

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SIAOSI VANISI,

Appellant,

vs.

WILLIAM GITTERE, WARDEN,
and
AARON FORD, ATTORNEY
GENERAL FOR THE
STATE OF NEVADA.

Respondents.

Electronically Filed
Sep 26 2019 04:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 78209

District Court No. 98CR0516

Volume 13 of 38

APPELLANT'S APPENDIX

Appeal from Order Denying Petition for Writ of
Habeas Corpus (Post-Conviction)
Second Judicial District Court, Washoe County
The Honorable Connie J. Steinheimer

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27	114. Declaration of Heidi Bailey-Aloi April 7, 2011.....	AA05727 – AA05730
27	115. Declaration of Herbert Duzant’s Interview of Tony Tafuna April 18, 2011.....	AA05731- AA05735
27	116. Declaration of Terry Williams April 10, 2011.....	AA05736 – AA05741
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27	118. Declaration of Mele Maveni Vakapuna April 5, 2011.....	AA05746 – AA05748
27	119. Declaration of Priscilla Endemann April 6, 2011.....	AA05749 – AA05752
27	120. Declaration of Mapa Puloka January 24, 2011.....	AA05753 – AA05757
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27	122. Declaration of Sione Pohahau January 22, 2011.....	AA05768 – AA05770
27	123. Declaration of Tavake Peaua January 21, 2011.....	AA05771 – AA05776
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27-28	125. Declaration of Vuki Mafileo February 11, 2011	AA05800 – AA05814

28	127. Declaration of Crystal Calderon April 18, 2011.....	AA05815 – AA05820
28	128. Declaration of Laura Lui April 7, 2011.....	AA05821 – AA05824
28	129. Declaration of Le’o Kinkini-Tongi April 5, 2011.....	AA05825 – AA05828
28	130. Declaration of Sela Vanisi-DeBruce April 7, 2011.....	AA05829 – AA05844
28	131. Declaration of Vainga Kinikini April 12, 2011.....	AA05845 – AA05848
28	132. Declaration of David Hales April 10, 2011.....	AA05849 – AA05852
28	136. Correspondence to Stephen Gregory from Edward J. Lynn, M.D. July 8, 1999.....	AA05853 – AA05855
28	137. Memorandum to Vanisi File from MRS April 27, 1998.....	AA05856 – AA05858
28	143. Memorandum to Vanisi File From Mike Specchio July 31, 1998.....	AA05859 – AA05861
28	144. Correspondence to Michael R. Specchio from Michael Pescetta October 9, 1998.....	AA05862 – AA05863
28	145. Correspondence to Michael Pescetta from Michael R. Specchio October 9, 1998.....	AA05864 – AA05866

28	146. 3 DVD's containing video footage of Siaosi Vanisi in custody on various dates (MANUALLY FILED).....	AA05867
28	147. Various Memorandum to and from Michael R. Specchio 1998-1999	AA05868 – AA05937
28	148. Memorandum to Vanisi file Crystal-Laura from MRS April 20, 1998.....	AA05938 – AA05940
28	149. Declaration of Steven Kelly April 6, 2011	AA05941 – AA05943
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28	152. Declaration of Luisa Finau April 7, 2011	AA05950 – AA05955
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28	156. Declaration of Nancy Chiladez April 11, 2011	AA05967 – AA05969
28-29	159. Transcript of Proceedings, Trial Volume 1, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 11, 1999.....	AA05970 – AA06222

29-31	160. Transcript of Proceedings, Trial Volume 2, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 12, 1999.....	AA06223 – AA06498
31	163. Neuropsychological and Psychological Evaluation of Siaoosi Vanisi, Dr. Jonathan Mack April 18, 2011.....	AA06499 – AA06569
31-32	164. Independent Medical Examination in the Field of Psychiatry, Dr. Siale ‘Alo Foliaki April 18, 2011.....	AA06570 – AA06694
32	172. Motion for Change of Venue, <i>State of Nevada v.</i> <i>Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 July 15, 1998.....	AA06695 – AA06700
32	173. Declaration of Herbert Duzant’s Interview with Tongan Solicitor General, ‘Aminiasi Kefu April 17, 2011.....	AA06701 – AA06704
32	175. Order Denying Rehearing, Appeal from Denial of Post-Conviction Petition, <i>Vanisi vs. State of</i> <i>Nevada</i> , Nevada Supreme Court, Case No. 50607 June 22, 2010.....	AA06705 – AA06706
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- 32 183. San Bruno Police Department Criminal
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- 32 184. Manhattan Beach Police Department Police
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- 32 185. Manhattan Beach Police Department
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- 32 186. Notice of Intent to Seek Death Penalty,
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- 32 187. Judgment, *State of Nevada v. Vanisi*,
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- 32 190. Correspondence to The Honorable Connie
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- 32 195. Declaration of Herbert Duzant’s Interview of
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- 32 196. Declaration of Herbert Duzant’s Interview of
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32	198. Declaration of Herbert Duzant’s Interview of Juror Robert Buck April 18, 2011.....	AA06753 – AA06755
12	Remittitur, <i>Vanisi v. State of Nevada, et al.</i> , Nevada Supreme Court, Case No. 35249 November 27, 2001.....	AA02527 – AA02528
15	Remittitur, <i>Vanisi v. State of Nevada, et al.</i> , Nevada Supreme Court, Case No. 50607 July 19, 2010	AA03031 – AA03032
35	Remittitur, <i>Vanisi v. State of Nevada, et al.</i> , Nevada Supreme Court, Case No. 65774 January 5, 2018.....	AA07319 – AA07320
12	Reply in Support of Motion to Withdraw as Counsel of Record, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 December 27, 2002	AA02572 – AA02575
39	Reply to Opposition to Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 15, 2018.....	AA08232 – AA08244
36	Reply to Opposition to Motion to Disqualify the Washoe County District Attorney’s Office, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 July 27, 2018	AA07615 – AA07639

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36	1. Response to Motion for a Protective Order, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court
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	of Nevada, Case No. CR98-0516 March 9, 2005.....	AA07640 – AA07652
36	2. Letter from Scott W. Edwards to Steve Gregory re Vanisi post-conviction petition. March 19, 2002.....	AA07653 – AA07654
36	3. Supplemental Response to Motion for a Protective Order, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 March 16, 2005.....	AA07655 – AA07659
36	4. Appellant’s Appendix, Volume 1, Table of Contents, <i>Vanisi v. State of Nevada</i> , Nevada Supreme Court, Case No. 50607 August 22, 2008.....	AA07660 – AA07664
36	5. Facsimile from Scott W. Edwards to Jeremy Bosler April 5, 2002.....	AA07665 – AA07666
35	Reply to Opposition to Motion for Reconsideration and Objection to Petitioner’s Waiver of Attendance at Evidentiary Hearing, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 April 16, 2018.....	AA07356 – AA07365

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35	1. Petitioner’s Waiver of Appearance (and attached Declaration of Siao Si Vanisi), April 9, 2018.....	AA07366 – AA07371
13	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 (Hearing Requested), <i>State of Nevada v.</i> <i>Vanisi</i> , Second Judicial District Court of Nevada,	

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36 Reply to State’s Response to Petitioner’s Suggestion
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36 1. Declaration of Randolph M. Fiedler
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36 Request from Defendant, *State of Nevada v.*
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32 Response to Opposition to Motion to Dismiss
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36 Response to Vanisi’s Suggestion of Incompetency
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35 State’s Opposition to Motion for Reconsideration
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1. Declaration of Donald Southworth, *Vanisi v. State of Nevada, et al.*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 36 State’s Sur-Reply to Vanisi’s Motion to Disqualify the Washoe County District Attorney’s Office, *Vanisi v. State of Nevada, et al.*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 36 1. Transcript of Proceedings – Status Hearing, *Vanisi v. State of Nevada*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 36 Suggestion of Incompetency and Motion for Evaluation, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 37 Transcript of Proceedings – Competency for Petitioner to Waive Evidentiary Hearing, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 37-38 Transcript of Proceedings – Report on Psychiatric Evaluation, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
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13	Transcript of Proceedings – Conference Call – In Chambers, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 February 5, 2003	AA02583 – AA02587
35	Transcript of Proceedings – Conference Call, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 May 10, 2018	AA07372 – AA07384
34	Transcript of Proceedings – Decision (Telephonic), <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 March 4, 2014.....	AA07089 – AA07096
12	Transcript of Proceedings – In Chambers Hearing & Hearing Setting Execution Date, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District of Nevada, Case No. CR98-0516 January 18, 2002.....	AA02541 – AA02552
13	Transcript of Proceedings – In Chambers Hearing, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District of Nevada, Case No. CR98-0516 January 19, 2005.....	AA02645 – AA02654
13	Transcript of Proceedings – In Chambers Hearing, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 24, 2005.....	AA02655 – AA02679
35	Transcript of Proceedings – Oral Arguments, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 May 30, 2018	AA07391 – AA07446

38	Transcript of Proceedings – Oral Arguments, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 25, 2019.....	AA08136 – AA08156
32-33	Transcript of Proceedings - Petition for Post-Conviction (Day One), <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 December 5, 2013	AA06848 – AA06966

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33	199. Letter from Aminiask Kefu November 15, 2011.....	AA06967 – AA06969
33	201. Billing Records-Thomas Qualls, Esq. Various Dates.....	AA06970 – AA06992
33	214. Memorandum to File from MP March 22, 2002.....	AA06993 – AA07002
33	Transcript of Proceedings - Petition for Post-Conviction (Day Two), <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 December 6, 2013	AA07003 – AA07083

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33	200. Declaration of Scott Edwards, Esq. November 8, 2013.....	AA07084 – AA07086
33	224. Letter to Scott Edwards, Esq. from Michael Pescetta, Esq. January 30, 2003.....	AA07087 – AA07088

12-13	Transcript of Proceedings – Post-Conviction, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 28, 2003.....	AA02576 – AA02582
13	Transcript of Proceedings – Post-Conviction, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 November 22, 2004.....	AA02614 – AA02644
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13	Transcript of Proceedings – Report on Psychiatric Evaluation, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 27, 2005.....	AA02680 – AA02716
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38	Transcript of Proceedings – Report on Psychiatric Evaluation, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 25, 2018.....	AA08034 – AA08080

36-37	Transcript of Proceedings – Status Conference, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 5, 2018.....	AA07725 – AA07781
3-5	Transcript of Proceedings – Trial Volume 1, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 20, 1999.....	AA00622 – AA00864
5-6	Transcript of Proceedings – Trial Volume 2, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 21, 1999.....	AA00865 – AA01112
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6-7	Transcript of Proceedings – Trial Volume 3, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 22, 1999.....	AA01113 – AA01299
2-3	Transcript of Proceedings – Trial Volume 4, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 14, 1999.....	AA00296 – AA00523
7	Transcript of Proceedings – Trial Volume 4, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 23, 1999.....	AA01300 – AA01433

3	Transcript of Proceedings, Trial Volume 5, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 15, 1999.....	AA00524 – AA0550
7-8	Transcript of Proceedings, Trial Volume 5, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 24, 1999.....	AA01434 – AA01545
8	Transcript of Proceedings – Trial Volume 6, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 27, 1999.....	AA01546 – AA01690
8-9	Transcript of Proceedings – Trial Volume 7, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 28, 1999.....	AA01691 – AA01706
9	Transcript of Proceedings – Trial Volume 8, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 30, 1999.....	AA01707 – AA01753
9-10	Transcript of Proceedings – Trial Volume 9, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 1, 1999.....	AA01754 – AA01984
10-11	Transcript of Proceedings – Trial Volume 10, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 4, 1999.....	AA01985 – AA02267

11-12	Transcript of Proceedings – Trial Volume 11, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 5, 1999.....	AA02268 – AA02412
12	Transcript of Proceedings – Trial Volume 12, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 6, 1999.....	AA2414 – AA02522

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of September, 2019.

Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

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Sara Jelenik
An employee of the Federal
Public Defender's Office

1 habeas.

2 MR. MCCARTHY: No, they don't say that.
3 Mr. Edwards is more than qualified. He's done an
4 outstanding job on dozens of them. Kay Ellen Armstrong has
5 had -- actually she's never completed one in this county
6 that I know of, but I know she's had some in other counties.

7 MR. PICKER: Let me add that I know that
8 Douglas County, she's handled a number, and also in Carson
9 City. We have had that discussion.

10 THE COURT: Well, if I enter an order relieving
11 you, that leaves Mr. Edwards, and there's no rule that he
12 has to have two attorneys.

13 MR. EDWARDS: Judge, are you going to leave me
14 on the case?

15 THE COURT: Well, yeah. Until you help me find
16 someone -- I was perfectly willing to go to the State Public
17 Defender and say, this case is of such a nature that I would
18 like to hire two attorneys to work on the habeas. As long
19 as you don't double bill, they are fine with that and they
20 are willing to pay that.

21 But my problem is finding someone who's willing
22 to co-chair with you, Mr. Edwards. You are already up to
23 snuff on at least your portion of it. It would make a lot
24 more sense to find someone that is compatible with you to
25 co-chair the habeas if we let Mr. Picker out than to start

1 from scratch all over again.

2 MR. EDWARDS: Well, that's true, Judge. You
3 know, I'll be frank with you. When Marc informed me that he
4 wanted out, I looked around and tried to see if I could find
5 somebody to take his place, and the few people that I have
6 had prior co-counsel experience with in these kind of cases,
7 Karla Butko is one of them, Ian Silverberg is another,
8 neither of those two people wanted anything to do with this
9 case. So I don't know who out there would fit the bill as
10 far as taking Mr. Picker's case as lead counsel.

11 I don't know Kay Ellen Armstrong, by the way.

12 THE COURT: What about John Arrascada? You're
13 habeas qualified, John Arrascada has a lot of trial
14 experience and can look at it from the trial standpoint.
15 Wouldn't that be of help?

16 MR. EDWARDS: Well, I like John Arrascada and I
17 have worked with him before. If he's, you know, willing and
18 qualified to do something like that. We don't have a --
19 he's not somebody I have talked to about this case, but I
20 certainly don't have a problem with him.

21 THE COURT: I don't know. Number one, I have
22 no problem with interim billings. So anybody who is on the
23 case who wants to do interim billings, they may certainly
24 submit interim bills. I think we talked about that before,
25 but if for some reason we didn't, that has always been my

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RONALD A. LONGSTIN, JR.

BY *[Signature]*
DEPUTY

Code No. 4185

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

---o0o---

THE STATE OF NEVADA,
Plaintiff,

-vs-

SIAOSI VANISI,
Defendant.

Case No. CR98P0516

Dept. No. 4

CONFERENCE CALL - IN CHAMBERS
February 5th, 2003
Reno, Nevada

APPEARANCES: (See separate page)

Reported by:

KATE MURRAY, CCR #599

775-883-7950 SUNSHINE REPORTING SERVICES 775-323-3411

2JDC06253
AA02583

RENO, NEVADA; WEDNESDAY, FEBRUARY 5TH, 2003; 3:32 P.M.

---oOo---

THE COURT: Let the record reflect that we are convened on CR98P0516 with the Court and clerk as well as counsel; Mr. Picker, Mr. Edwards and Mr. Hatlestad on behalf of the State regarding Siao Si Vanisi's post conviction..

It is my understanding that we had a meeting last week, and Mr. Picker was going to try to find successive counsel to take his place pursuant to his motion to be relieved.

MR. PICKER: Your Honor, I'm going to defer to Mr. Edwards, who I have talked to earlier today and who seems to have come up with a proposal that he is comfortable with.

THE COURT: Okay. Mr. Edwards?

MR. EDWARDS: Your Honor, I did search around for a comfortable fit with an attorney that I feel comfortable doing this case with, and I wasn't able to find anybody in that regard, so after discussion with the Federal Public Defender's Office down in Las Vegas, who has given me some guidance on some other cases death penalty wise, I decided what I would do and this is all presumably -- at the last meeting we had, you indicated you weren't inclined to allow me to withdraw, so with that in mind, I'm going to

SVan1s12JDC06255

1 stay on the case and do it myself with a paralegal.

2 THE COURT: Okay. Are you comfortable with
3 that, Mr. Hatlestad? Do you see any impediment to that?

4 MR. HATLESTAD: No. That's fine.

5 THE COURT: All right. That will be the order.
6 I will relieve Mr. Picker, and Mr. Edwards, you will stay on
7 the case.

8 With regard to your request to have paralegal
9 fees paid by the State Public Defender, I would like you to
10 contact the State Public Defender, explain the situation and
11 see if he has any objection --

12 MR. EDWARDS: Sure.

13 THE COURT: -- to the paralegal fees. Then if
14 he has none, ask him to please send me a letter so that if
15 he does have an objection, I could at least have a hearing
16 and decide, but if he has no objection, then I'll go along
17 with it.

18 MR. EDWARDS: Okay. That would be great, Your
19 Honor.

20 THE COURT: All right.

21 MR. EDWARDS: We'll also do some interim
22 billing. I think that will be good for them, the State
23 Public Defender's Office, me, and it will allow you to know
24 how the case is progressing at least without having to have
25 a status check on it.

SVan1s12JDC06256

1 THE COURT: I have no problem with interim
2 billing. That is fine with me.

3 MR. EDWARDS: Okay. Great.

4 THE COURT: Mr. Picker, would you provide the
5 Court with an order relieving you as counsel, and make sure
6 that the order says that Mr. Edwards will remain on as
7 counsel for the habeas.

8 MR. PICKER: I will do so.

9 THE COURT: Mr. Edwards, you will contact
10 Mr. Vanisi and let him know what is going on. We'll also
11 serve him with a copy of the order, but you will let him
12 know.

13 MR. EDWARDS: Yes, Your Honor.

14 THE COURT: All right. Thank you, Counsel.

15 MR. EDWARDS: Thank you.

16 THE COURT: You're welcome.

17 (Proceedings concluded at 3:37 p.m.)
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25

SVan1s12JDC06257

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

4 I, KATE MURRAY, Certified Court Reporter of the
 5 Second Judicial District Court, in and for the County of
 6 Washoe, State of Nevada, do hereby certify:

7 That I was present in the above-entitled court on
 8 Wednesday, February 5th, 2003, and took stenotype notes of
 9 the proceedings entitled THE STATE OF NEVADA, Plaintiff,
 10 versus, SIAOSI VANISI, Defendant, Case No. CR98P0516, and
 11 thereafter transcribed them into typewriting as herein
 12 appears;

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

15
 16 DATED: At Reno, Nevada, this 18th day of
 17 February, 2003.

18
 19
 20 
 21 KATE MURRAY, CCR #599
 22
 23
 24
 25

SVan1512JDC06230

ORIGINAL

FILED

CODE: 2075
Scott W. Edwards
Bar Number 3400
1030 Holcomb Ave., Reno, NV 89502
(775)786-4300
Attorney for: Petitioner

2003 OCT 30 PM 4:26

RONALD A. LONGTIN, JR.

BY S. Davis
DEPUTY

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

SIAOSI VANISI,

Petitioner,

VS.

WARDEN, ELY STATE PRISON,

Respondent

CR98P0516

Case No. CR97P-0274

Dept. No. 4

MOTION FOR ORDER APPOINTING CO-COUNSEL

COMES NOW, SCOTT W. EDWARDS, ESQ., appointed counsel for Petitioner, SIAOSI VANISI, and moves this Court for an order appointing Thomas Qualls as co-counsel on this case. This motion is based upon the following affidavit of counsel.

RESPECTFULLY SUBMITTED this 29th day of October, 2003.



SCOTT W. EDWARDS
Attorney for Petitioner

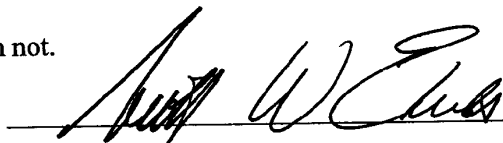
AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF WASHOE)

SCOTT W. EDWARDS, under penalty of perjury affirms that the assertions in this Affidavit are true.

1. Your affiant was appointed counsel, for Petitioner SIAOSI VANISI in this death penalty habeas action by order of this Court.
2. To assist in the preparation of this case, your affiant engaged the services of Thomas Qualls, a law school graduate with extensive experience in capital habeas litigation. Since Mr. Qualls began work on this case, he has taken and successfully passed the Nevada Bar Exam. He is now a Nevada attorney in good standing. (Bar Id. No. 8623)
3. Accordingly, your affiant respectfully requests an order formally recognizing Mr. Quall's status as co-counsel on this case.

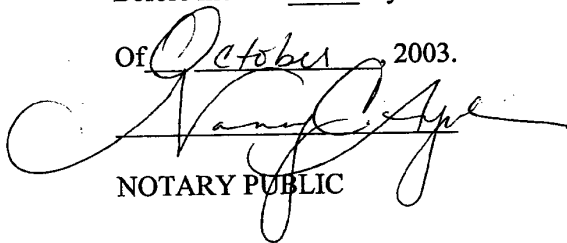
FURTHER, your affiant sayeth not.



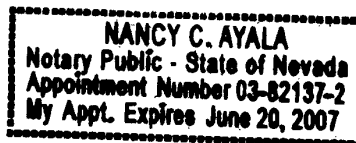
SCOTT W. EDWARDS

SUBSCRIBED AND SWORN to

Before me this 29th day
Of October, 2003.



NOTARY PUBLIC



SVan1s12JDC06232

CERTIFICATE OF SERVICE

I, Nancy Ayala, hereby certify pursuant to N.R.C.P. 5, that on this 30th day
of October, 2003, I caused to be delivered via Reno Carson Messenger Service a true and correct
copy of the foregoing MOTION FOR ORDER APPOINTING CO-COUNSEL addressed to:

Washoe County District Attorney
Appellate Division
P.O. Box 30083
Reno, NV 89520-3083

ORIGINAL

CODE: 2745

FILED

DEC 23 2003

RONALD A. LONGTIN, JR., CLERK

By: *[Signature]*
DEPUTY

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

SIAOSI VANISI,

Petitioner,

vs.

WARDEN, ELY STATE PRISON,

Respondent.

Case No. CR98P0516

Dept. No. 4

ORDER

On March 11, 2002 an Order was filed appointing Marc Picker, Esq. And Scott Edwards, Esq. As co-counsel for Petitioner. On February 10, 2003 an Order was filed relieving Marc Picker, Esq. as attorney for Petitioner and further ordering that Scott Edwards, Esq. would remain as attorney for petitioner and allowing Mr. Edwards to employ the services of a paralegal to assist in this matter. Mr. Edwards engaged the service of Thomas Qualls. Since beginning work on this matter, Mr. Qualls has taken and successfully passed the Nevada Bar Exam, and is now a Nevada attorney in good standing. On October 30, 2003 Petitioner filed a Motion for Order Appointing Thomas

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///

///

1 Qualls, Esq. as co-counsel. On November 20, 2003 this Motion was submitted to the
2 Court for decision.

3 Based on the foregoing and good cause appearing,

4 IT IS HEREBY ORDERED that Thomas Qualls, Esq., can second chair this
5 matter with Mr. Edwards.

6 Dated this 19 day of December, 2003.

7 Connie I. Steinheimer
8 DISTRICT JUDGE
9
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13
14
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17
18
19
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21
22
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26

CERTIFICATE OF MAILING

I certify that I am an employee of JUDGE CONNIE STEINHEIMER; that on the
23rd day of December, 2003, I deposited in the county mailing system
for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of
the Order regarding the appointment of Mr. Qualls, addressed to:

Washoe County District Attorney
Via: Interoffice mail

Scott Edwards, Esq.
1030 Holcomb Avenue
Reno NV 89502

Thomas Qualls, Esq.
443 Marsh Avenue
Reno NV 89509

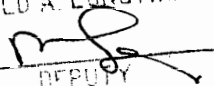


S. Schueller

ORIGINAL

FILED

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

2004 NOV -9 PM 12:16
 RONALD A. LONGSTIN, JR.
 BY  DEPUTY

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

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,

Dept. No. 4

DEATH PENALTY CASE


23 Respondents.
 24 _____

25 **MOTION FOR STAY OF POST-CONVICTION HABEAS CORPUS PROCEEDINGS**
 26 **AND FOR TRANSFER OF PETITIONER TO LAKES CROSSING FOR**
 27 **PSYCHOLOGICAL EVALUATION AND TREATMENT (HEARING REQUESTED)**
 28

COMES NOW appointed counsel, SCOTT W. EDWARDS AND THOMAS L. QUALLS,
 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

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.

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

21
22 **It is the universal experience in the administration of criminal justice that those**
23 **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).

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

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

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

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

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

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

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

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

16 The undersigned counsel are in the process of acquiring relevant medical and other records
17 from the Nevada Department of Corrections related to VANISI. It is the intent of counsel to present
18 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 VANISI's competence to proceed may be resolved. Additionally, a hearing is requested on this
 4 matter.
 5

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

7
 8 
 9 SCOTT EDWARDS, ESQ.
 10 State Bar No. 3400
 729 Evans Ave., Reno, Nevada 89512
 (775) 786-4300
 11 THOMAS L. QUALLS, ESQ.
 12 State Bar No. 8623
 443 Marsh Ave., Reno, Nevada 89509
 13 (775) 333-36633
 14 Attorneys for Petitioner,
 SIAOSI VANISI
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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 SIAOSI 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 pyschotropic 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;

23

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1 ///

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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

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

9

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

11

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

13

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

18

19 24. VANISI further claimed to have gone into the yard in his boxers and tennis shoes, with
20 a bedsheet over his head. When called in from the yard, he wouldn't go into his "house" (his cell) but
21 instead "captured the tier" (the area outside his house);

22

23 25. Further, VANISI made several comments regarding the guards "impinging upon his
24 life and freedom" -- without any acknowledgment of his incarcerated status or the inherent legal
25 authority of the guards over him. He stated that he would not "consent to be governed";

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28 ///

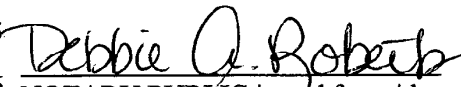
1 ///

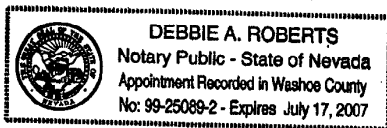
2 26. In short, your affiant believes that VANISI's current mental state prevents him from
3 accurately understanding his situation and from meaningfully assisting counsel in the pursuit of his
4 post-conviction relief.
5

6
7 **FURTHER YOUR AFFIANT SAYETH NAUGHT**

8
9 
10 SCOTT W. EDWARDS, ESQ. _____

11
12 SUBSCRIBED AND SWORN to before me,
13 the 8th day of November 2004.

14
15 
16 NOTARY PUBLIC in and for said
17 County and State.



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;

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

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

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

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

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

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

16 15. VANISI reported that he has taken to blindfolding himself in the yard when he is
17 running and doing his workouts and is thereby forced to feel his way around. VANISI explained, "I
18 do my motions; I do my movements." VANISI also reports to standing on his head in the yard;
19

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

21 17. Further, VANISI claims to have been naked in the yard in the snow making snow
22 angels;
23

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

26 ///

27 ///

28

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

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

6 21. VANISI also claimed to have stayed outside in the yard all night long in April of 2004
7 (for approximately 24 hours);
8

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

10 23. Also, several times during the interview, VANISI made random statements which,
11 although somewhat poetic in their form, were basically unintelligible. For example, quite out of
12 context, VANISI proclaimed, "My identity itself causes you violence. You hang up my picture in
13 silence."
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15 24. VANISI further claimed to have gone into the yard in his boxers and tennis shoes, with
16 a bedsheet over his head. When called in from the yard, he wouldn't go into his "house" (his cell) but
17 instead "captured the tier" (the area outside his house);
18

19 25. Further, VANISI made several comments regarding the guards "impinging upon his
20 life and freedom" -- without any acknowledgment of his incarcerated status or the inherent legal
21 authority of the guards over him. He stated that he would not "consent to be governed";
22

23 ///

24

25 ///


26

27 ///

28

FURTHER YOUR AFFIANT SAYETH NAUGHT

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

 **DEBBIE A. ROBERTS**
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 99-25089-2 - Expires July 17, 2007

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CERTIFICATE OF SERVICE:

Pursuant to NRCp 5(b), I hereby certify that I am an employee of the law offices of Scott 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.
- XP _____ 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

8VAn1s12JDC06188

2JDC06188

AA02609

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.

20
 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 17th day of November, 2004.

18
19
20 
21 SCOTT EDWARDS, ESQ.

22 State Bar No. 3400
23 729 Evans Ave., Reno, Nevada 89512
24 (775) 786-4300
25 THOMAS L. QUALLS, ESQ.
26 State Bar No. 8623
27 443 Marsh Ave., Reno, Nevada 89509
28 (775) 333-36633
Attorneys for Petitioner,
SIAOSI VANISI

SVan1s12JDC06192

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.

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

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

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RONALD L. MARTIN, JR.

[Signature]
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-

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

ORIGINAL

Reported By:

MARCIA FERRELL, CCR No. 797

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APPEARANCES:

For the Plaintiff:	TERRY McCARTHY
	DEPUTY DISTRICT ATTORNEY
	75 Court Street
	RENO, NEVADA 89520
For the Defendant:	SCOTT W. EDWARDS
	ATTORNEY AT LAW
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	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

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

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 Mines,
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

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

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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?

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MR. McCARTHY: I understand.

THE COURT: All right, court is in recess.

(Proceedings concluded.)

--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
 20 Marcia L Ferrell
 21 Marcia L. Ferrell, CSR #797

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 23
 24

ORIGINAL

FILED

2005 FEB 16 AM 8:06

RONALD A. LONGTIN, JR.

BY *[Signature]*
DEPUTY

4185
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

-o0o-

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

CASE NO. CR98P0516
DEPARTMENT NO. 4

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

A P P E A R A N C E S

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For the Respondent:

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

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

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

MR. EDWARDS: Hi, Marcie.

MR. MCCARTHY: Fine.

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

MR. MCCARTHY: Yes, ma'am.

THE CLERK: Is that everybody?

MR. EDWARDS: That is us.

THE CLERK: Here is the Judge.

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

MR. EDWARDS: Uh-huh.

MR. MCCARTHY: Uh-huh.

THE COURT: I received a faxed letter from Dr. Amazaga who is doing one of the psychological evaluations, and he's requesting access to Siaosi Vanisi's medical record for about an hour at the prison. But before I granted that and issued an Order, I wanted to be sure neither of you had any 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 --o0o--


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.
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JUDITH ANN SCHONLAU CSR #18

SVan1s12JDC05901

CODE: 4185

ORIGINAL

2005 JUN 27 01:19:41

CLERK OF COURT
BY *[Signature]* CLERK JR.
CLERK

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

--ooOoo--

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

1

DONNA DAVIDSON, RMR, CRR - (775) 815-0653

2JDC05901
AA02655

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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

reevaluation in 90 days.

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

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

THE COURT: Not necessarily.

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

MR. QUALLS: Sure.

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

MR. EDWARDS: I understand.

THE COURT: Most psychologists and psychiatrists don't want to be involved with 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.)

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

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

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ORIGINAL

ROBERT L. MARTIN, JR.

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Respondent.

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DR. THOMAS BITTKER

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

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

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

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

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

DR. BITTKER: Good afternoon, your Honor.

THE COURT: Good afternoon.

THE CLERK: Please raise your right hand.

(Whereupon the witness was duly sworn.)

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

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

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

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?

A Yes, I do.

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

A Yes, I have.

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

A That's accurate.

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

A A psychiatric assessment, yes.

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

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

Q Were you able to formulate an opinion as to Mr. Vanisi's mental competence to assist and communicate 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

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

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

A Of course.

Q And how do you understand that term to mean?

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

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

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

Q And this was years ago; is that correct?

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

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Q Okay. And how about during this eval, this assessment that you performed?

A Well, I don't think that he was as forthcoming as I would like him to be; but he did not advance to me symptoms in an effort to manipulate me, I believe. I believe he more likely attempted to close off any transparency so that it would be more difficult for me to understand his pathology. But, no, in common terms I don't think he was faking it when I examined him at the last exam.

Q Your report indicates, quote, Mr. Vanisi did not seem to fully capture the significance of being transparent with his defense counsels. Is that right?

A Yes.

Q What do you mean by that?

A I don't think he fully understands that in order for you to assist him that you need to understand what went on with him in his inner life as you're attempting to proceed with his appeal. I think you are still perceived as an instrument of the State and irrationally so. So there's very little that he will disclose about what went on. I can acknowledge that there may be rational reasons for him not doing this. It would make sense, one would say, if this was prior to his initial conviction. But it isn't making a great deal of sense right now.

Q You also found that Mr. Vanisi possess what you

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call manic entitlement. Can you explain what that is?

A I think it was demonstrated as he described to me what went on with him in Ely. He did not do well with the constraints of being incarcerated. He believed that he was entitled to wear traditional garb and attempted to assume that when wearing, I guess, some sort of sheet or gown, was outside for a full 24 hours from my understanding. He was somehow outside of his cell or outside the wall for about 24 hours during that time where he was just wanting to do what he wanted to do. He didn't fully comprehend that, yes, as an incarcerant, as somebody who's been convicted of a crime, he needs to remain and conform to the expectations of the institution for his safety and the safety of other inmates. He had some insight into that. What he said was that the medication allowed him to get control of this impulsive aspect of himself. So that was the positive aspect of taking medicine. The negative aspect was he would -- he explained that he just could not access what he was as a person. He was not the same person with the medicines as he was off the medicines.

Q In your diagnosis on Axis 5 you indicate his behavior is considerably influenced by delusions and serious impairment and judgment.

A Yes.

Q Is that right?

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1 A Yes, and I think that's part of the
2 entitlement.

3 Q And your recommendation for Mr. Vanisi is that
4 he have his medication altered. And is that with the
5 prospect of him returning to a state of competency?

6 A I believe that if he were placed on a trial of
7 newer generation medications, particularly those medicines
8 that are less likely to aggravate his problem of modest
9 obesity, the new generation of medicines would allow him to
10 think more clearly, could stabilize his mood without
11 promoting excessive sedation.

12 Q Did you talk to any prison medical personnel
13 about this recommendation?

14 A No, I did not. At the time when I visited the
15 prison, I didn't have access to personnel. I spoke to a
16 nurse, and I reviewed the chart. But, no, I have not had a
17 dialogue with any prison personnel.

18 MR. EDWARDS: Thank you, Dr. Bittker.

19 No further questions, your Honor.

20 THE COURT: Counsel.

21
22 CROSS-EXAMINATION

23 BY MR. MCCARTHY:

24 Q Dr. Bittker, when you examined Siaosi Vanisi,
25 he was oriented to person, place, time?

1 A Yes, he was.

2 Q He knew who he was, where he was, why he was?

3 A He knew who he was, where he was. I'm not sure
4 if we fully understand the why he was.

5 Q In the metaphysical sense do any of us?

6 A Yes.

7 Q He was -- you indicated that you were not so
8 sure -- I think you said not so sure about the question
9 about whether or not he was suffering any hallucinations?

10 A I'm sorry, what did you say now? "Not so sure"
11 is not something I would put in a report.

12 Q No. A few moments ago on direct examination
13 the question of whether he was suffering hallucinations --

14 A I said he denied -- what I believe I said was
15 he denied the presence of perceptual distortion. But
16 without greater transparency, I am uncertain as to whether
17 or not that is true; and I have my doubts.

18 Q Okay. What did you do to determine if your
19 doubts had validity?

20 A Without adequate cooperation with Mr. Vanisi
21 and without greater transparency, there's very little that I
22 could do. I did not administer projective tests, as a
23 psychologist might. On the other hand, the projective tests
24 also requires some level of transparency.

25 Q Did he demonstrate to you that -- did he give

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1 you any reason to believe that he was in fact hearing voices
2 or seeing things?

3 A Certainly when you start talking to Mr. Vanisi
4 about his sense of God and in that portion of the interview,
5 there was a fragmentation of his thinking and an
6 expansiveness. And he would say within seconds statements
7 such as "I don't believe in God. But then again, God
8 pervades everything in my life." There was this what you
9 might -- you, given your level of education, might consider
10 this Jungian thinking; but that's not rational thinking.
11 That is much more likely a positive sign of psychotic
12 ambivalence.

13 Q And how would you distinguish that from the
14 ordinary, run-of-the-mill agnosticism?

15 A The distinction is the degree to which God he
16 believes pervaded his life. And he went on. If you're an
17 agnostic, you say "I don't know" and it stays that way. He
18 was perseverating about this issue for several moments
19 during our interview about God, about the afterlife. One
20 would say, Well, you know, that might make sense for
21 somebody who's confronting the death penalty. On the other
22 hand, the frequency with which he switched back and forth on
23 this issue and the fragmentation of his thinking, the
24 derailment of his thinking is a much more important sign of
25 psychosis than is the sign of perceptual distortion.

Q Unsure of his beliefs?

A Beg your pardon?

Q He's unsure of his religious beliefs?

A Yes.

Q He's also unsure of the existence of an afterlife?

A All of us can share that. We all -- unless you have come back from a near-death experience, it's very difficult to speak of that. However, those of us who have that level of ambivalence don't show the same level of fragmentation of thinking that Mr. Vanisi demonstrated in my interview.

Q It would be difficult to carrying on a conversation with Mr. Vanisi?

A I actually didn't find it that difficult to carry on a conversation with Mr. Vanisi. I think it would be difficult, if you weren't a psychiatrist, to make sense of what he was saying. And even as a psychiatrist, it is a challenge to attach consensually validated meaning to what he is saying, something that you and I can agree on this is what the guy meant.

Q Okay. Now, let's see. What is a nihilistic delusion?

A Nothing matters, doesn't make any difference.

Q And is he wrong?

1 A To the extent that he's curated it, yes.

2 Q Is there something called cotired(ph) syndrome?

3 A Cotired syndrome?

4 Q Yeah. Are you familiar with that?

5 A Tell me about it.

6 Q The nihilistic delusion that one no one longer
7 exists or is dead. Does that sound familiar?

8 A The eponym I don't know, but I can understand
9 what you're talking about.

10 Q Apparently a term not used anymore?

11 A Well, you started it out; so we've now
12 resurfaced the use.

13 Q Does Siao Si Vanisi, as far as you can tell,
14 suffer from that?

15 A No.

16 Q He doesn't believe he's dead?

17 A No.

18 Q And he's able to -- you know, I was wondering
19 in the materials that you read prior to or after your
20 interview with Mr. Vanisi, did you see where he complained
21 of a toothache?

22 A I don't recall.

23 Q If he were complaining of a toothache and he
24 asked to, therefore, see a dentist, would that have --
25 that's not irrational, is it?

A That's not irrational, but a psychotic person can do that.

Q All right. In what ways then would his problems interfere with the care of his ordinary affairs?

A Well, I think as I discussed earlier under direct examination, he isn't fully able to integrate his relationship with an institution such as a penal institution. He's entitled; he's a Tongan; he doesn't need to comply. Well, you could say he's just a hard case. But the other part of that is with the frequency with which that occurs one would say is a reflection of a manic psychosis.

Q The frequency with which it occurs among the death row population, do you find a disregard for prison rules as unusual on death row?

A Having not interviewed more than, I think right now, a half dozen death row inmates, I cannot respond to that at any level of expertise.

Q A general disrespect for authority, is that uncommon in the prison population?

A No, that's not. However, the extent to which that was shown -- one can get into a fight, one can be resistant to authority. But does one spend 24 hours outside wearing a gown? I don't think so.

Q That's pretty unusual?

A I think that is at the level of what one might

1 consider as bizarre behavior.

2 Q Were you struck at all by the fact that he was
3 allowed to do that?

4 A I didn't know the circumstances. I didn't see
5 the report.

6 I should say that the significance of that even
7 he understood was bizarre, which is one of the reasons he
8 volunteered it to me.

9 Q Right. He volunteered that? You didn't ask
10 about it?

11 A I believe the context was when he was concerned
12 about medicine. I was asking him how the medicine helped
13 him and what was his concerns about the medicine. This is
14 when that came up.

15 Q You and Mr. Vanisi discussed his prior
16 malingerer, did you not?

17 A Yes.

18 Q And didn't he explain to you that he was taking
19 advice from amateur lawyers on his cellblock?

20 A Exactly this term.

21 Q Did it seem unusual to you that he could take
22 legal advice from someone?

23 A No.

24 Q Have any reason to believe that he couldn't
25 take legal advice from a more experienced attorney?

1 A I believe he could take legal advice from a
2 more experienced attorney; but as it relates to the issues
3 of his appeal and his guardedness with his more experienced
4 attorney, apparently he's not more forthcoming.

5 Q That's our operative phrase here, isn't it,
6 "not forthcoming"?

7 A Yes.

8 Q That condenses the whole thing.

9 A Not exactly. If that condenses the whole
10 thing, then we character what's going on. But it is an
11 element of concern. Then the question is: Why is he not
12 forthcoming? And in my belief, based on limited evidence --
13 because admittedly I've had one interview with him. I've
14 not reviewed all the documentation. But I think the balance
15 of evidence would suggest that given his history, given how
16 he presented to me, a very likely reason that he's not
17 forthcoming is not rational but rather irrational and based
18 on psychotic.

19 Q If an attorney or a psychiatrist were to
20 formulate a question, present a question to Mr. Vanisi such
21 as "What were you thinking when you committed this crime?,"
22 is it your opinion that he is unable to formulate an answer
23 or unwilling to express it?

24 A It's my opinion that two things are going on.
25 One is I believe he's quite confused about what went on at

1 the crime, at the time of the crime. And secondly, I
2 believe that because of his level of suspiciousness,
3 pathological paranoia, the sense that this is not natural,
4 he believes that if he discloses that to you as his defense
5 counsel, that you are going to be harmed.

6 Q Okay. Is there any -- is that something that
7 can be overcome with sufficient motivation?

8 A Not if you're psychotic. One of the problems
9 with psychosis -- I'm sorry, we've worked together before.
10 What is your name?

11 Q Terry McCarthy.

12 A Mr. McCarthy, forgive me.

13 Q Oh, I'll get over it.

14 A One of the problems with psychosis is that it
15 does impact motivation.

16 Q So a motive to protect one's self, could that
17 affect the type of decisions that he might have to make?

18 A The motive to protect oneself can impact the
19 decision. However, if the self-protection is illfounded --
20 I guess you could best illustrate it that if I'm thrown into
21 water and I try to keep my head above water, I'm not going
22 to swim very effectively. I think that metaphor applies in
23 this case. In order for him to advance his appeal, he's
24 going to have to work with counsel most effectively and to
25 understand what went on in his head at the time of the

crime.

Q Well, let's assume it is something that he's not confused about. Again --

A What's the foundation for that assumption?

Q I'm making it up as we go along. Let's assume that counsel or a psychiatrist poses a question such as "Where were you on the night of September 21st, 1999?" or something like that and he's not confused, does he have the ability with sufficient motivation to relate the answer?

A If he were not confused and if his motivation were clear and not psychotic, he has the cognitive capacity to retrieve that answer.

Q And to express it?

A And to express it.

Q But the psychosis might make him unwilling to express it; is that what you're saying?

A That's correct. And I think the quality of psychosis that is relevant here is that when you're in the midst of a paranoid psychosis, acknowledging that there's potential harm out there, that the world is a mix of good and evil, the paranoid psychotic can't make that distinction. So virtually everyone is a threat, virtually everyone is evil or can't understand.

Q For one on death row would that seem terribly unusual to you?

1 A Well, if you look at my relatively limited
2 number of death row evaluations -- as I said, I think it's
3 about a half dozen more or less -- Mr. Vanisi is unique in
4 that he is most closed about that and virtually every other
5 person that I've examined on death row.

6 Q He is aware that society through the government
7 of the State of Nevada proposes to execute him?

8 A He's very aware of that.

9 Q In your opinion does that enter into it at all,
10 this lack of his being forthcoming?

11 A You could say that it may, but I do not believe
12 that's the primary motivation.

13 Q Would that be a motivation to malinger, by the
14 way?

15 A Would that be a motivation to malinger?

16 Q Yes, to feign incompetency and thereby avoid
17 execution.

18 A I'm sorry. Oh, your suggestion is that he's
19 feigning incompetency to postpone execution?

20 Q I'm suggesting nothing. I'm asking.

21 A What's the question?

22 Q Would a pending execution create a motivation
23 for one to feign incompetence?

24 A Of course.

25 Q You mentioned Mr. Vanisi, when asked the

1 difference between truth and a lie, said that a lie would be
2 perjury. Right?

3 A Yes.

4 Q Did you follow up at all? Did you discuss that
5 further?

6 A I attempted to, and that's where we got into
7 the nihilistic arguments that nothing really made any
8 difference anyway.

9 Q Did you give him an example of a false
10 statement and ask him if that was true or false?

11 A No.

12 Q Have you ever been in a courtroom when people
13 do that, like with a child? They ask something like "If I
14 told you I was wearing a green suit, would that be true or
15 false?"

16 A I've not been in a courtroom with a child as a
17 witness; but, yes, I've read about that intervention.

18 Q Did you do anything like that?

19 A I did ask him about the question of the truth
20 and a lie and its relevance to the case. And he
21 acknowledged that he could not -- and I asked him
22 particularly as it related to what he could tell me. He
23 acknowledged that he could not completely trust me, but he
24 assured me that he could trust his counsels. But when I
25 spoke to his counsels about that, they gave me virtually the

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same report that I had about Mr. Vanisi being closed off and not being able to disclose.

Q Okay.

Hang on just a moment please.

I was interested in the expression you used. You said you established a modest rapport with Mr. Vanisi in your two-hour meeting.

A In the second part of the meeting, yes.

Q Can you describe -- explain to ignorant old me. What is a modest rapport?

A I would never contend that you are ignorant, sir. I will advance what I believe was evidence of that.

The first part of our interview, that wooden quality and a very closed off quality persisted. And questions were responded to by "I don't know," "I don't want to talk about it," very flat, not going anywhere. And in an effort to break that, I said, "Okay, if there's nothing further, then I suppose you can leave." Just as he was at the door, I had him come back. That intervention was enough to allow him to just kind of relax and talk more freely. The flow of conversation was far more spontaneous. That's when I began to see the fragmented thinking. That's when he was much more forthcoming about his own awareness of his distorted thinking and the way it was getting him into trouble, his feelings about the medication and so on. In

1 that element of history the ease with which he was in dialog
2 with me was evidence of that improved rapport.

3 Q And you also indicated he doesn't fully
4 understand -- I think that was your word, "fully
5 understand," the need to be candid with his attorneys. Does
6 he understand in a rudimentary way?

7 A Help me with what you mean by "rudimentary."
8 What are the boundaries?

9 Q In a more simplistic way. Given the question
10 "Is it true, Mr. Vanisi, that lawyers help you?," does he
11 seem to understand that?

12 A First of all, do not confuse my assessment of
13 the psychosis with any attempt to allege that Mr. Vanisi is
14 not an intelligent man.

15 Q Oh, no.

16 A He's fully aware of what the roles are. I
17 think sometimes he's not able to repeat that in a way that
18 makes a lot of sense to some of us, but I think that
19 represents more a problem of fragmentation of his thinking
20 and the way he's expressing himself. But I don't think he
21 understands fully the role of defense counsel and how
22 defense counsel can help him because of that paranoid sense
23 that everybody is out to get him and so why be transparent?

24 The other problem is since nothing makes any
25 difference anyway -- and I believe just in the limited

1 evidence that that may have had some impact on his decision
2 at the time of the crime. But again, I don't have enough
3 evidence really to go into that today. And I hope you
4 understand that that is not the issue today.

5 But the concern I have is that nihilistic
6 quality that "Nothing really makes much difference, and I
7 really can't trust these guys anyway." That gets in the
8 way. Also I think if you look at his desire to represent
9 himself, I see that as also evidence of a psychotic thinking
10 and part of this grandiose entitlement that "I can do it for
11 myself."

12 Q Is it your understanding that in this matter,
13 this post conviction matter, he has attempted to represent
14 himself?

15 A No, I'm referring to earlier in his trial
16 history.

17 Q Okay. You know, I went looking earlier -- I
18 have an older version of DSM -- for nihilistic delusion. I
19 couldn't find anything.

20 A I don't think you're going to find it in DSM.

21 Q Is there a definition anywhere?

22 A Of nihilistic delusions?

23 Q Yes.

24 A I'm sure. In fact, actually I did
25 coincidentally just look it up in the APA psychiatric

1 dictionary and Steadman's. It refers to a sense of it's as
2 if there is nothing, nothing is of consequence.

3 Q All right. Are you familiar with nihilism as a
4 branch of philosophy?

5 A Yes.

6 Q And it is a recognized philosophy, is it not,
7 the belief that there are no absolutes, of doubt and
8 existence?

9 A I'm not aware that Nietzsche had the same
10 boundary problems with the law that Mr. Vanisi has.

11 Q Nihilistic delusion though, the belief that
12 nothing matters, that is a recognized philosophical school,
13 is it not?

14 A It's a recognized philosophical school. We may
15 even have professors of psychology -- I'm sorry, professors
16 of philosophy that may advance this in a university course.
17 However, they usually have enough awareness of boundaries
18 that they appear at the time of their lectures and grade
19 appropriately.

20 So the distinction between a nihilistic
21 philosophy which might be a polar perspective -- having only
22 a vague familiarity of Nietzsche and that's probably about 20
23 years old. But my own sense of that is that it was put
24 forth as an argument, as a polarizing point. But I'm not
25 convinced that philosophers that advance this live their

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life based on that philosophy.

Q One who lived their life based on that philosophy would have a hard time requesting a dentist to fix a toothache, would they not?

A That is true.

MR. MCCARTHY: Thank you, doctor.

THE WITNESS: Thank you, Mr. McCarthy.

THE COURT: Anything further, Mr. Edwards?

MR. EDWARDS: Just a question, your Honor.

REDIRECT EXAMINATION

BY MR. EDWARDS:

Q Dr. Bittker, did you see the comment made in writing by Mr. Vanisi to one of his medical personnel that he had sunshine in his soul, therefore he must be ill? Did you see that comment?

A No, I did not see that comment. It would have been helpful to have highlighted that. I saw handwritten medical records and didn't pick that up, I regret. Those were in the medical records at the Nevada State Penitentiary?

Q Well, those might have come from the records at Ely State Penitentiary.

A I actually looked through the medical records at the Nevada State Penitentiary and saw a lot of brief

1 reflections of medical encounters, but I didn't see that
2 kind of transparency. It could have been in there, but
3 either I overlooked it or it wasn't present.

4 Q And again, you don't perceive him to be
5 malingering presently?

6 A No, I would not consider his representation to
7 me on our last examination that of malingering.

8 Q And he remains not competent at this time to
9 assist counsel and cooperate in this litigation?

10 A I believe that's a crunch issue of his
11 incompetence. It's a critical issue right now. I do not
12 believe he can fully cooperate with you.

13 MR. EDWARDS: Thank you.

14 THE COURT: Anything further, Mr. McCarthy?

15 MR. MCCARTHY: May I?

16 THE COURT: You may.

17 MR. MCCARTHY: Thank you.

18
19 RECROSS EXAMINATION

20 BY MR. MCCARTHY:

21 Q Let's assume you had seen the comment,
22 something like "I have sunshine in my heart or my soul and,
23 therefore, I am ill." Does that sound like a recognition of
24 one's own bipolar disorder?

25 A It could be a reflection of insight. Without

further exploring what the meaning of that is with him, I would hesitate commenting. But that would be one interpretation.

MR. MCCARTHY: That's all I have.

THE COURT: Anything further, Counsel?

MR. EDWARDS: No, your Honor.

THE COURT: Thank you, Dr. Bittker. You may step down.

THE WITNESS: Thank you, your Honor.

THE COURT: It's my understanding that Dr. Amezaga is attempting to make arrangements to visit with Mr. Vanisi.

MR. EDWARDS: Yes, your Honor. And I believe he's selected three dates and communicated them to your court clerk as February 9th through the 11th. And he's now in the process of making arrangements with the prison to see which date is most appropriate for him to be there. He did state, it's my understanding, that he will need one week following whatever date he does get in to see Mr. Vanisi to generate his report.

THE COURT: Is it your intention then today to bifurcate today's hearing and deal with Dr. Amezaga's report and testimony at a later time?

MR. EDWARDS: Yes, your Honor. I so move right now.

1 THE COURT: Mr. McCarthy?

2 MR. MCCARTHY: Your Honor, I have been told
3 that Mr. Vanisi's failure to cooperate earlier was due to a
4 misunderstanding, that he didn't know who it was that
5 awaited him in the meeting place. Nevertheless, your Honor,
6 I repeat this is his motion; and it's his burden to produce
7 the evidence. And if this is the evidence that exists
8 today, then I think we ought to move on to a decision. But
9 my primary position is there's no legal significance to
10 this. Nevertheless, your Honor, I gave up tilting at
11 windmills long ago. If the Court is inclined to bifurcate
12 the hearing, I probably won't get too upset.

13 THE COURT: Well, I think it's important to
14 make a complete record no matter what the ultimate decision
15 is here. There is a representation from counsel for
16 Mr. Vanisi that the misunderstanding -- it was a
17 misunderstanding when Dr. Amezaga went there before. I
18 certainly would not accept such an excuse a second time.
19 But given the circumstances of this particular instance, I
20 will give you one more shot to get Dr. Amezaga there.
21 Therefore, we'll get a new date and time from the clerk.

22 MR. EDWARDS: Thank you, your Honor.

23 Your Honor, just for the record, I'd like to
24 note that I have had the opportunity to communicate with my
25 client yesterday. And in no uncertain terms I told him that

1 his cooperation with the interview with Dr. Amezaga is most
2 critical to his position in this case, and I think it's been
3 made quite clear to him.

4 (Court and clerk confer.)

5 THE COURT: Counsel, are you available February
6 18th at 1:30?

7 MR. EDWARDS: Yes, your Honor.

8 MR. MCCARTHY: This is difficult for me to
9 answer, your Honor. I have a notion that my staff told me
10 she was scheduling something on that day because she checked
11 with me about it. It's the beginning of a holiday weekend;
12 that's the part I remember. But I have nothing written down
13 here, so I don't know. If the Court wants to schedule it,
14 and then please forgive me if I call and say there's a
15 problem.

16 THE COURT: Why don't we schedule it then. If
17 you need to reset it, you and Mr. Edwards can get together
18 and come to the department and we'll reschedule it. For now
19 we'll continue this hearing until February 18th at 1:30 in
20 the afternoon. And Mr. Vanisi will be brought back for that
21 hearing.

22 Mr. Edwards, it's your responsibility to get
23 Dr. Amezaga's report to the Court and to Mr. McCarthy prior
24 to the hearing date.

25 MR. EDWARDS: Understood, your Honor.

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THE COURT: Thank you. Court's in recess.

(Proceedings concluded at 3:10 a.m.)

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

4 I, DEBBIE ARNAUD, Certified Court Reporter of the
5 Second Judicial District Court, in and for the County
6 of Washoe, State of Nevada, do hereby certify:

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

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

14 DATED: At Reno, Nevada, this 28th day of January,
15 2005.

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17 _____

18 DEBBIE ARNAUD, CCR #416, CSR #10102, RPR
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STEIN, JR.
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SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

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SIAOSI VANISI,)	Case No. CR98P0516
)	
)	Dept. No. 4
Petitioner,)	
vs.)	
)	TRANSCRIPT OF PROCEEDINGS
STATE OF NEVADA,)	
)	
Respondent.)	

POST CONVICTION - REPORT ON PSYCHIATRIC EVALUATION
FEBRUARY 18, 2005, RENO, NEVADA

APPEARANCES:

For the Petitioner:	SCOTT W. EDWARDS, ESQ. 729 Evans Avenue Reno, Nevada 89512 THOMAS QUALLS, ESQ. 443 Marsh Avenue Reno, Nevada 89509
For the Respondent:	TERRENCE MCCARTHY, ESQ. Deputy District Attorney 50 W. Liberty Street, Ste 300 Reno, Nevada 89520
The Petitioner:	Siaosi Vanisi

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Computer-Aided Transcription

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EXAMINATION

DIRECT CROSS REDIRECT RECROSS

For the Petitioner:

WITNESS: ALFREDO M. AMEZAGA, JR., Ph.D.

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RENO, NEVADA; FRIDAY, FEBRUARY 18, 2005; 1:45 P.M.

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THE COURT: This is the time set for report for psychiatric evaluation. Counsel, have you received Dr. Amezaga's report?

MR. EDWARDS: Yes, your Honor.

MR. MCCARTHY: Yes, your Honor.

THE COURT: Is everyone ready to proceed?

MR. EDWARDS: Yes.

MR. MCCARTHY: State's ready.

THE COURT: Does any one want to call Dr. Amezaga as a witness?

MR. EDWARDS: I'll call him, your Honor.

THE COURT: Okay. Please come forward, Dr. Amezaga, and be sworn.

ALFREDO M. AMEZAGA, JR., Ph.D., called as a witness by the Petitioner herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EDWARDS:

Q Good afternoon, sir. Could you state your name and spell your last name?

A First name is Alfredo, A-l-f-r-e-d-o, middle initial M., last name A-m-e-z-a-g-a, Junior. Alfredo Amezaga, Jr. Ph.D., clinical psychologist.

Q Is there an accent in your last name?

A Yes, there is.

Q Where is that, for the record?

A On the E.

Q Can you tell me a little bit about your credentials, sir?

A I'm a graduate clinical psychology program University of Nevada, Reno. Completed my first year of residency at the V A. Medical Center, West Los Angeles. I completed my second residency School of Medicine University Missouri, Columbia, Department of Clinical Psychology.

Q How long have you practiced here in Nevada?

A Been licensed in Nevada since 1996.

Q Since 1996, you say?

A Correct.

Q Have you published any treatises, professional

1 books, professional publications?

2 A Yes.

3 Q Can you tell me what they are?

4 A Majority of those publications concerned my
5 doctoral dissertation, basically, on the outcome
6 assessment of social service and mental health service
7 programs, what works, what doesn't work, for whom, under
8 what set of circumstances, and why.

9 Q Were these books or --

10 A Papers.

11 Q -- papers for your work?

12 A Correct.

13 Q Do you sit on any professional boards?

14 A No, I do not.

15 Q Now, sir, you're not a medical doctor; is
16 that correct?

17 A That's correct.

18 Q So this logo on the left-hand side of your
19 report, AMA, that relates to your name, not to the
20 American Medical Association?

21 A That's correct.

22 Q Do you have authority to prescribe medication
23 to treat mental illness?

24 A No, I do not. I'm not a physician.

1 Q Do you have skills and experience to diagnose
2 mental illness?

3 A Yes, I do.

4 Q For example, bipolar disorder?

5 A Yes, I do.

6 Q And you would be comfortable making that kind
7 of diagnosis?

8 A I'm sufficiently aware of the symptoms and
9 signs that are associated with that disorder to make a
10 diagnosis.

11 Q Have you testified as an expert in a criminal
12 case here in Nevada before?

13 A Yes, I have.

14 Q When was that?

15 A Hum, I believe the majority of those
16 testimony are associated with proceedings associated
17 with juveniles at Wittenberg Hall.

18 Q Have you ever testified in a criminal trial
19 in the district court?

20 A I believe I was involved in several
21 competence evaluations, the dates and the specifics I'm
22 not able to recall at this instant.

23 Q But you have been qualified as an expert in
24 court proceedings before?

1 A I been qualified as an expert both in Washoe
2 County and in various counties in California.

3 Q And you can't give us a case here in Nevada
4 that you've testified in?

5 A I can't recall the specific case at this
6 point in time.

7 Q Who called you as a witness in this case that
8 you can't recall --

9 A I believe Judge Polaha, but I'm uncertain at
10 that point.

11 Q Have you ever testified on behalf of the
12 defense in a criminal trial?

13 A Yes, I have.

14 Q When was that, sir?

15 A Nevada County, California.

16 Q When?

17 A 2001, I believe.

18 Q Sir, you conducted an evaluation of
19 Mr. Siaosi Vanisi; is that correct?

20 A That's correct.

21 Q And what were you asked to determine in this
22 evaluation?

23 A I was determined -- I was asked to assess his
24 ability to proceed -- his competency and ability to

1 proceed with trial.

2 Q And what was your conclusion?

3 A That defendant, indeed, is competent to
4 proceed with trial.

5 Q Aside from -- now, in preparation for this
6 evaluation, you conducted an interview of Mr. Vanisi in
7 person; is that right?

8 A That's correct.

9 Q And aside from that interview, and I
10 understand you performed some testing in the course of
11 that interview; is that right?

12 A That's correct.

13 Q What information did you review in the
14 process of making your opinion?

15 A Could you repeat the question, please?

16 Q What other information besides the interview
17 and the testing did you review in the course of this
18 evaluation?

19 A I reviewed all the records that were
20 contained in his medical file at the Nevada State
21 Prison.

22 Q So you reviewed the medical records in the
23 file at Nevada State Prison?

24 A Correct.

1 Q Did you review the prison disciplinary
2 records relative to Mr. Vanisi?
3 A I was only allowed to have access to the
4 medical information concerning the defendant.
5 Q How long did this review of medical records
6 take?
7 A Approximately two hours.
8 Q And how long was the interview?
9 A Approximately two hours.
10 Q Did you review the affidavits of myself and
11 Mr. Qualls in support of our motion for mental
12 examination?
13 A The court order?
14 Q No, the affidavits.
15 A No.
16 Q Did you interview Mr. Qualls or myself?
17 A No.
18 Q Did you discuss the case with a Dr. Thomas
19 Bittker?
20 A No.
21 Q Did you review Dr. Bittker's report?
22 A I was provided a copy of the record
23 yesterday. I briefly reviewed the report.
24 Q But not before composing your report?

1 A No.

2 Q Were you made aware through the news media or
3 any other means that Dr. Bittker had found Mr. Vanisi
4 presently incompetent?

5 A Yes.

6 Q How did you find that out?

7 A The date of the article appearing, I took
8 notice of the headlines, I briefly glanced at the
9 headlines, and then set them aside.

10 Q Do you have any knowledge regarding instances
11 of what we have termed bizarre behavior by Mr. Vanisi in
12 the past year?

13 A I'm aware that there have been documentations
14 of some of his bizarre behavior.

15 Q Did you review any of that documentation?

16 A Yes, I did.

17 Q What did you review?

18 A The various notations made in his medical
19 file, just instances where he engaged in very bizarre
20 psychotic-like behavior. I could not give you a
21 reference to a specific notation.

22 Q He engaged in bizarre psychotic behavior?

23 A In the past, correct.

24 Q Were you aware that he considered him an

1 independent sovereign?

2 A Yes.

3 Q How about the fact that he has been known to
4 dress up in a cake?

5 A Yes.

6 Q Called him Dr. Pepper?

7 A Correct.

8 Q How about how he disrobed and rolled on the
9 floor in the presence of counsel?

10 A I'm aware that that's been cited in his
11 medical records.

12 Q And were any of these facts helpful to you in
13 conducting your evaluation?

14 A It gave me a context for his behavior.

15 Q What day did you interview Mr. Vanisi?

16 A On February 3rd.

17 Q And you said it lasted about two hours?

18 A Approximately.

19 Q And during that two-hour period, is that when
20 you performed the tests?

21 A Correct.

22 Q Do you know how long it had been since
23 Mr. Vanisi had been injected with Haldol?

24 A No, I do not.

1 Q Are you familiar with Haldol?

2 A I'm familiar that it's medication used to
3 treat individuals who are severely psychotically
4 impaired.

5 Q Okay. Is it your understanding, sir, that
6 administering psychotropic medication can affect how a
7 person presents to you in a competency evaluation?

8 A I would expect that if someone is taking a
9 potent psychotropic, that that would affect their
10 presentation and behavior and that would be displayed
11 and observable.

12 Q Do you make any adjustments in the way you
13 perform a competence evaluation based on the medication
14 a person is receiving?

15 A I take note of the fact that the individual
16 is taking medication, but apart from it, I observed no
17 behavior to suggest that the medication was a negative
18 influence on his behavior as part of my evaluation.

19 Q Were you also aware that he's been taking the
20 drug call Depakote?

21 A Yes, I am.

22 Q What are the disorders or disorder that these
23 medications are treating Mr. Vanisi for?

24 A Well, first of all, let me qualify that I am

1 not a physician so I don't pass judgment on the
2 appropriateness or the -- the efficacy of the medication
3 that a client might be receiving, but in general, that
4 combination of medication is usually used amongst --
5 with individuals who are experiencing some form of a
6 psychoses or severe psychotic disorder.

7 Q Have you performed a competency evaluation of
8 Mr. Vanisi in the past?

9 A No, I have not.

10 Q Is this the first contact you've ever had
11 with him?

12 A Correct.

13 Q Did you review prior competency findings?

14 A No, I did not.

15 Q Do you agree with the diagnosis that
16 Mr. Vanisi has bipolar disorder mixed type with
17 psychosis?

18 A I suspect that Mr. Vanisi, likely, is
19 suffering from a psychotic disorder of some sort,
20 however, the mission of my evaluation did not concern
21 arriving at a specific diagnoses so, in general, I
22 suspect there's a psychotic component; I'm uncertain as
23 to what the specific component might be.

24 Q Do you agree that he suffers from nihilistic

1 delusions?

2 A I'm not sure what that is.

3 Q Do you agree that he suffers from paranoia?

4 A I observed no indications of paranoia as part
5 of my evaluation.

6 Q Do you have any opinion whether he presents a
7 narcissistic sense of entitlement?

8 A I have -- I certainly don't have any
9 demonstrations of any sense of narcissistic entitlement
10 that I was able to observe as part of my evaluation.

11 Q Do you have any opinion whether Mr. Vanisi is
12 chronically suicidal?

13 A I have no opinion.

14 Q In your report, Doctor, I think you indicated
15 that you didn't think he was suicidal, right?

16 A I don't recall specifically making that
17 reference.

18 Q Do you have any dispute with the reputation
19 or skills of Dr. Bittker?

20 A I have never had the opportunity to meet
21 Dr. Bittker.

22 Q Are you familiar with the standard of
23 competence required under the 9th Circuit opinion of
24 Rohan versus Woodford?

1 A No, I'm not.

2 Q Do you feel Mr. Vanisi, or do you conclude, I
3 should say, Mr. Vanisi is impaired in his ability to
4 rationally communicate with counsel and assist in his
5 defense?

6 A Please repeat the question.

7 Q Do you feel Mr. Vanisi is impaired in his
8 ability to communicate with counsel and assist in his
9 defense?

10 A No, I do not.

11 Q Why did you use the Dusky Standard, sir, in
12 your evaluation?

13 A It's the standard that, to the best of my
14 understanding, is the normative standard used in the
15 determination of competency.

16 Q And you did review the order appointing you
17 in this case, correct?

18 A Yes, I did.

19 Q And specifically on line 21 of that order,
20 you were directed to evaluate the Petitioner's mental
21 competence to assist and communicate with counsel?

22 A Yes, I did.

23 Q Do you recall that?

24 A Yes.

1 Q I'd like to look at some specific conclusions
2 in your report, if I might, sir. Do you have a copy of
3 it with you there?

4 A Yes, I do.

5 Q Okay. If you could look at page 3, second
6 paragraph, second to last paragraph, you observed that
7 my client was, quote, mechanical and robotic. Is that
8 correct, do you recall those?

9 A Yes.

10 Q Okay. Did that suggest to you any kind of
11 mental disease or defect?

12 A I was aware that this subject -- there could
13 be two possibilities; number one, that there could be
14 some sort of a schizophrenia, perhaps a catatonic form
15 of schizophrenia, though I was amused to see that
16 symptom displayed given the diagnosis of a bipolar
17 disorder.

18 More importantly, the symptoms ceased after
19 approximately ten minutes of its display, which I would
20 not expect in an individual who had a legitimate form of
21 a schizophrenia.

22 Q Could that presentation, the mechanical and
23 robotic posture, have anything to do with the medication
24 that they administered to him?

1 A It's possible it certainly could be the case.

2 Q Do you think that mechanical and robotic is
3 an indication that somebody's malingering?

4 A Not in and of itself.

5 Q Page 4 of your report, first line, you state,
6 "He denied the experience of all psychotic symptoms".

7 A Correct.

8 Q Okay. Do you think he was truthful about
9 that?

10 A No.

11 Q So he was malingering about that.

12 A He was misrepresenting probably what he may
13 have actually been experiencing.

14 Q Is there a difference between
15 misrepresentation and malingering?

16 A Well, malingering is a much more formal term
17 that requires a rather exhaustive assessment to make
18 that determination. I'm unwilling to call that
19 malingering.

20 Q Have you made that assessment in the course
21 of this evaluation?

22 A I provided various assessments that lead me
23 to some conclusions. I'm not in a position to determine
24 whether or not Mr. Vanisi, in fact, is malingering for

1 -- in his symptoms.

2 Q So, you're telling us he's misrepresenting
3 his symptoms?

4 A He denied psychotic symptoms. Given his
5 behavior, given his presentation, I found it difficult
6 to believe that, perhaps, that might be exhaustively
7 true.

8 Q His denial that he's psychotic is not a
9 reflection of the truth, in your opinion? He is,
10 actually, psychotic.

11 A He has demonstrated some psychotic behaviors.

12 Q Give us some examples.

13 A I would suggest that the stiffening behavior
14 could be a form of a psychotic behavior. It could be a
15 consequence of his medication; it could be a consequence
16 of feigning. I was uncertain. I was unsure.

17 Q On page 4, the fifth line on page 4 from the
18 top, you indicate that Mr. Vanisi is maybe suffering
19 from delusion of memory?

20 A Correct.

21 Q Does that mean he's delusional?

22 A No.

23 Q What does it mean?

24 A Well, it means he denied the fact that he had

1 ever resided or spent significant time in the Reno or
2 greater Nevada area, which, according to the evidence,
3 would suggest not to be true. It's possible that he was
4 being delusional in his recall of that information.

5 Q So he was being delusional about that.

6 A Correct.

7 Q Could that have been caused or triggered by
8 the medication that he's on?

9 A It could have been triggered by a host of
10 issues. It could have been triggered by his medication.
11 It could have been triggered by his psychotic or
12 delusional disorder, it could have been triggered by
13 feigning.

14 Q Page 4, second paragraph, you indicate, "Mr.
15 Vanisi was unable to maintain concentration for extended
16 periods and evidenced short-term memory impairment".

17 A Correct.

18 Q Is that evidence of psychosis?

19 A It could be evidence of psychosis. It could
20 be evidence, once again, of his medication. It could be
21 evidence of feigning.

22 Q Is it evidence of malingering?

23 A Malingering, once again, is a term -- it
24 could be evidence of misrepresentation. I'm not willing

1 to go forward to call it evidence of malingering in and
2 of itself.

3 Q Page 5 of your report below the first bold
4 line there about a third of the way down the page you
5 state, "Mr. Vanisi gave no indication of being
6 significantly influenced by whatever psychotic symptoms
7 he may or may not be experiencing".

8 A Correct.

9 Q So you're not ruling out psychosis with
10 respect to Mr. Vanisi; is that right?

11 A I'm not ruling it out. The presence or the
12 existence of a psychotic disorder is, really, separate
13 and apart from the issue of competency. Just because
14 someone is psychotic does not mean that he meets
15 criteria for incompetency.

16 Q On the last paragraph, you summarize your
17 findings, or at least some of them, with respect to this
18 test that you performed?

19 A Correct.

20 Q And that is the evaluation of competency to
21 stand trial task, right?

22 A Correct.

23 Q What is your conclusion stated in the last
24 paragraph?

1 A My conclusion is that he demonstrated no
2 efforts to feign or exaggeration any psychiatric
3 symptoms that would lead me to conclude that he was
4 incompetent to proceed. Those conclusions are depicted
5 in graph, or an attachment of in graph or attachment
6 number two.

7 Q So the result of this test is that Mr. Vanisi
8 was not misrepresenting his psychotic symptoms.

9 A The conclusion is Mr. Vanisi was not
10 demonstrating any evidence of incompetency.

11 Q I beg your pardon? Let's read together,
12 Doctor.

13 A Correct.

14 Q "In summary, as was observed as part of his
15 overall presentation, the results of his ECST-R testing
16 indicate no effort to feign or exaggeration psychiatric
17 symptoms in order to suggest the possibility of
18 incompetency."

19 A Correct.

20 Q So, your finding is that he was not trying to
21 hide any kind of --

22 A Correct.

23 Q -- psychosis?

24 A Correct.

1 Q Misrepresent psychosis?
2 A That's correct.
3 Q So he was not misrepresenting himself as
4 impaired?
5 A He was not representing himself as impaired,
6 that's correct.
7 Q Misrepresenting?
8 A Misrepresenting.
9 Q The second test you administered resulted in
10 a different conclusion; is that right?
11 A That's correct.
12 Q And this test was administered within the
13 same two-hour period that you interviewed him?
14 A That's correct.
15 Q How long does it take to administer one of
16 these tests?
17 A Approximately 20 to 30 minutes.
18 Q So was there a break between the
19 administration of the two tests, was there --
20 A No, they were continuous.
21 Q They were continuous. So which test did you
22 perform first?
23 A The ECST-R.
24 Q So you performed that and you found no

1 evidence of malingering or misrepresentation, I should
2 say, right?

3 A Correct.

4 Q And then immediately administered the next
5 test and you find that there is evidence of
6 misrepresentation?

7 A Well, I administered the second test and sent
8 that test off for scoring. I had no idea what the
9 results of that test were.

10 Q Right. Until later?

11 A Correct.

12 Q Let's return to your report again, and on
13 page 7, third paragraph, analysis of this second test
14 that you performed --

15 A Uh-hum.

16 Q -- you indicate, "There is sufficient
17 reliable evidence to support a conclusion that he
18 intended to misrepresent himself as impaired" --

19 A Correct.

20 Q -- is that right? Can you tell us what this
21 sufficient and reliable evidence is?

22 A I can tell you what that is; that would be
23 part of my use of the posters that I brought to the
24 Court, and with the permission of the Court, I would be

1 able to make a mini presentation of approximately 12 to
2 15 minutes to explain that result.

3 THE COURT: Do you want him to do that?

4 MR. EDWARDS: Yes, please, your Honor.

5 THE COURT: Okay. Do you want to step down
6 and use the stencil?

7 Excuse me just a minute.

8 (Short pause.)

9 THE COURT: Okay. Doctor, you may proceed.

10 THE WITNESS: Thank you.

11 MR. EDWARDS: And your Honor, the question to
12 him, just so we're clear, I asked him if he could please
13 tell us what this evidence is and why he considers it
14 sufficient and reliable.

15 THE WITNESS: Correct.

16 THE COURT: Okay.

17 THE WITNESS: This is a sample question from
18 -- taken from the VIP, or the Validity Indicator
19 Profile, is a hundred item questionnaire of nonverbal
20 cognitive abilities, that is, the thinking and the
21 problem solving skills displayed by a test taker. Each
22 problem is presented to the individual, one problem at a
23 time, on one single sheet. The upper half of the sheet
24 depicts the problem that's to be solved and the lower

1 half depicts one of two possible choices or answers for
2 the problem. Obviously, in this case the most correct
3 answer would be item number one to complete the problem.

4 Now, I refer to this as a test of cognitive
5 abilities, but what it actually is is a test of a
6 response style that the defendant makes use of in
7 completing the assessments. By response style, I mean
8 the intention and the effort that a test taker utilizes
9 in order to complete the test. Poster number two here
10 might give me a better, more concrete example by what I
11 mean. Response style in taking any examination,
12 including the VIP, an individual can put forth an honest
13 effort, sign zero effort to do well in the examination,
14 or they could be indifferent or casual or sloppy in how
15 they approach the test. The VIP is specifically
16 designed to measure the quality or the integrity of the
17 intention and the effort an individual puts forth in
18 completing the assessment instrument.

19 There are four possible response styles
20 depicted here on this form. The first possibility is
21 that an individual might have the intention to perform
22 well on the examination and demonstrate high effort to
23 do so. That would result in a compliant response style,
24 as well as a valid outcome on the assessment.

1 BY MR. EDWARDS:

2 Q Doctor, if I might ask you, how can you tell
3 if they're putting forth maximum effort?

4 A As I proceed I'll be able to demonstrate
5 that --

6 Q Okay.

7 A -- to you. A second option in responding to
8 the assessment would be an individual who approaches the
9 test with the intention to perform well but demonstrates
10 low effort in doing so, so for example, someone may have
11 the intention to do well on an examination but
12 demonstrate inconsistent or minimal effort in the
13 completion of the examination, or may have difficulties
14 with their attention or concentration which allows them
15 not to exert a high level of effort as would be required
16 to achieve a compliant response style as is depicted
17 here.

18 A third option is the individual who intends
19 to perform poorly on the examination and demonstrates
20 low effort in doing so. This would, basically, be equiv
21 -- this is called an irrelevant response style and also
22 results in an invalid assessment. In this response
23 style pattern, the answers that an individual provides
24 bears no resemblance whatsoever to the questions that

1 are being asked. An individual may decide, for example,
2 to answer every third item as true or correct or in an
3 attempt to display a random pattern of answering.

4 The last possibility in response styles on the
5 VIP is an individual who tends to perform poorly and
6 demonstrates high effort in doing so. The ability to
7 answer questions -- the individual has the ability to
8 answer questions, but suppresses a correct answer for an
9 incorrect answer.

10 Now, the VIP, as can be seen here, is a forced
11 choice test. If an individual did not know any of the
12 answers or answered randomly to all of the 100 questions
13 on the item, they would never, by chance alone, obtain
14 approximately 50 percent of the questions correctly
15 merely by guessing. The VIP uses this evidence of below
16 chance performance to identify the deliberate effort to
17 respond incorrectly. And by deliberate effort, the
18 demonstration of deliberate effort would, likely,
19 constitute misrepresentation.

20 If I can turn this, these are examples of two
21 VIP profiles, one of which is a valid and compliant
22 profile, the other which is an invalid and suppressed
23 profile. Before -- these are not Defendant Vanisi's
24 profiles, these are just samples that I'm providing, but

1 before you can comprehend the meaning or the
2 interpretation of these profiles, I'd like to explain or
3 provide an explanation for two -- for two issues that
4 are important in determining how -- knowing how to
5 interpret this.

6 Number one, when the individual is provided
7 with the initial test questions, those questions are
8 provided to the individual randomly in terms of their
9 degree of difficulty. When the assessment is tested and
10 sent off for testing by computerized scoring, those
11 questions are rank ordered from left to right, according
12 to degree of difficulty, so the easiest questions
13 depicted by the example of the model I provided earlier
14 are on the extreme left side of this vertical/horizontal
15 access and the most difficult items are on the extreme
16 right side, number one.

17 Number two, this curve here is known as a
18 performance curve and it's computed based on a
19 statistical property known as a running mean or a moving
20 average. That is to say, you may have heard a financial
21 analyst, for example, talk about the three-day moving
22 average of a particular stock, or the three-day moving
23 average price of a particular mutual fund. That means,
24 basically, they've taken the closing price of that stock

1 or mutual fund for three consecutive days, Monday,
2 Tuesday, Wednesday, noted the closing price, divided
3 that price of that sum over three days, divided it by
4 three to obtain a moving average. In order to maintain
5 the integrity of that moving average the following day,
6 Thursday, the -- that's the closing price would be
7 noted, but the first day closing price would be dropped,
8 so the second average would be computed based on the sum
9 of the closing prices on Tuesday, Wednesday, Thursday
10 divided by three to obtain a moving average. That, in
11 turn, would be plotted on a profile; ditto for a Friday,
12 Thursday and Wednesday. The intent is to provide a
13 plot, a moving average of the average score of the
14 individual. On the VIP, this is a ten-day moving
15 average. The first ten answers from least difficult to
16 most difficult are sum divided by ten and an average
17 score is placed at this indicator here. Because that
18 score is 1.0 on those first ten items the defendant
19 answered correctly, and on the most easiest items, so
20 what we have here, then, on this vertical axis is a
21 range of 1.0 to 0 indicating how the client, on average,
22 responded to the questions of the assessment. A score
23 of 1.0 would be a true answer, and as incorrect answers
24 are added to the average you would see a natural

1 progression in the performance curve. And once again,
2 the horizontal axes is the rank ordering of the items
3 according to difficulty from left to right, the left
4 being the easiest, the right being the most difficult.

5 This shaded area represents the area of chance
6 guessing, at this point at 0.5 (indicating). Once
7 again, we have a forced choice assessment where there's
8 only one or two possible answers are correct. This area
9 here represents the area of guessing, a random guessing
10 that would be expected over a period of time. At the
11 midline is the 0.5 cutoff at this height is 0.7, at this
12 lowest level is 0.3.

13 Now, if I can proceed here to discuss these
14 various sectors, the first sector here on this compliant
15 valid profile is called an ability sector. That is to
16 say, it is the ability that the test taker demonstrates
17 in answering the easiest items of the test that are rank
18 ordered. And in this instance it's quite clear that the
19 gentleman, because it's not a valid compliant profile,
20 had no difficulty and was more than willing to answer
21 the questions correctly. The running means or the
22 moving indicators that I've discussed earlier are
23 consecutive up to this point in time. The greater this
24 distance in sector one, the greater the ability or the

1 willingness of the test taker to answer the easy item
2 correctly. One would expect to score, on average, in
3 the 50's to the 60's range, as is demonstrated in this
4 compliant profile.

5 Sector two here in this area is much -- is a
6 much narrower width than sector one here (indicating).
7 This is called a transition sector. This is the area
8 where the test taker moves from knowing the answers to
9 the questions, transitioning to an area where he's
10 beginning to guess about the answers to the questions,
11 and is, as demonstrated in this validity compliant
12 profile, it's very narrow meaning it doesn't take many
13 questions to reach that question, and it's a very sharp,
14 steep decline.

15 Sector three on this compliant profile is the
16 transition sector. It's that portion of the performance
17 curve here that reflects the period of transition from
18 knowing the answers to guessing at the answers at the
19 beginning at the sector two there and continues all the
20 way to the end. This depicts the performance on items
21 that are sector three. The transition of random sector
22 depicts the performance on items that are beyond the
23 range of the test taker's ability to answer. And
24 because these are rank ordered by item difficulty, one

1 would expect this area to be depicted of the performance
2 curve by answers in a shaded area because if one is
3 honestly guessing, over time approximately half the
4 questions will be answered even if you don't know the
5 correct answer. So what we have here, then, is a valid
6 performance of an individual who demonstrated some
7 willingness to answer the easiest items with integrity,
8 made a very rapid transition from what he knew to be
9 correct to being uncertain, and then with regards to the
10 most difficult items of the VIP assessment, demonstrated
11 random guessing where approximately 50 percent of the
12 answers were correct, 50 percent of the answers were
13 incorrect. This is a second example of a profile that
14 is not that of the defendant. This represents an
15 invalid suppressed style of responding. As you can see,
16 at the very onset, at the easiest answers, the
17 individual is making a demonstration to feign no
18 knowledge how to respond. He is answering according to
19 random guessing rather than to degrees of certainty.
20 Point in fact, the entire running means that have been
21 computed are all in the shaded area suggesting he's
22 merely guessing and not making an honest effort to
23 answer with any degree of integrity or sincerity. In
24 addition, what makes up a suppressed profile is the

1 suppression sector right in here that is below the shade
 2 area (indicating). This means that for an extended
 3 period of time of the performance curve, there were
 4 running means of less than 0.3 below the shaded area.
 5 That means for the extended number of items the test
 6 taker answered no more than 30 percent of them
 7 correctly. A suppression sector on the VIP is designed
 8 or defined as 20 or more running means of 0.3 or less.
 9 Given that, guessing at an answer will result in 50
 10 percent of the correct answers on average, the existence
 11 of this running mean strongly suggests a suppression of
 12 correct answers. If he didn't know the answers to the
 13 problems, the performance curve would be in the shaded
 14 area which is -- which depicts chance responding. So
 15 these suppression -- this suppression pattern here means
 16 that he knew the correct answers, but was willing,
 17 seemingly willing to answer them incorrectly in order to
 18 misrepresent himself, albeit in a very naive manner,
 19 particularly given this introduction here.

20 Now allow me to present the defendant's
 21 profile. This is the defendant's profile on the VIP,
 22 the Validity Indicator Profile. And at the onset one
 23 can see it is an invalid suppressed profile, not unlike
 24 the previously invalid suppressed but with a bit more

1 sophistication. Sector one, the ability sector, the
2 willingness of the defendant to answer the easiest items
3 of the test is demonstrated here in sector one. As you
4 can see, it's not very wide. The distance is 32, when
5 we would expect a range approximately in the 50's or the
6 60's. The total score, that is the number of items the
7 defendant answered correctly, was 64. On average we
8 would at least expect a score approximately of 50 plus
9 or minus a few, so this tells us that he's making some
10 effort to answer correctly, particularly the easiest
11 items of the test.

12 The transition sector here, sector two, is
13 problematic. It's much too wide, as can be seen. It's
14 much too wide and there appears to be some degree of
15 confusion about his -- the transition from knowing the
16 answers to guessing the answers. This sector, the
17 transition sector depicts an individual who is uncertain
18 about wanting to answer the items correctly. The cutoff
19 for this sector is 23 on the VIP. That is to say,
20 anything in excess of 23 presents a problem. Mr. Vanisi
21 obtained a score of 25 on this sector. This, basically,
22 means that the individual, the defendant, was not
23 exerting a full answer in an effort to honest a straight
24 answer but in and of itself this problem here in sector

1 one, this problem here in sector two is not what makes
2 this profile invalid. What makes this profile difficult
3 is his response pattern on sector three. Sector three,
4 as I stated previously, depicts the performance of an
5 individual on items that are beyond their ability to
6 answer. And because they're beyond their ability, we
7 would expect a chance pattern of responding, that is,
8 the performance curve would be in the shaded area. But,
9 however, notice that rather than demonstrating chance
10 performance here in the shaded area, there is a
11 consecutive existence of 23 running means that are below
12 0.3 or less. This is referred to, as I stated
13 previously, a suppression sector. It begins at unit
14 number 64 and continues to unit number 86, a distance of
15 23 units which exceeds the cutoff of 20 for the
16 establishment of suppression sector, so we have two
17 choices about what this suppression sector means. Numbe
18 one, the defendant deliberately answered the item
19 incorrectly in an attempt to misrepresent his actual
20 abilities. Number two, that the defendant experienced
21 an extremely improbable period of bad luck that resulted
22 in him responding in an incorrect manner for 23
23 consecutive trials. If you receive this latter
24 explanation, this would be equivalent to flipping a

1 coin, a 50/50 option 23 consecutive times, and each time
2 you said heads, the outcome was tails; and each time
3 that you said tails, the outcome was heads. That, I put
4 to the Court, is an improbable occurrence, therefore, if
5 I assume that this is a deliberate misrepresentation of
6 his abilities, I have to conclude that when the
7 defendant was presented with a problem, he was able to
8 do a correct answer, suppress his correct answer and
9 select an incorrect answer. I put it to you that's
10 hardly the experience of -- that delusions or impact
11 judgment would not allow that kind of thinking or
12 cognitive processing to occur.

13 Now, there are two points I want to make in
14 conclusion. It takes just as much reasoning skill to
15 select a correct -- incorrect answer here as it takes to
16 select a correct answer. And the only reason why
17 someone would select an incorrect answer there would be
18 to misrepresent their actual abilities.

19 And two, this is a much more sophisticated
20 attempt to misrepresent one's abilities than the first
21 poster I presented where the individual at the very
22 onset was in the random range of responding. Here we
23 have an individual who is willing to answer the initial
24 questions correctly, demonstrated some hesitancy or

1 concern about what was going on and how he wanted to
2 respond, and then rather than answering randomly, which
3 would be expected to be the most difficult items on the
4 assessment, purposely suppressed his answers indicating
5 that he knew the answers to begin with. So the issue
6 reasoning and rational thinking associated with
7 competency suggest some emphasis on cognitive
8 functioning.

9 The presence of a mental illness is relevant
10 only insofar as that illness affects one's rational and
11 factual understanding. My conclusion is based on large
12 part on these results here that whatever mental health
13 symptoms Mr. Vanisi would be experiencing, whatever
14 diagnosis you want to give him, that those symptoms and
15 signs do not overwhelm his cognitive abilities to engage
16 in reasoning, in rational thinking, in factual
17 understanding of the information as presented on the
18 VIP.

19 THE COURT: Thank you. Please retake the
20 stand.

21 BY MR. EDWARDS:

22 Q So, Doctor, what you're telling us here is
23 this test can measure human intention?

24 A It measures a response style. It measures

1 the style, the intention the individual demonstrated in
 2 completing the requirements of the examination. I can
 3 generalize, therefore, from this assessment to other
 4 like assessments of cognitive abilities. I can suspect,
 5 also, that for other assessments not affiliated with
 6 cognitive abilities that there's strong reason to
 7 suspect the sincerity of effort that's being put forth.

8 Q This is a better test than the first test you
 9 gave him?

10 A They're different tests.

11 Q Which one's recognized in the state of Nevada
 12 as a --

13 A Both tests meet the Daubert standards.

14 Q You've used both tests before in proceeding
 15 in court --

16 A Correct.

17 Q -- right? Okay. Seems to me on this VIP
 18 test that that chart shows somebody who performs poorly
 19 as the questions become more difficult. Didn't it look
 20 like that to you?

21 A It looks that way.

22 Q The questions get more difficult, his answers
 23 get less correct?

24 A With the exception of the suppression sector

1 that is highlighted in yellow.

2 Q But that's not the problem you see in this
3 case?

4 A No, it is the problem.

5 Q Oh, it is the problem?

6 A Yes.

7 Q Well, tell us what question 64 was on this
8 test.

9 A I can not tell you what that question is.

10 Q Can you tell us what any of the questions
11 were?

12 A I gave you the sample that was provided
13 initially, but I do not have the test and it would be
14 unethical for me to reveal those test answers.

15 Q It would be unethical?

16 A Yes, it would.

17 Q On what ethical grounds are you prohibited
18 from sharing that information with us?

19 A Well, I'm permitted ethical grounds of the
20 American Psychological Association not to reveal the
21 answers to a specific assessment instrument.

22 Q So it's a secret test?

23 A No, it's not a secret test, but they may give
24 it to you one day and I don't want you to know what the

1 answers might be.

2 Q Well, I guess you can perceive my intention
3 here. I guess that would be like letting out the SAT or
4 something?

5 A An SAT, sure.

6 Q It's that reliable?

7 A Yes.

8 Q And it's all statistical based, right?

9 A Largely.

10 Q Okay. So on the basis of these statistics,
11 is the questions which we don't know what they are
12 become more difficult, I have to take your word for
13 that, right? Like what's the first question on the
14 test?

15 A The questions are nonverbal.

16 Q They're nonverbal?

17 A They're patterns as was demonstrated in the
18 sample I provided earlier.

19 Q Like pictures?

20 A Correct.

21 Q Is this a deduct kind of thing or at a
22 category?

23 A No, it was much akin to the sample I provided
24 in the initial part of the presentation.

1 Q So the basis of these secret questions you've
2 determined that my client is lying to you?

3 A On the basis of his response to these
4 questions, I determined the client was making, in all
5 probability, a purposeful effort to misrepresent his
6 actual abilities in responding to a simple 50/50 forced
7 choice test.

8 Q We can't judge whether that's a reasonable
9 conclusion because we're not allowed to know what
10 questions you asked him.

11 A Well, I have the results there. If -- if
12 some arrangements can be made to actually look at the
13 test, perhaps that would resolve your curiosity.

14 Q Well, you know, secretive testing is kind of
15 suspicious, wouldn't you think?

16 A The secrets were not -- the testing was not
17 secret to the defendant. I'm merely reporting his
18 responses to the questions and, more importantly, the
19 pattern of responses that he provided.

20 Q Do you know Mr. Vanisi's IQ?

21 A No, I don't, but I suspect he's a very bright
22 man.

23 Q You suspect?

24 A Yes.

1 Q On what basis?

2 A On the basis of this sophisticated attempt to
3 misrepresent his actual abilities.

4 Q Could this suppressive responding you're
5 referring to have been due to bad guessing, bad luck?

6 A Indeed, that was part of my presentation that
7 it's possible. An alternative explanation is that it
8 could have been an extremely extended period of bad
9 luck, equivalent to flipping a coin 23 times and each
10 time making the incorrect decision.

11 Q And you mention that he was two points over
12 what, some threshold where --

13 A Three points over, 23.

14 Q Questions -- was it 64 to 86 or --

15 A Approximately, yes.

16 Q Okay. That's 22, right?

17 A 23.

18 Q Okay. So he got both 64 and 86 wrong.

19 A On the attachment number four the distance of
20 the suppression sector is 23 units. It begins its
21 starting point 64 and ends at ending point 86.

22 Q And therefore, he was three questions over
23 the threshold?

24 A The threshold in and of itself is sufficient

1 to trigger a suppress -- the existence of a suppression
2 sector.

3 Q So do you have any way with this test to
4 determine whether that's a severe suppression or just a
5 --

6 A Well, if you recall --

7 Q -- moderate one or --

8 A If you recall the previous example, there was
9 a demonstration of a suppression sector that was 50
10 units in length. That was a very obvious naive attempt
11 to answer questions in a subvertive manner. This is
12 less naive. I put it to you that it's a much more
13 sophisticated attempt.

14 Q But it might be bad luck, too.

15 A But if you think you can guess the outcome of
16 28 flips of a coin randomly, it would be bad luck.

17 Q All right. On page 8 and 9 of your report
18 you address your attempt to assess Mr. Vanisi's
19 willingness to engage in truthful testimony. Do you
20 recall that?

21 A Correct.

22 Q What did you conclude?

23 A That he is not likely to engage in truthful
24 testimony, in spite of the fact that he knows what

1 truthful testimony is.

2 Q Do you think that unwillingness to engage in
3 truthful testimony has any relation to the way he's
4 communicating between counsel and his ability to
5 communicate with counsel?

6 A Could you restate the question?

7 Q Yeah. If he's unable to testify truthfully,
8 do you think it has any impact on his relationship to
9 his attorneys?

10 A Well, it's certainly possible that he'd be
11 willing to miss -- to deceive his attorneys, of course,
12 but that in and of itself would not constitute criteria
13 for incompetency.

14 Q On page 9 you state, "He has clearly
15 demonstrated his willingness to engage in sophisticated
16 acts of deception".

17 A Based upon the results of the VIP assessment.

18 Q So these sophisticated acts of deception are
19 the wrong answers he gave to these secret questions?

20 A The suppression sector which strongly
21 suggests the duration of a suppression sector, its place
22 in the assessment process in sector three as opposed to
23 sector one certainly indicates some sense of planning
24 and premeditation of how to respond to the assessment

1 itself.

2 Q Premeditation?

3 A One has to look at the test and make a
4 determination, do I want to answer this portion of the
5 test correctly or not.

6 Q All right. Finally, in your report you
7 conclude that "The legitimacy of Mr. Vanisi's
8 psychiatric symptoms should be called into question".

9 A Yes.

10 Q Are you saying he does haven't bipolar
11 disorder --

12 A No.

13 Q -- with psychosis?

14 A No.

15 Q Do you think his bizarre behavior is really
16 just kind of faking it?

17 A I think at times it's rather obvious that his
18 bizarre behavior was, indeed, faking. I think at times
19 it may not be. I suspect that he has some symptoms
20 associated with the bipolar disorder, but in an attempt
21 to present himself in a sophisticated manner is more
22 than willing to exaggeration or at times feign those
23 symptoms.

24 Q Do you think the prison doctors are wrong in

1 involuntary administering psychotropic drugs?

2 MR. MCCARTHY: Your Honor, the witness has
3 already said he's not an expert in the field of
4 medication.

5 THE COURT: Are you objecting?

6 MR. MCCARTHY: Yes.

7 THE COURT: Sustained.

8 BY MR. EDWARDS:

9 Q Doctor, on page 6, you indicate that my
10 client -- let me get the line for you -- first line,
11 page 6, quote, has a regime of potent psychiatric
12 medications.

13 A Uh-hum.

14 Q Is that right?

15 A Correct.

16 Q Is there a reason for that?

17 A For his medications.

18 Q Is there a reason for receiving them, yeah.

19 A Well, once again, I'm not a physician. I
20 presume that the medications are either, as they consist
21 in many prison contexts, to control his behavior or to
22 treat his symptoms.

23 Q So the fact that he's receiving medicine
24 might corroborate the fact that he has legitimate

1 psychiatric symptoms, right?

2 A It may corroborate that as a behavioral
3 problem and this is a way of containing those behaviors,
4 could be either way.

5 Q You give us three facts in your report that
6 you use to support your conclusion that Mr. Vanisi's
7 psychiatric conditions are, perhaps, being faked; is
8 that right?

9 A Specifically --

10 Q Well --

11 A -- page 9?

12 Q You list them one, two, three --

13 A Correct.

14 Q -- page 9 and 10. First on page 9, you
15 state that you're not aware of any mental health
16 condition prior to Mr. Vanisi's arrest --

17 A Correct.

18 Q -- and that seems to indicate, or you seem
19 to be implying that, therefore, he might be faking
20 because he didn't have anything before.

21 A Within the context of the results obtained on
22 the VIP, I have reason to suspect a host of issues about
23 Mr. Vanisi's presentation. These points are independent
24 of that and would likely corroborate that suspicion.

1 Q You have suspicion. Do you have any
2 evidence?

3 A No.

4 Q Do you have any evidence to suggest that he
5 did not have these mental health conditions prior to his
6 arrest?

7 A No, because the existence of a psychotic
8 disorder really isn't -- does not constitute designation
9 of incompetency in and of itself.

10 Q So point one, in fact, one is really
11 speculate one?

12 A I am presuming that there are no evidence I
13 observed in one. It's possible there may be.

14 Q So it's really an innocuous fact, then,
15 right?

16 A I observed no evidence in his file that
17 suggested there was a history as I might expect with an
18 individual who has a serious psychotic disorder prior to
19 his incarceration in Washoe County Jail.

20 Q And the second factor you rely on to conclude
21 that Mr. Vanisi might be faking his psychiatric
22 condition is that the medical record in 1999 never ruled
23 out malingering, right?

24 A The medical record, there were various

1 notations in the initial medical record that suspected
2 that his symptoms were feigned or exaggerated. I would
3 expect most professional experienced mental health
4 professionals to be acutely attune to that possibility.

5 Q And this is the very same medical record that
6 contains the diagnosis of bipolar disorder and numerous
7 references to psychotic behavior, correct?

8 A Correct.

9 Q And it also indicates, most importantly, that
10 my client is being treated with what you call powerful
11 antipsychotic drugs, right?

12 A Correct.

13 Q So is it fair to say, then, Doctor, that the
14 medical record you're referring to does not prove any
15 conclusive manner that Mr. Vanisi is faking his
16 symptoms?

17 A I'm not -- I'm not concluding that Mr. Vanisi
18 is faking any symptoms. I'm merely referring to the
19 fact there are a host of individual pieces of evidence
20 when, if taken together, a reasonable person may
21 conclude that there may be some exaggeration or feigning
22 of specific symptoms demonstrated by Mr. Vanisi.

23 Q Well, you would agree that reasonable people
24 make conclusions on the basis of evidence, not

1 speculation, correct, Doctor?

2 A That's correct.

3 Q Okay.

4 A Would you like to address point number three?

5 Q Yes. The third and final fact you rely on to
6 question the legitimacy of Mr. Vanisi's psychiatric
7 symptoms is that he appeared in a Miller Light
8 commercial and that he was housed in the psychiatric
9 detention center here in Sparks?

10 A My conclusion is Mr. Vanisi was a paid
11 professional actor prior to his legal difficulties and
12 if, indeed, he has that skill, it, once again, would not
13 be unreasonable that he might be able to mimic
14 psychiatric behaviors in a facility such as Lakes
15 Crossing detention center.

16 Q What evidence do you have that he was a paid
17 professional actor?

18 A I have no evidence. I'm taking it at face
19 value, as well as notes that are made in his entry
20 chart.

21 Q So you haven't seen this commercial that he
22 allegedly appeared in?

23 A No.

24 Q And you don't have any evidence he ever

1 received any professional training as an actor?

2 A I'm taking it at face value.

3 Q You never saw any of his performances?

4 A No, I did not.

5 Q Okay. Is it somehow a scientific fact that
6 actors can fake psychiatric symptoms better than other
7 people?

8 A I'm not sure it's scientific fact but,
9 however, my Masters degree was on professional Hollywood
10 actors and their ability to disassociate themselves and
11 take on differing roles.

12 Q So was that a yes or a no?

13 A Repeat the question.

14 Q Is it a scientific fact --

15 A No, it's not.

16 Q -- that professional actors can fake
17 psychiatric symptoms better than others?

18 A No, it's not a scientific fact.

19 Q All right. So you're really just speculating
20 that because he was in a beer commercial he might be a
21 more skilled faker than others, right?

22 A It's a realistic speculation.

23 Q Do you know if he showed up in a grass skirt
24 in that commercial?

1 A I have no idea if he did.

2 Q Okay. Finally, the fact that he was housed
3 in Lakes Crossing and, therefore, I guess what the
4 implication here is that he -- he learned to -- learned
5 to fake by watching others?

6 A The speculation is that if one had the skill
7 and the wherewithal to take on and mimic other peoples'
8 behavior, Lakes Crossing would be the ideal optimal
9 facility to do that given the legitimacy of the majority
10 of the people, the psychiatric legitimacy of some of the
11 signs and symptoms some of -- the majority of people
12 display at that facility.

13 Q He wouldn't know anything what Mr. Siaosi
14 Vanisi sought at Lakes Crossing, do we?

15 A No, we do not.

16 Q We do not know who he was exposed to?

17 A No, we do not.

18 Q So we don't know what symptoms he could have
19 learned there?

20 A I have no idea.

21 Q It's all speculation?

22 A It's -- it's a suspicion.

23 Q Mental illness contagious, Doctor?

24 A No, it's not.

MR. EDWARDS: No further questions.

THE COURT: Cross.

MR. MCCARTHY: Can I have a short break first?

THE COURT: Certainly. Court's in recess.

(Short break.)

THE COURT: Okay, Mr. McCarthy.

MR. MCCARTHY: Thank you.

CROSS-EXAMINATION

BY MR. MCCARTHY:

Q Dr. Amezaga, I noticed in your testimony earlier you mentioned a couple of times you were concerned about Mr. Vanisi's competency for trial; I'll put the word trial in quotes. Are you aware that proceeding to follow this is not really a trial?

A Correct.

Q Does that make any difference at all in your analysis?

A No, it's not. No, it doesn't.

Q Okay. And tell me, Doctor, are you trained in how to conduct a clinical interview?

A Yes, I am.

Q And you also know how to conduct these more objective tests?

A Correct.

1 Q Is there some reason why testing is better,
2 in your view, than clinical interviewing?

3 A Testing allows someone -- allows an
4 individual, a professional to acquire evidence in an
5 objective standardized manner which allows them to come
6 to a more -- hopefully a more accurate, more reliable
7 decision about what exactly is going on or being
8 experienced by the test taker.

9 Q Okay. By the way, do you have any way of
10 calculating the odds of flipping a coin and getting
11 heads 23 times in a row?

12 A I thought about how that might be computed
13 referring -- referring to my -- to my old statistical
14 days it was a permeation some day to 28 to the 27th
15 power times the 26th power, 25, it was rather
16 improbable.

17 Q A long number?

18 A A long number.

19 Q When one -- I'm not sure I understand. Is a
20 low score or high score on the last part of the VIP test
21 that we talked about, is that indicative of
22 intelligence?

23 A A low score.

24 Q Or a high score?

1 A A high score.

2 Q That is falling without the gray range either
3 above or below?

4 A Can you restate the question please?

5 Q You know, I don't think I can. I think I'm
6 going to move on.

7 Okay. Were you expressing the opinion that
8 Siaosi Vanisi suffers no mental illnesses at all?

9 A No, I was not.

10 Q Your opinion is despite his mental illnesses,
11 he is competent?

12 A The existence of a mental illness in and of
13 itself does not preclude someone from a designation of
14 competency or incompetency.

15 Q And it's your understanding of the standard
16 of competency --

17 A Correct.

18 Q -- that if a psychotic person -- if a
19 schizophrenic person, nevertheless, is able to
20 understand the proceedings and the charge, they can be
21 competent?

22 A I'm well aware of individuals who have a
23 formal diagnosis of schizophrenia who, if they're asked,
24 can restrain their symptoms and engage in sufficient

1 cooperation and communication with your attorney to
2 assist with their defense.

3 Q Okay. And if they are unwilling to do so and
4 if they are unwilling to cooperate with their attorney,
5 in your view does that make someone incompetent?

6 A No. Unwilling is to be differentiated from
7 capacity. Someone certainly has those, though someone
8 has the capacity, it becomes a volitional choice of
9 whether or not they wish to execute that capacity.
10 Given the nature of the responses that were provided on
11 the first assessment administered to Mr. Vanisi, the
12 ECST-R, I conclude that Mr. Vanisi has sufficient
13 capacity to respond and communicate and convey
14 information to his attorneys if he so chooses.

15 Q What was it about the quality of his
16 responses on that exam that leads you to that
17 conclusion?

18 A Well, there were specific answers concerning
19 each; the progression of competency that were asked
20 directly of Mr. Vanisi and Mr. Vanisi was able to
21 respond in a rational coherent logical manner to those
22 questions.

23 Q Can you give an example?

24 A Page 6 of my report, factual understanding of

1 the ECST-R, on this domain, this portion of this
2 particular assessment, the specific intent of the
3 specific questioning is to determine to what degree
4 Mr. Vanisi possesses factual understanding of the
5 proceedings against him. He was asked to identify his
6 charges, he initially stated he did not recall. After a
7 few seconds he identified his charges as homicide
8 murder. He identified the possible consequences
9 associated with his murder charge as the death penalty,
10 I'm subject to die. He was able to correctly remember
11 the roles and responsibilities of both the defense
12 counsel, my attorney helps me, helps defend my case, and
13 opposing counsel, McCarthy, prosecute the case against
14 me, et cetera, et cetera, et cetera. This led me to
15 conclude and derive the conclusion that based on his
16 responses to those direct questions regarding his
17 factual understanding of the proceedings against him,
18 that he demonstrated no significant impairment in his
19 level of understanding in whatever psychiatric symptoms,
20 be they valid or not, he was experiencing.

21 Q Would you agree with the proposition that
22 Siaosi Vanisi has the ability if a question is posed to
23 him and he knows the answer, he has the ability with
24 sufficient motivation to formulate an answer and express

1 it?

2 A Emphatically, yes.

3 Q If his attorneys wished to acquire knowledge
4 from him, he could, if he wished, provide that
5 knowledge?

6 A The results of the VIP indicate that
7 Mr. Vanisi has the wherewithal, the capacity to respond
8 to the questions that may be asked of him.

9 Q Does that mean he would be an easy client for
10 a lawyer?

11 A No.

12 Q Might be difficult?

13 A I would suspect it's extremely difficulty
14 given the degree of sophistication in an attempt to
15 misrepresent himself that was displayed on the VIP.

16 Q Might require some patience on the part of
17 counsel?

18 A I suspect so.

19 Q Do you have an explanation for why the two
20 tests that you mention have seemingly different results?

21 A I formulated a possible explanation, yes.

22 Q Okay.

23 A On the first test, the ECST-R is usually
24 administered to individuals to assess the severity of --

1 of their psychotic behavior and how severe that behavior
2 -- unrealistic that behavior may be in an attempt to
3 look worse than they really are.

4 Mr. Vanisi did not demonstrate any behavior to
5 suggest that he was incompetent in any way. What he did
6 demonstrate was an excessive degree of defensiveness in
7 some of his responding which led me to conclude that
8 through, perhaps, routine normal every-day experiences
9 that he was denying in attempt not to present himself as
10 significantly impaired or psychotic.

11 My conclusions, basically, were that the
12 evaluation of competency to stand trial gave no
13 indication that he was making an overt effort to
14 demonstrate incompetency. The VIP is a measure of his
15 thinking skills, his cognitive abilities, his
16 problem-solving skills on this measure, he made, in my
17 opinion, a concerted effort to misrepresent his actual
18 abilities. I conclude from that assessment or that
19 result that there's reasonable suspicion to suspect his
20 reliability in providing or sharing information
21 regarding his -- his behaviors.

22 Q Are you suggesting perhaps you want him to
23 appear not quite as bright as he really is?

24 A That was a good conjecture.

1 Q All right. You mentioned or you were asked
2 about a nihilistic delusion earlier. As far as you
3 know, is that a recognized diagnosis of any sort?

4 A No, I'm not aware of it being any form of a
5 psychiatric descriptor.

6 Q Certainly not something that's found in the
7 MMRP?

8 A MMPI?

9 Q Sorry, wrong book. DSM. It is not?

10 A It is not.

11 Q Okay. But do you have a general
12 understanding of what one might mean by the phrase
13 nihilistic delusions?

14 A I suspect some sort of fatalistic belief.

15 Q Okay. And I'm just -- perhaps I'm a little
16 bit unclear. If you would, what does the result of the
17 suppression part of the VIP test indicate to you? How
18 does that affect your opinion?

19 A May I approach the poster, your Honor?

20 THE COURT: Yes, if you need to.

21 THE WITNESS: The suppression sector means
22 that on the most difficult items of the examination,
23 where an otherwise compliant individual is able to
24 obtain chance response, that Mr. Vanisi demonstrated the

1 ability to answer questions that were not expected that
2 he actually knew the answers here; therefore, he was
3 attempting to misrepresent his actual cognitive and
4 thinking abilities.

5 BY MR. MCCARTHY:

6 Q So I had it right earlier when I asked
7 perhaps he doesn't want to appear to be as bright as he
8 really is?

9 A And that the evidence -- the span of the
10 suppression sector is equivalent to, once again, tossing
11 the coin 23 consecutive times and each time arriving at
12 the incorrect answer when the expectation is one would
13 arrive at a chance answer as was demonstrated in this
14 plot and profile here.

15 MR. MCCARTHY: That's all I have.

16 THE COURT: Redirect?

17 REDIRECT EXAMINATION

18 BY MR. EDWARDS:

19 Q Doctor, you testified just a moment ago in
20 the course of looking at page 6 of your report that you
21 came to the conclusion that there was no significant
22 impairment. Do you recall that statement?

23 A Correct.

24 Q Okay. Now, that's not exactly true, right?

1 If you look right before the underlying portion under
2 rational understanding on the ECST-R, the last few words
3 there are mildly impaired to normal range, right?

4 A I'm sorry, where are you at?

5 Q I'm on page 6, six lines from the top -- from
6 the bottom, I beg your pardon, and it indicates mild
7 impairment, right? I think you would agree that you've
8 made a finding that my client's --

9 A I still don't know where you --

10 Q Is my client mildly impaired in some respect?

11 A In some respects I concluded that he might
12 have been mildly impaired.

13 Q Mildly impaired in what ability?

14 A And his ability to assist his defense with
15 his counsel.

16 Q So there is some impairment?

17 A Mild impairment.

18 Q And there's a bipolar disorder with
19 psychosis, right?

20 A Yes.

21 Q Okay. Can these graphs over here be impacted
22 by drugs, performance on these secret questions?

23 A Yes, I would expect, however, a deterioration
24 in his ability to respond.

1 Q Is that based upon medical knowledge?

2 A Well, if you're assuming the drugs are having
3 a negative affect, then there's a degree of an
4 impairment that, likely, would be reflected on the
5 assessment here.

6 Q So we could have either super smart, so smart
7 that he's able to do that --

8 A Uh-hum.

9 Q -- right? Or drug impaired or unlucky.

10 A If there was some impairment due to the
11 medication, then he would not likely be able to answer
12 with the consistency he responded to in the first sector
13 of the evaluation, the most easiest items on the
14 assessment, quite the contrary; he answered correctly
15 the most difficult items on the assessment.

16 Q This first test, the ECST-R?

17 A Correct.

18 Q You gave us the questions in that, didn't
19 you?

20 A Correct.

21 Q How come you can give the questions there and
22 not the one in the VIP, the ones in the VIP?

23 A These questions are paraphrased, the VIP is a
24 symbolic nonverbal test of a picture. I can't give you

1 a paraphrase of a picture.

2 Q So you're measuring cognitive ability with
3 the VIP?

4 A The VIP is a measure of response style, how
5 the individual approaches and the integrity that's used
6 in carrying out his responses to the assessment.

7 Q And your conclusion is it's a remarkably
8 sophisticated attempt at deception?

9 A I'm concluding that Mr. Vanisi made the
10 attempt to purposely misrepresent his actual results.

11 Q And you also used the word sophisticated.

12 A Yes, I did.

13 Q And sophisticated implies high-end
14 intelligence, right?

15 A Correct.

16 Q And you don't know what his IQ is?

17 A No, I don't.

18 MR. EDWARDS: Okay. I have no further
19 questions.

20 THE COURT: Anything further?

21 MR. MCCARTHY: I forgot to have this marked
22 and authenticated --

23 THE COURT: Okay.

24 MR. MCCARTHY: -- if you would? I don't

1 think it's admitted.

2 THE COURT: The original is provided to me,
3 counsel.

4 MR. EDWARDS: Yes, ma'am.

5 THE COURT: We have Exhibit D as Dr. Bittker's
6 original report. Do you all want Mr. Amezaga's report
7 marked next in order?

8 MR. EDWARDS: Yes, your Honor. That would be
9 fine.

10 FURTHER REDIRECT EXAMINATION

11 BY MR. EDWARDS:

12 Q Dr. Amezaga, the two charts that you have up
13 here, they differ from the ones that you've attached to
14 the back of your report; is that right?

15 A Yes, those are sample protocols.

16 Q Do you have any objection to us entering
17 those in the record, the two sample protocols?

18 A I can provide you with samples, yes. No, no
19 objection.

20 MR. EDWARDS: Terry?

21 MR. MCCARTHY: No, I think it's a good idea.

22 COURT CLERK: Exhibit E marked.

23 THE COURT: Exhibit E was filed in an original
24 when it was received in the department, so it's actually

1 marked as an exhibit and it has also a file stamp that
2 was admitted as a document in the file. So just so the
3 record's clear why it has a file stamp and an Exhibit E,
4 but either way, I'm either admitting it one way or it's
5 part of the permanent record.

6 (Exhibit E is marked and admitted into
7 evidence.)

8 MR. MCCARTHY: I'm done.

9 THE COURT: Okay.

10 MR. EDWARDS: And your Honor, I've moved to
11 admit these two additional pieces of evidence that will
12 correspond to the hearing we've had today.

13 THE COURT: The clerk will mark those next in
14 order.

15 MR. MCCARTHY: Is that all right with you, the
16 ones that are actually taped to the board, we can have
17 those?

18 THE WITNESS: Yes.

19 MR. MCCARTHY: Thank you. No objection.

20 COURT CLERK: Those will be marked F and G.

21 (Exhibit F & G are marked.)

22 THE COURT: And F is the sample and G is,
23 actually, Mr. Vanisi's response.

24 MR. MCCARTHY: I think --

1 MR. EDWARDS: Mr. Vanisi's response, your
2 Honor, is attached to the report.

3 THE COURT: Right, but it says "SV" on there.

4 MR. EDWARDS: Does it?

5 MR. MCCARTHY: I think that means Siaosi
6 Vanisi.

7 THE COURT: Right.

8 MR. EDWARDS: I guess I was moving to admit
9 these two.

10 THE COURT: Well, decide which ones you want.

11 MR. EDWARDS: The ones that correspond to the
12 presentation the doctor made.

13 MR. MCCARTHY: Okay.

14 THE COURT: The sample question and the
15 different kinds of answers --

16 MR. EDWARDS: Right.

17 THE COURT: -- those are what you wanted?

18 MR. EDWARDS: Yeah. Mr. McCarthy.

19 MR. MCCARTHY: Sure. Sure. Why not.

20 THE COURT: So the sample question which is
21 practice question number one will be marked by the
22 clerk.

23 COURT CLERK: That's marked as Exhibit F.

24 THE COURT: And it's admitted. And then the

1 responses, types of responses.

2 COURT CLERK: Is G.

3 THE COURT: And that's admitted.

4 (Exhibit F & G are admitted into evidence.)

5 THE COURT: And then did you want the others
6 on the other side marked?

7 MR. MCCARTHY: I thought they were attached.

8 THE COURT: One is --

9 MR. MCCARTHY: Oh, okay.

10 THE COURT: -- Mr. Vanisi's responses. It's
11 attachment number four to the report.

12 MR. EDWARDS: So I guess --

13 MR. MCCARTHY: Figure 6 would be the --

14 MR. EDWARDS: Test interpretation out of
15 Chapter 7.

16 THE COURT: Was just a sample that he
17 testified about.

18 MR. MCCARTHY: Of a valid sample.

19 THE COURT: Let me see it.

20 MR. MCCARTHY: An example of a valid test.

21 THE COURT: Turn around so the doctor can see
22 it, please.

23 MR. MCCARTHY: I'm going to be Vanna White in
24 my next life.

1 THE COURT: They're talking about the one on
2 your left.

3 THE WITNESS: That is a sample.

4 THE COURT: Of?

5 THE WITNESS: Of a valid profile of no
6 particular individual.

7 THE COURT: Okay. That will be marked as --

8 COURT CLERK: H. And you said the one on the
9 left?

10 (Exhibit H is marked.)

11 THE COURT: Left, your left, and the one on
12 your right.

13 THE WITNESS: Is Mr. Vanisi's protocol.

14 THE COURT: Which is a blowup version of
15 attachment four in your report which we've admitted. Do
16 you want that one marked also? And F is admitted also?

17 COURT CLERK: No, we went to H.

18 THE COURT: H? Okay. F, G, and H are
19 admitted, as well as E.

20 (Exhibit H is admitted into evidence.)

21 THE COURT: Anything further, counsel? Okay.
22 Doctor, you may step down.

23 THE WITNESS: Thank you.

24 THE COURT: Do you wish to present argument?

MR. EDWARDS: Yes, your Honor.

THE COURT: Mr. --

MR. EDWARDS: Mr. Qualls will be presenting the argument.

Thank you, Doctor.

MR. QUALLS: Thank you, your Honor. We're dealing with two overlapping issues here. The first is the standard of competence for Capital Habeas Petitioners on post conviction review as we've cited under the 9th Circuit case of Rohan.

And second, what has arisen as we've previously indicated that it might is the effect of Riggins versus Nevada on the instant case as far as Mr. Vanisi's right to challenge his current forced medication which requires an analysis of the effect of his current medications in the Rohan context.

THE COURT: Usually -- I don't think that is an issue before me right now. You're asking -- if I'm understanding what you're saying, there's no issue with regard to forced medications before the Court. The only issue is whether or not he may proceed in the habeas action based upon his mental state. And then you asked for an additional consideration about whether or not he could testify if you wanted him to testify, whether or

1 not he was competent, and I agreed to allow the doctors
2 to analyze that. As far as I understand, those are the
3 only two issues before the Court right now.

4 MR. QUALLS: And I believe the Court actually
5 sua sponte added the his ability to testify or the
6 difference between a truth and a lie.

7 THE COURT: It wasn't sua sponte, it came out
8 of a request on behalf of the defense.

9 MR. QUALLS: But at any rate, I'll address
10 your question, your Honor, which is, and this is jumping
11 ahead a little bit, and the reason why I bring Riggins
12 into the fold is because I think it's very much tied up
13 in the competency issue, particularly if you look at the
14 report and the testimony of Dr. Bittker. Dr. Bittker
15 observed and evaluated Mr. Vanisi and that evaluation
16 was based very much and had a lot to do with his -- and
17 his findings had a lot to do with his medication. As a
18 matter of fact, his final recommendations and
19 conclusions were that something to the effect that the
20 medications that he was on was inhibiting his competency
21 and also possibly endangering his health. That is why
22 I've kind of said that by necessity brings up the issue
23 of medication.

24 We had a conversation in which I believe the

1 Further, Dr. Bittker makes multiple references
2 to Mr. Vanisi's psychosis, and attributes his inability
3 to distinguish between truth and lying to his
4 incompletely treated psychotic thinking disorder. Also,
5 Dr. Bittker's evaluation places considerable importance
6 on Mr. Vanisi's current medications and their effect on
7 his mental state.

8 In short, Bittker concludes Mr. Vanisi's
9 current medications are not ideally suited to assist him
10 in reestablishing competency. In making this finding
11 Dr. Bittker considered Vanisi's treatment with 500
12 milligrams of Depakote and 50 milligrams of Haldol of
13 two weeks, as well as other medications. And he also
14 looked at the laboratory studies which indicate that his
15 current medications could compromise Mr. Vanisi's
16 health. Dr. Bittker considered the effect of the
17 medications upon Mr. Vanisi's ability to communicate,
18 for example, his bizarre effect and his feeling of being
19 disconnected from himself. Bittker also opined that
20 Mr. Vanisi's medications, particularly his Haldol,
21 should be changed to do so, avoid dangers to his health.

22 Finally, that the negative effect of the
23 medications, Bittker concluded the cognitive impact of
24 bipolar disorder and the side effects of medicine

1 Court questioned the Court's authority to mandate
2 whether the medications could be changed, whether this
3 Court could order the prison to change his medication,
4 and I believe under the authority of Riggins if this
5 Court so decided it could decide that. It could, again,
6 decide that relative to a determination of competency in
7 this case.

8 Again, Dr. Bittker originally recommended that
9 what we do is change his medication and then revisit
10 this issue in 90 days, reevaluate him to see if the
11 change of medication had anything to do with his
12 competency, and so I think as a matter of necessity we
13 have to address a Riggins issue in the context of
14 competence under Rohan. Shall I proceed?

15 THE COURT: Go ahead.

16 MR. QUALLS: Okay. So the Court has the
17 reports and testimony of two professionals to weigh in
18 deciding these issues. The first was Dr. Bittker, as I
19 mentioned, the psychiatrist that gave us a report and
20 testified here. If the Court will recall, Dr. Bittker
21 found, number one, that Mr. Vanisi does not currently
22 have the requisite emotional stability to permit him to
23 cooperate with counsel or to understand the distinction
24 between truth and lying.

1 significantly compromise his ability to cooperate with
2 counsel.

3 It's significant to note that Dr. Bittker did
4 not find any evidence of malingering by Mr. Vanisi
5 during the evaluation. That's despite the fact that in
6 the previous evaluation years ago he actually did find
7 evidence of malingering.

8 Additionally, Dr. Bittker found Vanisi's
9 behavior to be considerably influenced by delusions and
10 serious impairment of judgment.

11 Finally, Bittker testified that he thought it
12 would be difficult if he weren't a psychiatrist to make
13 sense of what he was saying.

14 Secondly, we have Dr. Amezaga, the
15 psychologist who testified here today. His findings, of
16 course, are markedly different from Dr. Bittker's. In
17 considering Dr. Amezaga's report and his testimony, it's
18 important to keep in mind that unlike Dr. Bittker,
19 Dr. Amezaga is not a medical doctor and, therefore,
20 could not take into consideration the medications and
21 their full effect on Mr. Vanisi or evaluate whether
22 proper medications were being administered. Dr. Amezaga
23 admits in his report that majority of Vanisi's answers
24 were limited to one- or two-word responses, but does not

1 take into account all of Vanisi's medications. Amezaga
2 admitted that he might have been suffering from
3 delusions of memory, but does not seem to figure into
4 the conclusions. Amezaga did not distinguish between
5 Mr. Vanisi was either unable or unwilling to maintain
6 his concentration over a period of time. And again, he
7 did not appear to consider or evaluate the
8 appropriateness of his medication related to this
9 factor.

10 Interestingly, Dr. Amezaga stated in the
11 report that he found Mr. Vanisi to be malingering and
12 yet at the same time he found, quote, no effort to feign
13 or exaggerate psychiatric symptoms in order to suggest
14 the possibility of incompetency. So it seems on the
15 critical issue of competency, there was no malingering
16 where that was concerned. In fact, Amezaga indicated
17 that Vanisi may have been attempting to downplay his own
18 psychosis in order to appear as someone who does not
19 need the potent psychiatric medications he's now on.

20 Amezaga also opines that Vanisi has the
21 ability to, at least minimally, communicate with
22 counsel, but admits that Vanisi showed suboptimal
23 attention and concentration during his testing.

24 Finally, as to his testimony today, Amezaga

1 determination of competence as defined by Rohan.

2 Additionally, because we only have one expert
3 considering the role of the medications determining
4 competency, that expert's opinion must necessarily be
5 weighed heavier where that is concerned than the other.

6 Accordingly, we argue that the great weight of
7 the evidence in this matter shows, number one, that
8 Vanisi does not have the present ability to communicate
9 rationally and adequately assist counsel under the Rohan
10 standard. But this inability would cause a structural
11 error if we were forced to go forward with the
12 proceedings in this case. And as argued previously,
13 Rohan recognizes that could be done habeas proceedings
14 with the petitioner. Rohan recognizes a due process
15 right to competence which exists beyond trial, and Rohan
16 recognizes that right is connected to the Sixth
17 Amendment, right to counsel.

18 Finally, Rohan recognizes the Eighth Amendment
19 ban on the execution of the insane and, again, largely
20 at issue here is the importance to communicate
21 rationally with counsel. Without the ability to
22 communicate rationally with counsel the meaningful
23 assistance of counsel guaranteed under the Sixth
24 Amendment is meaningless.

1 reviewed the records from NSP but not any of the records
 2 from the Ely State Prison, which much of this -- much of
 3 the current motion was predicated by. He was, again,
 4 not aware when his medications were administered
 5 relevant to his interview with Mr. Vanisi. He admits
 6 that Vanisi's denial of psychotic symptoms may be a
 7 misrepresentation, and although I'm paraphrasing here,
 8 in essence, his testimony clarifies that Vanisi was not
 9 faking it when he was acting crazy, but attempting to
 10 appear, actually, more normal than he was.

11 As to the VIP assessment, Amezaga attributes a
 12 grand sophistication to the wrong answers that Vanisi
 13 gave when it could be, as was mentioned, that Vanisi
 14 simply is not as smart as Dr. Amezaga thinks he is or is
 15 a really bad guesser. Amezaga admits that the three
 16 factors that he used to determine the legitimacy of
 17 Vanisi's psychosis were each speculation and not based
 18 upon actual evidence.

19 Bottom line here is that there are many
 20 inconsistencies and speculations given by Dr. Amezaga.
 21 He is unable to judge the appropriateness of Vanisi's
 22 medication as Dr. Bittker was, so in conclusion as to
 23 the evidence to be weighed, it must be acknowledged that
 24 the medications do play a significant role in the

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1 Now, as to the issue of forced medication in
2 Riggins, which I have explained is sort of a necessary
3 consideration here, the U.S. Supreme Court in Riggins
4 recognized a Constitutional liberty interest at stake.
5 In short, the high court found that in the order to
6 forcibly medicate the State must show both, one, that
7 the medication was medically appropriate, and two, that
8 less intrusive alternative means were not sufficient.

9 In this case, again, based upon Bittker's
10 findings, it appears that his current medications are
11 neither medically appropriate or -- well, certainly
12 they're not medically appropriate, perhaps, it's yet to
13 be determined whether there are any lesser means of
14 controlling Mr. Vanisi's behavior. Therefore, in
15 conclusion, the weight of the evidence favors a finding
16 that Vanisi is not competent to assist counsel in these
17 proceedings and that his medications are not appropriate
18 under Riggins and must be adjusted for the sake of his
19 health and for a finding of competence under Rohan for
20 him to continue.

21 THE COURT: Thank you. Mr. McCarthy.

22 MR. MCCARTHY: Your Honor, last things first.
23 Until this moment I never heard any motion to modify the
24 medication medical regime. Had there been such a motion

1 I would have suggested that it should be brought in the
2 county where Mr. Vanisi is confined in a court with
3 authority to inquire. This Court is authorized to
4 inquire into whether this actually could go forward,
5 whether Siaosi Vanisi and persons like him are
6 authorized, if they are allowed to seek relief from
7 their conviction.

8 My primary position, as I've mentioned before,
9 your Honor, is that the question of his competence is of
10 no legal significance. Rohan is incorrect. It makes no
11 sense at all. Other cases have held to the contrary,
12 but I will say this. I have come along in some respect.
13 I now agree it's a good idea. I have come along to
14 where I agree it's a good idea that we have a record
15 now. In particular, I notice that both the experts seem
16 to agree that Mr. Vanisi is competent to be executed.
17 He's aware of his condition. He's aware he's in prison.
18 And he is aware the State proposes to execute him.
19 Might be kind of handy to have that kind of record in
20 the future so anyway, no, I don't think it's of any
21 legal significance. I now think it was a good idea to
22 have this hearing, so.

23 And the Court may become somewhat surprised to
24 find I think that both the doctors used the wrong