IN THE SUPREME COURT OF THE STATE OF NEVADA

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SIAOSI VANISI, No. 65774

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

RENE L. VALLADARES
Federal Public Defender

TIFFANI HURST
Assistant Federal Public Defender
RANDOLPH FIEDLER
Assistant Federal Public Defender
GARY TAYLOR
Assistant Federal Public Defender

ATTORNEYS FOR APPELLANT

CHRISTOPHER J. HICKS
District Attorney

TERRENCE P. McCARTHY
Chief Appellate Deputy
P.O. Box 11130
Reno, Nevada 89520

ATTORNEYS FOR RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI, No. 65774

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from an order dismissing a second post-conviction petition for writ of habeas corpus.

Much of the procedural recitation by appellant is accurate. The devil, as they say, is in the details. For example, the Opening Brief recites several times that the district court found that there is no objective standard for the performance of post-conviction counsel. That is incorrect. The actual finding was simply that the current lawyers for Vanisi had failed in their burden of proving that the specific acts or omissions of prior counsel fell below some specific objective standard. Volume 25, Appellant's Appendix at page 6243 (25 AA 6243). Noting the failure of proof is not the same as finding that the opposite contention has been proved.

Petitioner Vanisi was represented by the Washoe County Public

Defender on charges including murder stemming from the attack on University Police Sergeant George Sullivan. The case has a lengthy procedural history including pre-trial writs and appeals. Ultimately, the case was tried and Vanisi was convicted and sentenced to death. He appealed but the judgment was affirmed. *Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001). In the course of affirming, the Court noted, *inter alia*, that the evidence of Vanisi's guilt was "overwhelming." *Id.*

Vanisi later filed a petition for writ of habeas corpus (post-conviction). The district court appointed counsel and allowed a supplemental petition. Before counsel filed the supplement, however, counsel filed a motion in which they suggested that Vanisi was incompetent and that the cause should be stayed indefinitely. Volume 8, Supplemental Appendix, page 1903 (8 SA 1903). Counsel suggested that they should not be required to file a supplement because there could be other claims that would come to light only if Vanisi was competent. The State opposed the motion and suggested that even if Vanisi were incompetent, that would not lead to indefinitely staying the proceedings. On February 18, 2005, the court conducted a hearing on the issue. Upon considering all the evidence, the court determined as a matter of fact that Vanisi was not incompetent. 8 AA 1819.

Counsel filed their supplemental petition, raising some nineteen enumerated claims and many subsidiary claims. The State moved to dismiss

but the court ordered a hearing on all the claims. At that hearing, among other things, trial counsel testified to a fairly extensive investigation into mitigating evidence and sanity. 7 AA 1609-1650. Counsel testified that they arranged a mental health evaluation and got evidence of a bi-polar disorder but nothing that would negate the intent to kill. 7 AA 1624-26. At the end, the court entered findings of fact and conclusions of law and determined that none of the claims were proven. 8 AA 1818 *et seq*. Vanisi appealed but the judgment was affirmed. *Vanisi v. State*, Docket No. 50607, Order of Affirmance, (April 28, 2010); 8 AA 1991.

Vanisi then filed a second petition, prepared by current counsel. That petition, some 236 pages long with thousands of pages of exhibits, was undoubtedly untimely, abusive and successive. Accordingly, the State moved to dismiss the petition. 22 AA 5470. Vanisi opposed that motion. 22 AA 5483. He argued that his claims must be heard because, *inter alia*, all claims were not "adequately" presented earlier due to ineffective assistance of counsel and that he is actually innocent. The district court determined that the petition did not describe sufficient evidence of innocence but the court scheduled a hearing on the subject of the ineffective assistance of post-conviction counsel as a proposed method of excusing the procedural bars. 22 AA 5943.

Vanisi would have this Court believe that the district court prohibited

him from calling any witnesses other than prior post-conviction counsel. Again, that is a distortion of the record. The record reveals that the attorney for the State, the undersigned, assumed that the hearing would involve testimony from post-conviction counsel but the contention that the court prohibited other witnesses is just unfounded. 24 AA 5939-40. The district court also denied that it had ever limited the hearing and invited the current counsel to present whatever evidence on the subject of ineffective assistance of post-conviction counsel that they had. 25 AA 6197.

The court convened a hearing. Two witnesses testified. At the close of the hearing the court found that Vanisi had failed to prove that post-conviction counsel's specific acts or omissions fell below an objective standard of reasonableness. 25 AA 6240 *et seq*. Accordingly, the court ruled that the petition must be dismissed as it was procedurally barred and Vanisi had failed to overcome those bars. This appeal followed.

II. STATEMENT OF THE FACTS

The facts relevant to this appeal tend to fall into three categories. First, the evidence adduced at trial. Second, the testimony and findings at the habeas corpus hearing. Finally, the allegations in the habeas petition, while not exactly facts, will be important to this appeal.

The basic facts of the underlying crime can be discerned in the opinion

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of this Court in the direct appeal at *Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001) :

> The evidence of Vanisi's guilt in this case is overwhelming. During a visit to Reno in January 1998, Vanisi told several friends and relatives that he wanted to murder and rob a police officer. Makeleta Kavapalu testified that Vanisi indicated that "he was going to kill a police officer with his ax." Sateki Taukiuvea testified that Vanisi said that he wanted to kill a police officer and take his badge, radio, gun, and belt. Maria Louis testified that Vanisi said he wanted to kill a police officer and take his radio and gun. Priscilla Endemann testified that Vanisi repeatedly told her he wanted to "kill a cop."
>
> Mele Maveni testified that on January 9, 1998, she accompanied her cousin and Vanisi to a local Wal–Mart where Vanisi purchased a hatchet and a pair of gloves. He told Maveni and her cousin that he wanted to kill police officers.
>
> In the early morning of January 13, 1998, UNR Police Sergeant George Sullivan was murdered and robbed on the UNR campus. At least two witnesses, including UNR Police Officer Carl Smith, observed Vanisi near the murder site shortly before the time of the killing. Officer Smith testified that sometime after 12:17 a.m. he observed Vanisi in the same area as Sullivan, who had made a traffic stop. Vanisi had dreadlocks and was wearing a dark jacket. Subsequently, Smith observed Sullivan head towards the area of a kiosk, a fairly well lit area where officers wrote reports.
>
> A short time later, a student discovered Sullivan's body lying under his police car near the kiosk. Smith received a dispatch just before 1:00 a.m. and was the first officer at the scene. Several items that Sullivan had been carrying were missing, including his gun and gun belt.
>
> Dr. Ellen Clark performed the autopsy on Sullivan's body. The cause of death was multiple injuries to the skull and brain due to blunt impact trauma.
>
> Shortly after the killing, Vanisi proceeded to an apartment occupied by some of his relatives. His niece, Maria Louis, testified that Vanisi entered the apartment between 1:00 and 1:15 a.m. wearing a jacket and gloves and carrying a plastic grocery bag. Many of the injuries to Sullivan's body were consistent with a hatchet that was discovered at the apartment, apparently the hatchet purchased by Vanisi a few days before. Police also recovered other evidence at the apartment, including a pair of gloves, a jacket, and plastic bags containing items belonging to Sullivan. Vanisi's fingerprints were found on one of the bags. Stains on the hatchet and jacket contained Sullivan's DNA. The

gloves contained DNA from both Sullivan and Vanisi.

After the killing, Vanisi told others that he had killed Sullivan. Vainga Kinikini testified that Vanisi provided him with the following details of the crime. Vanisi had bought a hatchet and had been looking for a white police officer to kill. He observed a police officer in the middle of a traffic stop. He waited for the officer to complete the stop and then crept up on the officer. He knocked on the window of the officer's patrol car, and the officer asked if he could help Vanisi. Vanisi attacked the officer and knocked him out. Vanisi then kicked the officer over and over, "stomping" on his head. Vanisi stated that it was "fun" or "great." He had worn a disguise at the time of the killing, a beanie with fake dreadlocks to make him look Jamaican. He threw the wig and beanie into a canal nearby. (A wig and baseball cap were later discovered in a ditch near the UNR campus.) Vanisi also showed Kinikini a gun that he claimed was a police officer's.

The State presented evidence that Vanisi committed three other crimes on the evening after the killing: the theft of a car in Reno, which was later recovered in Salt Lake City outside a residence where Vanisi was apprehended; and two store robberies. Witnesses to both robberies identified Vanisi as the perpetrator, and a surveillance videotape and a surveillance photograph supported their testimony.

On January 14, 1998, police apprehended Vanisi at a residence in Salt Lake City. Vanisi did not comply with police orders to exit the residence, and a SWAT team entered after Vanisi set a fire in the garage. Vanisi confronted one officer with a handgun, and the officer fired several shots, hitting Vanisi in the arm. Police partially withdrew and attempted to persuade Vanisi to surrender. Vanisi eventually emerged but refused to obey officers' commands, so he was subdued with a "bean-bag" round. Police discovered Sergeant Sullivan's gun in the residence. Boots and pants that Vanisi had worn tested positive for Sullivan's DNA.

The jury found Vanisi guilty of first-degree murder and three counts of robbery, all with the use of a deadly weapon, and one count of grand larceny.

At the penalty phase, the State presented testimony about Vanisi's disciplinary problems during his pretrial incarceration. Vainga Kinikini again testified about Vanisi's statements concerning the killing. Vanisi said that once he had killed, he had to kill some more to keep his "high" or "rush." Kinikini indicated that Vanisi was "smart" but "insane, crazy" and that Vanisi himself said he was insane and did not care anymore. The State presented victim impact testimony from several individuals, including Sullivan's sister, wife, and daughter.

> The defense called a number of witnesses, including Vanisi's relatives. Some of the witnesses indicated that Vanisi had changed in the last few years. For example, Vanisi's wife testified that Vanisi had been friendly, outgoing, and kind but began to change in late 1995 and 1996. At times Vanisi became violent and abusive, he exhibited poor hygiene and bizarre behavior, he would ramble, and he lacked a sense of reality. Vanisi would sometimes pose in front of a mirror pretending to be different people and would dress as a superhero. Eventually, Vanisi's wife left him. Testimony at the penalty phase indicated that drug use by Vanisi might have been a factor in his changed behavior.
>
> The defense also called a psychiatrist, Dr. Ole Thienhaus, who treated patients at the county jail, including Vanisi. Thienhaus testified that his initial diagnosis of Vanisi indicated possible bipolar disorder, also known as manic depression, or cyclothymia, a similar condition. Thienhaus stated that a colleague who had seen Vanisi independently had the same impressions of his condition. During his pretrial incarceration, Vanisi had been prescribed various medications, including Depakote (a mood stabilizer, discontinued after Vanisi complained of side effects), lithium (for bipolar disorder), and Risperdal (an antipsychotic medication). Thienhaus indicated, however, that Vanisi's bipolar disorder did not appear to be an extreme case. Thienhaus explained that bipolar disorder could be characterized by psychotic episodes, i.e., a loss of touch with reality, and that violent behavior might occur in the manic phase. However, Thienhaus testified that this kind of "out-of-control" behavior was impulsive and inconsistent with planning for a crime. He acknowledged that it was possible that Vanisi was "malingering," i.e., fabricating symptoms, but he thought it was more likely that Vanisi did in fact suffer from bipolar disorder.
>
> On cross-examination, the State referenced reports from other professionals who had evaluated Vanisi. Although there was some additional support for a diagnosis of bipolar disorder, some professionals indicated that Vanisi exhibited signs of malingering.

Additional facts were established at the first habeas corpus hearing. The lawyers were the County Public Defender Mike Specchio (now retired) and Chief Deputy Steve Gregory (now deceased) and Deputy Public Defender Jeremy Bosler (now serving as the County Public Defender). Steve Gregory testified that they were greatly hampered by the lack of cooperation from their client but that they still were able to conduct a reasonable investigation into

the penalty phase of the trial. 7 AA 1609. The court found that they did the best they could with what they had to work with. Gregory testified that they inquired into Vanisi's mental status and found that Vanisi was competent at the time and sane. He lacked even a good faith basis for claiming insanity. 7 AA 1625-26. Jeremy Bosler agreed with that assessment. 7 AA 1640. The same mental health professional was unable to contribute any mitigating evidence. 7 AA 1646.

Jeremy Bosler described an extensive investigation seeking mitigating evidence. However, he testified that he ran into great resistance as witnesses did not wish to appear. He had to go so far as to use the Uniform Act to Secure the Attendance of Witnesses to get people from California. 7 AA 1648, 49. They consulted with experts in the field of mitigation and tried to get as much as they could. 7 AA 1650. The district court found that Vanisi had failed to prove that trial counsel were ineffective. 8 AA 1817 *et seq*.

At the second post-conviction hearing, the hearing giving rise to this appeal, Vanisi showed that additional mitigating evidence was available. There was, however, no additional evidence concerning the scope of trial counsel's investigation. Vanisi merely adduced evidence that with unlimited time and resources post-conviction counsel would have liked to investigate and further and would have liked to have uncovered much of the new mitigating evidence discovered by current counsel. There was no new

evidence of the scope of trial counsel's investigation that would contradict the finding that trial counsel conducted a reasonable investigation.

Contrary to the many assertions in the Opening Brief, the post-conviction lawyers anticipated the need for a supplement following the competency hearing and had notice of the need to file supplement. 25 AA 6037-38. Post-conviction counsel Scott Edwards testified to the decision to devote themselves more to the legal issues and less to the question of ineffective assistance in failing to investigate mitigating factors. According to the testimony, post-conviction counsel were aware that no matter how much mitigating evidence was gathered, the best they would get is a reweighing of the mitigating and aggravation. As the aggravating circumstances were so very horrendous, that seemed like an insurmountable barrier. 25 AA 6168. Thus, they decided to devote their energies first to the question of Vanisi's competency to maintain the post-conviction action and secondarily to issues of law. 25 AA 6168-6171. Investigating additional mitigating evidence was less of a priority. *Id.*

There was one interesting part of the second post-conviction hearing. When discussing the role of the lawyer in relation to mitigating evidence, Tom Qualls revealed the current theory. He said that the common approach is to simply find more mitigating evidence and then operate on the theory that counsel must have been ineffective in failing to find whatever is found later.

25 AA 6044. That is precisely what the Opening Brief is about. Underlying it all is the unspoken assumption that the standard for trial counsel and post-conviction is success. The theory is that if there is some evidence that exists now that was not presented earlier, then counsel must be ineffective. That is a fine theory and is surely widely used, but it is contrary to the established law.

This Court might want to keep in mind that the scores of exhibits were offered not for the truth of the matter, but simply as examples of evidence that PC counsel would have found interesting. 25 AA 6007-08.

Among the various findings of fact that affect this appeal, are that Vanisi always had the ability to assist his various lawyers but simply refused to do so. 25 AA 6041. The only specific allegation about ineffective post-conviction counsel was the assertion that counsel believed that they were limited to the record. That was denied by post-conviction counsel. 25 AA 6050.

III. ARGUMENT

1. The District Court Did Not Err in Failing to Be Persuaded That Vanisi Had Overcome the Procedural Bars by Demonstrating That Each and Every Claim Was the Product of Ineffective Assistance of Post-Conviction Counsel.

The first argument is somewhat convoluted but it appears to be a contention that the district court was required to find that Vanisi had overcome every procedural bar by demonstrating that post-conviction counsel was ineffective in failing to "adequately" plead and develop all possible claims.

The State's first response is that the Order of the district court should be

affirmed for reasons other than those articulated by the district court because there never should have been a hearing in the first place.[1] The petition, which is even longer than the Opening Brief, presents only conclusory assertions of ineffective assistance of post-conviction counsel. The petition simply recites that all claims must be heard because post-conviction counsel were ineffective in failing to "adequately investigate" and "adequately develop" issues.

Vanisi also contends that his prior post-conviction lawyers were ineffective in their efforts to show that trial counsel were ineffective. However, each such claim was presented in a generic fashion. The claim is oft repeated that counsel was ineffective in "failing to investigate, develop and present" information. That is, the petition attacks the result, not the process. Those claims are but bare or naked claims and are insufficient to warrant any inquiry. *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Court ruled that the prisoner must identify the specific decisions of counsel, and the trier of fact must inquire into an "objective standard" governing the decision. A failure to achieve something is not a decision, let alone a decision that may be evaluated objectively. Hence, the various generic claims of ineffective post-conviction counsel are insufficient.

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[1]If the State was seeking some relief other than affirmance, then the argument might require a cross-appeal. As it is, the State seeks only affirmance of the order dismissing the second petition.

Justifications to overcome the procedural bars must be pleaded with specificity. NRS 34.810(3)(a). A claim that counsel was ineffective by failing to succeed is not adequate. The district court should never have scheduled a hearing on that claim. However, the court refused to rule on the subject, noting that the question was "close." 24 AA 5940. Being close simply means that the decision requires some thought, not that the decision should be ignored. As an example of how one might specifically plead a claim of ineffective assistance of post-conviction counsel, the court might consider *Maples v. Thomas*, ___ U.S. ___, 132 S.Ct. 912 (2012). There, it was alleged that the two post-conviction lawyers had left their law firm without seeking to withdraw from the case, and essentially abandoned the prisoner. Because they were incommunicado, they missed a filing deadline for an appeal. That describes specific acts and specific decisions leading to specific failings. If the instant petition has alleged that post-conviction counsel had failed to conduct an investigation into mitigating evidence because they believed that post-conviction claims may not include matters *de hors* the record, that would have been a specific claim that the court could have inquired into. There was no such allegation in the petition and if there had been such an allegation it would have been unproved.

About all that was alleged was that current counsel had uncovered additional mitigating evidence. There was nothing more. The petition alleged

no specific claim of any act or omission, other than the failure to succeed in their effort to show that trial counsel were ineffective. That is not a valid claim of ineffective assistance of counsel and the district court should never have allowed the hearing.

Even assuming that the claim of ineffective assistance of post-conviction counsel was pleaded with particularity, the next problem is that there is only half a claim. In addition to gathering additional mitigating evidence that trial counsel could have presented, post-conviction counsel would have had to be able to plead and prove that trial counsel was ineffective in failing to conduct the exact same investigation, even though the evidence showed, and the court found, that trial counsel conducted a fairly extensive investigation into mitigation. 8 AA 1829-1830. No amount of additional mitigating evidence would have altered that conclusion. Therefore, this Court should affirm because the district court should have dismissed without any hearing.

Turning to the arguments in the Opening Brief, the primary position seems to be that the district court was required to be persuaded that post-conviction lawyers rendered ineffective assistance in their efforts to show that trial lawyers were ineffective in failing to present additional mitigating evidence. Most of the hearing consisted of demonstrating that there is additional mitigating evidence that was available. That is always true. Indeed, the concept of "mitigating evidence" is so broadly defined that it may be said

that no jury has ever heard, or will ever hear, all possible mitigating evidence. So, the evidence that the current set of lawyers found additional mitigating evidence means virtually nothing.

In general, in order to prevail and overcome the procedural bars, Vanisi would have to prove that some objective standard of reasonableness, as measured by prevailing professional norms, required these post-conviction lawyers, under these circumstances to undertake a specific sort of investigation, at a specific time and uncover the specific evidence that was later uncovered by Vanisi's current lawyers. *See*, *for example*, *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 2536-37 (2003) (The Court based its ruling on the evidence establishing that the prevailing norm, at that time, in that place, was for trial counsel to undertake that specific sort of investigation.). In addition, Vanisi would have to show that if post-conviction counsel had undertaken that investigation, they would have uncovered evidence that trial counsel should have uncovered (because there is another objective standard that would have required trial counsel, under the circumstances, to undertake that same investigation) and that the evidence was of such persuasive force that if the jury had heard it, a different result was reasonably probable. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984).[2]

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[2]The State has assumed that post-conviction counsel will be judged by the normal *Strickland* standard. There is some support for a higher standard,

The standard proposed in the Opening Brief is quite a bit different. They would propose a standard based on success. That is, the proposed rule of law is that every lawyer must undertake every investigation and raise every possible claim and failure to do so is necessarily grounds for reversal. The district court rejected that position, ruling that post-conviction lawyers, like appellate lawyers, are not required to raise every possible claim but should instead make tactical decisions on what issues to present. 25 AA 6243. Post-conviction counsel made it pretty clear when he testified that what one would do with additional time and resources is uncover additional mitigating evidence and than argue that the existence of the evidence alone is grounds for relief. 25 AA 6044. This Court ought to recognize that Qualls correctly described the position that is now being advanced, and the Court should reject that position. As there will always be additional mitigating evidence available, a standard that requires a new sentencing hearing based solely on the existence of new mitigating evidence, without regard to the scope of the investigation of trial counsel or the decisions of post-conviction counsel, would be a standard by which there would no finality to any judgment.

Post-conviction counsel testified, and the district court found, that post-conviction counsel had made reasonable decisions about how to proceed. They had decided to focus their attentions on claims that had a chance of

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approaching abandonment by counsel. *See Maples v. Thomas, supra*. The State suggests that standard may be appropriate.

succeeding and determined that the aggravating circumstances were so great that no amount of mitigating evidence was likely to alter the outcome. 25 AA 6243. The district court noted that while different paths were available, the evidence did not persuade the court that some objective standard required post-conviction to travel that path. *Id.*

One who would assert ineffective assistance of counsel bears the burden of proving the claims. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). That is not a mere burden of production, but a burden of persuasion. As there are no circumstances under which the trier of fact is required to be persuaded (absent a stipulation), this Court should find no error in the failure of the trier of fact to be persuaded.

2. The District Court Did Not Err in Failing to Be Persuaded That the Procedural Bars Were Overcome in Relation to the Claim of Error in the Instructions.

The next claim is perhaps more convoluted that the first. The claim as pleaded in the petition was that the trial court had erred in the instructions defining first degree murder and that counsel on direct appeal was ineffective in not advancing the error in the direct appeal. 1 AA 107; 1 AA 135. That claim was clearly barred and again Vanisi sought to overcome the bar by pleading that post-conviction counsel were ineffective in failing to plead the claim that appellate counsel was ineffective in failing to argue that the court erred in the instructions. Vanisi now seems to contend that the district court prohibited him from presenting evidence to overcome the procedural bars. That is

incorrect. The district court allowed Vanisi the opportunity to show that post-conviction counsel rendered ineffective assistance and the court put no limits on that hearing. Vanisi, however, chose to present no evidence on the subject. Thus, at the end of the day, we are left with the presumption that counsel fully discharged their duties and that the decision was a tactical decision. *See State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006)(One claiming ineffective assistance "must overcome the presumption that a challenged action might be considered sound strategy.").

As there was no testimony on the subject of jury instructions from post-conviction counsel, the presumption is unrebutted. The Court might also note the flaw with the discussion of prejudice. The notion that this Court might have found prejudice from the lack of a different instruction on the subject of the *mens rea* of the crime is based on the evidence that was not part of the record at the time of the direct appeal. That is, current counsel uses newly discovered evidence to assert that this Court, on appeal, would have found prejudice from the lack of an instruction. Appellate review on direct appeal is limited to the record as it exists at the time. *Carson Ready Mix v. First National Bank*, 97 Nev. 474, 635 P.2d 276 (1981). As the appeal would have been based on the record as it existed at that time, the analysis that incorporates evidence that did not exist at the time is inappropriate. If the actual claim is that trial counsel (who objected to the instruction) was

ineffective in failing to gather additional evidence, that claim is barred and, as noted above, the mere fact that additional evidence exists does not overcome the bar.

If the actual claim is that trial counsel failed to gather the psychological evidence mentioned in the brief, that is negated by the findings after the first habeas corpus hearing. Vanisi refused to reveal his defense to his lawyers and they did not want to undercut whatever his defense might be. In addition, the record showed that they undertook extensive investigation through respected mental health professionals. As there is nothing in the record extant supporting the notion that some objective standard required trial counsel to find the evidence that is now discussed in the Opening Brief, the argument ought to be rejected.[3]

The court might also note that the argument has an additional flaw. Even if the appeal concerning the instructions had been based on the evidence gathered by current counsel, that evidence does not demonstrate that Vanisi was unable to form the intent to kill. Instead, the evidence includes the opinion that Vanisi did, in fact, form the specific intent to kill, and that he did so based on his belief that killing a cop would restore his life to an even keel. 1 AA 97. That is not a defense. That is an indictment. As noted in *Finger v.*

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[3]There seems to be an unspoken assumption that when a lawyer consults with respected mental health professionals, some prevailing professional norm requires counsel to continue trolling for experts until they find someone willing to be helpful. That norm was not proved.

State, 117 Nev. 548, 27 P.3d 66 (2001), the sort of persistent delusion that will form a defense to the murder is a delusion that, if true, would justify the killing. As the delusion that one will feel better after killing a cop, if true, would not justify the killing, the delusion means nothing. With that evidence, it seems even more likely that the Court's response to the assertion that the court erred in failing to give the instructions described in *Byford* was harmless due to the overwhelming evidence of premeditation. Indeed, that evidence is even more overwhelming now as we now have the opinion of *why* Vanisi planned to kill a cop. Thus, this Court should determine that the court did not err in failing to find that the procedural bars relating to the claim of ineffective appellate counsel had been overcome.

3. The District Court Did Not Err in Failing to Be Persuaded That Post-Conviction Counsel Were Ineffective in Failing to Assert That Trial and Appellate Counsel Were Ineffective in Failing to Argue That the Repeal of Statutes Allowing the Plea of Not Guilty by Reason of Insanity Prohibited the Conviction.

The next argument begins with the assertion that this Court should change its prior ruling on the subject of procedural bars. There was no prior ruling and so the State assumes that the argument is addressed to the district court.

In 1995, the legislature amended statutes that provided for a plea of "not guilty by reason of insanity." A few years later, this Court issued its ruling in *Finger v. State*, 117 Nev. 548, 27 P.3d 66 (2001). The ruling expounded on the subject of insanity and held that to the extent that insanity precludes

formation of the requisite *mens rea* it must be recognized in Nevada.

The only evidence on the subject came in the first post conviction hearing, in 2005, in which trial counsel testified that they were aware of the arguments that could be advanced that were ultimately accepted in *Finger*. They did not advance the arguments, however, as they had no application to Vanisi. They thoroughly explored his mental state, using multiple mental health professionals. At the end, they lacked enough to even make a good faith claim of insanity. 7AA 1625. In short, they checked and found the current argument to be meaningless. That is the only evidence on the subject. In the second post conviction hearing, there was no testimony on the subject.

The new additional evidence is often presented with multiple levels of hearsay, as in the declaration of an investigator, who spoke with someone who spoke with someone else, at 14 AA 3457. That new evidence, even if presented for the truth of the matters asserted (it was not) does not amount to evidence of insanity as that term was defined in *Finger v. State*, *supra*. Instead, the only opinion that is not dependent upon facts which were deliberately withheld from the jury, is that Vanisi knew he wanted to kill a police officer so that he would feel better. As described in *Finger*, that would not give rise to a defense because the delusion that one would feel better if one killed a cop, if true, would not justify murder. Thus, even if the new evidence were accepted, it generates a scene much like the defense proffered by *M'Naughten*

(as described in *Finger, supra*) who proposed to seek out and kill the Prime Minister under the delusional belief that the Minister was conspiring to kill him.

There is another version, about being attacked by a police officer and defending, but as indicated earlier, Vanisi refused to tell his lawyers what his defense would be and refused to tell his story to the jury. No amount of investigation would have yielded what Vanisi refused to say.

If the current argument asserts that post-conviction counsel were ineffective in some way relating to insanity, that was never proved. It the current argument concerns trial counsel or post-conviction counsel, that claim is barred. If it is simply that the new evidence demands the conclusion that Vanisi was insane at the time of the crime, it does not. That argument is also barred.

4. No Matter How Many Times Vanisi Argues That Post-Conviction Counsel Was Ineffective in Failing to Seek and Obtain Additional Mitigating Evidence, the Result Is the Same.

The new argument presented in the Opening Brief is unrelated to any decision of the trial court. Vanisi argues that this Court should conduct the re-weighing it did in the last appeal, and include the new mitigating evidence. Among the many problems with that approach is that the new evidence has not been admitted for the truth of anything. It has not been tested by cross examination or evaluated by any trier of fact. Vanisi was allowed to show the various statements of people simply to ask if post-conviction counsel might

have been interested in the evidence. That hardly demands that this Court do anything now. Much of the so-called mitigating evidence is laced with multiple layers of hearsay and it is not ripe for re-weighing.

The other problem is that re-weighing is appropriate only if the petitioner has demonstrated some constitutional error. The mere presence of additional mitigating evidence from time to time, unaccompanied by proof of some constitutional error, does not mandate re-evaluating the decision of the jury. *Sawyer v. Whitley*, 505 U.S. 333, 345, n.13 (1992).

5. There Was No Issue Presented to the District Court That Would Call Upon the District Court to Overrule this Court.

Having argued that this Court must re-weigh the evidence again, Vanisi next argues that this Court cannot do that and that the Court erred in re-weighing last time. That argument has nothing to do with any ruling of the district court and therefore it is not properly before the Court.

This Court previously ruled, in the 2010 appeal, that the response to striking an aggravating circumstance, as demanded by *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004), is to re-weigh the remaining aggravators and mitigators to determine if the change would affect the sentence. That ruling is the law of the case. *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 798-99 (1975). If Vanisi had asked the district court to overrule the decision of this Court, the district court would have properly declined to do so.

The Supreme Court has expressly approved of the re-weighing process. *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884 (2006). This Court has repeatedly approved of the re-weighing process. *See e.g.*, *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006). Therefore, this Court should determine that if the correctness of the last appeal was properly before the court, the correct result would be to rule that the Court did not err in the last appeal.

6. The District Court Still Did Not Err in Failing to Be Persuaded That Post-Conviction Counsel Was Ineffective in Their Investigation.

Vanisi next makes a different argument on the subject of prejudice stemming from post-conviction counsel's focus on potential legal errors. As noted above, Vanisi failed to prove that counsel's performance fell below an objective standard of reasonableness and thus the district court never reached the question of prejudice and so there is nothing for this Court to review.

If the issue were properly before this Court, the State would point out that absolutely none of the so-called evidence obtained with the help of the Tongan consulate relates in any way to any claim based on the Vienna Convention on Consular relations. That treaty requires an arresting agency to inform an arrested foreign national of his ability to contact his consulate. *See* article 36 of the treaty set out in the margin of *Garcia v. State*, 117 Nev. 124, 127, n.3, 17 P.3d 994, 996, n.3 (2001).[4] However, as noted in the last appeal,

[4]The part requiring the arresting agency to notify the consulate itself applies only "upon request." That has no application here. The current claim,

within days of the arrest counsel were appointed. In fact, the Washoe County Public Defender got involved immediately upon arrest, and did not wait to be appointed. 7 AA 1705. So, as noted in the last appeal, those lawyers were certainly aware of their ability to contact the consulate and anyone else in the world. 7 AA 1628. So, any prejudice attending the claim that Vanisi was not promptly informed of his right to contact his consulate[5] would have to have irremedial prejudice that arose in the moments between the time of the arrest and the time in which Vanisi had lawyers operating on his behalf. If there had been a violation of the Vienna convention, the involvement of lawyers with unlimited access to telephones would represent a break in causal chain. There is no explanation for why any bit of mitigating evidence could only have been obtained by having the arresting agency inform Vanisi of his right to contact the Tongan consulate. Therefore, if the district court had ruled on the argument now presented, and denied relief, it would have been correct to do so.

7. <u>There Was No Ruling Concerning the Tongan Consulate</u>.

The next argument seems to repeat the last in that Vanisi is asking this Court to rule as a matter of fact in the first instance that

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at p. 87 of the Opening Brief, that the Tongan government has no record of any contact by any law enforcement agency means nothing as the law enforcement agency need not contact the foreign officials absent a request by the prisoner.

[5]Thus far, through a trial and two habeas corpus hearings, there has been zero evidence that the arresting agency did not comply with the treaty.

1) When he was arrested no one informed him of his right to contact the consulate.

2) Some prejudice arose from that lack of information and the fact that counsel knew they could contact the consulate does nothing to negate that prejudice.

3) The Tongan claim that counsel contacted the "wrong" consulate is true.

4) Some objective standard requires every lawyer in the U.S. to know how the government of Tonga allocates the duties of its various consulates.

5) The additional mitigating evidence would have altered the outcome of some unspecified proceeding.

As there was no such claim in the district court, and no ruling, and this Court is not a fact-finding body, the judgment of the district court should be affirmed.

8. The Court's Ruling Concerning the Investigation into Competence Was Supported by Substantial Evidence.

In addition to the other theories about all the new evidence that current counsel has accumulated, counsel suggested that post-conviction counsel was ineffective in failing to gather all possible evidence from every possible source in order to support the claim that Vanisi was incompetent at the time of the first post-conviction action. There actually was a bit of evidence on the subject. At the second post-conviction hearing, counsel Scott Edwards

testified that the prevailing professional norm was to ask the mental health professionals to make an evaluation and render an opinion about competency and then if the mental health professionals advised that they were unable to do so without additional information, then the lawyers would seek out the additional information that the doctors would want. The district court found that was indeed the custom. 25 AA 6252. To the suggestion that the prevailing norm is to gather all possible information that in retrospect might be helpful to a psychologist, the trier of fact rejected that proposal. *Id.*

The State might add that in all the additional evidence there is no opinion that Vanisi was incompetent at the time of the first post-conviction action and so the entire argument is meaningless.

Much of the argument is based on the notion that this Court erred in the last appeal in affirming the factual finding that Vanisi was competent, that he had the ability to understand and assist his lawyers but that he irrationally chose not to involve himself. There was no ruling on that subject in the proceedings leading to the instant appeal and so there is nothing for this Court to review.

To the argument that the district court erred in finding that Vanisi was competent, there was no such ruling in the most recent habeas corpus action. To the argument that this Court erred in the last appeal by determining that the factual finding was supported by substantial evidence, that should also be

disregarded as this is not an appeal from that ruling of this Court.

9. The District Court Did Not Err in Determining That the Claim of Actual Innocence Was Not Pleaded Sufficiently to Warrant a Further Inquiry.

Vanisi next makes an argument that could actually relate to the proceedings in the district court. He claims he is actually innocent. The State assumes that is a claim that the district court erred in dismissing his petition because he sufficiently pleaded a claim of actual innocence to warrant the opportunity to prove the claim in the effort to overcome the procedural bars.

Vanisi first claims that he is "actually innocent of the death penalty." That assertion, if proven, can overcome procedural bars in some circumstances. When a petitioner cannot demonstrate good cause to overcome the procedural bars, the district court may nevertheless excuse a procedural bar if the petitioner demonstrates that failing to consider the petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). A fundamental miscarriage of justice requires "a colorable showing" that the petitioner is "actually innocent of the crime or is ineligible for the death penalty." *Id.* To establish ineligibility of the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." *Id.* However, the actual argument currently before the Court is just that the new mitigating evidence is legitimate. That is, Vanisi claims that in a capital case, anytime anyone

presents any additional mitigating evidence, the court is required to find that the procedural bars have been overcome and that all claims may be heard again and again, *ad infinitum*. In order for that to be true, this Court would have to adopt the underlying premise of the brief, that whenever new mitigating evidence is found, then as a matter of law there must have been some constitutional error. Would that it were.

The gateway claim of being "innocent of the death penalty" focuses on eligibility. Thus, in *Wilson v. State*, 127 Nev. ___, 267 P.3d 58 (2011), this Court found that the gateway had not been passed when one aggravator was stricken, and additional mitigation existed, but where another aggravator remained, the defendant was not "innocent of the death penalty." 267 P.3d at 63, n.3 ("Even if the receiving-money aggravator is invalid, Wilson is not actually innocent of the death penalty because the felony aggravators based on robbery and kidnapping remain. Accordingly, the district court did not err by dismissing Wilson's challenge to his death sentence on this ground.").

Assuming that Nevada law on procedural bars is somewhat similar to federal law, an examination of federal standards is appropriate. In *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514 (1992) the Court considered a couple different standards. The Court expressly rejected the notion that the mere existence of additional mitigating evidence, even compelling evidence, is sufficient to overcome the procedural bars. 505 U.S. at 345, n.13 ("If a

showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard which we have held also acts as an "exception" to a defaulted, abusive, or successive claim. In practical terms a petitioner would no longer have to show cause, contrary to our prior cases."). Thus, the Supreme Court has rejected the notion that permeates throughout the Opening Brief, the notion that the presentation of additional mitigating evidence is necessarily sufficient to overcome the procedural bars.

On that subject, the State would note that "mitigating evidence" is defined very broadly. Indeed, if it is offered by the defense, it is mitigating. *Watson v. State*, ___ Nev. ___, 335 P.3d 157, 173-74 (2014).[6] One day, this Court will issue a judgment in this case. If, on the next day, someone discovered some evidence that Vanisi had done a kindness for someone while this appeal was pending, that would mean that additional mitigating evidence would again exist. Accepting the petitioner's position now would mean that Vanisi would then be free to file a new petition every day and allege something new that amounts to mitigating evidence, and each time the court would be required to determine that the presence of additional mitigating evidence

[6]A common debate is whether chronic mental illness is mitigating or aggravating. The prosecutor can suggest that the illness associated with violence (as in the instant case) can lead to future dangerousness while the defense can argue that the illness is mitigating. Drug addiction likewise is often proffered as mitigating evidence while others see it as a confession of regularly committing felonies with a likelihood of committing future felonies.

means that the procedural bars have been overcome. That standard would be ridiculous.

This Court need not explain in this case all the nuances of the claim of being ineligible for the death sentence. It is enough to hold that the mere existence of additional mitigating evidence is not sufficient to overcome the procedural bars.

Vanisi also claimed that the procedural bars must be overcome because he is actually innocent of first-degree murder. This claim, repeated throughout the brief, is based on the notion that he was unable to form the intent to kill. A colorable claim of actual innocence, if proved, will serve to overcome the procedural bars and allow claims to be heard that would otherwise be barred. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). However, "such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995). There was no evidence adduced that would establish that Vanisi did not kill Sgt. Sullivan. To the notion that there was new evidence that he lacked the capacity to deliberate and thus could only be guilty of lesser degree of homicide, that is nonsense. The only meaningful opinion is that he did indeed deliberate and specifically decided to kill a police officer

in the delusional belief that he would restore his life to an even keel. 1 AA 97. That is not a defense. Furthermore, at least some courts hold that a claim of being guilty of a lesser degree of homicide is not a claim of innocence. *Rozzelle v. Secretary*, Florida Dept. of Corrections, 672 F.3d 1000 (11th Cir., 2012).

This Court should find that Vanisi failed to identify specific new, reliable evidence of innocence and so the district court did not err in concluding that Vanisi had failed to allege facts that would overcome the procedural bars.

10. The Propriety of the Aggravating Circumstances Are Not Properly Before the Court.

Vanisi next abandons any pretext that this is an appeal from an order dismissing an untimely, abusive and successive petition, and simply raises issues that might have been appropriate for the direct appeal in 2001. As this Court's jurisdiction is limited to review of decisions by the district court, all of the remaining issues should be rejected as they were not part of the decision of the district court.

Vanisi begins by claiming that the aggravating circumstance involving "mutilation" necessarily applies to all murders. The State first notes that the aggravating circumstance has not been applied to all first-degree murders and in fact it seems rather rare.

On direct appeal, this Court held that the aggravator was properly defined. The Court also held that the aggravator was established by the evidence:

> There is compelling evidence establishing mutilation here. Dr. Clark, who performed the autopsy, testified to the extensive and severe injury inflicted on Sullivan's body. Clark identified at least twenty separate and distinct impacts to Sullivan's face and head. Sullivan had "many, many lacerations" and some of Sullivan's teeth were actually found outside of the body. Clark testified that the weapon used in the offense was "wielded in different fashions, that some of the injuries are coming this direction, some are coming this direction, some are coming towards the back, and other injuries are made with a sharp portion of the blade." Clark also found that some injuries to Sullivan's chin and jaw and to the back of his head were more consistent with "broad flat impact," possibly "stomping." Sullivan sustained skull fractures, fractures to virtually all of the facial bones, and damage to the brain. This physical evidence is consistent with the testimony of one of Vanisi's relatives concerning Vanisi's description of the murder. According to this account, even after Sullivan was knocked out by Vanisi's initial assault, Vanisi proceeded to kick Sullivan over and over, "stomping" on Sullivan's head.
>
> Given the weight of this evidence, we conclude that Vanisi's assault went well beyond the act of killing itself and resulted in mutilation of the victim's body. 117 Nev. at 342-43.

That ruling ought to be the law of the case. Nothing has changed since then and this Court should rule that the district court did not err in failing to exercise appellate authority over the judgment of this Court.

If the Court wishes to ignore the procedural bars (and fan the flames of the argument that the bars are discretionary), then the State would have additional comments. The "core meaning" of the mutilation aggravating factor is obvious from the definitions provided to the jury, and this Court has held that mutilation instructions like the one given in this case are not unconstitutionally vague. *See, e.g.*, *Hernandez v. State*, 118 Nev. 513, 530, 50 P.3d 1100, 1112 (2002); *Browne v. State*, 113 Nev. 305, 315-16, 933 P.2d 187, 193 (1997); *accord Deutscher v. Whitley*, 884 F.2d 1152, 1162 (9th Cir.1989)

(upholding as constitutional same instruction defining mutilation under NRS 200.033(8)), *vacated on other grounds sub nom. Angelone v. Deutscher*, 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991). Further, the instruction is not vague and overbroad as applied to post-mortem mutilation. *See Byford v. State*, 116 Nev. 215, 241, 994 P.2d 700, 717 (2000). Thus, if the issue were properly before the Court, it would be proper to reject it.

If the issue were a claim of ineffective assistance of counsel in failing to raise the claim that the aggravator was not supported by the evidence, that claim would be repelled by the record showing that counsel did indeed raise the issue. *See Vanisi v. State, supra*.

11. The Propriety of the Instruction on the Subject of Sympathy Is Not Properly Before the Court.

Vanisi next argues that the district court erred during the trial by instructing the jury that the verdict must not be influenced by "sympathy," as opposed to "mere sympathy." As noted above, this is not an appeal from a judgment of conviction. As with the other arguments concerning the trial, the issue is barred. If the court wishes to consider the issue anyway, the Court should hold that it has repeatedly approved this instruction where, as here, the jury has also been instructed to consider all mitigating evidence. *See, e.g.*, *Thomas v. State*, 120 Nev. 37, 46, 83 P.3d 818, 825 (2004); *Leonard v. State*, 117 Nev. 53, 79, 17 P.3d 397, 413-14 (2001); *Wesley v. State*, 112 Nev. 503, 519, 916 P.2d 793, 803-04 (1996). This jury was instructed that "the law never

compels the imposition of the death penalty." 3 AA 536. The instruction went on to inform the jury that even with proven aggravators, and the total lack of any mitigators, it has the authority to impose a sentence less than death. *Id.* That hardly suggests that the court informed the jury that it was limited in some way.

12. The Objection to the Instruction on the Subject of Implied Malice Is Not Properly Before the Court.

Vanisi next takes issue with a line from the instruction on the subject of malice, found at 3 AA 507. Once again, this is not an appeal from a judgment of conviction. If the issue were properly before the Court, the proper ruling is that the instruction comports with the law. *See Guy v. State*, 108 Nev. 770, 776–77, 839 P.2d 578, 582-83 (1992) (upholding a malice jury instruction containing the phrase "abandoned and malignant heart"); *Leonard v. State*, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998) (recognizing that "a heart fatally bent on mischief" is not common parlance but that its use "did not deprive the appellant of a fair trial").

13. The Lack of Instructions Concerning the Burden of Proving the Relative Weight of Aggravators and Mitigators Is Not Properly Before the Court.

Vanisi next takes issue with the lack of instruction to the effect that the evaluation of the relative "weight" of aggravating and mitigating circumstances must be made by reference to the standard of "beyond a reasonable doubt." This is not an appeal from the judgment of conviction and there is no ruling

on the subject in the judgment giving rise to this appeal. If the issue were properly before the Court, the State would point out that evaluating the weight of those factors is not a factual determination and it is not susceptible to "proof" by any standard. *Nunnery v. State*, 127 Nev. ___, 263 P.3d 235 (2011). That is, one cannot examine the evidence to determine the appropriate weight to be assigned to a factor and therefore one cannot determine if the result of the weighing is supported by substantial evidence.

14. The Propriety of the "Impact" Evidence Admitted in the Sentencing Hearing Is Not Properly Before this Court.

Vanisi raises yet another issue as though this were a direct appeal from the judgment of conviction. He contends that the court erred in admitting evidence at sentencing. He identifies only one witness and contends that if there had been an objection, and if that objection had been overruled, then it would have been error. He asks this Court to "draw a line in sand" and create some unspecified test and then rule that admission of the evidence was contrary to that new rule.

He concedes that no such rule exists as of today and so he asks that this Court create a new rule, and then rule that post-conviction counsel must be ineffective in failing to assert that trial counsel were ineffective in failing to anticipate that non-existent rule of law. Counsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel even where "the theory upon which the court's later decision is based is available,

although the court had not yet decided the issue." *Doyle v. State*, 116 Nev. 148, 156, 995 P.2d 465, 470 (2000).

The State also contends that the evidence described in the brief was not inappropriate. The law clearly allows the sentencing jury to hear of the impact of the murder on the family of the victim. *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991). When a single murder has a very powerful impact, that general rule does not change. *Payne* held that there was no constitutional bar to the admission of victim-impact evidence, and emphasized that such evidence "is designed to show ... each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Payne*, 501 U.S. at 823, 111 S.Ct. 2597. Thus, contrary to Vanisi's assertions, the *Payne* Court did not limit the victim-impact evidence that the jury may consider, and explicitly referenced the impact of the loss to the community resulting from the victim's death. *Payne*, 501 U.S. at 823 111 S.Ct. 2597. That seems particularly true where the victim is a police officer and the death of that officer affects the community. Thus, if the issue were properly before the Court, there would be no error.

15. <u>The Claim That the Court Erred at Trial in Some Fashion Relating to the Use of a Stun Belt Is Not Properly Before the Court</u>.

Vanisi next claims that the trial court erred in approving the use of a stun belt. The brief leaves it to this Court to find the appropriate spot in the 35 volumes of record. The only reference in the brief is to the petition and not to

any record of the trial court. As the argument has no reference to the record demonstrating that the trial court erred, this Court need no go searching for it.

The issue, whatever it is, is not properly before the Court. The only issue before this Court is whether the district court properly determined that the Vanisi had failed to overcome the procedural bars.

16. The Claim of Prosecutorial Misconduct Is Not Properly Before the Court.

Vanisi next raises claims of misconduct in the trial. As has been noted, no such claims are properly before this Court. The State might point out, however, that no court in the United States has ever ruled that the prosecutor may not use the first-person-plural pronoun in argument. If there is to be such a rule, it will have to be applied to all: to prosecutors and defense and to the civil bar.

As to the notion that the prosecutor may not comment on the absence of some mitigating circumstance, there is no such rule of law. When the defense claims that a mitigating circumstance exists, the prosecutor may indeed comment on the evidence. The case cited by Vanisi, *Turner v. Calderone*, 281 F.3d 851, 869 (9th Cir. 2002) mentioned only the harmless comment that a prosecutor suggested that the absence of mitigation is aggravating. The was no such comment in this case.

As to the comment that "Justice in this case demands death," that is not

misconduct. The rule of law proposed by Vanisi, that the prosecutor may not incorrectly inform the jury that they are required to impose a death penalty, has no application here as there was no such comment.

17. The Claim of Ineffective Assistance in Jury Selection Is Not Properly Before the Court.

Vanisi next would have this Court rule in the first instance that trial counsel was ineffective in jury selection. This is not an appeal from a ruling on the performance of trial counsel and there is ruling for this Court to review.

If the claim were properly before the Court, the State would suggest that the failure to ask certain questions means nothing without knowing the answers that would have been given at the time. The State would also suggest that the use of peremptory challenges is by its nature tactical. Furthermore, review of such decisions would necessarily require a subjective standard, instead of the objective standard required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). So, even if this were an appeal from a finding that trial counsel were not ineffective, the proper ruling would be to affirm that finding.

If the claim is that trial counsel was ineffective in failing to make a challenge for cause of the juror Grate, that is repelled by the record showing that there was such a challenge of Ms. Grate. 1 SAA 59. So, if the current arguments had been before the district court, they would have been properly dismissed.

Vanisi also asserts that this Court should decide in the first instance that trial counsel were ineffective in failing to seek to challenge for cause a juror who claimed to be "prejudiced" against all minorities. That juror explained that his "prejudice" meant that he resented how minorities are treated by others, perhaps by the government, as "they get all the breaks and all that," but he went on to explain that his attitude had nothing to do with the evaluation of the evidence as a juror. 2 SA 306-307. If the claim is that there is some objective standard that required counsel to challenge that juror for cause, and there is some rule of law that would require the court to allow that challenge, the State confesses to being ignorant of both the objective standard and the rule of law.

Vanisi also has an argument that some objective standard required counsel to prefer one juror over another. There is no such standard and so if this issue was presented to the district court in a first petition for writ of habeas corpus, it would be properly dismissed.

Vanisi also raises a series of arguments indicating that appellate counsel was ineffective in the direct appeal in failing to assert that the trial court erred in the course of jury selection. Each of the alleged errors is discretionary and each is barred as they could have been raised in the last go-round. If the claim is that this Court should decide now, as a matter of fact, that post-conviction counsel was ineffective, this Court is not a trier of fact. The only ruling before

this Court is the ruling that current counsel failed to prove that post-conviction counsel were ineffective in specific ways.

18. The Alleged Error of the Trial Court in Failing to *Sua Sponte* Grant Some Unspecified Remedy Because There Was No Initial Probable Cause Determination of the Aggravating Circumstances Is Not Properly Before the Court.

Vanisi raises an argument that aggravating circumstances must be found by a grand jury or a judge at a preliminary hearing. This Court has previously rejected that argument in an "other issues" paragraph in *Libby v. State*, 109 Nev. 905, 919, 859 P.2d 1050, 1059 (1993). The State also notes that the argument is based on the assertion that the aggravating circumstances are elements of the offense. They are not. Instead, they are sentencing factors. Those must be determined by a petit jury but even if they should have been determined by a grand jury, subsequent proof beyond a reasonable doubt would cure the error.

19. The Claim That Trial Counsel Did Not Object to Gruesome Photographs Is Not Properly Before this Court. It Is Also Untrue.

Vanisi next presents a generic argument about gruesome photographs being admitted at trial. The ruling leading to this appeal had no mention of photographs and so there is nothing to review.

To the suggestion that trial counsel did not object, that is untrue. *See* 13 AA 3017. The State also contends that each photograph was properly admitted and there was no abuse of discretion. The Court might also note that the State was required to prove "mutilation" as the defense did not stipulate to the

aggravating circumstance. That would seem to weigh in favor of admitting evidence of the mutilation.

20. The Propriety of the Ruling in the First Appeal Concerning the Waiver of the Right to Counsel Is Not Properly Before this Court.

Vanisi makes an argument that this Court erred in the 2001 appeal in affirming the denial of the motion for self-representation. This time there is not even the pretense of some claim of ineffective assistance of anyone. This is not an appeal from the 2001 ruling of this Court and so the propriety of that ruling is not before this Court. If it were, then the doctrine of the Law of the Case would weigh in favor of affirming the ruling of this Court.

21. The Arguments Concerning the Execution Protocol Are Not Properly Before the Court.

Arguments concerning the manner in which an execution is to be carried out are not cognizable in this action. *See McConnell v. State*, 125 Nev. 243, 248-49, 212 P.3d 307, 310-311 (2009). *Accord*, *Hill v. McDonough*, 547 U.S. 573, 579, 126 S.Ct. 2096 (2006). As federal courts likewise will not consider the claim in the post-conviction context, the argument that the claim must be exhausted here is misleading.

To the suggestion that the ruling constitutes an unlawful suspension of the writ of habeas corpus, the statutory remedy of the post-conviction petition for writ of habeas corpus is not the same as the common law writ of habeas corpus. In fact, the statutory remedy is mis-named as it requires a judgment of conviction as a prerequisite, while the common law writ would allow the

existence of a judgment as a defense to the writ. *See Frank v. Mangum*, 237 U.S. 309, 330, 35 S.Ct. 582, 588 (1915). Thus, the Nevada constitution does not mandate that the statutory remedy be provided at all.

22. The Continuing Insult to Every Elected Judge in the Nation Is Not Properly Before this Court.

Vanisi next asks the elected justices of this Court to rule that they cannot allow the elected justices of this Court to consider his arguments. No response is necessary.

23. All of the Remaining Arguments Are Nonsensical.

None of the remaining arguments have any pretense of being related to any of the prior proceedings in the district court or this Court. There is no ruling for this Court to review and so the judgment of the district court should be affirmed.

IV. CONCLUSION

The sole issue before this Court is whether some rule of law required the district court to be persuaded by the evidence and to conclude that post-conviction counsel's performance fell below an objective standard of reasonableness, and that Vanisi was prejudiced by those failings, in failing to

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show that trial counsel were ineffective in some specific way. The mere existence of additional evidence shows none of that.

DATED: April 7, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that, to the best of my ability, this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 80 pages or 37,000 words (11,255 words).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I

understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 7, 2015.

By: TERRENCE P. McCARTHY
Chief Appellate Deputy
Nevada Bar No. 2745
P. O. Box 11130
Reno, Nevada 89520
(775) 328-3200

CERTIFICATE OF SERVICE

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

Tiffani Hurst, Assistant Federal Public Defender
Randolph Fiedler, Assistant Federal Public Defender
Gary Taylor, Assistant Federal Public Defender

Shelly Muckel
Washoe County District Attorney's Office