mastered this yet, Your Honor, so I'm not sure if
23 I --

24 MR. QUALLS: Is that what was presented at

1 the November hearing?

2 THE CLERK: Do you want to look through this?

3 MR. EDWARDS: Maybe that's easier.

4 THE COURT: But that is all the old -- it
5 won't tell us when his injection is.

6 THE CLERK: But it might tell you if he got
7 it on the same day every month.

8 MR. EDWARDS: You mean January of this year?

9 THE COURT: Yes, I'd like to see how it
10 relates to the interview Dr. Bittker had of Mr.
11 Vanisi on January 14th, if that was right before
12 Haldol injection or right after, to see what the
13 difference would be between January 14th, when he met
14 with Dr. Bittker, and January 18th, was it, when
15 Dr. Amezaga tried to visit with him? January 20th.
16 So that's a space of six days.

17 MR. QUALLS: I don't know if -- certainly
18 this can address whether he was given another
19 injection prior to Dr. Amezaga, but Dr. Bittker
20 reports that he received the Haldol two days prior to
21 his court presentation here, 50 milligrams of Haldol,
22 and in contrast his interview with me occurred 14
23 days following the Haldol injection. So when
24 Dr. Bittker interviewed him, it was two weeks past

1 the injection.

2 THE COURT: Okay. So within a third week
3 after the injection, he wouldn't meet with
4 Dr. Amezaga, so we could maybe get some -- arrange
5 some time with Dr. Amezaga right after the injection
6 or within that first two-week period, and he might be
7 more willing to meet with Dr. Amezaga.

8 MR. EDWARDS: Sounds as good as any idea,
9 Your Honor. I really --

10 MR. QUALLS: Here it is. Every two weeks.
11 Haldol every two weeks.

12 THE COURT: Every two weeks. Not once a
13 month?

14 MR. QUALLS: No, every two weeks.

15 MR. EDWARDS: It seems like it's being
16 administered at the beginning and end of the month.
17 7th of August, 27th of August, 4th of June, 2nd of
18 July, 21st of July.

19 MR. QUALLS: So it seems that Dr. Bittker
20 must have interviewed him right before his next
21 injection.

22 MR. EDWARDS: And then if he got injected
23 let's say on the 18th, we could probably find this
24 out, or 17th, he would be like he was in court.

1 THE COURT: Which doesn't make sense that he
2 would refuse to come out of his cell.

3 MR. McCARTHY: Perhaps he just doesn't wish
4 to.

5 THE COURT: I mean if the rationale is that
6 it has something to do with the Haldol injections,
7 then it doesn't make sense for him to refuse the
8 medical treatment.

9 MR. EDWARDS: He says in here it makes him
10 feel stupid and flat. And Dr. Bittker, my
11 understanding, said that he's on the wrong medicine
12 for his diagnosis, and he thinks he's playing a role
13 in the behaviors he's manifesting in his mental
14 state.

15 THE COURT: Okay. So, Mr. McCarthy, do you
16 have a position on what you think we -- the action
17 should be taken at this point?

18 MR. McCARTHY: I think there is a presumption
19 of competence, and if he's unable to gather evidence
20 of incompetence for whatever reason, whether it's
21 Vanisi just doesn't wish to play or any other reason,
22 then he's failed to overcome the presumption. I
23 don't think Bittker's report, contrary to its
24 conclusion, establishes incompetence.

1 In fact, I think he's used inappropriate
2 standard. And finally I think it's legally
3 irrelevant. And I think I mentioned before the
4 lesson from the Calambro case is if he is
5 incompetent, we proceed anyway. But I don't -- as a
6 practical matter, there is no way to force someone to
7 cooperate with a psychiatric or psychological
8 examination.

9 THE COURT: That's true.

10 MR. MCCARTHY: Another lesson from Calambro.

11 THE COURT: So and I agree with you there,
12 there's no way to force him. And it's his motion
13 that's been brought. It's to benefit him. If he
14 refuses to cooperate, he refuses to cooperate.

15 We have Dr. Bittker, we'll bring him, you
16 guys can try to establish that you think he's
17 uncooperative because of what Dr. Bittker says,
18 Mr. McCarthy can establish whatever he wants to, and
19 we'll rule on whether or not we can move forward or
20 not.

21 I think I made it pretty clear I probably
22 would move forward with the post conviction, that I
23 was really trying to figure out where I was going
24 with him and any testimony he might give us, if he

1 did give us testimony in the post conviction. So
2 this is kind of a new and unique area that we're
3 going to. I don't think Calambro solves the problem.

4 MR. MCCARTHY: It gives clues.

5 THE COURT: Calambro itself has plenty of
6 problems in that decision.

7 MR. EDWARDS: You know, we mentioned, Your
8 Honor, that we were going to seek some clarification
9 from the supreme court if that was it, because that
10 varies a little bit from the Rohan decision itself by
11 going forward in -- well, I guess if you say he's not
12 incompetent, that's an intermediate -- I don't think
13 we have an interlocutory appeal. I don't know.

14 MR. QUALLS: Well, I guess the standard based
15 upon the evidence presented whether the evidence
16 supports that decision is kind of odd because we only
17 have half of the evidence we were seeking, we only
18 have one doctor's report, but -- and obviously our
19 opinion differs from Mr. McCarthy's opinion as to
20 what Dr. Bittker's recommendation and evaluation
21 says. But -- which is simply why I was trying to
22 split it to begin with and say since we have this
23 recommendation for a change in medication and the
24 90-day reevaluation, perhaps we could continue

1 Thursday's hearing until such time as we have a
2 reevaluation when there's new meds and, you know, in
3 another attempt to get him to cooperate with the
4 second psychiatrist. I understand that we are asking
5 the Court's indulgence somewhat regarding that, but
6 since it is only 90 --

7 THE COURT: But I don't have any authority to
8 order the prison to change his medical treatment. I
9 can't order the prison to stop giving him Haldol,
10 absent a lawsuit that -- and it wouldn't be in here,
11 it would be filed in Ely, where he's being housed and
12 where it's being administered. And you could on his
13 behalf get his medication changed, but I don't have
14 the authority to tell the prison to do it, and I
15 don't know that they would voluntarily take
16 Dr. Bittker's word.

17 You know, Haldol, just Haldol presents in a
18 prison setting and does things other than just deal
19 with competency and bipolar activity; and with
20 Mr. Vanisi, I'm sure there's other concerns, which
21 you may at some point want to deal with with the
22 prison, but I don't have the authority at this point
23 to order the prison to stop giving him Haldol.

24 So Haldol wasn't an early-on medication for

1 bipolar, and I know they don't use Haldol anymore for
2 bipolar, but Mr. Vanisi may have other issues that
3 the prison authorities believe Haldol is the
4 appropriate medication.

5 If you want the prison to stop giving him
6 Haldol, unless they voluntarily do it, you're going
7 to have to file a lawsuit in Ely to deal with his
8 medication issue, and it's not going to be me to be
9 able to resolve that, unless we get much further down
10 the road.

11 I mean, we would have to be in a situation in
12 dealing with an execution date before I would get
13 involved in that piece with regard to the medication.

14 So I'm inclined for you to contact your
15 client and remind him that this is in his best
16 interest to have Dr. Amezaga, because absent
17 Dr. Amezaga you're not going to be in a very good
18 position on Thursday to prove up his incompetence and
19 ultimate continuation of his case if that's what you
20 are going to go for.

21 MR. QUALLS: Could we then seek a brief
22 continuance and perhaps try to get the timing right
23 with the Haldol shot and see if we can't get him in
24 to see Amezaga one more time?

1 MR. McCARTHY: May I make a suggestion?

2 THE COURT: Yes.

3 MR. McCARTHY: Ask Dr. Amezaga to be here on

4 Thursday, make whatever observations he can, maybe --

5 THE COURT: Do the evaluation here?

6 MR. McCARTHY: Just observe. It's going to

7 be in court.

8 THE COURT: He has to do more than observe.

9 He has to try to ask him questions.

10 MR. McCARTHY: And if he says, "I have no

11 basis to reach a conclusion," then the Court can act

12 on that; although I'm suggesting you don't act,

13 but --

14 THE COURT: We don't really have a guarantee

15 that Mr. Vanisi will voluntarily come to court.

16 Mr. Vanisi could refuse to come to court.

17 MR. McCARTHY: I think generally the guys

18 with the keys pretty much insist on it.

19 THE COURT: I assume they do.

20 MR. McCARTHY: I have never had a -- I have

21 never heard of transport officers just saying okay

22 when a prisoner doesn't want to come to court.

23 MR. EDWARDS: I don't know how useful that

24 would be, Your Honor, just to observe him. I mean, I

1 would like to have Dr. Amezaga do his best to
2 interview him and do what Dr. Bittker did, review the
3 medical records.

4 MR. QUALLS: It's got to be interactive.

5 THE COURT: Why don't you contact Dr. Amezaga
6 and see if he has some time to go see Mr. Vanisi.
7 Even if he doesn't prepare a written report, he just
8 comes and testifies at the hearing that's set on
9 Thursday as to his conclusions, and contact
10 Mr. Vanisi and encourage him to cooperate with this
11 because you believe it's in his best interest to
12 establish this record.

13 If he refuses to do that, I'm going to move
14 forward with whatever I have, because one of the
15 objections, as you both know, that the State had was
16 this was a malingering or an effort to continue the
17 case and stop it from moving forward with finality.
18 And we can't allow, and I will not allow Mr. Vanisi
19 to voluntarily refuse to cooperate with you all and
20 the doctors so that we can continue it forever.
21 That's not what I ordered, and that's not what I'm
22 willing to do.

23 So I guess my bottom line is contact
24 Mr. Vanisi, see if he'll cooperate, if Dr. Amezaga

1 goes again, see if Dr. Amezaga can go visit with him
2 again before the hearing on Thursday, we'll keep the
3 hearing on schedule.

4 If Dr. Amezaga can make an oral report and
5 testify at the hearing, then it's fine; if he can't
6 get in between now and Thursday, then I'll entertain
7 a motion to bifurcate the hearing on Thursday, we'll
8 hear Dr. Bittker, cross-examine him and allow -- if
9 it's a short like a week or two that Dr. Amezaga can
10 put it back on calendar to get down to see Vanisi,
11 then I will allow for the hearing to be continued for
12 Dr. Amezaga's report, but not beyond that.

13 I'm not going past two weeks. It's got to be
14 done on Thursday or two weeks from then. We're not
15 going to drag this out forever. And I'd rather not
16 have Mr. Vanisi transported more times than
17 necessary.

18 So if, in fact, you find out from Dr. Amezaga
19 that he isn't available and you call Dr. Bittker and
20 he says, well, I could be available in two weeks from
21 now, too, to testify, and you call Mr. McCarthy and
22 he says it's okay with me set it out for two weeks
23 rather than bifurcate the hearing on Thursday, then
24 you contact my administrative assistant, and we'll

1 reschedule it. But we have to do it very soon
2 because Mr. Vanisi will be transported soon.

3 MR. EDWARDS: In a way you were going to
4 bifurcate the hearing, anyway, right, Your Honor, at
5 least stagger the witnesses?

6 THE COURT: Well, we had arranged for
7 Dr. Bittker, we said to be here at 2:00.

8 MR. MCCARTHY: Dr. Bittker was 2:00, and
9 Dr. Amezaga was 3:00.

10 THE COURT: Because I didn't want the
11 physicians sitting and waiting while you all crossed
12 and have them testify anyway. But that certainly is
13 a little different than staying it for two weeks. So
14 does that give you some idea of where I am?

15 MR. EDWARDS: I think so. Did Dr. Amezaga
16 say anything when he called? Did he write you?

17 THE COURT: He hasn't said anything to me. I
18 do have his letter that he sent on January 20th.

19 MR. EDWARDS: That was the one we had the
20 phone conference about when he wanted to make sure he
21 would have access to medical records?

22 THE COURT: No.

23 THE CLERK: This is a new one.

24 THE COURT: This is something else. Go ahead

1 and read it. It's just his telling me.

2 THE CLERK: I'm sorry. I thought everybody
3 had received it.

4 MR. EDWARDS: Okay.

5 THE COURT: The record should reflect that
6 we're showing the letter from Dr. Amezaga to counsel
7 for Mr. Vanisi and the State that was dated January
8 20th.

9 MR. MCCARTHY: Thank you, Judge.

10 THE COURT: Okay. Any questions about --

11 MR. EDWARDS: So we'll try to get a hold of
12 Amezaga. You know him, right?

13 MR. QUALLS: Well, I have worked with him
14 some.

15 MR. MCCARTHY: Given the difficulties in
16 getting physicians in court just generally, if we
17 already got it lined up, my inclination is to not try
18 to move it.

19 THE COURT: That's kind of my inclination,
20 too.

21 MR. MCCARTHY: It could be years, you know.

22 THE COURT: He's scheduled to be here at 2:00
23 on Thursday. Dr. Amezaga was scheduled to be here --

24 MR. EDWARDS: 3:00.

1 THE COURT: At 3:00. We need to let him know
2 if we still need him even though he wasn't able to
3 meet with him. But if he can get in to see Vanisi
4 between now and then, or if you can arrange and
5 Mr. Vanisi will cooperate with him, I'll give it one
6 more shot of Dr. Amezaga to go down there.

7 MR. McCARTHY: Maybe they could even meet
8 here in the holding cell.

9 THE COURT: I don't know -- we would have to
10 talk to the sheriff and the transport team from the
11 prison to determine if they feel that they could have
12 a secure enough location for an interview.

13 MR. McCARTHY: I don't know where it would be
14 off the top of my head.

15 THE COURT: Well, there's ongoing issues with
16 Mr. Vanisi, so it would be whether or not they could
17 provide a secure location for Mr. Vanisi to meet with
18 Dr. Amezaga and whether they could provide -- be
19 close enough, and yet I don't know how much privacy
20 the prison gives in a psychiatric evaluation.

21 MR. McCARTHY: Some of them I have noticed
22 took place at the cell door, some of the periodic
23 evaluations.

24 THE COURT: From the prison.

1 MR. McCARTHY: Yes. Of course, that's a
2 different purpose.

3 THE COURT: They won't even let him out when
4 they talk to him.

5 MR. McCARTHY: I got the impression it might
6 be just somebody stopping by and saying how you
7 doing, you know.

8 THE COURT: So I'm not sure if you want to
9 try to do it here on premises. We can do that in an
10 oral report. But we have to talk to the warden and
11 see if the warden is comfortable with that. And the
12 sheriff.

13 MR. EDWARDS: Is it possible, do you know, is
14 it possible for you guys arrange it here?

15 THE BAILIFF: I think we can do it.

16 MR. EDWARDS: So if I got the doctor here
17 early --

18 THE BAILIFF: Normally what we can do --
19 first of all, just to let you guys know, we already
20 contacted NSP, and they are going to have their DRT
21 team, they call it SRT, but they are going to be
22 transporting him. It's going to be a four-man team.
23 So we could put him in the holding cell. And
24 normally they just put the food slot down, and they

1 can talk through the food slot.

2 That's what they do at the jail. They don't
3 even go in the cell. They can just talk through the
4 food slot. He can refuse to talk or he can talk.

5 MR. QUALLS: What do you think about the
6 effectiveness of that?

7 MR. EDWARDS: I don't know how well you're
8 going to get in Mr. Vanisi's mind through a food
9 slot. Is that because of physical danger?

10 THE BAILIFF: Right.

11 MR. EDWARDS: But in NSP I got the impression
12 that Dr. Bittker had an actual personal meeting with
13 him. I don't know what kind of supervision there
14 was.

15 THE COURT: Well, I'm not sure how -- if
16 there's a -- if there's someone present at all times,
17 if Mr. Vanisi is somehow restrained to a table.

18 MR. EDWARDS: That would be fine with me. I
19 would rather have him restrained with others present
20 than talking through a food slot.

21 THE BAILIFF: Depending on your privacy
22 issue, we would just set him in the jury room with
23 the SRT team in there.

24 MR. EDWARDS: That's fine with me. I'm not

1 concerned about somebody from law enforcement, you
2 know, violating some privilege.

3 THE BAILIFF: He's going to be in a lock box,
4 so his hands will be -- I don't see them having a
5 problem.

6 THE COURT: But we can't put him in a jury
7 room with nobody in there but the doctor.

8 MR. EDWARDS: That's fine, Judge.

9 THE COURT: So there would be prison guards
10 present. And the jury room is such that they would
11 be within ten feet of Mr. Vanisi; so it's not like
12 they could be far enough away that they would not be
13 able to hear.

14 MR. EDWARDS: That's okay with me.

15 MR. MCCARTHY: I have some experience dealing
16 with recalcitrant prisoners, long ago, and I found
17 having someone that far away seemed like adequate
18 safety for everybody, and he's still able to
19 communicate.

20 MR. EDWARDS: Yeah.

21 THE COURT: So if you want to do that, you
22 would have to contact Dr. Amezaga and see if he's
23 available to be here earlier, because he would
24 obviously have to interview Mr. Vanisi before the

1 hearing starts at 2:00. But then we would also have
2 to contact the prison and do an order to produce him
3 to get him here earlier.

4 MR. McCARTHY: Let's see if we can do it with
5 a phone call.

6 MR. QUALLS: Let's also see if it's possible
7 to get Amezaga back down to NSP before we do this,
8 too.

9 MR. EDWARDS: We only have a day really or
10 two days.

11 THE COURT: Yes. You are very short on time.
12 This is Monday. And so --

13 MR. EDWARDS: I'll give it a shot.

14 THE COURT: And, please, once you have --
15 defense and prosecutors have communicated, if it is
16 going to happen you think here at a particular time,
17 you need to communicate with my bailiff, who will
18 coordinate with the prison and the sheriff to open up
19 the jury room.

20 MR. EDWARDS: Will do.

21 THE COURT: Okay. Thank you, gentlemen.

22 MR. EDWARDS: Thank you, Your Honor.

23 MR. QUALLS: Thank you, Your Honor.

24 (Proceedings concluded.)

--oOo--

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, DONNA DAVIDSON, Official Reporter of the
Second Judicial District Court of the State of
Nevada, in and for the County of Washoe, do hereby
certify:

That as such reporter, I was present in
Department No. 4 of the above court on said date,
time and hour, and I then and there took verbatim
stenotype notes of the proceedings had and testimony
given therein.

That the foregoing transcript is a full, true
and correct transcript of my said stenotype notes, so
taken as aforesaid.

That the foregoing transcript was taken down
under my direction and control, and to the best of my
knowledge, skill and ability.

DATED: At Reno, Nevada, this 15th day of
January, 2005.

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BY: [Signature] JR.

DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

SIAOSI VANISI,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

Case No. CR98P0516

Dept. No. 4

TRANSCRIPT OF PROCEEDINGS

REPORT ON PSYCHIATRIC EVALUATION

JANUARY 27, 2005

RENO, NEVADA

Reported by: DEBBIE ARNAUD, CCR No. 416, CSR No. 10102, RPR

APPEARANCES:

For the Petitioner:

SCOTT W. EDWARDS
Attorney at Law
729 Evans Avenue
Reno, Nevada

THOMAS QUALLS
Attorney at Law
443 Marsh Avenue
Reno, Nevada

For the Respondent:

TERRENCE MCCARTHY
Deputy District Attorney
75 Court Street
Reno, Nevada

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1 RENO, NEVADA, THURSDAY, JANUARY 27, 2005, 2:15 P.M.

2 -oOo-

3
4 THE COURT: Let the record reflect we are
5 convened in court on Case No. CR98P0516. This is the time
6 set for report on psychiatric evaluation. It's my
7 understanding that Dr. Bittker is present to discuss his
8 report with us.

9 Counsel for Mr. Vanisi, are you going to call
10 Dr. Bittker?

11 MR. EDWARDS: Yes, your Honor, I would.

12 THE COURT: Dr. Bittker, please come forward
13 and be sworn by the court clerk.

14 DR. BITTKER: Good afternoon, your Honor.

15 THE COURT: Good afternoon.

16 THE CLERK: Please raise your right hand.

17 (Whereupon the witness was duly sworn.)

18 THE CLERK: Thank you. Please be seated at the
19 witness stand.

20 THE COURT: At this time I'm directing the
21 clerk to mark Dr. Bittker's report as an exhibit for
22 purposes of today's hearing.

23 THE CLERK: Exhibit C marked -- I'm sorry, D
24 marked.

25 THE COURT: Any objection to the admission?

1 MR. EDWARDS: No, your Honor. I'd move for
2 admission.

3 MR. MCCARTHY: No, your Honor.

4 THE COURT: It's admitted under seal.

5 (Exhibit D marked and admitted.)

6 THE COURT: You may proceed.

7
8 DIRECT EXAMINATION

9 BY MR. EDWARDS:

10 Q Sir, could you please state your name and spell
11 your last name?

12 A Surely. Is this picking up? Okay. My name is
13 Dr. Tom Bittker. Last name is spelled B- as in boy, i-,
14 double t-k-e-r.

15 Q Dr. Bittker, could you tell us a little bit
16 about your credentials?

17 A I am a board certified psychiatrist also board
18 certified in forensic psychiatry. I'm a -- referred to as a
19 Distinguished Life Fellow in the American Psychiatric
20 Association. I'm a professor at the University of Nevada
21 School of Medicine. I'm on the faculty and am a lecturer at
22 the National Judicial College. And I have testified in a
23 number of cases for the court, also for the prosecution and
24 for the defense, many of them related to homicide.

25 Q And do you have a practice here in Reno?

1 A Yes, I do.

2 Q And you've testified before in Nevada district
3 courts?

4 A Yes, I have.

5 Q And you related that you've testified for both
6 sides of the litigation; is that right?

7 A That's accurate.

8 Q In this case, Dr. Bittker, you were appointed
9 by the Court to do a psychological evaluation of an
10 individual named Siaosi Vanisi; is that correct?

11 A A psychiatric assessment, yes.

12 Q Okay. And what was the competency question you
13 were requested to render an opinion on?

14 A Judge Steinheimer commanded me to examine the
15 incarcerant, Mr. Vanisi, regarding his present competence,
16 specifically to participate in a capital post conviction
17 habeas proceeding. And I needed to also assess his ability
18 to assist and communicate with counsel, understand and
19 knowingly participate in the habeas proceedings as a
20 litigant and witness and understand the difference between
21 the truth and a lie and the consequence of lying as a
22 witness in court.

23 Q Were you able to formulate an opinion as to
24 Mr. Vanisi's mental competence to assist and communicate
25 with counsel, understand and participate in habeas

1 proceedings as a litigant and a witness?

2 A Yes, I have.

3 Q What is your opinion?

4 A I do not believe that Mr. Vanisi is currently
5 competent to participate in trial proceedings or to best
6 assist counsel.

7 Q What information did you rely on in reaching
8 that conclusion?

9 A The information was relatively limited. I did
10 speak with you and your co-counsel to get some background
11 material from you as to what your concerns were about your
12 client.

13 I reviewed the medical records, but the medical
14 records were limited to only his encounters at the Nevada
15 State Penitentiary. They did not incorporate those records
16 while he was housed at Ely nor were there records of his
17 previous encounters at Washoe Detention Center. I had
18 referenced to the report of Dr. Thienhaus, but I had never
19 seen that report. Specifically the reference came from the
20 summary published in the Supreme Court proceedings regarding
21 his appeal. And of course I interviewed Mr. Vanisi over
22 about a two-hour period at the time of my assessment, which
23 was approximately 1-14-05, January 14th of this year.

24 Q In the course of your assessment and review of
25 the records and your interview of Mr. Vanisi, were you able

1 to come to any diagnosis of existing mental health issues
2 with him?

3 A Well, I saw in the record that Mr. Vanisi had a
4 prior diagnosis of bipolar disorder and polysubstance
5 dependence and was considered to suffer an antisocial
6 personality disorder. I also saw reference to
7 Dr. Thienhaus' diagnosis of what was summarized in the
8 Supreme Court proceedings as a relatively mild to moderate
9 bipolar disorder. I think his term was it wasn't "severe or
10 extreme." I did not have that same conclusion.

11 On the basis of my assessment I believe that
12 Mr. Vanisi is incompletely treated. He certainly has
13 residual evidence of psychosis. I would agree that he has a
14 history of alcohol abuse and cannabis abuse. There was some
15 other medical problems that were reflected in his lab
16 studies. His laboratory studies also indicated that he was
17 experiencing or had a relatively low level of one of the
18 medications that he was taking called valproic acid. In
19 addition, as he explained to me he was having substantial
20 side effects from the two medications that he was receiving.
21 He didn't feel spontaneous; He didn't feel like he could
22 concentrate, and he didn't feel as if he could best
23 represent himself as how he was. And I agreed with him. I
24 felt that the medications were incompleting treating him,
25 and the choice of medications left his treating psychiatrist

1 and also left Mr. Vanisi in something of a bind. As we
2 increase the dosages of those traditional medicines such as
3 haloperidol, Mr. Vanisi will tend to feel suppressed, not
4 spontaneous, may not be able to concentrate. In addition,
5 he is subject to significant medication side effects. Also
6 haloperidol in higher doses has been associated with some
7 lowering in mood. There are newer agents available that I
8 think would -- I believe would warrant a trial in
9 Mr. Vanisi's case where he could both have some of his
10 psychotic thinking controlled while at the same time be able
11 to access his spontaneity, his memory and to be able to
12 concentrate better.

13 Q What is the psychotic thinking that you're
14 referring to?

15 A Well, Mr. Vanisi is extremely guarded. He is
16 very protective of any information regarding the crime of
17 course, but he's particularly protective -- at least as you
18 disclosed to me -- to you and to your co-counsel, which I
19 would imagine would render it difficult for you to at least
20 advance an appeal. It certainly would make it difficult for
21 any expert to evaluate him to understand what his mental
22 state was at the time of the crime.

23 He's quite ambivalent. His thoughts,
24 he will make statements like -- if I could quote from my
25 report. I'd asked him, for example, how he felt about what

1 he confronts, specifically the death penalty. And I should
2 say in fairness to the State that he is aware that he is
3 confronting the death penalty. He understands why he's
4 confronting the death penalty, and he understands to some
5 sense of what it means to die. On the other hand, he's
6 markedly ambivalent about it. He makes statements like he's
7 not sure if life goes on or if it doesn't go on. He quoted
8 to me, "It's like you have this craving to smoke or craving
9 to have sex, but you can't do anything about it because you
10 don't have a body anymore." It's a very relatively naive
11 extension of himself.

12 His thoughts alternate between very
13 constricted, slowed thinking, non-spontaneous to during my
14 interview -- ultimately when he was able to establish a
15 modest rapport with me -- very fluid, expansive, grandiose
16 thinking, lots of fragmentation in that thought, which does
17 itself during the thought process indicate somebody who's
18 having some difficulty focusing his thoughts. And that is a
19 sign of psychosis, that rambling, expansive quality that's
20 mixed with a level of grandiosity that he displayed to me.

21 Although he denies perceptual distortions -- he
22 says he doesn't hear things or he doesn't see things that
23 aren't there -- I'm not so sure about that. I think his
24 level of suspiciousness and paranoia is such that in an
25 effort to represent himself as best as he can as a man of

1 some integrity, he may feel very vulnerable about those
2 kinds of perceptual distortions and may not be very
3 disclosing of them. His primary attitude toward me and in
4 terms of what you had explained to me over the phone is one
5 of guardedness, suspiciousness, distrust and paranoia. All
6 of this, I think, represents a flavor of psychosis that
7 would warrant treatment.

8 The other concern I had was because of the
9 medicines he's receiving -- let's go at this from a little
10 different direction. The traditional old-line medicines
11 that he's receiving, haloperidol, in order for us to give
12 him enough medication to contain the psychosis, he would
13 have so many side effects as to not be able to represent
14 himself best spontaneously in the courtroom. And he may not
15 even be able to access information from the past. There is
16 a suppression of fluid thinking with these traditional
17 antipsychotic agents.

18 Q Is that what "blunted affect" means in your
19 report? What is that?

20 A Blunted affect can spring from a disease, his
21 disorder. It can also spring from excessive medication.

22 Q How does that appear to a layperson? What's a
23 blunted affect?

24 A Like you're not there. Just a lack of feeling,
25 lack of responsiveness, very limited range in how he's

1 responding. If I could mimic it, it would be "I'm pleased
2 to be here today." Just very slowed, no reactivity. It's
3 almost as if there's a wooden quality to the individual,
4 which he displayed to me for the first portion of our
5 interview. And from what you told me over the phone, you
6 had seen that quality also in your interviews with him.

7 Q Doctor, are you familiar with the term
8 "malingerer"?

9 A Of course.

10 Q And how do you understand that term to mean?

11 A You attempt in an effort to gain something,
12 whether it means to avoid the consequences of a criminal
13 charge or to gain something from an insurance company, you
14 represent a physical or psychological problem in an effort
15 to manipulate authorities or manipulate others or manipulate
16 observers in behalf of gain. But those representations may
17 not accurately reflect either what is going on in your mind
18 or going on in your body.

19 Q Did you detect any malingerer in your
20 assessment of Mr. Vanisi in this case?

21 A In my initial assessment of Mr. Vanisi when
22 first requested by the Court, I most certainly did.

23 Q And this was years ago; is that correct?

24 A I believe this was at the time of his initial
25 trial, yes.

1 what the State has implicated as some type of malingering.

2 Let me tell you why it's not malingering first.
3 We heard the definition of malingering. Malingering is like
4 you're faking an illness. Malingering means someone who
5 projects symptoms of mental illness to avoid punishment, to
6 avoid responsibility, to avoid consequences. That's
7 malingering. If that's malingering, then how can you
8 explain why Siaosi Vanisi would manifest these symptoms
9 years before this event? Is he malingering to lose the love
10 of his wife? That doesn't fit the definition of
11 malingering. Is he malingering so his wife is going to take
12 the two children that he loves away from him? That doesn't
13 fit the definition of malingering.

14 If he's malingering, then why, after Dr.
15 Thienhaus finally gets his medication set at the proper
16 levels of lithium, Elavil, Risperdal, if he's malingering
17 why has his behavior changed so he's not an institutional
18 problem? Because ladies and gentlemen, if you believe he
19 was malingering, he would be malingering today, because this
20 is the time that he would need to mangle to avoid a
21 punishment. You don't get better before your trial. If
22 you're trying to mangle, you stay sick through the trial
23 in hopes that the jury is going to understand that.

24 It's not malingering. Not only because so many
25 people have, Dr. Thienhaus' diagnosis and I believe two or

1 three of the other psychologists also agreed to that
2 diagnosis of bipolar disorder. The malingering aspect is,
3 unfortunately whenever you have a mentally ill person in
4 jail, the first thing people -- the first things people
5 think about is, is he faking it? He's in jail. He has
6 consequences he may need to suffer or to face. Is he faking
7 it? It's really in that context that all these people
8 believe he's malingering. But ladies and gentlemen, the
9 symptoms occur well before that would even come into play.
10 And that doesn't fit the definition. And the fact that he's
11 now healthy when he would most need to be mentally ill isn't
12 going to aid him.

13 So I would just hope when you hear the argument
14 which I anticipate from the State that there is no mental
15 illness, you look at the facts. You look at the State's own
16 witnesses. The witnesses the State brought up here and
17 offered them as credible vessels to carry Siaosi Vanisi's
18 statement to you about what he had done, and the trial, that
19 the State brought them up here and asked you to believe them
20 for the trial, then it's going to be a little bit
21 disingenuous for them to say, well, this stuff about mental
22 illness you hear from them, it's not to be believed because
23 they're family members.

24 Well, the State's already offered they're not
25 biased in this case and they have two important things to

1 bring to you. One was in the trial phase. And now let's
2 listen to them when they say that George Tafuna, Siaosi
3 Vanisi, when he showed up in Reno wearing a wig, a different
4 person. Some people didn't even recognize him. We know
5 that George Tafuna, when he went to his sister's wedding, a
6 completely different person. He would stay up all night
7 talking. No one would understand a word he was saying.

8 He would wear wigs and stand in front of the
9 mirror and talk to himself for hours. He would dress up as
10 a superhero, walk out to the street, walk to Chuck E. Cheese
11 where other people were, and pretend he was a superhero. If
12 that's not a symptom of mental illness, what is? How else
13 do you prove mental illness? None other than from the
14 behavior of the person who is suffering that mental illness.

15 I think that you can find many mitigators in
16 that fact, not only in the fact that Siaosi Vanisi was
17 diagnosed as being mentally ill and that in some sense, I
18 think in the greatest sense, played a part in this terrible
19 tragedy. It's mitigating, the fact he's finally been
20 diagnosed. Unlike the earlier time in the jail when he was
21 just getting medication, he's finally been diagnosed and
22 they have him at a level where he is Siaosi Vanisi that you
23 heard through all these witnesses. It's mitigating
24 evidence. Not only that he's been diagnosed, receives
25 medication, it's mitigating evidence the fact that this can

1 be given in an institutional setting. There's ways to keep
2 Mr. Vanisi from being the manic, essentially crazed person
3 that would try to crawl under a fence in broad daylight,
4 with people with shotguns standing over him and actually go
5 under one fence into another secure area.

6 Although the State wants to offer that as a
7 reason why they think you should kill Siaosi Vanisi, I think
8 what it proves is that he's mentally ill, because no
9 rational person would think to crawl under a fence in broad
10 daylight with shotgun armed guards over his head and crawl
11 into another area that's even more secure. I can't tell you
12 how many bits and pieces of testimony that you have that
13 support Siaosi Vanisi's mental health. Most notably Dr.
14 Thienhaus.

15 The State, although they reference reports from
16 other doctors, do not bring a doctor in to rebut that. What
17 we have is the diagnosis agreed upon even by some of the
18 State's doctors, even some of the people who suspect
19 malingering but aren't going to refute the diagnosis of
20 bipolar disorder.

21 The use of alcohol, drugs, I think everybody
22 knows how alcohol and drugs affect a normal rational person,
23 and how the normal rational person, under the influence of
24 alcohol and drugs, loses important, I don't know if it's a
25 conscience or whatever thing we have, superego that controls

1 our behavior, that rational people lose that under the
2 influence of alcohol and drugs.

3 What do we know about Siaosi Vanisi? It's an
4 unfortunate part of this illness -- when it occurs later in
5 life, a lot of people think by doing drugs I'm going to
6 medicate myself, make myself feel better. What it does is
7 the exact opposite. It makes that illness worse. And,
8 again, the same witnesses who testified for the State at the
9 trial, the same witnesses they ask you to believe in order
10 to find Siaosi Vanisi guilty of first degree murder, are the
11 same witnesses who are going to say that Siaosi Vanisi never
12 drank as a teenager, avoided parties. He starts to
13 experiment with drugs later in his marriage. And we know
14 how that affected the bipolar disorder that had just begun
15 in two years of that marriage. It's the Siaosi Vanisi who
16 sits outside of Renee Peaua's house, smokes laced marijuana,
17 snorts methamphetamine. It's the same Siaosi Vanisi we see
18 staggering around the campus moments before George
19 Sullivan's tragic death.

20 The reason why the law -- the reason why I'm
21 going to ask you to consider that as mitigation is because
22 in the sense that we voluntarily take drugs, that isn't
23 mitigation. And I'm not trying to argue that someone forced
24 these drugs down Siaosi Vanisi's throat. But the reason why
25 the law considers this mitigation is because people who take

1 drugs and alcohol aren't the same people who show up in
2 court to be sentenced, because they're at a different state
3 of mind when they commit these acts, and really it's the
4 person you need to look at who isn't strung out on
5 methamphetamine, who hasn't slept in a week, who is smoking
6 laced marijuana, who is drunk on alcohol. That isn't the
7 person you ultimately sentence. It's the sober, reasonable
8 person you sentence.

9 The law says if you think that those acts were
10 involved, involved or exacerbated, influenced by controlled
11 substances, then that's not really something you hold
12 against them, because that's not the same person you get to
13 sentence.

14 For that reason, evidence, I'd ask you to
15 consider, when you think, well, they've shown me some
16 aggravators and I'm not convinced all four are there, what
17 mitigates this offense. When you start to think about it,
18 there's going to be more things than I could ever tell you,
19 more things than I could ever sit up here and say are
20 reasons why you shouldn't kill Siaosi Vanisi than is humanly
21 possible.

22 I put these down as a list, not because I think
23 those are the only ones you should consider, the
24 instructions say there are going to be things that occur to
25 you that are more important. And it's up to you to decide

1 in your mind is this a mitigating factor to me. If it is,
2 it's personal to me. How does this affect how I
3 individually weigh it whether Siaosi Vanisi should live or
4 die? It can be something, maybe some people would feel it's
5 so insignificant as Mr. Vanisi's statement at the end of the
6 trial, that I want to express my grief to the Sullivan
7 family, to my own family. It can be that display of
8 humanity that can be reason for you not to kill Siaosi
9 Vanisi.

10 It could be something so obscure -- and I'm
11 sure the State will disagree with this -- something so
12 obscure as the fact that -- and I think two things: After
13 this manic episode was over and George Sullivan was dead and
14 Siaosi Vanisi decides he needs to go to see David Kinikini,
15 a close friend, someone who has always been a confidante to
16 him, and Siaosi Vanisi decides to rob two stores. Is this:
17 Siaosi Vanisi doesn't hurt those people. He has a loaded
18 firearm. He actually almost seems overly polite for a
19 robber. The young man says you're robbing the store, take
20 my money. No, go ahead and keep that; that's not when I'm
21 after. That display I think is more, although it's a
22 criminal act, it's more in character with the Siaosi Vanisi
23 knowing that he's already killed somebody and how drastic,
24 how terrible that is, besides the only way he can get to
25 Salt Lake City is by, one, to take a car that's not his, and

1 by getting money to get him here. That's Siasos Vanisi when
2 he robs those stores and decides I'm not going to hurt these
3 people. I have a loaded gun. They're Caucasian. I suppose
4 they hate Caucasians. I need the money. That's all I need.
5 I'm not going to pistol whip anybody, order them around;
6 just give me the money, please, thank you, and leaves.

7 Even something that may seem so illogical to
8 you, I don't know if that's going to be the thing that is
9 important to you, but you need to look through this whole
10 case and decide are there things like that that I've heard
11 that are important things before I decide whether someone
12 has to die to, and again I'll submit to you, it's not going
13 to accomplish anything.

14 I thought about this and this is again maybe
15 not something that's important to you. When Siasos Vanisi
16 is in David Kinikini's house and he started the fire as kind
17 of a diversion, the SWAT team walks in, the first SWAT
18 officer is walking down the hallway. It's the second
19 officer who is probably the more astute and sees what's
20 going on. As the first officer walks by, the second officer
21 is behind him. He sees that Siasos Vanisi is there with a
22 gun -- we later find out it's loaded -- points it at the
23 officers. Could have easily shot. Again, white officers.
24 If he wanted to kill them, the first guy would have been a
25 target, never would have seen it coming. Siasos Vanisi

1 raises the gun, gets shot, puts it down, is taken into
2 custody, later walks out, is shot with a beanbag.

3 Again, ladies and gentlemen, I'm not trying to
4 say that Siaosi Vanisi is a saint for being involved in the
5 fire, having the SWAT team kick down the door, essentially
6 causing David Kinikini to move to a different residence.
7 He's not a saint for that. But I think the fact that when
8 he had an opportunity, again this is the guy who is out to
9 kill white police officers, the fact that he showed that
10 humanity that he didn't want to shoot these people, he
11 wanted to get shot. He knew he would be taken into custody,
12 that is a display of humanity. It may not be important for
13 you, but this whole case is just so full of, when Siaosi
14 Vanisi is out of his manic stage, full of so many displays
15 of humanity that when you look at whether this person needs
16 to live or die, there's just so many reasons, so many
17 displays of humanity other than -- what happened to George
18 Sullivan is terrible. I'm not trying to deny that. I'm not
19 trying to minimize it.

20 Siaosi Vanisi has been convicted of first
21 degree murder. In some sense you're getting an instruction
22 that that really isn't an issue today, whether he's been
23 convicted of first degree murder. The issue is do we as a
24 group of people and as individuals feel that really the only
25 appropriate way to punish him is to kill him? And I can't

1 tell you how many reasons there are, because it's humanly
2 impossible for me to list all the reasons. There's just too
3 many. My mind isn't going to be able to retain them all or
4 tell you about them, but I only ask you when you sit and
5 sift through what is two weeks' testimony, a lot of it
6 difficult, a lot of it emotionally challenging, gut
7 wrenching, decide is this person who sits at this table so
8 deprived of humanity, so bereft, so lacking in any human
9 quality? Has his life been so empty and so bad that really
10 the only thing you need to do, the only thing that's
11 possible, the only appropriate punishment is death?

12 There may be people out there who fit that bill
13 of goods. And I'm not here to say there isn't. But I think
14 when you look at the case and the reasons that the death
15 penalty is asked for, what we think it accomplishes for us
16 as a community, and you look at that man there and what type
17 of life he's led, it can be the fact that -- another small
18 episode, I think it shows his humanity, is what does his
19 wife say that when he goes to the Chuck E. Cheese dressed as
20 a superhero, I mean such bizarre behavior, it can't manifest
21 anything but mental illness. When he goes to Chuck E.
22 Cheese, how does he get his high? He gets his high by
23 playing with the little kids. The same Siaosi Vanisi that
24 at the group, the family picnics, wants to spend his time
25 gossiping with the older ladies and playing with the

1 children. Those displays of humanity, they're not statutory
2 mitigators. They may not amount to a lot for the State.
3 They may not amount to a lot for the family of George
4 Sullivan. But those displays are the types of humanity that
5 we need to consider before we decide does this person
6 actually need to die. Are we accomplishing anything by
7 putting him to death?

8 I have some other things I'd like to show you.
9 If I could, I'd just like to depart from my presentation for
10 a moment and talk about things the State had said.

11 Detective Jenkins was their last witness. And
12 a lot of statements through Detective Jenkins and Vainga
13 Kinikini are in the big scheme of things -- I mean, if
14 they're taken out of context, these statements would help
15 support your decision to put Siaosi Vanisi to death. But
16 what do we know about the illness from Dr. Thienhaus? That
17 people in their manic episodes exaggerate, are boisterous,
18 can actually lose touch with reality.

19 Ladies and gentlemen of the jury, when
20 Detective Jenkins takes those statements from Siaosi Vanisi,
21 isn't that exactly what's going on? Is it not delusional
22 that Siaosi Vanisi, as he's handcuffed and in belly chains
23 and ankle chains, believes he's a Lamanite warrior? Is it
24 not delusional that Siaosi Vanisi actually believes he's
25 going to become later a Robinhood? Things Siaosi Vanisi

1 says about I don't feel anything anymore. I don't care
2 anymore. I'm having fun.

3 What else do we know? What lets us know that
4 this is really the manic episode, the manic depressive
5 person speaking, what does Vainga Kinikini say about this?
6 And again Vainga Kinikini is their witness. He's excited
7 while he's saying this.

8 Ladies and gentlemen, the key symptom for
9 bipolar disorder is that manic hyperexcitement that happens
10 and in that hyperexcitement is when all these statements
11 come out. And so in some sense I'm not disagreeing that
12 these aren't statements that come from Siaosi Vanisi. But
13 are they the statements of Siaosi Vanisi, the Siaosi Vanisi
14 who is not in the throes of a manic episode? No, they're
15 exactly that. And that's from the State's witnesses.

16 The State also asked you to consider if Siaosi
17 Vanisi didn't intend to mutilate George Sullivan, why choose
18 a hatchet. Well, check your own notes. My understanding is
19 that Siaosi Vanisi actually wanted to buy a weapon first.
20 Then when he's told you need a license opts for the hatchet.
21 So those don't prove an intent to mutilate. It's proof of a
22 fact that maybe Siaosi Vanisi didn't have the money to buy a
23 weapon, but it doesn't mean in the end that he was trying to
24 mutilate someone so that he could kill them. That may prove
25 an intent to kill, which you already found in the first

1 degree murder case, but it doesn't prove an intent to
2 mutilate.

3 The State also asks you to consider the fact
4 that Siaosi Vanisi was laughing while he was being shot
5 while trying to escape from the Nevada State Prison. I'm
6 using the word "escape" pretty loosely, because he's
7 actually going to escape into a more secure area of the
8 prison.

9 Ladies and gentlemen, if someone does that in
10 broad daylight, does that show they're a danger? It shows
11 they're in the danger of being manic again or they're
12 suffering from a manic episode at that point. But it
13 doesn't prove a dangerousness, because we know that ever
14 since -- Dr. Thienhaus and Dr. Lynn have talked about their
15 co-diagnosis of Siaosi Vanisi, and after they've begun to
16 medicate him in order to keep his manic episodes and
17 depressive episodes level, he's not been a problem at the
18 facility. So it doesn't demonstrate danger. It
19 demonstrates mental illness. Now that we know that the
20 mental illness has been taken care of, it's a reason not to
21 kill Siaosi Vanisi.

22 If we could, I'd like to talk to you again
23 about what is accomplished by the death penalty. We have --

24 MR. STANTON: May counsel approach?

25 (Bench conference between Court and counsel)

1 outside the presence of the jury as follows:)

2 MR. GREGORY: Maybe we should take a break to
3 do this, Judge?

4 MR. STANTON: That's the exhibit that counsel
5 had presented in front of the jury. This was not shown to
6 the State. I briefly saw it. It's entirely inappropriate.

7 THE COURT: I was going to take the break at
8 11:15, but now is fine.

9 MR. BOSLER: I'm almost done.

10 THE COURT: I'm sorry. You said this is
11 entirely inappropriate?

12 MR. STANTON: Yes. I believe the portions that
13 I've read is arguments by, may the record reflect counsel
14 has a blown up exhibit, statements of Coretta Scott King and
15 Kerry Kennedy Comeau, and they're statements in opposition
16 to the death penalty. It's inappropriate argument. The
17 death penalty is a law in the state of Nevada.

18 MR. BOSLER: Your Honor, my authority is Ybarra
19 versus State, 103 Nevada, at page eight. And the quotation
20 is:

21 "Factual matters outside the record are not
22 generally proper subjects for argument at penalty unless
23 counsel is discussing general theories of penology,
24 punishment, deterrence and the death penalty."

25 THE COURT: Let me see.

1 MR. BOSLER: That's exactly what I'm doing.

2 MR. GREGORY: Not only that, the U.S. Supreme
3 Court has many times said that counsel can argue the values
4 of western civilization which these people obviously
5 represent.

6 MR. BOSLER: As a reason not to impose the
7 death penalty.

8 MR. STANTON: What you're asking, the problem
9 with it, if the Court wants to read that section, is that
10 they're arguing to the jury not to follow the law. You can
11 argue that the death penalty isn't appropriate based upon
12 facts in this case, but you can't argue that the death
13 penalty is not appropriate. It's the law. So their
14 argument is that the jury not follow the jury instructions.

15 MR. BOSLER: Your Honor --

16 THE COURT: Just a minute.
17 Was this Mills Lane's case?

18 MR. STANTON: I think so.

19 THE COURT: '87?

20 MR. STANTON: I think so.

21 THE COURT: I think so.

22 MR. GREGORY: Your Honor, in response --

23 MR. BOSLER: Maybe it would be better to take a
24 break, Your Honor.

25 THE COURT: No. Just wait a minute.

1 MR. GREGORY: If I might respond to counsel's
2 last statement, Your Honor. We're not arguing the law,
3 we're arguing the philosophy of western civilization. It
4 has nothing to do with the law.

5 THE COURT: If you are arguing why the death
6 penalty should not be imposed in this case, because of
7 circumstances involved in this case, you're entitled to do
8 that. You're not entitled to bring in evidence that certain
9 people in the community believe that the death penalty is
10 inappropriate. What this says is that, and I don't know why
11 you intended to use it, but you've got a quote here saying
12 the death penalty is not the proper outcome, ever, in any
13 case. So then you really are arguing for nullification of
14 the law that allows the death penalty be imposed.

15 MR. BOSLER: I'm not going to argue that. I'm
16 arguing that in general, theories of penology and
17 deterrence, Your Honor.

18 THE COURT: You can argue general theories that
19 some people should not receive the death penalty. But using
20 the quote would be inappropriate.

21 MR. BOSLER: Am I allowed to -- I'm not allowed
22 to quote people, historical characters?

23 THE COURT: I allow a certain amount of leeway
24 there, but I mean I've allowed people to quote historical
25 figures in the past. I don't know exactly what you want to

1 do here.

2 MR. STANTON: Your Honor, my additional
3 objection is that neither of these people -- this isn't
4 evidence. He's bringing quotes from people that aren't
5 examined and sworn witnesses in this case.

6 MR. GREGORY: Quotes from famous people are
7 used all the time and has been approved by the U.S. Supreme
8 Court.

9 THE COURT: This exhibit is not appropriate and
10 the use of the exhibit will not be allowed.

11 MR. GREGORY: So we can quote those people but
12 we just can't show it as an exhibit?

13 THE COURT: I don't understand how you can
14 quote these people and still fulfill the requirements of
15 Ybarra. When I read the Ybarra case, it seemed clear that
16 what the Supreme Court was talking about was an error, error
17 that was committed both by the prosecution and the defense.
18 The general statement of the law in the Ybarra case does not
19 open the door for this kind of argument. It was deemed in
20 the Ybarra case improper. Not proper. That's my reading of
21 Ybarra itself.

22 MR. STANTON: I'd specifically ask that the
23 Court order that that exhibit not be shown in any way, shape
24 or form to the jury, nor any contents read or referred to by
25 Mr. Bosler. There's nothing in those comments that's

1 appropriate.

2 THE COURT: Has this even been marked?

3 MR. GREGORY: No. You can keep the exhibit up
4 there, Judge.

5 THE COURT: We'll have the clerk mark it.

6 (Exhibit 54 was marked.)

7 THE COURT: The exhibit is marked 54. It's the
8 next in order. And so we can keep a record, I'm going to
9 grant Mr. Stanton's motion, but we'll have a record of the
10 exhibit. It will be in the record. If you believe my
11 decision is improper, it can be a subject of appeal.

12 MR. GREGORY: Thank you, Your Honor.

13 MR. STANTON: Your Honor, additionally, do you
14 have any more of these little gems?

15 MR. BOSLER: (Showing document) This has been
16 pretty commonly used.

17 MR. GREGORY: This is used in capital
18 punishment seminars that we've all attended.

19 MR. STANTON: Counsel understands he's not to
20 read anything from that document to this jury?

21 THE COURT: That's my ruling.

22 MR. BOSLER: I object, but --

23 THE COURT: That document being the exhibit
24 that's been marked.

25 (Whereupon, the following proceedings were held
in open court, in the presence of the jury.)

1 MR. BOSLER: The way in which our society says
2 people from the community can be drawn at random and decide
3 whether someone lives or dies is a difficult concept. Not
4 only morally, but legally. What I've done is hopefully
5 present a little chart so you guys could understand how the
6 process works. And I think what the chart will show you is
7 again, like I said many days ago, there are many more
8 reasons not to kill than there are reasons to kill.

9 As it was explained, the first step is to find
10 does an aggravating factor exist, has it been proven beyond
11 a reasonable doubt. If it hasn't, then the only choice is
12 life imprisonment. If you find an aggravating circumstance
13 does exist and has been proven beyond a reasonable doubt --
14 death eligibility, the legal term for it -- you go to the
15 next step: Has there been any evidence of mitigating
16 circumstances? And again the law says there's many more
17 reasons not to kill than there are to kill. The way the law
18 works is that the State has the burden of proof for
19 aggravating circumstances. If any of you as individuals
20 find any evidence of mitigating circumstance, then you can
21 find in your mind that that's been established.

22 The proof beyond a reasonable doubt isn't a
23 burden that's imposed upon the defendant. It's only the
24 fact that some of you would find any evidence of mitigating
25 circumstance. Hopefully that's pretty relevant or

1 understandable.

2 If you find mitigating circumstances, then you
3 have to go the next step: Do they outweigh the aggravating
4 circumstances? Well, I've given you eight, 10, 12 different
5 mitigating circumstances. I know you, as intelligent,
6 rational members of our community, will be able to look at
7 this evidence and see many more that I'm not going to be
8 able to pull out or show you. Things are going to be more
9 important to you. They may be things that I may not find
10 important. But again, the process, as you look through all
11 this evidence, decide, well, this juror finds these two
12 aggravators but I find these six mitigators. Talk to me
13 about why you think the aggravators are more important than
14 my mitigators, convince me why, even if I believe these are
15 found, that death is the appropriate punishment. That's the
16 type of process that's supposed to go on.

17 If you were to find that the aggravators, the
18 mitigation does not outweigh the aggravation -- mitigation
19 does outweigh the aggravation, the next step, life in
20 prison. You define the aggravators outweigh the mitigation
21 in order to even consider death. Even then we come to this
22 point right here. Like I said when we selected the jury, if
23 you found 12 aggravators and didn't find any mitigators, you
24 never have to impose death. That is a moral, awesome,
25 judgment decision you need to make as a group and as

1 individuals, and the law doesn't force you to do anything.

2 There is no magical mathematical formula that
3 says we can put these four volumes of paper over here and
4 these three volumes over here and we're magically told
5 whether someone lives or dies. That's not how the law
6 works. That's not how society works.

7 The weighing process, all the way through the
8 process, gives you all the opportunities to say I'm not
9 going to accomplish anything by killing this person. There
10 are more reasons to not kill than there are to kill, and the
11 instructions are going to tell you that. The diagram tells
12 you that. I've told you that. The State said it. I just
13 don't want there to be any confusion.

14 This may be hard to believe, but I'm usually a
15 man of very few words. I heard Mrs. Sullivan -- I sat
16 through her victim impact statement. One can't help but to
17 be moved by the quality of life that she shared with George
18 Sullivan and how it's impacted their family. You can't help
19 but be moved by that. But she said one thing. It kind of
20 stuck out to me. She was describing what would happen when
21 her children seem to act out or get angry and she believed
22 it was due to what had happened to her husband. She tells
23 the children to stay away from the anger, go away from the
24 anger. And it seemed so again ironic to me that these
25 lessons we give to children sometimes seem to be lost on the

1 adults.

2 There's reasons to be angry about what happened
3 in our community. There's reason to be angry about the
4 death of George Sullivan. But in the end, if we follow
5 Mrs. Sullivan's advice and stay away from that, there's many
6 more reasons not to kill Siaosi Vanisi, for you not to
7 sentence him to death than are actually used for him to
8 sentence you to death. If you look at really what's going
9 to be accomplished by doing what the State asked you to do,
10 you have just made, you've doubled one tragedy into two.
11 And if that's some sense of justice, then I'm not going to
12 understand it. But I'll abide by your decision. I just
13 would ask you to consider what I've said before you
14 undertake what is an awesome responsibility.

15 Thank you.

16 THE COURT: Okay. The State is allowed to make
17 a rebuttal argument, but I am going to take our morning
18 recess now. The bailiff will provide you with some menus.
19 I'm going to ask you order a meal for your lunch, because
20 you will not be out and about today. If you need to make
21 any telephone calls to advise any last minute family members
22 about the fact that you are not going to be available to
23 talk to anyone in a little while and throughout the rest of
24 the deliberations, I'd ask that you make those calls on this
25 morning's break.

1 During this break do not discuss among
2 yourselves or with anyone else any matter having to do with
3 this case. It is your further duty not to form or express
4 any opinion regarding the ultimate punishment in this
5 matter.

6 You are not to read, look at or view any news
7 media accounts regarding the case. And should any person
8 attempt to influence you in any manner with regard to this
9 case, you must report such an attempt to the Court
10 immediately.

11 Court's in recess.

12 (Recess taken.)

13 THE COURT: Counsel, will you stipulate to the
14 presence of the jury?

15 MR. STANTON: Yes, Your Honor.

16 MR. GREGORY: Yes, Your Honor.

17 THE COURT: The State may conclude your closing
18 arguments.

19 MR. STANTON: Thank you, Your Honor.

20 Ladies and gentlemen, I'm going to speak
21 primarily to the comments, facts and analysis that
22 Mr. Bosler just gave you. The first thing I'd like to start
23 off with is his analysis of the aggravator of mutilation.
24 He's got a primary defect in his argument here. Fatally
25 flawed.

1 There's nothing in this instruction that says
2 that the mutilation has to take place when someone is dead.
3 And that was the entirety of his argument to you about
4 disfiguring the body once somebody has died. The statute
5 says that a portion of mutilation, one way to find it -- and
6 there's several up there -- is that it is an act beyond the
7 killing itself, not that the person is dead, but that the
8 murder in the fashion it was committed was more than was
9 necessary to commit the murder.

10 He argues that Andrew Ciocca found the officer
11 breathing; that he was still alive. That flies in the face
12 of that definition. He argues by analogy the State says
13 look at the weapon that he used, a hatchet. He wanted to
14 buy a gun. Okay. Let's use that analogy that Mr. Bosler
15 gives you. A gun. If Siaosi Vanisi had walked up to
16 Sergeant Sullivan, knocked him on the ground and shot one
17 round into his head and it was a high caliber weapon, 12
18 gauge shotgun, caused significant disfigurement, that would
19 not be mutilation. But if he took that same shotgun, that
20 same handgun -- remember the testimony of Dr. Ellen Clark,
21 minimum of 20 blows to the head. So instead of one shot to
22 the head to kill, he shot that gun or shotgun 20 times,
23 that's evidence of mutilation.

24 It doesn't trigger itself on when death occurs.
25 Do you think Siaosi Vanisi was making that assessment? Do

1 you think he checked Sergeant Sullivan's pulse? No. That's
2 not what that instruction means. It is the act beyond the
3 killing itself is mutilation, coupled with it the state of
4 mind. What's he doing? Why is he doing it? Why is he
5 hitting George Sullivan in the face? Wounds to the face are
6 to disfigure, the anger and the hatred. Why? It's in his
7 mind. The State didn't make up that evidence. He's the one
8 that stated it.

9 Mr. Bosler talks to you about mental illness.
10 Ladies and gentlemen, I know you will very carefully
11 consider the evidence in this case. One thing I ask you is
12 be very, very careful about the evidence that you've heard
13 about mental illness.

14 Where have you seen that evidence and what kind
15 of evidence is it? First of all, Dr. Thienhaus, their
16 witness, comes in and says the primary source of information
17 for him to make a diagnosis almost exclusively is from one
18 source and one source only. Who is that? Where is that
19 source from? From the defendant himself. In what situation
20 is Siaosi Vanisi in when he makes the statements to Dr.
21 Thienhaus that draws him to the, quote, diagnosis that he's
22 mentally ill?

23 First of all, he never diagnosed him as being
24 mentally ill. He diagnosed him as being possibly manic
25 depressive.

1 Once again, from him. What evidence do you
2 have in this case that would suggest that anything from
3 Siaosi Vanisi might be structured purposely to manipulate
4 the system for his own good? At least two doctors, a
5 psychiatrist and a psychologist, had previously concluded
6 conclusively that that man was malingering, a conscious
7 fabrication to benefit one's self.

8 "Mr. Vanisi does not believe that he's mentally
9 ill, but he is smart and motivated. Therefore, he's
10 attempting to manipulate us into believing he's psychotic
11 with a short-term goal of avoiding responsibility for recent
12 behavior. Digging under a fence, setting fires, refusing
13 direct orders. This will produce a future forensic problem.
14 Mr. Vanisi is motivated to avoid a death sentence and is
15 smart and manipulative. I am required by ethics to educate
16 him regarding his mental illness. This results in his
17 increased ability to fake and exaggerate symptoms. For
18 example, he tried to tell me today that his manic depression
19 makes him unaware -- equals not responsible -- for what he's
20 doing. I told him he was not telling me the truth and
21 explained that bipolar disorder could result in a decreased
22 ability to make rational, reasonable decisions to control
23 his impulses. He understood the difference immediately and
24 applied it."

25 That's what he did regarding mental illness.

1 He's learning. He's learning the right things to say and do
2 to benefit himself.

3 So when any of you sit there and consider
4 mitigating evidence in this case that that man is mentally
5 ill, think very carefully about what evidence you get that
6 from and the weight and the credibility you should lend to
7 it. I suggest none. Unless it's independently
8 corroborated. Oh, we have independent corroboration,
9 according to Mr. Bosler. What is it? His pre-murder
10 behavior.

11 The entirety of the evidence presented by the
12 defense penalty witnesses in this case boils down to a
13 couple categories. One category I refer to is the high
14 school witnesses. I think that testimony can be fairly
15 surmised as follows: 10, 11, 12 years ago a person by the
16 name of George Tafuna attended Cappuchino High School in the
17 greater San Francisco area. He was a nice guy. Good
18 student. No problems. That's it.

19 Next we have a series of family witnesses that
20 have said he was raised in a loving, caring environment. He
21 wasn't abused. That's also offered as mitigating evidence
22 that someone has an abusive childhood. Was it in this case?
23 No.

24 I think it can fairly be represented that the
25 family of the defendant generally were loving, caring

1 people, that gave him an environment to grow in, healthy
2 environment to grow in. In fact, Mr. Vanisi even tells
3 Detective Jenkins that. Concedes it.

4 But look at what the evidence doesn't show you.
5 There's a huge gap in what they presented to you. It's as
6 glaring as the daylight sun. All the evidence comes up to
7 what I'll refer to as the royal wedding that we heard so
8 much about, and behavior that disrespected the royal family.
9 Was there any other instances that showed mental illness as
10 Dr. Thienhaus described? Anything that was severe manic
11 depression or even mild manic depression?

12 The only testimony about Mr. Vanisi's behavior
13 prior to getting to Reno in January 1998 was from Deanne
14 Vanacey, his wife. What did she tell us? Some shocking
15 information, actually. That this person, as Mr. Bosler
16 said -- let me get his quote -- "he's a decent human being
17 before the murder." Really? Siaosi Vanisi is a decent
18 human being before the murder?

19 The definition of decency must be obviously a
20 distorted one if that's indeed a claim to be made to you,
21 ladies and gentlemen. Because it is uncontroverted
22 testimony that the Deanne Vanacey left the defendant a year
23 before she made the January 29th, 1998 telephone call to
24 Sergeant Jeff Partyka. By her sworn testimony, a year
25 before, she had left him because he was physically and

1 verbally abusive; that he didn't care for the children
2 because he didn't work and she had to work two jobs to care
3 for the children; that he wanted to go out to clubs and be
4 single, live the single life. That he wore wigs. He was
5 the center of attention.

6 Ladies and gentlemen, that's not mental
7 illness, that's selfishness. That's being self-centered.
8 And what he's running away from when he comes to Reno is a
9 lifestyle he'd rather forget. It's not love for his
10 children, it's not love for his wife, it's an abrogation of
11 his responsibility as a human being. He comes to Reno not
12 in a drug-induced manic state of mind, dressed as a
13 superhero, he comes up here wearing his wig and a racist
14 view of life that he's going to be a Tongan man and take
15 back from the whites.

16 Renee Peaua said that the defendant, who she
17 idolized, were her words to the police, was obsessed with
18 money. Obsessed with money. This is this manic depressive
19 person? It boils down to a very simple thing, ladies and
20 gentlemen, this quote mental illness -- he didn't like, as
21 he got into his 20s, living the lifestyle he had previously
22 led in Los Angeles as an actor. He wanted a completely
23 different lifestyle. And his, quote, mental illness was now
24 a racist viewpoint that he had thought about and researched
25 for months. His hatred towards whites.

1 Be very careful about the evidence of mental
2 illness in this case, where it comes from and the
3 credibility and the veracity of any of that information.

4 Deanne Vanacey, a couple things that she said
5 that I'd just point out to you to view with suspicions, some
6 of her testimony - her motivation. She's testifying at a
7 penalty phase where the death penalty is an option. And she
8 still loves the defendant.

9 She says that in 1996 the defendant takes a
10 trip to China and buys bottles of Phen Fen. What's odd
11 about that was her earlier testimony on direct examination:
12 They had no money. How does he get to China to purchase
13 drugs, to smuggle back into the United States?

14 He's a superhero. Remember her testimony about
15 wearing a wig and women's leggings standing in front of the
16 mirror? She left the witness stand, sounded like odd
17 behavior, until we have the Public Defender investigator who
18 sheds some light on what really that was all about.

19 And Mr. Bosler mentioned it to you; that he's
20 dressed up as this superhero at a Chuck E. Cheese with
21 children, and he says if that's not evidence of mental
22 illness, I don't know what is.

23 I'll leave it to you, ladies and gentlemen of
24 the jury, if that's any evidence of mental illness to you,
25 that a man dresses up to entertain children at a Chuck E.

1 Cheese.

2 Kathy Peaua: This is the person that lives at
3 Sterling who testified primarily to the aberrant behavior of
4 Mr. Vanisi; that he was using drugs. And she previously
5 hadn't told the truth that indeed there was drug usage going
6 on at Sterling, and that she was an eyewitness to it and an
7 eyewitness to the defendant using drugs. What did she tell
8 you, when you look closely at her testimony? She said she
9 sees the defendant using drugs, marijuana, and white pills.
10 There's no evidence what those white pills are. None
11 whatsoever.

12 But let's go further with what she testifies
13 to. What was his demeanor like? "He was withdrawn and
14 antisocial." All the other witnesses in the case say that's
15 the exact opposite of what Mr. Vanisi was. In fact, it
16 directly contradicts the symptoms of methamphetamine, which
17 is an accelerant to someone's behavior, and it flies
18 directly in the face of Manaoui Peaua, who testified in the
19 guilt phase. Remember, he's the gentleman that sees the
20 defendant sleeping just before he watches the movie, a time
21 of which after Mr. Vanisi gets up, wakes from his sleep,
22 goes and murders Sergeant Sullivan, comes back to the
23 Sterling Way house and asks for a ride over to Losa's house
24 over on Rock Boulevard. That's who Manaoui is. So her
25 testimony that she's never seen him sleep and saw him using

1 drugs at 10:30 at night is in direct contravention to
2 Manaoui Peaua's testimony, who saw him sleeping.

3 And remember Mr. Peaua said that on the way
4 over to Rock Boulevard the defendant had several things
5 different. He wasn't wearing his wig anymore. He was quiet
6 when he drove over. Other than that, he seemed normal. And
7 yet the aggravating or the mitigating circumstance that
8 Mr. Bosler tells you exists in this case is that the
9 defendant was operating under an extreme emotional
10 disturbance. When? It has to be at the time of the murder.

11 Dr. Thienhaus said on cross-examination by
12 Mr. Gammick that in order to be in an extreme episode of
13 manic depression, the person wouldn't know and be able to
14 operate mentally, to plan and organize. Is there evidence
15 that the murder of Sergeant Sullivan was planned and
16 organized? Absolutely. Where is it from? From the
17 defendant's own relatives. Out of his own mouth. "I want
18 to kill a cop." "I want to kill a cop on a coffee break."
19 "I want to kill a cop when I sneak up, creep up on him from
20 behind." "I'm going to take the dog along, Doobie, so it
21 acts as cover." I'm going to wear a Jamaican disguise so no
22 one will ever know it's me."

23 Yet, according to the defense's own expert
24 witness about manic depression, if it's an extreme bout of
25 manic depression, he couldn't even think that way, let alone

1 what he does after the murder: throws the wig and the beanie
2 into the creek. Why? If he's manic depressive, he wouldn't
3 care one way or another. No, he did it because he's the
4 Tongan warrior.

5 This mentally disturbed man afterwards sports
6 this as a proud trophy after he bludgeoned Sergeant Sullivan
7 to death.

8 MR. BOSLER: The record should reflect that
9 Mr. Stanton is wearing the belt.

10 THE COURT: The record will so reflect.

11 MR. STANTON: That is the evidence of this
12 deranged man. It entirely fits with his racist views of
13 whites and his views of cops.

14 We had a witness say that Mr. Vanisi hated
15 white police officers because his wife, Deanne Vanacey, left
16 him for a white police officer. Ms. Vanacey denies that
17 under oath on the stand. Whether it's true or not, who
18 knows.

19 The question is, what effect did it have in his
20 mind? The effect was disastrous.

21 Mr. Bosler tells you that, get this one
22 correct, "that it was a tragic circumstance that the police
23 officer that Siaosi Vanisi killed was white." Tragic?
24 Coincidence? Besides the two witnesses, and I understand
25 Mele Maveni has recounted her testimony, but we had two

1 witnesses who swore under oath in the guilt phase,
2 uncontested in the guilt phase, that he wanted to kill a
3 white cop. But we have two prevailing comments about hating
4 whites and hating police officers. So what's the leap
5 between white and cop? There is none. We know for sure
6 that Sateki Teki Taukiueva and this man stalked a Sparks
7 police officer the night before Sergeant Sullivan's murder.
8 Guess what, he's white, too. That's what Mr. Taukiueva's
9 testimony was.

10 Coincidence? The defense would like you to
11 think so. It certainly wasn't a coincidence based upon
12 Mr. Vanisi's statements.

13 Another problem Mr. Bosler has, the robberies.
14 The robberies of the two grocery stores. How do you argue
15 that? Because there's one major aspect of those robberies
16 that flies in the face of their theory. His demeanor. His
17 demeanor. He's cool, calculated. Polite. He knows exactly
18 what he's doing there. Is that evidence of someone
19 operating under a mental disease or defect such as Dr.
20 Thienhaus said they would be incapable of planning or
21 formulating any rational thought?

22 Cool, calm and collected is what both those
23 witnesses said. Yet, incredibly we now have an argument to
24 you that doesn't analyze his behavior, because they can't
25 answer that question. It flies in the face of their theory.

1 But what they now argue to you is, ladies and gentlemen,
2 that's a mitigating factor. The victim of an armed robbery
3 and the fact that he did not kill them because they were
4 white is a mitigating factor because, quote, he showed
5 compassion by not killing the victims.

6 He said - Mr. Bosler - that the State probably
7 wouldn't agree with that. It's not whether the State agrees
8 or doesn't agree with you. I ask you, ladies and gentlemen
9 of the jury, is that a mitigating factor?

10 Mr. Bosler says this process of the death
11 penalty, that we quickly dispatch the defendant with a
12 decision of death. He says several different things that
13 attempts to shift the burden on your shoulders relative to
14 the death penalty, whether you decide to kill Siaosi Vanisi.

15 Ladies and gentlemen, your death verdict in
16 this case, as the instructions clearly state, you are to
17 presume that sentence will be carried out. And there is no
18 doubt that if you render a death verdict, that indeed that
19 is the sentence that will be carried out.

20 But ladies and gentlemen, it is not you that
21 put us in this situation today. There's only one --

22 MR. BOSLER: I'm going to object, Your Honor,
23 to anything that implicates that the jury has any other duty
24 other than to impose death -- any comment that Mr. Vanisi is
25 the person who chose death by his conduct is improper,

1 because ultimately the jury is the people who have to decide
2 whether Mr. Vanisi lives or dies.

3 THE COURT: Overruled.

4 MR. STANTON: The position of you making this
5 decision is solely because of him and no one else. Let's
6 get one thing straight about this case and about
7 responsibility. This case isn't about drugs. It's not
8 alcohol. It's not mental illness. How many people suffer
9 from depression? Manic depression? How many people of
10 those use methamphetamine? Yet, the question begs itself,
11 why kill and why kill in this fashion? The only explanation
12 that remains is that Siaosi Vanisi, in his heart, in his
13 soul and in his mind is the basis for his behavior and
14 nothing else.

15 "Quickly dispatch Mr. Vanisi." This is a legal
16 process. You heard evidence, facts and instructions of law.
17 A civilized society. That's how the imposition of
18 punishment in all criminal cases is, and the most severe of
19 all, a first degree murder, capital murder case. He tries
20 to compare with two wrongs don't make a right argument.
21 Sergeant Sullivan was tragically killed, he concedes, but
22 what are we going to do by sentencing Mr. Vanisi to death?
23 We're going to compound the tragedy by inflicting the trauma
24 that the Sullivans had to the greater Vanisi family.
25 There's a major problem with that argument. The problem is

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1 this: George Sullivan didn't have a jury. He didn't have
2 evidence. George Sullivan was an innocent man. That's the
3 difference between this process. That is what an ordered
4 society does. They follow the rules. They have a trial
5 before a jury of his peers.

6 Manic illness -- besides the number of people
7 that have the disorder that don't do what Mr. Vanisi did,
8 what was Dr. Thienhaus' answer about the question where does
9 violence play in a manic depressive order? In other words,
10 are manic depressives violent?

11 Dr. Thienhaus' testimony was it's only in an
12 acute stage of manic that someone can be violent. And
13 acute, he says, is when someone cannot process or think at
14 all; plan. We've already proven to you, I would submit,
15 the evidence in this case about how he killed and what he
16 did after directly contradicts any assertion that he was
17 operating under a manic or severe manic episode.

18 Counsel argues the following: Guess what,
19 Siaosi Vanisi is a cop killer. You've seen what's happened
20 to him at jail and prison. Sentence him to life without the
21 possibility of parole and that's really going to punish that
22 man. Because, as Mr. Bosler argued to you, the jail
23 deputies and the prison deputies have been unfair to him.
24 They've beaten him up, shoved him down, violently assaulted
25 him. Why? Because on two occasions he didn't listen to

1 orders quick enough.

2 That's not what the testimony was. The
3 testimony was conclusively in every single cell extraction
4 Mr. Vanisi had multiple opportunities to respond to those
5 jail deputies' orders after the Detention Response Team or
6 distract team was called.

7 That's Mr. Bosler's job, he's a defense
8 attorney, to make some argument to you. But remember, look
9 at the entirety of the facts when you evaluate those
10 assessments of counsel.

11 And if life in prison is going to be so tough
12 for Mr. Vanisi, why argue for it? If it's that tough for
13 him, why would you want to argue for that? It's because
14 ultimately the most valuable thing is life itself.

15 Mr. Bosler says that Mr. Vanisi was walking in
16 a drug-induced manic depressive state at the campus of UNR
17 on January 12th into January 13th, 1998. What's the
18 evidence to suggest that?

19 What's the evidence before you that suggests
20 that he was suffering from any mental disease or that he was
21 under the influence of some drug-induced stage? We have
22 Brenda Martinez, whose observation was he staggered;
23 possibly, as she put it, drunk. Does she know whether he's
24 drunk? She has no idea. None whatsoever. And that he
25 followed the lights down the street. There's no evidence of

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1 what Mr. Vanisi did from when Brenda Martinez saw him.

2 The next piece of evidence and the only piece
3 of evidence you have is what Carl Smith saw, not of a
4 staggering drunk, but of Mr. Vanisi glaring at him.

5 Mr. Bosler says, look, these are the State's
6 witnesses; they want you to believe the State witnesses
7 because they carry the message of what Mr. Vanisi said and
8 did. Ladies and gentlemen, those witnesses were called by
9 the State. They're not my witnesses. They're the people
10 that have evidence to support criminal charges. Who are
11 these witnesses? They're not my choice. If I had my choice
12 to be able to go walk out into the community and to pick
13 witnesses to testify in a criminal case, Lord knows it
14 wouldn't be Renee Peaua. I am left with the witnesses that
15 he chose, the defendant, to bear his soul to, who he said
16 things to, where he dropped the evidence, where he put his
17 blood stained clothing, that's who I'm left to call. Am I
18 endorsing their credibility because I called them? No. I'm
19 not endorsing their credibility whatsoever. That's your
20 job. Their bias, their perspective, their demeanor and
21 appearance on the stand is what you should consider when you
22 determine what credibility to lend to those witnesses.

23 Do they say that Siaosi Vanisi changed in his
24 behavior? I think everybody did. David Kinikini believed
25 as well, with several other witnesses, that he looked

1 different. Dressed different, whatever. Is that borne out
2 of mental illness because somebody looks different from the
3 last time they've seen him several years ago? No. Not
4 because Mr. Vanisi has now embraced, done his research about
5 his racist views on whites. Now he's different.

6 Remember the testimony of what he does in the
7 van, where he takes the hatchet and hits in the back of
8 Ms. Kauapalu and then stares at her after she tells him
9 "Wanting to kill somebody is wrong." Just glares at her.
10 In that van, Mr. Vanisi says, "I want to go get my Tongan
11 mats." And the witness told you what a Tongan mat is. It's
12 a garb dress like the warriors. This isn't some superhero
13 comic book character. This is Mr. Vanisi's viewpoint that
14 he wants to be a Tongan warrior to kill whites.

15 Ask yourself when you think about that racist
16 angle in this case, how is it any different substantively
17 from a white supremacist who hates minorities? And as I
18 said in my opening statements to you in this case, there is
19 no distinction between it. It's morally offensive no matter
20 what race your hatred is targeted.

21 Mr. Bosler talks to you about the prison
22 escape - well, it's an escape in quotes. You're either
23 pregnant or you're not. It's either an escape or it's not.

24 The guards aren't shooting weapons at him
25 because they're going to sit there and say, hey, Bob, don't

1 worry about it, once he gets through the next fence he's
2 going to get to a more secure area, we'll blast him then.

3 It's not a sign of mental illness. It's a sign of him
4 showing the dangerous person that he is, attempting to
5 escape and mentally, as part of this game, playing with
6 correctional officers, his hatred, his disrespect, his
7 despise of those officers and what they represent.

8 There is a photograph in evidence, a photograph
9 of the weapon of Sergeant Sullivan in Salt Lake City. The
10 testimony in the guilt phase is that it was taken in the
11 laundry room area after the hostage situation was taken
12 over. There's an important piece of evidence in that
13 photograph, one that was never mentioned by Mr. Bosler in
14 his closing today. Why it wasn't mentioned? Because it
15 doesn't fit their theory. Remember, the defendant is in a
16 hostage situation in his own relative's house, which he
17 tries to burn down by starting a fire in the garage. And
18 what does Mr. Vanisi say at the beginning of the hostage
19 situation according to the witness, Keith Stephens, Craig
20 Meyer? He tells the SWAT officers that there's children in
21 the house, to buy himself time, to manipulate them. Is that
22 the sign of a man who can't think? He doesn't know what
23 he's doing? No. It's precisely consistent with everything
24 else that this man has done, and that is attempt to
25 manipulate the system to his best advantage.

1 What else does he do? He takes a cutting
2 board, a wooden cutting board that's in that photograph, and
3 he stuffs it down his shirt when the police are coming in.
4 Remember, I asked the SWAT officer that went into that home,
5 what concern that had to him as a SWAT officer being
6 involved in a potentially deadly use of force. He said that
7 board protects the center mass, just like a police officer's
8 vest. Is that the sign of a crazed, drug-induced person
9 that can't think, or is that the sign of a person who is
10 wily, cunning, intelligent, beyond his years in school?
11 That's exactly what it is. He's doing what any person
12 reasonably could do that could think under those
13 circumstances. And he was acting just like he did in those
14 two stores: calm, cool, collected.

15 Mr. Bosler mentioned some things about
16 statements to Detective Jenkins. He has the testimony
17 wrong. Detective Jenkins testified about statements that
18 Mr. Vanisi made to him when he was in handcuffs. Those
19 statements were made about his mother should be wearing
20 these same chains for bringing him over to the United
21 States. The same mother, either his aunt or his biological
22 mother, who did nothing but love him all his life. And
23 that's what he has to say about them.

24 What he's relating is the statements made to
25 Vainga Kinikini, "I want to kill this white mother fucker."

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1 "I want to kill Jesus Christ." "I want to kill this white
2 mother fucker," pointing to each one of the presidents of
3 the Mormon church. It's not the sign of a drug-induced,
4 crazed man. It's induced by hatred, racial hatred and
5 nothing else. Pure and simple.

6 He made comments about Carolyn Sullivan's
7 comments about her children. The children are told not to
8 hate because they're children. It's the healthy way to
9 improve.

10 The function of a jury in a capital murder
11 case, your sworn oath is to apply the law and the facts and
12 to make a reasoned moral judgment. There's a great
13 distinction and no parallel exists between those two.

14 Ladies and gentlemen, Siaosi Vanisi doesn't
15 deserve your sympathy. He doesn't deserve your pity. He
16 doesn't deserve your warmth. He doesn't deserve your
17 compassion. He doesn't deserve your mercy. He doesn't
18 deserve your leniency. Justice in this case demands death.

19 Thank you very much.

20 THE COURT: Counsel stipulate to the alternates
21 remaining in the custody and care of the officers?

22 MR. GREGORY: The defense would so stipulate,
23 Your Honor.

24 MR. GAMMICK: The State would too, Your Honor.

25 THE COURT: Thank you.

1 Ladies and gentlemen of the jury, at this time
2 our alternates remain, Mr. Carmichael, Mr. Costello and
3 Ms. Frazer. You will not begin your deliberations on this
4 matter at this time. You will be held separately as was the
5 case before. And if there is a vacancy on the jury, one of
6 you would be substituted in for the juror who had to be
7 relieved and the jury will begin their deliberations anew.
8 Therefore, you must follow the admonition during this break
9 that I've given you at all other breaks. You must follow it
10 diligently and remember it carefully.

11 It is your duty not to discuss this case among
12 yourselves or with anyone else. You may not form or express
13 any opinion with regard to the ultimate decision in this
14 case. You may not look at, listen to or view in any way or
15 read any news media accounts regarding this case. You may
16 not allow anyone to attempt to influence you with regard to
17 it. If anyone should attempt to influence you with regard
18 to it, you must report it to the officers who will be in
19 charge of you.

20 I'm going to let you leave in just a moment
21 with the rest of the jury, proceed into the jury room,
22 gather up your personal belongings, and leave with
23 Mr. Anderson. Do not discuss anything with your fellow
24 jurors as you walk through the jury room.

25 Ladies and gentlemen of the jury who will be

1 deliberating this phase of the case, you will have with you
2 in the jury room all the evidence that has been admitted in
3 this case. In addition, you'll have a copy of the jury
4 instructions that I've given you and you may take your notes
5 with you.

6 The clerk will now swear the officers to take
7 charge of the jury.

8 (Bailiffs sworn).

9 THE COURT: Gentlemen, will you please escort
10 the jury and alternates into the jury room.

11 (Whereupon the jury was excused.)

12 (Whereupon, the following proceedings were held
13 in open court, outside the presence of the
jury.)

14 THE COURT: Counsel.

15 MR. GREGORY: Just a couple matters.
16 Instruction No. 8 and Instruction No. 5.

17 THE COURT: Okay.

18 MR. GREGORY: Instruction No. 8, Your Honor, we
19 use the term "firearm." I believe "hatchet" should have
20 been inserted. I have no objections to that being changed
21 before it's given to the jury.

22 THE COURT: Or "deadly weapon." That's what
23 the jury found.

24 MR. GREGORY: Fine.

25 THE COURT: I did notice that as I was reading

1 it but counsel didn't object so I kept reading.

2 MR. GREGORY: I didn't want to do it in front
3 of the jury.

4 THE COURT: Mr. Stanton.

5 MR. STANTON: The instruction number that the
6 Court is referring to?

7 THE COURT: It's 8, "Any person who uses a
8 firearm." The jury found a deadly weapon in this particular
9 case.

10 MR. GREGORY: It's in two places. Also on line
11 eight.

12 THE COURT: Do you have a position?

13 MR. STANTON: No objection, Your Honor.

14 THE COURT: Then the Court will, by
15 interlineation, change the word "firearm" to "deadly
16 weapon."

17 MR. GREGORY: Thank you, Your Honor.

18 THE COURT: In both places.

19 MR. GREGORY: Instruction No. 5, line nine,
20 "doubt, to be reasonable."

21 THE COURT: I think I read it "to be
22 reasonable."

23 MR. GREGORY: You did indeed.

24 MR. STANTON: No objection, Your Honor.

25 MR. GREGORY: Thank you, Your Honor.

1 THE COURT: Those changes have been made.

2 Anything further?

3 MR. GREGORY: No, Your Honor.

4 THE COURT: Have the alternates been removed?

5 THE BAILIFF: Yes, Your Honor.

6 THE COURT: I want to remind everyone who has
7 participated in the trial in terms of family members of both
8 sides and observers, that while the jury is deliberating,
9 it's my policy to keep the floor clear of interested
10 participants. Therefore, the family members on both sides,
11 friends and family, and friends, and anyone just interested,
12 I'm going to ask you leave the fourth floor immediately.
13 You can remain in the courthouse. It's free to you, but I
14 don't want you on the fourth floor during the deliberations.
15 And if you want to stay someplace where you can be notified
16 by counsel, just tell them where you are. They will notify
17 you if we have a verdict.

18 Counsel, it's your responsibility to stay in
19 touch with the clerk of the court and the administrative
20 assistant with regard to your whereabouts.

21 Court's in recess subject to the call of the
22 jury.

23 (Noon recess taken at 12:06 p.m.)

24

25

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(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

(Mr. Stanton was not present for this hearing.)

THE COURT: Counsel, the bailiff has handed me a question from the jury. I think you've been handed a copy of the question which reads: "Do we have to be unanimous on the aggravating factors on either the "Yes" or "No"?"

Counsel have any position with regard to the answering and how the answer should be made?

MR. GAMMICK: Your Honor, I think this can be a very simple answer. I think the Court can simply state, if you want to make it a little longer, but "Refer to Jury Instruction No. 19."

MR. GREGORY: We would agree, Your Honor. Although we don't think it has to be any longer.

MR. GAMMICK: "In answer to your question, you may refer to Jury Instruction No. 19," if you want to throw in a few extra words.

MR. GREGORY: Court's indulgence.

THE COURT: The concern that I have is I'm not

1 sure if the jury is asking if they have to be unanimous as
2 to the answer on each aggravating circumstance or whether
3 they are asking if they must be unanimous as to all of the
4 aggravating circumstances. In other words, do they have to
5 decide the same thing as to each aggravating factor.

6 MR. GAMMICK: Not getting into a complete
7 analysis, different directions of this question, I might
8 suggest to the Court you send an answer back "Refer to Jury
9 Instruction No. 19 at this time." If that does not -- if
10 they want to rephrase it a different way, if that doesn't
11 answer it, then I think they can send it back out again. As
12 to the question right now, I wouldn't want to try to
13 second-guess or read much into it; take it on face value and
14 tell them to refer to Instruction No. 19.

15 MR. GREGORY: I believe Mr. Bosler has
16 something to add.

17 MR. BOSLER: I don't read the question the same
18 as you. My concern is that if they are confused about the
19 unanimous requirement for each aggravator, they already have
20 the instructions. If that hasn't resolved the issue, then
21 I'd rather not have them resolve this issue in a manner that
22 is incorrect or done with a misunderstanding of the law. So
23 I mean the question -- the Court may perceive this as
24 problematic. I know normally I say just refer to the
25 instructions, but I think the Court would not be unwise to

1 say you must find unanimously the existence of each
2 aggravator.

3 MR. GAMMICK: I'm going to object to that at
4 this time, giving them any further instructions. I think
5 we've already instructed them. No. 19 says, "When you
6 retire to consider your verdict, you must first determine
7 whether the State has proven beyond a reasonable doubt that
8 an aggravating circumstance or circumstances exist in this
9 case. All of you must agree as to each aggravating
10 circumstance."

11 THE COURT: But do you understand that it's
12 possible to read that as meaning that they must agree that
13 all the circumstances exist or that none of the
14 circumstances exist?

15 MR. GAMMICK: Give me just a minute, Your
16 Honor. I thought we addressed that in another instruction
17 that says they must find at least one aggravating
18 circumstance. I see what you're saying now.

19 THE COURT: When I read that -- I think it
20 meant something to all of us, but I'm not sure it meant the
21 same thing to the jury.

22 MR. GAMMICK: If the suggestion is to say
23 something to the them to the effect you must find at least
24 one aggravating circumstance beyond a reasonable doubt and
25 you must be unanimous, I'd have no objection to that. Does

1 that answer what the Court's concern was?

2 THE COURT: Kind of. I'm thinking. It's
3 always problematic for the Court to answer jury questions
4 after we've already instructed them as to the law. So I
5 appreciate your input. Give me a minute and I'll see if I
6 can come up with something.

7 Counsel approach.

8 (Bench conference between Court and counsel.)

9 THE COURT: Let the record reflect I'm having
10 counsel read the proposed answer. I'll read it into the
11 record after they've had an opportunity to look at it. The
12 question about whether or not I would refer to another
13 instruction, I'd rather not in case -- there may be many
14 instructions they really should utilize. I don't want to
15 imply that one particular instruction is the only one that
16 answers their question.

17 MR. BOSLER: I think 19 is the one that deals
18 with this specific issue.

19 THE COURT: Parts of it. So the answer I
20 propose is "You must decide on each alleged aggravating
21 factor separate from the others. You must be unanimous as
22 to any aggravating factor you respond "Yes" to on the
23 verdict form.

24 MR. BOSLER: No objection.

25 THE COURT: Anybody have an objection to that

1 answer?

2 MR. GAMMICK: No objection, Your Honor.

3 THE COURT: Then the clerk will type that
4 answer and put a signature line. I'll sign it. It will be
5 handed to the jury in a few minutes.

6 MR. BOSLER: Will the Court provide us with
7 copies?

8 THE COURT: Yes.

9 The Court's in recess.

10 (Recess taken at 2:35 p.m.)

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RENO, NEVADA, WEDNESDAY, OCTOBER 6, 1999, 4:00 P.M.

-oOo-

(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Deputy, do we have a verdict?

THE BAILIFF: Yes, Your Honor.

THE COURT: Please bring the jury in.

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

THE COURT: The clerk will now call the roll of the jurors.

(Roll call taken.)

THE COURT: Mr. Ayers, has the jury reached a verdict?

JUROR 10: Yes, it has, Your Honor.

THE COURT: Would you please hand the verdict to the bailiff, who in turn will hand it to the Court.

The defendant will please rise. The clerk will read the verdict of the jury.

THE CLERK: In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, the State of Nevada, Plaintiff, versus Siaosi Vanisi, also known as "Pe", also known as "George",

1 Defendant, Case No. CR98-0516, Department No. 4.

2 Verdict: We the jury, in the above-entitled
3 matter, having previously found the defendant Siaosi Vanisi
4 also known as "Pe", also known as "George", guilty of murder
5 in the first degree, find that the following aggravating
6 circumstances exist, to wit: Number one, the murder of
7 Sergeant George Sullivan was committed by Defendant Siaosi
8 Vanisi, also known as "Pe", also known as "George", in the
9 commission of, or attempt to commit, the crime of robbery
10 with the use of a deadly weapon. Yes.

11 Number two, the murder of Sergeant George
12 Sullivan was committed by Defendant Siaosi Vanisi, also
13 known as "Pe", also known as "George", upon a peace officer
14 who was engaged in the performance of his official duty, and
15 the defendant knew or reasonably should have known that the
16 victim was a peace officer. Yes.

17 The murder involved mutilation of Sergeant
18 George Sullivan. Yes.

19 Number four, the murder of Sergeant George
20 Sullivan was committed by Siaosi Vanisi also known as "Pe",
21 also known as "George", because of actual or perceived race,
22 color, religion or national origin of Sergeant George
23 Sullivan. No.

24 The jury further finds that there are no
25 mitigating circumstances sufficient to outweigh the

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1 aggravating circumstance or circumstances found and
2 therefore set the penalty to be imposed upon the defendant
3 at death.

4 Dated this 6th day of October, 1999. James L.
5 Ayers, Foreperson.

6 THE COURT: You may be seated.

7 Ladies and gentlemen of the jury, is this your
8 verdict say you one and say you all?

9 (All Responded Affirmatively.)

10 THE COURT: Does either party wish the jury
11 polled?

12 MR. GREGORY: We do indeed.

13 THE COURT: The clerk will now poll the jury.

14 THE CLERK: Juror No. 1, is this your verdict
15 as read?

16 JUROR NO. 1: Yes.

17 THE CLERK: Juror No. 2, is this your verdict
18 as read?

19 JUROR NO. 2: Yes.

20 THE CLERK: Juror No. 3, is this your verdict
21 as read?

22 JUROR NO. 3: Yes.

23 THE CLERK: Juror No. 4, is this your verdict
24 as read?

25 JUROR NO. 4: Yes.

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1 THE CLERK: Juror No. 5, is this your verdict
2 as read?
3 JUROR NO. 5: Yes, it is.
4 THE CLERK: Juror No. 6, is this your verdict
5 as read?
6 JUROR NO. 6: Yes.
7 THE CLERK: Juror No. 7, is this your verdict
8 as read?
9 JUROR NO. 7: Yes.
10 THE CLERK: Juror No. 8, is this your verdict
11 as read?
12 JUROR NO. 8: Yes.
13 THE CLERK: Juror No. 9, is this your verdict
14 as read?
15 JUROR NO. 9: Yes.
16 THE CLERK: Juror No. 10, is this your verdict
17 as read?
18 JUROR NO. 10: Yes.
19 THE CLERK: Juror No. 11, is this your verdict
20 as read?
21 JUROR NO. 11: Yes.
22 THE CLERK: Juror No. 12, is this your verdict
23 as read?
24 JUROR NO. 12: Yes.
25 THE COURT: The verdicts of the jury will be

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1 recorded by the clerk. Ladies and gentlemen of the jury,
2 your job here is finished. I join with the officers of the
3 court and my staff in thanking you. It has been several
4 weeks, and you've worked very diligently. We appreciate
5 your service. Jury service, as I told you in the beginning,
6 is at best inconvenient and many times it creates hardships.
7 You've worked through those hardships and that
8 inconvenience.

9 With our appreciation, you are now released
10 from the admonition that I've given you all along. You may
11 talk about the case with anyone you so desire to speak of it
12 with. However, you're not obligated to speak of the case.
13 No one can force you to talk about it. It is your choice
14 and your choice alone. If you have any difficulties in this
15 regard, please feel free to contact me. If I can answer any
16 questions for you or assist you in any manner, please feel
17 free to call me at a later date.

18 Ladies and gentlemen of the jury and
19 alternates, with our thanks, you are released at this time.

20 (Whereupon the jury was excused.)

21 (Whereupon, the following proceedings were held
22 in open court, outside the presence of the
jury.)

23 THE COURT: The jury having found the defendant
24 guilty, the defendant will be remanded to the custody of the
25 sheriff. The clerk will give us a date for entry of

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1 judgment and sentencing on those charges that the jury did
2 not reach an appropriate sentence for the defendant.

3 THE CLERK: November 22nd at 10:00 a.m.

4 MR. GREGORY: Thank you. Your Honor, if I
5 might. We're willing to waive a presentence report. We're
6 willing to allow the Court to impose the maximum consecutive
7 sentence at this time. If the Court does not wish to do
8 that, we're going to ask that Parole and Probation not have
9 any contact with Mr. Vanisi.

10 MR. GAMMICK: May we have just a moment?

11 Your Honor, we're in total agreement with that,
12 with one exception. We'd ask that the Court canvass the
13 defendant personally to ensure that this is his wishes. But
14 if he wishes to have the maximum sentence imposed on Counts
15 II, III, IV and V, consecutive to the death sentence, we
16 have no objection to that.

17 MR. GREGORY: I'm his counsel, Your Honor. I
18 speak for him.

19 MR. GAMMICK: Your Honor, we would like to have
20 a personal canvass, please.

21 THE COURT: I have a question first: Is this
22 a -- is your concern the investigation that would be
23 conducted by the Department of Parole and Probation or the
24 interview of your client that would be conducted as part --

25 MR. GREGORY: I don't want my client talking to

1 Parole and Probation, first of all. And secondly, I believe
2 it's a useless exercise. I know what their recommendation
3 is going to be, and I suspect what the Court will do.

4 THE COURT: It's the Court's opinion that the
5 investigation conducted by the Division of Parole and
6 Probation is never a useless exercise. A criminal defendant
7 has an absolute right to have that investigation. And the
8 Court should have the value of having the Division of Parole
9 and Probation evaluate the facts and circumstances. I, at
10 this point had, although I've sat through the entire trial,
11 am very familiar with it, I had not anticipated sentencing
12 your client.

13 Furthermore, I don't know if your client is
14 going to want to make some statements at his sentencing on
15 the other charges that might be addressed to the Court,
16 something different than what he might address to a jury.

17 MR. GREGORY: I can aid the Court. He will not
18 make any statements either to the Court or to Parole and
19 Probation.

20 THE COURT: Mr. Vanisi, your attorney has
21 indicated that you wish to waive your right to have a
22 presentence investigation in this matter. Do you waive that
23 right?

24 THE DEFENDANT: I'm represented by counsel
25 and --

1 THE COURT: That's true, Mr. Vanisi. However,
2 this is a very significant right that counsel does not waive
3 for himself. He can only waive it if you request that it be
4 waived. It is not a determination that he can make on his
5 own. If you agree with that determination and want to waive
6 that right, you may do so. If you do not agree with that
7 determination, I will deny his request. If you want to
8 stand mute on the decision, you may do so and I will rule
9 accordingly.

10 MR. GREGORY: Court's indulgence.

11 THE DEFENDANT: Yeah, I understand the
12 questions, the admonishment that you have given me, but at
13 this point he's my counselor. He's going to make that
14 decision.

15 THE COURT: Okay. The Court will deny the
16 motion. We'll set the date for sentencing as the clerk has
17 set it. We will have a presentence investigation.
18 Certainly you have a right to deny the interview with the
19 Division of Parole and Probation. However, it will be
20 referred to the Division of Parole and Probation for a
21 presentencing investigation.

22 MR. GREGORY: Yes, Your Honor, you've just
23 indicated to him he has a right to deny to see Parole and
24 Probation. Unfortunately, at the jail, what happens when
25 the P&P officer comes up, they usher the defendant down to

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1 him and they in effect force the defendant on the Parole and
2 Probation officer. I'm advising the Court and the sheriff's
3 department he will not talk to Parole and Probation. So
4 it's not necessary for them to even go down there.

5 Thank you, Your Honor.

6 THE COURT: The Division of Parole and
7 Probation will make contact with the defendant through the
8 shift supervisor at the jail. If Mr. Vanisi acknowledges to
9 the shift supervisor that he does not wish to speak to the
10 P&P officer, no further contact will be made. If Mr. Vanisi
11 changes his mind and wants to talk to the P&P officer, the
12 P&P officer will conduct the personal investigation. The
13 shift commander will make a written report with regard to
14 the contact and serve that report on counsel for both sides.

15 Anything further?

16 MR. GAMMICK: The date and time of sentencing
17 again, please, Your Honor.

18 THE COURT: Yes.

19 THE CLERK: That is November 22nd at 10:00 a.m.

20 THE COURT: That will be also the time that the
21 death warrant will be issued at the time of sentencing.

22 MR. GAMMICK: We will prepare all the necessary
23 paperwork and have it to the Court before then as well as
24 defense counsel, Your Honor.

25 MR. GREGORY: A 250 matter. Certain

1 allegations were made against me in front of the press. The
2 Court did not allow me to at that time offer my explanation.
3 And of course it was reported in the press, as I suspected
4 it would be, that I had done something wrong. Now --

5 THE COURT: Do you want a hearing set?

6 MR. GREGORY: No.

7 MR. GAMMICK: I'm going to request a hearing,
8 Your Honor.

9 MR. GREGORY: Okay. I was going to suggest
10 that I provide the Court with an affidavit. They can
11 respond. I'll give them a copy. And if a hearing is needed
12 as a result of that, then we can have one.

13 MR. GAMMICK: However we get there, I am going
14 to request a hearing on the matter that we left pending.

15 THE COURT: Right. There's two questions: Is
16 your motion for attorney misconduct and Rule 11 sanctions,
17 if they apply in this case? Or is your motion for contempt
18 of court? And does either party want to be heard with
19 regard to whether the Court needs to hear it if it is a
20 contempt of court motion?

21 MR. GREGORY: Well, I'm going to file charges
22 or, rather, allegations, Your Honor, and request whatever
23 appropriate action the Court deems necessary for
24 prosecutorial misconduct. I'm not going to get involved in
25 that and perform for the media. But there are several areas

1 that I need to bring to the Court's attention.

2 THE COURT: Okay. What I'm going to do is I'm
3 going to set a briefing schedule, and then we'll have a
4 hearing at the conclusion of that. If during your briefings
5 you determine that another department should hear part or
6 all of your motions, you should put that in your motions.
7 You will submit your -- each of you will have until October
8 18th at 4:00 p.m. to file your initial pleadings. They must
9 be served on opposing counsel personally. Opposing counsel
10 will have until October 22nd at 5:00 p.m. to respond. Any
11 replies will be submitted to the Court October 26th at 4:00
12 p.m.

13 MR. GREGORY: Thank you, Your Honor.

14 THE COURT: In your replies, if you do file
15 them, or your responses, you should note whether or not you
16 want to have a hearing.

17 The Court will set the hearing subsequent to
18 that.

19 Anything further?

20 MR. GREGORY: No, Your Honor.

21 THE COURT: Mr. Gammick? Mr. Stanton?

22 MR. GAMMICK: No, Your Honor.

23 THE COURT: Court's in recess.

24 (Proceedings concluded at 4:20 p.m.)
25

STATE OF NEVADA,)
)
COUNTY OF WASHOE.)

I, DENISE PHIPPS, Certified Shorthand Reporter
of the Second Judicial District Court of the State of
Nevada, in and for the County of Washoe, do hereby certify:

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

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

DATED: At Reno, Nevada, this 6th day of
October, 1999.

Denise Phipps

DENISE PHIPPS, CCR No. 234

Washoe State of Nevada
District Court in and for the County of
JANUARY 2, 1999
DATE: 1999
Office in case number
which was on file and of record in my
The record to which this certificate is
attached is the original
CERTIFIED ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 35249

District Court Case No. CR9980516

REMITTITUR

TO: Amy Harvey, Washoe County Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: November 27, 2001

Janette M. Bloom, Clerk of Court

By: J. Richards
Chief Deputy Clerk

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender
Federal Public Defender

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on Nov 29, 2001
Amy Harvey
County Clerk



SA01901
01-19805

FILED
DEC 06 2001
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 35249

District Court Case No. CR9980516

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "Affirmed."

Judgment, as quoted above, entered this 17th day of May, 2001.

IN WITNESS WHEREOF, I have subscribed my name and affixed
the seal of the Supreme Court at my Office in Carson City,
Nevada, this 27th day of November, 2001.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards
Chief Deputy Clerk

ORIGINAL

FILED

2004 NOV -9 PM 12:16

RONALD A. LORSTIN, JR.

BY  DEPUTY

1 CODE: 2195
2 SCOTT W. EDWARDS, ESQ.
3 State Bar No. 3400
4 729 Evans Ave., Reno, Nevada 89512
5 (775) 786-4300
6 THOMAS L. QUALLS, ESQ.
7 State Bar No. 8623
8 443 Marsh Ave., Reno, NV 89509
9 (775) 333-6633
10 Attorneys for Petitioner, SIAOSI VANISI

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

14 * * *

15 SIAOSI VANISI,

16 Petitioner,

17 vs.

Case No. CR98P0516

Dept. No. 4

18 E.K. McDANIEL, Warden
19 Nevada State Prison, Ely; and
20 FRANKIE SUE DEL PAPA,
21 Attorney General of the
22 State of Nevada,

DEATH PENALTY CASE

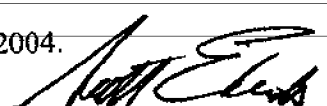
23 Respondents.

24 **MOTION FOR STAY OF POST-CONVICTION HABEAS CORPUS PROCEEDINGS**
25 **AND FOR TRANSFER OF PETITIONER TO LAKES CROSSING FOR**
26 **PSYCHOLOGICAL EVALUATION AND TREATMENT (HEARING REQUESTED)**

27 COMES NOW appointed counsel, SCOTT W. EDWARDS AND THOMAS L. QUALLS,
28 and on behalf of Petitioner, SAOSI VANISI, hereby move this Honorable Court for an order:
(1) staying post-conviction habeas corpus proceedings; and (2) transferring the Petitioner to Lakes
Crossing for competency evaluation and any necessary treatment. Further, a hearing is requested prior
to determination of this Motion.

This Motion is based upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S.
Constitution, the attached points and authorities, and the attached Affidavits of Counsel.

DATED this 8th day of November, 2004.


SCOTT EDWARDS, ESQ.
THOMAS L. QUALLS, ESQ.,
Attorneys for Petitioner,
SAOSI VANISI

SA01903

2JDC06199

POINTS & AUTHORITIES

STATEMENT OF FACTS

It has come to the attention of the undersigned counsel that the competence of Petitioner, SIAOSI VANISI ("VANISI"), in these post-conviction habeas corpus proceedings is questionable. The question of competence arises from personal observations of both counsel, as well as the reported behavior of the Petitioner. (*Please see* Affidavits, attached). Specifically, the observations of counsel when attempting to interview VANISI for the purposes of these proceedings are that VANISI displays extremely erratic behavior and is highly delusional. It is the opinion of the undersigned counsel that due to his compromised mental state, VANISI may not be competent to assist counsel and to understand and appreciate these habeas corpus proceedings. However, counsel are not professionally trained in either psychology or psychiatry. Accordingly, professional observation and evaluation -- and any recommended treatment -- are sought through the instant Motion.

LEGAL ARGUMENT

Although it appears that the Nevada Supreme Court has not addressed this issue, in Rohan v. Woodford, 334 F.3d 803 (9th Cir. 2003), the Ninth Circuit reviewed a prisoner's right to receive a stay of proceedings while incompetent. The Court held that if a prisoner cannot communicate with counsel because of incompetency, the state must order a stay of proceedings. Id. at 803-804.

Further, in Rohan, the Ninth Circuit held that a district court must stay capital habeas proceedings during the petitioner's incompetence, rather than appointing a "next friend" and requiring the friend to pursue the habeas petition on the petitioner's behalf. *See also* Calderon v. U.S. District Court, 163 F.3d 530 (9th Cir. 1998) (*en banc*).

///

1 In Rohan, the Court also explored the implications of executing an insane prisoner. Id. at 807-
 2 808. The same issue is before this Court in the instant case. It is anticipated that the State will argue
 3 that prior competence evaluations and/or hearings in this matter determined that VANISI was
 4 competent to stand trial and that those determinations should guide this Court's decision as to the
 5 instant motion. Rohan is both instructive and on point on this issue.

7 In Rohan, Oscar Gates ("Gates") received the death penalty for committing murder. At the
 8 time of trial, through testimony of neighbors and a psychologist, the jury found Gates competent and
 9 sentenced him to death. Id. at 805. After his conviction, however, Gates' mental condition
 10 deteriorated. He suffered from a number of delusions, including that he was an heir to a huge fortune
 11 and therefore, the government was trying to assassinate him to get his money. Due to these delusions,
 12 Gates' counsel presented an argument that rested on Gates' inability to properly assist in his defense
 13 during further proceedings because of his insanity. Id. Gates' attorneys also claimed that their ability
 14 to pursue many of Gates' claims was impaired by their inability to communicate coherently with him.

17 As a result, the state sent Gates to the California Department of Mental Health so mental health
 18 professionals could examine him. Rohan, 334 F.3d at 805-806. The psychologists there determined
 19 Gates was not malingering and that he was indeed mentally ill. Further, they determined that Gates'
 20 mental incompetence interfered with the understanding of his surroundings and his ability to
 21 communicate with counsel. Id.

23 The district court heard testimony regarding Gates' competency and determined Gates' mental
 24 condition would impede his counsel from protecting his rights. Rohan, 334 F.3d at 806. However,
 25 the district court refused to stay further proceedings and instead appointed Colleen Rohan ("Rohan")
 26 as Gates'"next friend" to protect Gates' interest. But Rohan also had trouble communicating with
 27
 28

1 Gates and was unable to present an adequate defense. Still the district court refused to stay the
2 proceedings. Id.

3
4 On appeal, the Ninth Circuit evaluated the consequences of Gates' incompetence. The Court
5 reasoned that competence (or sanity) included both understanding one's surroundings *and* having the
6 ability to relay information which could result in exoneration. Rohan 334 F.3d at 807-808.
7 Accordingly, the Ninth Circuit ruled that the right to competency did not expire with the jury's verdict,
8 but extended from judgment to execution. Id. at 808.

9
10 Specifically, the Ninth Circuit found that although Congress had not required competency
11 during a habeas corpus proceeding, the common law implied such a requirement. The Court explained
12 that those who challenge convictions in capital cases have the right to counsel, which carries with it
13 the right to adequately assist counsel in their defense. Rohan, 334 F.3d at 313. The Ninth Circuit
14 therefore concluded that Gates had a right to be competent at his habeas proceeding. Id. at 817.
15 Accordingly, the Ninth Circuit determined the court should stay proceedings in Gates' case until Gates
16 returned to a competent state. Id. at 819.

17
18 As is often acknowledged in capital cases, "Death is different." It is therefore necessary for
19 us to sometimes take extraordinary measures to assure the guarantees of constitutional due process.

20
21 Courts have traditionally recognized this requirement in capital cases:

22
23 **It is the universal experience in the administration of criminal justice that those
charged with capital offenses are granted special considerations.**

24 William v. Florida, 399 U.S. 78 at 103, 90 S.Ct. 1893 at 1907, 26 L.Ed.2d 446 (1970)(emphasis
25 added).

26
27 ///

28

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 409 U.S. 15, 92 S.Ct. 2726, 2760 (Stewart, J.).

That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction become relevant.

Williams v. Georgia, 349 U.S. 375, 391, 75 S.Ct. 814, 99 L. Ed. 1161 (1955) (Frankfurter, J.).

In death cases doubts such as those presented here should be resolved in favor of the accused.

Andres v. United States, 333 U.S. 740, 752, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948) (Reed, J.).

Mr. Justice Harlan expressed the point strongly: I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death.

Reid v. Covert, 354 U.S. 1, 77, 77 S.Ct. 1222, 1262, 1 L.Ed.2d 1148 (1957) (concurring in result).

The undersigned counsel are in the process of acquiring relevant medical and other records from the Nevada Department of Corrections related to VANISI. It is the intent of counsel to present the same to this Court at a hearing on this matter.

///

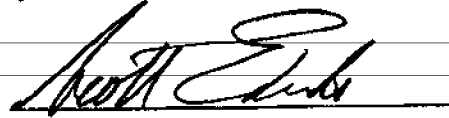
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1 WHEREFORE, the undersigned counsel, on behalf of Petitioner SIAOSI VANISI, hereby
2 request that this Court enter a stay of all post-conviction habeas corpus proceedings until the issue of
3
4 VANISI's competence to proceed may be resolved. Additionally, a hearing is requested on this
5 matter.

6 RESPECTFULLY SUBMITTED this 8th day of November, 2004.

7
8 
9 SCOTT EDWARDS, ESQ.
10 State Bar No. 3400
11 729 Evans Ave., Reno, Nevada 89512
12 (775) 786-4300
13 THOMAS L. QUALLS, ESQ.
14 State Bar No. 8623
15 443 Marsh Ave., Reno, Nevada 89509
16 (775) 333-36633
17 Attorneys for Petitioner,
18 SIAOSI VANISI
19
20
21
22
23
24
25
26
27
28

SVan is 12JDC06205

AFFIDAVIT OF SCOTT W. EDWARDS, ESQ.

STATE OF NEVADA)
)ss:
COUNTY OF WASHOE)

I, SCOTT W. EDWARDS, ESQ., after being first duly sworn, hereby depose and state under penalty of perjury as follows:

1. That your affiant was appointed as legal counsel for SLAOSI VANISI by Order of this Court as for the purpose of assisting co-counsel MARC PICKER in pursuing post-conviction relief for Mr. VANISI. Mr. Picker was allowed to withdraw as counsel from the case, leaving your affiant as sole counsel on the case. In December of 2003, this Court approved the appointment of THOMAS QUALLS as co-counsel on the case;

2. That on June 09, 2004, your affiant visited VANISI in the Nevada State Prison in Ely, Nevada with co-counsel QUALLS;

3. That the purpose of the visit on June 09, 2004 was to interview VANISI regarding his case and to seek his assistance in the preparation of his claims for post-conviction relief;

4. That during the visit on June 09, 2004, VANISI's mental state and erratic behavior prevented counsel from obtaining any meaningful assistance towards the preparation of his Supplement to his habeas petition;

5. Specifically, your affiant observed VANISI in an extremely manic and agitated state, both verbally and physically. Moreover, VANISI appeared delusional in his statements to counsel;

6. Your affiant observed VANISI unable to sit still for any meaningful length of time; Instead, VANISI moved all over the interview room, sometimes laying down on the ground, scooting

1 along the floor, pacing the room, and extremely animated in his behaviors;

2 7. Upon information and belief, VANISI is on forced psychotropic medication;

3 8. Your affiant observed VANISI make outlandish claims regarding his own thoughts,
4 behaviors, and imagined powers. Your affiant took notes during the visit regarding the same;

5 9. VANISI broke out into song numerous times during the interview, seemingly out of
6 the blue and without any relevance to the subject matter at hand;

7 10. Further, VANISI more than once attempted with some success to partially undress
8 during the interview;

9 11. Also, VANISI claimed that he had not slept in 8 days prior to the date of the interview;

10 12. VANISI once stated that he would like to be "Dr. Pepper";

11 13. Further, VANISI stated that he is an independent sovereign and that certain guards have
12 lost their authority to govern over him;

13 14. Also, VANISI repeatedly explained that he had to make the prison guards and others
14 around him "understand his ways";

15 15. VANISI reported that he has taken to blindfolding himself in the yard when he is
16 running and doing his workouts and is thereby forced to feel his way around. VANISI explained, "I
17 do my motions; I do my movements." VANISI also reports to standing on his head in the yard;

18 16. Also, VANISI claimed that he needed the blindfold to "get his head right";

19 17. Further, VANISI claims to have been naked in the yard in the snow making snow
20 angels;

21 18. VANISI apparently has new glasses. He explained that they allow him to see things
22 in "high definition;

1 ///

2 ///

3

4 19. Additionally, VANISI repeatedly snarled like a wild animal whenever asked to do
5 something that doesn't fit "his way" -- including when relating a story, as well as when counsel asked
6 certain things of him;

7 20. VANISI also seems to be delusional regarding how others view him;

8

9 21. VANISI also claimed to have stayed outside in the yard all night long in April of 2004
10 (for approximately 24 hours);

11 22. Further VANISI related that he had a total of six write-ups in April of 2004;

12 23. Also, several times during the interview, VANISI made random statements which,
13 although somewhat poetic in their form, were basically unintelligible. For example, quite out of
14 context, VANISI proclaimed, "My identity itself causes you violence. You hang up my picture in
15 silence."
16

17 24. VANISI further claimed to have gone into the yard in his boxers and tennis shoes, with
18 a bedsheet over his head. When called in from the yard, he wouldn't go into his "house" (his cell) but
19 instead "captured the tier" (the area outside his house);
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21 25. Further, VANISI made several comments regarding the guards "impinging upon his
22 life and freedom" -- without any acknowledgment of his incarcerated status or the inherent legal
23 authority of the guards over him. He stated that he would not "consent to be governed";
24

25 ///

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26. In short, your affiant believes that VANISI's current mental state prevents him from

3

4 accurately understanding his situation and from meaningfully assisting counsel in the pursuit of his

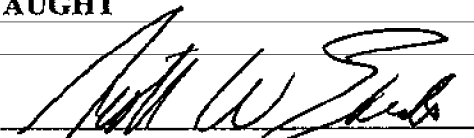
5 post-conviction relief.

6

7 **FURTHER YOUR AFFIANT SAYETH NAUGHT**

8

9


SCOTT W. EDWARDS, ESQ.

10

11

12 SUBSCRIBED AND SWORN to before me,

13 the 8th day of November 2004.

14

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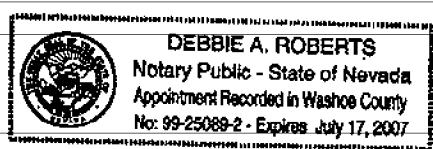
16 NOTARY PUBLIC in and for said

17 County and State.

18

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20



21

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23

24

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28

AFFIDAVIT OF THOMAS L. QUALLS, ESQ.

STATE OF NEVADA)
)ss:
 COUNTY OF WASHOE)

I, THOMAS L. QUALLS, ESQ., after being first duly sworn, hereby depose and state under penalty of perjury as follows:

1. That your affiant was appointed as legal counsel for SIAOSI VANISI by Order of this Court dated December 23, 2003 for the purpose of assisting co-counsel SCOTT W. EDWARDS in pursuing post-conviction relief for Mr. VANISI;

2. That on June 09, 2004, your affiant visited VANISI in the Nevada State Prison in Ely, Nevada with co-counsel EDWARDS;

3. That the purpose of the visit on June 09, 2004 was to interview VANISI regarding his case and to seek his assistance in the preparation of his claims for post-conviction relief;

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5. Specifically, your affiant observed VANISI in an extremely manic and agitated state, both verbally and physically. Moreover, VANISI appeared delusional in his statements to counsel;

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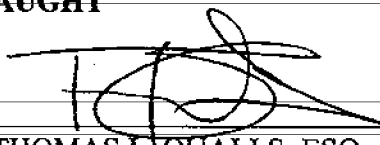
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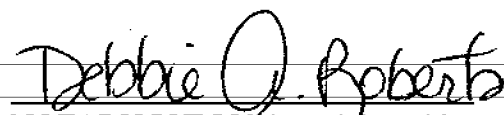
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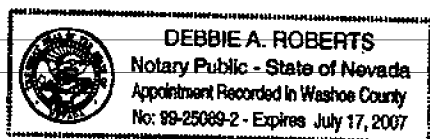
26. In short, your affiant believes that VANISI's current mental state prevents him from accurately understanding his situation and from meaningfully assisting counsel in the pursuit of his post-conviction relief.

FURTHER YOUR AFFIANT SAYETH NAUGHT


THOMAS L. QUALLS, ESQ.

SUBSCRIBED AND SWORN to before me,
the 8th day of November 2004.


NOTARY PUBLIC in and for said
County and State.



CERTIFICATE OF SERVICE:

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Scott W.

Edwards, and that on this date, I served the foregoing *Motion for Stay of Post-conviction Habeas*

Corpus Proceedings and for Transfer of Petitioner to Lakes Crossing for Psychological Evaluation

and Treatment on the party(ies) set forth below by:

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

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

XSP _____ Reno/Carson Messenger service.

addressed as follows:

Terry McCarthy
Appellate Deputy District Attorney
50 W. Liberty St., #300
P.O. Box 30083
Reno, Nevada 89520

DATED this 8th day of November, 2004.

Debbie A. Roberts

ORIGINAL

FILED

2004 NOV 17 PM 4:36

RONALD A. LONGTIN, JR.

BY

DEPUTY

1 CODE: 2195
2 SCOTT W. EDWARDS, ESQ.
3 State Bar No. 3400
4 729 Evans Ave., Reno, Nevada 89512
5 (775) 786-4300
6 THOMAS L. QUALLS, ESQ.
7 State Bar No. 8623
8 443 Marsh Ave., Reno, NV 89509
9 (775) 333-6633
10 Attorneys for Petitioner, SIAOSI VANISI

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

14 ***

15 SIAOSI VANISI,

16 Petitioner,

17 vs.

Case No. CR98P0516

Dept. No. 4

18 E.K. McDANIEL, Warden
19 Nevada State Prison, Ely; and
20 FRANKIE SUE DEL PAPA,
21 Attorney General of the
22 State of Nevada,

DEATH PENALTY CASE

23 Respondents.

24 **REPLY TO RESPONSE TO MOTION FOR STAY OF POST-CONVICTION HABEAS**
25 **CORPUS PROCEEDINGS AND FOR TRANSFER OF PETITIONER TO LAKES**
26 **CROSSING FOR PSYCHOLOGICAL EVALUATION AND TREATMENT (HEARING**
27 **REQUESTED)**

28 COMES NOW appointed counsel, SCOTT W. EDWARDS AND THOMAS L. QUALLS,
and on behalf of Petitioner, SAOSI VANISI, hereby submit the following reply to the State's response
to Petitioner's motion for stay of post-conviction proceedings and transfer to Lakes Crossing for
competency evaluation and any necessary treatment.

This Reply is based upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S.
Constitution and the attached points and authorities.

DATED this 17th day of November, 2004.

SCOTT EDWARDS, ESQ.
THOMAS L. QUALLS, ESQ.,
Attorneys for Petitioner,
SAOSI VANISI

SA01918

2JDC06188

POINTS & AUTHORITIES

The State rejects the holding in *Rohan v. Woodford*, 334 F.3d 803 (9th Cir. 2003), and instead relies on an obscure and somewhat dated precedent from the state of Washington. (*Matter of Hews*, 741 P.2d 983 (Wash.1987)). The issue must be addressed before any further proceedings upon the post-conviction case of the Petitioner. If the Court rules in favor the State, the Petitioner will be compelled to have the matter reviewed by the Nevada Supreme Court in an extraordinary writ proceeding. It is unknown whether the State is as sincere in its commitment that *Rohan* should be rejected.

Basically, the State rejects the existence of a constitutional due process right to competency in postconviction proceedings or a stay of proceedings until competence is regained. See, *Rohan v. Woodford*, 334 F.3d 803, 818 (9th Cir.2003) The Ninth Circuit holding in *Rohan* is controlling on the issue of federal constitutional law. The State has cited no authority for its assumption that Ninth Circuit precedent should not guide this Court's determination of the issue. Instead, the State merely maintains that the federal appellate court is wrong. It is respectfully submitted that the State's position should not be adopted and instead this Court should stay proceedings until the Petitioner regains competence.

In the instant motion, the Petitioner does not seek appointment of a "next friend" to maintain the habeas action pending his incompetency. It is merely asserted that considerations of due process warrant a stay of proceedings until the Petitioner can exercise his right to collateral review as a competent witness and litigant. The State's citation to the holding in *Calambro v. District Court*, 114 Nev. 961, 964 P.2d 794 (1998), seems to support the Petitioner's position rather than undermine it. If as the State maintains "when a prisoner is incompetent, then he is unavailable to litigate on his own

1 behalf? why take the position that habeas proceeding should proceed with an incompetent litigant?
2 In the absence of next friends or guardians, should a habeas court be wallowing in the lunacy of
3 allegations and claims made by incompetents? The State thinks so. The Petitioner respectfully
4 submits his call for a pause in the process is far more reasonable. It is hard to see how granting the
5 instant motion for stay would prejudice other prisoners in their quest for post-conviction relief. No
6 other proceeding will be stayed as a result of such a ruling by this Court. However, if post-conviction
7 litigation in other cases draws upon the *Rohan* precedent and results in staying those proceedings,
8 what is the harm? If other attorneys in other cases submit affidavits showing their respective clients
9 are incompetent to proceed and assist counsel, why should the law demand that those cases proceed
10 with incompetent litigants? The State's position makes no sense. If the State agrees with the
11 proposition that an incompetent convict should not be executed, why force him to proceed with his
12 post-conviction litigation? If he does not prevail, his execution is still stayed. The State gets no closer
13 to the ultimate finality in the case by forcing an incompetent litigant to litigate. The State's position
14 is wrong. The State cites no authority for its argument that the right to be competent at the time of
15 execution is somehow different from the right to be competent at this stage. *Rohan* specifically holds
16 that the Petitioner has a right to be competent at this stage.
17
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21 It should be noted that in the instant motion does not seek an actual "commitment" of the
22 Petitioner to Lakes Crossing as the State would have this Court believe. (Response, page 2, lines 10-
23 11) There has not been a medical determination of incompetency. Only if such a determination is
24 made would the appropriate action be commitment. For now, all that is requested is that the Petitioner
25 be evaluated and treated and observed over time by appropriate mental health professionals.

26 Finally, a word about the State's argument that the petition should be dismissed. After much
27 debate, undersigned counsel have withheld a filing of a supplement to the petition pending resolution
28

1 of the instant motion. Ultimately, it was decided that filing substantive claims in a supplement might
 2 be construed as a concession that a competent petitioner was not required to litigate the case. The
 3 State, informally, has been put on notice that if and when there comes a time to resolve habeas claims
 4 on the merits, there is, *inter alia*, a very complex issue of international law (Vienna Convention) for
 5 this Court to address. The Petitioner's factual input on this issue is necessary but not forthcoming
 6 because of his apparent incompetence. Additionally, resolution of the issue will require the attendance
 7 of one or more diplomats. Securing the attendance of those diplomats is a matter of some delicacy
 8 and rather than issuing a subpoena for the day before the Thanksgiving holiday, your undersigned
 9 elected to hold off until the *Rohan* motion is resolved. If that tactical decision is abhorrent to this
 10 Court and results in the dismissal of the Petitioner's habeas action, it must be considered ineffective
 11 assistance of counsel and this Court must afford relief to the Petitioner by according him the right to
 12 begin his habeas proceedings anew with new counsel.
 13

14 WHEREFORE, the undersigned counsel, on behalf of Petitioner SIAOSI VANISI,
 15 hereby request that this Court enter a stay of all post-conviction habeas corpus proceedings until the
 16 issue of VANISI's competence to proceed may be resolved.

17 RESPECTFULLY SUBMITTED this 7th day of November, 2004.

18
 19
 20 
 SCOTT EDWARDS, ESQ.

21 State Bar No. 3400
 22 729 Evans Ave., Reno, Nevada 89512
 23 (775) 786-4300
 THOMAS L. QUALLS, ESQ.
 24 State Bar No. 8623
 25 443 Marsh Ave., Reno, Nevada 89509
 26 (775) 333-36633
 27 Attorneys for Petitioner,
 28 SIAOSI VANISI

CERTIFICATE OF SERVICE:

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Scott W. Edwards, and that on this date, I served the foregoing *Reply to Response to Motion for Stay of Post-conviction Habeas Corpus Proceedings and for Transfer of Petitioner to Lakes Crossing for Psychological Evaluation and Treatment* on the party(ies) set forth below by:

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

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XX _____ Reno/Carson Messenger service.

addressed as follows:

Terry McCarthy
Appellate Deputy District Attorney
50 W. Liberty St., #300
P.O. Box 30083
Reno, Nevada 89520

DATED this 17th day of November, 2004.

Debbie Roberts

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

-oOo-

STATE OF NEVADA,)
 Plaintiff,) Case No. CR98P0516
 vs.)
 SIAOSI VANISI,) Dept. No. 4
 Defendant.)

TRANSCRIPT OF PROCEEDINGS

POST-CONVICTION

MONDAY, NOVEMBER 22, 2004

RENO, NEVADA

Reported By: MARCIA FERRELL, CCR No. 797

APPEARANCES:

For the Plaintiff: TERRY McCARTHY
DEPUTY DISTRICT ATTORNEY
75 Court Street
RENO, NEVADA 89520

For the Defendant: SCOTT W. EDWARDS
ATTORNEY AT LAW
729 Evans Avenue
RENO, NEVADA 89512

THOMAS L. QUALLS
ATTORNEY AT LAW
443 Marsh Avenue
RENO, NEVADA 89509

1 RENO, NEVADA, MONDAY, NOVEMBER 22, 2004, 10:00 A.M.

2 --o0o--

3 THE COURT: This is the time previously set for
4 post-conviction hearing. There's a motion to continue and
5 for psych eval. Counsel?

6 MR. EDWARDS: Yes, your Honor. As you've
7 noticed, we have filed a motion pursuant to the Ninth Circuit
8 precedent in the case of Rohan. What that precedent holds is
9 that in capital proceedings, when there is a question, an
10 actual finding of incompetency of the habeas petitioner, the
11 proceedings must be stayed pending evaluation, treatment, and
12 return to competency.

13 The Nevada Supreme Court has never addressed this
14 issue, we don't have any Nevada law on this. The Rohan case
15 is of recent vintage, 2003.

16 What I have for you today are matters that need
17 to be placed in the record so you can make a factual
18 determination of what to do. So in anticipation of this
19 hearing, I have subpoenaed records relative to disciplinary
20 proceedings at the prison regarding my client, as well as
21 medical records that are now produced for the first time
22 today. Relative to the psychological treatment, medications,
23 Mr. Vanisi is receiving.

24 I don't know whether you can actually make a

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

Electronically Filed
Jan 14 2015 12:30 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Volume 1 of 9

APPELLANT'S SUPPLEMENTAL 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

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| 4 | <u>The State of Nevada v. Siao Si Vanisi, et al., Washoe County Second Judicial District</u> Court Case No. CR98-0516 Trial Volume 5 September 24, 1999..... | SA00813-SA00924 |
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of January, 2015. Electronic Service of the foregoing Appellant's Supplemental 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

It is subject to this Court's supervision at all times. If you go beyond what is permissible, the Court must make and take corrective action.

The corrective action could be that I would comment on your statement to the jury, that the prosecutor may comment on your statement to the jury, or what is sometimes possible is even the reopening of the case for the prosecution to cross-examine you.

Your statement must be one of mitigation. Included in that you may talk about remorse, apology, chagrin, plans and hopes for the future.

It is not an opportunity for you to tell the jury of your innocence or to rebut facts in evidence, or to deny your guilt.

Do you understand the specific parameters of your right to make a statement to the sentencing authority?

THE DEFENDANT: Yes, I do.

THE COURT: Then we will take our afternoon recess. You can tell me after the recess your decision about making the statement.

MR. GREGORY: Thank you, Your Honor.

THE COURT: Court is in recess.

(The afternoon recess was taken at 3:03 p.m.)

RENO, NEVADA, TUESDAY, OCTOBER 5, 1999, 3:25 P.M.

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(Whereupon, the following proceedings were held in open court, out of the presence of the jury.)

THE COURT: Thank you. Please be seated.

Mr. Vanisi, have you had an opportunity to consult with your attorneys?

THE DEFENDANT: Yes.

THE COURT: And is it your desire to make a statement in mitigation?

THE DEFENDANT: Yes.

THE COURT: Okay.

MR. GREGORY: Your Honor, procedurally, I ask that the Court admonish the audience that there should not be any outbursts while Mr. Vanisi makes a statement. Secondarily, certainly the prosecutor can argue that it was an unsworn statement. I would ask, however, that this Court make no special effort to put a spotlight, unusual spotlight on the fact that he is making a statement.

THE COURT: Like what?

MR. GREGORY: Well, like: Ladies and gentlemen, Mr. Vanisi is going to stand up at counsel table. He is not going to take the stand. He is not subject to cross-examination. He's going to be -- you know, he has a

right to allocute in front of this jury. And I think all that's needed is that the jury be told, or that the Court invite Mr. Vanisi to stand and ask him if he would like to make a statement to the jury. If he answers in the affirmative, then allow him to do so.

THE COURT: Fine with me.

MR. GREGORY: That would be our request.

THE COURT: What outbursts do you anticipate?

MR. GREGORY: I don't know, Your Honor. I don't know. But I do know that I have seen that happen. I don't anticipate anything. I just want them to be told to please maintain the courtroom decorum.

THE COURT: All right. I haven't noticed there being any problems. If there is a problem, we will clear the courtroom.

This is a statement in mitigation and I can't foresee it's any problem, as long as the defendant is not trying to rebut facts in evidence or deny his guilt, or claim his innocence. Okay?

Please bring in the jury.

(Whereupon, the following proceedings were held in open court, in the presence of the jury.)

THE COURT: Counsel stipulate to the presence of the jury?

MR. GAMMICK: Yes, Your Honor.

MR. GREGORY: Yes, Your Honor.

THE COURT: Mr. Vanisi, we have come to the stage in the proceedings when you may make a statement to the jury, if you so desire.

THE DEFENDANT: Yes.

THE COURT: You may do so.

THE DEFENDANT: I want to say that I'm sorry the Sullivan family has gone through this. I'm sorry that my family has gone through this. If I had known that I was ill, I would have gone to a doctor. I used speed and marijuana before coming to Reno, and used it for the week that I was here. I didn't sleep much.

This is not an excuse, but a reason. I fell away from my church and my values. If given the opportunity, I hope to try to help others avoid the nightmare of drugs and despair. Maybe this will help the Sullivan family and my family with their grief. Thank you.

THE COURT: Ladies and gentlemen of the jury, we worked late last night after you left and I have not been able to finalize the jury instructions. I anticipate that I have another half an hour at least in order to finalize them. And that's very conservative.

Then counsel will be able to present their closing arguments to you on the penalty phase.

I'm very concerned about the lateness of the

hour and keeping you here all afternoon while we finalize these instructions and then begin closing arguments late in the day. For that reason, although I really told you I thought we were going to go to the jury today, I think it's better that we do it tomorrow morning.

So, in spite of the fact I know everyone wants to move forward with this case, I don't want you beginning your deliberations at 8:00 tonight. I think everyone will be tired at that point and you will be able to more effectively listen to closing arguments if you do it when you are fresh in the morning.

I have no other things scheduled tomorrow morning. We will begin sharply at 9:00 a.m. in the morning. Come on in in the morning. Go into the jury room. Be prepared to hear the instructions of the Court, closing arguments of counsel, and begin your deliberations.

Now, that's 9:00 a.m. tomorrow morning.

During this evening's recess, do not discuss the case among yourselves or with anyone else. Do not allow anyone to attempt to influence you with regard to this case. It is your duty not to express or form any opinion about the ultimate outcome. And do not read, look at, or listen to any news media accounts regarding this case.

Ladies and gentlemen of the jury, you are excused until 9:00 a.m. tomorrow.

(The jury was excused at 3:32 p.m.)

(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Counsel, I have a couple of different instructions that you all have given me. I want to go through those and make sure you all received copies before we begin settling the instructions again. We will be back on the record. We will take a short recess and then begin settling instructions.

(A recess was taken.)

RENO, NEVADA, TUESDAY, OCTOBER 5, 1999, 3:50 P.M.

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(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Thank you. Please be seated. Let the record reflect we have convened outside of the presence of the jury for the purpose of finalizing jury instructions and verdict forms. The defendant is present with counsel.

Let's go through the stack. You'll see there's a couple that we prepared in our office. I think there's some that I received from the State and the defense. Let's go through the pile and put them in the same order as each other.

"Ladies and gentlemen of the jury."

"If in these instructions any rule, direction, or idea."

"There are two kinds of evidence."

"The evidence presented during the trial."

"The State has the burden of proving beyond a reasonable doubt."

"You have found the defendant in this case to be guilty of murder in the first degree."

"A prison term of 50 years with eligibility of parole."

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"Any person who uses a firearm in the commission."

"The following are the aggravating factors."

This has been retyped.

MR. BOSLER: Retyped?

THE COURT: Right.

MR. STANTON: Aggravating or mitigating?

THE COURT: No, I'm sorry, it looks like the same. You can tell I'm tired.

"The term mutilate."

Okay. Now, this is the one that was a modification of defendant's offered H. It starts "A murder in the first degree may be mitigated by any of the following circumstances."

I asked the defense to prepare it, but we prepared it also. So is this in the form as what you want?

MR. BOSLER: Let me double-check with the Court's copy with what I have. I believe the District Attorney received a copy also.

THE COURT: Yes, that's it. Does everybody have that? Do you have it?

MR. GAMMICK: We have received one from the defense in the packet this morning. I don't believe we have seen the Court's. My understanding, it's the same language.

THE COURT: It's what we talked about.

Sometimes I don't always get it from the defense. I thought we might be going quick. We went ahead and retyped it this morning. I don't think we received anything from the defense.

Oh, Mrs. Stone says she thinks maybe the packet you thought you got from the defense might have been our packet.

MR. BOSLER: I believe it was, Your Honor.

THE COURT: Did you draw up a packet?

MR. BOSLER: It was not a packet, but we provided some of the things we talked about today to the D.A.

THE COURT: We'll see what we've got. Right now we have the modification of Exhibit H.

MR. BOSLER: We ask that you allow Mr. Vanisi to have his right hand free for purposes of this hearing.

THE COURT: Yes.

MR. BOSLER: Thank you, Your Honor.

THE COURT: Okay. So, we have the "Murder in the first degree may be mitigated by any of the following circumstances." We have, "One, the defendant has no significant history of prior criminal behavior."

"Two, the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."

"Three, the youth of the defendant at the time of the crime."

"Four, any other mitigating circumstances," and the last paragraph from the statute.

MR. BOSLER: Yes, Your Honor.

THE COURT: Okay. "Mitigating circumstances are things which to not constitute a justification or excuse of the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability."

MR. BOSLER: I believe that's the evidence instruction. I didn't get a copy of that from the Court.

THE COURT: It is.

MR. GAMMICK: Then did you --

THE COURT: Did the State by any chance get two copies of it?

MR. STANTON: No, Your Honor.

THE COURT: Mr. Anderson, would you go find Ms. Clements and find out why they don't have a copy?

MR. GAMMICK: That instruction is replacing what we talked about last night as the *Bishop* instruction?

THE COURT: No. Last night we talked about there's two evidence instructions. One is the *Bishop* instruction. And that's on page 1204 of the *Evans* case. And that is the *Bishop* instruction, but sandwiched between

the language that the State was using through *Bishop*, was additional language.

Then there was a second instruction in the *Evans* case on page 1203. It's cited in a footnote and approved in the case for an explanation of what mitigation is. That's the instruction that was not given in the original packet of instructions, but was given subsequently by the Court because the jury came out and did not understand what mitigation was. The Court defined mitigation.

Both of those instructions went up on appeal. The Court approved both of the instructions.

MR. GAMMICK: The one you were just reading is a 14-line instruction?

THE COURT: It is in *Evans*, page 1203, sub-footnote 31.

MR. GAMMICK: I'm asking about the physical instruction. How many lines?

MR. STANTON: How many lines?

THE COURT: The one I just read?

Four lines.

MR. GAMMICK: That's four lines, okay.

THE COURT: Then the next instruction is the one we have been talking about, which is the *Evans* instruction from page 1204.

MR. STANTON: Your staff has prepared what appears to be the rest of that instruction?

THE COURT: Yes.

MR. STANTON: Is that going to supplant the State's proffered instruction?

THE COURT: For the one you offered and cited as *Bishop*?

MR. STANTON: Yes.

THE COURT: Yes.

MR. GAMMICK: We will wind up with two instructions that talk about mercy?

THE COURT: I'm concerned about that aspect of it because in the *Evans* case there were two instructions. The other part of that instruction that was approved in the *Evans* case, though, is the description of mitigation, which is not defined anywhere in the packet as submitted by the State.

Furthermore, there's subsequent cases to *Evans* which cite to those specific instructions that were utilized in *Evans*.

We have the *Lane* case, *Lane vs. Nevada*, a 1998 case. I have only the Pacific 2d statute. It specifically approves and cites to *Evans*.

MR. GAMMICK: That's not my question, Your Honor. When we substitute and replace these, we have -- we

wind up with two instructions that talk about mercy.

THE COURT: So, is your suggestion that it would be appropriate to modify the *Evans* instruction that was given, even though the Court approved giving both of those instructions in that form?

MR. STANTON: Yes, Your Honor. Once again, I think in my argument last evening, I think the *Evans* instruction I believe needs to be taken into context. That is, the debate over the instruction that was given because of the juror's question presupposes that the jury is not going to understand -- the jury is not going to understand the definition of mitigation as it's given in other instructions.

THE COURT: Where is it defined?

MR. STANTON: According to yours, it's defined in that four-line paragraph, mitigation.

And also --

THE COURT: The one from the *Evans* case, page 1204? Is that the one you're thinking of?

MR. STANTON: It's the mitigating circumstances, four-line instruction.

THE COURT: That's the one that was given after the jury inquired.

MR. STANTON: Correct. Your question to me was, where is the definition of mitigating circumstances?

THE COURT: If we don't give that instruction, which was not given until the jury questioned the definition of mitigation --

MR. STANTON: In the next *Evans* instruction that is 14 lines in length --

THE COURT: Right.

MR. STANTON: -- beginning at line four, starting with the sentence "any aspect," that's the definition of mitigation.

MR. BOSLER: I disagree, Your Honor. I think the 14-line instruction doesn't define mitigation. Just shows how it can be used.

MR. STANTON: In addition, we have the actual instruction that lists the mitigation. It's not like it's in a vacuum. The one that lists the statutory mitigation that defense counsel believes *Evans* supports it and the residual exception.

In essence what the Court is inquiring, where is there a definition of the residual aspect of mitigation? Clearly no one can have a question or debate that the statutory mitigation is clearly defined. It's defined in the instruction that outlines the mitigation.

THE COURT: Well, I don't see anywhere where we tell the jury -- we use the words "mitigation" and "aggravation" all the time. We understand what those words

mean.

I don't know if our jury had been confused by those words. But it has happened in numerous cases. It specifically happened in the *Evans* case and went up on appeal.

I do not want to instruct duplicatively. I do not want to give two instructions that are the same. I don't want to continually tell the jury you have to consider mercy, mercy, mercy because that also gives the wrong impression.

I want to be completely accurate in how we instruct the jury.

I think that there is a potential for the jury not to understand what mitigation even means. And I know we have told them what the statutory ones are. I think perhaps we could join the two *Evans* instructions into one instruction. The State's concern would be alleviated. I would be instructing the jury in a form that has been approved by the Supreme Court.

MR. GAMMICK: If that results in the 14-line instruction, striking the language which starts at line six -- excuse me, starts at line five "including any desire you may have to extend mercy to the defendant," because that's the duplicative language. Strike that and you already talk about mercy and fairness in the shorter

instruction. I don't believe we would have any problem doing that.

THE COURT: So you're suggesting we could have it read, "Any aspect of the defendant's character or record, and any of the circumstances of the offense which a jury believes is a basis for imposing a sentence less than death may be considered a mitigating factor"?

MR. GAMMICK: Yes.

MR. BOSLER: Then the four-line instruction?

THE COURT: Right.

MR. GAMMICK: In conjunction with the four line one.

MR. BOSLER: No objection from the defense, Your Honor.

Just for order, we go from the four statutory mitigators, definition of mitigation, and then the longer Evans instruction?

THE COURT: Right. We are deleting the duplicative language which dealt with mercy.

MR. BOSLER: Thank you, Your Honor.

THE COURT: And my Administrative Assistant will be typing that.

Now, the next potential instruction is, "Your determination that an aggravating circumstance exists must be unanimous. You need not be unanimous, however, on you

finding of a mitigating circumstance. Your unanimous finding that an aggravating circumstance exists must be beyond a reasonable doubt, but such is not the case on your determination that a mitigating circumstance exists."

That's given to you today by me. Now -- yes?

MR. BOSLER: I think we have dealt with some of these issues. I think we have come to an agreement on the instruction that was a bone of contention last night. I object to this instruction because I think that it isn't specific enough to guide the jurors.

THE COURT: You object? It's not going to be given.

"The State has alleged aggravating circumstances are present in this case."

"The law compels the imposition."

"In reaching your verdict."

"In your deliberation you may discuss" -- I'm sorry, "may not discuss."

Your client did not testify. But he did assert his right of allocution. Do you want the constitutional right of a defendant not to testify? Do you want to modify it? Do you offer something different? Do you not want this at all? You two can talk.

MR. BOSLER: We don't need the Fifth Amendment instruction, Your Honor.

THE COURT: You specifically do not want that given?

MR. GREGORY: We do not.

MR. BOSLER: That's correct, Your Honor.

THE COURT: "Although you are to consider only the evidence."

Then I have the one that you all have played with and I have two different versions.

MR. GAMMICK: The latest version on line eight should read "may establish."

THE COURT: Okay. You guys both like this, right?

MR. GAMMICK: What we did here, Your Honor, we rewrote it the way we discussed it last night. We changed some of the language offered by the defense.

Today I talked to Mr. Hadelstadt about that. Even though he and I did not entirely agree on the language, I'll defer to him. He liked the language by the defense better. We changed it back, where now we have inserted the language that the defense gave to the Court last night verbatim. That's why line eight should read "may establish the existence." That's the difference between the two is whether it's "present" or "may establish."

"May establish" with the District Judge signature block at the bottom, that's the latest version.

That incorporates what was given to the Court last night in the shorter instruction we were discussing then about mitigation. You will note we put the aggravators in the first paragraph, the mitigators in the second paragraph. Third and fourth paragraph stayed as they were. What is usually the last instruction, we took it and placed it as the fifth paragraph in this particular instruction.

THE COURT: Okay.

MR. GAMMICK: "When all 12 of you agree upon a verdict."

THE COURT: Mr. Bosler?

MR. BOSLER: Now that it includes the language we asked for last night, we have no objection to this instruction.

THE COURT: Okay.

MR. BOSLER: This is kind of the reason I thought that the other instruction you offered is maybe not useful, because I think this explains a little bit more about the procedure.

THE COURT: All right.

We will go one more time preliminarily before we number. We are still waiting on the one to be retyped by Mrs. Clements.

"Ladies and gentlemen of the jury."

"If in these instructions."

"There are two kinds of evidence."

"The evidence presented."

"The State has the burden."

"You have found the defendant."

"A prison term of 50 years."

"A person who uses a firearm."

"The following are the aggravating factors."

"The term mutilate."

"A murder in the first degree is mitigated by."

"Mitigating circumstances are things which do not constitute."

You have a new retyped version of the mitigating circumstances. Please read that over and make sure it's what we discussed.

MR. STANTON: Your Honor, was there an instruction before this?

THE COURT: Yes, it's the short four-line, "Mitigating circumstances are things which do not constitute a justification or excuse of the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability."

MR. STANTON: Thank you.

THE COURT: "The State has alleged aggravating circumstances."

"The law never compels the imposition."

"In reaching your verdict."

"In your deliberation."

"Although you are to consider only the evidence."

"And when you retire."

Does the State have any additional instructions to offer?

MR. STANTON: No, Your Honor.

THE COURT: Defense have any additional instructions to offer?

MR. BOSLER: No additional, other than the ones that have already been offered and rejected. Thank you, Your Honor.

THE COURT: Any objections to the packet as I propose to give it? Mr. Stanton or Mr. Gammick?

MR. STANTON: No, Your Honor.

THE COURT: Any additional objections you have not already noted for the defendant?

MR. BOSLER: No, Your Honor.

THE COURT: We'll go ahead and number them. Before we worry about numbering, why don't we go ahead and talk about the verdict forms.

We have a proposed verdict, set of verdicts that the State has proposed. Then I have another proposed verdict, I think from the defense, which is three pages

long. Is that correct, Mr. Bosler?

MR. BOSLER: That is, but I apologize to the Court. I actually tinkered with it a little bit since I offered it to the Court.

THE COURT: You want to offer a different one?

MR. BOSLER: Can I read the amendment I offer the Court? Mine is handwritten.

THE COURT: Yes. I hate to mark up the exhibit because we are going to mark it. Why don't you tell me what the change is and then we'll mark your handwritten one.

MR. BOSLER: The change is on the last page. The first paragraph says, "The jury further finds that any mitigating circumstances do not outweigh the aggravating circumstances and therefore --" I would insert at that portion, where it says "and," it says "also finds that death is the appropriate penalty to be imposed on the defendant" and then put "and therefore said penalty to be imposed is death."

The reason I do that, Your Honor, I think that those two lines kind of imply it's just a weighing. That if you find the mitigators don't outweigh aggravators, death is the next step.

I think the law is different. Even when they reach that step, they have the next step: Is death the appropriate penalty? No matter which aggravators outweigh

mitigators. In that sense, I think it's misleading to the jury given the instructions that had been given. I move to add that language.

I believe the prosecutor has an objection to the whole of my offered instruction.

MR. GAMMICK: I will confirm Mr. Bosler's belief. Your Honor, if the Court will pull 175.554, paragraph four.

THE COURT: Yes?

MR. GAMMICK: Then in paragraph four, if you go to the second sentence, "The finding or verdict must designate the aggravating circumstance or circumstances which were found beyond a reasonable doubt." Both our proposed instruction and the defense proposed instruction do that, by the jury stating yes or no as to whether they found each of the individual aggravators beyond a reasonable doubt.

Then it goes on to state "and must state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."

What the law requires and the statute requires and what has been upheld in this state time and again is simply a statement from the jury saying they find no mitigating circumstance or circumstances that outweigh the aggravating circumstance or circumstances.

The problem we get into with the defense proffer is that it starts laying out mitigating circumstances. Now we are right back into the same circle we got into last night.

If a mitigating circumstance is not included here, then on appeal time, it's going to be brought up that they never found this mitigating circumstance or this mitigating circumstance, or this mitigating circumstance; or if the jury does say on these particular mitigating circumstances, then it wasn't sufficiently covered and it was over-covered.

We get into, with aggravators, they are specifically defined. They have to allege them. We have to prove them beyond a reasonable doubt. The jury is told so we know exactly what the target is. With mitigating circumstances, we tell the jury, "You can have 5,000 mitigating circumstances. Or you can have one." They have that complete spectrum.

For the Court to start outlining mitigators, and for the Court to start making a finding on that when it's not required by the law, has not been required by the U.S. Supreme Court, has not been required by the Nevada Supreme Court is getting out there where we get into argument that we can't win no matter which way it goes.

If they designate they found others, then the

argument will be made, what were they? If they designate they didn't find any others, the argument is going to be made the jury didn't properly deliberate the case.

So to step forward when the law doesn't require it, nor is it supported by any law to have specific designation of mitigators is taking a step out into the universe. We don't really need to be there. Yes, we do object to proposing this at all. The law is very specific as to what is supposed to be on the verdict form.

THE COURT: Okay. Now, without going into the specific argument that the defense is making with regard to having findings as to some mitigators' existence or not, what about his request to modify the last paragraph? Which is the same in both instructions.

MR. GAMMICK: Again I have problems because the statute says specifically "and must state." Not "may," and "must state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." That is a finding the jury makes and then they have to state that.

This is not something new we are dreaming up here. These instructions have been through all the judges in the Second Judicial District Court, through the Supreme Court. That's where we've evolved.

Now to start doing things differently and start

doing new things just to be doing them in contradiction to the statute is going to lead us down a road I don't particularly want to go down, and I urge the Court not to go down.

THE COURT: The proffered instruction doesn't match the statute.

MR. GAMMICK: I'm sorry, I didn't hear you.

THE COURT: I'm sorry, I drop my voice sometimes.

MR. GAMMICK. I couldn't hear you.

THE COURT: My dad can't hear me either.

The proffered instruction doesn't match the statute exactly.

I don't know if it makes a difference. The statute is that it must state that there are no aggravating, no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances. I don't know if that makes a difference, but the proffered instruction is not identical.

MR. GAMMICK: We'll change that line. We can have the word "sufficient." I didn't notice it was not verbatim.

THE COURT: I hadn't before either, but you had me read it. As you were going over the instruction, I read it and I saw that.

MR. BOSLER: That kind of gets to the problem I pointed out, Your Honor. It implies there's just a weighing process. There isn't the additional step that even though the jury finds the mitigators don't outweigh the aggravators, they still have the option of life.

In that sense, even the way it's offered in the statute and by the Court adding the word "sufficient," still doesn't comport with what the law is, which is even if they reach that point, they still can vote for death -- I mean vote for life. That's why I offered the amendment.

MR. GAMMICK: Get into the language of 200.030, sub (4)(a), which states "by death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances."

So again, basically the same basic language in 175.554 and 200.030, although they don't use the word "sufficient" under 200.030.

THE COURT: Right. I don't believe that the verdict form is what controls the jury in their deliberations. I think the jury instructions control the jury in their deliberations.

The instructions are very clear that the jury does not, it is not just a weighing process; that the jury has the option to not impose death for any reason, or no

reason at all. And the instructions clearly instruct the jury as to that.

The mere parroting of the language from the statute does not create a new instruction to the jury in the verdict form. Nor does it make a new implication to the jury in the verdict form. They are merely provided for the convenience of the jury anyway, and I tell them such.

So I don't think the objection to the language of the statute is well-founded and I won't modify it.

However, Mr. Gammick's argument and presentation of NRS 175.554 sub (4) is clear it must be instructed as to the language of the statute. I don't know if there's really a difference. There may be a semantic difference only. That's what the statute says. The statute is constitutional, has been found to be constitutional. This Court will instruct in that regard.

So the language needs to be modified to read identically to the statute.

Now, with regard to your request for additional findings by the jury? I rejected that argument in prior cases. I do not believe it's appropriate to limit in any way the findings of the jury with regard to mitigation, although I think you are offering it because you think it would be helpful to the defense. In many instances in the research I have done, in case law I've read, it is not the

preferred method. Nor has the Nevada Supreme Court ever adopted it.

For those reasons and the potential for the Supreme Court not choosing to adopt such a format, I will deny your request to adopt that format.

MR. BOSLER: To make the record, Your Honor, I believe the statute that has been cited by the prosecutor sets forth the minimum limits on a verdict form but does not set the maximum limits on the verdict form.

THE COURT: I agree with you. I just don't think adding more to the verdict form is going to make much difference. And I am instructing clearly in the jury instruction.

MR. BOSLER: Just to make the record clean, I think by only emphasizing the aggravating circumstances in the verdict form, you essentially deprive Mr. Vanisi of the weight of the mitigating circumstances and do not give a place where the jurors can actually recognize the existence of those mitigating circumstances. In that sense, I think it deprives him of a fair sentencing. I just note that for the record.

MR. GAMMICK: So, modify the verdict form where it will now read, "The jury further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found, and

therefore set the penalty to be imposed upon the defendant at death."

THE COURT: The language is fine to the word "found." I'm wondering about the "and therefore" or if we should start a new sentence. I just am thinking.

MR. GAMMICK: However the Court prefers. I don't have any preference. You want to make that a period? "Therefore, the jury sets the penalty to be imposed upon the defendant at death."

THE COURT: Defense have a preference? I don't care.

MR. BOSLER: In that regard we don't. We made our objections.

THE COURT: We will leave the stock format as provided and utilized on the Second Judicial District Court.

We will mark the defendant's proffered verdict form next in order.

MR. BOSLER: We ask the Court to note that it should reflect some oral amendments.

THE COURT: Yes. Actually, do you want to give us your oral amendment, the one you read from?

MR. BOSLER: My handwriting is so illegible, they should just look at the record.

THE COURT: Okay.

THE CLERK: Defendant's proffered Verdict

Form P.

THE COURT: And it is denied.

MR. BOSLER: Thank you, Your Honor.

THE COURT: Do you have any problem with the other verdict forms that have been provided?

MR. BOSLER: Can the Court give me a moment?

THE COURT: Yes.

MR. BOSLER: No, Your Honor. There's three additional verdict forms?

THE COURT: Yes. Okay. We will number the jury instructions now, the final set. We have, "Ladies and gentlemen of the jury," is one.

"If in these instructions" is two.

"There are two kinds of evidence," three.

"The evidence presented," four.

"The State has the burden of proving," five.

"You have found the defendant," six.

"A prison term," seven.

"A person who uses," eight.

"The following are the aggravating factors," nine.

"The term 'mutilate,'" ten.

"Murder in the first degree," 11.

"Mitigating circumstances," 12.

"The mitigating circumstances which I have

read," 13.

"The State has alleged," 14.

"The law never compels," 15.

"In reaching your verdict," 16.

"Your deliberation," 17.

"Although you are to consider," 18.

"When you retire" will be 19. And signed by myself.

Counsel have the entire packet?

MR. BOSLER: No, Your Honor.

THE COURT: No, you don't have them all?

MR. BOSLER: I have them all.

THE COURT: You have the entire packet?

MR. GAMMICK: Yes, Your Honor.

THE COURT: Great.

MR. GAMMICK: I should be able to have the corrected verdict form to the Court within the next few minutes.

THE COURT: Great. Anything else that counsel has before we proceed until tomorrow?

MR. GREGORY: No, Your Honor.

THE COURT: One thing that came up in a previous trial and I wanted to make sure you all were in agreement. And that is the clerk will be giving the jury all the exhibits that were admitted in the prior case.

Along with that are the original form of jury instructions provided to the foreperson, as well as the new verdict forms.

MR. STANTON: The original verdict forms?

THE COURT: I'm sorry, not verdict. The original jury instructions from the guilt phase.

MR. STANTON: What is the purpose of the original instructions?

THE COURT: Well, in the last case they asked for them. I don't know. They have been given them once.

MR. STANTON: I would disagree with that, Your Honor.

MR. STANTON: So would we, Your Honor.

THE COURT: By stipulation we will have only this set of instructions. In this packet there is no instruction on the relative weight to give testimony of an individual, or credibility of witness testimony. In the packet it's provided.

MR. GAMMICK: Could we kick that one around a little bit?

THE COURT: I am not saying you need it in this particular case, but there are general statements in your original packet of jury instructions that we deal with in terms of "it's the right of an attorney to make objections," that general statement. We have included a few you've asked

me to give, which is number one and number two.

Other than that, we do not make any comment in these instructions with regard to anything except for direct and circumstantial evidence. We don't talk about testimony. We didn't talk about expert testimony. The defense had expert witnesses.

MR. GREGORY: That's correct, Your Honor. May we again have the opportunity to think about this overnight?

THE COURT: I would like to give you maybe a half hour to think about it. 9:00 o'clock comes early.

MR. GREGORY: That's fine, Judge.

MR. STANTON: Was there a concern -- surely the Court is talking about the Babbs and Sirex case.

THE COURT: Yes.

MR. STANTON: The jury asked for the previous instructions?

THE COURT: They got them. I don't remember, and counsel stipulated to it. I don't want to do it without a stipulation or agreement of everyone. I can't tell you at this point how they got them.

But the instructions, the packet is not a complete statement of all the law that they can consider in this case. Now, some of the original instructions obviously have no application to the determination of penalty. That would be those that describe the definitions of offenses.

But you know, it's up to you how you want to do this. I think if you stipulate and it's a matter of tactics, you will make your determination and you will live with those determinations. I want to make sure you are aware and are sure of what you are asking me to do.

MR. GREGORY: May we have that half hour?

THE COURT: We need this verdict form anyway. Why don't you come back here in 20 minutes, ten minutes of 5:00.

(The recess was taken.)

RENO, NEVADA, TUESDAY, OCTOBER 5, 1999, 4:53 P.M.

-oOo-

(Whereupon, the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Thank you. Please be seated.

Mr. Stanton?

MR. STANTON: Your Honor, save and except for a misspelling which they are correcting and bringing up, I show you the corrected verdict form, I believe.

THE COURT: Okay. Oh, did you change "foreperson"?

MR. STANTON: No, sure didn't. I don't think so.

THE COURT: I didn't see it the first time around.

MR. STANTON: Nor did we.

THE COURT: So we will need all of them changed to "foreperson."

MR. GAMMICK: Okay.

THE COURT: We don't have a foreman, so it shouldn't matter.

MR. GAMMICK: We've already called downstairs. It should be on its way upstairs right now. With the one correction, we can do it again, if the Court wishes.

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THE COURT: We told them they have a foreperson. Now we have it saying "foreman."

MR. STANTON: I'll take care of it.

THE COURT: You can use the phone in the courtroom.

MR. STANTON: It's easier for me to do it this way.

THE COURT: Okay.

Now, you all had an opportunity to think about whether or not you had any instructions or any objection to the Court providing the jury with the original instruction packet?

MR. GAMMICK: You're back. Go for it.

MR. STANTON: Your Honor, I've reviewed the original jury instructions. I have a State's copy here. There are four, potentially five jury instructions that I think might be either relevant or of assistance to the jury in the penalty phase. I can cite to them by number or however the Court wants to proceed.

THE COURT: What is your idea, that you want me to just give a few of the instructions or give the whole packet and let them find out the ones they want?

MR. STANTON: I don't think that the vast majority of the instructions are relevant. Therefore, I would not suggest that the entire packet be given to the

jury.

THE COURT: Mr. Bosler?

MR. BOSLER: Your Honor, I don't think any of them are really relevant. They already have been instructed as to the issues in the trial. They know what an expert witness is. We ask the Court just to give the instructions we've already settled for the penalty phase.

THE COURT: What is your -- did you all talk about the five that the State wants to use?

MR. STANTON: I'm not saying the State wants to use them. If that's the impression, I need to correct that.

THE COURT: Okay.

MR. STANTON: Potentially there are five that could be relevant. I don't think they are necessary. To some extent I would agree with Mr. Bosler as to the result of his analysis, but not how he got there. Not that they remember it from the previous instruction, but merely that I'm not sure that any of that is relevant at this juncture.

There is one that I think is probably the most relevant and that is the assessment of witnesses. That would be jury instruction number 12 that begins "to the jury alone."

THE COURT: I don't understand -- I'm a little confused about what the harm is to allow the foreperson to have a complete set of the instructions. They get all the

evidence, all the evidence in the case, and they have had the packet of instructions. I don't understand what the concern is about that.

MR. STANTON: Well, for example, there's instructions about the elements of the crime that I don't know if it's relevant at this juncture.

THE COURT: It is if we tell them that it is relevant, they can't consider the crime.

MR. GREGORY: It's adding to the confusion. We are just adding paper. Needlessly confusing this jury.

MR. BOSLER: Juries already have a difficult time going through the instructions.

MR. GREGORY: There are instructions we've agreed on and given to this jury. Nothing else in the penalty phase.

MR. GAMMICK: My concern is, Your Honor, we also have an instruction that says you are not to consider the penalty. The set of instructions is replete with instructions like that.

THE COURT: Okay. You specifically had an opportunity to review the packet of instructions and the instructions that were given in the first trial. The State has no further instructions to offer for the penalty phase at this time; is that correct?

MR. STANTON: That's correct, Your Honor.

THE COURT: The defense has had the opportunity to review the original packet of instructions as well as the proposed instructions. The defense has no instructions to offer; is that correct?

MR. GREGORY: That's correct.

MR. BOSLER: That's correct, Your Honor.

THE COURT: Your assessment with regard to this instruction, with regard to a potential instruction as to how to utilize expert testimony is a decision that you have made, you've talked about it, and you specifically asked me not to include it in the packet?

MR. GREGORY: That's correct.

THE COURT: Then we won't change the packet. We just have to change the verdict forms and when we get them, I will use the originals. Anything else?

MR. BOSLER: No.

MR. GAMMICK: Nothing.

THE COURT: See you tomorrow morning at 9:00 a.m. Court is in recess.

(The trial adjourned at 5:00 o'clock p.m.)

STATE OF NEVADA,)
)
COUNTY OF WASHOE.)

WE, DENISE PHIPPS and KAREN YATES, Certified
Shorthand Reporters of the Second Judicial District Court of
the State of Nevada, in and for the County of Washoe, do
hereby certify:

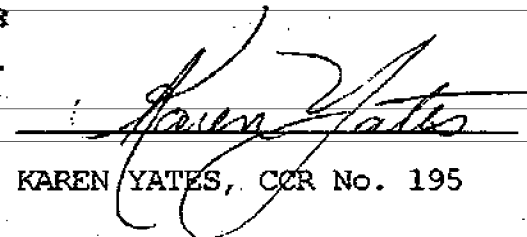
That we were present in Department No. 4 of the
above-entitled Court and took stenotype notes of the
proceedings entitled herein, and thereafter transcribed the
same into typewriting as herein appears;

That the foregoing transcript is a full, true
and correct transcription of our stenotype notes of said
proceedings.

DATED: At Reno, Nevada, this 5th day of
October, 1999.



DENISE PHIPPS, CCR No. 234



KAREN YATES, CCR No. 195

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CLERK OF DISTRICT COURT
SECOND JUDICIAL DISTRICT
COUNTY OF WASHOE
STATE OF NEVADA
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RENO, NEVADA

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OCT 07 1999

AMY HARVEY
By: *M. Stone*
DEPUTY CLERK

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

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

THE STATE OF NEVADA,
Plaintiff,
vs.
SIAOSI VANISI,
Defendant.

Case No. CR98-0516
Dept. No. 4

TRIAL - VOLUME 12
October 6, 1999
Reno, Nevada

APPEARANCES:

For the Plaintiff:

RICHARD A. GAMMICK
District Attorney
DAVID L. STANTON
Chief Deputy District Attorney
75 Court Street
Reno, Nevada

For the Defendant:

STEPHEN GREGORY
and JEREMY BOSLER
Deputies Public Defender
One South Sierra Street
Reno, Nevada

The Defendant:

SIAOSI VANISI

ORIGINAL

Reported by:

DENISE PHIPPS, CCR No. 234

1 RENO, NEVADA, WEDNESDAY, OCTOBER 6, 1999, 9:10 A.M.

2 -oOo-

3
4 (Whereupon, the following proceedings were held
5 in open court, outside the presence of the
6 jury.)

7 THE COURT: Counsel.

8 MR. GREGORY: Yes, Your Honor, just a couple of
9 requested admonishments. We're going to ask that the Court
10 admonish the prosecutor from charging counsel table or
11 screaming at our client or any other demonstration of that
12 sort.

13 We're also going to ask that the Court admonish
14 the audience. In fact, we're going to request that the
15 Court seal the court at the beginning of the closing
16 arguments. And the reason for that, Your Honor, is when
17 Ms. Sullivan was giving her heart-wrenching testimony, there
18 were several people who got up, couldn't control themselves,
19 walking in front of the audience, distracting the jury. We
20 would ask that the audience be admonished to remain seated,
21 to keep their emotional demonstrations to a minimum, and
22 that the Court not allow people to come and go during the
23 closing arguments.

24 Thank you, Your Honor.

25 MR. GAMMICK: I believe the first request is

1 premature. If anything is done that is not appropriate by
2 prosecution in the closing, an objection can be made and the
3 Court can rule on it at that time.

4 Secondly, we have specifically asked people,
5 knowing how the Court feels about disturbing the courtroom,
6 that if they feel their emotions are getting away from them,
7 to leave the courtroom so they do not put a display on here.
8 It's getting rather old, the chant from the defense, about
9 how Mrs. Sullivan had her emotional -- well, let's talk
10 about defense witnesses and how they were crying and how
11 people were crying in the audience when defense was putting
12 on their case. That's natural. This is a very highly
13 emotional case. We have asked people to leave here if they
14 feel they cannot control their emotions. We'd ask the Court
15 to continue with that so we don't have a disruption.

16 Also, I was watching the jury during
17 Ms. Sullivan's testimony. I don't believe the jury, any of
18 the jurors were paying any attention to the audience.

19 MR. GREGORY: Your Honor, I do have a response.
20 I'm a little concerned. Is the prosecutor planning to
21 charge defense table and scream at my client? Is that why
22 he's inviting me to make the objection in front of the jury?

23 THE COURT: Mr. Gammick -- actually, I don't
24 even know which one is going to make which closing argument,
25 or both, so whoever the prosecutor is I'm sure will not

1 commit prosecutorial misconduct. If they behave
2 inappropriately, I will sanction them and take the
3 appropriate steps. Counsel should object if there's a
4 problem.

5 Second, I'm not going to hold the audience
6 captive. I'm not going to do that. I think that that is
7 not the policy in this department. However, if during
8 closing arguments someone leaves, which has always been my
9 policy, is that they can stay outside until we're through to
10 the next break. I do not like people coming in and out and
11 in and out. And that has not been going on in this case,
12 and it won't go on this morning. So if someone has to
13 leave, they leave and they'll stay out until the next break.
14 We won't have a revolving door.

15 I have not seen the jury be disturbed by any of
16 the emotion in the courtroom. I have believed on both sides
17 it's been pretty well contained. I have at times heard
18 people crying, but it's been minimal. And I have not seen
19 it to be disruptive at all. If it does become disruptive, I
20 will control it. And they will be excused. My bailiffs
21 both understand. They're experienced, and they know how to
22 remove people in a very quiet manner.

23 MR. GREGORY: And that's all we want; we just
24 don't want it to get disruptive. Thank you, Your Honor.

25 THE COURT: Now, counsel, there is a

1 typographical error on Instruction No. 7, line four. I'm
2 sorry, line three. The court reporter found it for me.
3 Line three. "Does not mean that the defendant would be
4 parole after 20 years." It should be "paroled." I've
5 corrected that on mine. And I will read it as paroled.

6 Anything further?

7 MR. GAMMICK: Not from the State.

8 MR. GREGORY: No, Your Honor.

9 MR. BOSLER: No, Your Honor.

10 THE COURT: Bring the jury in, please.

11
12 (Whereupon, the following proceedings were held
13 in open court, in the presence of the jury.)

14 THE COURT: Counsel stipulate to the presence
15 of the jury?

16 MR. STANTON: Yes, Your Honor.

17 MR. GREGORY: The defendants would so
18 stipulate, Your Honor.

19 THE COURT: Thank you. Ladies and gentlemen of
20 the jury, we have come to the point in these proceedings
21 when it is my responsibility to give you the law as it
22 applies to the penalty phase. Again, I wish I could just
23 tell you the law in conversational tones and terms, but I
24 cannot do that.

25 As you remember from the last phase, I will be

1 reading you a set of jury instructions. You will have a
2 copy of those instructions in the jury room to review. And
3 if you become lost on any particular instruction, do not
4 become concerned. Remember, you do not have to take notes
5 during the course of my reading of the instructions, because
6 you will have them with you in the jury room.

7 Ladies and gentlemen of the jury, it is my duty
8 as judge to instruct you in the law that applies to this
9 penalty hearing. It is your duty as jurors to follow these
10 instructions and to apply the rules of law to the facts as
11 you find them from the evidence.

12 You must not be concerned with the wisdom of
13 any rule of law stated in these instructions, regardless of
14 any opinion you may have as to what the law is or ought to
15 be.

16 If in these instructions, any rule, direction
17 or idea is repeated or stated in different ways, no emphasis
18 thereon is intended by me and none may be inferred by you.
19 For that reason you are not to single out any certain
20 sentence or any individual point or instruction and ignore
21 the others, but you are to consider all the instructions as
22 a whole and regard each in the light of all the others.

23 The order in which the instructions are given
24 has no significance as to their relative importance.

25 There are two kinds of evidence: direct and

1 circumstantial. Direct evidence is direct proof of a fact,
2 such as testimony of an eyewitness. Circumstantial evidence
3 is indirect evidence, that is, proof of a chain of facts
4 from which you would find that another fact exists, even
5 though it has been proved directly. You are entitled to
6 consider both kinds of evidence. The law permits you to
7 give equal weight to both, but it is for you to decide how
8 much weight to give any evidence.

9 It is for you to decide whether a fact has been
10 proved by circumstantial evidence. In making that decision,
11 you must consider all the evidence in the light of reason,
12 common sense and experience.

13 You should not be concerned with the type of
14 evidence but rather the relative convincing force of the
15 evidence.

16 The evidence presented both during the trial
17 and during this hearing may be considered by the jury in
18 deciding the proper and appropriate sentence in this case.

19 This evidence consists of the sworn testimony
20 of the witnesses, both on direct and cross-examination,
21 regardless of who called the witness; the exhibits which
22 have been introduced into evidence and any facts to which
23 the lawyers have agreed or stipulated.

24 The State has the burden of proving beyond a
25 reasonable doubt the aggravating circumstances in this case.

1 A reasonable doubt is one based on reason. It
2 is not mere possible doubt, but is such doubt as would
3 govern or control a person in the more weighty affairs of
4 life. If the minds of the jurors after the entire
5 comparison and consideration of all the evidence are in such
6 a condition that they can say they feel an abiding
7 conviction of the truth of the charge, there is not a
8 reasonable doubt. Doubt, to be reasonable, must be actual,
9 not mere possibility or speculation.

10 You have found the defendant in this case to be
11 guilty of murder in the first degree; therefore, under the
12 law of this state, you must determine the sentence to be
13 imposed upon the defendant.

14 First Degree Murder is punishable: (1) by
15 death, only if an aggravating circumstance is found and any
16 mitigating circumstance or circumstances which are found to
17 not outweigh the aggravating circumstance, or

18 (2) by imprisonment in the Nevada State Prison
19 for life without the possibility of parole, or

20 (3) by imprisonment in the Nevada State Prison
21 for life with the possibility of parole, with eligibility
22 for parole beginning when a minimum of 20 years has been
23 served, or

24 (4) for a definite term of 50 years, with
25 eligibility for parole beginning when a minimum of 20 years

1 has been served.

2 A determination of whether an aggravating
3 circumstance exists is not necessary in the event you
4 determine to impose a sentence less than death.

5 A prison term of 50 years with eligibility for
6 parole beginning when a minimum of 20 years has been served
7 does not mean that the defendant would be paroled after 20
8 years but only that he or she would be eligible for parole
9 after that period of time.

10 Life imprisonment with the possibility of
11 parole is a sentence of life imprisonment which provides
12 that the defendant would be eligible for parole after a
13 period of 20 years. This does not mean that he or she would
14 be paroled after 20 years but only that he or she would be
15 eligible for parole after that period of time.

16 Life imprisonment without the possibility of
17 parole means exactly what it says, that the defendant shall
18 not be eligible for parole.

19 If you sentence the defendant to death, you
20 must assume that the sentence will be carried out.

21 Any person who uses a firearm in the commission
22 of a crime, shall be punished by imprisonment in the Nevada
23 State Prison for a term equal to and in addition to the term
24 of imprisonment prescribed for the underlying crime, and
25 said sentence shall run consecutively with the sentence

1 prescribed for the underlying crime.

2 Because you have found the defendant committed
3 the offense with the use of a firearm, if you sentence him
4 to life in prison with the possibility of parole, his
5 earliest parole eligibility would be 40 years. Likewise, if
6 you sentence him to a term of 50 years, his earliest parole
7 eligibility would be 40 years.

8 The following are the aggravating factors as
9 alleged in this case:

10 1. The murder was committed in the commission
11 of or attempt to commit the crime of Robbery With the Use of
12 a Deadly Weapon;

13 2. The murder was committed upon a peace
14 officer, Sergeant George Sullivan, while engaged in the
15 performance of his official duty and that the defendant knew
16 or reasonably should have known that the victim was a peace
17 officer;

18 3. The murder involved mutilation of the
19 victim;

20 4. The murder was committed by the defendant
21 upon a person because of the actual or perceived race,
22 color, religion or national origin of that person.

23 The term "mutilate" means to cut off or
24 permanently destroy a limb or essential part of the body, or
25 to cut off or alter radically so as to make imperfect, or

1 other serious and depraved physical abuse beyond the act of
2 killing itself.

3 A murder in the first degree may be mitigated
4 by any of the following circumstances:

5 1. The defendant has no significant history of
6 prior criminal behavior.

7 2. The murder was committed while the
8 defendant was under the influence of extreme mental or
9 emotional disturbance.

10 3. The youth of the defendant at the time of
11 the crime.

12 4. Any other mitigating circumstance.

13 This list of mitigating circumstances is not
14 meant to be exclusive. You may consider any other
15 mitigating circumstance or circumstances you believe is or
16 are appropriate as individual mitigating circumstances.

17 Mitigating circumstances are things which do
18 not constitute a justification or excuse of the offense in
19 question, but which in fairness and mercy may be considered
20 as extenuating or reducing the degree of moral culpability.

21 The mitigating circumstances which I have read
22 for your consideration are given only as examples of some of
23 the factors you may take into account as reasons for
24 deciding not to impose a sentence of death on the defendant.
25 Any aspect of the defendant's character or record and any of

1 the circumstances of the offense, which a jury believes is a
2 basis for imposing sentence less than death may be
3 considered a mitigating factor. Any one of them may be
4 sufficient, standing alone, to support a decision that death
5 is not the appropriate punishment in this case.

6 In balancing aggravating and mitigating
7 circumstances, it is not the mere number of aggravating
8 circumstances or mitigating circumstances that controls.
9 You must consider each separately and carefully to determine
10 what weight should be given.

11 The State has alleged aggravating circumstances
12 are present in this case. The defendant has alleged certain
13 mitigating circumstances are present in this case. It shall
14 be your duty to determine:

15 (a) whether an aggravating circumstance has
16 been proven beyond a reasonable doubt;

17 (b) whether a mitigating circumstance or
18 circumstances are found to exist; and,

19 (c) based upon these findings, whether the
20 defendant should be sentenced to death, or one of the
21 alternatives less than death.

22 The jury may impose a sentence of death only if
23 you find an aggravating circumstance and further find there
24 are no mitigating circumstances sufficient to outweigh the
25 aggravating circumstance or circumstances found.

1 The law never compels the imposition of the
2 death penalty. Even if you find that the aggravating
3 circumstances have been proven beyond a reasonable doubt,
4 and even if you also do not find that any mitigating
5 circumstances exist, you are not required to return a
6 verdict of the sentence of death as punishment, but may
7 instead sentence the defendant to one of the alternatives
8 less than death.

9 In reaching your verdict, you may consider only
10 the testimony of witnesses and the exhibits received into
11 evidence. Certain things are not evidence and you may not
12 consider them in deciding what the proper and appropriate
13 sentence should be in this case.

14 Arguments and statements by lawyers are not
15 evidence. The lawyers are not witnesses. What they have
16 said in their opening statements, closing arguments and at
17 other times is intended to help you interpret the evidence,
18 but is not evidence. If the facts as you remember them
19 differ from what the lawyers have stated, then your memory
20 controls.

21 Questions and objections by lawyers are not
22 evidence. Attorneys have a duty to object when they believe
23 a question is improper under the rules of evidence. You
24 should not be influenced by the objection or the court's
25 ruling on it.

1 Testimony excluded or stricken by the court or
2 testimony which you have been instructed to disregard is not
3 evidence and must not be considered.

4 Anything you may have seen or heard when the
5 court was not in session is not evidence. You are to decide
6 the proper punishment solely on the evidence received at the
7 trial and at this hearing.

8 In your deliberation you may not discuss or
9 consider the subject of guilt or innocence of the defendant,
10 as that issue has already been decided. Your duty is
11 confined to a determination of the punishment to be imposed.

12 Although you are to consider only the evidence
13 in the case in reaching a verdict, you must bring to the
14 consideration of the evidence your everyday common sense and
15 judgment as reasonable men and women. Thus, you are not
16 limited solely to what you see and hear as the witnesses
17 testify. You may draw reasonable inferences which you feel
18 are justified by the evidence, keeping in mind that such
19 inferences should not be based on speculation or guess.

20 A verdict may never be influenced by sympathy,
21 passion, prejudice or public opinion. Your decision should
22 be the product of sincere judgment and sound discretion in
23 accordance with these rules of law.

24 When you retire to consider your verdict, you
25 must first determine whether the State has proven beyond a

1 reasonable doubt that an aggravating circumstance or
2 circumstances exist in this case. All of you must agree as
3 to each aggravating circumstance. Then you must determine
4 whether a mitigating circumstance or circumstances exist in
5 this case. A single juror may establish the existence of a
6 mitigating circumstance. A mitigating circumstance can be
7 established if any juror finds that some evidence has been
8 provided as to its existence.

9 Based upon your findings in the verdict you
10 must then determine whether the defendant should be
11 sentenced to death, life without the possibility of parole,
12 life with the possibility of parole or 50 years in prison.

13 During your deliberations, you will have all
14 the exhibits which were admitted into evidence during the
15 trial and during this hearing, these written instructions
16 and forms of verdict which have been prepared for your
17 convenience.

18 When all 12 of you have agreed upon a verdict,
19 the foreperson should sign and date the same and request the
20 bailiff to return you to court.

21 Signed District Judge, Connie J. Steinheimer.

22 Any objection to the reading of the
23 instructions?

24 MR. STANTON: No, Your Honor.

25 MR. BOSLER: No, Your Honor.

1 THE COURT: Ladies and gentlemen, as with the
2 first case, the State has the burden of proof and they make
3 their opening statement first. You may proceed.

4 MR. STANTON: Thank you, Your Honor.

5 Ladies and gentlemen of the jury, in the
6 penalty phase, as the judge has just instructed you, the
7 focus and purpose of your listening to the evidence and the
8 deliberation that you're about to undertake is a completely
9 different focus than in the guilt phase.

10 The sole function at this juncture, the
11 evidence that you've heard, the entirety of the evidence
12 that was admitted in the guilt phase is now available for
13 your consideration to determine what is the proper
14 punishment in this case.

15 The first analysis that you must do as a jury
16 is to assess whether the State has met its burden of proof
17 in the penalty phase. The judge has read to you the
18 instruction of law that the State, the District Attorney,
19 Richard Gammick and myself, notice specific aggravating
20 factors.

21 There are four in this case. They're listed
22 before you in this exhibit. The first one, that the murder
23 was committed during the commission of a robbery. It's
24 self-evident and has already been found by you beyond a
25 reasonable doubt pursuant to your guilty verdict in Count II

1 of the Information in the guilt phase.

2 Number two, murder was committed upon a peace
3 officer while on duty. And the defendant knew or reasonably
4 should have known that indeed he was a police officer in his
5 official capacity.

6 While not an issue as far as a finding in the
7 guilt phase, I would submit to you that that evidence has
8 been proven beyond a reasonable doubt. It's been proven
9 beyond any doubt.

10 The evidence -- two fundamental areas: Number
11 one, is Sergeant Sullivan himself, that is, he's dressed in
12 a uniform. His patrol vehicle is duly marked. There are
13 several photographs better than this one admitted during the
14 guilt phase that is evidence to a reasonable person that
15 approached Sergeant Sullivan indeed he was a uniformed
16 police officer on duty in his official capacity. Second,
17 and probably much more relevant at this juncture, is the
18 state of mind of that man right there. Stated in his own
19 words repeatedly. To who? To friends and associates,
20 family members, relatives, children; Saia, his cousin;
21 William Louis, his brother, at the Rock Boulevard address,
22 present when Mr. Vanisi tells them repeatedly that he wants
23 to kill a cop.

24 In fact, the testimony in the guilt phase was
25 that Saia, in the van, says, "No, you're not." Recall the

1 testimony and the answer to that, what he said right after
2 Saia told him you're not going to kill a cop. "Watch me.
3 Watch me."

4 Aggravator number two: Beyond any doubt. The
5 murder involved mutilation of the victim. That, ladies and
6 gentlemen of the jury, is the instruction of law that was
7 given to you a few moments ago. "The term "mutilate" as
8 defined in this case in the penalty phase means to cut off
9 or permanently destroy a limb or essential part of the body,
10 or to cut off or to alter radically so as to make imperfect,
11 or other serious and depraved physical abuse beyond the act
12 of killing itself."

13 The Exhibit 4 series admitted in the guilt
14 phase -- these are not pleasant to look at, but they have
15 very specific forensic items of value to answer the question
16 relative to this aggravator and the definition that was just
17 given to you.

18 It comes not only from these photographs and
19 the evidence, but in combination with certain other
20 witnesses' testimony.

21 I direct your attention to the lower right,
22 this is Exhibit 4-C. That is the almost completely severed
23 fingers of Sergeant Sullivan. You notice what hand they
24 are. You recall Dr. Ellen Clark's testimony about defensive
25 wounds, and you recall the testimony of Vainga Kinikini of

1 what that man, Siasosi Vanisi, told him about how the murder
2 occurred. And the testimony of the friend and coworker of
3 Sergeant Sullivan, Steve Sauter. He had no doubt in his
4 mind that when Mr. Vanisi approached Sergeant Sullivan's
5 vehicle and knocked on that window, that Sergeant Sullivan
6 greeted him with a smile and "Can I help you?"

7 Exhibit 14-A, Sergeant Sullivan's glasses.
8 Take a close look at the left temple on those glasses. And
9 what lens is missing? The left lens.

10 That left hand of Sergeant Sullivan was the
11 first blow. The first blow to his head. His hand goes up,
12 almost severs the fingers, smashes his glasses. And as that
13 man told his cousin, he knocks him out. There's a brief
14 struggle. Maybe Sergeant Sullivan gets in one punch. And
15 he's knocked out. What happens next? I don't have a
16 videotape for you of this murder, but you can piece it
17 together almost perfectly so that you don't need a
18 videotape.

19 Exhibit 17-D, the blood letting event, the
20 beating of Sergeant Sullivan, occurred while he was down,
21 while he was helpless, while he was defenseless.

22 He took this hatchet, the one that's admitted
23 into evidence, and he then crushed Sergeant Sullivan's
24 skull, not once, not twice, repeatedly. He wanted to kill
25 Sergeant Sullivan. He had been thinking about it for a long

1 time. Maybe not Sergeant Sullivan, but who Sergeant
2 Sullivan represented: A white police officer. He hated
3 both those concepts.

4 This exhibit, the entirety of the 4 series,
5 shows you conclusively that aggravator. This is not just to
6 kill, this is to mutilate. This is an expression of his
7 anger. Why? Because of one other piece of evidence, and
8 that source once again is the defendant, Siaosi Vanisi.
9 What does he tell Vainga Kinikini he does after he brutally
10 beats Sergeant Sullivan? He stomps on him. He stomps his
11 head.

12 And you remember the examination by Mr. Gammick
13 of Dr. Clark relative to especially what you see here in
14 4-I. Sergeant Sullivan's upper mandible, his upper jaw, is
15 crushed. His teeth are knocked out, down his throat and off
16 his body. The force and violence that was perpetrated
17 against Sergeant Sullivan as depicted in those pictures was
18 massive. It is beyond the act of killing.

19 He tells several witnesses that he wants to
20 kill a cop to take his gun, his belt, his radio. And he
21 does. Sergeant Sullivan is lying dead on that pavement.
22 What does Mr. Vanisi do? He strips him. Rips his belt off.

23 MR. BOSLER: I'm going to object to that. I
24 think that's a misstatement of the evidence, because I
25 believe that Mr. Ciocca testified that he thought Officer

1 Sullivan was still alive when he approached him. This is
2 well after the belt was taken.

3 THE COURT: I'll let the jury make a
4 determination of the weight of the evidence.

5 MR. BOSLER: Thank you, Your Honor.

6 MR. STANTON: Thank you, Your Honor.

7 Mr. Vanisi strips him. Rips off his belt. You
8 recall the photographs, go back to the trial photographs,
9 that scene photograph outside the vehicle and the scene in
10 the video to show you the belt buckle that held that Sam
11 Brown together off of Sergeant Sullivan's body.

12 Finally, ladies and gentlemen, the forensic
13 value of this evidence, besides the extent of the wounds,
14 the severity of them, reflecting the force.

15 There's one other thing that has very
16 significant value in this case, where the wounds are.
17 They're on his face. They're on his head. Why? And why
18 use a hatchet? Because he wanted to mutilate Sergeant
19 Sullivan. It was part of his design, his goal, his intent
20 and purpose. Not formulated in an instant, formulated over
21 a period of months, if not years.

22 The only thing that needed to be answered to
23 formulate or to finish that plan was who? There are, as you
24 have heard, at least one Reno police officer and one Sparks
25 police officer that are lucky to be alive today, because

1 that man, Siaosi Vanisi, stalked and chose his target, not
2 at random in the sense of why he did it, but certainly at
3 random as who it was. It didn't make a difference as long
4 as it fit two criteria: It was a police officer and he was
5 white, because that's who he hated.

6 The murder was committed because of the actual
7 or perceived race, color or national origin of the victim.

8 The testimony in this case has been replete, I
9 would submit to you, respectfully, of evidence suggesting
10 and satisfying that beyond a reasonable doubt.

11 There was a witness that was called in the
12 guilt phase, the only time this witness was called. Her
13 name was Maria Louis. She was also known as Losa. She was
14 asked "Did Mr. Vanisi tell you why he wanted to kill a cop?"
15 "Yes, he wanted to kill them because they took so much.
16 Well, he wanted to kill a white cop because they took so
17 much from the Polynesians." "Did he say what he wanted to
18 take from a white police officer once he killed them? "Their
19 radio and their gun."

20 Mr. Gregory upon cross-examination asked a
21 series of questions about whether or not she ever used the
22 word "white" before. On redirect examination, "Ms. Louis,
23 when you met with the District Attorney's Office, the
24 question Mr. Gregory didn't ask you, did we ever ask you to
25 say the word "white"?

1 "ANSWER: No.

2 "Why is it your testimony that he said a white
3 cop today?

4 "ANSWER: Well, just -- well, we just had been
5 discussing it and talking amongst ourselves with other
6 witnesses."

7 "Is that because that's what he, Mr. Vanisi,
8 said?"

9 "Yes."

10 There was another witness that testified to
11 Mr. Vanisi saying he wanted to kill a white cop. That's
12 Ms. Maveni. You heard the interchange that took place.
13 Ms. Maveni, according to her penalty phase testimony, indeed
14 he didn't say that. That is one of the prerogatives and
15 duties of you as a juror to attach credibility and weight to
16 each one of the witnesses that have testified before you in
17 the penalty phase.

18 It really is not an issue. There's one
19 uncontroverted witness testifying that Mr. Vanisi put two
20 words together, "white cop." Do you even need that to put
21 that together? No, because it's not contested whatsoever
22 that he made repeated statements about killing police
23 officers and his hatred of white people.

24 The four aggravators are proven beyond a
25 reasonable doubt.

1 At that juncture, ladies and gentlemen, the
2 defendant is death eligible, meaning he is a person that the
3 death penalty is an appropriate sentence. And I submit to
4 you there's no question that he satisfies this part of your
5 analysis.

6 The next step of your analysis is to determine
7 whether any mitigating circumstances have been shown in this
8 case. And then, if there have been any, or if there are
9 none, you must determine whether or not the aggravation
10 outweighs the mitigating evidence. Then a second weighing
11 process by you occurs, and that is if the aggravation
12 outweighs the mitigating evidence, is the death sentence the
13 appropriate punishment? And I submit to you that without
14 question or without doubt it is. Why? The evidence before
15 you and the law. That's the guidelines that take you to
16 that decision.

17 The evidence that the State presented to you in
18 the penalty phase began with testimony, uncontroverted
19 testimony of the defendant and his behavior. When? Not
20 during the murder. Not initially after the murder. But
21 think about this, ladies and gentlemen, what the defendant
22 is doing and where he's doing it.

23 You heard from correctional officers Molnar and
24 Wiley from the Nevada State Prison. That man is sitting in
25 prison awaiting murder charges. And what does he do? He

1 purposely, willfully, intentionally, premeditated, confronts
2 physically correctional officers. There's more than the
3 confrontation: The details of how he does it. All the cell
4 extractions you've heard, there's one prevailing piece of
5 evidence that exists in each one of those cell extractions.
6 They're not done by surprise. Every single witness
7 specifically told you how those cell extractions occurred.
8 They're done in the sight of that man. They're not done
9 instantaneously. He knows what's going on before it
10 happens. He can see the crowd gather outside his door,
11 dressed, as you heard each witness pursuant to my direct
12 questioning, how each of them was dressed.

13 He knew what was going on. And what was his
14 response during virtually every single one of those? He was
15 ready to do battle. He got ready preparing himself with
16 towels, with water, for the gas that he knew was coming in.
17 Or don't forgot, this is the person that has the mental
18 illness that can't think, that can't cognicize, that he
19 knows exactly what's going on, because he's doing everything
20 he can to prepare to do battle.

21 You want to look into this man's mind?
22 Remember the testimony of the correctional officer while he
23 was attempting to escape and what Mr. Vanisi was doing while
24 he was shooting at him. On more than one occasion
25 Mr. Vanisi was laughing at him. He wasn't laughing at him

1 because he was mentally ill, he was laughing at him because
2 he was playing a game with the guards. You heard that from
3 Lieutenant Geoff Wise, who interacted with him on numerous
4 occasions, who told you he was a very intelligent man, is
5 conniving.

6 What about the defendant when they went and did
7 the cell extraction in prison? What did the defendant do?
8 He charged at them. He had a bucket as a shield and went
9 after the five officers that came into the cell.

10 You want to know who he is and what he's like?
11 Think about how he killed Sergeant Sullivan. And think
12 about those cell extractions. I told you at the beginning
13 of this case in the penalty phase that actions speak louder
14 than words. Those speak volumes.

15 Next you heard from Deputy Ellis. Deputy Ellis
16 told you about a cell extraction. More importantly, ladies
17 and gentlemen, he told you how it occurred and a very
18 important thing about his testimony and that is the strength
19 of that man right there.

20 Deputy Ellis is six four, 285 pounds. As he
21 testified to you, that during the cell extraction, after he
22 slid by, there were two to three deputies on Mr. Vanisi's
23 back and he was continuing to get up, even despite repeated
24 orders to stay down. And you saw Deputy Ellis stand before
25 you not 10 feet from you and demonstrate the knee drop that

1 he did. The knee drop of a six foot four, 285 pound man.
2 And remember what happened to Mr. Vanisi when he began to do
3 those knee drops. They had no effect. He was hitting him
4 in the shoulder. It wasn't until the blows came to the back
5 of the neck and the head that they stopped that man.

6 Think about the strength of that man when you
7 think about why those photographs are so graphic in series 4
8 as they are. It's part of that videotape to play in your
9 mind. If you want to know what lurks between his ears, in
10 his mind, think about that.

11 The testimony before you of the family,
12 friends, Carolyn Sullivan, Meghan Sullivan, emotional
13 testimony, as was a lot of the testimony in the penalty
14 phase, both sides, but it's evidence, ladies and gentlemen.
15 Just like those autopsy photographs are evidence, the
16 testimony from Sue Mallard, Steve Sauter and Carolyn
17 Sullivan, Meghan Sullivan are evidence for you to consider
18 in that final weighing process; does this man deserve death?

19 Think of the evidence that they gave you, not
20 in the context of the emotion, per se, think of it in the
21 context of how much damage he has done. That's the evidence
22 before you regarding those people's testimony. How this
23 man's misguided, racist, violent views destroyed those lives
24 forever.

25 Racist. That's what it is. It's not the

1 typical one that you may hear or know about, white
2 supremacists having distorted hateful views of minorities.
3 But it's no different. It's no different in its context,
4 its severity or its abrogation of the normal fabric of our
5 community. That's what that man is.

6 The testimony you've heard is that he was at
7 one point a nice person. George Tafuna. Siaosi Vanisi is
8 what this penalty phase is about.

9 I'm going to talk to you finally about a series
10 of pieces of evidence to assist you in your deliberation of
11 the evidence when you consider that final weighing process
12 of aggravating versus mitigating and then concluding whether
13 or not the death penalty is appropriate, considering all the
14 evidence in this case.

15 What you see there is a statement from
16 Mr. Vanisi. That statement came through the testimony of
17 Detective David Jenkins, who told you several things that I
18 believe were extremely relevant in your consideration of the
19 penalty phase witnesses that you've heard, especially from
20 the defense in this case.

21 Mr. Vanisi stated that he had led a very normal
22 and straight life as a teenager. I don't think anybody
23 would dispute that that's what the evidence shows in this
24 case. That now he was "having the time of his life and
25 running around." Comes from the defendant's own mouth.

1 "You know, I don't care about living anymore,
2 I'm free. And this is what I want to live. Once I kill, I
3 gotta kill some more to keep my high." "Once I'm killing, I
4 mean, I got, I just gotta keep on moving, I just gotta keep
5 on moving so they won't know where I'm at, you know, I gotta
6 keep on killing to keep this rush."

7 Where does that come from? The defendant,
8 Siaosi Vanisi, from his own mouth. To who? To his
9 relative, to his cousin, Vainga Kinikini. Remember the
10 testimony of Mr. Kinikini. What was the defendant's
11 demeanor when he was saying that? Was it remorseful? No
12 emotion? He was excited about it. Excited about it.

13 The State would submit to you, ladies and
14 gentlemen, that the proper punishment in this case is death
15 for all the reasons that I've just mentioned and the
16 evidence in this case.

17 Mr. Vanisi should not be permitted the
18 opportunity to kill again. He is an incredibly violent,
19 racist person who has shown no compunction whatsoever to
20 carry out his desire, hatred, revenge. This is not borne by
21 any mental illness, alcohol or drugs. It's borne by cold
22 blooded premeditated thought that's done not once but
23 repeatedly over a period of several months, if not years,
24 both in the murder of Sergeant Sullivan and his performance
25 in prison.

1 Ladies and gentlemen, the death penalty in this
2 case is a decision for you as a unanimous jury. But don't
3 ever lose sight of the fact that the death penalty is borne
4 by his behavior and his conduct alone. Make him face his
5 responsibility with that verdict.

6 Thank you for your time and attention.

7 THE COURT: Counsel, you may proceed to make
8 your closing argument.

9 MR. BOSLER: Thank you, Your Honor.

10 Ladies and gentlemen, why? Why kill Siaosi
11 Vanisi? What are we going to accomplish by that killing?
12 What is it about our society that we all flock to movies
13 where people are killed en mass, gratuitous violence? What
14 is it about our society that we can easily dispatch someone
15 as if there is no humanity left in them?

16 I look at the irony in this case that you have
17 two children both raised in essentially single family
18 households; both children grow up, go to school, do
19 everything to make their parents proud. Both children
20 married early, have children, care, cherish, love for these
21 children, and then suddenly these two paths are so close,
22 they're split apart. And what splits them apart? We find
23 out it's the mental illness of one, and that same mental
24 illness, ironically, is the thing that brings them both back
25 together and causes the death of the other.

1 How ironic it is or what a statement it makes
2 about our community that phone-in surveys, we're so easily
3 led to say this person did a terrible crime, he should die,
4 without ever thinking about, well, what is this person
5 about? What qualities do they have? What brought them to
6 the point that they've actually killed another human being?
7 All those people who clamor for the death penalty, they've
8 never had the chance, like you, to sit through a sentencing
9 hearing and actually hear that -- well, this is the dirty
10 little secret, ladies and gentlemen, about the criminal
11 justice system: The defendants that the State tries to
12 kill, the defendants the State asks you to kill for them,
13 they're human beings. They're people. They're children who
14 were raised with mothers, fathers, went to school, have
15 cared for their family, have done things that everybody has
16 done. They're not so inhuman that you can easily dismiss
17 them as if it's some casual decision: Well, you know, the
18 judge gave us a mathematical formula, we're going to weigh
19 that and we'll plug in the facts, and if Mr. Vanisi needs to
20 die, then the formula says that. That's not what our
21 society is about. That's not even what the law is about.

22 The person who sits at that table is a human
23 being. And I think you've heard a little bit about that
24 through the witnesses that were called at the penalty phase
25 and you heard about that from the witnesses who were

1 actually called by us that were earlier the State's
2 witnesses, to show that.

3 Ladies and gentlemen, I don't pretend I'm the
4 type of person who can say everything that needs to be said
5 to show you why Mr. Vanisi doesn't need to die. There are
6 so many reasons why he doesn't need to die for this crime, I
7 can't hope to tell you all of them. I can only ask, because
8 I only have this one opportunity -- the State will get up to
9 argue again. I don't get a chance to rebut what they say.
10 But when you go back in the jury room, you've heard the
11 testimony, you've heard enough facts about this case, that
12 you ladies and gentlemen of the jury can go through that
13 evidence and see each of these little things, each of these
14 little threads that you can pull together that say there's
15 more reasons not to kill Siaosi Vanisi than there are
16 reasons to kill him.

17 I guess if someone would convince me that by
18 killing Siaosi Vanisi we would bring George Sullivan back to
19 his loving family, then maybe there's a reason to support
20 the death penalty. But that's not what's going to be
21 accomplished when we decide to kill Siaosi Vanisi. You have
22 on one side of the courtroom a family who has lost a loved
23 one, essentially the leader of that family, a father who
24 loved his children, loved his wife, loved his job. If
25 killing Siaosi Vanisi was to bring George Sullivan back

1 again, maybe there would be an argument in favor of the
2 death penalty. But that's not what's accomplished. What is
3 accomplished is you have on one side a family who has
4 experienced a tragedy and lost a loved one; now the State's
5 asking you to visit that tragedy on the other family.

6 If that's equity, if that's what we're
7 accomplishing with the death penalty, then I think there's
8 some problems with the way we view punishment and crime in
9 our community.

10 Mr. Vanisi had the same loving family that
11 George Sullivan had. And I think it's abundantly obvious
12 that this person who grew up, played sports, took extra
13 classes in high school so he could be with teachers and
14 learn, would be the teacher's aide, do everything he could
15 to help his friends with their lives, to keep people from
16 fighting and engaging in violence, is it really an argument
17 that something significant had to have happened to him to
18 make those things change?

19 The argument that this isn't a mental illness
20 belies all the evidence that you've heard. And that's
21 evidence that comes from the State's own witnesses.

22 If you were going to tell me that the death
23 penalty acted as some sort of deterrence, then maybe I could
24 agree that the death penalty is appropriate in this case.
25 But let's look. Are we really supposed to expect that

1 killing Siaosi Vanisi is going to deter other manic people
2 who haven't been diagnosed from having manic episodes?

3 Again, I ask you to look, why would we kill Siaosi Vanisi?

4 What are we accomplishing by that? Because it's not going

5 to help other people who haven't been diagnosed with the

6 illness, because, as we know from Dr. Thienhaus, that you

7 don't get bipolar or manic depression, you don't get that

8 illness until late teens, early 20s. Siaosi Vanisi. And

9 unfortunately that illness isn't diagnosed until something

10 catastrophic happens and you actually figure out, well, my

11 mind is not working, enough of my friends have said

12 something to me, it's time I need treatment.

13 Killing Siaosi Vanisi is not a deterrent to
14 other manic people who haven't been diagnosed because it
15 just is logically impossible.

16 If you were going to tell me that by killing
17 Siaosi Vanisi we've exacted the extreme, the greatest
18 punishment that we can impose upon a person, I would ask
19 you, killing Siaosi Vanisi, is that more punishment than
20 actually looking at him and his life, the way he loves his
21 children, the way his family loves him, having to sit in
22 prison for the rest of his life without an opportunity to
23 ever get out, to see those people, to be with them? Which
24 is the more extreme punishment? It isn't death.

25 For Siaosi Vanisi and what you know about him

1 from the people who have spoken about him, the more extreme
2 punishment is life imprisonment without the possibility of
3 parole. And based upon the facts of this case I can't stand
4 here and say, you know, what happened to George Sullivan is
5 a typical murder, it's a first degree murder. It's a tragic
6 event. It's beyond the words that any law school or any
7 dictionary could teach me. There's no way to explain that
8 or describe it. And for that Mr. Vanisi deserves the
9 ultimate punishment. That ultimate punishment isn't death.
10 Not only for the reason it isn't going to accomplish
11 anything, but because really if you sit down and take
12 yourself away from this emotional -- I don't know if it's a
13 roller coaster or whatever that's thrown our society to this
14 way of thinking that the death penalty is actually going to
15 accomplish things, if you step away from that emotional
16 decision-making process, you'll see that really the greater
17 punishment for Siaosi Vanisi is life in prison.

18 And in some sense I'll agree with Mr. Stanton
19 -- it doesn't happen very often -- if you look at the way
20 that Mr. Vanisi is going to be treated in his custodial
21 status, you know that even prison for him isn't going to be
22 the prison that a normal prisoner suffers. As the person
23 who has been convicted of killing a peace officer, you
24 already know what goes on at the jail. Twice he's been late
25 returning to his cell. I know it's important that people

1 obey orders in the jail, but if we judge the response by the
2 jail to him going to his cell late and kind of griping that
3 he's not had enough time on the tier, their response, go
4 into the cell with six people, beat him into submission, tie
5 him up, hog tie them, whatever you want to do, let him sit
6 and then release him, if that's the type of response that
7 Mr. Vanisi is going to receive in a custodial status, then,
8 ladies and gentlemen, you're giving him the worst punishment
9 by making him suffer the rest of his life in prison.

10 The State spoke to you about the four
11 aggravators that are necessary before you can even consider
12 whether you should kill somebody. The first two, robbery.
13 You've already found that in the guilt phase. The second
14 one, killing of a police officer. I'm not going to insult
15 your intelligence and argue that those things aren't really
16 what the facts show. However, the other aggravators, I'd
17 ask you to take a little closer look at them.

18 What we have is the aggravator of mutilation.
19 I'll wait for the screen. The aggravator of mutilation.
20 "The term "mutilate" means to cut off or permanently destroy
21 a limb or essential part of the body, or to cut off or alter
22 radically so as to make imperfect, or other serious and
23 depraved physical abuse." This is where I want you to look.
24 "Beyond the act of killing itself."

25 As the judge told you, it's the whole

1 instruction that is the thing that carries the weight for
2 you as jurors. George Sullivan died a terrible, a painful
3 death. I'm not going to show you those pictures. I don't
4 think you need to look at them again. I think that they
5 would have an emotional impact upon you if you only saw them
6 for five seconds. But the issue really isn't the type of
7 death George Sullivan died. If anybody is killed with a
8 hatchet to the face, their body is going to look badly
9 disfigured. If you killed somebody with a hatchet, that's
10 probably -- by the nature of that instrument that's how the
11 death is going to occur. But the issue is, is this
12 instruction satisfied? Is what Siaosi Vanisi did beyond the
13 act of killing itself?

14 What do we know? We know that Dr. Clark
15 testified that she believed -- Dr. Ellen Clark. Questioning
16 by Mr. Gammick. "But were all these wounds caused before
17 death, before the cessation of his heart?"

18 Ellen Clark. "Yes. The wounds were caused
19 before death."

20 This is by Mr. Gammick. "You cannot make a
21 statement about whether or not he was conscious when these
22 wounds were inflicted upon him, can you?"

23 Ellen Clark, "I cannot."

24 "Just to make sure for the timing of the
25 wounds," Mr. Gammick says, "the timing of the wounds, when

1 they were delivered, do you make a determination based upon
2 blood flow, basically?"

3 Ellen Clark, "Relative to your question about
4 when the heart was beating, all the wounds had evidence of
5 bleeding into their margins or into the tissue around them,
6 implying that the heart blood was still circulating."

7 What else does Ms. Clark say, most importantly,
8 "The wounds were all acute and of the same age." What does
9 that mean?

10 That means when George Sullivan was attacked
11 with a hatchet, all the wounds were acute, as you would
12 expect from a hatchet, and of the same age. We know from
13 Andrew Ciocca that George Sullivan was still breathing when
14 he arrived. This is after Siaosi Vanisi had left. Why is
15 that important? Ladies and gentlemen, the term "mutilation"
16 doesn't mean just that a body is disfigured by the killing.
17 It means something is done that is done beyond the act of
18 killing itself. The act of killing itself wasn't even
19 accomplished by Mr. Vanisi. So for the State to say that
20 the hatchet blows to Mr. Sullivan's face were beyond the act
21 of killing itself isn't the truth.

22 If Ellen Clark would have said Sergeant
23 Sullivan has all these wounds to his face and later it was
24 determined that his fingers were almost severed after his
25 heart had stopped, you have mutilation. If Ellen Clark

1 would have testified that after all these blows were
2 delivered to Mr. Sullivan, and as he laid bleeding to death
3 on the ground other blows were administered, a limb was
4 chopped off, something was done other than the act of trying
5 to kill George Sullivan with a hatchet, then you would have
6 mutilation.

7 And this may seem like a hypertechnical way to
8 look at what mutilation is, but ladies and gentlemen, we're
9 all asked to follow the law. You've been specifically
10 instructed that the instructions are taken in totality. So
11 you don't stop with has been radically altered body parts or
12 is this abuse severe, serious and depraved. It is. But is
13 that the issue? The issue is when Siaosi Vanisi attacked
14 George Sullivan with a hatchet with the intent to kill him
15 and attacked him and made wounds to his face, were those
16 wounds to his face done for anything more than to just
17 simply kill George Sullivan? Even if you believe -- and
18 this evidence isn't contradicted -- even if you actually
19 believed he kicked or stomped George Sullivan, none of that
20 was done after he died. So none of the acts, although they
21 seem like it's a little bit more than necessary, none of the
22 acts were done beyond the killing itself.

23 The other factor I would ask you to consider is
24 that George Sullivan was chosen because he was a white
25 police officer. Again, I'm not going to insult your

1 intelligence and say that Siaosi Vanisi made his way up to
2 the kiosk not to attack a police officer, because I think
3 the evidence shows that. But what do we know about that
4 whole evening? It's Brenda Martinez, who is the young lady
5 who came in very early in the case. She goes to the
6 university to pick up her, I think it's grandfather or her
7 father. She sees Siaosi Vanisi staggering through the
8 parking lot with a dog. We know Siaosi Vanisi is the person
9 who walks the dog, Doobie, who is owned by the Peauas.

10 Siaosi Vanisi isn't stalking anybody at that
11 point. He is in the grips of a drug-induced, drug
12 aggravated, manic episode, where he's walking around with a
13 hatchet maybe looking for trouble, maybe even looking for a
14 police officer to kill. But whether it's a white police
15 officer or officer of any other color isn't proven by the
16 evidence.

17 What we have is Mr. Vanisi staggering around
18 one part of the campus, as he makes his way down Virginia
19 Street. Unfortunately, we find out later, for Mr. Sullivan
20 he's made a stop. Siaosi Vanisi in this manic thing focuses
21 on the lights, walks over to where the lights are. Is
22 Siaosi Vanisi planning this event? What does Siaosi Vanisi,
23 according to Carl Smith, do? Tries to get Carl Smith, who
24 is in a police car, a marked police car, driving, to get him
25 to attack Siaosi Vanisi. Siaosi Vanisi isn't deliberate.

1 He's not worried about who the target is. He is trying --
2 in his mind he's thinking I have to kill a police officer, I
3 have to kill a police officer. As the car drives by, he
4 tries to get the police officer to engage him in a
5 confrontation. Can Siaosi Vanisi even see inside the car at
6 night as he's traveling down the street? No.

7 Unfortunately for Officer Sullivan, when Siaosi
8 Vanisi later sees the car drive up the street and goes up
9 the street, George Sullivan is white. Does that mean that
10 Siaosi Vanisi went there to kill a police officer? It means
11 that Siaosi Vanisi went there to kill a police officer and
12 by circumstance that officer was white. But to say that
13 this whole episode of him staggering through the parking lot
14 being led by the lights, working his way up the hill to the
15 kiosk is motivated by race - it's not motivated by race.
16 It's motivated by a person who had for 23 years been a
17 respectable, decent, loving, caring human being, who, after
18 he begins to suffer from manic illness, begins to take drugs
19 in order to help himself but does the exact opposite. And
20 as he suffers this manic episode, he gets drawn towards
21 lights and ultimately towards Mr. Sullivan, who dies.

22 But ladies and gentlemen, to simply say that
23 that evidence proves beyond a reasonable doubt that the
24 reason George Sullivan was chosen was because he was white
25 isn't supported by the evidence. That is a tragic chain of

1 circumstances that happened. George Sullivan was white, but
2 that wasn't the reason for the violence.

3 There's been so much this witness said that,
4 they say something different on cross-examination, they say
5 something different on direct examination. What we know and
6 what Mr. Stanton has told you is that a lot of the people
7 who hang out at Sterling Drive, Rock Boulevard, they heard
8 Siaosi Vanisi talking. "The whites have taken a lot from
9 the Polynesians. The whites are bad for this. The whites
10 are bad for that." Later, "I need to kill a cop. I want to
11 kill a cop." It's those people who put those two phrases
12 together, the white cop.

13 And what do we hear from the witness the State
14 referenced -- I wrote her name down. Maria Louis? "We've
15 been talking about this amongst ourselves," the Peauas,
16 Maria Lewis and a lot of other people, and there's a lot
17 that live at that Sterling Way address. They talk amongst
18 themselves. "Remember when Siaosi Vanisi said he hated the
19 white people for what they did to Polynesians when they came
20 to Polynesia? Yeah, I remember that. Remember him also
21 saying I'm going to kill a cop? Yeah, I remember that."
22 They begin to talk and now it blends together and now Siaosi
23 Vanisi wants to kill a white cop.

24 The reason George Sullivan was killed wasn't
25 because he was white. It was a terrible -- words can't

1 describe the chain of circumstances that led to his death.
2 But it wasn't because he was white. And all these phrases
3 that we attribute to Siaosi Vanisi are really an
4 amalgamation, a blending of separate phrases that other
5 people had heard, until it came to the point that Mele is up
6 here saying, well, I thought the District Attorney suggested
7 to me it was white. No, maybe it was my friends. I can't
8 remember exactly when it happened. It could have been me.
9 Her testimony is actually I put those two things together.
10 He was mad at the whites, what they had done to the
11 Polynesians; he wanted to kill a cop. Mele said she's the
12 one that put that together. She's the one that testified to
13 support the State's aggravator that the reason this murder
14 happened was because Siaosi Vanisi wanted to kill a white
15 cop.

16 Again, I can only ask you -- this is the way it
17 works -- you each are your own judges in this case. As the
18 judge told you, it's up to you each to decide which
19 mitigators are found, any evidence of them. Has the State
20 proved the aggravators beyond a reasonable doubt? It's up
21 to you to decide each of those questions as individuals.
22 And I can only ask you to look really at the evidence to
23 show is this instruction really supported beyond a
24 reasonable doubt, the mutilation instruction supported by a
25 beyond a reasonable doubt, when you look at the facts? And

1 I mean look beyond the disfigurement to George Sullivan.
2 Because that in itself suggests mutilation. But ladies and
3 gentlemen, the mutilation has a specific definition under
4 the law.

5 I can only ask you as individuals to look about
6 whether this violence -- was the murder caused really
7 because George Sullivan was white or is that just an
8 unfortunate -- unfortunate is not a good word -- a tragic
9 tragedy beyond words, a tragic set of circumstances that led
10 Siaosi Vanisi as he was staggering around the campus with
11 Doobie to be drawn towards the lights and then eventually up
12 to the place where George Sullivan was finishing his report.

13 I told you when I got to speak the first time,
14 there's many more reasons not to kill than there are reasons
15 to kill. And I would like you to take that into
16 consideration when you think about what mitigating evidence
17 is. I'm not offering these things as an excuse for Siaosi
18 Vanisi's behavior. I'm not offering them as a defense to
19 the crime. If you think that's what mitigation evidence is,
20 then please look at the instruction. That's not why it's
21 offered.

22 People kill. And normally one can attribute a
23 reason why they're in a situation where they kill.
24 Mitigating evidence is only evidence that shows you: Does
25 this person deserve to die? Is there a reason why this

1 tragedy happened? Is there a reason? We need to consider
2 other circumstances besides just the crime before we decide
3 what the punishment is.

4 I took the liberty of writing down a few
5 mitigators for you. Again, collectively or as individuals,
6 I'm sure that many more things will come to you as an
7 important thing in your mind as you make this huge decision.

8 Siaosi Vanisi, no significant criminal history.
9 That hasn't really been contested by the State. What do we
10 know about him? A law-abiding person. When his girlfriend
11 got pregnant at 19, takes her in, cares for her as she has
12 the baby. Probably the person we would believe is like an
13 ideal person, the type of person we'd like to know, until we
14 start to have the first episodes of manic depression, the
15 violence, the bizarre behavior that ends in him dressing up
16 as a superhero, wearing wigs, talking to himself.

17 No prior criminal history. That can also be
18 defined. No prior history involving violence. You have a
19 man who, up until immediately preceding this event, had not
20 a history of being convicted for violent crimes. That can
21 be considered a mitigator.

22 The fact that he was suffering from extreme
23 emotional or mental disturbance. Again, ladies and
24 gentlemen, I'm not -- I only ask you to look at the evidence
25 about whether this is bipolar disorder, manic depression or