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.	Supreme Court No. 78209 District Court No. 98CR0516 Volume 15 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

RENE L. VALLADARES
Federal Public Defender

RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada State Bar No. 12577
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
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Attorneys for Appellant

EXHIBIT

EXHIBITS

EXHIBITS

EXHIBITS

EXHIBITS

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

CASE NO. CR98-0516 STATE OF NEVADA VS. SIAOSI VANISI

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
9/28/98 HONORABLE CONNIE J.. STEINHEIMER DEPT. NO. 4 B. Walker (Clerk) L. Clarkson (Reporter)	**STATUS HEARING** District Attorney Richard Gammick and Deputy District Attorney David Stanton represented the State. Defendant was present with counsel, Chief Public Defender Michael Specchio and Deputy Public Defender Steve Gregory. Respective counsel stipulated to the Defendant's submitting to a psychological evaluation. COURT ORDERED: Two (2) Psychiatrists or Psychologists appointed to evaluate the Defendant. Matter continued. Defendant in custody.	11/6/98 3:00 p.m. Report on Psych. Eval.

CASE NO. CR98-0516 STATE OF NEVADA VS. SIAOSI VANISI

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
8/4/98 HONORABLE CONNIE STEINHEIMER DEPT. NO. 4 B. Walker (Clerk) E. Nelson (Reporter)	**STATUS HEARING** District Attorney Richard Gammick and Deputy District Attorney David Stanton represented the State. Defendant was present with counsel, Public Defender Michael Specchio. Court furnished a file stamped copy of the Order dated August 4, 1998 to respective counsel and discussed the rulings therein. Regarding the Motion in Limine as to Prior Bad Acts, District Attorney Gammick addressed the Court stating he feels this motion is "moot" and if they come across something, they will produce same to the Court and Defense counsel; Public Defender Specchio requested the Court to "reserve ruling" on this matter. Deputy District Attorney Stanton addressed the Court as to the housing of the Defendant who is presently housed in the Nevada State Prison for security reasons, because the Washoe County Jail is having difficulty with the situation; response by Public Defender Specchio who stated he doesn't have the luxury of driving to Carson City and wants to have the Defendant transferred back to the Washoe County Jail. COURT ORDERED: The Department of Prisons to provide copies of any evaluation to the State and the Public Defender's office and copies be ongoing. Respective counsel to be notified of any disciplinary action or notes taken by prison officials. Deputy District Attorney Stanton addressed the Court, requesting any competency issues be placed on the record. COURT will contact Sheriff Means to discuss the housing of the Defendant. Public Defender Specchio addressed the Court requesting the personnel file of Sgt. Sullivan; response by District Attorney Gammick, who suggested meeting to discuss the matter. Defendant remanded to the custody of the Sheriff. **11/24/98 at 10:00 a.m.** Motion in Limine Re: Reference to Gang Affiliation Motion in Limine Re: Arrest of Defendant **11/24/98 at 1:30 p.m.** Motion to Avoid Death-Prone Jury Motion to Preclude Photographs and Television in the Courtroom Motion for Individual voir dire of Prospective Jurors **3:30 p.m.** Motion in Limine Re: State's DNA Expert **11/25/98 at 10:00 a.m.** Motion in Limine Re: Prior Bad Acts	

CASE NO. CR98-0516 **TITLE: THE STATE OF NEVADA VS. SIAOSI VANISI**

DATE,JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
3/19/98 HONORABLE CONNIE STEINHEIMER DEPT. NO.4 M. Stone (Clerk) D. Phipps (Reporter)	MOTION TO SET TRIAL District Attorney Richard Gammick and Deputy District Attorney David Stanton represented the State. Defendant present with counsel, Public Defender Michael Specchio and Deputy Public Defender Walter Fey. Upon discussion, COURT ENTERED ORDERED setting the jury trial and briefing schedule. COURT FURTHER ENTERED ORDER finding all counsel involved qualified to try a death penalty case pursuant to Rule 250. Defendant remanded to the custody of the sheriff.	7/23/98 4:00 p.m. Status Conf. 11/23/98 10:00 a.m. Pre-Trial Mtns 1/7/99 9:00 am Motion to Confirm/Pre-Trial Motions 1/11/99 10:00 am Jury Trial

CASE NO. CR98-0516 TITLE: THE STATE OF NEVADA VS. SIAOSI VANISI, a.k.a. PE, a.k.a. GEORGE

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
3/10/98 HONORABLE CONNIE STEINHEIMER DEPT. NO.4 M. Stone (Clerk) K. Bokelmann (Reporter)	ARRAIGNMENT District Attorney Dick Gammick and Deputy District Attorney David Stanton represented the State. Defendant present with counsel, Public Defender, Michael Specchio, and Deputy Public Defender, Walter Fey. Defendant handed copy of Information; indicated to the Court that name as set forth on same was his true name; waived reading and stood mute. Upon the Defendant standing mute, Court entered a plea of not guilty to the charges set forth in the Information. Defendant did waive the 60-Day Rule and COURT ORDERED this matter continued for jury trial and a briefing schedule to be set. Upon a notice of intent to seek the death penalty being filed, State's counsel Gammick set forth aggravating circumstances. State's counsel Gammick further reserved right to file any additional aggravating circumstances if necessary. Defendant remanded to the custody of the sheriff.	3/19/98 9:00 am Motion to Set Trial

Case No. CR98-0516 STATE OF NEVADA -VS- SIAOSI VANISI, AKA

DATE,JUDGE OFFICERS OF COURT PRESENT	APPEARANCES - HEARING	CONT'D TO
09/04/98 HONORABLE C O N N I E STEINHEIMER DEPT. NO. 4 S. Hopper (Clerk) E. Nelson (Reporter)	**STATUS HEARING** District Attorney Richard Gammick was present for the State. Defendant was present being represented by counsel, Washoe County Public Defender Michael Specchio. Court reviewed the letters and memos between counsel. Counsel Gammick addressed the Court regarding jury questionnaires and evidence. Court further reviewed personal profile of Sergeant Sullivan. Counsel Specchio addressed the Court regarding custody status of the Defendant at Washoe County Jail/Nevada State Prison. COURT ORDERED: Defendant shall be incarcerated at the Washoe County Jail per Captain Means. Counsel Specchio further addressed the Court regarding a psychiatric evaluation of the Defendant. COURT ORDERED: Matter continued. Defendant was in custody.	09/28/98 9:00 a.m. Status Hearing/ Motion for Psych Eval

Exhibits

Title: **SIAOSI VANISI VS. THE STATE OF NEVADA**

PET: **SIAOSI VANISI** PATY: **SCOTT EDWARDS, ESQ., AND THOMAS QUALLS, ESQ.**
RESP: **THE STATE OF NEVADA** DATY: **TERRANCE MCCARTHY, ESQ.**
Case No: **CR98P0516** Dept. No: **4** Clerk: **M. STONE** Date: **2/23/2005**

Exhibit No.	Party	Description	Marked	Offered	Admitted
A.	Court	Medical Records of Petitioner from Ely State Prison	11/22/04	Objection Overruled	11/22/05
B.	Court	Disciplinary File of Petitioner from the Ely State Prison	11/22/04	Objection Overruled	11/22/05
C.	Court	Facsimile copy of Letter from Dr. A.M. Amezaga, Jr., dated 1/19/05 ***SEALED***	1/19/05	No Objection	1/19/05
D.	Court	Psychiatric Assessment by Dr. Thomas E. Bitkker ***SEALED***	1/27/05	No Objection	1/27/05
E.	Court	Psychiatric Assessment by Dr. A.M. Amezaga, Jr. ***SEALED***	2/18/05	No Objection	2/18/05

Print Date: 2/23/2005

Case No: CR98-0516 Filed: 02/24/98 Type: CRIMINAL
Title: STATE OF NEVADA VS. SIAOSI VANISI At issue: 00/00/00
Dept: 4 Addl Info: Clerk: MB

Trial: 09/07/99 JURY TRIAL

E X H I B I T S

ID	Description	Type	Relshp	Dept	Clr
1	CURRICULUM VITAE - JEFFREY RIOLO	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/NO OBJ.		Admit: 11/24/9		
2	U.S. DEPT. OF JUSTICE FEDERAL BUREAU OF INVESTIGATION - QUALITY ASSURANCE STANDARDS FOR FORENSIC DNA TESTING LAB	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/NO OBJ.		Admit: 11/24/9		
3	THE EVALUATION OF FORENSIC DNA EVIDENCE BY NATIONAL RESEARCH COUNCIL	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/NO OBJ.		Admit: 11/24/9		
4.A	PIECE OF PAPER ACCIDENTIALLY MARKED	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: Disp: E01 11/24/98 WITHDRAWN		Admit: 00/00/0		
4.B	PHOTOGRAPH - FACE OF VICTIM	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/OBJ. Loc: EXHIBIT ROOM		Admit: 11/24/9		
4.C	PHOTOGRAPH - LEFT HAND OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.D	PHOTOGRAPH - TOP OF HEAD OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.E	PHOTOGRAPH - RIGHT CHEEK OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.F	PHOTOGRAPH - TOP OF HEAD	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.G	PHOTOGRAPH - TOP OF HEAD	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.H	PHOTOGRAPH - TOP OF HEAD	01	STATE	4	MT
	Intro: 01/09/99 Off/Obj:		Admit: 00/00/0		
4.I	PHOTOGRAPH - MOUTH OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.J	PHOTOGRAPH - LEFT EYE OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.K	PHOTOGRAPH - RIGHT FACE OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
4.L	PHOTOGRAPH - TOP	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
5	HATCHET (DEMONSTRATIVE)	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/NO OBJ.		Admit: 11/24/9		
6	COMPOSITE BY BRENDA MARTINEZ	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
7	DIAGRAM - UNR CAMPUS	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/11/9		
8	MAP OF AREA	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		

Case No: CR98-0516 Filed: 02/24/98 Type: CRIMINAL
Title: STATE OF NEVADA VS. SIAOSI VANISI At issue: 00/00/00

E X H I B I T S

ID	Description	Type	Relshp	Dept	Clr
9	PHOTOGRAPH - SGT. GEORGE SULLIVAN	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
10.A	PHOTOGRAPH - VICTIM'S WEB BELT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
10.B	PHOTOGRAPH - VICTIM'S RADIO	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
11	DEFENDANT'S MAROON LEATHER COAT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
12	BLACK LEATHER NOTEBOOK OF VICTIMS	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
13	FI CARD BY VICTIM OF WOOD	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
14.A	VICTIMS GLASSES	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
14.B	ENVELOPE WITH GLASSES LENS	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
15.A	VICTIM'S MODEL 21 GLOCK 45	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
15.B	GLOCK MAGAZINE WITH AMMO	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
15.C	13 ROUNDS OF AMMUNITION FROM MAGAZINE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
15.D	1 ROUND OF AMMUNITION FROM MAGAZINE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
16	BOX CONTAINING WHITE PLASTIC BAG W/ VICTIM'S GUN BELT AND EQUIPMENT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
16.A	RADIO OF VICTIM	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
16.B	FLASHLIGHT OF VICTIM	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
17.A	PHOTOGRAPH - CRIME SCENE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
17.B	PHOTOGRAPH - UNR SCENE & TELEPHONE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
17.C	PHOTOGRAPH - INSIDE OF VICTIM'S CAR WITH COFFEE CUP	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
17.D	PHOTOGRAPH - CAR WITH RED YARN MARKING SPOTS ON GROUND	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
18	RPD DISPATCH TAPE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
19	CRIME SCENE VIDEO	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
20.A	PHOTOGRAPH - HATCHET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		

Case No: CR98-0516 Filed: 02/24/98 Type: CRIMINAL
Title: STATE OF NEVADA VS. SIAOSI VANISI At issue: 00/00/00

E X H I B I T S

ID	Description	Type	Relshp	Dept	Clr
20.B	PHOTOGRAPH - CLOSEUP OF HATCHET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
21	HATCHET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: STIPULATED		Admit: 01/14/9		
22	PHOTOGRAPH - WHITE PLASTIC BAG	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
23.A	PHOTOGRAPH - JACKET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
23.B	PHOTOGRAPH - JACKET & GLOVE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
24.A	PHOTOGRAPH - DEFENDANT BEFOR TRIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
24.B	PHOTOGRAPH - DEFENDANT AFTER TRIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/13/9		
24.C	PHOTOGRAPH - BOOKING OF DEFENDANT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
24.D	PHOTOGRAPH - DEFENDANT'S PASSPORT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
25	DEFENDANT'S TAN LEATHER GLOVES	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
26	PHOTOGRAPH - WHITE PLASTIC BAG AT 1098 ROCK	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
27	PHOTOGRAPH - DEFENDANT IN JACKSON'S FOOD MART	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
28	PHOTOGRAPH - GUN IN SLC	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
29.A	PHOTOGRAPH - DEFENDANT'S CLOTHES FROM SLC	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
29.B	PHOTOGRAPH - DEFENDANT'S CLOTHES FROM SLC	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/14/9		
30	DNA TABLES AND RESULTS	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
31.A	PHOTOGRAPH - BEANIE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
31.B	PHOTOGRAPH - BEANIE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
31.C	PHOTOGRAPH - WIG	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
31.D	PHOTOGRAPH - WIG	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
31.E	PHOTOGRAPH - ORR DITCH	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		
31.F	PHOTOGRAPH - BEANIE IN ORR DITCH	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/0		

Case No: CR98-0516 Filed: 02/24/98 Type: CRIMINAL
Title: STATE OF NEVADA VS. SIAOSI VANISI At issue: 00/00/00

E X H I B I T S

ID	Description	Type	Relshp	Dept	Clrk
31.G	PHOTOGRAPH - WIG IN ORR DITCH	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
32.A	PHOTOGRAPH - CAR WITH COVER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
32.B	PHOTOGRAPH - CAR WITHOUT COVER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
33.A	PHOTOGRAPH - INSIDE OF KINIKINI HOUSE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
33.B	PHOTOGRAPH - INSIDE OF KINIKINI HOUSE HALL	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
33.C	PHOTOGRAPH - KINIKINI HOME/GARAGE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
33.D	PHOTOGRAPH - KINIKINI HOME/INSIDE GARAGE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
34.A	PHOTOGRAPH - SWAT OFFICER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
34.B	PHOTOGRAPH - SWAT OFFICER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
35	STIPULATION REGARDING THE CHAIN OF CUSTODY	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
36	JANUARY 1998 CALENDAR	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
37	TIMES OF EVENTS	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj: STIPULATION		Admit:	01/13/99	
38	OVERHEAD TRANSPARENCY - PHOTOGRAPHS OF DEFENDANT IN HIGH SCHOOL	01	DEF:	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/OBJ.OVRLD		Admit:	01/13/99	
A	JURY LIST	01	COURT	4	MT
	Intro: 01/04/99 Off/Obj: STIP.		Admit:	01/04/99	
C	DEFENSE'S VOIR DIRE QUESTIONS (PROPOSED)	01	COURT	4	MT
	Intro: 01/09/99 Off/Obj:		Admit:	00/00/00	
A1-A150	JURY QUESTIONIONNAIRES (JURY SELECTION)	01	COURT	4	MT
	Intro: 01/04/99 Off/Obj: STIP.		Admit:	01/04/99	

Case No: CR98-0516 Filed: 02/24/98 Type: CRIMINAL
Title: STATE OF NEVADA VS. SIAOSI VANISI At issue: 00/00/00
Dept: 4 Addl Info: Clerk: MB

Trial: 11/22/99 HEARING - SENTENCING

This case is exempt from purge

---------- E X H I B I T S ----------

ID	Description	Type	Relshp	Dept	Clrk
1	CURRICULUM VITAE - JEFFREY RIOLO	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj:		Admit:	00/00/00	
2	U.S. DEPT. OF JUSTICE FEDERAL BUREAU OF INVESTIGATION - QUALITY ASSURANCE STANDARDS FOR FORENSIC DNA TESTING LAB	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj:		Admit:	00/00/00	
3	THE EVALUATION OF FORENSIC DNA EVIDENCE BY NATIONAL RESEARCH COUNCIL	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj:		Admit:	00/00/00	
4.A	PIECE OF PAPER ACCIDENTIALLY MARKED	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj:		Admit:	00/00/00	
	Disp: E01 11/24/98 WITHDRAWN				
4.B	PHOTOGRAPH - FACE OF VICTIM	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
	Loc: EXHIBIT ROOM				
4.C	PHOTOGRAPH - LEFT HAND OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.D	PHOTOGRAPH - TOP OF HEAD OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.E	PHOTOGRAPH - RIGHT CHEEK OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.F	PHOTOGRAPH - TOP OF HEAD	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.G	PHOTOGRAPH - TOP OF HEAD	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.H	PHOTOGRAPH - TOP OF HEAD	01	STATE	4	MT
	Intro: 01/09/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.I	PHOTOGRAPH - MOUTH OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.J	PHOTOGRAPH - LEFT EYE OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.K	PHOTOGRAPH - RIGHT FACE OF VICTIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
4.L	PHOTOGRAPH - TOP	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
5	HATCHET (DEMONSTRATIVE)	01	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
6	COMPOSITE BY BRENDA MARTINEZ	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
7	DIAGRAM - AERIAL PHOTOGRAPH	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
8	MAP OF AREA	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	

Case No: CR98-0516 Filed: 02/24/98 Type: CRIMINAL
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ID	Description	Type	Relshp	Dept	Clrk
9	PHOTOGRAPH - SGT. GEORGE SULLIVAN	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
10.A	PHOTOGRAPH - VICTIM'S WEB BELT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
10.B	PHOTOGRAPH - VICTIM'S RADIO	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
11	DEFENDANT'S MAROON LEATHER COAT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/24/99	
12	BLACK LEATHER NOTEBOOK OF VICTIMS	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
13	FI CARD BY VICTIM OF WOOD	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
14.A	VICTIMS GLASSES	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
14.B	ENVELOPE WITH GLASSES LENS	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
15.A	VICTIM'S MODEL 21 GLOCK 45	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/24/99	
15.B	GLOCK MAGAZINE WITH AMMO	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/24/99	
15.C	13 ROUNDS OF AMMUNITION FROM MAGAZINE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/24/99	
15.D	1 ROUND OF AMMUNITION FROM MAGAZINE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit:	00/00/00	
16	BOX CONTAINING WHITE PLASTIC BAG W/ VICTIM'S GUN BELT AND EQUIPMENT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
16.A	RADIO OF VICTIM	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
16.B	FLASHLIGHT OF VICTIM	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
17.A	PHOTOGRAPH - CRIME SCENE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
17.B	PHOTOGRAPH - UNR SCENE & TELEPHONE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
17.C	PHOTOGRAPH - INSIDE OF VICTIM'S CAR WITH COFFEE CUP	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
17.D	PHOTOGRAPH - CAR WITH RED YARN MARKING SPOTS ON GROUND	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
18	RPD DISPATCH TAPE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
18.A	TRANSCRIPT OF RPD 911 DISPATCH TAPE	01	STATE	4	MT
	Intro: 09/27/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/27/99	
19	CRIME SCENE VIDEO	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/22/99	
20.A	PHOTOGRAPH - HATCHET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit:	09/23/99	

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ID	Description	Type	Relshp	Dept	Clrk
20.B	PHOTOGRAPH - CLOSEUP OF HATCHET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/23/99		
21	HATCHET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
22	PHOTOGRAPH - WHITE PLASTIC BAG	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
23.A	PHOTOGRAPH - JACKET	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/23/99		
23.B	PHOTOGRAPH - JACKET & GLOVE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/23/99		
24.A	PHOTOGRAPH - DEFENDANT BEFOR TRIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
24.B	PHOTOGRAPH - DEFENDANT AFTER TRIM	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/23/99		
24.C	PHOTOGRAPH - BOOKING OF DEFENDANT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
24.D	PHOTOGRAPH - DEFENDANT'S PASSPORT	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/00		
25	DEFENDANT'S TAN LEATHER GLOVES	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
26	PHOTOGRAPH - WHITE PLASTIC BAG AT 1098 ROCK	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/23/99		
27	PHOTOGRAPH - DEFENDANT IN JACKSON'S FOOD MART	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/23/99		
28	PHOTOGRAPH - GUN IN SLC	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OOFF'D/NO OBJ.		Admit: 09/27/99		
29.A	PHOTOGRAPH - DEFENDANT'S CLOTHES FROM SLC	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
29.B	PHOTOGRAPH - DEFENDANT'S CLOTHES FROM SLC	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
30	DNA TABLES AND RESULTS	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
31.A	PHOTOGRAPH - BEANIE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
31.B	PHOTOGRAPH - BEANIE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/		Admit: 00/00/00		
31.C	PHOTOGRAPH - WIG	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
31.D	PHOTOGRAPH - WIG	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
31.E	PHOTOGRAPH - ORR DITCH	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
31.F	PHOTOGRAPH - BEANIE IN ORR DITCH	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		

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Title: STATE OF NEVADA VS. SIAOSI VANISI At issue: 00/00/00

---------- E X H I B I T S ----------

ID	Description	Type	Relshp	Dept	Clrk
31.G	PHOTOGRAPH - WIG IN ORR DITCH	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
32.A	PHOTOGRAPH - CAR WITH COVER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
32.B	PHOTOGRAPH - CAR WITHOUT COVER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
33.A	PHOTOGRAPH - INSIDE OF KINIKINI HOUSE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/04/99		
33.B	PHOTOGRAPH - INSIDE OF KINIKINI HOUSE HALL	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/27/99		
33.C	PHOTOGRAPH - KINIKINI HOME/GARAGE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/27/99		
33.D	PHOTOGRAPH - KINIKINI HOME/INSIDE GARAGE	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/27/99		
34.A	PHOTOGRAPH - SWAT OFFICER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/27/99		
34.B	PHOTOGRAPH - SWAT OFFICER	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/27/99		
35	STIPULATION REGARDING THE CHAIN OF CUSTODY	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj:		Admit: 00/00/00		
36	JANUARY 1998 CALENDAR	01	STATE	4	MT
	Intro: 01/08/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/27/99		
37	TIMES OF EVENTS	01	STATE	4	MT
	Intro: 01/13/99 Off/Obj:		Admit: 00/00/00		
38	OVERHEAD TRANSPARENCY - PHOTOGRAPHS OF DEFENDANT IN HIGH SCHOOL	01	DEF:	4	MT
	Intro: 01/13/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/04/99		
39	STIPULATION DATED 1/14/99	01	STATE	4	MT
	Intro: 01/14/99 Off/Obj:		Admit: 00/00/00		
40	BLOW-UP	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
41.A	PHOTOGRAPH OF DOG	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
41.B	PHOTOGRAPH OF DOG	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
42	VIDEO TAPE OF 7-11 ROBBERY	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/24/99		
43.A	"DNA"	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
43.B	"WHERE CAN DNA BE FOUND"	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
43.C	"WHERE DOES DNA COME FROM?"	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
43.D	"DNA - THE MOLECULE"	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
43.E	"ISOLATION"	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		

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---------- E X H I B I T S ----------

ID	Description	Type	Relshp	Dept	Clrk
43.F	"AMPLIFICATION - THE CYCLES"	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
43.G	"PCR - SEQUENCE DETECTION"	01	STATE	4	MT
	Intro: 09/17/99 Off/Obj: OFF'D/NO OBJ.		Admit: 09/22/99		
44	PHOTOGRAPH OF DEFENDANT AT WCJ	01	STATE	4	MT
	Intro: 09/30/99 Off/Obj:		Admit: 00/00/00		
45	VIDEO OF VICTIM'S FAMILY GATHERINGS	01	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
46.A	PHOTOGRAPH OF VICTIM	01	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
46.B	PHOTOGRAPH OF VICTIM	01	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
46.C	PHOTOGRAPH OF VICTIM	01	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
46.D	PHOTOGRAPH OF VICTIM	01	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
46.E	PHOTOGTRAPH OF VICTIM	01	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
47	CERTIFICATE FOR FRESH-SOPH TRACK & FIELD	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj:		Admit: 00/00/00		
48	CERTIFICATE FRESH-SOPH WRESTLING	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj:		Admit: 00/00/00		
49	CERTIFICATE VARSITY FOOTBALL 87-88	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj:		Admit: 00/00/00		
50	CERTIFICATE VASITY FOOTBALL 88-89	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj:		Admit: 00/00/00		
51.A	PHOTOGRAPH OF DEFENDANT	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
51.B	PHOTOGRAPH OF DEFENDANT	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
51.C	PHOTOGRAPH OF DEFENDANT	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj:		Admit: 00/00/00		
52	PHOTOGRAPH - CAPUCHINO HIGH SCHOOL 86-87 FOOTBALL TEAM	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/04/99		
53	DIAGRAM DRAWN BY WITNESS WILEY	01	DEF:	4	MT
	Intro: 10/01/99 Off/Obj: OFF'D/NO OBJ.		Admit: 10/01/99		
54	DIAGRAM WITH QUOTES FROM KERRY KENNEDY CUOMO, AND CORETTA SCOTT KING	01	DEF:	4	MT
	Intro: 10/06/99 Off/Obj: OFF'D/OBJ.SUSTAINED		Admit: 00/00/00		
A	PSYCHIATRIC EVALUATION BY DR. PHILIP RICH	04	COURT	4	MT
	Intro: 11/06/98 Off/Obj: ADMITTED		Admit: 11/06/98		
A	UTAH WITNESS LIST	071	STATE	4	MT
	Intro: 11/24/98 Off/Obj: OFF'D/NO OBJ.		Admit: 11/24/98		
A	RPD TRANSCRIPT OF CHAITRA HANKE DATE 1/13/98 (EXHIBIT TO MTN FOR MISTRIAL)	071	STATE	4	MT
	Intro: 01/15/99 Off/Obj: OFF'D/NO OBJ.		Admit: 01/15/99		

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---------- E X H I B I T S ----------

ID	Description	Type	Relshp	Dept	Clrk
A	JURY LIST	04	COURT	4	MT
	Intro: 01/04/99 Off/Obj: STIP.		Admit:	01/04/99	
B	PSYCHIATRIC EVALUATION BY DR. RICHARD LEWIS	04	COURT	4	MT
	Intro: 11/06/98 Off/Obj: ADMITTED		Admit:	11/06/98	
	Disp: E01 01/19/99 RELEASED PER COURT ORDER				
B	LIST OF ABSENT JURORS	04	COURT	4	MT
	Intro: 01/07/99 Off/Obj: NO OBJ.		Admit:	01/07/99	
B	AUDIO TAPE OF STATEMENT BY CHAITRA HANKE (EXH. TO MTN FOR MISTRIAL)	071	STATE	4	MT
	Intro: 01/15/99 Off/Obj: OFF'D/NO OBJ.		Admit:	01/15/99	
C	VIDEO TAPE OF STATEMENT BY CHAITRA HANKE (EXH. TO MTN FOR MISTRIAL)	071	STATE	4	MT
	Intro: 01/15/99 Off/Obj: OFF'D/NO OBJ.		Admit:	01/15/99	
	Disp: E01 01/19/99 RELEASED PER COURT ORDER				
C	DEFENSE'S VOIR DIRE QUESTIONS (PROPOSED)	04	COURT	4	MT
	Intro: 01/09/99 Off/Obj:		Admit:	00/00/00	
D	JURY SELECTION PEREMPTORY CHALLENGES	04	COURT	4	MT
	Intro: 01/12/99 Off/Obj: STIPULATED		Admit:	01/12/99	
F	BACKGROUND SEARCH INFORMATION TRIAL #2	04	STATE	4	MT
	Intro: 09/20/99 Off/Obj: STIPULATED		Admit:	09/20/99	
F	MEMORANDUM TO GAMMICK/STANTON FROM BOSLER/GREGORY - LIST OF MITIGATION WITNESSES	04	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D		Admit:	09/30/99	
G	PEREMPTORY CHALLENGES TRIAL #2	04	COURT	4	MT
	Intro: 09/21/99 Off/Obj: STIPULATED		Admit:	09/21/99	
H	WASHOE COUNTY PUBLIC DEFENDER PEOPLE VS. SIAOSI VANISI WITNESS LIST	04	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D		Admit:	09/30/90	
I	E-MAIL TO STANTON FROM CRYSTAL CALDERON RE: TWO WITNESSES	04	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D		Admit:	09/30/99	
J	E-MAIL TO GAMMICK/STANTON FROM SPECCHIO RE: WITNESSES/EXHIBITS	04	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/		Admit:	09/30/99	
K	VICTIM IMPACT STATEMENT BY CAROLYN SULLIVAN - REDATED 10/1/99	04	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/OBJECTION		Admit:	10/01/99	
L	VICTIM IMPACT STATEMENT BY DEBRA MANN	04	STATE	4	MT
	Intro: 09/30/99 Off/Obj: OFF'D/OBJ.		Admit:	10/01/99	
M	DOCUMENTS SENT TO THE SUPREME COURT PURSUANT TO ORDER DATED 9/9/99	04	COURT	4	MT
	Intro: 09/15/99 Off/Obj:		Admit:	00/00/00	
V.1	SCR 250 TIME RECORD BY MICHAEL R. SPECCHIO	071	DEF:	4	MT
	Intro: 06/23/99 Off/Obj:		Admit:	00/00/00	

Case No: CR98-0516 Filed: 02/24/98 Type: CRIMINAL
Title: STATE OF NEVADA VS. SIAOSI VANISI At issue: 00/00/00

---------- E X H I B I T S ----------

ID	Description	Type	Relshp	Dept	Clrk
AA	WCSO MEMORANDUM REGARDING DEFENDANTS BEHAVIOR IN THE WCJ	04	STATE	4	MT
	Intro: 05/12/99 Off/Obj:		Admit:	00/00/00	
A1-A150	JURY QUESTIONIONNAIRES (JURY SELECTION)	04	COURT	4	MT
	Intro: 01/04/99 Off/Obj: STIP.		Admit:	01/04/99	
E1-E144	JUROR QUESTIONNAIRES FROM TRIAL #2	04	COURT	4	MT
	Intro: 09/13/99 Off/Obj: STIPULATED		Admit:	09/13/99	

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FILED
NOV 28 2007
HOWARD W. CONYERS, CLERK
By: C. Kepler
DEPUTY CLERK

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

SIAOSI VANISI,

Appellant(s)

vs.

THE STATE OF NEVADA,

Respondent(s)

_____/

Case No. CR98P0516

Dept. No. 4

CERTIFICATE OF CLERK

I hereby certify that the enclosed documents are certified copies of the original pleadings on file with the Second Judicial District Court, in accordance with the Revised Rules of Appellant Procedure Rule D(1).

Dated: **November 28, 2007**

Howard W. Conyers, Clerk of the Court,

By: C. Kepler.

Cathy Kepler, Appeals Clerk

1365

FILED
NOV 2 8 2007
HOWARD W. CONYERS, CLERK
By: DEPUTY CLERK

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

SIAOSI VANISI,
Appellant(s)
vs.
THE STATE OF NEVADA,
Respondent(s)
_____/

Case No. CR98P0516
Dept. No. 4

CERTIFICATE OF TRANSMITTAL

I hereby certify that the enclosed the Notice of Appeal and other required documents (certified copies) were delivered to the Second Judicial District Court mailroom system for transmittal to the Nevada Supreme Court.

Dated: **November 28, 2007**

Howard W. Conyers, Clerk of the Court,

By: C. Kepler

Cathy Kepler, Appeals Clerk

SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

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

Supreme Court No. 50607
District Court Case No. CR980516

RECEIPT FOR DOCUMENTS

TO: Scott W. Edwards
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Howard W. Conyers , District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

11/30/07	Filing Fee Waived: Criminal.
11/30/07	Filed Certified Copy of Notice of Appeal. Appeal docketed in the Supreme Court this day. (Docketing statement mailed to counsel for appellant.)

DATE: November 30, 2007

Janette M. Bloom, Clerk of Court

By: NH
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 50607

District Court Case No. CR980516
10

FILED

JUL 30 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

REMITTITUR

TO: Howard W. Conyers, Washoe District Court Clerk

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

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

DATE: July 19, 2010

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Connie J. Steinheimer, District Judge
Attorney General/Carson City
Law Office of Thomas L. Qualls, Ltd.
Washoe County District Attorney
Scott W. Edwards

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on 7-20-10.

District Court Clerk
HOWARD W. CONYERS

RECEIVED
JUL 28 2010
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

10-18131

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Supreme Court No. 50607

District Court Case No. CR980516

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 20th day of April, 2010.

JUDGMENT

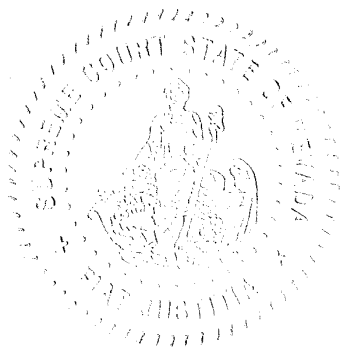
The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "Rehearing denied."

Judgment, as quoted above, entered this 22nd day of June, 2010.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 19th day of July, 2010.

Tracie Lindeman, Supreme Court Clerk

By: A. Ingersoll
Deputy Clerk



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

SIAOSI VANISI Petitioner, v. E.K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. CR98-P0516 Dept.: D4 Date of Hearing: _____ Time of Hearing: _____ Death Penalty Habeas Corpus Case Execution Date Not Scheduled

PETITION FOR A WRIT OF
HABEAS CORPUS (POST-CONVICTION)

The Petitioner, SIAOSI VANISI, by and through undersigned counsel, hereby files this Petition for Writ of Habeas Corpus pursuant to Nevada Revised Statutes sections 34.724 and 34.820. Mr. Blake alleges that he is being held in custody in violation of the Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States of America, the Nevada Constitution and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI.

Procedural Allegations

1. Mr. Vanisi is currently in the custody of the State of Nevada at Ely State Prison in Ely, Nevada, pursuant to a state court judgment of conviction and sentence of death. Respondent E.K. McDaniel is the warden of Ely State Prison, and Catherine Cortez-Masto is the Attorney General of the State of Nevada. The Respondents are sued in their official capacities.

2. On January 14, 1998, Mr. Vanisi was charged by Complaint with: (1) Murder in the First Degree; (2) Robbery with the Use of a Deadly Weapon; and (3) two counts of Robbery with the Use of a Firearm. Ex. 1. On February 3, 1998, the Complaint was amended to include a fifth count: Grand Larceny. Exs. 2, 10. It was alleged that these crimes occurred on or about January 13, 1998. The preliminary hearing occurred on February 20, 1998, and an Information containing the same counts was filed on February 26, 1998. Ex. 3.

3. The State filed its Notice of Intent to Seek the Death Penalty on February 26, 1998. Ex. 186. An Amended Notice of Intent to Seek Death Penalty was filed on February 18, 1999. Ex. 24.

4. Mr. Vanisi's first trial commenced on January 11, 1999, before the Honorable Connie Steinheimer, Second Judicial District Court, and ended in a mistrial on January 15, 1999. Ex. 91; 1/15/99 TT at 934. Mr. Vanisi's second trial commenced on September 13, 1999.

5. Mr. Vanisi did not testify during the proceedings.

6. On September 27, 1999, the jury returned a guilty verdict for murder in the first-degree with use of a deadly weapon, three counts of robbery with use of a deadly weapon and one count of larceny. Ex. 29. The penalty phase of Mr. Vanisi's trial commenced on October 1, 1999. The jury returned a death verdict on October 6, 1999. Ex. 30. The jury found three aggravating circumstances: (1) the murder was committed during the commission of a robbery; (2) the murder was committed upon a peace officer who was engaged in the performance of his official duty, and

the defendant knew or reasonably should have known that the victim was a peace officer; and (3) the murder involved mutilation. Mr. Vanisi was sentenced to death in the Second Judicial District Court, Washoe County, Nevada, Case No. CR98-0516 on November 22, 1999.

7. On November 22, 1999, the court entered the death Judgment. Ex. 187.

8. Mr. Vanisi timely appealed his conviction and sentence to the Nevada Supreme Court on November 30, 1999. Ex. 188. He filed an Opening Brief on April 19, 2000, Exs. 8, 9, raising the following issues:

> I. Judge Steinheimer committed reversible error when she improperly denied Appellant's Pretrial Faretta motion for self-representation.
>
> II. The Reasonable Doubt instruction given in this case improperly reduced the state's burden in violation of Due Process of the law.
>
> III. The imposition of the death penalty in this case was excessive and must be set aside.

9. On May 17, 2001, the Nevada Supreme Court affirmed Mr. Vanisi's conviction in a published opinion, Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). His Petition for Writ of Certiorari to the United States Supreme Court was denied on November 13, 2001. Vanisi v. Nevada, 534 U.S. 1024 (2001). On November 27, 2001, the Nevada Supreme Court issued a Remittitur.

10. Mr. Vanisi filed an In Proper Person Petition for Post-Conviction Relief on January 18, 2002, and a Motion for Appointment of Counsel on January 18, 2002, in the Second Judicial District Court, Clark County, Nevada. Ex. 34. The grounds pled in the Proper Person Petition are as follows:

> A: Denied rights under Fourth, Fifth, Sixth and Fourteenth Amendments as I did not receive Due Process of Law or Effective Assistance of Counsel at trial.
>
> B: Denied rights under Fourth, Fifth, Sixth and Fourteenth Amendments as I did not receive Due Process of Law or Effective Assistance of Counsel on Appeal.

The state district court appointed Marc Picker as post-conviction counsel for Mr.

Vanisi on March 11, 2002. After Marc Picker withdrew, Scott Edwards and Thomas L. Qualls filed a supplemental petition on February 22, 2005, Ex. 36, a reply to the state's response on March 16, 2005, Ex. 37, and McConnell briefing on March 28, 2007, Ex. 38. The claims contained in the supplemental petition are as follows:

> ONE: Petitioner was denied his right to consular contact under Article 36 of the Vienna Convention on Consular Relations, A Violation that must be remedied by this Court under the Supremacy Clause of the United States Constitution by vacating Petitioner's conviction and sentence.
>
> TWO: One of the Three Aggravating Circumstances found in this case – that the murder occurred in the commission of or an attempt to commit robbery, was improperly based upon the predicate felony-murder rule upon which the State sought and obtained a first degree murder conviction, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.
>
> THREE: The District Court's failure to allow Vanisi to represent himself, pursuant to Faretta v. California, resulted in a structural error amounting to "total deprivation of the right to counsel" in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.
>
> FOUR: The District Court erred in refusing to allow trial counsel to withdraw due to irreconcilable conflict, in violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment Rights.
>
> FIVE: Ineffective assistance of trial counsel re: actions during attempt to withdraw as counsel, in violation of petitioner's Fifth,, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution.
>
> SIX: Ineffective Assistance of trial counsel re: failure to put on an adequate defense, including failure to make a closing argument during the guilt phase, in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.
>
> SEVEN: Mr. Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a reliable sentence, as well as under international law, because the Nevada capital punishment system operates in an arbitrary and capricious manner. Const. Amends. V, VI, VIII & XIV; International Covenant on Civil and Political Rights, Art. VI; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21.
>
> EIGHT: Mr. Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Const. Art. VI, Amends. VIII & XIV; International Covenant on Civil and Political Rights, Arts. VI, VII; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21.

NINE: Petitioner's conviction and sentence are invalid pursuant to the rights and protections afforded him under the international covenant on civil and political rights. U.S. Const. Art. VI; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21.

TEN: Mr. Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a Reliable Sentence, as well as under international law, because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Const. Art. VI, Amends. VIII & XIV; U.S. Const. Art. VI; International Covenant on Civil and Political Rights, Art. VII; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21.

ELEVEN: Petitioner's conviction and sentence of death are invalid under the state and federal constitutional guarantees of Due Process, Equal Protection and a Reliable Sentence because Petitioner may become incompetent to be executed. U.S. Const. Amends. V, VI, VIII & XIV; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21.

TWELVE: Petitioner's conviction and sentence violate the constitutional guarantees of Due Process of the Law, Equal Protection of the Laws and a Reliable Sentence and international law because Petitioner's capital trial and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. U.S. Const. Art. VI, Amends. VIII & XIV; U.S. Const. Art. VI; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21; International Covenant on Civil and Political Rights, Art. XIIV; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21.

THIRTEEN: Mr. Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a Reliable Sentence, as well as under international law, because of the risk that the irreparable punishment of execution will be applied to innocent persons. U.S. Const. Art. VI, Amends. VIII & XIV; U.S. Const. Art. VI; International Covenant on Civil and Political Rights, Art. VII; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21.

FOURTEEN: The Eighth and Fourteenth Amendments to the United States Constitution forbid that the courts or the executive allow the execution of petitioner because his rehabilitation as an offender demonstrates that his execution would fail to serve the underlying goals of the capital sanction.

FIFTEEN: The Eighth and Fourteenth Amendments to the United States Constitution forbid that the courts or the executive allow the execution of Mr. Vanisi because his execution would be wanton, arbitrary infliction of pain, unacceptable under current American Standards of Human Decency and because the taking of life itself is cruel and unusual punishment and would violate international law.

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SIXTEEN: Nevada's Death Penalty Scheme allows district attorneys to select capital defendants arbitrarily, inconsistently and discriminatorily, in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

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

EIGHTEEN: Vanisi's sentence of death was imposed under the influence of passion, prejudice, or arbitrary factor(s), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

NINETEEN: Vanisi was not competent during the crime, his level of intoxication and psychosis amounted to legal insanity under the authority of Finger v. State; The legislature's ban on a verdict of "not guilty by reason of insanity" prevented trial counsel from putting on evidence of Petitioner's state of mind, in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

NINETEEN: Trial counsel was ineffective for failing to properly investigate possible mitigating factors and/or to put on witnesses and/or evidence in mitigation during sentencing, including an expert on mitigation, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

TWENTY: But for the individual and collective failures of trial counsel, Siaosi Vanisi would have been able to put on a meaningful defense; therefore, the ineffective assistance of trial counsel has prejudiced Vanisi in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

TWENTY-ONE: Ineffective assistance of appellate counsel for failure to raise all claims of error listed in this petition, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

MCCONNELL: The McConnell decision applies to Mr. Vanisi's case and the court should therefore grant Mr. Vanisi relief on Claim Two.

11. On May 2 and 18, 2005 and April 2, 2007, the state district court conducted an evidentiary hearing, and subsequently affirmed the judgment and death sentence on November 8, 2007. Exs. 39-42.

12. Mr. Vanisi timely appealed on November 28, 2007. Ex. 189. Mr. Vanisi filed his Opening Brief on August 22, 2008 and Reply Brief on December 2, 2008, raising the following issues:

/ / /

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

Vanisi was denied his right to consular contact under Article 36 of the Vienna Convention on consular relations

One of the three aggravating circumstances found in this case: that the murder occurred in the commission of or an attempt to commit robbery, was improperly based upon the predicate felony-murder rule, upon which the state sought and obtained a first degree murder conviction, in violation of the Eighth and Fourteenth Amendments to the United States Constitution

The district court's failure to allow Vanisi to represent himself, pursuant to Faretta v. California, resulted in a structural error amounting to "total deprivation of the right to counsel," in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments

The district court erred in refusing to allow trial counsel to withdraw due to irreconcilable conflict, in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

Ineffective assistance of trial counsel re: actions during attempt to withdraw as counsel, was in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution

Ineffective assistance of trial counsel re: failure to put on an adequate defense, including failure to make a closing argument during the guilt phase, was in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights

Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a reliable sentence, as well as under international law, because the Nevada capital punishment system operates in an arbitrary and capricious manner. Const. Amends. V, VI, VIII & XIV; International Covenant on Civil and Political Rights, Art. VI; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21

Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a reliable sentence, as well as his rights under international law, because the death penalty is cruel and unusual punishment. U.S. Const. Art. VI, Amends. VIII & XIV; International Covenant on Civil and Political Rights, Arts. VI, VII; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21

Vanisi's conviction and sentence are invalid pursuant to the rights and protections afforded him under the International Covenant on Civil and Political Rights. U.S. Const. Art. VI; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21

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Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a reliable sentence, as well as under international law, because execution by lethal injection violates the constitutional prohibition against cruel and unusual punishments. U.S. Const. Art. VI, Amends. VIII & XIV; U.S. Const., Art. VI; International Covenant on Civil and Political Rights, Art. VII.; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21

Vanisi's conviction and sentence of death are invalid under the state and federal constitutional guarantees of Due Process, Equal Protection and a reliable sentence because petitioner may become incompetent to be executed. U.S. Const. Amends. V, VI, VIII & XIV; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21

Petitioner's conviction and sentence violate the constitutional guarantees of Due Process of law, Equal Protection of the laws and a reliable sentence and international law because petitioner's capital trial and review on direct appeal were conducted before state judicial officers whose tenure in office was not during good behavior but whose tenure was dependent on popular election. U.S. Const. Art. VI, Amends. VIII, XIV; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21; International Covenant on Civil and Political Rights Art. XIV; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21

Vanisi's death sentence is invalid under the state and federal constitutional guarantees of Due Process, Equal Protection, and a reliable sentence, as well as under international law, because of the risk that the irreparable punishment of execution will be applied to innocent persons. U.S. Const. Art. VI, Amends. VIII & XIV; U.S. Const., Art. VI; International Covenant on Civil and Political Rights, Art. VII.; Nev. Const. Art. I, §§ 3, 6, and 8; Art. IV, § 21

The Eighth and Fourteenth Amendments to the United States Constitution forbid that the courts or the executive allow the execution of Vanisi because his rehabilitation as an offender demonstrates that his execution would fail to serve the underlying goals of the capital sanction

The Eighth and Fourteenth Amendments to the United States Constitution forbid that the courts or the executive allow the execution of Vanisi because his execution would be wanton, arbitrary infliction of pain, unacceptable under current American standards of human decency, and because the taking of life itself is cruel and unusual punishment and would violate international law

Nevada's death penalty scheme allows district attorneys to select capital defendants arbitrarily, inconsistently, and discriminatorily, in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution

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

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Vanisi's sentence of death was imposed under the influence of passion, prejudice, or arbitrary factor(s), in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution

Because Vanisi was not competent during the crime, his level of intoxication and psychosis amounted to legal insanity under the authority of Finger v. State; the legislature's ban on a verdict of "not guilty by reason of insanity" prevented trial counsel from putting on evidence of Vanisi's state of mind, in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution

Trial counsel was ineffective for failing to properly investigate possible mitigating factors and/or to put on witnesses and/or evidence in mitigation during sentencing, including an expert on mitigation, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments

But for the individual and collective failures of trial counsel, Vanisi would have been able to put on a meaningful defense; therefore, the ineffective assistance of trial counsel has prejudiced Vanisi in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments

Appellant was prejudiced by ineffective assistance of appellate counsel for failure to raise all claims of error listed in this petition, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution

The district court erred in denying Vanisi's motion for protective order, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution

Exs. 43, 44.

13. The Nevada Supreme Court entered an Order of Affirmance in an unpublished opinion on April 20, 2010. Ex. 45. A petition for rehearing was filed on May 10, 2010 which was denied on June 22, 2010. Exs. 46, 175.

14. On August 5, 2010, Mr. Vanisi's counsel filed a Petition for Writ of Habeas Corpus in the Federal District Court, Case No. 3:10-cv-00448-RLH-VPC. Docket No. 1. On April 18, 2011, Mr. Vanisi filed an Amended Petition for Writ of Habeas Corpus. Mr. Vanisi anticipates a grant of a federal stay and abeyance for the purpose of presenting any claims deemed to be unexhausted.

15. Mr. Vanisi is serving a sentence solely based upon the judgment attacked in the instant petition. Mr. Vanisi does not have any future sentences to serve after he completes the sentences imposed by the judgment under attack.

Statement with Respect to Exhaustion

I. Claims Re-Raised in the Instant Petition

16. Mr. Vanisi has re-raised in the instant petition the grounds raised on direct appeal to the Nevada Supreme Court because Mr. Vanisi is entitled to a cumulative consideration of the constitutional errors which infect his conviction and death sentence. This Court cannot perform an appropriate harmless error review without considering the claims that Mr. Vanisi has previously raised. Further, the failure to raise these claims adequately on direct appeal was the result of the ineffective assistance of counsel on direct appeal. Thus, Mr. Vansisi is again raising grounds raised in the post-conviction proceedings for the following reasons:

A. Cause and Prejudice Due to the Ineffective Assistance of First Post-Conviction Counsel

17. Mr. Vanisi is re-raising certain claims in the instant petition due to the ineffective assistance of post-conviction counsel in failing to adequately develop, present, or demonstrate prejudice with respect to those claims. Mr. Vanisi had a right to the effective assistance of counsel under state law during the previous state habeas proceedings, and Mr. Vanisi did not consent to the failure to develop or adequately present any available constitutional claim and did not knowingly and intelligently waive any such claim. Mr. Vanisi did not voluntarily conceal from, or fail to disclose to, appointed counsel, at any stage of the proceedings, any fact relevant to any available constitutional claim. To the contrary, Mr. Vanisi suffered from profound mental illness and was incompetent during the pendency of his proceedings thereby preventing him from assisting counsel.

18. As alleged in Claims One through Three, first post-conviction counsel, were ineffective in their representation of Mr. Vanisi, and their deficient performance was prejudicial. There is a reasonable probability of a more favorable outcome in the post-conviction proceedings if counsel had performed effectively. First post-conviction counsel was ineffective in the following respects:

i. First post-conviction counsel was ineffective for failing to investigate, develop and present evidence in support of their allegation that trial counsel were ineffective in failing to adequately investigate Mr. Vanisi's life history and neurological and psychiatric deficits (Claims One and Two). The facts discovered and presented for the first time by undersigned counsel demonstrate how Mr. Vanisi was prejudiced by first post-conviction counsel's failure. First post-conviction counsel's failure to investigate, develop and present the substantial mitigating evidence contained herein constitutes good-cause for re-raising claims One and Two.

ii. Singly and cumulatively, first post-conviction counsel's failure to develop the factual bases for the issues listed above was prejudicial in Mr. Vanisi's case and there is a reasonable probability of a more favorable outcome if counsel had performed effectively. Mr. Vanisi can therefore demonstrate cause and prejudice to re-raise the aforementioned claims. Law of the case does not bar reconsideration of these claims because the facts are substantially different than they were during the prior habeas proceeding.

B. Cause and Prejudice Due to Limitations Imposed on the Habeas Proceedings by the Judge

19. Good cause exists to excuse any failure to develop the factual basis for Mr. Vanisi's claims based on unreasonable requirement imposed by the habeas judge, which deprived Mr. Vanisi of a full and fair opportunity to litigate his ineffective assistance of trial counsel claims. The habeas judge erroneously found Mr. Vanisi to be competent (Claim Four) and then forced first post-conviction counsel to file an amended habeas petition within a week after making this ruling, despite that first post-conviction counsel had not had time to conduct an extra-record investigation into how Mr. Vanisi had been prejudiced by trial counsel's deficient performance.

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20. Under Strickland v. Washington, 466 U.S. 668, 693-95 (1984), a defendant must demonstrate prejudice in order to succeed on a claim of ineffective assistance of counsel. The ability to present evidence of prejudice is essential to the ability to enforce the right to effective assistance of counsel. Here, Mr. Vanisi's due process rights were violated when he was denied the right to investigate, develop and present evidence that was necessary to show prejudice on his ineffective assistance of trial counsel claims. The district court's improper rulings constitute good cause for re-raising Claims One and Two. The newly developed facts, which are outlined in detail in Claims One and Two, show that Mr. Vanisi was prejudiced by the district court's failure to grant him a full and fair opportunity to investigate, develop and litigate his petition.

C. Fundamental Miscarriage of Justice and Actual Innocence.

21. Mr. Vanisi is entitled to receive a merits review of Claims One and Two because the claim alleges that first post-conviction counsel was ineffective for failing to investigate, develop and present an allegation that Mr. Vanisi was incapable of forming the requisite intent to commit first-degree murder and thereby innocent of first-degree murder;

22. Mr. Vanisi is entitled to receive a merits review of Claim Seven because this claim challenges the validity of one of the aggravating circumstances found by the jury, and Mr. Vanisi can overcome the procedural default bars because he is actually innocent of this aggravating circumstance. E.g., Leslie v. State, 118 Nev. 773, 779-80, 59 P.3d 440, 445 (2002); State v Bennett, 119 Nev. 589, 596-99, 81 P.3d 1, 6-8 (2003). Mr. Vanisi is actually innocent of the death penalty because he has demonstrated a "reasonable probability that absent the aggravator the jury would not have imposed death . . . .," Leslie, 118 Nev. at 780, 59 P.3d at 445. Mr. Vanisi's actual innocence of the death penalty requires this Court to consider his challenges to the invalid aggravating circumstance found by the jury.

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23. This Court must consider all of the errors alleged, both previously raised and not previously raised, in the instant petition in order to resolve the issue of Mr. Vanisi's innocence of the death penalty, arising either from the invalidity of the aggravating circumstances which forms one required basis of death-eligibility, or from the outweighing of the aggravating circumstances by the mass of mitigating evidence which was not presented by previous counsel.

D. Cumulative Consideration

24. Claims One (IAC Penalty), Two (Experts), Three (B) (IAC for Conceding Guilt), Four (A)-(C) (Rohan), Seven (A), (C) (Mutilation), Eight (D) (Reasonable Doubt), Nine (A)-(E) (Vienna Convention), Ten (Faretta), Eleven (Lethal Injection), Twelve (Elected Judges), Eighteen (Finger), Nineteen (Arbitrary and Capricious NV DP), Twenty (Death Qualification of Jurors) and Twenty-One (Prosecutorial Charging) are being re-raised in part in the instant petition because Mr. Vansisi is entitled to a cumulative consideration of the constitutional issues which infect his conviction and death sentence. This Court cannot perform an appropriate harmless error review without considering the claims that Mr. Vansisi has previously raised.

E. Constitutional Considerations

25. Applying any procedural default rulings to bar consideration of any of Mr. Vanisi's constitutional claims would violate Due Process and Equal Protection under the state and federal constitutions, because the Nevada Supreme Court applies or disregards the default rules in its unfettered discretion, and arbitrarily treats habeas petitioners, who are similarly-situated with respect to those rules, inconsistently.

26. The instant petition is timely. It is filed within a reasonable time, one year, of the finality on direct appeal of Mr. Vanisi's initial habeas corpus proceedings. During the pendency of that proceeding, Mr. Vanisi could not attack

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the ineffective assistance of post-conviction counsel who was still representing him, and post-conviction counsel could not litigate claims of her own ineffective assistance of counsel.

II. Claims Raised for the First Time in the Instant Petition

27. Mr. Vanisi has raised new grounds for relief in the instant post-conviction proceedings for the following reasons:

A. Cause and Prejudice Due to the Ineffective Assistance of Post-Conviction Counsel

28. As alleged in Claims One (IAC penalty); Two (Experts); Three (A), (C)-(H) (IAC Guilt), Four (D) (Rohan), Five (Voir Dire), Six (Re-Weighing), Seven (B), (D) (Mutilation), Eight (A)-(C), (E)-(G) (Jury Instructions), Nine (F) (IAC Appellate Counsel re Vienna Convention), Thirteen (Probable Cause); Fourteen (Prosecutorial Misconduct); Fifteen (Stun Belt); Sixteen (Victim Impact); Seventeen (Venue); Twenty-Two (Gruesome Photographs); and Twenty-Three (IAC Appellate Counsel). First post-conviction counsel was ineffective in their representation and counsel's deficient performance was prejudicial. There is a reasonable probability of a more favorable outcome in the post-conviction proceedings if counsel had performed effectively. First post-conviction counsel were ineffective in the following respects:

i. First post-conviction counsel was ineffective for failing to investigate, develop and present the new allegation contained in Claims One and Two that Mr. Vanisi was incapable of forming the requisite intent to commit first-degree murder; Claim Three, namely that: (A) trial counsel was ineffective during voir dire; (C) trial counsel were ineffective for failing to object to the Mutilation Aggravating Circumstance; (D) trial counsel were ineffective for failing to object to unconstitutional jury instructions and request constitutional jury instructions; (E) trial counsel were ineffective for failing to object to prosecutorial misconduct; (F) trial counsel were ineffective for failing to object to the use of a stun belt; and (G)

trial counsel were ineffective for failing to renew their request for a change of venue. Post-conviction counsel's ineffectiveness in failing to discover and present these claims constitutes good cause to raise them for the first time here. There is a reasonable probability that the district court, or the Nevada Supreme Court, would have found trial counsel ineffective if post-conviction counsel had presented the evidence and arguments contained in Claim Three (A), (C)-(H).

ii. First post-conviction counsel were ineffective for failing to argue: that the trial court's denial of Mr. Vanisi's Rohan motion violated equal protection and a reliable sentence (Claim Four (D)); that the trial court singly and cumulatively erred during voir dire proceedings by failing to sustain the for cause challenge of a juror biased against Mr. Vanisi, denying trial counsel's motion for individually sequestered voir dire, and denying defense motions that would have allowed trial counsel to conduct an effective voir dire (Claim Five); that the constitution forbids jurors from imposing a death sentence based merely upon the gruesomeness of the murder (Seven (B), (D)); that the guilt phased jury instructions failed to require the jury to find all of the mens rea elements of first-degree murder (Eight (A)); that the jury instructions failed to require that mitigation be outweighed by aggravation beyond a reasonable doubt (Eight (B)); that the jury instruction defining "mutilation" was unconstitutional (Eight (C)); that the jury instructions improperly forbade the jury from considering sympathy (Eight (E)); that the malice instructions were unconstitutionally vague (Eight (F)); that the jury instructions singly and cumulatively rendered Mr. Vanisi's trial and sentence fundamentally unfair (Eight(G)); that post-conviction counsel failed to raise certain constiuttional violations in connection with the Vienna Convention (Nine(F)); that the failure to submit all of the elements of capital eligibility to the grand jury or to the court for a for a probable cause determined was unconstitutional (Thirteen); that the prosecution committed severe and pervasive misconduct by repeatedly suggesting that the jury was aligned with the prosecution during its innocence/guilt phase

deliberations, the state improperly argued the non-existence of a statutory aggravating factor, the state improperly argued to the jury that "justice" required the death penalty (Fourteen); that the forced use of a stun belt was unconstitutional (Fifteen); that the trial court erroneously denied Mr. Vanisi's Motion to Limit Victim Impact Statements, improperly allowed a friend and co-worker to present victim impact evidence, improperly allowed a holiday family video to be played and improperly allowed the decedent's wife to express opinions about Mr. Vanisi (Sixteen); that trial counsel was ineffective for failing to renew their motion for a change a venue because the trial court erroneously issued pretrial rulings preventing trial counsel from making the record necessary to establish a cause for a change of venue (Seventeen); that the trial court admitted gruesome photographs over trial counsel's objection (Twenty-Two); and that appellate counsel was ineffective for failing to raise cognizable claims (Twenty-Three). There is a reasonable probability that the district court would have granted Mr. Vanisi's first petition if post-conviction counsel had presented the above listed arguments contained in Claims Four (D); Five; Six; Seven (B), (D); Eight (A)-(C), (E)-(G); Nine (F); Thirteen; Fourteen; Fifteen; Sixteen; Seventeen; Twenty-Two; and Twenty-Three.

iii. Singly and cumulatively, first post-conviction counsel's failure to raise the issues contained above was prejudicial in Mr. Vanisi's case and there is a reasonable probability of a more favorable outcome if counsel had performed effectively. Cause and prejudice exists to excuse any purported procedural default from failing to raise the claims in the instant petition in the first post-conviction proceeding.

B. Cause and Prejudice Due to the State's Failure to Disclose Material Exculpatory and Impeachment Evidence

29. Mr. Vanisi and previous counsel were prevented from discovering and alleging certain factual allegations raised in this petition by the state's action in failing to disclose all material evidence in possession of its agents (Claim Eleven).

The state failed to disclose material exculpatory and impeachment information regarding Mr. Vanisi's lethal injection claim. The state's failure to disclose material exculpatory and impeachment information constitutes an impediment external to the defense which establishes cause to excuse any purported state procedural default. Mr. Vanisi suffered prejudice due to the state's suppression of evidence and there is a reasonable possibility of a more favorable outcome if the state had complied with its constitutional disclosure obligations.

C. Cause and Prejudice due to First Post-Conviction Counsel's Conflict of Interest.

30. Petitioner is filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal but less than one year after the appointment of new counsel, who could raise the ineffective assistance of post-conviction counsel under Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997), without suffering from a conflict of interest.

31. The Nevada Supreme Court has recognized in other cases that counsel cannot properly litigate his or her own ineffective assistance because of an inherent conflict of interest, and has recognized that timeliness rules cannot properly bar consideration of a habeas petition while the petitioner continues to be represented by counsel suffering from the conflict of interest, or until new unconflicted counsel represents the petitioner. It would be a denial of equal protection of the laws and due process of law under the state and federal constitutions for this Court to impute a time bar to Mr. Vanisi's case, while other litigants who are similarly situated with respect to this issue have not had consideration of their claims barred under similar circumstances.

32. Mr. Vanisi alleges that the reason for any delay in filing the instant petition was due to first post-conviction counsel's ineffectiveness, due to the habeas court's interference with counsel's ability to perform effectively, and due to the State's failure to disclose material exculpatory and impeachment evidence.

33. Mr. Vanisi is filing the instant petition within a reasonable time, less than one year of the appointment of undersigned counsel who do not suffer from a conflict of interest in litigating the ineffectiveness of first post-conviction counsel as cause to allow the filing of a new petition. The Nevada Supreme Court denied Mr. Vanisi's Petition for Rehearing on June 22, 2010, Ex. 175. Undersigned counsel was appointed to represent Mr. Vanisi in federal court on August 5, 2010, and the instant petition is being filed less than one year from both dates. Mr. Vanisi was unable to file the instant petition sooner since his allegations of "cause" stemming from the ineffective assistance of post-conviction counsel were not ripe at any point in the prior proceedings. By filing the instant petition less than one year after the conclusion of his prior post-conviction proceeding, Mr. Vanisi has been reasonably diligent in raising the claims in the instant petition. Mr. Vanisi's instant petition is therefore timely filed under the state statutory scheme.

34. Any delay in filing the instant petition is not Mr. Vanisi's "fault" within the meaning of Nev. Rev. Stat. 34.726(2). Mr. Vanisi has been continuously represented by counsel since the beginning of the proceedings in this case, and counsel have been responsible for conducting the litigation. Mr. Vanisi has been incompetent the entire time that he has been represented by undersigned counsel who has filed a Rohan motion simultaneously with the filing of this petition. Mr. Vanisi has not committed any "fault," within any rational meaning of that term as used in Nev. Rev. Stat. 34.726(1), in connection with the failure to raise any issue in the litigation. Any failure to raise these claims has been the fault of counsel, which is not attributable to Mr. Vanisi under Pellegrini v. State, 117 Nev. 860, 36 P.3d 519, 526 n. 10 (2001).

D. Constitutional considerations

35. The application of any state procedural rule to bar consideration of Mr. Vanisi's claims would violate his state and federal constitutional rights to Due Process of Law and Equal Protection of the laws, because the Nevada Supreme

Court applies the default rules inconsistently and arbitrarily, in its own unfettered discretion and without relation to any rational standards for exercising that discretion.

Prior Counsel

36. The attorneys who previously represented Mr. Vanisi were appointed by the court. They were:

1. Arraignment

   Michael R. Specchio, Washoe County Public Defender

2. Trial Proceedings

   Michael R. Specchio, Stephen Gregory, Jeremy Bosler, Washoe County Public Defenders

3. Sentencing

   Stephen Gregory and Jeremy Bosler, Washoe County Public Defenders

4. Direct Appeal

   John Reese Petty, Washoe County Public Defender

5. First Post-Conviction and Post Conviction Appeal

   Marc Picker, appointed counsel Scott W. Edwards, Thomas L. Qualls, appointed counsel

37. The grounds upon which Mr. Vanisi is being held unlawfully are listed as "Claims" below.

CLAIM ONE

38. Mr. Vanisi's state and federal constitutional rights to due process, confrontation, effective counsel, a reliable sentence, a fair trial, equal protection, and freedom from cruel and unusual punishment were violated because he received ineffective assistance of counsel during the penalty phase of trial. U.S. Const. amends. V, VI, VIII & XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

39. One of the most important questions that a juror wants answered during the mitigation phase of trial is what led the defendant to commit the crime. In the instant case, the facts of the crime demanded explanation if the jurors were going to consider a life sentence after convicting Mr. Vanisi for killing a police officer with a hatchet. The jury needed to hear about Mr. Vanisi's descent into madness which culminated in this offense.

40. Mr. Vanisi's attorneys, however, failed to investigate obvious and readily available evidence of Mr. Vanisi's sharply declining mental health. Instead they focused their investigation on and presented testimony that: (1) ten years prior to the crime Mr. Vanisi was an admirable student and helpful individual; and (2) during his sister's wedding, which occurred several months prior to the crime, his family members found his clothing and behavior to be different. While Mr. Vanisi's ex-wife testified that "his mental health declined during their two year marriage," she was easily discredited because she still loved Mr. Vanisi, and she was the only source that mentioned this decline.

41. Had trial counsel investigated Mr. Vanisi's mental health, they would have discovered that he was brain damaged and psychotic. They would have learned that he experienced a ten year mental health decline culminating with the offense as verified by thirty collateral sources. See Exs. 92, 95, 97, 98, 100, 101, 104-109, 111-119, 122-124, 128, 129, 131, 132, 153. Had trial counsel investigated Mr. Vanisi's Tongan heritage, they would have learned that Mr. Vanisi's Tongan

relatives had a hard time spontaneously presenting information about Mr. Vanisi's mental health deterioration when not properly prepared for trial. Tongan psychiatrist Mapa Puloka, M.D. explains:

> The early warning signs of mental illness routinely go unrecognized by most Tongan families until their loved one's life becomes unmanageable and the patients become a threat to themselves and others.
>
> Several superstitious beliefs shaped the views of mental health issues within Tongan culture. The mentally ill were often believed to be bothered or possessed by spirits of the deceased. Many families still seek the advice and assistance of traditional healers before coming into my office for professional help, even now. The traditional healers usually gave the mentally ill various potions and herbal bath mixtures.
>
> . . .
>
> Bipolar disorder, delusional disorders, schizo-affective disorder and schizophrenia are very common diagnoses amongst many of my patients here in Tonga, and I've frequently found that they are inherited disorders which run throughout the patients' blood relations.

Ex. 120 ¶¶ 4-5. Had the information described below been presented to competent mental health experts, they would have been able to explain Mr. Vanisi's behavior leading up to the offense and while incarcerated prior to trial. The failure to investigate, develop and present readily available mental health and social history evidence during the penalty phase of trial was deficient and prejudicial to Mr. Vanisi. There is a reasonable likelihood that had the jury known that Mr. Vanisi was insane during the offense, he would not have been sentenced to death.

A. Trial counsel ineffectively argued that Mr. Vanisi's mental health issues mitigated his offense without investigating, developing or presenting the readily available overwhelming amount of evidence to support their defense.

42. The theme of trial counsel's closing argument was that the instant offense was committed by a mentally ill person who first began displaying signs of mental illness during his marriage one year prior to the offense. See 10/6/99 TT 1788-89, 1795, 1801- 03. Of the seventeen collateral witnesses that trial counsel had testify,

however, only one provided evidence that Vanisi was psychotic and she clearly was unprepared to testify. Vanisis's wife DeAnn testified as follows:

> Q. What kind of differences did you see in [Vanisi's] behavior?
>
> A. It was Christmas Event of '95 and it was our first Christmas with our son. And I was trying to make it as nice as possible and trying to get everything done. And he was upset with me and had pushed me to the ground because he didn't want me to be so stressed out over something that he thought was so little.
>
> . . . .
>
> Q. Did his behavior get much more bizarre?
>
> A. Yes, very much.
>
> Q. Including things like wearing costumes?
>
> A. He would want to dress like a superhero. He would wear women's leggings, wanting to be like Superman or something.
>
> . . . .
>
> Q. Did there come other episodes of either bizarre or violent behavior?
>
> A. He would start - - the dressing, he would start to dress weird, I mentioned with the leggings.
>
> Q. Stand in front of a mirror and put wigs on and talk to himself?
>
> A. He would pretend to be different people. He would pose in front of the mirror pretending to be different people, giving himself names. Sunny.
>
> . . . .
>
> A. He didn't really have any sense of reality. He didn't have any responsibility kind of things. He didn't seem to know what was real and what wasn't. He thought he could be a superhero.
>
> . . . .
>
> A. Just like we had gone to Chuck E Cheese one time and a little boy thought he was Superman or something, and he was real happy about that. He wanted to be a superhero, just having no sense of what reality was.

/ / /

10/4/99 TT 1490-99. DeAnn also described incidents of domestic violence and a decline in Vanisi's personal hygiene. Id.

43. In attacking the penalty phase evidence, the state accurately observed that:

> [t]he entirety of the evidence presented by the defense penalty witnesses in this case boils down to a couple of categories. One category I refer to is the high school witnesses. I think that testimony can be fairly surmised as follows: 10, 11, 12 years ago a person by the name of George Tafuna [Vanisi] attended Cappuchino High School in the greater San Francisco area. He was a nice guy. Good student. No problems. That's it.
>
> Next we have a series of family witnesses that have said he was raised in a loving, caring environment. He wasn't abused. That's also offered as mitigating evidence that someone has an abusive childhood. Was it in this case? No.

10/6/99 TT 1827. The state continued:

> But look at what the evidence doesn't show you. There's a huge gap in what they presented to you. It's as glaring as the daylight sun. All the evidence comes up to what I'll refer to as the royal wedding that we heard so much about, and behavior that disrespected the royal family. Was there any other instances that showed mental illness as Dr. Thienhaus described? Anything that was severe manic depression or even mild manic depression?
>
> The only testimony about Mr. Vanisi's behavior prior to getting to Reno in January 1998 was from DeAnn Vanacey, his wife. What did she tell us? Some shocking information, actually. That this person, as Mr. Bosler said – let me get his quote – "he's a decent human being before the murder." Really, Siaosi Vanisi is a decent human being before the murder?
>
> The definition of decency must be obviously a distorted one if that's indeed a claim to be made to you, ladies and gentlemen. Because it is uncontroverted testimony that DeAnn Vanacey left the defendant a year before she made the January 29th, 1998 telephone call to Sergeant Jeff Partyka. By her sworn testimony, a year before, she had left him because he was physically and verbally abusive; that he didn't care for the children because he didn't work and she had to work two jobs to care for the children; that he wanted to go out to clubs and be single, live the single life. That he wore wigs. He was the center of attention.
>
> Ladies and gentlemen, that's not mental illness, that's selfishness. That's being self-centered. And what he's running away from when he comes to Reno is a lifestyle he'd rather forget. It's not love for his children, it's not love for his wife it's an abrogation of his responsibility as a human being. He comes to Reno not in a drug-induced manic state of mind, dressed as a superhero, he comes up here wearing his wig and a racist view of life that he's going to be a Tongan man and take back from the whites.

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

10/6/99 TT 1828-29 (emphasis added). The state then discredited DeAnn Vanacey's mental health testimony as conflicting and biased in favor of her ex-husband whom she still loved. This was particularly prejudicial since she provided the only hint of Mr. Vanisi's mental health decline during the years leading up to the offense. The remaining collateral mental health testimony focused upon one event, the wedding of Vanisi's sister, which occurred several months prior to the crime, where family members clearly had a difficult time describing what was psychotic about Mr. Vanisi's behavior. 10/4/99 TT 1367-94, 1520-22.

44. Had trial counsel conducted an effective investigation, they would have learned that there was overwhelming evidence that Mr. Vanisi suffered from mental illness throughout his childhood, which gradually increased in severity until Mr. Vanisi reached a full blown psychotic state. Because of trial counsel's defective investigation, the state easily was able to discredit trial counsel's defense.

45. The state then discredited the testimony of the only expert, Dr. Ole Thienhaus, a Washoe County Jail psychiatrist who treated Mr.Vanisi while he was incarcerated, but was never provided Mr. Vanisi's social and psychiatric history:

> Mr. Bosler talks to you about mental illness. Ladies and Gentlemen, I know you will very carefully consider the evidence in this case. One thing I ask you is be very, very careful about the evidence you've heard about mental illness.
>
> Where have you seen that evidence and what kind of evidence is it? First of all, Dr. Thienhaus, their witness comes in and says the primary source of information for him to make a diagnosis almost exclusively is from one source and one source only. Who is that? Where is that source from? From the defendant himself. In what situation is Siaosi Vanisi in when he makes the statements to Dr. Thienhaus that draws him to the, quote, diagnosis that he's mentally ill?
>
> First of all, he never diagnosed him as being mentally ill. He diagnosed him as being possibly manic depressive.
>
> Once again, from him. What evidence do you have in this case that would suggest that anything from Siaosi Vanisi might be structured purposefully to manipulate the system for his own good? At

> least two doctors, a psychiatrist and a psychologist, had previously concluded conclusively that that man was malingering, a conscious fabrication to benefit one's self.

10/6/99 TT 1825-26 (emphasis added). Finally, the state contrasted Mr. Vanisi's "cool, calm" behavior during the robberies with Dr. Thienhaus's testimony that a person who is in an extreme episode of manic depression "wouldn't know and be able to operate mentally, to plan and organize." 10/6/99 TT 1832–34, 1837.

46. It was inexcusable for trial counsel to fail to investigate readily available evidence that there were plenty of "other instances that showed mental illness." Mr. Vanisi's ex-wife's testimony could have been supported by testimony from the roommates, friends and relatives who observed Mr. Vanisi's sharp decline, including Toeumu Tafuna, Michael Finau, Edgar DeBruce, Lita Tafuna, Sitiveni Tafuna, Greg Garner, Robert Kurtz, Manamoui Peaua, Miles Kinikini, Peter Finau, Heidi Bailey-Aloi, Terry Williams, Tim Williams, Sione Pohahau, Tavake Peaua, Laura Lui, Le'o Kinikini-Tongi, and David Hales. See Exs. 96, 97, 98, 100, 101 105-107, 109, 111, 114, 116, 117, 122, 123, 128, 129, 132, 155. Further, Sitiveni Tafuna, David Kinikini, Totoa Pohahau, David Kinikini, and Miles Kinikini could have testified that Mr. Vanisi's mental health issues first became noticeable when Vanisi was a teenager. Exs. 101, 112, 124, 155.

B. There was a wealth of readily available evidence demonstrating that Mr. Vanisi has suffered from mental illness since childhood, which increased in severity over time.

47. There was readily available evidence that Mr. Vanisi first began evidencing mental health deficits when he was a child, and that these deficits significantly increased in severity during the ten year period that he was away from home as a young adult. This wealth of information should have been presented to competent mental health experts, such as neurosychologist Jonathan Mack and psychiatrist Siale Foliaki who have, after interviews, testing and reviewing Mr. Vanisi's social history, diagnosed Mr. Vanisi as suffering from, among other things, brain damage

and Schizo-Affective Disorder. See Claim Two. As long as Mr. Vanisi was being taken care of by family members in a controlled environment, he was able to remain within socially acceptable boundaries despite his mental illness. Once Mr. Vanisi left that controlled environment, however, he began a slow descent into the madness that culminated with the offense.

1. Mr. Vanisi first began exhibiting obvious mental health issues as a teenager.

48. Mr. Vanisi's cousin Miles reveals that Vanisi first began exhibiting recognizably strange behavior after being molested by Vanisi's brother Sitiveni. Ex. 155. Vanisi shared a bedroom with Sitiveni when he arrived in the United States from Tonga in 1976 at age six until Sitiveni left home in 1981. Exs. 155 ¶ 3; 101 ¶ 34. Sitiveni, nine years older than Vanisi, eventually became an alcoholic and drug addict. Exs. 155 ¶ 3; 101 ¶ 34. Before Sitiveni left home, he would chase the younger children around the house so that he could catch them and "insert his fingers in [their] buttocks." Ex. 155 ¶ 4. Vanisi's cousin Miles reports:

> I always suspected that Sitiveni sexually abused [Vanisi] because I witnessed Sitiveni chasing [Vanisi] around the house and putting his fingers in his butt, and they shared the same room. [Vanisi] wouldn't have had any protection from Sitiveni at night when they were in the room by themselves.

Ex. 155 ¶ 5. Vanisi confided in his ex-wife in 1995 that he had been sexually molested by Sitiveni [Steven]. Ex. 104 ¶ 9. Miles, Vanisi's cousin, reports that:

> By the time that [Vanisi] was 12 or 13 years old, he frequently and enthusiastically masturbated and ejaculated all over his house and in front of me and his other peers in the family. [Vanisi] never dared do such a thing in front of any of the adults in the family. [Vanisi] was always too concerned about the opinions of his elders and he always wanted to please them and win their approval. I once observed [Vanisi] masturbate and ejaculate on top of the toilet in the bathroom of his home. [Vanisi] then collected his semen from the toilet, placed it in a pill bottle and held it up to show me as he had a big smile on his face. [Vanisi] then told me that his semen was "spanish fly" and that he could get girls to have sex with him by putting it, his semen, in their drinks. I knew from that point forward that [Vanisi] was out of his mind. I also suspect that his sexual behavior was influenced by whatever was going on between him and his brother. No other kids in the family were engaging in these behaviors.

Ex. 155 ¶ 7. Sitiveni also physically beat Vanisi when he believed that he was misbehaving. Ex. 95 ¶ 9.

49. Miles notes that Vanisi had a feminine side to his personality when they were children. Ex. 155 ¶ 8. During family talent shows, Vanisi's aunt Toeumu, who had raised Vanisi as her son, would dress Vanisi up in a wig, hula skirt, and necklace, put lipstick and blush on his face, and have him dance and sing while everyone laughed. Ex. 115 ¶ 11. Miles reports that:

> [Vanisi] often spoke with a gay accent as he walked around flipping his wrists and switching his hips. [Vanisi] often did these things whenever [Vanisi] came out of the shower, while also tucking his penis between his thighs and pretending that he had a vagina. [Vanisi] placed towels over his head to pretend that he had long hair and around his chest pretending to have breasts. [Vanisi] behaved like this so often and in so many situations that I sometimes questioned his sexuality.

Ex. 155 ¶ 8. Dr. Foliaki reports that "[t]he impact of sexual abuse is almost universally viewed as having a major negative psychological impact on the development mental status of children." Ex. 164 ¶ 21.3. Vanisi's psychological status was already fragile as result of his insecure attachment as described below. See pp. 75-79 below. The sexual abuse he experienced increased his confusion and psychological insecurity. Ex. 164 ¶ 21.3.

50. Although Vanisi was the victim, he would have felt great shame for what transpired. Tongans equate incest with homicide, and both are considered equally sinful. Ex. 108 ¶ 27. Tongans believe that incest brings a curse upon the family and any children produced from the interaction. Ex. 108 ¶ 27. Other Tongan families usually ostracize the family where the incest occurred. Ex. 108 ¶ 27. The molestation that Vanisi suffered at the hands of his brother had a profound effect upon Vanisi not just psychologically, but also religiously.

51. Tongan culture is deeply religious and much of Tongan social life centers around church activities. Tongans consider Tonga to be a holy kingdom and the

official crest of Tonga bears the Tongan words for "God and Tonga are my inheritance." Ex. 131 ¶ 15.

52. Vanisi's grandfather was the first family member in Tonga to become a devoted member of the Church of Jesus Christ of Latter-Day Saints (LDS). Ex. 108 ¶ 23; 110 ¶ 2. Since that time, the LDS church has been an important and central part of the family's life. Ex. 108 ¶ 23; 130 ¶ 50. Vanisi's grandfather was the first LDS District Officer on their native island, Ha'api, Tonga. Ex. 108 ¶ 24. Vanisi's uncle Maile was the first LDS Bishop in their country's capital, Nukualofa, Tonga. Ex. 108 ¶ 24. Maile founded an LDS church in Nukuala. Ex. 108 ¶ 25. After Maile immigrated to the United States, he was appointed by the church to be a "Patriarch," which is a sacred and spiritual position that is higher than a Bishop. Ex. 108 ¶ 24. Maile was well known and respected for the work that he performed outside of the church to help people within the Tongan community in Northern California, Salt Lake City and other places within the United States. Exs. 108 ¶ 24; 124 ¶ 24. Several members of Vanisi's family continue to hold different positions within the LDS church.

53. As he entered high school Vanisi developed a very religious and conservative view of the world, often preaching to his younger cousins. Ex. 153 ¶ 17. Vanisi frequently spoke about the bible and would not allow his younger cousins to curse. Ex. 112. ¶ 11. Vanisi tried to influence his cousins to "do the right thing." Ex. 112 ¶ 8. Vanisi always kept a pocket edition of the Book of Mormon with him and never missed a church service or bible study meeting. Ex. 124 ¶ 23. He participated in adult bible study, frequently debated the meaning of various stories and texts, and often preached to his fellow LDS classmates and community members about the Mormon gospel. Ex. 124 ¶ 23; Ex. 96 ¶ 34. Many people in Vanisi's family were certain that Vanisi would go on an LDS mission and become very involved in the LDS Church as an adult in a meaningful way. Ex. 124 ¶ 23. Vanisi stated that he was against drugs, alcohol and foul language, and he was embarrassed by his

brother, Tevita, who was often in trouble. Exs. 130 ¶¶ 61, 83; 112 ¶ 8. Television, cursing, and "talking back" to adults were prohibited in Vanisi's household. Ex. 130 ¶ 50. The children were "seen but not heard," and wore conservative dress. Ex. 130 ¶ 50. Sundays involved a full day of worship. Ex. 130 ¶ 50.

54. While attending high school, however, Vanisi behaved so strangely that he was called "Crazy Pe" and "Crazy George." Ex. 124 ¶ 17. Pe was Vanisi's Tongan nickname, and Vanisi's first name translates to George in English. Ex. 124 ¶ 17. Vanisi's cousin Totoa lived with and attended high school with Vanisi when they were juniors and seniors. Ex. 124 ¶ 2. When Totoa first met Vanisi in 1987, Vanisi appeared nice but it was obvious to Totoa that he was suffering from "mental disturbances." Ex. 124 ¶ 4. Totoa observed Vanisi every day in school and at home and saw him behave bizarrely on countless occasions. Ex. 124 ¶ 4; 122 ¶ 4.

55. Totoa reports that no one in their family addressed Vanisi's mental health issues because of the huge stigma attached to mental illness in the Tongan culture. Ex. 124 ¶ 28. When Vanisi behaved strangely, people ignored him or told him to be quiet. Ex. 124 ¶ 28. Mental illness was a taboo topic and there was a tendency to avoid seeking treatment due to a fear that members of the Tongan community would ostracize the family member. Ex. 124 ¶ 28. Vanisi's mental illness, therefore, went unaddressed.

56. When walking to school with Vanisi, Totoa never knew what was going to occur because Vanisi's strange behaviors were so unpredictable. Ex. 124 ¶ 5. While engaging in normal conversation, Vanisi would suddenly begin yelling and shouting strange things. Ex. 124 ¶ 5. Totoa would look around to try to identify the cause, and after finding no cause would ask Vanisi what had made him yell and shout. Ex. 124 ¶ 5. Vanisi would smile and behave as if nothing had occurred, but it was as if a "switch" had gone "off and on in his head." Ex. 124 ¶ 5. Vanisi also would frequently isolate himself. Ex. 124 ¶ 12. One minute he would talk and laugh with friends, and the next minute he would abruptly walk away, sit by himself and

stare off into the distance. Ex. 124 ¶ 12; 122 ¶ 3. It was like a "switch went off in his mind which made him disengage" unexpectedly and without reason. Ex. 124 ¶ 12. During these trance-like states his eyes would fix on one place, he would have a blank empty look on his face, and he would not respond when people called his name. Ex. 124 ¶ 16; 122 ¶ 5. People would have to touch him to bring him back to reality. Ex. 124 ¶ 16; 122 ¶ 5. Vanisi also displayed a severe blinking and eye squinting problem whereby he would uncontrollably blink and squint without stopping. Ex. 124 ¶ 6.

57. Vanisi often mumbled, spoke and laughed to himself while walking to school, during classes, during sports practice, at movie theaters and at home. Exs. 124 ¶ 7; 122 ¶ 4. Totoa could never understand Vanisi during these occasions because Vanisi frequently changed subjects, spoke out of sequence, and was incoherent. Ex. 124 ¶ 7. When asked why, he would just smile. Ex. 124 ¶ 7.

58. At times Vanisi would suddenly begin doing the "Sipitau," an ancient Tongan warrior dance, without reason, while walking to school, in school hallways, in classrooms, and during football practice. Ex. 124 ¶ 14. In football practice, while the coach instructed the team, Vanisi would speak over him and give his own instructions. Ex. 124 ¶ 10. Although no one listened to him during these outbursts, and the coach just told Vanisi to "close his mouth and pay attention," it was disruptive. Ex. 124 ¶ 10. After practice ended, Vanisi would puzzle his exhausted teammates by sprinting back out on the field and running head-first into the rubber tackle bag. Ex. 124 ¶ 8-9. No one could figure out where he obtained the energy to be so hyperactive and full of energy when everyone else was so exhausted. Ex. 124 ¶¶ 8-9. Vanisi was a starting player on the football team until he made the error of hurting another team member so badly that the team member was hospitalized shortly prior to a game. Exs. 124 ¶ 11; 101 ¶ 32. The coach had instructed everyone to tackle lightly in preparation for the upcoming game. Ex. 124 ¶ 11. After this incident, Vanisi would have to be reminded to get dressed or he would sit on the

bench while everyone was getting dressed and stare off into the distance . Ex. 124 ¶ 11. Vanisi lost his motivation and stopped playing regularly. Exs. 124 ¶ 11; 101 ¶ 32.

59. Vanisi suffered severe mood swings. Ex. 155 ¶ 12. Vanisi would laugh and joke one moment, and then furiously yell the next. Ex. 155 ¶ 12. His cousin Miles recalls an incident where he and their cousin Saia Tafuna were driving with Vanisi when Vanisi was in high school:

> We were all laughing and joking and having a good time, when all of a sudden [Vanisi] became enraged and started yelling at us demanding that we get out of his car and walk home. Saia and I had no idea what we may have said to make him so angry, but we got out of his car and walked home. It was like someone flipped a switch in his brain and changed instantly his mood, but we were used to this. You never knew why, when or what might set [Vanisi's] emotions off.

Ex. 155 ¶ 12. Vanisi also spoke rapidly, and frequently changed topics without explanation, which made conversation difficult. Ex. 112 ¶ 5.

60. Whenever Vanisi's cousin Totoa confronted Vanisi about his bizarre behavior, Vanisi never had an explanation. Ex. 124 ¶ 15. Vanisi complained that he was unable to control his mumbling, laughing, talking to himself, blinking, squinting, shouting and blurting out random thoughts, and he did not know why. Ex. 124 ¶ 15. Vanisi said that he sometimes "just snapped." Ex. 124 ¶ 15.

61. Although Vanisi frequently preached about doing the right thing, his cousin Miles also observed Vanisi to occasionally curse, drink alcohol and have sex in his house while the adults were away. Ex. 155 ¶ 13. Vanisi's cousin Totoa also observed Vanisi smoke what he believed to be marijuana, and sniff a white powdery substance, which he assumed was cocaine, with Vanisi's best high school friend, Jason. Ex. 124 ¶ 20. When Vanisi used cocaine, he went from talking non-stop to being absolutely quiet. Ex. 124 ¶ 20. Vanisi would stop his constant blinking and his blurting out of random words, and instead behave like a normal person. Ex. 124 ¶ 20. It appeared that the cocaine "completely calmed him down and made him act

more normal." Ex. 124 ¶ 20. Totoa suspects that Vanisi and his friend Jason did cocaine whenever they spent time together because when Jason would drop Vanisi off after school, that was the only time that Vanisi displayed an unusual calm. Ex. 124 ¶ 21. Vanisi would not eat dinner, but would go to bed early and sleep uninterrupted, which also was unusual. Ex. 124 ¶ 21. In the morning, however, Vanisi would return to his usual bizarre behavior. Ex. 124 ¶ 21.

62. From a young age, therefore, Mr. Vanisi displayed different personalities: the bizarre-acting "crazy George," the devout LDS student, and the self-medicating drug user. While Vanisi remained in a controlled family environment where he had little responsibility, however, he was able to contain these vastly conflicting personalities. It was not until Mr. Vanisi was forced to leave his family after a failed LDS mission that Vanisi's mental health issues began a sharp decline.

2. Mr. Vanisi fell from grace at age nineteen when he was sent home after a failed LDS mission.

63. Mr. Vanisi's first attempt to exist outside of his controlled family environment failed miserably. Vanisi became an object of disgrace, scorn and humiliation because he failed his attempted LDS mission. After this failure, Vanisi's family pushed him to leave town and attend college. Once Vanisi no longer had his controlled family environment to keep his brain damage and developing psychosis within socially acceptable boundaries, he began his slow descent into madness.

64. By the time Vanisi was nineteen, he had been a deacon, a Sunday school teacher, an "Aaronic Priest," and had received his LDS Patriarchal Blessing. Ex. 95 ¶ 3; 10/4/99 TT 1401. He was admitted into the Temple just prior to being accepted to perform an LDS mission. [NT Interview at 3-4].

65. Vanisi expressed interest to Bishop Nifai Tonga in going on an LDS mission. Ex. 99. It was Bishop Tonga's job to make certain that Vanisi had been regularly attending church and the Aaronic youth program, did not smoke, use drugs or

alcohol, and did not engage in fornication. Id. He had a series of meetings with Vanisi who appeared eager and serious about the process. Id. Bishop Tonga happily recommended Vanisi for an LDS mission, and Vanisi entered the Mission Training Center in Provo, Utah, after which he was to be sent to New York for his mission. Id. Unfortunately, Vanisi failed to mention that, in the prior months, he had impregnated his first cousin. Id.

66. When Vanisi's family learned that he had been approved for an LDS mission after his high school graduation, there were celebrations held for him attended by all family members, friends, the church elders and fellow congregants. Exs. 130 ¶ 75; 101 ¶ 28; 103 ¶ 34. Vanisi was the first boy in the family to graduate from high school and to be chosen for an LDS mission, so the elders placed him on a pedestal. Ex. 101 ¶ 28; 103 ¶ 34. At least two hundred people attended his mission celebration dinner. Exs. 101 ¶ 28; 103 ¶ 34. There were various speeches because it was such a great source of pride, and everyone had high hopes and expectations. Ex. 130 ¶ 75; Ex. 101 ¶ 28; 103 ¶ 34.

67. Vanisi's cousin David Kinikini, who entered the LDS Mission Training Center a few years after Vanisi, explains:

> Life at the LDS Mission Training Center is very difficult mentally and spiritually speaking, but very rewarding. Before anyone is allowed to embark on a church mission, he or she is required to go to the Mission Training Center to receive preparatory training to learn all that is required of them while conducting their mission. There are usually anywhere between five and ten thousand students at the Mission Training Center in Salt Lake City at any given time. There are only three LDS church Mission Training Centers worldwide but the one in Salt Lake is the largest.
>
> Before a student comes to the Mission Training Center, they're given a checklist of things that they have to bring and things that aren't allowed. They are also given a list of rules and expectations of what they are required to accomplish and how they are to conduct their behavior. The Mission Training Center looks just like a college campus with several dorms and classrooms that are large and small. Besides learning about everything that is required of you while conducting a mission, virtually every language in the world is taught for the center for students whose missions carry them abroad to various foreign lands.

> The normal time that it takes to complete the Mission Training Center's preparation process is about three to six weeks for English only instruction, and two to three months for foreign language training. There are three classes each day that usually last for two or three hours a piece, and there are three meal breaks.
>
> Every student is paired up with at least one or two other students, of the same sex, and they stay together throughout their time at the training center. Students are usually not allowed to be alone at anytime.
>
> The Mission Training Center is a very spiritual place and the students are required to stop what they're doing six or seven times a day to pray and commune with the heavenly father. The environment encourages each student to be very introspective and to evaluate their relationship with God and the church. The faculty and staff at the Mission Training Center are dedicated and spiritually in-tune. I always felt a sense that the staff at the Mission Training Center could see right through you and see into your soul when they interact with the students.
>
> An undisciplined and ill-prepared person will have a difficult time at the Mission Training Center. All students are required to achieve a basic mastery of the scriptures and key biblical concepts. Going to bed on time each night is important because everyone has to wake up early each morning to begin their routine. Students are encouraged to discuss their feelings and be open about any temptations so that the staff members can counsel them and get them back on the right path. It's a rigorous experience that is not for the faint of heart.

Ex. 112 ¶¶ 15-20. Vanisi's brother Sitiveni reports that, while at the Mission Training Center, Vanisi became extremely homesick. Ex. 101 ¶ 29. Vanisi wrote letters revealing that he cried every day and wanted to return home. Ex. 101 ¶ 29. Sitiveni believes that what occurred next was in part due to the fact that Vanisi's "heart was heavy from the guilt of lying to the church elders," but also because Vanisi wanted to return home. Ex. 101 ¶ 29; see also Ex. 97 ¶ 10.

68. Vanisi confessed to one of his superiors that he had fornicated with a girl from his home town before going on his mission. Exs. 101 ¶ 29; 96 ¶ 45. Vanisi was expelled from his mission and sent home in disgrace. Exs. 130 ¶ 75; 112 ¶ 11; 108 ¶ 26; 101 ¶ 30. Family members cried when they heard the news. Ex. 101 ¶ 30. His uncle and the family patriarch, Maile, told Vanisi that "he was a disgrace to everyone and that he was no longer a part of the family." Ex. 155 ¶ 14. His failure was a tremendous source of embarrassment and disgrace for Vanisi's family, and Vanisi felt ashamed. Exs. 101 ¶ 30; 130 ¶ 77; 103 ¶ 34.

69. Worse than failing his LDS mission, however, Vanisi and his family discovered that the object of his affection, Heather, was both pregnant and his paternal first cousin. Exs. 130 ¶ 76; 108 ¶ 27; 96 ¶ 45. Vanisi, in fact had been named after Heather's father. She and Vanisi did not know each other because Vanisi's father had abandoned the family shortly before Vanisi's birth. Exs. 130 ¶ 76; 96 ¶ 45. Their interaction was considered to be incestuous under Tongan culture, where first cousins are treated as siblings. Incest, as previously noted, is one of the highest Tongan taboos. Exs. 130 ¶ 76; 108 ¶ 27; 96 ¶ 45. The fact that neither Vanisi nor Heather knew that they were first cousins did not matter. Exs. 108 ¶ 27; 96 ¶ 45. The baby was taken away and raised by maternal relatives, and Vanisi was never a part of his child's life. Ex. 96 ¶ 45.

70. Vanisi's act of incest brought great shame to his family. Ex. 108 ¶ 27. Vanisi's uncle reports:

> When [Vanisi] returned from [his failed mission], I recall that there was a family gathering held where [Vanisi] was made to explain himself. This meeting was attended by both of his mothers, all of his aunts and uncles, his siblings and some cousins. [Vanisi] was crying profusely and he told our family, in a trembling voice, that his secret sin weighed heavily on his heart. He told us that he had to confess to it while he was at the mission center because had he took it with him on his mission, he would not only have been letting down the Church and his family, but God as well. [Vanisi] then begged the entire family for forgiveness, and then he went around and individually addressed everyone. [Vanisi] looked each family member in the eyes, asked them to forgive him, and hugged them all individually.

Ex. 103 ¶ 36.

71. Shortly after his failed mission, Vanisi visited his cousin Miles who describes that "he seemed like he was a little crazy during that visit. [Vanisi] was dressed weird and he spoke like he wasn't completely in touch with reality." Ex. 155 ¶ 14. Vanisi arrived with his hair done in a punk rock style with the sides shaved, and was dressed in strange colorful clothes. Ex. 112 ¶ 11. Vanisi's speech issues were

"ten times worse." Ex. 112 ¶ 12. He frequently changed topics, "spoke off subject" and spoke as if "he was carrying on a conversation with himself." Ex. 112 ¶ 12.

72. Lita, Vanisi's sister-in-law, met Vanisi for the first time during this period when she began dating his brother Sitiveni. Ex. 100 ¶ 1. Upon meeting Vanisi, she immediately suspected that he had mental health problems and wondered if he had hallucinations during her conversations with him. Ex. 100 ¶ 1. Vanisi would converse with himself for more than an hour during which he appeared to be in a trance. Ex. 100 ¶ 3.

73. Vanisi also began "lashing out" and "speaking disrespectfully" to the Tongan head of the family, Maile. Ex. 101 ¶ 30. There was an incident where Vanisi was driving the first car in a funeral procession and drove in circles until he was told by Maile to pull over. Exs. 101 ¶ 31; 100 ¶ 6. When Maile tried to give Vanisi directions, Vanisi "became belligerent and began yelling and speaking in a disrespectful manner." Exs. 101 ¶ 31; 100 ¶ 6. Vanisi then left the car, walked to the highway and hitch-hiked home. Exs. 101 ¶ 31; 100 ¶ 6. For the first time, Vanisi physically fought with the brother who had molested him. Ex. 101 ¶ 30.

74. Although the family ultimately forgave him, Vanisi moved to Los Angeles in part to escape his shame. Exs. 108 ¶ 27; 130 ¶ 77. While Vanisi was the one who thought of the idea of going to Los Angeles to attend college, he changed his mind because he did want to leave his family. Ex. 103 ¶ 37. Vanisi's adopted mother encouraged Vanisi to go to college in Los Angeles so that he could secure both of their futures. Vanisi's biological mother held a farewell barbeque in his honor. Ex. 103 ¶ 38-39. Vanisi's uncle recalls that at the barbeque:

> there first being a family prayer and then the announcement was made that [Vanisi] was leaving. After the announcement, [Vanisi] began crying and saying over and over that he did not want to leave our family and go to L.A. This is when his uncle, Maile, ordered [Vanisi] to obey his mother, Toeumu, and attend college. It was like [Vanisi] had no choice, even though it was clear to me that he really did not want to leave San Bruno.

Ex. 103 ¶ 39. Although Vanisi attended college for a short time in Los Angeles, he did not complete any classes. Ex. 103 ¶ 40; 100 ¶ 5. He did not tell his family that he stopped attending because he did not want to disappoint them. Ex. 153 ¶ 18. It was at this time that Vanisi became obsessed with the idea of becoming a movie star. Ex. 111 ¶ 12. Vanisi also began to distance himself from Tongan culture. Ex. 111 ¶ 12. It appeared that he was trying to "run away from his identity and become someone else." Exs. 111 ¶ 12; 128 ¶ 3. Attorney Lui, Vanisi's in-law and the only Tongan attorney in Nevada reports:

> The Tongan community is a small community that's spread, mostly, throughout the western part of the U.S. Nevertheless news travels quickly because everyone knows someone who is related to you in some way or another. When a person does something shameful, like when [Vanisi] was sent home from a mission after engaging in incest and having a child out of wedlock, it is very difficult for that person to escape their mistake. Anywhere the person goes he will always be reminded of what he's done wrong because someone will know about it. This reality places a tremendous burden upon the person, and I believe this might be what happened to [Vanisi]. He seemed like he could have been trying to run away from his identity and his community.

Ex. 128 ¶ 4. Dr. Foliaki attributes Vanisi denial of his Tongan heritage to a larger problem regarding Vanisi's uncertainty regarding his identity which eventually blossoms into his use of various personalities. Ex. 164 ¶ 3.2.8.

3. Mr. Vanisi's mental health problems began to steadily increase.

A wide variety of collateral sources, including roommates, friends, family members and co-workers provide a consistent account of the deterioration of Vanisi's mental health from the time that he left home until he committed in the instant offense. What initially appears to be eccentric and quirky behavior caused by Vanisi's brain damage and Attention Deficit Hyperactivity Disorder evolves into psychotic behavior upon the adult onset of his Schizoaffective Disorder. See Claim Two; Ex. 163 at 67. Neuropsychologist, Jonathan Mack, Psy.D., reports that "Mr. Vanisi's Psychotic Disorder appeared to begin in his early twenties, which is

consistent with the typical course of a schizophrenic illness." Ex. 163 at 69. Psychiatrist Siale Foliaki, M.D., reports that the extent of Vanisi's "distorted sense of self, his cognitive and emotional deficits, become more apparent once he leaves the rigidly organized structure of family, school and church life." Ex. 164 ¶ 3.3.1.

a. Los Angeles 1990-91

75. When Heidi Bailey met Vanisi at the LDS Church Institute located across the street from El Camino College in Los Angeles, Vanisi first informed her that he had successfully completed his LDS mission, but later admitted to her that his failed mission was one of the greatest disappointments of his life. Ex. 114 ¶ 4. Heidi recalls that she believed Vanisi to be mentally disturbed when they first met. Ex. 114 ¶ 7. Heidi notes that his speech was "all over the place," he "rambled a lot," and spoke rapidly. Ex. 114 ¶ 7. Vanisi was often incoherent, and frequently made himself laugh during "strange and inappropriate times." Ex. 114 ¶ 7. When Heidi's father was in fragile and critical condition in a hospital intensive care unit, Vanisi walked into his room and made loud outbursts completely inappropriate to the gravity of the situation. Ex. 114 ¶ 9.

b. Mesa, Arizona, 1992-93

76. In 1992 Vanisi moved to Mesa, Arizona where he lived with his cousin Michael and a third roommate. Ex. 97 ¶ 11. He changed his name from George Tafuna (the name given to him by his aunt when he began school) to Perrin Vanacey, after a bottle of Lea and Perrins steak sauce. Exs. 97 ¶ 15; 114 ¶ 3; 107 ¶ 4; 111 ¶¶ 13, 16; 106 ¶ 3; 123 ¶ 9. Vanisi denied being Tongan which outraged close-knit Tongan community members. Exs. 97 ¶¶ 9, 12; 114 ¶ 11; 104 ¶ 7; 112 ¶ 37; 128 ¶ 3; 123 ¶ 9; 153 ¶ 19. Vanisi had difficulties remaining employed and could not pay rent. Ex. 97 ¶ 12; 153 ¶ 12.

77. During this time, Vanisi dated and lived with a woman named LeAnna for nine months. Exs. 153 ¶ 2; 97 ¶ 17. LeAnna reports that Vanisi suffered from severe and unpredictable mood swings. Ex. 153 ¶ 14; 106 ¶ 22. "One minute he was happy

and laughing, and the next minute he was sad or angry for no reason." Ex. 153 ¶ 14. LeAnna never knew what to expect. Ex. 153 ¶ 14. Vanisi kept five or six empty two-liter plastic bottles around the livingroom into which he would urinate when he was too tired or too focused on a movie to go to the bathroom. Ex. 153. ¶ 15. These bottles would remain full for days next to the couch where Vanisi sat. Ex. 153 ¶ 15.

78. More disturbingly, Vanisi began to randomly manifest various personalities, with their own accents and mannerisms. Ex. 153 ¶ 3. Vanisi had various photo identification cards with different names for each personality. Ex. 153 ¶ 4. The cards were issued by various colleges so that Vanisi could spend time on their campuses, despite that he did not attend any of the colleges. Ex. 153 ¶ 4.

79. Vanisi also would wear business suits and tell everyone that he was a stock broker despite that he did not have a job. Ex. 111 ¶ 16. He appeared to live in a "fantasy that he created in his mind." Ex. 111 ¶ 16.

80. Vanisi let his short and neat hair grow long and disorderly, and he would wear his hair differently according to the personality that he was displaying. Ex. 153 ¶ 5. Vanisi also began wearing wigs and pantyhose. Ex. 153 ¶ 5.

81. Vanisi would stay out until early morning hours and at times return home with black-eyes and bruises, or smelling of alcohol. Ex. 153 ¶ ¶ 8-9. Vanisi slept very little during this time. Ex. 153 ¶ 11; 116 ¶ 22. Vanisi's friend Terry recalls that Vanisi would wander the streets during all hours of the day and night. Ex. 116 ¶ 22. Vanisi would appear at his house between 2:00 a.m. and 3:00 a.m. and pound heavily on his door. Ex. 116 ¶ 22. Terry and his wife would awake in a panic worried that there was an emergency. Ex. 116 ¶ 22. When Terry would answer the door, Vanisi would say "its just me," and he would enter the apartment and begin talking about insignificant things as if it were the middle of the afternoon. Ex. 116 ¶ 22.

82. During Vanisi's relationship with LeAnna, she became pregnant. Exs. 97 ¶ 15; 153 ¶ 17. Their relationship ended after an argument, three months into the

pregnancy. Exs. 97 ¶ 19. After a conversation with LeAnna's father, a police officer, Vanisi fearfully left town for a couple of months. Ex. 153 ¶ 17. While away, he met and impregnated his now ex-wife, DeAnn during a trip to Lake Havasu. Exs. 153 ¶ 18; 104 ¶ 15.

c. Manhattan Beach, California, 1993-95

83. Vanisi and his friends took a "road trip" to Lake Havasu, Arizona. Ex. 105 ¶ 4. When their car broke down before reaching the lake, a man named "Wolfchief" offered to take Vanisi and his friends to Lake Havasu in exchange for a bottle of rum. Exs. 105 ¶ 4; 106 ¶ 13. While driving, Vanisi asked Wolfchief how he protected himself while on the road. Ex. 105 ¶ 6. Wolfchief pulled out a hatchet and raised it over his head as if he were going to strike Vanisi and his friends. Exs. 105 ¶ 6; 106 ¶ 13. Vanisi's friends became terrified, especially since Wolfchief had told them that he had recently been released from prison for murder. Exs. 105 ¶ 6; 106 ¶ 13. Vanisi's friend Greg recalls that "[t]he weirdest thing about this situation is that [Vanisi] was the only one who wasn't disturbed by Wolfchief's hatchet" despite that Vanisi was in the front seat and Vanisi would be the first to be hit. Ex. 105 ¶ 7. Vanisi's friend Robert reports that Vanisi was nonchalant and laughing while his friends truly believed that they were going to die. Ex. 106 ¶ 13.

84. Vanisi met his ex-wife DeAnn during the Lake Havasu trip. Ex. 104 ¶ 2. When first they met, Vanisi told her that he had approached her because Sam Beckett from the television series "Qauntum Leap" had entered his body and made him approach her. Ex. 104 ¶ 4. Vanisi told DeAnn that his name was Giacomo. Ex. 104 ¶ 7. It was not until two weeks later that DeAnn learned that most people in Los Angeles knew Vanisi as "Perrin." Ex. 104 ¶ 7. At nineteen, DeAnn thought that Vanisi's multiple identification cards with different names was "cool and exciting" instead of a "huge warning sign." Ex. 104 ¶ 6.

85. DeAnn became pregnant with their first son two months later, and her parents expelled her from their home. Exs. 104 ¶ 5; 105 ¶ 11. Vanisi took her in and was a "good provider and very attentive" to her needs. Ex. 104 ¶ 5. DeAnn first discovered that Vanisi was Tongan when he took her home to meet his family after she became pregnant. Ex. 104 ¶ 7. Vanisi married DeAnn in 1994 two months after the birth of their first son. Ex. 104 ¶ 14. Prior to the marriage, DeAnn converted to the LDS religion "because it was important for [Vanisi] that [their] family be involved in the LDS faith." Ex. 104 ¶ 16; see also Ex. 132 ¶ 2. Because DeAnn was Caucasian, only one of Vanisi's family members attended their wedding. Ex. 104 ¶ 14. Vanisi changed their last name to Vanacey because of the anger that he felt for his father abandoning his family, and he insisted that this last name be used on their childrens' birth certificates. Ex. 104 ¶ 15.

86. When Vanisi's friend Heidi returned from her LDS mission, she became good friends with Vanisi's wife DeAnn. Ex. 114 ¶ 10. Heidi observed Vanisi frequently to talk to himself in front of others, oblivious to their presence. Ex. 114 ¶ 13. At times Vanisi would have a serious face as he said strange things that would make people laugh, after which Vanisi would look puzzled. Ex. 114 ¶ 12.

87. Although Vanisi often spoke about becoming rich, he could not keep a job, and did not study or take any courses to acquire skills. Ex. 132 ¶ 6. Trying to become an actor, Vanisi would take on jobs as a "grip on film sets to get his foot in the door, but he couldn't maintain these jobs or position himself to do more." Ex. 132 ¶ 6. Vanisi's magical thinking gave Bishop Hales of the Manhattan Beach Ward of the LDS church the impression that Vanisi "was not in touch with reality." Ex. 132 ¶ 6.

88. Nevada attorney Lui recalls that:

> I continued seeing [Vanisi] when he periodically came to town for visits. [Vanisi] acted strangely whenever he visited my husband, Olisi, and I. [Vanisi] spoke quickly, he rapidly changed subjects, and he rambled a lot when he spoke to the point that I could not always understand what he was trying to say. [Vanisi] also suffered from

> mood swings. [Vanisi] stopped taking care of his personal appearance and hygiene.

Ex. 128 ¶ 5; see also Exs.107 ¶ 7; 106 ¶ 22. Attorney Lui "always suspected that [Vanisi] suffered from mental health problems, and [she] believe[s] that it runs in his family." Ex. 128 ¶ 6. Vanisi's mother, uncle and sister also exhibited the same "dramatic and unexplained mood swings." Ex. 128 ¶ 6; see Claim Two.

89. Vanisi began wearing "weird and inappropriate outfits" in public. Ex. 114 ¶ 14. He enjoyed dressing up like a super-hero in electric blue waist tights and a cape. Ex. 114 ¶ 14. Vanisi appeared to think that the strange looks that he received as he walked down the street in this outfit were because people recognized him as being a famous person. Ex. 114 ¶ 14. Vanisi's friend Heidi firmly believed that Vanisi was mentally unstable, and she notes that he grew worse over time. Ex. 114 ¶ 14.

90. During his time with DeAnn, they would visit Vanisi's family. Ex. 100 ¶ 7. His sister-in-law Lita reports that during these visits Vanisi appeared to be "out of his mind." Ex. 100 ¶ 6. Vanisi was hyperactive, suffered from racing thoughts, constantly spoke without ceasing, and would answer himself before anyone could respond to his questions. Ex. 100 ¶ 7. Vanisi's conversations were always incoherent as he would frequently change subjects and make random comments completely unrelated to the topic. Exs. 100 ¶ 7; 98 ¶ 3. Edgar, Vanisi's future brother-in-law, met Vanisi for the first time and observed that Vanisi was "somewhat off, mentally speaking." Ex. 98 ¶ 2.

91. On one occasion, when Vanisi babysat his brother's children, he piled every mattress from each bedroom on the livingroom floor. Ex. 100 ¶ 8. When his brother returned, Vanisi and the children were jumping up and down on the mattresses while laughing uncontrollably without regard for their safety. Ex. 100 ¶ 8. When asked whether Vanisi had considered that the children might get hurt, Vanisi looked puzzled and stated that he had never considered the possibility. Ex. 100 ¶ 8.

92. In 1994 Vanisi was excommunicated after he decided to "recommit his life" to the LDS Church. Exs. 104 ¶ 17; 132 ¶ 11. During this time, DeAnn was pregnant with their second son and Vanisi decided that he wanted to "get his life right with God" in preparation for the birth. Ex. 104 ¶ 17. Vanisi scheduled a meeting with an LDS Bishop where he confessed "every bad thing that he had ever done in his entire life." Ex. 104 ¶ 17. After the meeting, Vanisi was excommunicated. Ex. 104 ¶ 17. An excommunicated congregant in the LDS church can continue attending church services, but they cannot take part in various ceremonies and church activities. Exs. 104 ¶ 17; 105 ¶ 16. Although Vanisi was allowed to be present during his sons' blessing ceremonies, he was not allowed to "lay hands on them" during either ceremony. Ex. 104 ¶ 17. Vanisi's cousin David had to perform this ceremony on Vanisi's behalf. Exs. 104 ¶ 17; 112 ¶ 24. Coincidently, David was completing an LDS mission in Manhattan Beach at that time. Ex. 112 ¶¶ 21-22. David reports:

> An excommunication can be devastating to a church member and he or she may be ostracized by the church community or their families if the word ever got out. For this reason, excommunications are usually private matters which are kept between the excommunicated member and the church leaders. Privacy is kept to prevent damaging the reputations of excommunicated members while they're working their way back into the priesthood.
>
> Once a person is excommunicated within the LDS church, their records are removed from the church's archives and they are officially no longer considered members of the church. It is like erasing the fallen member's history in the church. However, in most cases the excommunicated member will be given a path to have their membership and records restored.
>
> Excommunicated members are encouraged to continue attending church services, but he or she can only sit and listen, and nothing else. Their input is not welcomed, encouraged or allowed during church meetings of any kind. Excommunicated members are not allowed to participate in various church activities or ceremonies, like Fast Testimony Sunday. During Fast Testimony Sundays members fast, donate money to the poor and share their testimonies with the congregation. Excommunicated members cannot take part in gospel discussions, and they cannot serve in the leadership of any church projects. However, the excommunicated member can continue tithing.
>
> It's a long process for an excommunicated member to regain full membership in the church. It normally takes between two and five years for an excommunicated member to be readmitted to the

> priesthood. The higher the position that the person once held, the longer it takes to get back in. The idea here is that a person who held a high position in the church should know better, and it takes longer for them to get back in because they are held to a higher standard. Adults who have been admitted into the Melchizedek priesthood are held to a higher standard than teenagers or young adults who have only been a part of the Aaronic Priesthood.
>
> The most common reasons for excommunication are adultery, incest and other crimes against children. Another reason can be for repeated violations of the terms of a probationary period.
>
> Confession of sins is an important part of the process to regain membership within the priesthood. The church Bishops are the heavenly father's representatives on earth, and they have the power to forgive someone for their sins and wipe the slate of their soul clean on God's behalf. This is very important, because once you're forgiven you never have to discuss or answer for that sin again. If Siaosi was forgiven for any past sins but still brought them up when he spoke with his Bishop it was only because of his own sense of guilt that he's continuously carrying around in his mind.

Ex. 112 ¶¶ 25-31; see also 106 ¶ 18. Two sins that require the excommunication to be permanent are murder and denying the existence of God. Ex. 106 ¶ 17.

93. After Vanisi's failed mission which resulted in his family forcing him to Los Angeles, his excommunication and inability to "lay hands" on his sons was devastating. Ex. 104 ¶ 18. Vanisi's friend Robert reports that "[a]mongst all of the other pressures in [Vanisi's] life, during the mid-1990s, his excommunication was probably one of the most major issues." Ex. 106 ¶ 19. Initially Vanisi tried to follow LDS directives in order to reestablish his membership, but he eventually stopped trying. Ex. 104 ¶ 18. Vanisi and DeAnn, however, continued to attend church every Sunday throughout their marriage, while Vanisi's mental health began to sharply decline. Ex. 104 ¶ 18.

d. Los Angeles, California, 1995-97

94. Vanisi's former roommate Michael stayed with Vanisi and his wife DeAnn in 1995 while they lived in Los Angeles. Ex. 97 ¶ 16. At this time Vanisi's different identities "began to take on separate lives of their own." Ex. 104 ¶ 20. Vanisi's various personalities became extremely pronounced and were very disturbing to his

friends and family members. Exs. 97 ¶¶ 18-22; 112 ¶ 33; 105 ¶ 17; Ex. 104 ¶ 20; 123 ¶ 10. Dr. Foliaki notes that collateral reports support that Vanisi's mental status, indicative of a Schizophrenic like illness, deteriorates markedly during this time period. Ex. 164 ¶ 3.3.5.

95. Vanisi had about five or six personalities. Exs. 104 ¶ 21; 123 ¶ 10; 106 ¶ 21; 116 ¶ 6. The main personalities were Gia Como, Sonny Brown, Perrin Vanacey and Rocky. Exs. 97 ¶ 17; 105 ¶ 17; 123 ¶ 10; 116 ¶ 6. Vanisi would re-introduce himself and behave as if it were the first time that he had met his friends when he changed personalities. Ex. 116 ¶ 7. Vanisi usually maintained the Perrin personality at home and around his Los Angeles friends. Ex. 105 ¶ 18. Vanisi was Gia Como around the beach and certain neighborhood friends. Ex. 105 ¶ 18. When Vanisi was Gia Como, he spoke in an exaggerated and stereotypical Italian accent and dressed like a mobster. Exs. 97 ¶ 18;104 ¶ 21. When Vanisi was Sonny Brown, he dressed like he was on a safari, wearing a hat, wig and sleeveless jacket or vest. Exs. 97 ¶ 19;104 ¶ 21. The Sonny Brown and Rocky personalities were more erratic and unpredictable. Ex. 105 ¶ 19. They exhibited severe and sudden mood swings and wore scary blank looks on their faces when Vanisi was upset that caused people to fear for their safety. Ex. 105 ¶ 19. Eventually, Sonny Brown and Rocky became the more dominant personalities in Vanisi's mind as his behavior grew more bizarre. Ex. 105 ¶ 19.

96. Michael, who had seen Vanisi prepare for acting roles when they were roommates in 1992, reports that Vanisi's behavior was completely unlike that which occurred during his former pursuit of his acting career. Ex. 97 ¶ 19; see also Exs. 104 ¶ 20; 123 ¶ 11. Vanisi never stated that he was studying for roles or described his behaviors as being part of a film; and he never asked anyone to critique the way that he was acting. Ex. 123 ¶ 11.

97. Vanisi's friend Robert recalls a time when he and his wife went on a weekend getaway with Vanisi and his wife. Ex. 106 ¶ 22. Vanisi was very friendly while

driving up to the lake with each couple in separate cars. Ex. 106 ¶ 22. Once they arrived, however:

> [Vanisi] underwent a sudden, unexplained and extreme shift in his mood. All of a sudden, [Vanisi] began treating my wife and I like we were his mortal enemies. [Vanisi] began speaking to both of us in a very nasty manner, and when we tried to share the food that we all brought to eat, [Vanisi] told us not to touch his food and that we should just eat our own. [Vanisi] acted like he was someone else and not the person we knew and loved. [Vanisi] seemed almost like he had been possessed by an evil spirit. [Vanisi's] facial expressions and whole demeanor had changed to the point that he visibly looked like someone else. My wife and I were so disturbed that we decided to turn around and drove back to Los Angeles and we left Vanisi and DeAnn.

Ex. 105 ¶ 22. Vanisi's friend Terry confirms that Vanisi "might be laughing and having a good time one minute, but then he became angry for no reason and looked at you like he wanted to kill you." Ex.116 ¶ 10.

98. Vanisi's cousin Tavake recalls being in the supermarket with Vanisi when he sat in a motorized cart. Ex. 123 ¶ 13. Vanisi pretended to be blind and crippled, and ran into people and items. Ex. 123 ¶ 13. Vanisi then drove the cart in a circle in the middle of the supermarket for ten minutes. Ex. 123 ¶ 13. Tavake tried to get Vanisi to stop and asked him what was wrong, but Vanisi had a blank look on his face and appeared not to hear him. Ex. 123 ¶ 13. Vanisi did not smile, laugh or make any indication that he was joking and Tavake believed that there was something "seriously wrong." Ex. 123 ¶ 13. When they finally left the store, Vanisi "snapped back into his regular personality" as if "a light switch" had turned on, and behaved as if nothing had occurred. Ex. 123 ¶ 13.

99. Vanisi collected three dozen bizarre hats including a large Chinese hat, a bee keeper hat, a jungle hat, a welder's hat and several others. Ex. 105 ¶ 16. He also owned a dozen wigs, including ones with long hair, short hair, a large afro, dread locks, and colorful clown wigs. Ex. 105 ¶ 16. Vanisi used hats and wigs to transform into his various personalities. Exs. 104 ¶ 20; 116 ¶ 8. Strangers were often disturbed by Vanisi's appearance. Ex. 105 ¶ 16.

100. Vanisi began carrying around a large stick that was about seven feet long and six inches thick. Ex. 105 ¶ 23. Vanisi never harmed anyone with it, but several members of the community were afraid because they believed Vanisi to be crazy and did not know of what he was capable. Ex. 105 ¶ 23.

101. Vanisi would take his cousin David for drives around the Manhattan Beach area where he would stop at various clubs, restaurants and social spots. Ex. 112 ¶ 33. David recalls that:

> When [Vanisi] walked into a location with one outfit and wig he used one name, and then left me at that location and returned later in a different outfit and wig and he'd use another name. [Vanisi] also spoke differently. [Vanisi] took me to a different shop and did the same thing all over again. [Vanisi] kept various clothes, wigs and hats in his old Volkswagen van and he changed outfits in his vehicle. [Vanisi] often changed his outfits and identities several times a night and I found this behavior to be very disturbing.

Ex. 112 ¶ 33. Eventually, David stopped spending time with Vanisi because he found his behavior to be so disturbing. Ex. 112 ¶ 33. Vanisi spoke rapidly and his conversations "were all over the place." Ex. 112 ¶ 34. He constantly changed subjects and was difficult to understand. Ex. 112 ¶ 34.

102. Vanisi had a super hero personality that he called "Super Rocky." Ex. 105 ¶ 20. Vanisi would dress in various colored wrestling or women's tights and wore capes as if he were a super hero. Exs. 97 ¶ 20;104 ¶ 21; 117 ¶ 14; 105 ¶ 20; 123 ¶ 10; 116 ¶ 8. Vanisi would wear this outfit outside the home, exs. 104 ¶ 21; 105 ¶ 20, and "[p]eople in the neighborhood often stared at him and thought that he had lost his mind." Ex. 97 ¶ 22; see also Ex. 116 ¶ 9. Vanisi also would dress in native Tongan clothing like the "Lava Lava" wraps and straw Hawaiian Hula type skirts, and do war dances. Ex. 117 ¶ 19. Vanisi was expelled by certain neighborhood establishments because he scared the customers and staff. Ex. 97 ¶ 22.

103. Vanisi also would wear women's clothing. Ex. 116 ¶ 9. He wore loose dresses, skirts with wigs, high heels and make-up. Ex. 116 ¶ 9. Vanisi would wear this and other outfits to bars, restaurants, supermarkets and stores. Ex. 116 ¶ 9.

104. As a result of Vanisi's issues, people would often encourage him to tell them the details of his various delusions so that they could laugh at his expense. Ex. 105 ¶ 34. Vanisi did not seem to realize that he was the brunt of a joke. Ex. 105 ¶ 34. Vanisi's former roommate Greg reports:

> At first everyone was amused by [Vanisi's] behaviors because it was entertaining. Siaosi was the butt of many jokes amongst our friends. However, as his strange behaviors persisted and grew more disturbing it became obvious to me that [Vanisi] was losing his mind and it was no longer funny to anyone. His behaviors were totally unexplained and unpredictable.

Ex. 105 at 21. Greg found Vanisi's delusions to be "disturbing and painful." Ex. 105 ¶ 34.

105. Vanisi had an imaginary friend named Lester. Exs. 104 ¶ 22; 107 ¶ 7; 105 ¶ 33. Vanisi explained that Lester was a more powerful being than Jesus and the devil because Lester controlled the universe while the other two only controlled earth. Ex. 105 ¶ 33. His wife DeAnn found Vanisi's delusions to be "very unsettling" and at first she tried not to think about them. Ex. 104 ¶ 22.

106. During one episode, in the middle of a conversation with his friend Tim, Vanisi's voice, facial expression and demeanor changed and he stated "Timmy, I will protect you," in a "weird deep voice with a strange look on his face." Ex. 117 ¶ 13. The statement was completely out of place, and shortly afterwards Vanisi "snapped back into his normal self and continued carrying on the conversation like nothing had happened." Ex. 117 ¶ 13. On another occasion, Tim caught Vanisi sitting in a corner in his livingroom with a spotlight shined on him while he sobbed and cried for his mother. Exs. 117 ¶ 17; 105 ¶ 12. As Vanisi cried, he stated "Stop . . , No daddy" as if he were being abused. Ex. 105 ¶ 12. When Vanisi saw Tim, he composed himself and said that he had just been practicing for a part, but Vanisi never provided any details about this supposed role. Ex. 117 ¶ 17. Vanisi's friend Terry recalls that on a weekly basis he would see Vanisi "standing in the corner of a room in his apartment with all of the lights off and crying in the dark." Ex. 116 ¶

11. On other occasions, Vanisi would stand silently in the dark posing like he was a statue for long periods of time. Ex. 116 ¶ 11.

107. Vanisi's home had piles of garbage including plastic bottles and fast food wrappers "laying all over the floor in every room." Exs. 113 ¶ 3; 123 ¶ 17; 107 ¶ 5. Vanisi would collect discarded film set equipment such as light gels, broken microphones, stands, extension cords, wires and other random items. Ex. 105 ¶ 16. Vanisi's explanations for the presence of the garbage did not make sense. Ex. 113 ¶ 3. Vanisi spoke about building a laser beam and using his collection of plastic bottles for a star-ship. Exs. 104 ¶ 23; 105 ¶ 33. Vanisi stated that he was going to use the hundreds of bottles to "help with reentry into the atmosphere and landing the spacecraft." Ex. 105 ¶ 13. Vanisi reported, in a serious manner, that the bottles would serve as protective cushioning and insulation. Ex. 105 ¶ 13. Vanisi also stopped bathing daily, wore dirty clothes and gained a lot of weight. Exs. 104 ¶ 28; 107 ¶ 4; 112 ¶ 23; 113 ¶ 2; 105 ¶ 31; 123 ¶ 14.

108. Between 1996 and 1997, Vanisi began to completely lose control, Ex. 105 ¶ 30, to the point where DeAnn could no longer ignore the problem. He became distant and cold to DeAnn and his children. Ex. 105 ¶ 30. He began to isolate himself and did not show them attention or affection. Ex. 105 ¶ 30. He began speaking in tongues and frequently rambled about biblical topics and the teachings of the prophet Joseph Smith in nonsensical ways. Exs. 105 ¶ 32; 123 ¶ 20. He would suddenly stick out his tongue and perform the Tongan warrior dance. Ex. 105 ¶ 32.

109. Vanisi clearly became "detached from reality." Ex. 104 ¶ 24. He would talk to himself for hours in mirrors, using his rambling one-sided, incoherent form of speech. Ex. 104 ¶ 24. Vanisi began to talk about taking his star-ship into outer space. Exs. 104 ¶ 23; 117 ¶ 16. He often said that he was from another planet, and would say "I'm here . . . but I'm really not here." Ex. 116 ¶ 19. Vanisi said that he was building a spaceship so that he could return home to his galaxy. Ex. 116 ¶ 19.

Vanisi spoke about having invisible alien friends who no one could see except for him. Ex. 116 ¶ 20.These friends were going to accompany him back to his galaxy, where they would go on a mission to see whose god was the greatest. Exs. 116 ¶ 20;123 ¶ 20.

110. Vanisi painted his bedroom walls black and used magic markers and spray paint to draw pictures and write things on all of the walls of his apartment. Exs. 113 ¶ 4; 123 ¶ 18; 104 ¶ 25; 107 ¶ 6. These writings and scribbles were gibberish, exs. 113 ¶ 4; 107 ¶ 6; 105 ¶ 14; 116 ¶ 18, containing weird symbols and Tongan words, ex. 105 ¶ 14. Vanisi drew "several creepy images that were sexual in nature" including an image of Satan having sex with a woman. Ex. 116 ¶ 18. He also placed stickers all over the walls in distinct rows and patterns arranged in a way that made sense only to him. Ex. 105 ¶ 14.

111. Vanisi's friend Robert recalls the day that his wife, Lynn, realized that Vanisi was "out of his mind" and gave Robert an ultimatum that he either stop interacting with Vanisi or she would leave him. Ex. 106 ¶ 28. While Lynn and Vanisi were alone in Vanisi's apartment, Vanisi told Lynn that Robert had been in a horrible accident and that the hospital did not know if he would survive. Ex. 106 ¶ 28. Lynn began crying hysterically until Vanisi began to laugh, at which time he reported that the story was untrue. Ex. 106 ¶ 28. Robert's parents "always thought that [Vanisi] was crazy and they never trusted him." Ex. 106 ¶ 28. When Vanisi came to the house of Robert's parents over the years, he was not allowed to cross the driveway. Ex. 106 ¶ 28. Vanisi's behaviors were so disturbing to his friend Terry's wife that she began to completely avoid him. Ex. 116 ¶ 22.

112. DeAnn finally left Vanisi when Vanisi began filming strange videos of their children in department and furniture stores while instructing them to role play. Ex. 104 ¶ 26. Although these videos were not of a sexual or perverted nature, DeAnn became very uncomfortable about how Vanisi's behavior was negatively affecting their children. Ex. 104 ¶ 26.

113. After DeAnn left, Vanisi's cousin Michael and friend Greg moved into Vanisi's apartment. Ex. 123 ¶ 21. Vanisi's behavior worsened. Exs. 97 ¶ 23; 117 ¶ 11. Vanisi began to complain about losing his sense of time. Ex. 97 ¶ 24. His roommate Michael recalls that this occurred at least three times, the last one occurring shortly prior to the instant offense. Ex. 97 ¶ 24.

114. During a Halloween party, Vanisi brought a hatchet which made many people uncomfortable. Exs. 105 ¶¶ 24-25; 116 ¶ 15. Vanisi went into the courtyard and began chopping down a tree. Exs. 105 ¶ 24; 116 ¶ 15. When asked what he was doing, Vanisi replied that he was "chopping down the tree of life." Exs. 105 ¶ 24; 116 ¶ 15. Vanisi's friends Robert and Greg believe that Vanisi's use of the hatchet was related to the experience that they had when they met Wolfchief on their Lake Havasu trip. Exs. 105 ¶ 25; 106 ¶ 14. Vanisi would practice throwing his hatchet into his bedroom closet door for long periods of time. Ex. 116 ¶ 16. Greg had to convince Vanisi that he would not be allowed by airport security to take the hatchet on an airplane. Ex. 105 ¶ 25.

115. On one occasion, Vanisi became tired of his friend Terry being taken advantage of financially by Terry's friend Jeff. Vanisi began to swing his hatchet at Jeff, coming within inches of Jeff's throat. Ex. 116 ¶ 17. Vanisi pushed Jeff against the wall and informed Terry, "Just say the word and I'll finish him." Ex. 116 ¶ 17. Everyone was horrified, and Terry had to calm Vanisi down and convince him not to harm Jeff. Ex. 116 ¶ 17.

116. Before his wife left, Vanisi had begun taking a diet drug called Fen-Phen in order to lose weight. Exs. 97 ¶ 24; 104 ¶ 41; 117 ¶ 24; 112 ¶ 36; 105 ¶ 22. Vanisi claimed that he had obtained an acting role as an extra in China and that he had to lose weight for this role. Ex. 98 ¶ 6. Vanisi rarely ate, but when he did, he "went on eating binges that were followed by [Vanisi] forcing himself to vomit." Ex. 112 ¶ 36. In the month prior to the instant offense, Vanisi's roommate found hundreds of empty prescription Fen-Phen bottles all over Vanisi's floor, under his bed and piled

up on his dresser. Exs. 97 ¶ 25; 98 ¶ 6; 111 ¶ 20; 123 ¶ 19. The medication would keep him up for days at a time. Exs. 97 ¶ 27; 104 ¶ 42; 123 ¶ 19; 105 ¶ 22. Fen-Phen was banned in late 1997 at which point Vanisi began using illicit drugs. Exs. 97 ¶ 27; 98 ¶ 6. Vanisi daily used marijuana, alcohol, "crytal meth," and other drugs such as cocaine. Exs. 97 ¶ 29; 117 ¶ 20.

117. It was during this time that Vanisi attended his sister Sela's wedding and his family members had the opportunity to observe that Vanisi had become psychotic. Exs. 95 ¶ 11; 115 ¶ 14; 92 ¶ 10. While some of Vanisi's family members testified during Vanisi's penalty phase hearing about how upsetting Vanisi's behavior was, the language barrier and lack of preparation made them ill equipped to describe Vanisi's psychosis during trial, and relatives only were able to report that Vanisi "spoke like he was out of his mind and out of touch with reality." Ex. 115 ¶ 14. Although he initially wore a suit, he changed clothes several times. At one point, he wore a cowboy outfit. Ex. 92 ¶ 10. While wearing this outfit, he spoke with a southern drawl. Exs. 92 ¶ 10; 115 ¶ 14. He then changed into a wrestling outfit. Ex. 100 ¶ 9. Finally, he wore a "Crocodile Dundee" outfit. Ex. 98 ¶ 4. He disrupted the wedding by climbing on top of the speakers and insulting the members of the royal family of Tonga who were in attendance. Exs. 95 ¶ 11; 115 ¶¶ 14-15; 153 ¶ 23. As the evening progressed, his relatives realized that "something was seriously wrong" with Vanisi. Ex. 115 ¶¶ 14-15; 100 ¶ 10.

118. Vanisi's roommate Michael told Vanisi to seek professional help. Ex. 97 ¶ 22-23. Each time Michael spoke to Vanisi about seeking help, Vanisi would go into his room, close the door, and begin talking as if he were on the phone with his doctor. Ex. 97 ¶ 23. One day Michael entered Vanisi's room during one of these conversations and saw that Vanisi was holding an "in depth and serious conversation with a bottle of Dr. Pepper." Ex. 97 ¶ 23. This was when Michael "had no doubt that [Vanisi] was totally out of his mind." Ex. 97 ¶ 23.

119. Although Vanisi supposedly spent a week in China a couple of weeks prior to the instant offense, Vanisi's friends and family members do not believe that he actually traveled to China. Exs. 104 ¶ 39; 105 ¶ 29. Vanisi never provided a name of the movie that he traveled to China to participate in as an extra or a description of his part. Exs. 104 ¶ 39; 105 ¶ 28. He did not take any photographs depicting his time in China, which is something that he would always do in the past when on a trip. Exs. 104 ¶ 39; 105 ¶ 28. Despite Vanisi's desire to become a successful actor in order to impress his family, he mostly performed unpaid intern work as a "grip"in hopes that it would possibly open doors to an acting career. Ex. 104 ¶ 37. In ten years, however, he only obtained two small acting roles. Exs. 104 ¶ 38; 105 ¶ 27. One was as an extra in a cable movie, and the other was a starring role in a Miller Light beer commercial where he played a cheerleader who twirled a baton on his toes. Exs. 104 ¶ 38; 105 ¶ 27. Nancy Chaildez, formerly of Shirley Wilson's Entertainment Agency and Vanisi's agent, notes that she did not book Vanisi for a role in China. Ex. 156 ¶¶ 2-4. Nancy reports that several actors have severe mental health problems, and that the different personalities that Vanisi would display when he came to her office were completely unrelated to any acting work. Ex. 156.

120. Just prior to the instant offense, Vanisi began working for his neighbor, an elderly woman who paid him to drive her to work. Ex. 97 ¶ 36. Eventually, she began paying Vanisi to have sex with her for two hundred dollars a session. Ex. 97 ¶ 36. Although Vanisi found her obesity to be very unattractive, he used the money to support his drug habit. Exs. 97 ¶ 35; 106 ¶ 26; 116 ¶ 26. Vanisi was smoking methamphetamine during this time. Ex. 116 ¶ 25. During one of these sessions, the woman had a heart-attack and died. Exs. 97 ¶ 35; 116 ¶ 26. Vanisi saw her clutch her chest and reach for the phone prior to dying. Ex. 97 ¶ 37. Vanisi's reaction was to return to his apartment and begin talking to his bottle of Dr. Pepper. Ex. 97 ¶ 37.

121. Prior to this incident, Vanisi had already developed a "severe case of paranoia and hyper vigilance." Ex. 97 ¶ 38. Vanisi constantly looked around,

shifted his eyes and appeared to be nervous and sweating. Ex. 97 ¶ 38. After his neighbor died, Vanisi expressed his paranoid belief that the police were going to arrest him despite that his neighbor's death was attributed to natural causes. Exs. 97 ¶ 34; 123 ¶ 22; 116 ¶ 26. Vanisi's cousin Tavake recalls that although there were no signs of "foul play," Vanisi was certain that the police would determine a way to blame him for her death. Ex. 123 ¶ 22.

122. Since high school, Vanisi believed that the police treated him and other Pacific Islanders discriminatorily. Exs. 97 ¶ 30; 123 ¶ 15. Vanisi's feelings about this intensified when he became an adult. Ex. 97 ¶ 32. Vanisi frequently complained about being stopped by the police. Exs. 105 ¶ 35; 106 ¶ 26; 123 ¶ 15. Vanisi believed in resisting what he perceived to be unjust stops. Exs. 97 ¶ 33; 105 ¶ 35; 116 ¶ 24. At first Vanisi would laugh when he was beaten by the police. Ex. 117 ¶ 23. With each encounter, beating, or incident of harassment, however, his animosity towards the police grew. Exs. 97 ¶ 35; 183; 185; 191.

123. When Michael first lived with Vanisi in 1992, there were several occasions when Vanisi was beaten by police officers. Ex. 97 ¶ 33. Michael constantly saw black and blue bruising and scars on Vanisi after these occasions. Ex. 97 ¶ 33. On one occasion, Vanisi and his friends were stopped by the police after driving to a secluded residential community to urinate. Ex. 105 ¶ 36. While his friends responded respectfully, Vanisi became belligerent and told the police that he would not answer their questions. Ex. 105 ¶ 36. One of his friends spoke over Vanisi and the officers eventually let them go with only a warning. Ex. 105 ¶ 36.

124. In November 1995, Vanisi engaged in a brawl at a bar during which he fought with several men after they laughed at him because someone had turned the lights out while he was using the bathroom. Exs. 97 ¶ 34; 184. After Vanisi and his friend left the bar, Vanisi was stopped by the police because two of the individuals that he had fought had been off duty police officers. Ex. 97 ¶ 35. When Vanisi refused to exit his car, the police broke his car window and began spraying him

with mace, which had no effect. 105 ¶ 37. The police then cut off his seat-belt and dragged him out of the car after beating him with night sticks. Ex. 97 ¶ 35; 105 ¶ 37; 116 ¶ 24; 184. Vanisi, who did not fight back, "was a bloody mess, with cuts and bruises all over his head, face and torso." Exs. 97 ¶ 35; 105 ¶ 37; 116 ¶ 24.

125. After his neighbor's death, Vanisi began to complain that everyone was watching him and was against him. Ex. 123 ¶ 22. He appeared to be "trapped in a cage by all of his paranoias." Ex. 123 ¶ 22. Vanisi appeared confused and distant, frequently shifting his empty looking eyes, and staring off into space with a blank look. Ex. 123 ¶ 23. His words were more incoherent. Ex. 123 ¶ 23. Vanisi rambled about his failed relationship with his wife and his regrets over not being close to his family. Ex. 123 ¶ 22. Vanisi "seemed like the walls in his life were all closing in on him and he was losing himself to all of his worries and fears." Ex. 123 ¶ 22. Vanisi's cousin, Tavake, suggested that Vanisi stay with him in Reno so that he could reconnect with family and "mentally reset" himself. Ex. 97 ¶ 39; 123 ¶ 24. Within two weeks of being in Reno, Vanisi killed an officer with a hatchet.

/ / /

f. Reno, Nevada, 1997

126. Dr. Foliaki reports that Vanisi's adolescent obsession that the police were purposefully harassing him and racially profiling him grew in intensity as Vanisi became more mentally disordered:

> This obsession grows in intensity and the more mentally disordered Mr. Vanisi becomes he begins to form an obsession of a delusional nature about killing a police officer.

Ex. 164 ¶ 3.4.1

127. Each time Vanisi's cousin Le'o saw Vanisi in Reno during the week prior to the offense, "he seemed like he was out of his mind." Ex. 129 ¶ 16. Le'o wondered if Vanisi was on drugs. Ex. 129 ¶ 14. His relatives called him "Fakasesele" which means "crazy" in Tongan. Ex. 113 ¶ 18.

128. Vanisi's cousin Renee Peaua spent the most time with Vanisi during that week. Ex. 113 ¶ 6. Renee reports that when Vanisi first arrived, relatives were happy to see him. Ex. 113 ¶ 6. Within days, however, everyone began to avoid Vanisi because it was clear that he was "not in his right mind." Ex. 113 ¶ 6. Whenever Vanisi wore wigs, Renee knew that he was in "crazy mode." Ex. 113 ¶ 7.

129. While at the store, Vanisi informed family members that he wanted to buy a gun. Ex. 118 ¶ 7. Once Vanisi learned that he could not buy a gun without a license, he purchased a hatchet. Ex. 118 ¶ 7. Vanisi appeared at an LDS dance with the hatchet and began "dancing around like a native, chanting strange sounds, and swinging the hatchet." Ex. 113 ¶ 20; 119 ¶ 4. Relatives tried to convince him to put down the hatchet because he was scaring people, but he continued to dance wildly and yell. Ex. 113 ¶ 62. Renee reports that Vanisi did not sleep during most of this time period. Ex. 118 ¶ 4.

130. A neuropsycholgist, Dr. Mack, reports that:

> An in-depth review of the history of Siaosi Vanisi reveals an individual who was in a state of chronic mental illness at the time of the homicide of Sergeant George Sullivan on 1/14/1998. The history makes it clear that Mr. Vanisi had early onset ADHD and a number of psychosocial losses and traumas in childhood. The history also makes it clear that in

> his mid-20's Mr. Vanisi had a psychotic break and developed a schizophrenic disorder that is best characterized as a Schizoaffective Disorder due to both a chronic schizophrenic presentation that is separate and apart from his mood disorder, but concomitant with a Bipolar One Disorder that is primarily hypomanic/manic, with much less frequent and remote bouts of depression.

Ex. 163 at 67. Dr. Mack further reports that:

> At the time of the homicide Mr. Vanisi had delusional and perseverative thinking about the need to kill a police officer; he had been talking about an imaginary friend Lester; he had a preoccupation with religious ideas/religiosity, flight of ideas, and emotional lability. He appeared to essentially enter into a state of schizophrenia and persistent hypomania/mania in his early twenties.

Ex. 163 at 67.

C. Trial counsel ineffectively failed to investigate, develop and present the mitigating evidence contained in this claim.

131. While it is clear from trial counsel's file that they worked very hard to try to secure Mr. Vanisi a fair trial, it is equally clear that at the time of the trial they lacked the necessary knowledge to competently investigate mental health issues and thereby failed to devote the necessary time and funds towards performing a constitutionally effective mitigation investigation. They completely failed to recognize the significance of the mental health information that was uncovered, failed to follow up on numerous mental health investigative leads, and failed to provide the readily available and essential background information to a mental health expert for a competent assessment of Mr. Vanisi's mental health status. Mr. Vanisi hereby incorporates Claim Two as if fully pled herein.

132. Mr. Vanisi's investigator, Crystal Calderon-Bright, reports that Mr. Specchio, who was in charge of Mr. Vanisi's case, did not allow the investigators to create a comprehensive social history. Ex. 127 ¶ 7. Mr. Specchio characterized Mr. Vanisi as a "dead man walking" and thought that a death verdict was inevitable. Ex. 127 ¶ 5, 8. Crystal reports that Mr. Specchio did not see the point of spending money to accomplish tasks that he believed would not change the outcome of Mr. Vanisi's case. Ex. 127 ¶ 5. As a result, Mr. Specchio did not give Crystal permission to

travel to interview Mr. Vanisi's family, teachers and friends until shortly prior to the first trial. Mr. Specchio also did not allow Crystal to travel to Utah where a large number of Mr. Vanisi's family members live, and where Mr. Vanisi's arrest occurred. Ex. 127 ¶¶ 6-7. Mr. Vanisi's paternal family was never interviewed because they live in Tonga. Id. at 6.

133. A prior deputy public defender confirms that it was always difficult to convince Mr. Specchio to approve funds to hire experts, incur witness fees or to spend money on investigation because the Early Case Resolution program was enacted to save the County money by avoiding the costs of investigation and trials. Ex. 179 ¶¶ 3, 5. The program often resulted in the County's budget being placed ahead of the client's legal interests. Ex. 179 ¶ 3. The deputy public defenders were constantly pressured to negotiate cases pursuant to the Early Case Resolution program, and Mr. Specchio spent as little money as possible on cases that did not resolve in a plea bargain. Ex. 179 ¶ 3. Attorney Walter Fey reports:

> Although not included in the Early Case Resolution program, the more serious cases defended by the office were also subject to fiscal constraints and considerations. An office philosophy emerged to process cases and resolve them as cheaply and as quickly as possible.
>
> It is my opinion that many clients represented by the Washoe County Public Defender's Office during the time I was a trial deputy did not receive the zealous advocacy they were entitled to under the Sixth Amendment.

Ex. 179 ¶¶ 6-7.

134. Within one month of the offense, Mr. Specchio concluded that Mr. Vanisi's guilt was "indefensible" after reviewing the discovery and listening to Mr. Vanisi's admissions. Ex. 147 ¶ 17. This recognition should have prompted Mr. Specchio to put his time and financial resources into developing a strong mitigation case.

135. Mr. Specchio was first put on notice that Mr. Vanisi suffered from mental health issues on January 26, 1998, after speaking with Mr. Vanisi's ex-wife DeAnn, who described Vanisi's actions of wearing tights and wigs and acting like a superhero. Ex. 147 at 7. In February, Mr. Specchio was put on notice that prior to

the offense, Mr. Vanisi had reported to his friends that he "was going crazy." Ex. 147 at 20.

136. On March 4, 1998, it was strongly recommended in writing to Mr. Specchio that he focus on mitigation:

> I've been talking about your client, Mr. Vanisi, with the people at the Center for Capital Assistance in San Francisco. They have experience in dealing with clients from minority cultural backgrounds, and they steered me to the experts we used in the Calambro case. They have become interested in the Tongan aspect of Mr. Vanisi's case, and they have produced the enclosed material on potential experts and investigation in his case. I think you would be well-advised to contact Scharlett Holdman (Center for Capital Assistance).

Ex. 147 at 18. In Mr. Specchio's March 6, 1998, letter to Scharlette Holdman requesting assistance, Mr. Specchio wrote that the Tongan community only wants to support Mr. Vanisi if he is innocent. Ex. 147 at 23-25. In contrast, Attorney Phillip Tukia of the Tongan community signed a declaration which was mailed to Mr. Specchio on March 10, 1998, stating that while the Tongan community would feel deeply ashamed if the charges were proven to be true, he believes that Mr. Vanisi is "unequivocally entitled to a competent defense." Ex. 147 at 27. Based upon his understanding of Tongan culture, Attorney Tukia urged that "further investigation should be conducted to determine [Mr. Vanisi's] state of mind." Ex. 147 at 28. Attorney Tukia also informed Mr. Specchio that he has "heard talk in the Tongan community that [Vanisi's] mental state has deteriorated considerably over the years." Ex. 147 at 28.

137. On April 20, 1998, Mr. Speechio reported:

> I had a conference call with Scharlette Holdman an anthropologist at the Center for Capital Assistance in San Francisco and Debra Sabah an attorney (taking the Bar in May) who have agreed to assist in this case.
>
> They have requested that we do certain things that are probably beyond our capabilities . . . go to Tonga for two weeks . . . with an expert in Tongan culture . . . but they are sending me books on Tongan culture and have provided some other expert names that I will contact.

/ / /

> They want to have the birth records, school records and employment records of three (3) generations of Vanisi family members

> . . . they want us to prepare Releases so we can get this information . . . I will do so for my May meeting with family members and potential witnesses.
>
> We probably have to get ALL of Vanisi's medical, school and employment histories . . . possibly Crystal get a complete breakdown of all schools he attended (with dates and employment history (dates) that he can remember and any medical or psychological problems . . . we have some W-2 records as well.
>
> Laura will send e-mails to these people to see if anyone can be of assistance to Mr. Vanisi . . . we will copy Vanisi.
>
> We will then try to get as much of this background and family employment, education and medical/psychological histories together. I told Scharlette and Debra that I would then come to San Francisco and discuss this with them.

Ex. 148. Mr. Specchio also reported that given Mr. Vanisi's bizarre behavior prior and subsequent to the offense, he believed that "attacking mental health and "cultural" issues would be the only way to save Mr. Vanisi's life." Investigator Crystal Calderon reports however that Mr. Specchio thought that Scharlett's recommendations were a waste of time and money, despite that the office had the available funds. Ex. 127 ¶ 5. In a memorandum dated April 20, 1998, Mr. Specchio reported "[w]ith all due respect to these ladies, I am sure that they are experts and do what they do very well . . . I do not know if I can do what they expect nor do I have the time or resources to do as they suggest." Ex. 148 at 2.

138. Despite that Mr. Specchio recognized and memorialized what needed to occur, he failed to collect Mr. Vanisi's records, failed to go to Tonga, and failed to obtain information about Mr. Vanisi's psychological issues so that he could prepare an expert to perform a competent mental health examination. The only records obtained were one high school transcript, criminal documents for relative Seteki Tautivea and police reports about Mr. Vanisi's altercations in Manthattan Beach in the 1990's. Mr. Specchio indicated in his August 1, 1998, memorandum to Crystal that:

> It might be necessary to send you to Salt Lake City to interview the Kinikini brothers . . . David will definitely be a good witness for us . . .

> his brother, Vaigna, is a devastating witness against Vanisi but should probably be interviewed;
>
> . . .
>
> I guess we may want to try to contact Vanisi's father in Hawaii . . . Maka' afa Vanisi. This will probably tee off Vanisi since he HATES his father . . . we better think this one over.
>
> We should probably interview Seteki "Teki" Taukuivea . . . he was with Vanisi a lot of the time and probably knows more than he is saying;

Ex. 147 at 51-54. According to Crystal, this investigation was never financially approved.

139. On April 27, 1998, Mr. Specchio spoke with psychiatrist Edward Lynn who reported that he had interviewed Mr. Vanisi at the jail, and "left off a MMPI packet for the client to complete and mail back to him." Ex. 137. Dr. Lynn also planned to mail Mr. Specchio some "additional forms he need[ed]" Mr. Vanisi to complete. Ex. 137. Psychologist Jonathan Mack, PsyD, reports that this is a completely invalid method of administering and MMPI. Ex. 163. Dr. Mack reports:

> It is in appropriate for a psychologist or mental health professional to rely on test results wherein it is not proven who took the test or whether anyone coached the examiner. Leaving the MMPI test with the prisoner to mail and send back violates this security procedure and also violates test and test item security.

Ex. 163.

140. Without having a social history or any records, Dr. Lynn concluded that Mr. Vanisi was "not psychotic, he [was] not insane and in fact, [was] quite intelligent," and had "no indication, at [the] time of any mental illness." On May 12, 1998, upon reviewing the invalidly administered MMPI test, Dr. Lynn reported that his opinion had not changed. Ex. 147 at 37. Mr. Specchio unreasonably relied upon Dr. Lynn's conclusions and determined that there is "no rational basis upon which to pursue any mental angle" in Mr. Vanisi's case. Ex. 147 at 39. In contrast, Dr. Mack reports:

> The severity of [Dr. Mack's] diagnostic conclusions, including a schizophrenic break in Mr. Vanisi's mid-twenties that has persisted to

> this day and is still under intensive medication treatment, raises, in [his] opinion, a reasonable question as to whether or not Mr. Vanisi was fully sane at the time of the commission of this crime. This quetion is raised by the intensity and severity of his psychotic state at the time of the homicide that is well documented in the affidavits.

Ex. 163.

141. After speaking again with Mr. Vanisi's ex-wife, a member of the LDS Church, and Greg Garner during a trip to California, Mr. Specchio did not to pursue the information obtained from them about Mr. Vanisi's bizarre behavior, delusional thinking, prior sexual abuse, increasing drug and alcohol abuse, and general mental health deterioration. See Ex. 147 at 43-45. On June 19, 1998, without having spoken to any additional witnesses, Mr. Specchio concluded "[f]rom a realistic standpoint most of the work in this case is done, but we now have to dot all of the I's and cross the T's." Ex. 147 at 48.

142. On July 31, 1998, however, trial counsel received a call from the prosecutor who spoke with the Nevada State Prison where Vanisi had recently been transferred from the Washoe County Jail. The prosecutor noted that they were concerned about Mr. Vanisi's mental status because he was: (1) wearing a hand-made mask; (2) drawing tattoos on his arms; (3) talking gibberish; (4) "pissing off" every guard and inmate with whom he has had contact; (5) causing some inmates to threaten to kill him; (6) speaking in a strange language; (7) saying bizarre things; and (8) talking to himself all of the time in a very loud voice. Ex. 143. Mr. Specchio took no action regarding the state's report.

143. On September 28, 1998, in response to the state's report, the trial Judge sua sponte ordered a competency investigation. Ex. 64. After one examination, Dr. Philip Rich found Mr. Vanisi to be competent, but his diagnostic impression was that Vanisi had bipolar affective disorder with mixed personality traits. Ex. 25 at 4. Dr. Lewis found, after the second exam, that although bipolar disorder should not be ruled out, Mr. Vanisi was competent to stand trial. Ex. 190.

144. Dr. Foliaki explains that without Mr. Vanisi's social history and neuropsychological testing, neither doctor was in a position to find Mr. Vanisi competent nor to properly assess his mental health status. Ex. 164 ¶¶ 5.1.1-2. On October 6, 1998, the Federal Public Defender's Office wrote to Mr. Specchio:

> I have received some information that Mr. Vanisi may be suffering from a bipolar disorder, and may have committed the offense in the manic phase of the disorder. I have consulted some experts informally, who have indicated that it is important to have a person suffering from such a disorder to be examined over a period of time long enough to allow the manic phase to manifest itself, under observation at a place like Lakes Crossing. I don't know what your experts have received in connection with examining Mr. Vanisi, but I strongly advise getting all of his recent incarceration records and investigating what everyone who's come into contact with him can report.

Ex. 144. In response Mr. Specchio wrote:

> Thank you for your letter of October 6, 1998. I wish the information you have relayed were correct. Our preparation in this case contradicts the information that you have received. Possibly if you would advise us as to the source of your information, I could do some follow-up.
>
> Mr. Vanisi has been tested and evaluated and is undergoing separate, court-ordered evaluations at this writing.
>
> Mr. Vanisi has sporadically attempted to feign some sort of mental illness while admitting that he his "pulling the chains" of the authorities.
>
> There may have been rumors and reports that he has acted in a bizarre fashion. Unfortunately, he has acted in bizarre ways for many years. It is more to gain attention than an indication of ANY mental illness.
>
> This is a very difficult case and I believe that the inclusion of a "mental" defense, if supported, would be to Mr. Vanisi's benefit. As you know, bizarre behavior, by someone craving attention is not sufficient.
>
> Mr. Vanisi is of average to above-average intelligence. I have spent almost one hundred hours with Mr. Vanisi. He is competent.
>
> I believe I know how this self-diagnosis claim of bipolar disorder came to pass. I would prefer not to go into specifics and a lengthy dissertation on the essence of our inquiry and investigation on this issue.
>
> If you have any other, more enlightening information as to Mr. Vansi's mental condition, I would like to hear about it.

Ex. 145 (emphasis added). Mr. Specchio's responding letter completely failed to acknowledge that two experts had expressed the impression that Mr. Vanisi suffered from bipolar disorder. Furthermore interviews were conducted by Michael Finau and Greg Garner which also provided several indicators that Vanisi may be bipolar. Ex. 194.

145. From December 14, 1998 to December 21, 1998, a few weeks prior to trial, investigator Crystal Calderon interviewed Luisa Finua, Sela Vanisi, Marie Jones, Anna Marie Jones, Judith Celeste, Leanna Graf, Kurt Krueger, Samuel Johnson, Jr., Ernest Schnurpfeil, Larry Schench, Roger Selsback, Brenda Woodard, Jeanette Yee, Gary Fry, Bryan Verna, Bishop Tonga, and Matthew McGinn. Ex. 194. All but three of these witnesses had not seen Vanisi in ten years. Mr. Vanisi's trial was scheduled to begin on January 11, 1999. This trial, however, ended in a mistrial.

146. On January 25, 1999, after the mistrial, Attorney Specchio sent a memorandum to Stephen Gregory, Jeremy Bosler, Maizie and Laura stating that he had "just read an article about mitigation in capital cases." Ex. 147 at 64. Specchio reported that the article "urge[d] consideration of the following factors in building a mitigation presentation:"

> Genetic pre-dispositions, medical histories of parents, medical histories of grandparents, family histories, abuse, maltreatment, abandonment, neglect, malnutrition, anemia, poor hygiene, poor medical/dental care, premature sexualization, instability, divorce in family, intermittent parents, adoption, foster placements, substance abuse, criminal involvement of caregivers, domestic violence, physical abuse, psychological abuse, sexual abuse, trauma, injuries - physical/mental, tragedy, natural disaster, death of family members, exposure to violence, exposure to trauma, recklessness - accidents / injuries, truancy, running away, depression, sexual disorders, sleep disorders, substance use/abuse, medications, school performance/adjustment, employment - performance/adjustment, psychological testing, evaluations, therapy, commitments, incarcerations, history of self-destructive behaviors, learning disabilities, literate versus illiterate, neurological deficits, seizures, physical conditions affecting cognitive power, stress, . . . medical illnesses, . . .incest, social inacceptance, prejudice, . . . rejection/acceptance, polysubstance - use abuse/addiction, reality confusion (hallucinations, illusions, phobias, disorientation, delusions), speech and language (incoherence, neologisms, poverty of speech, poverty of thought, distractibility, tangentiality, derailment, circumstantially, loss of goal, perseveration,

> pressured speech, blocking, paraphasia, slurring, monotone, stilted speech, micrographia, eye contact, eye movement, concentration, acknowledgment of presence, hypergraphia, dyslexia), memory and attention (amnesia, confabulation, hypermnesia, limited attention span, selective inattention), Medical complaints (. . . insomnia . . . blackouts), Emotional tone (anxiety, suspicion, depression, hostility, irritability, parania, excitement, flat affect, emotional liability - instability, vulnerability, delicate, compromising); personal insight and problem solving (. . . truthfulness, denial of mental problems); physical abilities (agitation, hypervigilence, psychomotor retardation, clumsiness, tension, organic disorders), social interaction (isolation, estrangement, difficulty perceiving social cues, suggestibility, dis-inhibition).

Ex. 147 at 64-68. Despite this memorandum, Jeremy Bosler, who was handling the mitigation for the retrial, was never given authority to expand the mitigation investigation of the case beyond the scope of the first trial. Ex. 180 ¶ 3. It is clear from trial counsel's file and the trial transcripts that Mr. Specchio's memorandum about what to look for in mitigation was completely ignored during the eight months leading up to the retrial.

147. The investigative interviews conducted prior to the first trial had clearly identified Vanisi's: (1) bizarre behavior in 1997; (2) chronic bizarre behavior; (3) inability to provide for his family; (4) insomnia; (5) loss of time; (6) vision about a new god named Lester; (7) plans to build a spaceship to escape this world; (8) hundreds of plastic bottles collected; (9) paranoia after the death of the elderly woman he prostituted for; (10) multiple confrontations with the police; (11) practicing with a hatchet; (12) wardrobe of tights, hats and wigs; (13) meeting with Wolchief; (14) an incestuous relationship; (15) sexual molestation; and (16) bad relations with his father figure Maile. Ex. 194 at 1-11, 14-15 22, 24, 35-36. Unfortunately, trial counsel failed to understand the mental health significance of these investigative leads, or the need to conduct further investigation. Thus, none of these topics were investigated in depth nor was the information provided to a competent mental health expert for assessment.

148. Additionally, trial counsel failed to recognize that Vanisi's incarceration behavior and records indicated the presence of a severe mental illness, and should

have been presented to a competent expert for review. Guards from Washoe County Jail Sheriff's Office report that:

> [o]ne minute [Vanisi] was a goofball, acting out his native Tongan cultural rituals and mumbling to the point no one could understand him. The next minute he was exhibiting normal thoughts and understanding the rules.

Ex. 151 ¶ 6; see also Ex. 150 ¶ 6. Vanisi often wore a dull stare during his pretrial incarceration. Ex. 151 ¶ 4, 7. The guards could never discern what would trigger Vanisi's violence. Ex. 150 ¶ 2. Additionally, Vanisi displayed no pain no matter how badly he was beaten. Ex. 151 ¶ 4; 149 ¶ 5.

149. One guard reflects that if they had known about Vanisi's mental health issues, then a lot of the problems could have been avoided or resolved. Ex. 150 ¶ 6. The Washoe County Sherriffs Office now has a special needs housing unit for the mentally ill. Ex. 149 ¶ 8. The corrections officers assigned to this unit are specifically trained in crisis intervention, and now are better equipped to handle inmates with mental illness. Id. The unit is also staffed with mental health workers. Id. As with the information gleaned during their investigation of collateral sources, trial counsel failed to appreciate the significance of Mr. Vanisi's incarceration behaviors. See Ex. 109.

150. As the retrial approached, trial counsel finally concluded that their only reasonable strategy was to put on a mental health defense during the penalty phase. Unfortunately, they were wholly unprepared. While they had interviewed an overwhelming number of family members, high school teachers, classmates, and Mr. Vanisi's LDS bishop in San Bruno, who were prepared to testify about what a great person Mr. Vanisi had been in high school, trial counsel had not followed up upon the many leads that they had that Vanisi's mental health had significantly deteriorated over the years, ultimately culminating with the instant offence. See Ex. 181 ¶¶ 4-7.

151. As trial counsel had never properly prepared a mental health expert to assess Mr. Vanisi's state of mind prior to, during and subsequent to the offense, they had to rely on the testimony of Dr. Ole Thienhaus, a county jail psychiatrist, and Mr. Vanisi's ex-wife DeAnn. Ex. 181 ¶ 12. Dr. Thienhaus, like unused defense expert Dr. Lynn, had not been provided with the above-listed social history, and was therefore ill equipped to testify on Mr. Vanisi's behalf. See 10/4/99 TT 1439-79, see also, Claim Two. As noted above, Dr. Thienhaus testified that he was not certain whether Mr. Vanisi suffered from bi-polar disorder, that he believed that Mr. Vanisi was malingering, and that even if Mr. Vanisi did suffer from bipolar disorder with manic psychosis, this disorder would not cause anyone to commit the offense of which Mr. Vanisi was accused. 10/4/99 TT 1458-72. Dr. Foliaki reports that a qualified competently prepared mental health expert would not have reached this conclusion. See Ex. 164 ¶ 5.1.3. ¶ 130. As previously noted, Mr. Vanisi's ex-wife was thoroughly discredited because her information about Mr. Vanisi's long term mental health issues was completely uncorroborated.

152. Mr. Gregory reports that Mr. Specchio failed to inform him that he had consulted with mitigation specialist Scharlette Holdman. Ex. 180 ¶ 5. Mr. Gregory was:

> never given [Holdman's mitigation investigation] recommendation or given any indication that funds were available to travel to Tonga, and therefore decided to focus [their] investigation on the many family members that [they] could interview here in the United States.
>
> Had [he] known that there were several witnesses to Mr. Vanisi's childhood in Tonga who could substantiate [their] defense that Mr. Vanisi was psychotic when he committed this crime, [they] could have presented this evidence at trial to support the testimony of Mr. Vanisi's ex-wife that Mr. Vanisi had been suffering from a mental health disorder for some time prior to the crime.
>
> Had [he] had the benefit of an expert report confirming what [their] office suspected - that Mr. Vanisi was psychotic during the offense, and while [they] were respresenting him, [they] could have utilized those reports both tho support [their] defense, and to try to convince the trial judge that Mr. Vanisi was not competent to stand trial.

Ex. 180 ¶ 5-6, see also Ex. 181 10-11. Mr. Bosler, who is currently in charge of the Washoe County Public Defenders Office reports that:

> It is current office policy to have a mitigation specialist in all capital cases investigate the client's background for the purpose of identifying whether there is any mitigating evidence such as childhood abuse or trauma, a history of mental health disorders, prenatal drug and alcohol abuse, and other factors that could offer a jury an explanation of how the client had arrived at the point in his life of committing the offenses. . . .
>
> It is current office policy to request medical, mental health, scholastic, criminal and other records, and provide them to both my investigator and mental health experts so that they can perform a complete evaluation of the client.

Ex. 181 ¶¶ 8-9.

153. Mr. Bosler confirms and Mr. Gregory notes that:

> There is no doubt in my mind that Mr. Vanisi was quite mentally ill throughout his proceedings. Unfortunately, both times Mr. Vanisi was examined for competency, he was found to be competent to stand trial. In desperation, we had Edward Lynn, M.D., a psychiatrist, evaluate Mr. Vanisi to determine whether there was any medication that could help to stabalize him. Unfortunately, despite our best efforts, we were unable to get Mr. Vanisi medication until shortly prior to his second trial.

Exs. 180 ¶ 4; 181 ¶ 3. Mr. Bosler reports that he is "unaware of a strategic reason for not obtaining additional collateral reports and historical records from Tonga supporting [their] theory that Mr. Vanisi was mentally ill when he committed the offense." Ex. 181 ¶ 8.

154. Trial counsel had no strategy within the range of reasonable competence for failing to conduct a thorough mitigation investigation. Trial counsel's decision to permanently rule out a mental health investigation, despite mounting evidence of mental health issues, fell below an objective standard of reasonableness. Trial counsel's failure to investigate, develop and present evidence about Mr. Vanisi's cultural background and mental health history fell below an objective standard of reasonableness. As demonstrated herein and in Claim Two, Mr. Vanisi was prejudiced by trial counsel's deficient performance in that that there is a reasonable

probability of a more favorable outcome had Mr. Vanisi's trial counsel performed effectively. Mr. Vanisi hereby incorporates Claim Two as if pled fully herein.

D. Trial Counsel was ineffective for failing to investigate Mr. Vanisi's family history.

155. Psychiatrist Siale 'Alo Foliaki reports that in order to conduct a valid psychiatric assessment for purposes of mitigation in a capital case, it is imperative that experts be provided with a family history:

> The critical features that require exploration when taking a family history include – any evidence of mental illness in the biological parents, the nature of their personalities, the quality of their attachment to Mr. Vanisi and the other siblings, and any evidence of mental illness in the other siblings. This enables any biologically weighted vulnerability to mental illness to be identified and taken into consideration when formulating the case.

Ex. 164 ¶ 11.0. Dr. Foliaki also reports that the "risk factors for the development of adult psychopathology are as follows: (1) attachment problems (2) abuse – which can be passive (neglect) or active (sexual or physical abuse), (3) bullying, (4) pathological parenting, (5) exposure to drugs and alcohol, and (6) peer relationship problems. Ex. 164 ¶ 12.0. Mr. Vanisi experienced all of these stressors as well as issues of identity and grief due to loss of significant others. 164 ¶ 21.0. Individuals suffering from Schizoaffective Disorder became much more disabled when they have a cognitive profile like Mr. Vanisi's. 164 ¶ 2.7.2.

1. Evidence of mental illness in Mr. Vanisi's biological parents.

156. Vanisi was born on June 26, 1970, in Nukualofa, Tonga to Maka'afa Vanisi and Luisa Tafuna. Exs. 6, 7, 31, 182. Vanisi was born in the South Pacific Island of Tongatapu, which is part of the archipelago of the Kingdom of Tonga, which is a feudal, autocratic society currently ruled by King Tupou the fifth. Ex. 164 ¶ 12.1

157. Siaosi was the fifth of seven children born to his mother, Luisa. Ex. 96 ¶ 1. Sitiveni Tafuna was the oldest child, Leini Tafuna was the second, Sela Vanisi was the third, Tevita Vanisi, now deceased, was the fourth, Moale Tafuna was the sixth, and the youngest was Tupou Uluave. Ex. 96 ¶ 1.

158. The family of Vanisi's mother, the Tafunas, were business owners and were considered to be upper middle-class when they lived in Tonga. Ex. 130 ¶ 2. The family had a transportation company that consisted of one bus and a few wheel taxis. Ex. 130 ¶ 2. They also cultivated various crops, owned a coconut grove, had a fish farm and raised cattle. Ex. 130 ¶ 2. The family had a good life and never wanted for anything when they lived in Tonga which sharply contrasts with their experience of poverty and discrimination upon migrating to the United States.

159. Similarly, the family of Vanisi's father were upper middle-class in Tonga. Ex. 130 ¶ 3. They owned businesses and held positions in government. Ex. 130 ¶ 3. They had a bus company and plantations that produced various crops, and several family members were police officers. Ex. 130 ¶ 3. Members of the Vanisi family were relatives of Queen Halevalu of Tonga, so they enjoyed a slightly higher position than the Tafunas in Tongan society. Ex. 130 ¶ 3. The Vanisis, however, were not considered to be actual members of the Royal family so they never took part in any Royal ceremonies.

160. There is strong evidence that several of Vanisi's family members suffered from mental illness including his biological father, his biological mother, his sister Sela, and his brother Tevita. Ex. 164 ¶ 3.1.1.

a. Vanisi's mother, Luisa Tafuna-Vanisi.

161. Vanisi's mother, Luisa Tafuna-Vanisi, has a history of giving away her children born out of wedlock after the deterioration of her relationships with their fathers. After completing high school, Luisa became involved with an officer which resulted in her oldest son Sitiveni's birth. Ex. 103 ¶ 7. Luisa's brother Maile told the officer that he could marry Luisa if he chose, but that if he did not, he would have to stay away from the family. 103 ¶ 7. The officer did not marry Luisa, so it was agreed that Luisa's brother Moli would adopt Sitiveni. 103 ¶ 8. Luisa's second and sixth children were the result of a secret liason between Luisa and her relative.

103 ¶¶ 10-13. It was agreed that Moli would adopt the second child. The sixth child was left behind in Tonga with Luisa's sister after Luisa immigrated the United States. 103 ¶ 14. Vanisi, Sela and Tevita were fathered by Luisa's first ex-husband. Luisa's final child, Tupoa, was fathered by Luisa's second ex-husband. Luisa gave Vaniis away to her sister Toeumu. Luisa, therefore, only raised three of her six surviving children.

b. Vanisi's father, Maka-Afa Vanisi

162. Dr. Foliaki notes that Maka'afa had almost an identical life as Vanisi's despite that the fact that he abandoned Vanisi and his siblings. Ex. 164 ¶ 3.1. The similarities include a poor level of overall functioning along with bizarre behaviors and the stabbing of a person when Maka'afa was twenty-eight. Ex. 164 ¶ 3.1.1.

163. Maka'afa was the youngest child and was "spoiled" by his parents. Exs. 121 ¶ 4; 103 ¶ 15. His father was a police inspector and Maka'afa never had to farm in the bush country like most Tongans. Exs. 121 ¶ 4; 103 ¶ 15. Maka'afa was his father's first born son and, as required by Tongan custom, was catered to by the entire family. Ex. 103 ¶ 15.

164. Maka'afa suffered from mood swings. Ex. 93 ¶ 8. Frequently he would sit and gaze off into the distance as if his mind were elsewhere. Ex. 93 ¶ 7. Maka'afa was happy one minute, sad the next and then he'd get angry and begin yelling at people and wanting to fight them for no reason. Ex. 93 ¶ 8. It was impossible to predict Maka'afa's moods and reactions to different situations because they were constantly changing without explanation. Ex. 93 ¶ 8.

165. As a teenager, Maka'afa spent most of his time drinking alcohol with his friends when he was supposed to be in school. Ex. 94 ¶ 3. He and his friends were never arrested for public intoxication because Maka'afa's father was a police inspector. Ex. 94 ¶ 4.

166. Maka'afa always drank to point of intoxication and frequently passed out or experienced blackouts. Ex. 94 ¶ 5. He usually had no memory of what had transpired prior to blacking out. Ex. 94 ¶ 5. Maka'afa was frequently robbed as he lay on the ground passed out. Ex. 94 ¶ 5. If Maka'afa discovered who robbed him, he would become abnormally preoccupied with vengance. Ex. 94 ¶ 6.

167. When Maka'afa was intoxicated, he would have delusions of grandeur. Ex. 94 ¶ 7. He also would talk to himself. Ex. 93 ¶ 5. Maka'afa rambled during these occasions and his words made little sense. Ex. 93 ¶ 5. Maka'afa spoke about random topics that were not in a particular order, and he sometimes mentioned a few names. Ex. 93 ¶ 5.

168. Maka'afa was a violent drunk who would start fights with random people while intoxicated. Ex. 93 ¶ 4. He often did the Tongan war dance while drinking and if anyone laughed at or teased him, he would attack them. Ex. 93 ¶ 6. Maka'afa frequently engaged in bar fights. Ex. 93 ¶ 15. While sitting quietly one moment, in the next moment he would suddenly attack people for no reason. Ex. 93 ¶ 15.

169. Maka'afa carried knives as a child and into adulthood. Ex. 93 ¶ 9. The man whom Maka'afa stabbed survived and Maka'afa was not tried. Ex. 93 ¶ 9.

170. Maka'afa never had a job. Ex. 93 ¶ 2; 121 ¶ 6. He survived by living off various members of the family. Ex. 93 ¶ 2; 94 ¶ 15. Maka'afa depended upon his parents, aunts, uncles and cousins for food, money and shelter. Ex. 93 ¶ 2. Maka'afa never lived independently as an adult. Ex. 93 ¶ 2. Maka'afa had a short attention span and a lot of difficulties completing tasks. Ex. 93 ¶ 2. "Maka'afa was never focused as a child, or at any time during his life, and he did not have any responsibilities." Ex. 93 ¶ 2.

171. Maka'afa enjoyed dressing up as a soldier or policeman and walking around town in these outfits, even though he was never a member of the military or the police. Ex. 94 ¶ 8. Maka'afa was also known for carrying large and small knives, and hanging them off of his uniform. Ex. 94 ¶ 8. Maka'afa particularly enjoyed

wearing his uniform while walking by bus stops full of people in order to "show off" and receive attention. Ex. 94 ¶ 8. At times, when Maka'afa was drunk while wearing his military and police uniforms, he behaved like an officer or a soldier. Ex. 94 ¶ 9.

172. As an adult, Maka'afa often would tell unrealistic and fanciful stories about being a sports champion or a direct descendent of 'Ulukalala, a revered Tongan warrior from the island of Vava'u where the Vanisi family originated. Ex. 94 ¶ 7. Everyone knew that Maka'afa had no actual blood relation to this warrior but they would listen as he told elaborate stories and did warrior dances to simulate 'Ulukalala. Ex. 94 ¶ 7. Maka'afa was more inclined to do the warrior dances when there was a crowd watching him. Ex. 94 ¶ 7. It is startling how much Vanisi's life mirrors that of his father's despite that Vanisi had absolutely no contact with his father or his paternal family between the ages of six and his late teens, thereby supporting a genetic component to the family's mental illness.

c. Tongan mental health

173. Dr. Foliaki reports that culture plays an important role in understanding the mental health disorders of migrants whose cultural norms deviate significantly from the host culture. Ex. 164 ¶ 20.0. Pacific Islanders who migrated to New Zealand before the age of twelve displayed twice as many mental health disorders as those who migrated after the age of eighteen. Ex. 164 ¶ 20.1. Further, only twenty-five percent of Pacific Islanders are likely to obtain help for "serious" mental health disorders as compared to fifty-eight percent of New Zealanders. Ex. 164 ¶ 20.2. Dr. Foliaki reports that:

> There are three main cultural reasons behind the failure to seek help for mental illness by Pacific Island people. Firstly the stigma with mental illness, secondly the lack of recognition of mental disorders themselves and finally the lack of trust in Western medical treatment options particularly since Pacific people conceptualize mental disorder as being a spiritual manifestation of sinfulness or retribution.

Ex. 164 ¶ 20.3.

d. Luisa and Maka-Afa's relationship

Vanisi's parents were married while Luisa was pregnant with her third child. Ex. 130 ¶ 4. Vanisi's paternal grandfather, Kuli Vanisi, was against Makaafa's relationship with Luisa because Luisa, never married, had given birth to two children prior to meeting Maka'afa. Ex. 130 ¶ 6. Kuli, a police inspector, believed the Tufunas to be of lower social status than Vanisis. Ex. 130 ¶ 6.

174. Maka'afa married Vanisi's mother, however, for financial reasons. Ex. 94 ¶ 13. Luisa provided Maka'afa with food and money from her family's business. Ex. 94 ¶ 13. Maka'afa used the money to support his drinking habit and to spend time with his friends. Ex. 94 ¶ 13. Maka'afa moved onto Luisa's family property after they married. Ex. 94 ¶ 14. Luisa's family took care of Maka'afa and treated him well. Ex. 94 ¶ 14. Maka'afa, however, was never serious about his marriage and he preferred to spend more time with his friends and drinking partners. Ex. 94 ¶ 16.

175. To endear himself to Luisa's family, Maka'afa, whose family were Methodists, converted to the Mormon faith. Ex. 94 ¶ 14. Contrary to the dictates of his new religion, however, Maka'afa continued to drink and carouse. Ex. 94 ¶ 16. Maka'afa was never a responsible husband or father. Ex. 94 ¶ 16. Maka'afa used money that could have gone towards supporting his household to support his drinking habits. Ex. 94 ¶ 16. When his friends visited, Maka'afa would immediately stop whatever he was doing, and would leave Luisa with the children while he went out for drinks. Ex. 94 ¶ 16. Maka'afa had more regard for his friends than his family. Ex. 94 ¶ 16. Maka'afa was an unapologetic womanizer; he often cheated on Luisa and would stay away from the home for days at a time. Ex. 130 ¶ 5. Occasionally he would physically beat Luisa. 130 ¶ 5.

176. Luisa complained about Maka'afa's irresponsibility. Ex. 103 ¶ 18. In response, Maka'afa would ignored her, or laugh and leave the house. Ex. 103 ¶ 18.

Luisa's brother Maile had little sympathy because Luisa knew that Maka'afa was irresponsible when she married him. Ex. 103 ¶ 18.

177. When Maka'afa and Luisa began having problems in their marriage, her father-n-law Kuli convinced Maka'afa to leave Luisa. Ex. 130 ¶ 6. Kuli purchased a one-way ticket for Maka'afa to leave Tonga for New Zealand. Ex. 130 ¶ 6. Luisa was pregnant with Vanisi when Maka'afa left, and she entered into a deep state of depression for the remainder of her pregnancy. Ex. 130 ¶ 6.

178. Dr. Foliaki reports that this depression is a critical risk factor for the later development of childhood and adult psychopathology. Ex. 164 ¶ 12.3. Common problems include learning difficulties, hyperactivity disorders and emotional dysregulation which is hypothesized to be the result of overstimulation of the autonomic nervous system. Ex. 164 ¶ 12.3.

2. Mr. Vanisi's attachment disorder

179. When Vanisi was born, he was given to his maternal aunt, Toeumu Tafuna. Exs. 130 ¶ 11; 96 ¶ 1. It is common in Tongan culture for a couple to unofficially adopt their relative's children when the couple is unable to produce a child, or when a child is born to relatives who become parents under less than ideal circumstances. Ex.130 ¶¶ 12-14. In most of these adoptions, the children know who their real parents are. Ex.130 ¶ 15. Vanisi, however, was lied to about his adoption. Ex.130 ¶ 15.

180. Dr. Foliaki reports that with increasing migration over the last thirty years, the cultural practice of familial adoption has become a source of significant attachment ruptures that are psychologically damaging for children. Ex. 164 ¶ 20.4. Mr. Vanisi had to address two major upheavals – the loss of his adopted mother at age three, followed by another loss and readjustment at age six when they were reunited. Ex. 164 ¶ 20.4.

181. In 1973, when Vanisi was three years old, Toeumu left Tonga. Ex.130 ¶ 18. Toeumu could not take Vanisi with her because she was not his official legal

guardian. Ex. 103 ¶ 24. Internal family adoptions are understandings within families in Tongan culture, but there's no official recognition by the government. Ex. 103 ¶ 24. Luisa Tafuna and Maka'afa Vanisi, therefore, were Vanisi's only legal guardians of record. Ex. 103 ¶ 24.

182. Vanisi was not told that Toeumu was leaving until they arrived at the airport. Ex. 103 ¶ 24. Vanisi cried, screamed and begged Toeumu not to leave him. Ex. 103 ¶ 25. Toeumu and other family members unsuccessfully tried to calm Vanisi down and assure him that he and Toeumu eventually would be reunited Ex. 103 ¶ 25. Vanisi clung to Toeumu's arms and legs, and everyone struggled to pull him away. Ex. 103 ¶ 25.

183. Every family member, adults and children, began to cry at the sight of Vanisi's despair. Ex. 103 ¶ 26. Toemu and those flying with her almost missed their flight. Ex. 103 ¶ 27. Toeumu managed to board the plane just before the door closed. Ex. 103 ¶ 27,

184. For the next three years, Vanisi was raised by his biological mother, Luisa. Ex. 103 ¶ 27. It took Vanisi several months to adjust to life in Tonga without his maternal aunt Toeumu. Ex. 130 ¶ 19.Whenever Vanisi would see a plane flying overhead, he often cried and called out for Toeumu. Ex. 130 ¶ 19. Vanisi sometimes held and kissed photographs of Toeumu when he felt lonely. Ex. 130 ¶ 19. Luisa tried to tell him that she was his mother and loved him just as much as her other children. Ex. 130 ¶ 19. At age three, however, Vanisi rejected the idea and accused Luisa of lying. Ex. 130 ¶ 19.

185. Whenever Vanisi was overcome with emotion because of Toeumu's departure, he was inconsolable. Ex. 130 ¶ 20. Luisa and others unsuccessfully would try to intervene, but often left him alone to cry himself to sleep. Ex. 130 ¶ 20. Vanisi became withdrawn and isolated himself, at times refusing to interact with other children in the family. Ex. 130 ¶ 21. Vanisi would hide under his bed and cry for long periods of time. Ex. 130 ¶ 21. After a few months, Vanisi slowly began to

interact with his family in a more normal fashion, but the pain of his separation from Toeumu always loomed in the background. Ex. 130 ¶ 22.

186. In 1976, when he was six, Vanisi was reunited with Toeumu when his family moved to the United States. Ex. 96. ¶ 8. When Vanisi first saw Toeumu, he did not recognize her. 130 ¶ 26. Luisa kept prodding him to go to his "mother." Ex. 130 ¶ 26. Vanisi would go to Toeumu and then run back to Luisa. 130 ¶ 26. When Toeumu tried to hug Vanisi, he pushed her away. 130 ¶ 26. After one day of visiting, Vanisi's biological mother, Luisa, left Vanisi with Toeumu. Ex. 130 ¶ 25. Dr. Foliaki reports that the readjustment to being returned to Toeumu caused conflicting emotions which Vanisi was not yet mature enough to understand. Ex. 164 ¶ 3.2.3.

187. During the first two years after being reunited with Toeumu, Vanisi followed her around wherever she went, and never let her out of his sight. Ex. 103 ¶ 30. Vanisi constantly sat with Toeumu instead of playing with his cousins, siblings or neighborhood friends. 103 ¶ 30. Whenever Toeumu left Vanisi to run errands, he cried and threw temper tantrums. 103 ¶ 30. Toeumu constantly had to reassure Vanisi that she loved him and would never leave his side again. 103 ¶ 30.

188. After about two years, when Vanisi was eight or nine years old, Vanisi incrementally began to give Toeumu more space. 103 ¶ 31. Vanisi began to interact more with his peers. 103 ¶ 31. As Vanisi played, however, he would check to make certain that Toeumu was still there. 103 ¶ 31. If Toeumu arose from her seat, Vanisi would run to her to learn where she was going. 103 ¶ 31. Eventually, Vanisi was able to play outside of Toeumu's presence, but he still would frequently run in and out of the house to make certain that Toeumu was still there. 103 ¶ 31.

189. Vanisi often tried to please Toeumu, appearing afraid she might get mad and leave him again if he misbehaved. 103 ¶ 33. Vanisi did everything within his power to please Toeumu and keep her happy so that she would stay with him. 103 ¶ 31. A maternal relative of Vanisi's, describes his relationship with Toeumu:

> Siaosi was very attached to Umu. He was clingy and seemed like he was always by her side. Siaosi acted like he was a baby clinging to his mother, even after he was no longer a small child. Umu and the rest of the family all treated Siaosi like he was a baby as long as I can remember. Because of his nature and the way he was treated Siaosi was given the nickname "Pe pe," which is the Tongan word for baby. When he got a little older his nickname was shortened to "Pe."

Ex. 92 ¶ 7.

190. At age ten, when Vanisi definitively learned that Luisa was his biological mother and Sitiveni his older brother, Vanisi became noticeably withdrawn. Ex. 101 ¶ 26. Vanisi went from being Toeuma's only son to being Sitiveni's younger brother. Ex. 101 ¶ 27. A cultural right and expectation for the first born males in Tongan families is that they are treated in a special manner. Ex. 101 ¶ 27. In addition to feeling the pain of being given away by his birth mother, Vanisi also felt a loss of status within the family. Ex. 101 ¶ 27.

191. At times Vanisi would asked Luisa why she did not love him enough to keep him, like she kept her other kids. Ex. 130 ¶ 28. Vanisi tried to live with Luisa, but Luisa coldly told him to return to Toeumu because Toeuma did not have any children of her own, and Vanisi needed to take care of her. Ex. 130 ¶ 29. Luisa never hugged or kissed Vanisi during these conversations. Ex. 130 ¶ 28. Vanisi expressed that he felt unwanted and unloved. Ex. 130 ¶ 29.

192. When Vanisi asked Toeuma where his father was, she told him that his father had died in a war. Ex. 130 ¶ 46. Vanisi learn that this was untrue when his father contacted the family while Vanisi was in high school. Ex. 130 ¶ 46. His father explained that he had come to town and wanted to see his children. Ex. 130 ¶ 46. While Vanisi enjoyed his time with his father, Toeumu was very angry about the meeting. Ex. 130 ¶ 46.

193. As if Vanisi did not have enough identity issues, Teoumu registered Vanisi under the name of George Tafuna when she enrolled him in school. Ex. 130 ¶ 45. Vanisi's first name, Siaosi, apparently translates to "George" in English. Ex. 130 ¶ 45. Because Vanisi's father was never part of his life, and never provided for

Vanisi, Toeumu refused to allow Vanisi to use his father's last name and instead changed it to her last name. Ex. 130 ¶ 45.

194. Dr. Foliaki reports that there are four types of attachments that a child can form with their parent: the secure infant, the anxious resistant infant, the anxious avoidant infant and the most severe disorganized/disoriented infant. Ex. 164 ¶ 21.1.2. Dr. Foliaki has concluded that as a result of Mr. Vanisi's repeated seperations from primary caregivers, Mr. Vanisi became "disorganized and disoriented." Ex. 164 ¶ 21.1.2. Early experiences provide the prototypes for all later relationships, and enables children to gain an understanding of their identity and that of others. Ex. 164 ¶ 21.1.3. Dr. Foliaki reports that "[t]here is strong evidence that Mr .Vanisi struggles from a young age" to understand his identity and that of others. Ex. 164 ¶ 21.1.3. His odd and weird behaviors reflect his inability to understand his own thoughts and feelings as well as those of others. Ex. 164 ¶ 21.1.3. Mr. Vanisi's insecure attachments leads to his failure to ever define his sense of self. Ex. 164 ¶ 21.1.3.

3. Vanisi's aunt Toema and his uncle Maile

Vanisi's maternal uncle, Maile Tafuna, was the leader of the family and he was at the center of all decisions involving the family. Exs. 95 ¶ 4; 108 ¶ 3; 110 ¶ 13; 115 ¶ 6. Most of Vanisi's aunts and uncles shared homes, and lived within walking distance during Vanisi's childhood, which made it easy for Maile to exercise his right to direct the family. Ex. 96 ¶ 20. Since Vanisi and his siblings had been abandoned by their fathers, Maile took a more active role in their lives than in the lives of his other nieces and nephews. Exs. 123 ¶ 7; 96 ¶ 20; 115 ¶ 4. Maile was Vanisi's main male role model and father figure throughout his childhood and early adult life. Ex. 115 ¶ 6; 123 ¶ 7; 96 ¶ 20.

195. Maile ran his immediate and extended family under the strict Tongan code of behavior under which the male leader of the family has the absolute say in all family affairs. Ex. 95 ¶ 6; Ex. 130 ¶ 37. Whatever Maile decided was the law within

the extended family. Ex. 95 ¶ 6. Maile was considered to be a good and well-intentioned person, but he often yelled and spoke harshly to people within the family. Exs. 123 ¶ 7; 110 ¶ 15; 124 ¶ 24; 115 ¶ 5; 95 ¶ 5. Maile spoke in a strict authoritative manner and sometimes could be extremely critical of a person's faults. Exs. 95 ¶ 5; 110 ¶ 15; 111 ¶ 9; 115 ¶ 5. Maile would give people the impression that he did not love them because of the way he spoke to them. Exs. 123 ¶ 7; 95 ¶ 5; 110 ¶ 15; 111 ¶ 9.

196. Although Maile had a kind heart and did a lot for people in the community, he did far less for his own children, nieces and nephews. Ex. 130 ¶ 39. Maile's son Tufui describes Maile:

> My father Maile was a great figure in San Bruno's Mormon Tongan community and was a patriarch of the Church of Jesus Christ of Latter Day Saints. He was a man who was very charitable and generous, but at the same time could be extremely harsh and authoritarian. My father spoke in a strict and authoritative manner and sometimes could be extremely, and vocally, critical of a person's faults. In my mind, by observing his interactions with others, I came to believe that this was just his nature and so I tried not to let it affect me. But a person could easily take his loud and critical talk as condemnation. This criticism seemed to me to be a source of shame for those who received it given my father's position with the church and the respect he had from members of the community.

Ex. 95 ¶ 5. Maile treated his family, and those under his control, such as Vanisi, much harsher than others. Ex. 130 ¶ 38.

> There were many incidents where my father slapped or beat my mother when she disagreed with him. I remember one time when she left him for at least a week because of his physical abuse. My father also beat his children and nephews, including me, when he felt that it was necessary to teach a lesson. I never thought of this as abuse because it was just the way things were within our family.

Ex. 95 ¶ Maile constantly cursed at his wife and berated her for insignificant things. Ex. 124 ¶ 26. Maile's relative Paulotu reports that:

> Domestic violence was very common in the Tafuna's and my family. Men in the family beat their wives and children as a form of discipline and this was not considered unsual. Maile's family was no exception. He was extremely authoritarian and harsh with his wife and family. He angrily yelled at them when he was unhappy with their behavior and he regularly beat his wife.

Ex. 92 ¶ 4; see also Ex. 111 ¶ 3. The second husband of Vanisi's biological mother, Luisa, similarly would beat Luisa in front of Vanisi and his siblings. Ex. 95 ¶ 12; 111 ¶ 2.

197. From the time that Vanisi was about ten years old, Maile would give him severe scoldings, for little or no reason. Ex. 130 ¶ 34; 108 ¶ 32; 124 ¶ 24. Maile treated Vanisi the worst of all of the children. 130 ¶ 34. It appeared at times that there was nothing that Vanisi could right. 130 ¶ 35. Maile frequently told Vanisi that he was "worthless," "useless," and "stupid." 130 ¶ 35. Maile did not care who was around when he said these things to Vanisi, and Maile would frequently embarrass Vanisi in front of an audience. 130 ¶ 35. Whenever Maile scolded him, Vanisi would have a lost look on his face, and begin to mumble to himself as he withdrew. 130 ¶ 36.

198. Inevitably, the family member Vanisi despised the most was Maile. Ex. 104 ¶ 8. Their relationship became quite strained. Exs. 124 ¶ 25; 104 ¶ 8. Maile constantly reminded Vanisi that he lived in Maile's house. Ex. 124 ¶ 25. On these occasions, Vanisi did not respond, but would go to his room and isolate himself for hours. Ex. 124 ¶ 25. Vanisi told his friends that Maile was very cruel and that he left San Bruno in part to escape Maile. Ex. 106 ¶ 5.

199. It appeared to family members that Vanisi received a lot of beatings at the hands of Toeumu, and many verbal scoldings by his uncle Maile for little to no reason. Ex. 130 ¶ 30.

200. Although Toeumu strictly disciplined Vanisi and frequently spanked him, she also spoiled him. Exs. 130 ¶ 47; 96 ¶ 33; 103 ¶ 32; 101 pp 25. Dr. Foliaki reports that this parenting style from the key adults in Vanisi's life was pathological. Ex. 164 ¶ 3.2.5. The alternation between an indulgent parent and an authoritarian parent establishes a confusing interpersonal dynamic that was hard for Vanisi's developing ego to integrate into a coherent sense of self. Ex. 164 ¶ 3.2.5.

201. Toeumu always gave Vanisi anything that he wanted when he was growing up, like candy and money. Ex. 130 ¶ 47; 96 ¶ 32. Because Toeumu's only task was to care for her ailing brother Moli, and she never had a job outside of the house, she was always around to provide for all of Vanisi's needs. Ex. 130 ¶ 47.

202. Vanisi had very little responsibility growing up. Ex. 130 ¶ 48. Vanisi's only chores in the household were to take the garbage out once a week and set the table or clean the dishes on Sundays. Ex. 96 ¶ 32. Vanisi would often forget to do these chores and family members would have to remind him. Ex. 96 ¶ 38.

203. Vanisi never had a job during his school years and he depended on Toeumu for any money that he needed. Ex. 96 ¶ 33. When Vanisi was younger, Toeumu would give him money whenever he wanted to buy a snack. Ex. 96 ¶ 33. When Vanisi became a high school student, however, Toeumu placed Vanisi's name on her bank account so that he could withdraw money whenever he needed it. Exs. 96 ¶ 33; Ex. 100 ¶ 5. Sometimes Vanisi asked for permission before he made withdrawals and other times he did not. Ex. 96 ¶ 33. Toeumu never became upset with Vanisi because she only put money in the account when she wanted. Ex. 96 ¶ 33.

204. Toeumu also was Vanisi's sole source of financial support when he lived in Los Angeles. Ex. 100 ¶ 5. By then, Toeumu had become a home care provider although she did not earn much income. Ex. 100 ¶ 5. She gave Vanisi almost every penny that she earned. Ex. 100 ¶ 5. Many people in the family became upset over the fact that even though Vanisi lived 400 miles away in Los Angeles, he still had no responsibilities. Ex. 100 ¶ 5. Toeumu never hesitated or regretted giving Vanisi everything, however, because she expected him to become successful one day and support her when she was older. Ex. 100 ¶ 5. Vanisi's joblessness and failure to support himself, however, continued for the next ten years. Ex. 164 ¶¶ 14.0-5.

205. Dr. Foliaki reports that the most difficult and confusing situation for a child is when he experiences different types of parenting from multiple primary care givers, which is what Mr. Vanisi experienced. The two most important women in his life were his adoptive mother who had a tendency to alternate between indulgent and authoritarian parenting, and his biological mother by whom Mr. Vanisi felt neglected. Ex. 164 ¶ 21.2. The main male role model, Maile, was overbearing and authoritarian. Ex. 164 ¶ 21.2. As a result, Mr. Vanisi tried hard to "be a good boy" but this type of family dynamic and competing parenting styles was too confusing. When added to Mr. Vanisi's attachment disorder, Mr. Vanisi's developing identity confusion became the obvious outcome. Ex. 164 ¶ 21.2.

206. Dr. Foliaki further explains that while there was a rigidity inherent in the structure of Vanisi's home and church life that helped to keep Vanisi on track, there was also evidence that he failed to form a strong sense of his "true self" as Vanisi "presented" himself as a certain person at home and at church but someone quite different when out and about with friends. Ex. 164 ¶ 3.2.5.

207. Vanisi's uncle, Moli, also was like a father figure to Vanisi until Moli became ill. Ex. 96 ¶ 15. Before Moli became bedridden, Moli taught Vanisi to read and dance, and lavished affection upon him. Ex. 96 ¶ 15. Whenever Moli had to travel, Vanisi would nervously ask Toeuma and others, "What did you all do with him . . . Where is he . . . I need him." Ex. 96 ¶ 16. From about the age of ten, Vanisi assisted Toeumu in caring for bedridden Moli. Exs. 96 ¶ 36; 130 ¶ 48. Vanisi assisted at least once a week for about an hour. Ex. 96 ¶ 36. Vanisi would clean Moli, feed him, change his urine catheter and bag, wash him, and put lotion on this skin. Exs. 96 ¶ 35; 130 ¶ 48.

208. Moli's father-in-law, Moleni, moved into their home and became a grandfather figure to Vanisi. Ex. 96 ¶ 17. Moleni and Vanisi shared a bedroom. Ex. 96 ¶ 17;130 ¶ 47. Vanisi would help him Moleni bathe. Exs. 130 ¶ 48; 96 ¶ 35.

Later in life, over family objection, Vanisi named his second son "Moleni" in honor of their close relationship. Ex. 96 ¶ 17.

209. Vanisi assisted Moli and Moleni until they died. Moleni died in 1985 when Vanisi was about fifteen years old. Ex. 96 ¶ 35; 130 ¶ 54. Moli died shortly there after in 1986. Ex. 130 ¶ 55. Both deaths had a significant impact on Vanisi. Ex. 130 ¶¶ 54-55. The following year, Vanisi's brother Tevita died. Ex. 130 ¶ 56; 96 ¶ 19. These years were particularly difficult for Vanisi in light of the above listed stessors. Ex. 130 ¶ 65. Vanisi cried a lot, and became withdrawn and depressed. Ex. 96 ¶¶ 18-19.

210. Dr. Foliaki reports that the experiences of the death of those close to teenaged Vanisi caused further damage as Vanisi was "not able to integrate the losses in a healthy way." Ex. 164 ¶ 21.5.

4. Evidence of mental illness in Mr. Vanisi's siblings.

211. In addition to sexually abusing Vanisi, his brother Sitiveni began abusing drugs and alcohol when he was a teenager. Ex. 101 ¶ 34. Sitiveni's drinking problem continued into adulthood. Ex. 101 ¶ 34. After the death of his uncle Moli, who had adopted him, Sitiveni became deeply depressed and his drinking worsened. Ex. 101 ¶ 36. Sitiveni reports that:

> By the mid-1980s, in addition to abusing alcohol, I also started abusing marijuana. By 1995, I began abusing cocaine. I was able to hold down jobs and support my family after we became married and started having children. However, I enjoyed using drugs and drinking when my work shift was over.
>
> I was a blackout drinker and I often woke up in strange and unfamilier places, or I had no recollection of how I got home the night before. I often had blank spots in my memory when recollecting what happened while I was intoxicated. I also experienced time loss, and had no idea how much time passed by while I was intoxicated.

Ex. 101 ¶¶ 37-39. Sitiveni experienced mood swings and changes in his personality when he was intoxicated. Ex. 101 ¶ 39. He would become belligerent and started fights. Ex. 101 ¶ 39. When Sitiveni used cocaine, he became paranoid. Ex. 101 ¶

40. Sitiveni had several separations from his wife and was arrested for domestic violence. Exs. 101 ¶¶ 42; 192; 193. Sitiveni's son reported that his dad would hit him with his hands and fists daily. Ex. 193 at 14. Sitiveni also was arrested for strong-armed robbery and driving while intoxicated. Ex. 101 ¶ 43. Sitiveni's son has been described as an "out of control" individual who "has some real problems." Ex. 193 at 14.

212. Vanisi's brother Tevita was a hyperactive child who may have had a learning disability. Ex. 130 ¶ 57. Tevita had difficulty staying focused in class and at home. Ex. 130 ¶ 57. Tevita was very disruptive in school and frequently was reprimanded for talking and walking around the halls while class was in session. Ex. 130 ¶ 57. Tevita was expelled from several schools for behavioral issues. Ex. 130 ¶ 57. His uncle Toa reports that he "always thought that Tevita Siu had something wrong with his mind." Ex. 108 ¶ 30. Tevita

> frequently exhibited erratic, bizarre and reckless behaviors throughout his short life. Tevita Siu also had no sense of danger. Tevita Siu was always quick to get into a fist fight with people out in the streets even when his opponent was much larger or when he was out numbered.

Ex.110 ¶ 6. Tevita's cousin Olisi is convinced that Tevita suffered from an undiagnosed mental illness. 110 ¶ 11.

213. Tevita was arrested and charged with several juvenile offenses for which he had no remorse. Ex. 130 ¶ 58. Many people in Vanisi's family believed that Tevita was more likely to have been placed on death row than Vanisi. Ex. 130 ¶ 58.

214. Tevita died when he was a high school senior from "huffing White Out." Ex. 96 ¶ 7; 130 ¶ 63. Tevita "huffed glue, gasoline, White Out, and any other chemical that he though would get him high." Ex. 95 ¶ 7.

215. Family members also believe that Vanisi's sister Sela suffers from a mental illness. Ex. 110 ¶ 12; 111 ¶ 10.

216. Miale's biological sons also abused drugs and both were deported. Ex. 101 ¶ 45. One son was deported for robbery and drug sale convictions and the other was deported for a domestic violence conviction. Ex. 101 ¶ 45.

5. United States racism and the Tongan culture.

217. Maile was the person who decided that Vanisi's family should migrate to the United States. 103 ¶ 22. Maile believed that the family would become more successful in America because of increased business opportunities. 103 ¶ 22. Maile also wanted his family's children to attend American universities. 103 ¶ 22. Maile first sent his brother Moli to America. 103 ¶ 22. Once Moli had established himself, Moli petitioned for other family members to migrate. 103 ¶ 22.

218. The transition was quite difficult for the family who had been quite successful in Tonga, but in some cases had to live between ten to twenty people to a house in the United States. See, e.g., 103 ¶¶ 2-5; 101 ¶ 4-7, 12, 20; 130 ¶ 17; 108 ¶¶ 7-11.

219. Furthermore, upon arriving in San Bruno, Maile developed racial animosity against whites based upon the bad relations that he had with his neighbors. Ex. 101 ¶ 22. A prejudiced neighbor constantly would call the police to complain about Maile. Ex. 101 ¶ 22. The neighbor continued to harass Maile until the neighbor moved away. Ex. 101 ¶ 22.

220. Maile was against anyone in the family marrying a non-Togan or non-Polynesian. Ex. 115 ¶ 9. Miale believed that interracial marriages are difficult because of the inevitable cultural conflicts which can lead to their children being raised with nontraditional values. Ex. 115 ¶ 9. When Vanisi's wife DeAnn met Maile during Christmas 1993, Mail treated her very coldly Ex. 104 ¶ 8.

221. San Bruno was a predominantly white community. Ex. 101 ¶ 23. Vanisi's brother Sitiveni recalls experiencing prejudice when he was growing up, mostly at school. Ex. 101 ¶ 23. Some of the white kids at school did not like Sitiveni because he was of another race, and they call him derogatory names. Ex. 101 ¶ 23. Sitiveni

was involved in many fights at school because of the bigotry and harassment that he received from some of his white classmates. Ex. 101 ¶ 23. As a result, Sitiveni was suspended from school on many occasions. Ex. 101 ¶ 23. The white children stopped bothering Sitiveni when they realized that he would never back down from a fight. Ex. 101 ¶ 23. On one occasion, Sitiveni became drunk while at school and decided to seek out and attack everyone who had ever harmed him. Ex. 101 ¶ 24.

222. Vanisi, on the other hand, always spent time with the white children around the neighborhood and associated with very few Tongan kids growing up. Ex. 96 ¶ 30; 130 ¶ 81. Vanisi's sister Sela reports that she never saw Vanisi spending time with Tongans or other South Pacific Islanders, and he always exclusively dated white girls. Ex. 130 ¶ 81. Vanisi did not explain to Toeumu why he almost exclusively chose to spend his time with white children. Ex. 96 ¶ 30. Vanisi also did not discuss his feelings about race or his lack of acceptance amongst American children. Ex. 96 ¶ 30. Many people in the family believed that Vanisi was ashamed of his heritage which was why he tried to avoid being around Tongans. Ex. 130 ¶ 81.

6. Psychological impact of key events

223. Dr. Foliaki reports that identity formation is a critical stage of adolescent psychosocial development. Vanisi's early stage of developing went awry when his adoptive mother left him when he was three. Ex. 164 ¶ 21.4. Vanisi's next stages of development were difficult to negotiate with the major upheavals that occurred in connection with the family's migration and Vanisi's return to his adoptive mother. Further, the sexual abuse lowered Vanisi's self-esteem and his sense of inferiority grew. The insecure attachment, abuse issues, and conflicting parenting styles, made it difficult for Vanisi to form a coherent sense of who he was, and the evidence is overwhelming that Vanisi's identity problems worsened over time. Ex. 164 ¶ 21.4.

224. In adolescence Vanisi tried hard, and had a caring and sensitive nature as evidenced by his care for his elderly grandfather. Ex. ¶ 21.5. His teenage peer relationships were not particularly healthy, but Vanisi was unaware of the opinion of the teenagers around him, who thought that he was slightly odd and weird at times. Ex. ¶ 21.5. Vanisi then experienced the death of people who were close to him, which he was not able to integrate in a healthy way, and further psychological damage was done. Ex. ¶ 21.5. These numerous psychological insults over the course of his childhood and adolescence undermined his ability to develop the necessary psychological machinery required to manage the major stressors that were awaiting him in adult life. Ex. ¶ 21.5. Once Vanisi left high school, his downward spiral began, and he became overwhelmed by his schizoaffective disorder until it culminated in the instant offense. See section B above.

E. State Post-Conviction counsel was ineffective for failing to conduct the above-listed mitigation investigation.

225. Thomas Qualls represented Mr. Vanisi during post-conviction proceedings. Ex. 178 ¶ 1. During this representation, Mr. Qualls became very concerned about Mr. Vanisi's competency to proceed and thereby filed a motion to stay proceedings in order to determine his level of competency. Ex. 178 ¶ 2. Because Mr. Qualls was focused on the competency litigation and believed that the judge would stay post-conviction proceedings due to Mr. Vanisi's incompetency, he did not seek funds to conduct an investigation. Ex. 178 ¶ 5.

226. Mr. Qualls believed that to have effectively represented Mr. Vanisi, he should have conduced a complete investigation of all aspects of Mr. Vanisi's case. Ex. 178. He especially should have investigated his allegation that trial counsel was ineffective for failing to pursue mitigation. Ex. 178 ¶ 3. Mr. Qualls admits that:

> To conduct a full investigation of Mr. Vanisi's case I planned to and should have traveled to Tonga, with a cultural expert, to explore Mr. Vanisi's cultural and family background. Such was the litigation plan and we should have conducted a thorough investigation into Mr.

> Vanisi's life and provided competent experts with an in-depth social history as well as all medical, employment and educational records we could obtain.

Ex. 178 ¶ 4.

227. After the post-conviction judge denied the motion to stay Mr. Vanisi's proceedings, she gave Mr. Qualls "an extremely short period of time to file the amended/supplemental post-conviction petition." Ex. 178 ¶ 6. Mr. Qualls believes that it was less than a week. Ex. 178 ¶ 6. As a result, the planned investigation was never conducted and the "supplemental petition was left deficient of that information." Ex. 178 ¶ 6.

228. Mr. Qualls notes that:

> This was my first death penalty post-conviction case as a licensed attorney. If I were handling the case today I would not have postponed my investigation pending a competency determination. If I had made that decision, I would have insisted that the post-conviction judge give me adequate time to conduct an investigation before filing an amended petition.

Ex. 178 ¶ 7.

229. A reasonable likelihood exists that but for prior counsel's deficient performance, Mr. Vanisi would have received a more favorable outcome at trial.

CLAIM TWO

230. Mr. Vanisi's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, a fair trial, and a reliable sentence because trial counsel ineffectively deprived Mr. Vanisi of his constitutional right to expert assistance to aid in his defense during the guilt/innocence and penalty phase of his trial. U.S. Const. amends. VI, VIII & XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

231. Mr. Vanisi had a constitutional right to competent expert assistance to assess his neurological and psychological disorders, and to address the issue of future dangerousness. A competent and properly prepared psychiatrist and neuropsychologist could have explained the impact of Mr. Vanisi's psychiatric and neuropsychological disorders on the day of the offense. Mr. Vanisi hereby incorporates Claim One as if fully pled herein. A social scientist could have explained how the Tongan culture made it easy for Mr. Vanisi's mental health disorders to go unaddressed. A psychiatrist could have explained that once the proper medical regimen was established, Mr. Vanisi would not be a future danger.

232. The above-referenced experts could have explained to Mr. Vanisi's jury that:

> At the time of the homicide Mr. Vanisi had delusional and perseverative thinking about the need to kill a police officer; he had been talking to his imaginary friend Lester; he had a preoccupation with religious ideas/religiosity, flight of ideas, and emotional lability. He appeared to essentially enter into a state of schizophrenia and persistent hypomania/mania in his early twenties.

Ex. 163 at 67.

A. Trial counsel were ineffective in failing to obtain a neuropsychologist.

233. Trial counsel were ineffective in failing to retain and properly prepare a neuropsychologist such as Jonathan Mack, Psy.D., to conduct neurological testing and to testify about how Mr. Vanisi's neuropsychological and psychotic disorders affected him on the day of the offense. Dr. Mack has diagnosed Mr. Vanisi as

suffering from: Schizoaffective Disorder; Attention Deficit Hyperactivity Disorder (ADHD), Combined Type; Dementia Due to Multiple Etiologies; Amphetamine Abuse and Dependence, Remotely; and a History of Alcohol Abuse. Ex. 163 at 69.

234. Dementia is a form of brain damage that is usually explained by a traumatic brain injury when it is diagnosed in people under sixty-five. Ex. 164 ¶ 22.3. Mr. Vanisi has a history of being involved in numerous altercations that could have had an accumulated effect of brain injury. Further, there are reports that when Mr.Vanisi was five, he was kicked in the head by a horse which resulted in a spot on his head where hair no longer grows. 104 ¶ 13. Mr. Vanisi's Schizoaffective Disorder also could be the cause of his brain damage. Ex. 164 ¶ 22.3.

235. Dr. Mack reports that "[n]europsychological. . . markers of brain damage are very significant in the case of Mr. Vanisi." Ex. 163 at 68. Mr. Vanisi's scores on the Wechsler Adult Intelligence Scale-IV reflect that Mr. Vanisi has strong verbal fluency scores reflecting a strong capacity to converse. Ex. 164 ¶ 2.7.3-4. Mr. Vanisi's ability to critique, analyze and explore the issues about which he converses, however, is severely impaired. Ex. 164 ¶ 2.7.3-4. Mr. Vanisi, therefore, has major cognitive deficits that have increased the severity of his Schozoaffective Disorder. Ex. 164 ¶ 2.7.3-4.

236. Mr. Vanisi's strong verbal fluency is a cognitive strength that is misleading. Ex. 164 ¶ 2.7.5. Most prior mental health professionals who saw Mr. Vanisi believed that Mr. Vanisi was either intelligent or very intelligent based upon his verbal fluency skills. Ex. 164 ¶ 2.7.5. Mr. Vanisi's level of intelligence, however, cannot be judged from his conversational ability alone, and in fact his intelligence is well below that of the normal person. Ex. 164 ¶ 2.7.5.

237. Mr. Vanisi suffers from impaired frontal executive functioning, which was caused by a combination of factors such as Dementia, Attention Deficit Hyperactivity Disorder, multiple head traumas and possibly traumatic brain injury. Ex. 163. Mr. Vanisi's long period of non-treatment, combined with substance use,

possible head trauma (from physical confrontations with other people and the police) and long standing heavy doses of psychotropic medication have impacted his neuropsychiatric cognitive testing. Ex. 164 ¶ 2.7.2.

238. This frontal lobe impairment explains the adaptive/functional deficits that Mr. Vanisi has displayed throughout his life. Ex. 163 at 68-69. The lack of self-control and the disinhibition caused by Mr. Vanisi's impaired executive functioning is borne out by the numerous self-defeating, impulsive actions undertaken by Mr. Vanisi that have caused him to fail at every major endeavor that he has attempted, such as his failed LDS mission, failed college attempt, failed career and eventually his failed marriage. See Claim One.

239. Mr. Vanisi's "severe executive-frontal dysfunction [includes] a very significant perseverative tendency, impaired complex sequencing, impaired concept formation, and impaired non-verbal abstract reasoning." Ex. 163 at 68. This cluster of cognitive deficits causes Mr. Vanisi to think and reason in an impaired and irrational manner, to fixate on his irrational ideas and to have difficulty preventing himself from acting on those ideas, behaviors which he has displayed throughout his life. See Claim One.

240. Mr. Vanisi's "chronic schizophrenic presentation. . . is separate and apart from his mood disorder, but concomitant with a Bipolar One Disorder that is primarily hypomanic/manic." Ex. 163 at 67. Mr. Vanisi's bizarre behaviors, unusual dress styles, strange ways of thinking and rambling speech patterns about non-sensical or delusional subject matter began manifesting in his early adulthood. Ex. 163 at 67. The fact that this behavior increasingly worsened and culminated in the instant offense is indicative that "in his mid-20's Mr. Vanisi had a psychotic break and developed a schizophrenic disorder that is best characterized as a Schizoaffective Disorder." Ex. 163 at 67.

/ / /

241. The importance of these findings is that Mr. Vanisi has a reduced ability to:

> hold information and process it to the extent that he can problem solve and find non-delusional and non-fantastical answers to challenging life situations, is greatly impaired. In effect the individual who has normal cognitive functioning but is suffering from Schizoaffective Disorder is in a much better position to deal with their illness compared to someone with the same diagnosis but cognitively less intact.

Ex. 164 ¶ 22.4.

242. Dr. Mack could have explained to the jury that, contrary to the state's arguments at trial, Mr. Vanisi "has been mentally ill since well before the onset of the crime in question, with increasing deterioration of mental/psychiatric functions in the years preceding the homicide." Ex. 163 at 69. Mr. Vanisi has suffered from Attention Deficit Hyperactivity Disorder from at least the time he was five years old, when his family had to place barbed wire fencing around their home to prevent him from leaving and had to keep him away from a dog that he would repeatedly antagonize even though the dog consistently hurt him. Ex. 130 ¶ 23; 96 ¶¶ 5. 21. Ex. 163 at 58. This disorder persisted into adulthood, contributing to Mr. Vanisi's dementia and his executive-frontal cognitive deficits. Ex. 163 at 68. This disorder also contributed to Mr. Vanisi's hypomanic presentation. Ex. 163 at 68. The numerous reports of Mr. Vanisi speaking rapidly from the time he was a young child, his inability to stay focused on a topic of conversation, and to rapidly switch from topic to topic, all indicate that Mr. Vanisi suffered from Attention Deficit Hyperactivity Disorder and impaired executive functioning, and thus a lack of inhibition, from a very young age. See Claim One.

243. Dr. Mack could have explained to the jury that "Mr. Vanisi's Psychotic Disorder appears to have begun in his early twenties, which is consistent with the typical course of a schizophrenic illness." Ex. 163 at 69. Given Mr. Vanisi's underlying cognitive impairments, the effects of psychosis would undoubtedly manifest in bizarre and unpredictable ways, as the witnesses who knew and spent time with Mr. Vanisi during this time period report. See Claim One. Dressing in strange costumes, assuming fantastical personalities, obsessively relaying delusions

about aliens, Lamanite warriors and a god named Lester all would be consistent with Mr. Vanisi's unique cluster of organic, cognitive, and psychotic impairments.

244. "At the time of the homicide Mr. Vanisi had delusional and perseverative thinking about the need to kill a police officer." Ex. 163 at 67. Mr. Vanisi relayed to Dr. Mack that at the time of the homicide he was carrying a hatchet because he had what Dr. Mack characterizes as a delusional belief that he was going to "'get beat up or harassed again.'" Ex. 163 at 44. It is likely that Mr. Vanisi developed this obsessive delusion from his numerous prior encounters with police officers wherein Mr. Vanisi believed that he had been wrongfully harassed or beaten. Ex. 163 at 44; see also, Claim One at 54-55.

245. Dr. Mack reports that the severity of Mr. Vanisi's schizophrenic break raises "a reasonable question as to whether or not Mr. Vanisi was fully sane at the time of the commission of this crime." Ex. 163.

246. Trial counsel's failure to hire and properly prepare a neuropsychologist was unreasonable and that failure prejudiced Mr. Vanisi.

B. Trial counsel were ineffective in failing to retain a psychiatrist.

247. Trial counsel were ineffective in failing to investigate and retain the services of a psychiatrist such as Siale 'Alo Foliaki, M.D., to conduct a forensic assessment of Mr. Vanisi in order to explain to the jury how Mr. Vanisi's mental health disorders affected him on the day of the offenses. Mr. Vanisi has attached the declaration of Dr. Foliaki. Ex. 164.

248. After reviewing a vast amount of records including, but not limited to, Mr. Vanisi's social history, psychiatric reports, incarceration records and trial transcripts, Dr. Foliaki has concluded that:

> 1.1 Mr. Vanisi suffers from a chronic and disabling mental disorder known as a Schizoaffective Disorder that greatly impairs his cognitive, emotional and behavioural control and the evidence for this is unequivocal as will be demonstrated in great detail in [this] report.

> 1.2 Mr. Vanisi as part of his Schizoaffective Disorder, compounded by substance misuse was suffering from a severe, psychotically driven disturbance of mind with marked delusional ideas at the time of the instant offense – the murder of Police Sgt. George Sullivan on the 13th of January 1998.
>
> 1.3 Previous mental health professionals did not have access to sufficiently robust information regarding Mr. Vanisi's genetic predisposition to mental illness, his major childhood developmental insults, evidence of pre-offence mental instability, the necessary neuropsychiatric battery of tests and important neurological investigations (CT Scan, MRI, EEG's) to make an accurate diagnostic assessment. The psychiatric and psychological opinions therefore failed to diagnose and hence convey to the sentencing court the true extent, depth and breadth of Mr. Vanisi's disordered mental status.
>
> 1.4 Mr. Vanisi is not and has never been Malingering in the true clinical sense of the term. The evidence is very strong and is based primarily on the most recent Neuropsychiatric Psychometric Testing and Psychiatric Evaluation. The evidence also strongly challenges the issue of Mr. Vanisi's perceived legal competency.
>
> 1.5 Mr. Vanisi without medication would return to a florid state of psychosis and lability of mood very rapidly. It would be completely unethical to stop his medications to test this hypothesis and demonstrate the seriousness of his ongoing Schizoaffective Mental Disorder but a large body of evidence will be presented to support this conclusion.

Ex. 164. Schizoaffective Disorder is:

> an illness with coexisting, but independent schizophrenic (psychotic) and [bipolar] mood components. Schizoaffective disorder is seen primarily as part of a schizophrenia spectrum.

Ex. 164 ¶ 2.7.1. According to Dr. Foliaki, Mr. Vanisi began suffering from sufficient symptoms for a diagnosis of Schizoaffective Disorder to have been made many years prior to the offense. Ex. 164 ¶ 2.7.1.

249. Schizoaffective Disorder greatly impairs cognitive, emotional and behavioral control. Ex. 164 ¶ 1.1. Dr. Foliaki explains that Mr. Vanisi's Schizo-affective Disorder is associated with significant cognitive deficits. Ex. 164 ¶ 2.7.2. Furthermore, the severity and pattern of Mr. Vanisi's cognitive deficits is seen in people with long standing Schizophrenia which strengthens the diagnosis of Schizoaffective Disorder as opposed to a diagnosis of Bipolar Mood Disorder with

psychosis which was the diagnosis of choice for many psychiatrists who evaluated Mr. Vanisi. Ex. 164 ¶ 2.7.2.

250. In short, Mr. Vanisi has a primary psychotic condition that affects his mood rather than the other way around. Ex. 164 ¶ 2.8. This is evident because:

> Mr. Vanisi experiences a marked decline from his best level of functioning, beginning with adolescence, has increasingly bizarre and disorganized behavior, with a marked decline in his personal self-cares which is persistent and independent of marked mood swings. This is the classical description and course of a primarily schizophrenic illness.

Ex. 164 ¶ 2.8.

251. Dr. Foliaki has concluded that based upon the historical evidence contained in his social history, Mr. Vanisi was mentally disturbed at the time that he committed the offense. Ex. 164 ¶ 18.0. This historical evidence includes genetic, environmental, and psychological factors, and the historical impact that these factors had on Mr. Vanisi's mental state. Ex. 164 ¶ 18.0.

252. Dr. Foliaki reports that there is also a significant body of literature that indicates that both marijuana and amphetamine based drugs can markedly worsen psychosis. Mr. Vanisi's substance abuse contributed to the severity of Mr. Vanisi's pre-existing psychosis at the time of the offense. Ex. 164 ¶ 15.4.

253. Dr. Foliaki reports that the following summary of facts of Mr. Vanisi's psychiatric history enabled him to form his diagnosis:

> Mr. Vanisi inherited a genetic predisposition for mental illness from both his parents and is not the only child of his parents that has experienced mental illness. His biological father is a very disturbed human being that becomes completely incapable of living autonomously which is a hallmark of significant mental illness. His biological mother experiences maternal depression and his early childhood involved serious attachment disturbances. His grade school years and early adolescence is a particularly confusing time due to the move from a simple village life of a Pacific Island to the complex urban environment that is San Bruno in 1976. Mr. Vanisi experiences sexual abuse from an older sibling soon after arriving in the United States and faces the confusion of the contrasting parenting styles of his adult care-givers. He experiences very strict school, home and church life and although this provides him the necessary structure for Mr. Vanisi to progress satisfactorily, the traumatic experiences strangle his

ability to develop a strong sense of self. He is not however a violent or aggressive person at this stage in his life.

The structured life that protects Mr. Vanisi from experiencing severe levels of emotional distress changes in late adolescence and early adulthood. He is no longer bound by the strict rules and boundaries of his earlier life and he now becomes directly responsible for himself and the decisions that he makes.

At this point in Mr. Vanisi's life, his developing psychotic illness becomes more evident and his poor executive functioning (found on psychometric testing when incarcerated) combine to impact on his inability to progress academically or occupationally. Every endeavour he attempts goes poorly and some of his failures, and the shame and humiliation he experiences are psychologically difficult for his inadequate cognitive functioning to adequately address. His growing sense of failure causes distress which acts on his genetic vulnerability to mental instability, his poorly formed sense of self and identity confusion in conjunction with his poor intellectual capacities, lead to the overt expression of psychiatric illness.

This manifests itself in his growing identity confusion and descent into frank psychosis with significant lability of mood. He has a number of negative interactions with Police during this period and his poor executive functioning does not allow him to integrate his experiences into a rational view that enables him, to see his role in contributing towards the negative dynamic with the police. Mr. Vanisi's descent into overt psychosis causes him to lose touch with reality and he develops a systematic delusional idea that initially is poorly formed but somehow involves the police as being a constant and sinister force in his life.

Towards the end of 1997 the convergence of his growing mental illness, the separation from his wife, the death of the elderly neighbour with whom he has been consorting, appear to be the final straw. There is a marked increase in alcohol and illicit drug use and the formation of the psychotically driven notion that the killing of a police officer will miraculously restore his life to an even keel. This distorted delusional idea grows so strong that he senses and communicates this notion (that he describes as a driving force) to friends and family well before the act. Family and friends do not take him seriously despite recognising that he is becoming more mentally disturbed. They fail to believe him because his premorbid personality as a child and adolescent is not aggressive or violent.

The four weeks leading up to the instant offense, Mr. Vanisi descends into florid psychosis and the psychotically driven notion to kill a policeman is released as his labile mood state increases his impulsivity, and propensity towards violence. Mr. Vanisi kills a policeman that he happened upon in a poorly planned, random, non-rational manner in a psychotic rage. It speaks to his delusional thinking that "any policeman would do". True to his systematised delusional thinking Mr. Vanisi experiences a momentary release from the unmanageable ~~e~~motional tensions that had been driving his behaviour. He then makes a number

> of simplistic, poorly considered decisions as he tries to escape the scene and avoid the consequences of his actions.
>
> Mr. Vanisi's inevitable capture and incarceration proves that effecting his psychotic delusion to kill a police officer has not freed him of his ongoing psychological turmoil. In fact his actions complete his descent into madness as he can no longer integrate his actions into a cohesive, rational and coherent understanding of himself and requires external restraint to keep him and those around him safe.
>
> To spend time with Mr. Vanisi now is akin to speaking with the shell of a person. The exterior is calm and well presented but his interior psychic world is no longer accessible. There is an obvious immaturity that speaks to an arrested emotional development. He is very child-like in his lack of appreciation of the harmful things that he has done in his life.
>
> He talks a lot, no longer capable of any analysis of the issues he is talking about which is the cardinal sign of his absolute disconnection from reality.
>
> Without the prescribed psychotropic medication Mr. Vanisi's psychosis would return very rapidly leading to severe mood fluctuations and he would again experience the psychological state present at the time he committed the murder of Police Sgt George Sullivan in 1998. He was a very disturbed and clearly mentally disordered human being well before the instant offence, during the actual act of committing the instant offence and continues to be a very disturbed but medically stabilised human being up until the present time.
>
> Mr. Vanisi reported to me that "he loves being on death row, it's the first time I've felt normal in my life and people here take good care of me." It is ironic that in prison, heavily medicated, and with his civil liberties taken away from him that Mr. Vanisi should report such a sentiment. The most logical explanation for this expressed sentiment is that in the first time in his adult life the mental disorder that he labours under has been adequately addressed. **For him to be so content now on death row must indicate how distressed he was prior to getting the right medication for his disorder.**

Ex. 164 ¶ 3.9.2 (original emphasis).

254. As part of Dr. Foliaki's psychiatric assessment, he reviewed the prior competency evaluations conducted while Mr. Vanisi was incarcerated for the instant offense. Ex. 164 ¶ 5.2. Dr. Foliaki reports that the doctors who conducted these evaluations did not have access to Mr. Vanisi's extremely detailed developmental and family history or the comprehensive battery of tests undertaken by Dr. Jonathan Mack. Ex. 164 ¶¶ 5.1.1-2. Dr. Foliaki concludes "if my colleagues

had this information available to them that the nature and findings of their psychiatric opinions would have been drastically different." Ex. 164 ¶ 5.1.3.

255. Dr. Foliaki reports that collateral reports regarding Mr. Vanisi's personal history and custodial reports reveal a diagnosable mental illness:

> Despite questions of malingering and diagnostic differences of opinion the overall impression is that Mr. Vanisi has always suffered from a degree of psychopathology.

Ex. 164 ¶ 7.0.

256. The choice of psychotropic medication gives strong support that Mr. Vanisi has been suffering from psychosis. Dr. Foliaki reports that:

> Large doses of psychotropic medication have significant correlation with severity of psychiatric illness and argue against malingering. Individuals who are feigning mental illness will not be able to physiologically tolerate large doses of antipsychotic medications as the tranquilising effect would be too sedating without the presence of psychosis to moderate their effects.

Ex. 164 ¶ 10.00. Through trial and error over many years at Ely State Prison, Mr. Vanisi's treating clinicians have arrived at the best medication regimen for his condition. These psychotropic medications would cause marked physiological disturbances to any person not mentally disordered so the issue of malingering can be readily discounted. The other significant pattern that emerges is that each time Mr. Vanisi's antipsychotic or mood stabilizer is stopped, he becomes progressively unwell and the medications have to be reinstated. If Mr.Vanisi was suffering only from Bipolar Mood Disorder then strong doses of antipsychotics would not be required. Mr. Vanisi's current medication regimen is ideal for a person suffering from Schizoaffective Disorder. Dr. Foliaki notes:

> A strong endorsement of the validity of any psychiatric diagnosis is the medication regimen that best treats the condition. In this regimen the Haldol is a potent antipsychotic and treats the Schizophrenic component of his condition. The Lithium is the most efficacious mood stabiliser and treats the bipolar/mood component of the illness. Seroquel is an agent with proven antipsychotic and mood stabilising properties and his Cogentin treats side-effects from his Haldol.

Ex. 164 ¶ 10.22.

Trial counsel's failure to hire and properly prepare a psychiatrist was unreasonable and that failure prejudiced Mr. Vanisi.

C. Cumulative error and prejudice

257. Each error contained herein individually and cumulatively, prejudiced and deprived Mr. Vanisi of his state and federal constitutional rights.

Prior post-conviction counsel was ineffective for failing to raise the claims contained herein. A reasonable likelihood exists that but for prior counsel's deficient performance, Mr. Vanisi would have received a more favorable outcome at trial.

CLAIM THREE

258. Mr. Vanisi's state and federal constitutional rights to due process, confrontation, effective counsel, a reliable sentence, a fair trial, equal protection, and freedom from cruel and unusual punishment were violated because he received ineffective assistance of counsel pretrial and during the guilt phase of trial. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

Mr. Vanisi suffered ineffective assistance of counsel prior to and during the guilt phase of trial.

A. Trial counsel was ineffective during voir dire.

259. Mr. Vanisi's trial counsel were constitutionally ineffective during the voir dire stage of the proceedings. In part due to erroneous rulings by the trial court, see Claim Five, trial counsel ineffectively failed to question the venire regarding their ability to consider specific mitigation evidence that trial counsel intended to introduce during the penalty phase of the trial. 09/21/99 TT 338. Furthermore, trial counsel were constitutionally ineffective by failing to move the court to remove members of the venire for cause who displayed bias against Mr. Vanisi. Considered singly, and cumulatively, trial counsel's defective performance during voir dire prejudiced Mr. Vanisi.

1. Trial counsel were ineffective in failing to life qualify the venire.

260. Trial counsel were ineffective in failing to adequately voir dire the persons on the venire regarding their ability to consider a sentence of less than death in the specific circumstances of Mr. Vanisi's case. Trial counsel's purpose during voir dire was to empanel jurors who could consider a penalty of less than death in Mr. Vanisi's case. In order for jurors to be qualified to serve in Mr. Vanisi's case, they would have to state that they could consider all of the sentencing options in the circumstances of Mr. Vanisi's case. To put it simply, each of the jurors should have

been required to confirm on the record that they could consider a sentence of life with or without parole for Mr. Vanisi. It was not enough for the jurors to simply affirm that they could follow state law or to consider life with parole as a sentence for murder in the abstract. Federal law recognizes that a juror's assurances in response to general questions are not the same as requiring their assurance in the specific case before them that they can be fair and impartial.

261. The jurors who served on Mr. Vanisi's jury also should have been questioned about their ability to consider the specific mitigating circumstances that trial counsel intended to present in the penalty phase. Trial counsel was erroneously forbidden by the trial court to question any of the jurors about their feelings and ability to consider the specific mitigating evidence in Mr. Vanisi's case. During the penalty phase in Mr. Vanisi's case the jury was presented with evidence that Mr. Vanisi had been a good, well behaved child and teenager, that he had been a devoted member of the Church of Jesus Christ of Latter Day Saints, a good student and a good football player, that he suffered from bipolar disorder and had been using drugs in the period leading up to the crime. See 10/01/99 TT 1311-10/05/99 TT 1696. Mr. Vanisi also incorporates the allegations of Claim One regarding trial counsel's failure to investigate and present mitigation evidence as if fully set forth herein.

262. When trial counsel attempted to ask members of the venire if they would be able to consider mitigating circumstances beyond those specifically listed in the statute, the following exchange occurred:

> MR. STANTON: Once again, counsel's questions about–you are posing about alcohol, about the ones that aren't statutory mitigating evidence is violating the rule that you cannot tell a jury what mitigating evidence is.
>
> . . .
>
> THE COURT: ..Curtail your inquiry into the permissible inquiry, which is whether or not they will look at other evidence in determining penalty.
>
> MR. BOSLER: So don't talk about specific mitigators?

THE COURT: No.

09/21/99 TT 337-38.

263. The trial court's erroneous ruling tied the hands of trial counsel and forced them to ineffectively fail to fully question the jury. Mr. Vanisi hereby incorporates Claim Five as if fully pled herein.

2. Trial counsel were ineffective in failing to move to excuse biased jurors for cause.

264. Trial counsel ineffectively failed to request that jurors biased against Mr. Vanisi be removed for cause.

265. Trial counsel were ineffective in failing to move to excuse Patrick Grider from the venire on the ground that he was biased as a matter of law. During voir dire, Mr.Grider confirmed that he was prejudiced against minorities. 09/21/99 TT 302-303. Mr. Grider's questionnaire and answers during voir dire indicated that he was strongly supportive of the death penalty. 09/21/99 302; Ex. 165 at 51.

MR. BOSLER: You also wrote something else on your questionnaire that I have a concern about. You came out and said I'm prejudiced against minorities.

PROSPECTIVE JUROR: Yes I am.

MR. BOSLER: Do you remember saying that?

PROSPECTIVE JUROR: Yes, I do.

MR. BOSLER: Anything that you have changed your mind about that statement?

PROSPECTIVE JUROR: If you remember my explanation on that, it's because I feel like I'm a minority anymore [sic] because everything is favored towards minorities.

MR. BOSLER: And you had a certain physical altercation with a minor. [sic]

PROSPECTIVE JUROR: Yes, I did.

MR. BOSLER: So you are saying that you still feel this prejudice in your mind against minorities?

PROSPECTIVE JUROR: Yes, I do.

MR. BOSLER: Is there any particular minority or all minorities?

PROSPECTIVE JUROR: Any particular. All of them.

09/21/99 TT 302-03.

266. Trial counsel were ineffective in failing to move to excuse Mr. Grider for cause due to his admitted racial prejudice. Despite his assurances that he would judge the case fairly, the average person with Mr. Grider's prejudices would be affected by the fact that Mr. Vanisi was a Tongan defendant accused of murdering a white police officer, in part because the police officer was white. Trial counsel could not have had a strategic justification for failing to request Mr. Grider's removal from the venire, especially given his favorable opinion about the death penalty and admitted racial bias. Trial counsel's failure deprived Mr. Vanisi of a fair trial, especially since trial counsel had to use a peremptory challenge against Mr. Grider, thereby resulting in Shaylene Grate, a juror biased against Mr. Vanisi, serving upon the jury that convicted Mr. Vanisi and sentenced him to death. Ex. 162. See Claim Five. The presence of a juror on the jury who was biased against Mr. Vanisi deprived him of a fair trial, and requires the automatic reversal of his conviction and death sentence. In the alternative, there is a reasonable probability of a more favorable outcome in the penalty phase of the proceedings if trial counsel had performed effectively by moving to remove Mr. Grider from the venire.

3. Trial counsel were ineffective in exercising their peremptory challenges.

267. Trial counsel were ineffective in failing to intelligently exercise their peremptory challenges against those persons on the venire who would be the most undesirable as jurors in his case. Trial counsel used their peremptory challenges against potential jurors who, based upon their answers during voir dire, would have been much more favorable to Mr. Vanisi if they had sat on the jury than Shaylene Grate. Trial counsel used a peremptory challenge to remove Leon Ralston, for example. Ex. 162. A review of his questionnaire indicates that although he favored

the death penalty, he did not believe in it in all cases. Ex. 165 at 136-40. His answers during voir dire questioning demonstrated much less bias than Ms. Grate, who had been challenged for cause, but eventually served on Mr. Vanisi's jury. 09/21/99 TT 325-40. Mr. Vanisi hereby incorporates the allegations of Claim Five regarding the trial court's failure to remove Ms. Grate from the jury for cause as though fully set forth herein. As a result of trial counsel's ineffective use of their peremptory challenges a juror was empaneled who was biased against Mr. Vanisi. There was no strategic reason for trial counsel to exercise their peremptory challenges against seemingly unbiased jurors while allowing a biased juror to remain on the jury.

268. As a result of trial counsel's ineffective exercise of their peremptory challenges, Mr. Vanisi was denied his state and federal constitutional rights to a fair trial before an impartial jury. Because peremptory challenges were used against seemingly unbiased jurors, trial counsel exhausted their challenges and were unable to use a peremptory challenge against Ms. Grate, an actually biased juror. The resultant presence of a juror on the jury who was biased against Mr. Vanisi deprived him of a fair trial, and requires the automatic reversal of his conviction and death sentence. In the alternative, there is a reasonable probability of a more favorable outcome in the penalty phase of the proceedings if trial counsel had performed effectively by using one of their peremptory challenges against Ms. Grate.

269. Trial counsel's deficient performance and the trial court's errors during voir dire deprived Mr. Vanisi of a liberty interest in his peremptory challenges. Under state and federal constitutional law, Mr. Vanisi was entitled to raise a challenge on the basis of "the existence of a state of mind in the juror evincing enmity against or bias to either party." Nev. Rev. Stat. § 16.050(1)(g). Mr. Vanisi was deprived of his federal constitutionally protected liberty interest in the application of state law due to trial counsel's failure to move to remove Mr. Grider from the venire for cause. The deprivation of a liberty interest was prejudicial in Mr. Vanisi's case under

controlling state and federal law. In addition, at the time of the adoption of the constitution in 1791, a criminal defendant's right to exercise peremptory challenges was well established at common law. That right was accordingly incorporated in the jury trial guarantee of the Sixth Amendment as well as the right to due process of law. Trial counsel's ineffectiveness accordingly directly deprived Mr. Vanisi of his state and federal constitutional rights.

B. Trial counsel were ineffective for disclosing that Mr. Vanisi had confessed to the crime.

270. Counsel violated Mr. Vanisi's constitutional rights to the effective assistance of counsel when they revealed privileged information to the court during a hearing on their motion to withdraw as counsel. Mr. Gregory revealed to the court that, in February of 1999, he had a conversation with Mr. Vanisi during which Mr. Vanisi admitted that he in fact killed the alleged victim. Ex. 23 at 3.

271. Mr. Gregory explained to the court that as a result of this admission, Mr. Vanisi's counsel attempted to fashion a defense based upon provocation, but that Mr. Vanisi allegedly refused to even talk about such a defense and instead wanted to present a defense based upon an alleged conspiracy against Mr. Vanisi, which included someone else doing the killing. Ex. 23 at 3, 10.

272. Counsel for Mr. Vanisi, therefore, revealed privileged attorney-client information to the court, in violation of their professional responsibilities, as well as Mr. Vanisi's constitutional rights.

273. The Nevada Supreme Court's holding that Mr. Vanisi's trial counsel were not ineffective for breaching attorney-client confidentiality in the course of their motion to withdraw as counsel, Vanisi v. State, 2010 WL 3270985, *4 (Nev. Apr. 20, 2010) (unpublished order), was contrary to and an unreasonable application of clearly established federal law.

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C. Trial counsel were ineffective for failing to object to the mutilation aggravating Circumstance.

274. Trial counsel was ineffective for failing to object to the mutilation aggravating circumstance as over broad, unconstitutionally vague, and failing to protect against the arbitrary and capricious infliction of the death penalty. Mr. Vanisi hereby incorporates Claim Seven as though fully pled herein.

D. Trial Counsel were ineffective for failing to object to unconstitutional jury instructions and request constitutional jury instructions.

275. Trial counsel was ineffective for failing to object to unconstitutional jury instructions and request constitutional jury instructions. Specifically, trial counsel failed to object to: (1) the first-degree murder instruction; (2) the mutilation instruction; (3) the penalty phase anti-sympathy instruction; and (4) the malice instructions. Additionally, trial counsel failed to request a jury instruction requiring that the mitigation be out weighed by the statutory aggravation beyond a reasonable doubt. Mr. Vanisi hereby incorporates Claim Eight as if pled fully herein.

E. Trial counsel were ineffective for failing to object to prosecutorial misconduct

276. Trial counsel were ineffective for failing to object to prosecutorial misconduct. Specifically, trial counsel failed to object when the prosecution: (1) disparaged trial counsel; (2) made reference to personal beliefs during closing argument; (3) instructed the jury to send a message to the community; (4) argued that the jury show Mr. Vanisi the same mercy that he showed the victim; and (5) improperly commented on mitigating factors. Mr. Vanisi hereby incorporates Claim Fourteen as if fully pled herein.

F. Trial counsel were ineffective for failing to object to the use of a stun belt.

277. Trial counsel were ineffective for failing to demand that the trial court hold a hearing on whether it was necessary to require Mr. Vanisi to use a stun belt during the trial. Mr. Vanisi hereby incorporates Claim Fifteen as if fully pled herein.

G. Trial counsel were ineffective for failing to renew their request for a change of venue.

278. Trial counsel were ineffective in failing to renew their motion for a change of venue at the completion of voir dire. Mr. Vanisi hereby incorporates Claim Seventeen as if fully pled herein.

H. The errors of trial counsel when considered singly and cumulatively prejudiced Mr. Vanisi.

279. The ineffective assistance of trial counsel singly and cumulatively prejudiced Mr. Vanisi. Mr. Vanisi hereby incorporates Claims One and Two as if fully pled hereing. There was no strategic reason within the range of reasonable competence for trial counsel's defective performance throughout the entire proceedings in the instant cause. There is a reasonable probability that, but for trial counsel's deficient performance, the outcome of Mr. Vanisi's trial would have been different

CLAIM FOUR

280. The state post-conviction court's ruling that Mr. Vanisi was competent to proceed with state court post-conviction proceedings violated Mr. Vanisi's state and federal constitutional rights to due process, a reliable sentence and the effective assistance of counsel. U.S. Const. amends. V, VIII, XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

281. During state post-conviction counsel's first interview, Mr. Vanisi took off his clothes, rolled on the floor, burst into spontaneous song, and explained that he was Dr. Pepper, an independent sovereign. Mr. Vanisi was manic and agitated and claimed not to have slept for eight days. Mr. Vanisi recited gibberish and poetry, snarled like a wild animal and explained that he had made snow angels while naked. During subsequent interviews, there was little to no improvement.

282. Mr. Vanisi's bizarre behavior prompted prior post-conviction counsel to make further inquiry. Prison disciplinary records were produced revealing that during the prior two years, Mr. Vanisi's mental health and behavior had degenerated. Additionally, Mr. Vanisi was being forcibly injected with powerful anti-psychotic medication which rendered him mute and zombie-like during certain periods of each month. Trial counsel filed a motion to stay state post-conviction proceedings pursuant to Rohan v. Woodford, 334 F.3d 803 (9th Cir. 2003).

283. On November 22, 2004, the state district court ordered a competence evaluation, pursuant to Nev. Rev. Stat. § 178.415 and Rohan, to be conducted by Thomas E. Bittker, M.D. and Raphael Amezaga, Ph.D. 11/22/04 HT 25; Ex. 48. Dr. Bittker, a psychiatrist, found that Mr. Vanisi was incompetent to proceed, and recommended a short pause in the proceedings to adjust Mr. Vanisi's medications and return him to competency. 1/27/05 HT 7, 15, 32. Dr. Amezaga was unable to comment on Mr. Vanisi's medication regime, although he acknowledged that the medications being used were powerful ones used to treat psychosis. Ex. 50 at 12-13.

Dr. Amezaga relied upon a test that measured competency to stand trial which utilizes the Dusky standard detailed below to find Mr. Vanisi competent. Exs. 50 at 2; 58 at 454. Both experts found Mr. Vanisi unable to testify truthfully. Exs. 49 at 7; 50 at 48.

284. Habeas petitioners have a federal right to meaningful assistance of post-conviction counsel and a state right to the effective assistance of post-conviction counsel. Counsel's assistance, however, depends in substantial part on the petitioner's ability to communicate rationally. In post-conviction proceedings, a petitioner's incompetence is relevant not only because it impairs his decision-making, but because it prevents him from communicating information that he alone possesses. Forcing an incompetent petitioner to proceed with habeas proceedings constitutes structural error requiring automatic reversal.

A. A psychiatrist, Dr. Bittker, found Mr. Vanisi incompetent.

285. After examining Mr. Vanisi, reviewing medical and disciplinary records, and interviewing counsel, Dr. Bittker reported that: (1) Mr. Vanisi's social judgment was compromised by a nihilistic delusional system and a narcissistic sense of entitlement; and (2) his current presentation is consistent with his prior diagnosis of Bipolar Disorder, mixed type, with psychosis causing manifestations of bizarre behavior, nihilistic delusions, and narcissistic entitlement, with a marked ambivalence about such issues as life, death, and the nature of reality. Ex. 49 at 5-7.

286. Dr. Bittker concluded that although Mr. Vanisi had a reasonable level of sophistication about the trial process, his guardedness, manic entitlement, and paranoia inhibited his ability to cooperate with counsel during post-conviction proceedings. Id. at 7. He further concluded that Mr. Vanisi did not currently have the requisite emotional stability to permit him to cooperate with counsel or to understand fully the distinction between truth and lying. Id. This latter deficit emerged directly as a consequence of Mr. Vanisi's incompletely-treated psychotic

thinking disorder. Id. Finally, Dr. Bittker recommended a modification of Mr. Vanisi's medication regimen and a reevaluation of his competency after ninety days of treatment. Id. at 7-8.

287. On January 27, 2005, Dr. Bittker testified under oath that because Mr. Vanisi is "extremely guarded" and "protective of any information regarding the crime" it is difficult for him to assist counsel. 11/27/05 HT 9. Further, because Mr. Vanisi is being medicated with haloperidol, "he may not even be able to access information from the past." 11/27/05 HT 11.

288. Dr. Bittker also testified that: (1) it would be difficult to make sense of what Mr. Vanisi said if one were not a psychiatrist; (2) the balance of evidence suggests that Mr. Vanisi's psychosis makes him irrational and not forthcoming; (3) Mr. Vanisi's closed demeanor is unique among the people that he had examined on death row; and (4) Mr. Vanisi does not fully understand the role of defense counsel because of his paranoia. 1/27/05 HT 8- 15, 18, 22-24, 28. Finally, Dr. Bittker directly addressed Mr. Vanisi's inability to assist counsel in the context of post-conviction proceedings:

> I don't think [Mr. Vanisi] fully understands that in order for [counsel] to assist him that [counsel] need[s] to understand what went on with him in his inner life as [counsel is] attempting to proceed with his appeal. I think that [counsel is] 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.

Id. at 14. Dr. Bittker also testified that:

> I don't think [Mr. Vanisi] understands fully the role of defense counsel and how defense counsel can help him because of that paranoid sense that everybody is out to get him and so why be transparent.
>
> . . .
>
> [T]he concern I have is that nihilistic quality that 'Nothing really makes much difference, and I really can't trust these guys anyway.'

Id. at 29.

B. Psychologist, Dr. Amezaga, found Mr. Vanisi competent.

289. The second expert, psychologist Dr. Amezaga, reported that based upon his interview with Mr. Vanisi and the administration of two tests: (1) Mr. Vanisi's rational ability to assist his counsel with his defense during trial was at most mildly impaired; (2) Mr. Vanisi's body posture at times was mechanical and robotic; (3) Mr. Vanisi's short-term memory may be mildly impaired or delusional; and that (4) Mr. Vanisi's ability to testify non-disruptively and in a truthful manner was seriously in doubt. Ex. 50 at 3-4, 7, 9, 20. The first test, VIP, does not assess competency but focuses upon attempts to feign mental illness. The second test focuses on competency to stand trial, not to participate in post-conviction proceedings. Based upon the results of the ECST-R test, Dr. Amezaga reported that:

> Mr. Vanisi has a basic factual understanding of the charges against him. Though he was initially resistant in identifying his charges ("I don't remember"), when provided with a few seconds of time he identified his charges as "homicide-murder." As part of this evaluation, he was asked to define murder. He responded, "The victim involved is dead." He identified the possible consequences associated with his murder charge as "death penalty – I'm subject to die." He was able to correctly appreciate the roles and responsibilities of both the defense ("My attorney, helps defend my case") and opposing counsel (". . . McCarthy, prosecutes the case . . . against me.") He identified the primary responsibility of the jury as "[t]o deliberate."

Ex. 50 at 6. Of course, none of the questions that Mr. Vanisi answered in the "factual understanding" section apply to post-conviction proceedings in that he has already been convicted, there is no jury, and the sentence of death has already been ordered. Dr. Amezaga further reported that in the "rational understanding" portion of the test, Mr. Vanisi:

> defined, for example, a plea bargain as "trying to reduce [the] sentence . . ., get a deal for less punishment." He was able to provide simple responses for decisions about plea bargaining ("Think about it. Talk to my attorney. Believe him if good offer.") Given the nature of his legal charges, he was able to define a good offer as "life in prison." He was aware of the adversarial nature of the proceedings and the importance of not speaking with opposing counsel without legal representation ("No, that would not be advantageous to me.") He identified the best possible outcome associated with his legal charges as "life [in prison]." His worst possible outcome was identified as "death." He described the

> most likely or probable outcome associated with his charges as "life, most likely.")

Id. Once again, however, these questions do not apply to post-conviction proceedings which do not involve plea bargains and offers, but a previously assessed death sentence. Finally, Dr. Amezaga reported that in regard to the "capacity to consult with counsel" portion on the ECST-R, Mr. Vanisi:

> expressed confidence and trust in the abilities of his attorneys to serve as his advisors and advocates ("[They] do what [they're] supposed to do, represent me.") He has a realistic expectation of his responsibilities as a defendant for his own defense ("To assist him, listen to him and do what he wants me to do.") He was unable to provide an example of a significant disagreement with either of his attorneys ("I agree to cooperate . . ., no examples [of disagreement].)" He was unable or unwilling to offer a definitive means of how he might resolve the possibility of a future conflict ("I don't know – just do what they say.")

Id. at 7. Based on Mr. Vanisi's responses to the ECST-R tests, Dr. Amezaga found that Mr. Vanisi at most was in the mild impairment range regarding his factual and rational understanding of trial proceedings, and in his ability to assist trial counsel.

290. The ECST-R test administered by Dr. Amezaga is a semi-structured interview developed specifically for the purpose of establishing competency to stand trial under the prongs set forth in Dusky v. United States, 362 U.S. 402 (1960). Ex. 58. Dr. Amezaga's entire analysis was based upon whether Mr. Vanisi could assist counsel at trial without any analysis about whether Mr. Vanisi could assist counsel during post-conviction proceedings. 2/18/05 HT 53, 57. Without knowing the Rohan standard, Dr. Amezaga testified during the February 18, 2005, competency hearing that he considered his analysis of Mr. Vanisi's ability to stand trial to apply to Rohan proceedings. 2/18/05 HT 53. He offered no scientific analysis or legal basis, however, for this conclusion. It is axiomatic that assisting counsel during trial requires a different type of participation by a defendant than assisting counsel during post-conviction proceedings.

291. Dr. Amezaga also testified: (1) he was not familiar with the Rohan post-conviction competency standards; (2) he did not interview post-conviction counsel

or review their affidavits in support of the motion for a stay, nor did he review the disciplinary actions in prison, but instead only reviewed state prison medical records; (3) he suspected that Mr. Vanisi was suffering from a psychotic disorder, although he was uncertain of what that might be and speculated that some of Mr. Vanisi's symptoms might be feigned; and (4) that Mr. Vanisi was not likely to engage in truthful testimony. 2/18/05 HT 6-9, 12-14, 43-44. 48, 52.

292. Dr. Amezaga found that while Mr. Vanisi was not malingering, the VIP test displayed evidence that Mr. Vanisi was misrepresenting his impairment. 2/18/05 HT 20, 22-23. Dr. Amezaga testified that the VIP demonstrated that Mr. Vanisi had the ability to identify the correct answer to difficult VIP questions, suppress those answers and select an incorrect answer. 2/18/05 HT 36. Dr. Amezaga testified that his conclusion of competency:

> is based in large part on these results here that whatever mental health symptoms Mr. Vanisi is experiencing whatever diagnosis you want to give him, that those symptoms and signs do not overwhelm his cognitive abilities to engage in reasoning in rational thinking, in factual understanding of the information as presented on the VIP.

Id. at 37.

293. Neuropsychologist Jonathan Mack, PsyD. reports that "[t]he technical problem with Dr. Amezaga's conclusion is that he only administered half of the VIP, and that the ECST-R Atypical Presentation range indicates the non-feigning of psychotic symptomatology." Ex. 163.

294. Dr. Mack reports that:

> The conceptualization by other doctors/mental health experts of Mr. Vanisi as malingering in the face of his chronic (over 15 years), inexorable, severe, and persistent psychotic and manic presentation along with perseveration, and the fact that he has been, defacto, treated for both psychotic and mood disorder for years with massive doses of anti-psychotic and mood stabalizing meidcation with partial, yet very incomplete, improvement. I have reviewed the report and data summary sheets of Dr. A.M. Amezaga of February 2005, and there is nothing in his report that persaudes me against my opinion.

Ex. 163. Additionally, Psychiatrist, Siale Foliaki, M.D. notes that based upon the administration of the Test of Memory Malingering (TOMM) which is an instrument

superior to the VIP, it is clear that Mr. Vanisi is "highly unlikely to be malingering. Ex. 164 ¶ 5.8.7. Further, Dr. Foliaki concludes that if a person is malingering, he would feign both tests. Ex. 164 ¶ 5.8.8. The fact that Dr. Amezaga reports that Mr. Vanisi made no effort to feign or exaggerate psychiatric symptoms in order to suggest the possibility of incompetency does not make logical sense if indeed Mr. Vanisi had an intent to malinger. Ex. 164 ¶ 5.8.8.

295. Further, Dr. Amezaga failed to address how performance on the VIP demonstrates that Mr. Vanisi has an ability to competently assist his counsel during post-conviction proceedings, and failed to contradict Dr. Bittker's testimony, that although Mr. Vanisi was intelligent, his level of psychosis and paranoia prevented him from competently assisting counsel during post-conviction proceedings.

296. The VIP test measures a person's intelligence. Where a petitioner claims that they should not be executed because they are mentally retarded, the VIP test can distinguish between those who are truly mentally retarded and those who are only pretending to be. Mr. Vanisi was not claiming to be mentally retardation, he was claiming to be incompetent, so the VIP test was completely irrelevant to the proceedings.

297. Further, Dr. Amezaga's entire testimony focused upon Mr. Vanisi's understanding of trial proceedings and counsel's role therein. Prior to trial, however, Dr. Bittker too had found Mr. Vanisi competent to stand trial. Ex. 59. Unlike Dr. Amezaga, Dr. Bittker recognized that post-conviction proceedings require a different type of assistance from Mr. Vanisi than that required during trial.1/27/05 HT 15. Because Dr. Amezaga failed to interview post-conviction counsel, his report and testimony did not recognize or address the differences between assisting counsel during trial versus post-conviction proceedings.

298. When a claim is raised during post-conviction proceedings that trial counsel presented inadequate mitigation evidence during the penalty phase, a competent client is in a better position than anyone to identify aspects of his personal history

that should have been presented but were not, and that client is in a unique position to testify about the extent of trial counsel's efforts to elicit that mitigating evidence from him. Even if the post-conviction court had to speculate as to what evidence Mr. Vanisi might offer, that does not detract from the probability that some corroborating evidence existed within his private knowledge. As Dr. Bittker noted, while there may be rational motive prior to trial to withhold such information, there is no such rational motive during post-conviction proceedings.

299. Finally, Dr. Amezaga testified that he is not a medical doctor and does not have authority to prescribe medicine to treat mental illness, 2/18/05 HT 5, or to pass judgment on the efficacy of medication, 2/18/05 HT 12-13. Dr. Amezaga, thus, was unable to rebut Dr. Bittker's testimony that Mr. Vanisi's improper medications were causing an inability to understand the role of defense counsel during post-conviction proceedings. Dr. Amezaga agreed with Dr. Bittker that Mr. Vanisi's psychosis made him willing to "deceive his attorneys," but failed to comprehend Dr. Bittker's assessment that it was irrational for Mr. Vanisi to take this action after he had already been found guilty and sentenced to death. 2/18/05 HT 44.

C. The ruling that Mr. Vanisi was competent constituted an unreasonable determination of the facts and was contrary to clearly established federal law.

300. At the end of the hearing, the district court ruled:

> [I]t's the Court's opinion at this time after having heard both Dr. Bittker and Dr. Amezaga, and seeing their written reports and the prison documents that have been submitted by the defense, and reading those medical records, as well as the history of this case and all information, and lastly, my opportunity to observe Mr. Vanisi during these hearings and his reaction to certain things, when a joke is made, Mr. Vanisi cracks his smile. He seems to be connecting to the proceedings. All of that put together, I find that he is competent to proceed. I do find him competent to assist counsel. He understands the – where he is, what he's doing, and what the possibilities are with regard to this litigation.

2/18/05 HT 89. There was absolutely no evidence presented, however, that Mr. Vanisi understood the possibilities in regard to the post-conviction proceedings.

301. The district court later adopted the prosecution's proposed order and issued a written ruling denying Mr. Vanisi's motion for stay:

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

Ex. 56 at 3.

302. On appeal, prior post-conviction counsel alleged that the district court's ruling was not based upon the substantial evidence adduced during the competency hearings, was arbitrary and capricious and violated Mr. Vanisi's Sixth Amendment right to the effective assistance of counsel. The Nevada Supreme Court's reliance on Doggett v. Warden, 93 Nev. 591, 594, 572 P.2d 207, 209 (1977) (citing Dusky v. U.S., 362 U.S. 402, 402 (1960)) to conclude that "the district court's competency determination was based on substantial evidence and uphold its decision" was contrary to and an unreasonable application of clearly established federal law and an unreasonable determination of the facts. Further, the Nevada Supreme Court's position that "psychiatrist Dr. Thomas Bittker opined that Vanisi was being incompletely treated for his mental problems and had 'residual evidence of psychosis' to the extent that, while he was able to assist his counsel, he was irrationally resistant to doing so," Vanisi, 2010 WL 3270985 at *1, is belied by the transcript. Dr. Bittker testified that Mr. Vanisi's medication issue made him unable to assist counsel.

303. The Nevada Supreme Court's conclusion that the district court's competency determination was based on substantial evidence is contrary to and an unreasonable application of clearly established federal law. Vanisi v. Nevada, No. 50607, 2010 WL 3270985, at *1 (Nev. April 20, 2010).

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D. Prior post-conviction counsel was ineffective for failing to allege that Mr. Vanisi's rights to due process, equal protection and a reliable sentence were also violated by the trial court's ruling.

304. By forcing Mr. Vanisi to proceed with post-conviction proceedings despite his incompetency, the trial court violated Mr. Vanisi's rights to due process, equal protection and a reliable sentence. Prior post-conviction counsel were ineffective for failing to include these constitutional violations in their briefing to the Nevada Supreme Court. Further, prior post-conviction counsel was ineffective in failing to properly prepare the court appointed experts in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). In part, Dr. Amezaga based his position that Mr. Vanisi might be feigning certain psychotic symptoms on the fact that he had not been provided with any evidence that Mr. Vanisi had any mental health conditions prior to his arrest. 2/18/05 HT 47-48. A reasonable investigation by prior post-conviction counsel would have revealed a wealth of evidence that Mr. Vanisi had mental health issues for at least ten years prior to his arrest. Mr. Vanisi hereby incorporates Claims One and Two as if fully pled herein. Further, Dr. Bittker testified that his conclusion was based on the limited records provided to him:

305. The information [provided] was relatively limited. . . .

> I reviewed the medical records, but the medical records were limited to only [Mr. Vanisi's] encounters at the Nevada State Penitentiary. They did not incorporate those records while housed at Ely nor were there records of his previous encounters at Washoe County Detention Center. I had reference to the report of Dr. Thienhaus, but I had never seen that report.

1/27/05 HT 7; see also 1/27/05 HT 22.

306. There could be no strategy, within the range of reasonable competence, for state post-conviction counsel to fail to raise these additional constitutional violations, or to fail to conduct a reasonable investigation that would have provided the experts with the wealth of available information showing that Mr. Vanisi had a

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long history of mental health issues. A reasonable likelihood exists that but for prior counsel's deficient performance, Mr. Vanisi would have received a more favorable outcome.

CLAIM FIVE

307. Mr. Vanisi's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, a fair trial, a reliable sentence, a fair and impartial jury and the effective assistance of counsel due to the improper actions of the trial court during the voir dire. U.S. Const. Amends. V, VI, VIII, XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

308. The trial court violated Mr. Vanisi's state and federal constitutional rights due to its improper conduct during the voir dire proceedings. The trial court prevented Mr. Vanisi from receiving a fair and impartial jury due to its failure to sustain challenges for cause against biased jurors. The trial court erred in failing to grant Mr. Vanisi's motion for individually sequestered voir dire. Considered singly and cumulatively, the trial court's conduct during voir dire was prejudicial.

A. The trial court erred by failing to sustain the for cause challenge of a juror biased against Mr. Vanisi.

309. Mr. Vanisi alleges that the trial court erred in failing to sustain his challenge for cause to remove Shaylene Grate from the venire on the ground that she was biased as a matter of law. During the voir dire examination of Ms. Grate, she stated that she knew several police officers and could not be fair to Mr. Vanisi. 09/21/99 TT 52-53. She also stated that she knew many things about the case and that would influence her view of the evidence. 09/20/99 TT 59.

310. Ms. Grate's answers demonstrated that she had actual bias against the defense, therefore, trial counsel moved to have her removed from the jury for cause:

> A PROSPECTIVE JUROR: Well, let's see. My brother-in-law, Dustin Grate, was just on Sparks PD. He is in between jobs right now.
>
> My husband owns a judicial school, and like three of our friends are students there, and they are all police officers. Tim Avilla, David Gill and Larry Lyman, sheriffs. My father-in-law is a retired sheriff.
>
> THE COURT: From Washoe County?

A PROSPECTIVE JUROR: Uh-huh.

THE COURT: Now, is there anything about all these associations that would cause you difficulty serving as a juror in this case?

A PROSPECTIVE JUROR: Probably. I would try not to, but to be honest, it is kind of hard.

THE COURT: What would be the nature of your difficulty?

A PROSPECTIVE JUROR: Just because I could see them in the spot of Mr. Sullivan.

THE COURT: And would that give you the inability to be fair and impartial as you hear evidence?

A PROSPECTIVE JUROR: Honestly?

THE COURT: Absolutely, honestly.

A PROSPECTIVE JUROR: It would impair my judgment, honestly.

. . .

MR. STANTON: [C]ould you put aside your feelings and your understanding and your relationship that you have with friends and associates that are law enforcement and make your decision as a juror solely on what you hear in this room and nothing else?

A PROSPECTIVE JUROR: I could try.

MR. STANTON: Okay. Well, I guess that's–not only trying it, but you know yourself, obviously, better than anybody in this room. Do you think you can do that? Because if you are selected as a juror, you will take an oath separate and apart from the oath you have already taken, to indeed precisely do that. Can you do that?

A PROSPECTIVE JUROR: I guess I'd have to say no.

09/21/99 TT 51-53.

MR. BOSLER: Do you think that is going to affect your ability to sit at the trial fairly?

A PROSPECTIVE JUROR: It might.

MR. BOSLER: Do you think that based upon those circumstances, you are the type of person who should be sitting in the this case and saying they can be fair?

A PROSPECTIVE JUROR: I'm probably not the person, no.

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09/21/99 TT 55. The trial court denied trial counsel's challenge for cause. 9/20/99 TT 61. As a result, Ms. Grate actually sat on the jury that convicted Mr. Vanisi and sentenced him to death. Ex. 166.

311. The trial court's refusal to strike Ms. Grate from the jury deprived Mr. Vanisi of a liberty interest in his state law right to peremptory challenges in violation of the federal constitution, and directly violated his federal constitutional right to jury trial and to due process of law, because the right to exercise peremptory challenges was well established at common law at the time of the adoption of the constitution. Under controlling federal law, the fact that Ms. Grate was biased made her constitutionally unqualified to sit as a juror in Mr. Vanisi's case. Ms. Grate was incapable of performing her function of impartiality and she should have been removed from the jury for cause.

312. The deprivation of a liberty interest was prejudicial in Mr.Vanisi's case under controlling state and federal law, and Mr. Vanisi was further prejudiced because he was deprived of the opportunity of using a peremptory challenge to remove other persons from the venire that were undesirable. Mr. Vanisi hereby incorporates the allegations set out in Claim Three(A) regarding trial counsel's ineffective failure to challenge jurors for cause and ineffective use of their peremptory challenges as though set forth fully herein.

B. The trial court erred by denying trial counsel's motion for individually sequestered voir dire.

313. Mr. Vanisi alleges that the trial court erred in failing to grant his motion for individually sequestered voir dire. Mr. Vanisi filed a motion for individually sequestered voir dire on June 8, 1998, prior to the mistrial and again on April 15, 1999, arguing that individually sequestered voir dire was necessary to determine whether the jurors held strong biases on the subject of the death penalty. Exs. 167; 168. The trial court denied Mr. Vanisi's motion on December 16, 1998, but granted the use of jury questionnaires. Ex 169.

314. Mr. Vanisi was prejudiced by the trial court's failure to allow individually sequestered voir dire. It is apparent from a review of the voir dire transcript that jurors who were evidently prejudiced against Mr. Vanisi from their questionnaires were able to parrot back language of impartiality in order to prevent Mr. Vanisi from properly exercising challenges for cause. Mr. Vanisi hereby incorporates the allegations set forth in Claim Seventeen regarding the need for a change of venue as if fully pled herein.

315. Trial counsel made a record at the conclusion of voir dire of the trial court's denial of individually sequestered voir dire. Trial counsel argued to the trial court:

> What was trying to be prevented [by trial counsel's motion] in the jury selection actually came to pass. In fact, what you had is a person who put on their questionnaire that they were prejudiced against minorities and could not be fair in the case, but that person, for whatever reason, was able to answer the questions correctly to avoid any Whitt, Witherspoon or Morgan challenges. I would submit that was a systematic problem that could have been cured had we been able to do individual sequestered voir dire.
>
> Your Honor, based upon those facts we also have Mrs. Bell, who remains on the jury, despite having a child in the same school as Mr. Sullivan's, I believe having been on a field trip with Mr. Sullivan. We have Shaylene Grate, who, from the first day said she couldn't be fair in this case, but slowly through the process has now learned to say the right things to fight off any challenges.
>
> For those reasons we're going to object to the jury panel as it's been sworn on the Sixth Amendment right to a fair and impartial jury; The Eighth Amendment right to reliability in sentencing, and a Fourteenth Amendment right to due process and protection.

09/21/99 TT 482-83. The trial court's actions prevented trial counsel from being able to make a record for the purpose of a change of venue. See Claim Seventeen.

316. The deprivation of Mr. Vanisi's liberty interest in peremptory challenges is prejudicial per se. In the alternative, the cumulative impact of constitutional error during the voir dire proceedings had a substantial and injurious effect on the penalty phase verdicts. Mr. Vanisi is therefore entitled to habeas relief

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on his claim that the trial court erred by failing to allow individually sequestered voir dire in Mr. Vanisi's case.

C. The trial court erroneously denied defense motions that would have allowed trial counsel to conduct an effective voir dire.

317. The trial court erroneously denied additional defense motions that would have allowed biased jurors to be discovered during voir dire and ferreted out including: (1) request for an extended questionnaire; and (2) motion for additional peremptory challenges. Exs. 20, 168, 175, 177. Mr. Vanisi also incorporates Claim Twenty regarding a denial of counsel's motion to prevent the death qualification of jurors as if fully pled herein.

318. At the conclusion of voir dire trial counsel made the following record of the trial court's erroneous rulings and the adverse effect they had on trial counsel's ability to conduct an adequate voir dire, especially with respect to trial counsel's motion for a change of venue:

> For the sake of the record, there are some things I have to say. At this point Mr. Vanisi is going to make an objection to the jury as it was sworn, just to make the record. I would advise the court–before these proceedings began we asked the Court for an extended questionnaire to learn a little bit more about the jury. That was denied. We also made a motion for individual sequestered voir dire. That motion was denied. We further made a motion for additional peremptory challenges. That too was denied. And as part of those motions we submitted an affidavit from a professor in Chico about the danger of close-ended questions being asked by the Court in the process of jury selection, because what you have, according to this professor, is people being indoctrinated and essentially learning the proper responses.

09/21/99 TT 482. Because of the harmful effect of the improper voir dire format, trial counsel were unable to create the necessary record to establish the facts necessary for their change of venue motion. See Claims Three(A). Mr. Vanisi hereby incorporates claim Seventeen on venue as if fully pled herein.

D. Mr. Vanisi was prejudiced by the errors that occurred during the voir dire.

319. The trial court's errors during voir dire deprived Mr. Vanisi of his right to a fair and impartial jury and is prejudicial per se. The prejudice from trial counsel's

ineffective assistance during voir dire, see Claim Three(A), is inextricably intertwined with the trial court's erroneous actions during voir dire and when considered together greatly prejudiced Mr. Vanisi. Mr. Vanisi hereby incorporates Claim Three(A) as if fully pled herein. The seating of even one juror who was not fair and impartial in Mr. Vanisi's case requires the automatic reversal of his death sentence. The unconstitutionally infirm jury that was ultimately empaneled in Mr. Vanisi's case undermines any confidence in the verdict that they reached; therefore, there is a reasonable probability of a more favorable outcome if trial counsel had performed effectively.

E. The errors in the voir dire process should be considered singly and cumulatively.

320. The above listed voir dire errors should be considered singly and cumulatively as violations of Mr. Vanisi's right to a fair and impartial jury and to due process. This due process violation led inevitably to equal protection violations as well, since the clear lack of standards virtually insured that identically-situated defendants would be treated unequally. Reasonably competent trial counsel would have objected to the improper voir dire process and demanded that the trial court conduct voir dire in a manner that protected Mr. Vanisi's right to a fair and impartial jury. Mr. Vanisi hereby incorporates Claim Three(A) as if fully pled herein.

F. Appellate counsel was ineffective in failing to raise this claim on direct appeal and post-conviction counsel was ineffective in failing to investigate, develop and present this claim.

321. This claim is of obvious merit. By the failure of appellate counsel to raise this issue on direct appeal, Mr. Vanisi was deprived of the due process and equal protection rights to effective assistance of counsel on appeal, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution. Competent counsel would have raised and litigated this meritorious issue on direct appeal and in state post-conviction. There is no reasonable appellate strategy, within the range

of reasonable competence, that would justify appellate counsel's failure in this regard. Mr. Vanisi is entitled to relief in the form of a new trial and sentencing hearing.

CLAIM SIX

322. Mr. Vanisi's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, the right to a jury determination of every element of the capital offense, and the right to a reliable sentence, due to the Nevada Supreme Court's purported "re-weighing" and "re-sentencing" after invalidating an aggravating circumstance, and to its failure to properly consider the effect of the erroneous penalty phase jury instructions in its harmless error assessment. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

323. Mr. Vanisi was deprived of his state and federal constitutional rights when the Nevada Supreme Court affirmed his death sentence after striking an invalid aggravating circumstance. The Sixth Amendment provides that Mr. Vanisi is entitled to a jury determination beyond a reasonable doubt of every fact which has the effect of increasing his sentencing exposure. Mr. Vanisi's rights under the Sixth Amendment were violated when the Nevada Supreme Court purported to "reweigh" Mr. Vanisi's eligibility for the death penalty after striking an aggravating circumstance, which is itself an element of the offense that must be submitted to the jury and proven beyond a reasonable doubt.

324. Under state law, Mr. Vanisi possesses the right to a jury determination beyond a reasonable doubt regarding: (1) the presence of statutory aggravating circumstances; and (2) whether those aggravating circumstances outweigh any mitigation evidence. As elements which expose Mr. Vanisi to the greater crime of capital eligible murder, both elements must, under state law, be submitted to a jury and found beyond a reasonable doubt. On appeal from the denial of post-conviction relief, the Nevada Supreme Court placed itself in the position of a sentencer thereby invading the province of the jury. The Nevada Supreme Court itself re-weighed the mitigation evidence presented at Mr. Vanisi's penalty hearing and came to its own

determination that "the jury would have imposed a sentence of death," absent the robbery aggravating circumstance. Vanisi v. State, No. 50607, 2010 WL 3270985, at *3 (Nev. 2010).

325. The Nevada Supreme Court could do no more than speculate as to whether the actual jury that sentenced Mr. Vanisi to death made the same assessment of the mitigation evidence presented because the jury was never asked to designate what weight they attached to any mitigating circumstances found. The court's attempt to quantify the mitigation evidence presented in Mr. Vanisi's case based on a cold record without any relevant jury findings, and its subsequent attempt to balance that evidence against the remaining aggravating circumstances constituted an improper invasion of the jury's role to find every element of the capital offense beyond a reasonable doubt.

326. The "re-weighing" and appellate sentencing of Mr. Vanisi on appeal is per se prejudicial, which requires the reversal of Mr. Vanisi's death sentence. In the alternative, the state cannot show beyond a reasonable doubt that the Nevada Supreme Court's failure to perform appropriate harmless error analysis after invalidating an aggravating circumstance was harmless. Had the Nevada Supreme Court properly considered Mr. Vanisi's challenge to the invalid aggravating circumstance they could not have found it to be harmless error. Mr. Vanisi's death sentence is therefore necessarily invalid.

CLAIM SEVEN

327. Mr. Vanisi's sentence violates his state and federal constitutional rights to due process, equal protection, effective assistance of counsel, and against cruel and unusual punishment because the mutilation aggravating factor is overly broad and does not protect against the arbitrary and capricious infliction of the death penalty. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

A. The mutilation statue is unconstitutionally broad.

328. Nevada Revised Statute section 200.033(8) provides that a first-degree murder can be aggravated if "[t]he murder involved torture or the mutilation of the victim." The statute, however, fails to define mutilation. Although a term in a statute will generally be given its plain meaning, the term "mutilation," on its face, applies to conduct in the course of any murder, rendering it both unconstitutionally vague and overbroad. Webster's dictionary defines mutilation as the "deprivation of a limb or essential part esp. by excision." Blacks Law Dictionary explains that in criminal law, mutilation means "[t]he act of cutting off or permanently damaging a body part, esp. an essential one." Black's Law Dictionary 1039 (7th Ed. 1999).

329. This definition of mutilation overlaps with murder itself. Any act of murder will necessarily "deprive" another of an "essential part" of his body. Under its plain meaning, jurors could fairly conclude that any murder involves mutilation. The jury instruction in Mr. Vanisi's case is even more vague and overbroad. Mr. Vanisi's jury was instructed that:

> The term 'mutilate' means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect, or other serious and depraved physical abuse beyond the act of killing itself.

Ex. 12 at Instruction 10. On its face, the instruction applies to every murder, in that a defendant will necessarily have to "destroy" or "alter an essential part" of a

victim's body in order to accomplish the homicide. Where jurors can fairly conclude that mutilation applies to every defendant eligible to the death penalty, the aggravating circumstance is constitutionally infirm.

330. This conclusion is reinforced by the Nevada Supreme Court's interpretation of what the Court has deemed the "closely related" term of torture. In construing mutilation, this Court must look to the construction of torture under the doctrine of noscitur a sociis: the meaning of a particular term in a statute may be ascertained by reference to the words associated with them in the statute. If words of an analogous meaning are together in a statute, those words are deemed to express the same relation and give color and expression to each other. Should a certain meaning and application appear from their use or in connection in the statute, that meaning and application are controlling.

331. In defining torture, the Nevada Supreme court has required evidence of a specific intent to inflict pain for revenge, extortion, persuasion or for any sadistic purpose. The court, however, has failed to require evidence of any specific intent in order to establish mutilation. The Ninth Circuit has held that California's instruction on its "murder-by-torture" special circumstance violates the Eighth Amendment by omitting an intent to torture. Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994), overruled on other grounds by Rohan ex. rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003). In accordance with the doctrine of noscitur a sociis, it is evident that an intent requirement is similarly necessary for a finding of mutilation.

332. Here, the jury instruction on mutilation, absent an intent to mutilate, suffers from the same defect that the Ninth Circuit Court of Appeals held unconstitional in Wade. A jury can find mutilation in every murder case because both mutilation and murder involve the destruction of an essential part of the body. By creating an essentially unlimited class of death eligible homicides, the instruction fails to provide the jury with a principled way in which to distinguish those who deserve death from those who do not.

333. Having failed to adopt an intent requirement, the Nevada Supreme Court has allowed for an impermissibly overbroad construction of the aggravator. Under the Court's construction, jurors can find mutilation based solely on the wounds which caused the victim's death. Any murder can necessarily involve mutilation and thus any defendant can be found guilty of first-degree murder and can be death-eligible, a clear violation of Godfrey. See Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (holding that there must be some principled way to distinguish a case in which the death penalty is imposed from those in which it is not).

B. The Constitution forbids jurors from imposing death based merely on the gruesomeness of the murder.

334. In Godfrey, the Supreme Court held:

> [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational.

Id. at 433 n.16 (emphasis added). Reaffirming this portion of Godfrey, the United States Supreme Court subsequently held in Maynard v. Cartwright, 486 U.S. 356, 363 (1988), that it had already "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty."

335. By allowing mutilation to be found on the ground that the murder resulted in a gruesome scene, the application of the aggravating circumstance, and consequently the petitioner's eligibility for the death penalty, depends entirely on the sensibilities of the jurors. It permits jurors to impose death freely and without objective standards, and thereby fails to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and make rationally reviewable the process of imposing death.

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C. The evidence was insufficient to establish mutilation beyond the act of killing itself.

336. Even assuming arguendo that the mutilation aggravator is constitutional, the evidence in Mr. Vanisi's case still fails to support such a finding. While there is no question that the victim suffered disfigurement, that disfigurement was the inevitable result of the deadly weapon used and was not the product of a specific intent to mutilate or maim. Thus, the disfigurement resulted from the killing act itself, not because of an intent to mutilate.

337. Medical examiner Dr. Ellen Clark testified that the victim died from "multiple injuries of the skull and brain due to blunt impact trauma." 9/22/99 TT 527. She found twenty fractures to the face and head that were "all acute and of the same age," and occurred prior to death. 9/22/99 TT 539. Some of the fractures, however, may have radiated from one impact site. 9/22/99 TT 539. This testimony is consistent with the statements attributed to Mr. Vanisi by his cousin Vainga Kinikini. 9/27/99 TT 979-80.

338. Apart from the prosecutor's opinion, there is no evidence that this purported mutilation was "beyond the act of killing itself." The State focused on the defensive injuries to fingers, and a crushed upper jaw that occurred during the act of killing, see 10/6/99 TT 1773-76, but there was no testimony that the victim's injuries occurred beyond the act of the killing itself.

339. The Nevada Supreme Court's rejection of this claim because there was extensive and severe injury inflicted on the victim's body was contrary to and an unreasonable application of clearly established federal law. See Vanisi v. State, 117 Nev. 330, 342-43, 22 P.3d 1164, 1172-73 (2001).

340. Additionally, the Nevada Supreme Court's ruling that the use of the word "depravity" in the mutilation instruction was harmless error was contrary to and an unreasonable application of clearly established federal law. Id. As the court recognized, the depravity portion of the instruction was based upon a former

version of the statute which referred to the "depravity of mind" as well as torture and mutilation. In 1995, the state legislature amended the statute to delete "depravity of mind." The "depravity of mind" aggravating circumstance has been held by the Ninth Circuit to be unconstitutionally vague. Valerio v. Crawford, 306 F.3d 742, 750-51 (2002).

D. Prior counsel was ineffective.

341. Trial counsel was deficient for failing to object to the mutilation aggravating circumstance and the "depravity" language used to define the circumstance. Appellate counsel was ineffective for failing to argue that Mr. Vanisi's rights to due process and equal protection were violated by the use of the unconstitutional aggravating circumstance, for failing to attack the "depravity" portion of the instruction, and for failing to make a Godfrey challenge as contained in section (A) above.

342. The use of this unconstitutional aggravating circumstance Mr. Vanisi's capital sentencing hearing and death sentence fundamentally unfair, and the state cannot show beyond a reasonable doubt that any constitutional error was harmless.

CLAIM EIGHT

343. Mr. Vanisi's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, a fair and impartial jury, and a reliable sentence because the trial court gave the jury erroneous and unconstitutional jury instructions. U.S. Const. amends. V, VI, VIII, XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

A. The guilt phase jury instructions failed to require the jury to find all of the mens rea elements of first-degree murder.

344. The jury in Mr. Vanisi's case was instructed on the definitions of first- and second-degree murder. Ex. 11 at Instruction No. 19 ("Murder of the First Degree is (a) premeditated and deliberate murder or (b) murder committed while lying in wait or (c) murder committed during the commission or in the furtherance of a robbery. All other types of murder are Murder in the Second Degree.").

345. The jury was given the following instruction on "premeditation:"

> Unless felony-murder applies, the unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute Murder of the First Degree. The intent to kill must be the result of deliberate premeditation.
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Ex. 11 at Instruction No. 24.

346. This has become known as the Kazalyn instruction. See Byford v. State, 116 Nev. 215, 233, 994 P.2d 700, 712 (2000); Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). In addition to the Kazalyn instruction, Mr. Vanisi's jury was instructed:

> The nature and extent of the injuries, coupled with the repeated blows, may constitute evidence of willfulness, premeditation and deliberation.

Ex. 11 at Instruction No. 23. The trial court rejected trial counsel's proposed instructions defining deliberation:

> Willfulness, malice and premeditation may exist, without that cool purpose contemplated, and if so, the result is second-degree murder, not first.
>
> Deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for or against the proposed course of action.
>
> While intent and premeditation may arise instantaneously, the very nature of deliberation requires time to reflect, a lack of impulse, and a cool purpose.

Ex. 140 at Defendant's Offered Instructions B & C.

347. Shortly prior to Mr. Vanisi's sentence being affirmed on direct appeal, the Nevada Supreme Court decided the Byford case, in which it concluded that the Kazalyn instruction blurred the distinction between first- and second-degree murder by eliminating the element of deliberation from the definition of first-degree murder and by confusing the distinction between first- and second-degree murder. Byford, 116 Nev. at 235, 994 P.d2 at 713. The court disapproved the use of the Kazalyn instruction in future cases, and directed that a new standard instruction be used. 116 Nev. at 236-37, 994 P.2d at 714-15. Direct appeal counsel in Mr. Vanisi's case was ineffective for failing to raise the issue that Mr. Vanisi received the incorrect Kazalyn instruction over the objection of defense counsel, and that the trial court erred by rejecting trial counsel's instructions which would have remedied the defective Kazalyn instruction.

348. In 2007, a unanimous panel of the United States Court of Appeals for the Ninth Circuit decided Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). In this non-capital case, the court held that the Kazalyn instruction violated the federal constitutional guarantees of due process of law by removing the deliberation

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element of first-degree murder from the jury's consideration of guilt. The Ninth Circuit held:

> Under Nevada Revised Statutes § 200.030(1)(a), first-degree murder is a willful, deliberate, and premeditated killing. In Byford, the Nevada Supreme Court reaffirmed that "[i]t is clear from the statute that all three elements, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder." 994 P.2d at 713-14 (internal quotation marks and citation omitted). It is not sufficient for the killing simply to be premeditated.

The court also held:

> Deliberation remains a critical element of the mens rea necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting. "In order to establish first-degree murder, the premeditation killing must also have been done deliberately, that is, with coolness and reflection."

Id. at 714 (citation omitted). The court further indicated:

> Yet, Polk's jury was instructed to find "willful, deliberate, and premeditated murder" if it found premeditation: "For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act of constituting the killing, it is willful, deliberate and premeditated murder." Instruction No. 14; see Byford, 994 P.2d at 714 ("direct[ing] the district courts to cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.' ").
>
> This instruction is clearly defective because it relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated. See id. at 713 ("By defining only premeditation and failing to provide deliberation with any independent definition, the Kazalyn instruction blurs the distinction between first- and second-degree murder.").

Polk, 503 F.3d at 910-911. The court concluded:

> Instead of acknowledging the violations of Polk's due process right, the Nevada Supreme Court concluded that giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law. Rather, the question of whether there is a reasonable likelihood that the jury applied an instruction in an unconstitutional manner is a "federal constitutional question." The state court failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and Winship, and thus ignored the law the Supreme Court

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> clearly established in those decisions-that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution.

Id. at 911.

349. The Ninth Circuit finally held that the Nevada Supreme Court's rejection of the above referenced argument in Mr. Polk's case "was contrary to . . . clearly established Federal law." 28 U.S.C. § 2254(d)(1); Polk, 503 F.3d at 909, 911. The State's petition for rehearing and rehearing en banc was denied on December 5, 2007, and the State did not seek review on certiorari in the United States Supreme Court, so the Polk decision is now final and is the controlling law in the Ninth Circuit. Mr. Vanisi's appellate and post-conviction counsel were ineffective in failing to present a claim that the trial court erred by refusing Mr. Vanisi's proposed instruction on deliberation, and giving the Kazalyn instruction over defense objection.

350. The Nevada Supreme Court acknowledged, after reviewing the precedents existing prior to Byford, that there was no rational distinction between first- and second-degree murder. Nika v. State, 124 Nev. __, 198 P.3d 839, 844-51 (2008). Where the Nevada Supreme Court cannot harmonize its own precedents (which caused it to declare that it had simply changed the law), there is no possibility that "ordinary people can understand what conduct is prohibited" as first-degree murder under the Kazalyn instruction. Kolender v. Lawson, 461 U.S. 352, 357 (1983). Even more important, however, is that the "complete erasure" of the distinction between first- and second-degree murder left juries with no "adequate guidelines" for determining when a homicide is first- rather than second-degree murder. The absence of such adequate standards does not merely "encourage arbitrary and discriminatory enforcement," Kolender, 461 U.S. at 357 (citations omitted), but virtually ensures it.

351. This constitutional violation leads, in turn, to two other constitutional violations. First, the "standardless sweep" of the definition will result in disparate

treatment of similarly situated defendants, whose offenses will be indistinguishable but whose treatment, by conviction of first- or second-degree murder, will be determined by the "personal predilections" of juries. This gives rise to a violation of the equal protection guarantee that "all persons similarly situated should be treated alike," Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), unless there is a "rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (citations omitted).

352. Second, Nevada law restricts imposition of the death penalty to cases involving convictions of first-degree murder. Nev. Rev. Stat. § 200.030(4)(a). A state system that limits the application of the death penalty to first-degree murders, but then erases the distinction between first- and second-degree murders, necessarily results in arbitrary imposition of the death penalty in violation of the narrowing requirement of the Eighth Amendment. Basing death-eligibility on a vague aggravating factor invites "arbitrary and capricious application of the death penalty." Stringer v. Black, 503 U.S. 222, 228, 235-236 (1992); cf. Jones v. State, 101 Nev. 573, 582, 707 P.2d 1128 (1985) (high degree of premeditation is a prerequisite to death eligibility). Basing death-eligibility on a conviction for a capital offense, when the conviction is predicated upon a vague definition of the elements that are supposed to distinguish it from second-degree murder, is even more arbitrary and capricious.

353. The conflation of premeditation and deliberation with simple intent to kill also has the effect of eliminating any necessity of showing any actual evidence from which the jury could infer that the defendant actually premeditated and deliberated. See Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Polk v. Sandoval, 503 F.3d at 909-10 (9th Cir. 2007). The "instantaneous" premeditation theory has the practical effect of eliminating the necessity for any such evidentiary showing from which premeditation and deliberation can be inferred. See State v. Thompson, 65 P.3d 420, 427 (Ariz. 2003). If a court can simply recite that premeditation can be

instantaneous, essentially identical to, and arising at the same time as, the simple intent to kill, it can completely ignore the absence of any evidence that would support an inference that premeditation and deliberation actually occurred.

354. It is clearly established federal law, as determined by the Supreme Court, that a defendant is deprived of due process if a jury instruction "ha[s] the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind." Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Francis v. Franklin, 471 U.S. 307, 326 (1985) (reaffirming "the rule of Sandstrom and the wellspring due process principle from which it was drawn."); see also In re Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Nevada Revised Statute 200.030(1)(a) defines first-degree murder as a killing that is willful, deliberate, and premeditated. Federal due process, therefore, requires that the State prove willfulness, deliberation, and premeditation before a jury can find a defendant guilty of first-degree murder. The premeditation instruction given in Mr. Vanisi's case was clearly defective because it relieved the State of the burden of proving whether the killing was deliberate as well as premeditated, or, in the alternative, by relieving the State of showing any rational basis for imposing liability for first-degree murder based on an instruction that erases any distinction between first- and second-degree murder. It is clear, therefore, that the jury in Mr. Vanisi's case was improperly instructed over trial counsel's objection.

355. Thus, the only remaining question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (internal quotation marks and citation omitted). Considering the instructions as a whole, there is a reasonable likelihood that the jury in Mr. Vanisi's case applied the premeditation instruction in a way that violated Mr. Vanisi's right to due process. Given trial counsel's ineffective failure

to present evidence that the victim's death was the result of Mr. Vanisi's mental illness, it is likely that the combination of the unconstitutional instruction and the ineffective assistance of trial counsel allowed the jury to convict Mr. Vanisi despite the lack of deliberation present in this case. If trial counsel had conducted an adequate investigation they could have provided the testimony of a neuropsychologist that as a result of Mr. Vanisi's Personality Change Due to Brain Damage, Schizoaffective Disorder, Dementia Due to Multiple Etiologies, and Amphetamine Abuse and Dependence, Mr. Vanisi was in a psychotic state at the time of the offense, and was incapable of deliberating.

Ex. 163 at 67-70.

356. The guilt phase jury instructions rendered Mr. Vanisi's sentence fundamentally unfair and unconstitutional. The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless.

B. The jury instructions failed to require that mitigation be outweighed by aggravation beyond a reasonable doubt.

357. Mr. Vanisi's constitutional rights were violated because the jury was erroneously instructed concerning the constitutionally-required burden of proof for finding Mr. Vanisi death eligible. One instruction told the jury that "[t]he jury may impose a sentence of death only if you find an aggravating circumstance and further find there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." Ex. 12 at Instruction No. 14. A second instruction told the jury that "First Degree Murder is punishable: (1) by death, only if an aggravating circumstance is found, and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance." Ex. 12 Instruction No. 6. A final instruction completely left out the entire weighing process, instructing that after determining whether aggravating or mitigating circumstances exist, the jury must "then determine whether the defendant should be

sentenced to death, life without the possibility of parole, life with the possibility of parole or 50 years in prison." Ex. 12 Instruction No. 19.

358. Under Nevada law, the maximum penalty a person can receive based solely on a conviction for first-degree murder is life without the possibility of parole. Eligibility for the death penalty requires two factual findings: (1) the existence of one or more statutory aggravating circumstances, and (2) that the mitigation evidence does not outweigh the aggravating circumstances. See Nev. Rev. Stat. § 175.554(3). Clearly established federal law requires that any fact that increases a punishment beyond the statutory maximum be found beyond a reasonable doubt by the jury. Mr. Vanisi's jury was never instructed that it had to find the second element of death-eligibility – that the mitigating evidence did not outweigh the aggravating circumstances – beyond a reasonable doubt.

359. The weighing process performed by the sentencer is entirely idiosyncratic; the weighing process does not depend on the number of aggravating or mitigating factors; the jurors may give any factor whatever weight they determine is appropriate. No entity other than the jury can perform the necessary weighing, and the failure to instruct the jury on the standard by which it was required to find this death-eligibility factor constituted structural error which is prejudicial per se. Alternatively, The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless.

C. The instruction defining "mutilation" was unconstitutional.

360. The jury was instructed as follows on the aggravating circumstance of mutilation:

> The term "mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect, or other serious and depraved physical abuse beyond the act of killing itself.

Ex. 12 at Instruction No. 10.

361. The aggravating circumstance of "mutilation" is vague on its face and in its application in this case. Mr. Vanisi hereby incorporates Claim Seven as if fully pled herein. Further the use of the word "depravity" in the mutilation instruction was unconstitutionally vague. As the Nevada Supreme Court recognized, the depravity portion of the instruction was based upon a former version of the statute which referred to the "depravity of mind" as well as torture and mutilation. See Vanisi v. State, 117 Nev. 330, 342-43, 22 P.3d 1164, 1172-73 (2001). In 1995, the state legislature amended the statute to delete "depravity of mind." Id. The "depravity of mind" aggravating circumstance has been held by the Ninth Circuit to be unconstitutionally vague. Valerio v. Crawford, 306 F.3d 742, 750-51 (2002).

362. The mutilation jury instruction rendered Mr. Vanisi's sentence fundamentally unfair and unconstitutional. The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless.

D. The reasonable doubt instruction was unconstitutional.

363. Trial counsel requested the following instruction on reasonable doubt:

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as a juror in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not. In criminal cases, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt, and find him not guilty.

Ex. 140 at Defendants offered Instruction A. The court refused this instruction, and over defense objection, instructed the jury during the guilt and sentencing phases as follows:

> A reasonable doubt is one based on reason. It is not a mere possible doubt, but is such a doubt as would govern or control a person in the

> more weighty affairs of life. If the minds of the jurors after the entire comparison and consideration of all the evidence are in such condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable, must be actual, not mere possibility or speculation.

Exs. 11 at Instruction No. 18; 12 at Instruction No. 5. This instruction inflates the constitutional standard of doubt necessary for acquittal, and giving this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the Constitution requires.

364. The principal defect of the instruction is the second sentence: reasonable doubt "is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life." This language is an appropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than the standard of reasonable doubt itself. This language is also a historical anomaly; as far as can be discerned, no other state currently uses this language in its reasonable doubt instruction, and the few states that previously used it have since disapproved it.

365. The final sentence of the instruction is also constitutionally infirm. That sentence states "[d]oubt, to be reasonable, must be actual, not mere possibility or speculation." This language is functionally identical to language condemned by the United States Supreme Court and, when read in combination with the "govern or control" language, creates a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the Constitution requires.

366. The characterization of the proof standard as an "abiding conviction of the truth of the charge" does not cure the defects of the inaccurate statements of the reasonable doubt standard. That term is not linked to any language suggesting a proper definition of the proof standard, and the immediately preceding reference to the unconstitutional "govern or control" standard in fact links the "abiding conviction" language to a standard of proof that is impermissibly low. In short, the instruction does nothing to dispel the false notion that the jurors could have an

"abiding conviction" as to guilt if the reasonable doubts they harbored were not sufficient to "govern or control" their actions.

367. The reasonable doubt instruction permitted the jury to convict and sentence Mr. Vanisi based on a lesser quantum of evidence than the Constitution requires. This structural error is per se prejudicial, and no showing of specific prejudice is required.

368. The Nevada Supreme Court's rejection of this claim was contrary to and an unreasonable application of clearly established federal law. See Vanisi v. State, 117 Nev. 330, 345, 22 P.3d 1164, 1174 (2001).

E. The jury instructions improperly forbade the jury from considering sympathy.

369. Mr. Vanisi's jury was improperly instructed that "a verdict may never be influenced by sympathy, passion, prejudice, or public opinion." Ex. 12 at Instruction No. 18. By forbidding the sentencer from taking sympathy into account, this language on its face precluded the jury from considering evidence concerning Mr. Vanisi's character and background, thus effectively negating the constitutional mandate that all mitigating evidence be considered. A reasonable likelihood accordingly exists that this instruction denied Mr. Vanisi the individualized sentencing determination that the state and federal constitutions require.

370. The flaw in this instruction is that it did not preclude the jury's consideration of "mere sympathy"– that is, the sort of sympathy that would be totally divorced from the evidence adduced during the sentencing phase – but rather precluded consideration of all sympathy, including any sympathy warranted by the evidence. Because the jury in this case was told not to consider any sympathy – rather than "mere" sympathy – it is reasonably likely that the jury at Mr. Vanisi's trial understood that when making a moral judgment about his culpability, it was forbidden to take into account any evidence that evoked a sympathetic response.

371. The giving of the unconstitutional "anti-sympathy" instruction rendered Mr. Vanisi's sentence fundamentally unfair and unconstitutional. The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless.

F. The malice instructions were unconstitutionally vague.

372. The jury was instructed that the element of malice must be present in order for a killing to be considered murder:

> Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

Ex. 11 at Instruction No. 19. In defining malice, the court instructed:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Ex. 11 at Instruction No. 21 (emphasis added). The court further instructed:

> Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause or excuse, or what the law considers adequate provocation. The condition of mind described as malice aforethought may arises [sic], not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may also result from any unjustifiable or unlawful motive or purpose to injure another which proceeds from a heart fatally bent on mischief, or with reckless disregard of consequence and social duty.

Ex. 11 Instruction No. 22 (emphasis added).

373. The "abandoned and malignant heart" and "heart fatally bent on mischief" language is so vague and pejorative that it is meaningless without further definition, and it should have been eliminated in favor of less archaic terms. The language is so cryptic and metaphysical as to be meaningless without further definition. Such language might easily permit a jury to equate an "abandoned and malignant heart" and "a heart fatally bent on mischief" with an evil disposition or despicable

character. The jury, therefore, was allowed to find the existence of malice aforethought simply because it believed that Mr. Vanisi was a bad man.

374. While the jury could have relied upon the lack of provocation rather than the "abandoned and malignant heart" language, there is no way to make that determination. When improper language is used in the disjunctive with proper language, there is no way to determine whether the jury relied upon the proper or improper language, and the entire instruction is invalid.

375. The malice jury instructions rendered Mr. Vanisi's sentence fundamentally unfair and unconstitutional. The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless.

G. Singly and cumulatively the jury instructions rendered Mr. Vanisi's trial fundamentally unfair.

376. The jury instructions given to the jury in Mr. Vanisi's case so infected the trial with unfairness as to make the resulting conviction a denial of due process, or in the alternative, the state cannot show beyond a reasonable doubt that the constitutional error was harmless.

CLAIM NINE

377. The State of Nevada failed to inform Mr. Vanisi that he had a right under Article 36 of the Vienna Convention on Consular Relations to notify Tongan consular officials of his arrest and detention, which deprived him of his rights under that treaty and international law, and his state and federal constitutional rights to due process, equal protection, effective assistance of counsel, compulsory process, and a reliable penalty determination. U.S. Const. art. VI, amends. V, VI, VIII & XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21; Vienna Convention on Consular Relations, Art. 36.

SUPPORTING FACTS:

378. During the time of his arrest and conviction, Mr. Vanisi was a citizen of Tonga. Exs. 6, 7. The United States and Tonga were signatories to an international treaty which required the United States to provide Mr. Vanisi with certain individualized rights contained therein. Mr. Vanisi's right to due process was violated because he was not informed of his right to contact his consulate until after he was convicted and sentenced to death. Further, the consulate was not informed that Mr. Vanisi had been arrested until far into trial counsel's representation, which limited trial counsel's ability to effectively utilize the consulate. Additionally, trial counsel were ineffective in failing to inform Mr. Vanisi of his rights under the Vienna Convention, and for failing to timely notify the consulate of Mr. Vanisi's arrest and criminal proceedings. Finally, prior post-conviction counsel was ineffective for failing to investigate, develop and fully present this claim as contained herein. Mr. Vanisi's conviction and sentence of death must be vacated as a remedy to the violation of his rights under the international treaty.

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A. The Vienna Convention is a treaty that governs relations between nations.

379. The Vienna Convention is an international treaty that governs relations between individual nations, and foreign consular officials. In 1963, the United States and several other nations agreed that foreign nationals facing criminal prosecution outside their native land deserved the protection of consular assistance. This agreement was codified in Article 36 of the Vienna Convention on Consular Relations. Vienna Convention on Consular Relations, April 24, 1963, TIAS 6820, 21 U.S.T. 77. The adoption of the Vienna Convention by the international community was the single most important event in the entire history of the consular institution.

380. The United States ratified the treaty in 1969; as a result, it became binding upon the states under the Supremacy Clause of the United States Constitution. Failure to notify Mr. Vanisi of his Vienna Convention rights, therefore, violated international law and the domestic law of the United States, as the Vienna Convention is the supreme law of the land under Article VI of the United States Constitution.

381. Article 36 of the Vienna Convention requires that when a foreign national is arrested, the country detaining him must: (1) inform the consulate of the foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay; and (3) inform a detained foreign national of his rights under Article 36 without delay. 21 U.S.T. 77. Article 36(1)(b) of the Vienna Convention provides that:

> if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by a person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

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Vienna Convention on Consular Relations, Article 36(1)(b), April 24, 1963, 21 ACED 77 (emphasis added).

The United States Department of State has recognized that:

> The Vienna Convention contains obligations of the highest order and should not be dealt with lightly. Article 36, paragraph 1(b), requires the authorities of the receiving state to notify the consular post of the sending state without delay of the arrest or commitment of a national of the sending state, if that national so requests. While there is no precise definition of delay, it is the Department's view that such notification should take place as quickly as possible, and, in any event, no later than the passage of a few days.

Ruiz-Bravo, Hernan, Suspicious Capital Punishment, 3 San Diego Just. J. 396-97 (1995) (quoting Department of State File L/M/SCA: Department of State Digest, October 24, 1973, p. 161).

B. The consulate protects the rights of its citizens located in foreign countries.

382. Foreign nationals who are detained in the United States find themselves in a very vulnerable position when they are separated from their families, far from their homelands, and are suddenly swept into a foreign legal system. Language barriers, cultural barriers, lack of resources, isolation and unfamiliarity with local law create an aura of chaos around foreign detainees, which can lead them to make serious legal missteps.

383. The consulate can serve as a cultural bridge between the foreign detainee and the state legal machinery. The assistance of an attorney cannot entirely replace the unique assistance of the consulate, who can provide not only an explanation of the receiving state's legal system, but an explanation of how that system differs from the one to which the detainee is accustomed. This assistance can be invaluable, because cultural misunderstandings can lead a detainee to make serious legal mistakes, particularly where the detainee's cultural background informs the way he interacts with law enforcement officials and judges.

384. The consulate can also assist in more practical ways, such as processing passports, transferring currency and helping to contact friends and family back

home. The consulate can provide critical resources for legal representation and case investigation. The consulate can even conduct its own investigations, file amicus briefs and intervene directly in a proceeding if it deems that necessary. Finally, the consular office can help a defendant obtain evidence, or witnesses from the detainee's home country that the detainee's attorney might not know about or be able to obtain.

C. The State failed to comply with the Vienna Convention in Mr. Vanisi's Case in violation of his right to due process.

385. The State failed to comply with the Vienna Convention in Mr. Vanisi's case, thereby resulting in a Due Process violation, as Mr. Vanisi was not timely informed of his rights under the Convention. Because the Vienna Convention is self-executing – that is, it provides a personal right enforceable by Mr. Vanisi – it may be raised in post-conviction proceedings.

386. No prejudice need be demonstrated because the violation of the Vienna Convention constitutes fundamental error. The exclusion of consular assistance pervaded every aspect of Mr. Vanisi's prosecution. In the alternative, this violation affected the fairness of the proceedings and prejudiced Mr. Vanisi as demonstrated below, and the state cannot demonstrate beyond a reasonable doubt that the constitutional error was harmless.

D. Trial counsel was ineffective for failing to request the assistance of the Tongan Consulate.

387. Trial counsel should have been aware of Mr. Vanisi's rights under Article 36, and should have acted to protect them. Their failure to do so was deficient. All lawyers that represent criminal defendants are expected to know the laws applicable to their client's defense. Numerous courts had held by the time of Mr. Vanisi's trial that Article 36 created individual rights, even in a criminal setting.

388. Trial counsel's failure to obtain the assistance of the Tongan Consulate was deficient and Mr. Vanisi was prejudiced by this failure. Had the consulate been

notified, they could have assisted trial counsel in obtaining mitigating information from Mr. Vanisi's family and friends, as well as assisted in obtaining records pertaining to Mr. Vanisi's social history. Ex. 173; See Claims One and Two. They could have provided interpreters, a government vehicle and an escort to trial counsel during a mitigation investigation taking place in Tonga. Ex. 173.

389. Furthermore, trial counsel were ineffective in that they erroneously attempted to contact the Tongan consulate in San Francisco, when in fact the correct location of the Tongan consulate for these matters is located in New York because that is where the Tongan Embassy is located. Ex. 173. Had the proper office been contacted, the Tongan government would have become involved in Mr. Vanisi's case. Ex. 173. Since no other Tongan national has ever been tried or convicted of a capital crime in the United States, the Tongan government would have made Mr. Vanisi's situation a high priority at the top levels of Tongan government. Ex.173.

390. During the trial proceedings, the judge was in a unique position to address an Article 36 violation. Where a defendant raises an Article 36 violation at trial, a court can make the appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefit of consular assistance.

E. Mr. Vanisi is entitled to a new trial.

391. Under international law, the recognized remedy for a treaty violation is to restore the status quo ante, and return the parties to the position they would have occupied had the violation not taken place. Mr. Vanisi should be restored to the position he occupied before the State of Nevada failed to inform him of his rights under the Vienna Convention, and before his trial, and appellate counsel ineffectively failed to assert these rights on Mr. Vanisi's behalf. Mr. Vanisi's conviction and death sentence must be reversed.

392. The Nevada Supreme Court's ruling that the due process claim was procedurally barred was contrary to and an unreasonable application of clearly established federal law. Vanisi v. State, No. 50607, 2010 WL 3270985, at * 2,

unpublished order, (Nev. April 20, 2010) as direct appeal counsel was not in a position to conduct the extra-record investigation necessary to raise this claim. Further, although the denial of the ineffective assistance of counsel portion of this claim was before the Nevada Supreme Court, they failed to address this portion of Mr. Vanisi's appeal.

F. Prior post-conviction counsel were ineffective for failing to obtain information from Tongan officials.

393. Prior post-conviction counsel were ineffective in failing to utilize the services offered by Tongan officials to investigate, develop and present the information contained in the instant petition and in section D above. Mr. Vanisi hereby incorporates each claim as if contained herein. Prior post-conviction counsel were also deficient in failing to allege that this error violated Mr. Vanisi's state and federal constitutional rights to equal protection, a reliable sentence and compulsory process.

CLAIM TEN

394. The trial court's failure to allow Mr. Vanisi's attorney to withdraw and grant Mr. Vanisi's knowing and voluntary request to represent himself, pursuant to Faretta v. California, constituted structural error that amounted to the "total deprivation of the right to counsel" in violation of Mr. Vanisi's state and federal rights to due process, confrontation, effective counsel, a reliable sentence, a fair trial, equal protection, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21.

SUPPORTING FACTS:

395. On August 3, 1999, Mr. Vanisi orally requested to represent himself at his September 7, 1999, trial. The state court instructed Mr. Vanisi to submit his motion in writing. Ex. 21 at 2. On August 5, 1999, Mr. Vanisi filed a written motion for self-representation. Ex. 17. On August 10, 1999, a hearing was held on that motion. Ex. 22. The court canvassed Mr. Vanisi pursuant to SCR 253 and heard testimony from a psychiatrist who had treated Mr. Vanisi who indicated that he was competent. Id. The State supported Mr. Vanisi's motion by arguing to the court:

> the State is certainly aware of the unequivocal and fundamental constitutional right that has been endorsed time and again by the United States Supreme Court and the Nevada Supreme Court. That is the powerful right of one to represent themselves. The State has seen nothing in the canvass this morning that would render Mr. Vanisi incapable pursuant to our guidelines of representing himself, although we collectively do it, make that assessment with a severe degree of caution.
>
> Frankly speaking, Your Honor, some day this transcript and this proceeding is going to be reviewed by the Ninth Circuit Court of Appeals. And the decision that this Court has from the State's perspective is one it can't make correctly. That is, if you deny it based on what I think the record is, there is an argument that it may be reversed. I think that he's satisfied all the requirements.

Ex. 22 at 83. The court responded, "Counsel we have a ten a.m. hearing tomorrow morning. I am going to issue my decision right before that hearing. However, I encourage Mr. Vanisi to be prepared for that hearing tomorrow morning." Id. at 84.

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On the next day, August 11, 1999, the court entered an order denying Vanisi's motion for self-representation. Ex. 19.

A. The failure to allow Mr. Vanisi to represent himself was structural error and reversible per se.

396. The court based its refusal to allow Mr. Vanisi to represent himself upon three grounds: (1) the motion was made for purpose of delay; (2) Mr. Vanisi was abusing the judicial process and presented a danger of disrupting subsequent court proceedings; and (3) because the case was a complex death penalty case, the court had concerns about Mr. Vanisi's ability to represent himself and receive a fair trial. Ex. 19. The Nevada Supreme Court ruled that the third reason was invalid. Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001). The Nevada Supreme Court's ruling refusing to substitute its own judgement regarding the trial court's ruling on delay, and determination that the trial court had adequately documented that Mr. Vanisi was disruptive is contrary to and an unreasonable application of clearly established federal law.

1. Mr. Vanisi's motion was timely filed and there is nothing in the record to support a ruling of dilatory intent.

397. Mr. Vanisi's motion to represent himself was made more than a month prior to his trial. A motion to proceed pro se is timely made as long as it is made before the jury is empaneled. United States v. Schaff, 948 F.2d 501 (9th Cir. 1991). The trial court, however, ruled that Mr. Vanisi's motion was made with dilatory intent because: (1) Mr. Vanisi had previously requested a continuance of his first trial without the agreement of defense counsel; (2) for six weeks after the trial court refused to appoint new defense counsel pursuant to Mr. Vanisi's motion, he refused to cooperate with counsel, thereby causing a delay in proceedings for a competency assessment; and (3) Mr. Vanisi indicated that he formed his intent to represent himself on the day that he was arrested, but did not make his request until a year and a half later. The trial judge's findings of dilatory intent are not supported by the

record, which clearly supports that Mr. Vanisi's request was made solely to resolve a long-standing, well documented, conflict between himself and trial counsel regarding his defense.

398. "A court must examine the events preceding the request to determine if they are consistent with a good faith assertion of Faretta and whether the defendant could reasonably be expected to have made the request at an earlier time." Fritz v. Spalding, 682 F.2d 782, 784-85 (9th Cir. 1982). On November 6, 1998, prior to Mr. Vanisi's then scheduled January trial, Mr. Vanisi informed the court that he was considering hiring private counsel. Ex. 65. At that time, he asked the court whether he would be allowed to have a continuance of the January trial if he hired private counsel, or decided to represent himself, because he did not want to "stand trial in January." Ex. 65 at 3-9. The judge informed him: "I won't give you another day, even if you represented yourself. I'm not going to give you a continuance. It's set. It's ready to go. If you want to represent yourself, we can set this for a hearing and I'll canvass you and see if you're competent to represent yourself." Id. The next day, Mr. Vanisi informed the court that he had decided to keep his current counsel. Ex. 66 at 2. At no other time during the ten months that elapsed between this exchange and Mr. Vanisi's retrial in September 1999, did Mr. Vanisi make another request for a continuance. To the contrary, during his Faretta canvass on August 10, 1999, after the judge accused Mr. Vanisi of desiring to represent himself in order to delay proceedings, violate a rule of law or violate an ethical rule, Mr. Vanisi responded:

> Let me tell you that what you are saying is incorrect. With all due respect, Your Honor, I am not going to do those things which you had enumerate, such as putting up a perjured witness up there or delaying court time. Those are not, you're coming – I will have to say on the record you're a little off there, Judge.
>
> But my intention when I say tactical reasons [for representing himself] always has been for the pure interest for upholding the law and complying with the Court; never to create an arena for disorderly conduct.

///

> So yeah, if you're not so, you are incorrect when you say I'm doing this to delay. I'll be ready on September 7. I will be ready on September 7.
>
> Now you were speaking in the abstract. I didn't know you were hinting, I guess covertly that you are denying? You are denying my motion? Because that is the, through your abstract speech I kind of got it that you insinuated denying, by I just wanted to put on the record that I am not, I'm not – I'm not delaying time. I will be ready on September 7.
>
> I don't intend to do anything that would violate the constitutional or the court law or any law. My pure intention of a tactical decision, it's just as I said first was, it was in my best interest. And that's why I want to represent myself, because it's in my best interest to pose as myself as a person who litigates for himself.

Ex. 22 at 42-43.

399. Absent an affirmative showing of purpose to secure delay, a defendant may not be denied his Faretta rights upon the filing of a timely motion. Fritz, 682 F.2d at 784. The court must examine a defendant's purpose by identifying when it became clear that the defendant and counsel had irreconcilable differences, and whether there was bona fide reason for not asserting Faretta prior to that time. Id. at 784-85. In the instant case, although Mr. Vanisi stated during the Faretta canvass that he first decided to represent himself on the day he was arrested, the record clearly reflects that he then changed his mind, and allowed counsel to represent him during his first trial in January 2009, which ended in a mistrial due to trial counsel's failure to listen to the very tapes upon which Mr. Vanisi's entire was based. Instead trial counsel relied upon the transcription of these tapes which contained a substantive typographical error. It was quite reasonable for Mr. Vanisi to change his mind a second time under these circumstances. Further, the fact that Mr. Vanisi first planned to represent himself when he was initially arrested, and subsequently changed his mind in connection with the first trial, is completely irrelevant to the inquiry into when he decided that he wanted to represent himself in connection with the retrial.

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400. In February 1999, after the mistrial, Mr. Vanisi made a statement to defense counsel that caused them to alter the defense that they had originally offered during the January 1999 trial. Ex. 23 at 3. From February through June, 1999, Mr. Vanisi and counsel disagreed about what defense should be presented. Ex. 32. In June, it became apparent to Mr. Vanisi that the conflict was not resolvable, at which time he filed a motion to have new counsel appointed. Ex. 16. During the June 23, 1999, hearing on this motion, contrary to Mr. Vanisi's wishes, defense counsel represented that they did not believe that they had a conflict, see Ex. 20 at 25-26 (originally sealed), and the trial court denied Mr. Vanisi's motion. Id. at 33.

401. After the denial of the motion for new counsel, defense counsel visited Mr. Vanisi twice, during which they continued to disagree on what defense would be presented. During the second visit, Mr. Vanisi informed defense counsel that he wanted to represent himself. Ex. 35 at 4. On August 3, 1999, upon his first return to court after the denial of Mr. Vanisi's motion to change counsel, Mr. Vanisi timely requested to represent himself. Ex. 21 at 2 (originally sealed). The trial judge instructed him to file a written motion, Id., which Mr. Vanisi did on August 5, 1999. Ex. 17. The hearing on the motion was held on August 11, 1999, Ex.71, a full month prior to Mr. Vanisi's scheduled trial date, and during that hearing, Mr. Vanisi assured the trial court that he did not intend to delay the trial and was prepared to proceed on the scheduled trial date. Ex. 22 at 42-43.

402. Eight weeks after Mr. Vanisi informed the court that he and his counsel had a conflict, defense counsel acknowledged what Mr. Vanisi already knew – that their conflict was irreconcilable – and counsel filed a motion to withdraw on August 18, 1999. Ex. 35. A hearing was held a week later, on August 26, 1999, during which counsel confirmed that they had indeed been at odds with Mr. Vanisi over what defense to present since February 1999. Ex. 23 at 3-4. Defense counsel explained to the court that Mr. Vanisi's motion to represent himself was the culmination of this long standing conflict, and was not made to delay the proceedings. Ex. 35.

403. The trial court's finding of dilatory intent is simply unsupported by the record which clearly reflects that Mr. Vanisi filed his motion to represent himself as soon as it became apparent to him that he and his counsel had an irreconcilable conflict about what defense to present at Mr. Vanisi's retrial.

2. The record does not display one instance of disruptive behavior exhibited by Mr. Vanisi.

404. While "a defendant's right to self-representation does not allow him to engage in uncontrollable and disruptive behavior in the courtroom," United States v. Flewitt, 874 F.2d 669, 674 (9th Cir. 1989) (interpreting Faretta), clearly established federal law requires that the "uncontrollable and disruptive behavior" consist of behavior that is obstructionist and severe, United States v. Lopez-Ozuna, 242 F.3d 1191 (9th Cir. 2001). The behavior cited by the state district court such as focusing on one issue, and at times refusing to take action, does not constitute "obstructionist courtroom behavior that substantially delay[s] proceedings." Lopez-Osuna, 242 F.3d at 1200. Further, a lack of legal knowledge, "without severely disruptive behavior, is not sufficient to override [defendant's] right of self-representation." Id. The only relevant question is whether the defendant is "able to abide by courtroom procedure so as not to substantially disrupt the proceedings." Id. The Nevada Supreme Court's ruling that the district court judge made sufficient findings supporting that Mr. Vanisi would be disruptive during trial is unsupported by the record, and is contrary to and an unreasonable application of clearly established federal law. See Vanisi, 117 Nev. at 339-40, 22 P.3d at 1171. The concurrence in Vanisi accurately noted that the record did not reflect that Vanisi had been or would be disruptive. 117 Nev. at 345, 22 P.3d at 1174 (Justice Rose):

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

Id. (citing Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997) (quoting Flewitt, 874 F.2d at 674)). There are no instances of Mr. Vanisi being disruptive during his five-day January 1999 trial, which ended in a mistrial due to a State mistake. See Exs.74, 89, 159, 160, 161.

405. Pretrial activity is relevant only if it affords a strong indication that the defendant will disrupt the proceedings in the courtroom. During the seventeen pretrial proceedings where Mr. Vanisi was present, there is not one recorded disruption by Mr. Vanisi. See Exs. 20-23, 60-73. The Judge's ruling that "[a]t previous hearings, Mr. Vanisi has blurted out statements in a loud voice and interrupted this Court requiring this Court to caution Mr. Vanisi about his conduct," does not support a finding that Mr. Vanisi would be disruptive at trial.[1] There was only one hearing in the seventeen pretrial proceedings where Mr. Vanisi spoke out of turn, and this hearing involved his motion to dismiss counsel. During this hearing, however, Mr. Vanisi was not disruptive, unruly or obnoxious, and he stopped talking each time the Judge instructed him that he needed to wait until she called upon him to talk:

> THE COURT: Do you have any objection, either of you, in my finding Mr. Vanisi competent to continue?
>
> MR. STANTON: No objection from the State, Your Honor.
>
> MR. GREGORY: None from the defense.
>
> THE COURT: The Court has had –
>
> THE DEFENDANT: I have a question.
>
> THE COURT: Well, I'll get to you.
>
> Court has had an opportunity to review the evaluations conducted by Dr. Evarts and Dr. Bittker. Based upon the evaluations

[1]The record in this case reflects that all proceedings were transcribed, including telephone conferences and in chambers discussions. Further, the trial judge made clear her desire that all of Mr. Vanisi's proceedings be transcribed. See Ex. 21 at 1-34.

and the information contained therein, the Court finds that Mr. Vanisi is competent to stand trial, competent to assist counsel and continue with this case. Therefore, there is no need to take any further action with regard to his psychiatric condition.

MR. GREGORY: Your Honor, I will have some issues to address to the Court at the end of the hearing, though, regarding that.

THE COURT: That is fine. We'll get to everything. We have a long day.

THE DEFENDANT: Remember me also.

THE COURT: I won't forget you, Mr. Vanisi. Why don't you just be quiet for a minute.

THE DEFENDANT: I wanted to address the competency issues.

THE COURT: We'll get to you.

Ex. 20 at 2. The Court went on to have a lengthy discussion about the logistics of having an in camera hearing and clearing the courtroom to address Mr. Vanisi's motion to dismiss defense counsel, after which the following exchange occurred:

THE COURT: Ladies and gentlemen of the gallery –

THE DEFENDANT: Your Honor, I was letting [my counsel] know, he was telling me that it would probably be best that you remove these people in the camera, but that's okay, they can be here. That's fine. I'll feel freely to speak what I have to bring up to the Court. No problem. They can stay.

THE COURT: Mr. Vanisi, thank you. This is not an issue of whether or not you want them removed or not. This is an issue of what the Court has to do. So there are certain things that I have to do to protect your rights, whether you want me to protect your rights or not.

Now, please wait until I call on you to talk next. Okay?

THE DEFENDANT: Yes, Your Honor. Thank you.

Id. at 3-5. These polite interjections pertaining to Mr. Vanisi's wishes to be heard on his motion to dismiss his counsel can hardly be classified as major disruptive behavior, especially in light of the trial judge's subsequent statement to defense counsel during the same hearing: "[a]ctually, I don't think [Mr. Vanisi] is any worse than you. But you can go on. I mean, you have interrupted me on many occasions. I mean, [Mr. Vanisi] is excitable, but I would not call him manic." Ex. 20 at 37.

Washoe county guards confirm that Mr. Vanisi never acted up in court. Exs. 150 ¶ 5; 151 ¶ 7. The guards also report Mr. Vanisi never gave the defense team any problems during either of his trials. Ex. 150 ¶ 5.

406. The dissent in Vanisi, Justice Rose (with whom Justices Agosti and Becker agreed) concluded:

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

Vanisi, 117 Nev. at 345-46, 22 P.3d at 1174-75. "Counsel for the State as well as counsel for the defense agreed that Mr. Vanisi had been 'anything but disruptive' during the hearing on the motion for self-representation." Vanisi, 117 Nev. at 346, 22 P.3d at 1175.

407. Clearly established federal law defines disruptive behavior as being "obstructionist courtroom behavior that substantially delay[s] proceedings" or "threatens the dignity of the courtroom." Lopez-Osuna, 242 F.3d at 1200. Disruptive behavior can involve a defendant who is so disrespectful and contemptuous that he is found to be in contempt and has to have his "mouth taped shut" to stop him from talking, see, e.g., Tanksley v. State, 113 Nev. 997, 1001-02, 946 P.2d 148, 150-51 (1997), or a defendant who "engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial," Flewitt, 874 F.2d at 674 (citing Illinois v. Allen, 397 U.S. 337, 338 (1970)); Faretta, 422 U.S. at 2541 n.46.

408. The trial court incorrectly cited as disruptive that during his Faretta canvass: (1) Mr. Vanisi exhibited difficulty in processing information; (2) took a lengthy period of time to respond to many of the court's questions, stopping proceedings for

two or three minutes while he pondered his answer; (3) asked the court to repeat the same question many times before answering; (4) refused to answer a question because he believed it to be an "incomplete sentence;" (5) asked the court questions rather than answering the court directly; and (6) spoke out loud to himself making it difficult to determine whether he was addressing the court. Ex. 23 at 5. Even where a defendant's conduct is "exasperating," and the judge must display "admirable patience in granting various requests," see Flewitt, 874 at 673, or where a defendant is fixated on one issue, see Lopez-Osuna, 242 F.3d at 1200, this does not constitute obstructionist behavior. The court also noted that at past hearings, Mr. Vanisi had been observed making "unsettling rocking motions" and "repeating himself over and over again," Ex. 23 at 5, but Mr. Vanisi had not been medicated at that time, and he did not exhibit that type of behavior during his Faretta canvass. See Ex. 23.

409. The trial court also cited to Mr. Vanisi's aggressive and disruptive behavior while at the Nevada State Prison, prior incidents at the Washoe County Jail, and the fact that Mr. Vanisi would have to remain restrained in the courtroom as a basis for denying Mr. Vanisi's Faretta motion. Ex. 23 at 5. Mr. Vanisi's incarceration behavior, however, is irrelevant. See, e.g., Flewitt, 874 F.2d 669 (defendant's refusal to cooperate with government during discovery is irrelevant to question of whether he will be disruptive in courtroom during trial). The trial judge's conclusion that she could deny Mr. Vanisi's Faretta motion because if he remained in restraints during the trial, he would "complain on appeal that he was not afforded an equal opportunity to present his case as the prosecutor," was irrelevant to the analysis and is contrary to clearly established federal law.

410. While "flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated," see Flewitt, 874 at 674 (emphasis in original), there was not one instance of flagrant disregard for courtroom decorum displayed by Mr. Vanisi. Mr. Vanisi's courtroom behavior during the year prior to

and during his Faretta canvass "constituted neither a contemptuous refusal to comply with court orders nor such as to indicate that [he] would be uncontrollable at trial or abuse the dignity of the courtroom." Id. at 675 (emphasis added).

411. Where a defendant, such as Mr. Vanisi, has demonstrated that he is able to abide by courtroom procedure "so as not to substantially disrupt the proceedings," a denial of a Faretta motion is structural error. The Nevada Supreme Court's refusal to revisit this claim for procedural reasons during the appeal of the denial of Mr. Vanisi's first post-conviction proceedings was contrary to and an unreasonable application of clearly established federal law. Vanisi v. State, No. 50607, 2010 WL 3270985, at *2 (Nev. April 20, 2010).

B. The trial judge's denial of trial counsel's motion to withdraw was unconstitutional.

412. The district court erred in refusing to allow trial counsel to withdraw due to an irreconcilable conflict, in violation of Mr. Vanisi's Fifth, Sixth, Eighth and Fourteenth Amendment rights to the United States Constitution, especially in light of Mr. Vanisi's Faretta motion to represent himself due to his conflict.

413. Mr. Vanisi filed a motion to dismiss the Washoe County Public Defender's Office. Ex.16. On June 23, 1999, a closed hearing was held before the district court. Ex. 20. Mr. Vanisi informed the court that his attorneys: (1) did not adequately explain things to him; (2) did not accept his collect calls; (3) would not file a double jeopardy motion to dismiss, and (4) that Mr. Specchio falsely represented to the court during an August 2, 1998, hearing that he had visited Mr. Vanisi twenty times when in fact he had only visited Mr. Vanisi ten times. Id.[2] The

[2]Mr. Vanisi actually was correct that trial counsel had falsely represented that he had visited Mr. Vanisi twenty times, when, in fact, he had visited Mr. Vanisi ten times. Exs. 33 at 1457-92, 47.

court opined that Mr. Vanisi was merely attempting to delay the trial, Ex. 20 at 33-34, and denied Mr. Vanisi's motion, Ex. 20 at 34.

414. On August 26, 1999, after the court denied Mr. Vanisi's motion for new counsel and his motion to represent himself under Faretta, a new in camera hearing was held to hear from Mr. Vanisi's counsel on an ex parte motion to withdraw as counsel filed pursuant to SCR 166 and 172. Ex. 23. During that hearing, Mr. Gregory, counsel for Mr. Vanisi, revealed to the court that in February of 1999, he had a conversation with Mr. Vanisi during which Mr. Vanisi admitted that he in fact had killed the alleged victim. Ex. 23 at 3.

415. Mr. Gregory explained that as a result of this admission, they attempted to fashion a defense based upon provocation, but that Mr. Vanisi refused to discuss this defense and instead wanted to present a defense that someone else had committed the killing. Ex. 23 at 3, 10. Mr. Vanisi expressed a desire to testify to this fact. Mr. Vanisi's counsel explained that for ethical reasons, they would not put on such a defense in light of Mr. Vanisi's admission. Ex. 23 at 3-4.

416. Counsel for Mr. Vanisi then contacted bar counsel, Michael Warhola, and presented their dilemma. "Without hesitation," bar counsel advised that they had to withdraw as counsel pursuant to SCR 166 and 172. Ex. 23 at 6, 13. Additionally, bar counsel informed counsel for Mr. Vanisi that to offer evidence or cross-examine vigorously or select a jury under those circumstances would be a prohibited ethical violation. Ex. 23 at 13, 18.

417. During the hearing on their motion, counsel cautioned the court that if they were not allowed to withdraw, they would have to certify themselves as ineffective. Ex. 23 at 6, 9. Mr. Gregory explained that if they were required to stay on the case, Mr. Vanisi would not have a defense, because they would have to sit "like bumps on a log doing nothing." Ex. 23 at 10. The district court denied their request. Ex. 72.

418. The trial court's denial of counsel's motion not only violated Faretta, as explained above, but also completely denied Mr. Vanisi representation due to trial counsel's conflict of interest, thereby causing structural error. Prejudice is presumed where a defendant is completely denied his right to representation. The Nevada Supreme Court's denial of this claim as procedurally barred and law of the case is contrary to and an unreasonable application of clearly established federal law. Vanisi v. Nevada, No. 50607, 2010 WL 3270985, at *2 (Nev. April 20, 2010).

CLAIM ELEVEN

419. Mr. Vanisi's death sentence is invalid under the state and federal constitutional guarantees to freedom from cruel and unusual punishment, due process, equal protection, a reliable sentence, and compliance with international law because execution by lethal injection is unconstitutional under all circumstances, and specifically because it violates the constitutional prohibition against cruel and unusual punishments. U.S. Const. art VI, amends. V, VIII & XIV; Nev. Const. art. 1 §§ 1, 6 & 8, and art. 4 § 21; International Covenant on Civil and Political Rights, art. VII.

SUPPORTING FACTS

A. Lethal Injection Constitutes Cruel and Unusual Punishment

420. Nevada law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. § 176.355 (1).

421. The Nevada Department of Corrections did not release a redacted copy of its "Confidential Execution Manual," last revised February 2004, until April, 2006. See Ex. 13. The execution manual specifies that execution by lethal injection will be carried out using five grams of sodium thiopental, a barbiturate typically used by anesthesiologists to induce temporary anesthesia; 20 milligrams of Pavulon, a paralytic agent; and 160 milliequivalents of potassium chloride, a salt solution that induces cardiac arrest. Id. at 8; See also Ex. 5 at ¶ 10. Sodium Pentothal is a brand name for the generic drug sodium thiopental. Pavulon is a brand name for the generic drug pancuronium bromide.

422. Competent physicians can not administer the lethal injection because the ethical standards of the American Medical Association prohibit physicians from participating in an execution other than to certify that a death has occurred. American Medical Association, House of Delegates, Resolution 5 (1992); American

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Medical Association, Judicial Counsel, Current Opinion 2.06 (1980). Thus, the lethal injection is not administered by competent medical personnel.

423. Competent physicians are precluded from administering the drugs sodium thiopental, pancuronium bromide, and potassium chloride in lethal injection procedures because these substances are not approved by the Food and Drug Administration as a safe and effective means for administering executions in human beings. For example, sodium thiopental is not approved in any manner for administration on human beings. Rather, federal law restricts injection of sodium thiopental to anesthetic uses on dogs and cats only "by or on the order of a licensed veterinarian." See 21 C.F.R. §§ 522.2444a(c)(1), (3), 522.2444b(c)(1), (3). The Department of Corrections' use of these drugs in violation of the Food and Drug Act allows state prison officials to make unapproved use of drugs distributed in interstate commerce. Competent medical personnel are thus prevented from participating in lethal injection procedures and ensuring that Nevada's lethal injection procedures comply with constitutional prohibitions on cruel and unusual punishments.

424. Lethal injection conducted by untrained personnel using the three drugs specified by Nevada's protocol creates an unnecessary risk of undue pain and suffering because Nevada's procedures for inducing and maintaining anesthesia fall below the medical standard of care for the use of anesthesia prior to conducting painful procedures. See Ex. 5 at ¶¶ 14-15, 18. The humaneness of execution by lethal injection is dependent upon the proper administration of the anesthetic agent, sodium thiopental. In the surgical arena, general anesthesia can be administered only by physicians trained in anesthesiology or nurses who have completed the necessary training to be Certified Registered Nurse Anesthetists (CRNAs). Id. ¶ 23. Nevada's execution manual does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection must have. If the untrained executioner fails to successfully deliver a quantity of sodium thiopental sufficient to

achieve adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride Id. ¶ 17; see also Leonidas G. Koniaris, et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 The Lancet 1412-14 (2005), Ex. 14. According to Dr. Mark Heath, a board-certified anaesthesiologist who has reviewed NDOC's redacted Execution Manual:

> If an inmate does not receive the full dose of sodium thiopental because of errors or problems in administering the drug, the inmate might not be rendered unconscious and unable to feel pain, or alternatively might, because of the short-acting nature of sodium thiopental, regain consciousness during the execution.

Ex. 5 ¶ 21. Moreover, according to Dr. Heath:

> If sodium thiopental is not properly administered in a dose sufficient to cause the loss of consciousness for the duration of the execution procedure, then it is my opinion held to a reasonable degree of medical certainty that the use of pancuronium places the condemned inmate at risk for consciously experiencing paralysis, suffocation and the excruciating pain of the intravenous injection of high dose potassium chloride.

Ex. 5 ¶ 39.

425. Nevada's lethal injection procedure is vulnerable to many potential errors in administration that would result in a failure to administer a quantity of sodium thiopental sufficient to induce the necessary anesthetic depth. The risk of error is compounded by Nevada's use of inadequately trained personnel. Id. ¶¶ 21-22. The potential errors include: errors in preparing the sodium thiopental solution (because sodium thiopental has a relatively short shelf-life in liquid form, it is distributed as a powder and must be mixed into a liquid solution prior to the execution, id., errors in labeling the syringes, errors in selecting the syringes during the execution, errors in correctly injecting the drugs into the IV, leaks in the IV line, incorrect insertion of the catheter, migration of the catheter, perforation, rupture, or leakage of the vein, excessive pressure on the syringe plunger, errors in securing the catheter, and failure to properly flush the IV line between drugs. Id. ¶ 22.

426. Nevada's lethal injection protocol further falls below the standard of care for administering anesthesia because it prevents any type of effective monitoring of the inmate's condition or whether he is anesthetized or unconscious. Id. ¶ 26. In Nevada, during the injection of the three drugs, the executioner is in a room separate from the inmate and has no visual surveillance of the inmate.

> Accepted medical practice dictates that trained personnel monitor the IV lines and the flow of anesthesia into the veins through visual and tactile observation and examination. The lack of any qualified personnel present in the chamber during the execution thwarts the execution personnel from taking the standard and necessary measures to reasonably ensure that the sodium thiopental is properly flowing in to the inmate and that he is properly anesthetized prior to the administration of the pancuronium and potassium.

The American Society of Anesthesiologists requires that "[q]ualified anesthesia personnel . . . be present in the room throughout the conduct of all general anesthetics" due to the "rapid changes in patient status during anesthesia." Id. at Attachment D (American Society of Anesthesiologists, Standards for Basic Anesthetic Monitoring).

427. Nevada's lethal injection protocol fails to account for the foreseeable circumstance that the executioner(s) will be unable to obtain intravenous access by a needle piercing the skin and entering a superficial vein suitable for the reliable delivery of drugs. See Ex. 5 ¶ 33. Inability to access a suitable vein is often associated with past intravenous drug use by the inmate. Medical conditions such as diabetes or obesity, individual characteristics such as heavily pigmented skin or muscularity, and the nervousness caused by impending death, however, can impede peripheral IV access. See Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 109-10 (2002). Typically, when the executioner is unable to find a suitable vein, the executioner resorts to a "cut down," a surgical procedure used to gain access to a functioning vein. When performed by a non-physician, the risks are great. When deep incisions are made

there is a risk of rupturing large blood vessels causing a hemorrhage, and if the procedure is performed on the neck, there is a risk of cardiac dysrhythmia (irregular electrical activity in the heart) and pneumothorax (which induces the sensation of suffocation). In addition, a cut-down causes severe physical pain and obvious emotional stress. This procedure should take place only in a hospital or other appropriate medical setting and should be performed only by a qualified physician with specialized training in that area. See Nelson v. Campbell, No. 03-6821, Amicus Brief, October Term, 2003, Ex. 15. Nevada's execution manual recognizes that a "sterile cut-down tray" may be required equipment "if necessary," Ex. 13 at 7, but does not specify who determines when a cut down is necessary, how that determination is made, or the training or qualifications of the personnel who would perform such a cut down.

B. Nevada's Execution Protocol Is Cruel and Unusual

428. The United States Supreme Court considered the constitutionality of the Kentucky execution protocol in Baze v. Rees, 553 U.S. 35 (2008) (plurality opinion). The plurality holding in Baze, which upheld the constitutionality of a lethal injection execution protocol, specifically relied upon the detailed and codified guidelines for execution adopted by Kentucky. Id. at 62. To the extent that the Kentucky execution protocol was constitutional, it was because the extensive guidelines adopted by Kentucky ensured that a lethal injection execution did not inflict unnecessary pain and suffering. Id.

429. No Nevada court has ever reviewed the Nevada execution protocol, in light of Baze, to ensure that a lethal injection execution did not inflict unnecessary pain and suffering. To the extent that any previous holding of the Nevada Supreme Court is in conflict with Baze, see e.g. McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), Baze will control. U.S. Const. art. VI (Supremacy Clause).

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430. A constitutional challenge to the lethal injection protocol will prevail upon proof that the protocol created a demonstrated risk of severe pain and that the risk is objectively intolerable. Baze, 553 U.S. at 49-50. The plurality stated:

> Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." [citing] Helling v. McKinney, 509 U. S. 25, 33, 34–35 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."

Id. No court ever considered whether the Nevada execution protocol satisfied this standard.

431. Nevada's execution protocol does not specify what, if any, training in anesthesiology the person(s) administering the lethal injection must have. If an untrained or unskilled executioner failed to deliver sufficient sodium thiopental to ensure adequate anesthetic depth, the inmate will feel the excruciating pain of the subsequent injections of pancuronium bromide and potassium chloride.[3] The failure to ensure that a person properly trained and practiced in the institution of intravenous lines, and the administration of anesthetic drugs through such lines, creates a subjective risk of serious harm and is objectively intolerable. Moreover, the failure to adopt and practice appropriate execution procedures to assess and ensure the appropriate anesthetic depth creates a substantial risk of serious harm that is objectively intolerable.

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[3] A majority of the Supreme Court appeared to agree that an injection of pancuronium bromide or potassium chloride after no, or insufficient, sodium thiopental was cruel and unusual punishment. Compare Baze, 553 U.S. at 49 (Roberts, C.J–plurality)with id. at 1563 (Breyer, J., concurring) and id. at 71-75 (Stevens, J., concurring) and id. at 114 (Ginsburg, J., dissenting).

432. In Baze, the Supreme Court noted the dangers associated with the inadequate administration of sodium thiopental in a state sponsored execution:

> failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.

Id. at 53. The plurality noted that this danger, under the Kentucky execution protocol, was not substantial:

> If, as determined by the warden and deputy warden through visual inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental . . . .
>
> . . .
>
> Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. .. Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. .. Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. .. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.
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> . . .
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> In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. Three of the Commonwealth's medical experts testified that identifying signs of infiltration would be "very obvious," even to the average person, because of the swelling that would result. .. Kentucky's protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. .. In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.

Id. at 45, 55-56. It was the safeguards instituted by Kentucky to ensure that sodium thiopental rendered the inmate unconscious which ultimately satisfied the constitutional requirements.

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433. The safeguards in the Kentucky execution protocol, relied upon by the plurality in Baze, are absent from the Nevada execution protocol. Nevada's execution protocol only required that "appropriate medical services personnel" perform a venipuncture. The "execution checklist" attached to a previous execution protocol suggests Nevada contracts with the Carson City Fire department to provide emergency services personnel to assist in an execution. However, the Nevada execution protocol does not designate the training and experience of those personnel and never designates what responsibilities these personnel will have in an execution. After the venipuncture, the "medical services personnel will then leave the execution chamber." The protocol does not designate who will administer the lethal substances, who will determine whether the lethal substances were appropriately administered, or who is responsible to determine when a condemned inmate requires further sedation. The Nevada execution protocol does not designate the training for any of the execution team members. Finally, the Nevada execution protocol does not require a regular or routine "walk through of the execution procedures, including the siting of IV catheters into volunteers." Nevada's protocol offers little or no safeguards to eliminate the substantial or imminent risks an inmate will suffer excruciating pain of an injection of pancuronium bromide and potassium chloride.

434. The Nevada execution protocol provides that, after the lethal substances are administered, "the attending physician or designee and coroner shall then determine whether it was sufficient to cause death. If the injections are determined to be insufficient to cause death, the third set of lethal injections shall be administered." Therefore, under the Nevada execution protocol, an inmate who was never appropriately rendered unconscious, suffering the painful effects of the lethal chemicals, will be evaluated by a physician or coroner after an undesignated amount of time, and will possibly suffer further painful lethal injections. Such a protocol unquestionably poses a substantial risk of serious harm.

435. If terror, pain, or disgrace are "superadded" to punishment, such punishment violates the Eighth Amendment. Under the Nevada execution protocol, an inmate must be administered a strong sedative four hours before his scheduled execution and again one hour prior to execution. The medication is not voluntary–it is mandatory for all inmates scheduled to be executed. Such a requirement adds only disgrace and insult to an otherwise extreme punishment, and is cruel and unusual. The mandatory sedation clouds the inmate's senses, muddles his thoughts, and interferes with his ability to communicate with the warden or execution team. The forced sedation strips from the condemned inmate his last opportunity to acknowledge family or friends, to express remorse to the victims, and denies the inmate any dignity in death. The forced sedation only serves to inflict further terror, pain and/or disgrace and is constitutionally intolerable.

436. The Baze plurality suggested that alternative methods of execution will support an argument that an execution protocol is unconstitutional:

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." . . . To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.

Id. at 52. Mr. Vanisi proffers alternative procedures in requiring sufficient training, expertise or certification of execution team members, dispensing with the use of pancuronium bromide, and requiring reliable safeguards.

437. These alternatives are feasible, readily implemented, and significantly reduce the risk of severe pain. The adoption of training, expertise or certification requirements similar to that in the Kentucky protocol is feasible and readily implemented. Nevada should require those who practice venipuncture in Nevada executions to be qualified and experienced. Nevada should ensure that persons within the execution chamber be trained and experienced in the determination and

maintenance of consciousness. If technical procedures or equipment are available to ensure an inmate is unconscious before the administration of pancuronium bromide or potassium chloride, Nevada should use or adopt these resources. Nevada execution team members should regularly walk through the execution procedures, including venipuncture. Finally, Nevada can discontinue the use of pancuronium bromide or potassium chloride in the execution protocol, causing death solely with the use of sodium thiopental. The adoption of such safeguards will easily and significantly reduce the risk of severe pain.

438. If the inmate is not adequately anesthetized by the successful administration of sodium thiopental, he will suffer the pain of the remaining two injections. The choice of "potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution" because the "[i]ntravenous injection of concentrated potassium chloride solution causes excruciating pain." See Ex. 5 ¶ 12. The inmate would be consciously aware and feel the pain of the potassium-induced fatal heart attack. Id.

439. Pancuronium bromide, the second drug in the lethal injection process, is a paralytic agent that paralyzes all voluntary muscles. This includes paralysis of the diaphragm and other respiratory muscles, which causes the inmate to cease breathing. Pancuronium "does not affect sensation, consciousness, cognition, or the ability to feel pain or suffocation." Id. ¶ 37. If the inmate is not adequately anesthetized prior to the pancuronium injection, the pancuronium will cause the inmate to consciously experience a "torturous suffocation" lasting "at least several minutes." Id. ¶¶ 39-40.

440. Pancuronium is "unnecessary" and "serves no legitimate purpose" in the execution process because both sodium thiopental and potassium chloride, if properly administered in the doses specified in the execution manual, are adequate to cause death. Id. ¶¶ 37, 44. Pancuronium "compounds the risk that an inmate may suffer excruciating pain during his execution" because it masks any physical

manifestations of pain that an inadequately anesthetized inmate would feel during pancuronium-induced suffocation and potassium-induced cardiac arrest. Id. ¶¶ 37, 42. "[U]sing barbiturates [such as sodium thiopental] and paralytics [such as pancuronium] to execute human beings poses a serious risk of cruel, protracted death" because "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1984), reversed on other grounds, 470 U.S. 84 (1985) (citing Royal Commission on Capital Punishment, 1949-53 Report (1953)). By paralyzing the inmate and preventing physical manifestations of pain, pancuronium places a "chemical veil" on the lethal injection process that precludes observers from knowing whether the prisoner is experiencing great pain. See Adam Liptak, Critics Say Execution Drug May Hide Suffering, N.Y. Times, October 7, 2003.

441. Nevada's execution protocol falls below the standard of care for euthanizing animals. The American Veterinary Medical Association (AVMA) allows euthanasia by potassium chloride, but mandates that animals be under a surgical plane of anesthesia prior to the administration of potassium. Ex. 5, Attachment B at 680-81. "It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of potassium chloride intravenously." Id. at 681. "A combination of phenobarbital [a barbiturate similar to, but longer acting than, sodium thiopental] with a neuromuscular blocking agent is not an acceptable euthanasia agent." Id. at 680. Nevada is one of at least 30 states that prohibit the use of neuromuscular blocking agents in euthanizing animals, either expressly or by mandating the use of a specific euthanasia agent such as phenobarbital. See, Ala. Code § 34-29-131; Alaska Stat. § 08.02.050; Ariz. Rev. Stat. Ann. § 11-1021; Cal. Bus. & Prof. Code § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code Ann. tit. 3, § 8001; Fla. Stat. § 828.058; Ga. Code Ann. § 4-11-5.1; 510

Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; Mich. Comp. laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. § 54-2503; Nev. Rev. Stat. Ann. § 638.005; N.J. Stat. Ann. § 4:22-19.3; N.Y. Agric. & Mkts. Law § 374; Ohio Rev. Code Ann. § 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. § 686.040(6); R.I. Gen. Laws § 4-1-34; S.C. Code Ann. § 47-3-420; Tenn. Code Ann. § 44-17-303; Tex. Health & Safety Code Ann. § 821.052(a); W. Va. Code § 30-10A-8; Wyo. Stat. Ann. § 33-30-216. Nevada's execution protocol would violate state law if applied to a dog. The consistent trend in professional norms and statutory regulation of animal euthanasia, places the method currently practiced by Nevada outside the bounds of evolving standards of decency.

442. There have been numerous documented cases of botched lethal injection executions that have produced prolonged and unnecessary pain, including:

> **Charles Brooks, Jr.** (December 7, 1982, Texas): The executioner had a difficult time finding a suitable vein. The injection took seven minutes to kill. Witnesses stated that Mr. Brooks "had not died easily." See Deborah W. Denno, Getting to Death: Are Executions Unconstitutional?, 82 Iowa L. Rev. 319, 428-29 (1997) ("Denno-1"); Deborah W. Denno, When Legislatures Delegate Death: the Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us, 63 Ohio St. L.J. 63, 139 (2002) ("Denno-2").
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> **James Autry** (March 14, 1984, Texas): Mr. Autry took ten minutes to die, complaining of pain throughout. Officials suggested that faulty equipment or inexperienced personnel were to blame. See Denno-1 at 429; Denno-2 at 139.
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> **Thomas Barefoot** (October 30, 1984, Texas): A witness stated that after emitting a "terrible gasp," Mr. Barefoot's heart was still beating after the prison medical examiner had declared him dead. See Denno-1 at 430; Denno-2 at 139.
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> **Stephen Morin** (March 13, 1985, Texas): It took almost forty five minutes for technicians to find a suitable vein, while they punctured him repeatedly, and another eleven minutes for him to die. See Denno-1 at 430; Denno-2 at 139; Michael L. Radelet, Some Examples of Post-Furman Botched Executions, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions ("Radelet").

Randy Woolls (August 20, 1986, Texas): Mr. Woolls had to assist execution technicians in finding an adequate vein for insertion. He died seventeen minutes after technicians inserted the needle. See Denno-1 at 431; Denno-2 at 139; Radelet; Killer Lends A Hand to Find A Vein for Execution, L.A. Times, Aug. 20, 1986, at 2.

Elliot Johnson (June 24, 1987, Texas): Mr. Johnson's execution was plagued by repetitive needle punctures and took executioners thirty five minutes to find a vein. See Denno-1 at 431; Denno-2 at 139; Radelet; Addict Is Executed in Texas For Slaying of 2 in Robbery, N.Y. Times, June 25, 1987, at A24.

Raymond Landry (December 13, 1988, Texas): Executioners "repeatedly probed" Mr. Landry's veins with syringes for forty minutes. Then, two minutes after the injection process began, the syringe came out of his vein, "spewing deadly chemicals toward startled witnesses." A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Mr. Landry's vein. "After [fourteen] minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Mr. Landry was pronounced dead twenty four minutes after the drugs were initially injected. See Denno-1 at 431-32; Denno-2 at 139; Radelet.

Stephen McCoy (May 24, 1989, Texas): In a violent reaction to the drugs, Mr. McCoy "choked and heaved" during his execution. A reporter witnessing the scene fainted. See Denno-1 at 432; Denno-2 at 139; Radelet.

George Mercer (January 6, 1990, Missouri): A medical doctor was required to perform a surgical "cutdown" procedure on Mr. Mercer's groin. See Denno-1 at 432; Denno-2 at 139.

George Gilmore (August 31, 1990, Missouri): Force was used to stick the needle into Mr. Gilmore's arm. See Denno-1 at 433; Denno-2 at 139.

Charles Coleman (September 10, 1990, Oklahoma): Technicians had difficulty finding a vein, delaying the execution for ten minutes. See Denno-1 at 433; Denno-2 at 139.

Charles Walker (September 12, 1990, Illinois): There was a kink in the IV line, and the needle was inserted improperly so that the chemicals flowed toward his fingertips instead of his heart. As a result, Mr. Walker's execution took eleven minutes rather than the three or four contemplated by the State's protocols, and the sedative chemical may have worn off too quickly, causing excruciating pain. When these problems arose, prison officials closed the blinds so that witnesses could not observe the process. See Denno-1 at 433-34; Denno-2 at 139; Radelet; Niles Group Questions Execution Procedure, United Press International, Nov. 8, 1992.

Maurice Byrd (August 23, 1991, Missouri): The machine used to inject the lethal dosage malfunctioned. See Denno-1 at 434; Denno-2 at 140.

Rickey Rector (January 24, 1992, Arkansas): It took almost an hour for a team of eight to find a suitable vein. Witnesses were separated from the injection team by a curtain, but could hear repeated, loud moans from Mr. Rector. See Denno-1 at 434-35; Denno-2 at 140; Radelet; Joe Farmer,

Rector's Time Came, Painfully Late, Arkansas Democrat Gazette, Jan. 26, 1992, at 1B; Marshall Frady, Death in Arkansas, The New Yorker, Feb. 22, 1993, at 105.

Robyn Parks (March 10, 1992, Oklahoma): Mr. Parks violently gagged, jerked, spasmed and bucked in his chair after the drugs were administered. A news reporter witness said his death looked "painful and inhumane." See Denno-1 at 435; Denno-2 at 140; Radelet.

Billy White (April 23, 1992, Texas): Mr. White's death required forty seven minutes because executioners had difficulty finding a vein that was not severely damaged from years of heroin abuse. See Denno-1 at 435-36; Denno-2 at 140; Radelet.

Justin May (May 7, 1992, Texas): Mr. May groaned, gasped and reared against his restraints during his nine minute death. See Denno-1 at 436; Denno-2 at 140; Radelet; Robert Wernsman, Convicted Killer May Dies, Item (Huntsville, Tex.), May 7, 1992, at 1; Michael Graczyk, Convicted Killer Gets Lethal Injection, Herald (Denison, Tex.), May 8, 1992.

John Gacy (May 10, 1994, Illinois): The lethal injection chemicals solidified, blocking the IV tube. The blinds were closed for ten minutes, preventing witnesses from watching, while the execution team replaced the tubing. See Denno-1 at 435; Denno-2 at 140; Radelet; Scott Fornek and Alex Rodriguez, Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction, Chi. Sun-Times, May 11, 1994, at 5; Rich Chapman, Witnesses Describe Killer's 'Macabre' Final Few Minutes, Chi. Sun-Times, May 11,1994, at 5; Rob Karwath and Susan Kuczka, Gacy Execution Delay Blamed on Clogged IV Tube, Chi Trib., May 11, 1994, at 1 (Metro Lake Section).

Emmitt Foster (May 3, 1995, Missouri): Seven minutes after the lethal chemicals began to flow into Mr. Foster's arm, the execution was halted when the chemicals stopped circulating. With Mr. Foster gasping and convulsing, blinds were drawn so witnesses could not view the scene. Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were reopened so the witnesses could view the corpse. According to the coroner, the problem was caused by the tightness of the leather straps that bound Mr. Foster to the execution gurney. Mr. Foster did not die until several minutes after a prison worker finally loosened the straps. See Denno-1 at 437; Denno-2 at 140; Radelet; Witnesses to a Botched Execution, St. Louis Post- Dispatch, May 8, 1995, at 6B; Tim O'Neill, Too-Tight Strap Hampered Execution, St. Louis Post-Dispatch, May 5,1995, at B1; Jim Slater, Execution Procedure Questioned, Kansas City Star, May 4, 1995, at C8.

Ronald Allridge (June 8, 1995, Texas): Mr. Allridge's execution was conducted with only one needle, rather than the two required by the protocol, because a suitable vein could not be found in his left arm. See Denno-1 at 437; Denno- 2 at 140.

Richard Townes (January 23, 1996, Virginia): It took twenty two minutes for medical personnel to find a vein. After repeated unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes' right foot. See Denno-1 at 437; Denno-2 at 140; Radelet.

Tommie Smith (July 18, 1996, Indiana): It took one hour and nine minutes for Mr. Smith to be pronounced dead after the execution team began sticking needles into his body. For sixteen minutes, the team failed to find adequate veins, and then a physician was called. Mr. Smith was given a local anesthetic and the physician twice attempted to insert the tube in Mr. Smith's neck. When that failed, an angio-catheter was inserted in Mr. Smith's foot. Only then were witnesses permitted to view the process. The lethal drugs were finally injected into Mr. Smith forty nine minutes after the first attempts, and it took another twenty minutes before death was pronounced. See Denno-1 at 438; Denno-2 at 140; Radelet.

Luis Mata (August 22, 1996, Arizona): Mr. Mata remained strapped to a gurney with the needle in his arm for one hour and ten minutes while his attorneys argued his case. When injected, his head jerked, his face contorted, and his chest and stomach sharply heaved. See Denno-1 at 438; Denno-2 at 140.

Scott Carpenter (May 8, 1997, Oklahoma): Mr. Carpenter gasped, made guttural sounds, and shook for three minutes following the injection. He was pronounced dead eight minutes later. See Denno-2 at 140; Radelet; Michael Overall and Michael Smith, 22-Year-Old Killer Gets Early Execution, Tulsa World, May 8, 1997, at A1.

Michael Elkins (June 13, 1997, South Carolina): Liver and spleen problems had caused Mr. Elkins's body to swell, requiring executioners to search almost an hour – and seek assistance from Mr. Elkins – to find a suitable vein. See Denno-2 at 140; Radelet; Killer Helps Officials Find A Vein At His Execution, Chattanooga Free Press, June 13, 1997, at A7.

Joseph Cannon (April 23, 1998, Texas): It took two attempts to complete the execution. Mr. Cannon's vein collapsed and the needle popped out after the first injection. He then made a second final statement and was injected a second time behind a closed curtain. See Denno-2 at 141; Radelet; [First] Try Fails to Execute Texas Death Row Inmate, Orlando Sent., Apr. 23, 1998,at A1 6;Michael Graczyk, Texas Executes Man Who Killed San Antonio Attorney at Age 17, Austin American-Statesman, Apr. 23, 1998,at B5.

Genaro Camacho (August 26, 1998, Texas): Mr. Camacho's execution was delayed approximately two hours when executioners could not find a suitable vein in his arms. See Denno-2 at 141; Radelet.

Roderick Abeyta (October 5, 1998, Nevada): The execution team took twenty five minutes to find a vein suitable for the lethal injection. See Denno-2 at 141; Radelet; Sean Whaley, Nevada Executes Killer, Las Vegas Rev.-J., Oct. 5, 1998, at 1A.

Christina Riggs (May 3, 2000. Arkansas): The execution was delayed for eighteen minutes when prison staff could not find a vein. Radelet.

Bennie Demps (June 8, 2000, Florida): It took the execution team thirty three minutes to find suitable veins for the execution. "They butchered me back there," said Mr. Demps in his final statement. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder." The executioners had no unusual problems finding one vein, but because the Florida protocol requires a second alternate

intravenous drip, they continued to work to insert another needle, finally abandoning the effort after their prolonged failures. See Denno-2 at 141; Radelet; Rick Bragg, Florida Inmate Claims Abuse in Execution, N.Y. Times, June 9, 2000, at A14; Phil Long and Steve Brousquet, Execution of Slayer Goes Wrong; Delay, Bitter Tirade Precede His Death, Miami Herald, June 8, 2000.

Bert Hunter (June 28, 2000, Missouri): In a violent reaction to the drugs, Mr. Hunter's body convulsed against his restraints during what one witness called "a violent and agonizing death." See Denno-2 at 141; Radelet; David Scott, Convicted Killer Who Once Asked to Die is Executed, Associated Press, June 28, 2000.

Claude Jones (December 7, 2000, Texas): Mr. Jones's execution was delayed thirty minutes while the execution team struggled to insert an IV. One member of the execution team commented, "They had to stick him about five times. They finally put it in his leg." Radelet.

Joseph High (November 7, 2001, Georgia): For twenty minutes, technicians tried unsuccessfully to locate a vein in Mr. High's arms. Eventually, they inserted a needle in his chest, after a doctor cut an incision there, while they inserted the other needle in one of his hands. Mr. High was pronounced dead one hour and nine minutes after the procedure began. See Denno-2 at 141; Radelet.

Sebastian Bridges (April 21, 2001, Nevada): Mr. Bridges spent between twenty and twenty five minutes on the execution bed, with the intravenous line inserted, continuously agitated, asserting his innocence, the injustice of executing him, and the injustice of requiring him to sign a habeas corpus petition, and to suffer prolonged delay, in order to have the unconstitutionality of his conviction recognized by the court system. He remained agitated after the execution process began, so the sedative drugs appeared not to take effect and he died while apparently still conscious and shouting about the injustice of his execution.

Joeseph L. Clark (May 2, 2006, Ohio): It initially took executioners twenty two minutes to find a suitable vein in Mr. Clark's left arm for insertion of the catheter. As the injection began, the vein collapsed. After an additional thirty minutes, the execution team succeeded in placing a catheter in Mr. Clark's right arm. However, the team again tried to inject the drugs into the left arm, where the vein had already collapsed. These difficulties prompted Mr. Clark to sit up, tell the executioners that "It don't work," and to ask "Can you just give me something by mouth to end this?" Mr. Clark was finally pronounced dead ninety minutes after the execution began. Radelet; Andrew Walsh-Huggins, IV Fiasco Led Killer to Ask for Plan B, Associated Press, May 12, 2006.

Angel Diaz (December 13, 2006, Florida): After the initial injection, Mr. Diaz grimaced, face contorted, gasping for air for at least ten to twelve minutes. Prison officials administered a second injection, and thirty four minutes passed before they declared Mr. Diaz dead. Shortly thereafter, Governor Jeb Bush halted all executions and selected a committee "to consider the humanity and constitutionality of lethal injections." See Radelet; Terry Aguayo, Florida Death Row Inmate Dies Only After Second Chemical Dose, N.Y. Times, Dec. 15, 2006; Adam Liptak and Terry Aguayo, After

Problem Execution, Governor Bush Suspends the Death Penalty in Florida, N.Y. Times, Dec. 16, 2006; Ellen Kreitzberg and David Richter, But Can it be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions, 47 Santa Clara L. Rev.445, 445-46 (2007).

Christopher Newton (May 24, 2007, Ohio): Executioners stuck Mr. Newton at least ten times before getting the shunts in place and injecting the needles. It then took over two hours for Mr. Newton to die. Officials blamed the delay on Newton's weight – 265 pounds. See Radelet; Ohio Lethal Injection Takes 2 Hours, 10 Tries, Associated Press, May 24, 2007.

John Hightower (June 26, 2007, Georgia): It took prison officials almost an hour to complete Mr. Hightower's execution, forty minutes of which they spent trying to locate an usable vein. See Radelet; Lateef Mungin, Triple Murderer Executed After 40-Minute Search for Vein, Atlanta J.-Constitution, June 27, 2007.

Curtis Osborne (June 4, 2008, Georgia): Executioners took thirty five minutes to find a suitable vein. After they administered the drugs, it took an additional fourteen minutes before the in-chamber doctors pronounced Mr. Osborne's death. See Radelet; Rhonda Cook, Executioners had Trouble Putting Murderer to Death: For 35 Minutes, They Couldn't Find Good Vein for Lethal Injection, Atlanta J.-Constitution, June 27, 2007.

Rommell Broom (Sept. 15, 2009, Ohio): After two hours, executioners terminated their efforts to find a suitable vein in Mr. Broom's arms and legs despite his attempts to assist them in finding a good vein. "Broom said he was stuck with needles at least [eighteen] times, the pain so intense he cried and screamed out." Upon ordering the execution to stop, Governor Ted Strickland announced that he would seek physicians' advice on "how the man could be killed more efficiently." Executioners blamed Mr. Broom's extensive use of intravenous drugs for their difficulties. Mr. Broom is currently litigating whether a second execution attempt would constitute cruel and unusual punishment. See Radelet; Andrew Welsh-Huggins, Judge: Ohio Inmate's Execution Appeal Has Limits, Associated Press, Dec. 9, 2009.

443. Nevada's execution protocol is similar to the lethal injection protocol employed in California prior to the litigation in Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. February 14, 2006), aff'd, 438 F.3d 926 (9th Cir. 2006), cert. denied, 546 U.S. 1163 (2006); See Ex. 5 ¶ 7. The use of sodium thiopental, pancuronium bromide, and potassium chloride without the protections imposed in Morales to ensure adequate administration of anesthesia poses an unreasonable risk of inflicting unnecessary suffering.