IN THE SUPREME COURT OF THE STATE OF NEVADA

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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 19 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

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EXHIBIT

EXHIBITS

EXHIBITS

EXHIBITS

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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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An employee of the Federal
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Motion for Production of Criminal Histories of Witnesses

Motion for Order to Exchange Expert Witness List

Motion to Compel State to Designate Trial Witnesses

Motion to Exclude Inadmissible and Prejudicial Evidence at Penalty Phase

Motion for Production of All Aggravating Factors and Character Evidence the State Intends to Produce at the Penalty Phase

Motion for Reasonable Time between Guilt and Penalty Phases of Trial

Motion for Hearing to Determine Competence of Witnesses Under the Age of 14 Years

Motion to Exclude Testimony of Undisclosed Informants

There were approximately eight (8) other Motions that were withdrawn or not filed.

- OTHER RESULTS OF INVESTIGATIONS

and

- WITNESSES CONTACTED - NOT CALLED

The continuing Investigation in this case resulted in the finding of less than helpful facts and circumstances.

Particularly we were surprised that the State was not aware of some of this information and we had to make some tactical decisions regarding the testimony/evidence that we would avoid.

Further investigation revealed:

1. He had a child with a former girlfriend, Leanne Morris, of Chandler, Arizona. He has never paid child support and refused her request to consent to a termination of his parental rights to allow her husband to adopt the child.

2. He fathered a child with his cousin while on a mission for the LDS Church.

3. He has a history of drug use, thievery, sporadic employment, aggressive acts toward women (physical), practiced throwing a hatchet when he lived in California.

4. The Defendant had a fixation on "superheroes". He would wear tights and speak with young children about Robin Hood, etc. At first blush this should give one cause for concern. Once the true character of the Defendant is understood, one realizes that this is a young man that craves attention and will do anything to accomplish that end, hence: the wig, the dreadlocks, the beanie, the hatchet, the statements "I want to kill a cop", etc. He was constantly surrounding himself with youngsters that he could impress...most adults thought he was a braggart.

5. The defendant was alleged to have been involved as a bodyguard as well as having a stable of prostitutes in Los Angeles. He was involved in many petty thefts. He was involved in planning robberies. He wanted to be a gang member.

6. Apparently the statements that the Defendant made to Vainga Kinikini were fairly accurate. These are confirmed by his brother, David...never asked by the State.

7. It became obvious after initial investigation that the defense could not afford to call Michael Finau (cousin), Robert Kurts and Gary Gardner (friends/roommates) as defense witnesses. We would have to proceed with family members for the penalty phase, as best we could.

- OBSERVATIONS OF THE DEFENDANT

The Defendant is a very strange person. He craves attention at all costs. He has a desire to be noticed. His wearing of bizarre clothing (tights, tu tus, capes) are really nothing more than an attempt to draw attention to himself.

This is one of the reasons that he was hanging around young "gangbangers" in Los Angeles and high schoolers here in Reno (he was accompanied by three (3) young girls when the hatchet was purchased). He could more easily influence these young minds.

My initial reaction was that this Defendant had a screw loose and the defense would shift in that direction.

I had him examined early on and found that he was competent, could assist counsel, was very aggressive, was very mean spirited and reasonably intelligent.

The Defendant was housed at the Nevada State Prison for about six (6) weeks from July 15th through September 1st. I received reports that the Defendant:

Was wearing a hand-made mask
Was drawing Tattoos on himself
Was talking in tongue (gibberish)
Was acting bizarre
Was refusing to wear clothes, etc. etc., etc.
Was shot in a feeble escape attempt

I went to the prison to visit with the Defendant.

After much evaluation and my discussions with the Defendant, it was ascertained that he was "just playing with their minds" and would continue to do so.

The Court received the same information and Ordered the Defendant examined by two (2) doctors. He was determined to be sane, normal with above-average intelligence.

The Defendant began to realize about November that the State of Nevada was serious. They would NOT exile him to Tonga...they would try to execute him. He developed mood swings. He continued to do things to gain attention. He acknowledged that he acts bizarre because all superheroes act bizarre...I told him that he could not "snow" me with that hyperbole...he acknowledged he was doing it to harass the jailers and get attention.

The demeanor of the Defendant has remained fairly constant. It was only when he first realized the State wanted to execute him that he became interested in his defense.

The Defendant, in response to my Motion to exclude cameras and media from the courtroom, became as animated as I have seen. He WANTS the attention...at any cost.

He has been trying to "sell" his story to Hollywood. (He worked in Hollywood...did one beer commercial and mostly worked back stage).

The Defendant was advised early on that he would surely be convicted on Murder (1) and that there was the very strong possibility that he would be executed. From the outset, I so advised the Defendant. He was not given any false hope.

When the local Tongan community, and his relatives, decided there was some truth to these allegations and they withdrew support for the Defendant, he began to voice the fact that he would be found not guilty and "beat the rap".

When I explained that IF he were ever to "beat the rap" on the murder, he still was facing one hundred ten (110) years for the Robbery charges (3) and Possession of Stolen Property. He was astounded.

He was advised, on more than one occasion that he would spend the rest of his natural life in prison. He would never be a free man again. He would either die in prison in many years or he would die by lethal injection when the State says it's time. There is NO doubt this was fully understood by the Defendant.

The Defendant, having been uncomfortable with his present situation, began attempting to sabotage his defense team. He would refuse to sign documents (waivers, consent for documents, etc.), he would ask the same question over and over again (he wanted the answer to be as he wished), he would become difficult to deal with.

I am comfortable with the decisions in this case. The Defendant is legally sane and competent. He is attention starved.

The Defendant has NEVER shown any remorse. He only feels bad that HE is jail.

- THE DEFENSE - THE DEFENDANT'S INVOLVEMENT

The Defendant, despite the best efforts of the defense team, insisted on the use of the SODDI defense.

It was the considered opinion of the undersigned that (1) the Defendant was going to be convicted, and (2) our only goal was to try to save his life. It was my belief that a provocation defense was the only viable explanation that would have ANY chance of avoiding the Death Penalty...although that was a long-shot. The Defendant was advised repeatedly by everyone on the Murder Team that his choice of options was severely limited by the facts of the case and his choice of defenses was not in his best interests.

The Defendant began a campaign of attempting to find old Tongans, in ill health and /or failing health, who would want to accept responsibility for this murder and allow him to go free...needless to say there were no takers.

After attempting to persuade the Defendant that the SODDI defense was not workable in this case, we bowed to his wishes, after having advised him of the foolishness of his choice.

The defense in this case would be that "some other dude did it"...S.O.D.D.I...

This was the Defendant's choice that was not shared by any members of the defense team.

Subsequent to the mistrial, the Defendant realized the problems associated with his choice of defenses and reluctantly agreed to pursue the provocation defense at re-trial.

The defendant subsequently changed his mind and refused to cooperate with counsel.

- SHOULD THE DEFENDANT TESTIFY?

This was a decision made by the Defendant...that he would testify. His options were explained to him. I told him I thought he would be a bad witness. He had a tendency to answer everything with "and so on and so forth". I thought this very dangerous.

The Defendant indicated he had the right to testify and he would.

I am convinced that the thought of having a captured audience excited him. He wanted to exploit his unfulfilled need for attention.

He was also convinced that with his acting background, he would be able to tell the jury anything and they would believe it and find him not guilty. Despite my admonitions to the contrary, he believed he could "talk the jury to acquittal".

In light of the impossible defense the Defendant wished to proffer, his testimony was needed to fill in the many gaps in testimony elicited from the State's witnesses.

The entire situation changed when the Defendant indicated he would commit perjury.

It became obvious that a conflict of interest was created when the Defendant advised that he did, in fact, kill Sergeant Sullivan and he was going to testify and commit perjury when he was on the witness stand.

He was advised that his creation of a conflict of interest for us prevented us from representing him at trial. He moved the Court to represent himself.

The Court did an extensive *Faretta* canvass and despite the Defendant's demand to represent himself, his willingness to forego any delay in the commencement of trial and his answering all of the Court's inquiries properly, the Court denied his Motion.

We received an advisory opinion from the State Bar that the conflict required us to withdraw as counsel. The Court refused denied the Motion. On appeal, through Writ of Certiorari, the Nevada Supreme Court refused to intervene and the trial proceeded on September 20, 1999.

The defense was in a tenuous situation. As officers of the Court we had our ethical obligation and in representing the defendant our loyalty to the client.

We were required to proceed to trial with little help that we could provide to the Defendant. We had to exercise caution in cross-examining witnesses. We elected to take our only shot at trying to save the defendant's life at the penalty phase...guilt was not going to be a contested issue.

The Defendant was convicted and sentenced to death.

- ISSUES FOR APPEAL, REVIEW

The first place I would concentrate would be with the Motions filed in the case.

Motions for Individual Voir Dire/Jury Questionnaire:

Motion for Background Information on Prospective Jurors:

The State, as a matter of course, "runs" each potential jurors' criminal background. The defense does not have access to this information. The Court's denial of this Motion is error.

Motion to Disqualify Certain Jurors:

The defense moved to disqualify police and UNR students from the panel. This could readily necessitate the use of peremptory challenge. The Court's denial of this Motion is error.

Motion in Limine Re: Gruesome Photographs:

The Court erroneously denied this Motion AND allowed the State to take 8 x 10 photographs and enlarge them to four (4) feet by five (5) feet in front of the jury. This was clearly error.

Motion to Exclude Television and Media Coverage In the Courtroom:

With the extensive media coverage of this case and the Defendant, the Court erred in denying this Motion.

Counsel believes the following issues must be reviewed for possible inclusion in the Defendant's appeal:

From Vanisi I

All potential Jurors and all seated Jurors expressed an opinion as to the Defendant's guilt

All potential Jurors and all seated Jurors indicated they would have NO difficulty in imposing the death penalty

Juror number 4 (Adamson) indicated the defense would have to prove the Defendant was innocent

Juror number 35 (Burke) had a pre-conceived opinion of guilt AND knowledge of the case beyond what was in the media

Juror number 13 (Gerbatz) has a pre-conceived opinion as to guilt AND would believe a police officer over ANYONE else

The challenges for cause were denied. The Motion for Additional Peremptory Challenges was denied which prevented the seating of a jury other than one death prone.

The photographs the State intended to introduce were overly gruesome...they should not have been permitted. The Court indicated that the enlargement of the photographs to 4' x 4' was less gruesome that viewing the 8" x 10" photos.

These are the submitted issues, PRIOR to the declaration of the Mistrial.

Subsequent issues include:

The Defendant made a Motion, per *Feretta*, to represent himself. The Court conducted an extensive inquiry and it is submitted the Court erroneously denied the Motion to allow the defendant to represent himself.

The Defendant then advised that he would proffer perjured testimony through "his" (unidentified) selected witnesses and through his own testimony. We subsequently, upon the advice of Bar Counsel, attempted to withdraw from the representation of the Defendant.

The trial court denied our Motion to Withdraw.

We filed a Writ with the Nevada Supreme Court. The Court indicated they would not intervene and we continued to represent the Defendant.

The representation of the Defendant, under these circumstances, was precarious. We could not proffer testimony, evidence or even lead questioning in the direction of the defense demanded by the defendant. We were instructed by the Defendant he did NOT want us to pursue our defense.

The trial left little room for meaningful cross-examination and presentation of ANY viable defense.

- DIFFICULTY IN DEFENDING THE CASE

and

- COMMENTS

This was an extremely difficult case to defend for many reasons.

Unfortunately, the Defendant never expressed any remorse and until 60-90 days prior to trial did not express concern for his situation (the State wanted to kill him).

The difficulty in representing the Defendant in this case is highlighted by:

The Defendant was accused of killing a police officer;

Generally, a "cop killer" is given the death penalty;

The victim was a well-liked, 23 year veteran of the University Police Force;

The Defendant expressed no remorse for the officer or his family;

The Defendant had told at least fifteen (15) people that he wanted to kill a cop...up to and including the date of the murder of Sgt. Sullivan;

After the fact, the Defendant admitted to a number of people that he DID murder the officer;

The Defendant purchased a hatchet at the Wal-Mart store in the presence of three (3) young, high school girls;

The Defendant was seen with a bent hatchet AFTER the murder of the victim;

The Defendant told the young ladies that he wanted to kill a cop...going so far as to say "stop the car, I'll kill that cop" {sidewalk};

The Defendant left the jurisdiction within hours after the death of the victim...the flight instruction was not beneficial to the defense;

The Defendant had the victim's gun in his possession when he was arrested in Salt Lake City;

The Defendant was positively identified as the robber of the 7/11 and Jackson Markets in Reno and Sparks;

The blood of the victim was found on property found at the Rock Blvd. address, allegedly put there by the Defendant;

The Defendant insisted on pursuing an untenable defense, against the advice of counsel;

The Defendant was in possession of the stolen motor vehicle in Salt Lake City;

The Defendant had difficulty comprehending the concept of "circumstantial evidence." He erroneously believed, for some time, that if the State did not have a confession, there would be no conviction;

The Defendant, having heard his mental evaluations as "above average intelligence" provided him with the misconception that he was more intelligent than his counsel; This proved a false assumption. His decisions were skewed. His desire for notoriety exceeded his desire to be found not guilty;

The Defendant was never able to see the danger in having 10-15 people testify that he said "I want to kill a cop". He assumed if he testified that he was just kidding, the jury would believe him. He never did understand the irony of that statement AND the fact that he said it with an axe in his hand AND hours later, a cop is killed...with an axe;

The Defendant was convinced that with his acting ability, ability to speak with people and genuine personality the jury would have no alternative but to acquit him;

The Defendant relied heavily on support from the local Tongan community...they have totally distanced themselves from the Defendant. They refused to cooperate with the defense investigation;

The intent of the Defendant to attempt to throw suspicion on "other Tongans" was without basis and fraught with danger;

The Defendant did little to further his cause. This was a very inept murder. The Defendant insisted in proffering the most implausible defense, against the advice of counsel;

The Defendant was initially of the opinion that he would plead guilty...that he would take his chances before a three-judge panel. It took the undersigned more than three (3) months to convince the Defendant that he should NOT go before a three-judge panel.

The Defendant would alternate between wanting to die and wanting to be acquitted. This symptom was directly keyed to the status of his relationship with his wife.

The Defendant's attempt to "sell his story to Hollywood" was a lesson. The Defendant did not command the respect of his "Hollywood" peers as he had initially thought.

MISTRIAL DECLARED ON THE FIFTH DAY OF TRIAL, JANUARY 15, 1999

TRIAL WAS RE-SCHEDULED FOR SEPTEMBER 7, 1999, THEN RE-SCHEDULED TO SEPTEMBER 20, 1999 TO ALLOW THE DEFENSE TO FILE A WRIT IN THE NEVADA SUPREME COURT.

THE PRECEDING DOCUMENTS SHALL BE A PART OF THIS MEMORANDUM, TO COMPLETE THE RECORD.

SUBSEQUENT TO THE MIS-TRIAL AND PRIOR TO THE RE-TRIAL, THE DEFENDANT DID EVERYTHING HE COULD POSSIBLY

DO TO INSURE THAT HIS COUNSEL WOULD BE PREVENTED FROM PRESENTING ANY DEFENSE.

MINIMALLY, THE DEFENDANT AGREED TO DISPENSE WITH THE UNTENABLE S.O.D.D.I. DEFENSE IN FAVOR OF THE MORE PROBABLE PROVOCATION DEFENSE.

UNFORTUNATELY, THE DEFENDANT BEGAN TO INVOLVE HIMSELF IN UNACCEPTABLE BEHAVIOR WHILE IN THE COUNTY JAIL... REQUIRNG NUMEROUS CELL EXTRICATIONS THAT WOULD INFLAME AND PROVOKE ANY JURY.

UPON HIS SUBSEQUENT TRANSFER TO THE N.S.P. HE CONTINUED TO WEAR MASKS, WEAR TOOTHPASTE ON HIS FACE, DISTURB AND PROVOKE OTHER INMATES AND GUARDS AND HE ATTEMPTED A FEEBLE

ESCAPE REQUIRNG THE GUARDS TO SHOOT HIM WITH RUBBER BULLETS.

HE EFFECTIVELY CURTAILED ANY REMOTE POSSIBILITY COUNSEL MAY HAVE HAD TO SAVE HIS LIFE.

THE FINAL OUTCOME OF THIS CASE CAME AS NO SURPRISE.

THE DEFENDANT WAS ADVISED THE ONLY WAY WE COULD SAVE HIS LIFE (AND THIS WAS A REMOTE POSSIBILITY) WAS IF HE CONDUCTED HIMSELF IN ARATIONAL AND ORDERELY MANNER WHILE INCARCERATED...HE HAD TO BE A MODEL PRISONER.

THE DEFENDANT, PRIOR TO RE-TRIAL, DID EVERY CONCEIVABLE THING TO UNDERMINE OUR EFFORTS WITH HIS

COMBATIVE AND BIZARRE BEHAVIOR.

THE DEFENDANT BECAME AN IMMEDIATE

DISCIPLINE PROBLEM AT THE JAIL.

THE DEFENDANT CONSTANTLY

ANTAGONIZED OTHER INMATES.

THE DEFENDANT REFUSED TO ALLOW

OTHER INMATES TO SLEEP.

THE DEFENDANT REFUSED TO ABIDE

WITH THE MOST SIMPLE REQUESTS

OF THE JAIL PERSONNEL.

THE DEFENDANT'S BEHAVIOR

NECESSITATED HIS ULTIMATE TRANSFER

TO THE NEVADA STATE PRISON.

THE DEFENDANT INSISTED ON BEING

NAKED ALL THE TIME.

THE DEFENDANT INSISTED ON WEARING

HIS UNDERWEAR ON HIS HEAD.

THE DEFENDANT PUT TOOTHPASTE
ON HIS FACE (THE GUARDS INTERPRETED
THIS AS "WAR PAINT").
THE DEFENDANT'S BEHAVIOR REQUIRED
A NUMBER OF CELL EXTRICATIONS.
THE DEFENDANT ATTEMPTED TO DIG
UNDER A SECURITY FENCE WHEN
INCARCERATED AT THE NEVADA STATE
PRISON.
TH DEFENDANT'S INSISTENT ON TALKING
GIBBERISH AND HIS OTHER BIZARE
BEHAVIOR NECESSITATED FURTHER
MENTAL EVALUATIONS,
THE DEFENDANT'S MENTAL CONDITION
AND HIS ELECTION TO ACT IN SUCH A
BIZARRE FASHION MADE HIM UNABLE
TO ASSIST COUNSEL IN HIS OWN DEFENSE.

TIME RECORDS

SVANIS6-TQualls01824

State of Nevada vs. Siaosi Vanisi

SCR 250 Time Record

Michael R. Specchio
Bar Number 1017

1998

JANUARY, 1998:

1/19/98	Review newspapers; memoranda re: Killing of UNR Policeman	2.0
1/20/98	Assigned case to myself and Wally Fey	1.0
	Discussed, informally, case with Wally Fey and had him contact Salt Lake City P.D. to have client remain silent until discusses case with our office	2.0
1/21/98	Telephone conversation with Dick Gammick	.3
	Discussion with Wally Fey	.2
	Memorandum re: case	
	Preliminary Hearing to be set 2/17-2/18	
	Arrangements to view Sullivan's car – Crime Lab	3.0
1/22/98	Crime Lab – viewed victim's patrol car...notes	2.5
1/23/98	Review tape regarding vehicle	1.0
1/26/98	RJC – Arraignment /notes	1.5
1/26/98	WCJ – 1st interview with client; Memo; tape television interviews	5.5
1/27/98	Review notes; taped interview	
	Prepare Trial Books	5.0
1/27/98	Conversation/interview with Defendant's wife; Memo	2.0
1/28/98	Telephone – wife	.5
1/28/98	WCJ – client interview and memo	3.0
1/29/98	Memo: re: police reports; autopsy; interview; view of photos; defense team;	3.0
1/29/98	Jenkins P.C. Affidvait reviewed – Memo re: State's witnesses	2.5
1/29/98	Telephone with Jenkins re: blood draw	
	Telephone – client re: blood draw	.5
1/29/98	Telephone with Rusk State's Investigator on case	.5

(36.0)

FEBRUARY, 1998:

2/5/98	Discussed Vanisi with members of the Tongan community – memo	1.5
2/6/98	Discovery	3.5
2/7-8/98	Discovery- review and catalog	12.0
2/9/98	Viewed photographs memos	2.5
2/10/98	Prepare materials for Vanisi	2.0
2/11/98	Interview client at WCJ – Fey; documents, memo	2.5
2/12/98	New Discovery – memo	2.5
2/12/98	Ford and documents to WCJ	1.0
2/13/98	Discovery	1.0
2/14-15/98	Review, note and catalog new Discovery	9.5
2/18/98	Reviewed all t.v. news tapes – Reno and Utah	1.5
2/18/98	Letter to client's wife	1.5
2/19/98	Review and prepare witness re-cap	3.5
2/19/98	Discovery- review and catalog (PM)	3.0
2/20/98	Preliminary Hearing	10.0
2/24/98	WCJ- interview, other, memo	2.5
2/25/98	Notice of Intent (D.P.) to client	.5
2/26/98	New Discovery – Review / Memo	3.0
2/27/98	Discover – needs – list	3.5

(67.0)

(103.0)

MARCH, 1998:

3/2/98	WCJ – D.P. Notification	1.5
3/2/98	Note – Wally – Motions	.5
3/2/98	Ok'd release of Officer's badge/name tag	.5
3/2/98	Memo; letter – wife;	1.5
3/3/98	(T) – Wife re: mothers; Letter	1.5
3/3/98	Reviewed P/H photographs	1.0
3/4/98	Compiled background profile on client	5.0
3/5/98	(T) – David Goodman; Letters/ memo	3.0
3/5/98	(T) client	.5
3/6/98	(R) P/H transcript	1.5
3/6/98	Letters; Pascetta (Fed. P.D.; Center for Capital Assist. S.F.; review material, affidavits	3.0
3/8-9/98	Review, prepare Motions list	10.0
3/10/98	ARRAIGNMENT D-4; Memo	2.0
3/10/98	Prepare State's witness list	3.0
3/11/98	Motions	3.0
3/11/98	Preparation	2.5
3/12/98	Prepare MOTIONS books	1.5
3/13/98	Interview – WCJ; memo	3.0
3/13/98	Review and preparation	2.5
3/19/98	CONTINUED ARRAIGNMENT; memos; meeting w/team re: motions	5.5
3/20/98	MOTIONS (P)	6.0
3/21-22/98	MOTIONS (P)	15.0
3/23/98	MOTIONS (P)	3.0

3/22-23/98	JAIL INCIDENT – BLACK EYE MESSAGE –WIFE	1.0
3/24/98	MOTIONS (P)	4.5
3/25/98	MOTIONS (P)	4.5
3/26/98	MOTIONS (P)	4.0
3/27/98	MOTIONS (P)	3.0
3/30/98	Photos – jail incident	2.5
3/31/98	Tom – Tongan activist	1.0

(98)

(201)

APRIL, 1998:

4/2/98	WCJ	1.5
4/3/98	(T) wife	.5
4/8/98	Discovery	6.0
4/9/98	Motions/ polygraph/ misc.	8.0
4/10/98	WCJ (draft Motions to client {50})/ Motions	6.0
4/11/98	Review	4.5
4/13/98	Center for Capital Assistance (2x)	2.0
4/13/98	Jail re: prison transfer	2.5
4/14/98	Telephones, Letters, other (Doctors)	5.5
4/15/98	Motions (O); (P)	6.0
4/16/98	Doctors, correspondence, etc.	4.5
4/16/98	(T) David Goodman; correspondence, memo	2.0
4/16/98	Meeting – Investigator	1.0
4/17/98	Leeanne Morris – Telephone, memo, etc.	3.0
4/17/98	WCJ – client	2.0

4/20/98	Investigations; defense witnesses; (L) client	5.5
4/21/98	WCJ – Leanne Morris papers; (L)	3.0
4/22/98	Tongan Culture – Internet – Center for Capital Assistance (CCA)	6.0
4/23/98	(")	6.0
4/24/98	(")	7.0
4/25/98	Helen Morton's Book from CCA	5.0
4/26/98	(")	6.0
4/27/98	Dr. Widman replacement – (t), (l's) etc.	2.0
4/27/98	Dr. Lynn (T's, O); Memo	2.5
4/29/98	Internet – Chat lines	4.0
4/30/98	(Book)	2.0

(104)

(305)

MAY, 1998:

5/1/98	Review Motions	4.0
5/1/98	Team meeting	1.0
5/7/98	(T) – David Goodman	.5
5/11/98	Murder Team up-date	1.0
5/12/98	Dr. Lynn (T); Memo	1.5
5/13/98	Pre-Trial Motions – Petty/Laura	1.0
5/14/98	WCJ	2.0
5/14/98	(T) – Client	.5
5/15/98	Murder Team Meeting	2.0
5/15/98	Possible Witnesses: (T's): Giorgio; Terry Williams; Greg Garner	1.5
5/18/98	Books for client; Crystal	1.0
5/20/98	Investigation – Pismo Beach	8.0

	Travel	5.0
5/21/98	Investigation – Simi Valley (Redondo, Manhattan Beaches)	8.0
5/21/98	Travel	5.0
5/22/98	Investigation and Notes	8.0
	Travel	5.0
5/29/98	Team meeting	1.0
	(160)	
	(361)	
6/1/98	Investigation Memos	5.5
6/1/98	© J.P. re: Motions	1.5
6/2/98	(L) wife re: mother(s) addresses	1.0
6/3/98	(O) Memo re: finalizing investigation	1.5
6/4/98	WCJ	2.0
6/8/98	Discovery: Cell extrication – ordered tape from T. Rusk Albertson's threat – BMA	2.0
6/9/98	Reviewed tape of Cell Extrication, (O)	1.0
6/9/98	Memo – Investigation – Losa and Renee	1.0
6/10/98	D.P. LETTER	2.5
6/11/98	WCJ; MEMO	2.5
6/12/98	TEAM MEETING	1.0
6/15/98	LETTER – WIFE	1.0
6/18/98	WCJ –	1.5
6/19/98	© Investigator	.5
6/19/98	MEMO – TRIAL – INVESTIGATION	2.5
6/22/98	"AMOK"	1.5
6/22/98	CONSULATE	.5
6/23/98	MARGARET KAVAPALU (R) STATEMENT	1.5
6/26/98	RESPONSES TO MOTIONS (8)	3.5

6/26/98	TEAM MEETING		1.0
6/29/98	RESPONSE TO CLIENT (L)		1.0
		(37)	
		(398)	
7/1/98	(L) CLIENT RE: WITNESSES		1.0
7/1/98	(T) – CLIENT		.5
7/2/98	(L) WIFE 3X FOR FAMILY ADDRESSES		1.0
7/1/98	RESPONSES TO MOTIONS (3)		1.0
7/2/98	(L) D.A RE: SULLIVAN RECORDS		1.0
7/2/98	RESPONSES TO MOTIONS (3)		1.0
7/2/98	(T) – CLIENT		.5
7/6/98	(T) CHILDS – "NUT HOUSE"		1.0
7/7/98	(T'S) CAPT. DON MEANS –SUICIDE ATTEMPT? - TRANSFER TO NSP?		1.0
7/7/98	TERRY RUSK FOR 2ND EXTRICATION TAPE		1.0
7/8/98	(C) - INVESTIGATOR		1.0
7/8/98	RESPONSES TO MOTIONS (3)		1.0
7/9/98	(M) – DENIAL OF SULLIVAN'S PERSONNEL FILE; MEMO TO JRP		1.0
7/9/98	(T) DAVID GOODMAN		1.0
7/10/98	RESPONSES TO MOTIONS (3)		1.0
7/10/98	TEAM MEETING		1.0
7/13/98	DNA – STATISTICAL REPORTS		1.5
7/13/98	MOTIONS		1.0
7/14/98	MOTIONS		1.0
7/15/98	MOTIONS		1.0
7/15/98	CAPTAIN MEANS – TRANSFER TO PRISON		.5
7/16/98	MOTIONS		2.0
7/16/98	RESPONSES TO MOTIONS (2)		1.0

7/17/98	(P)...MOTIONS, WITNESSES; DEFENSES; DISCOVERY; (T) WIFE	8.0
7/20/98	MOTIONS	2.0
7/21/98	WCJ	1.5
7/21/98	LETTER TO D.A. RE: DISCOVERY	2.0
7/22/98	STATUS HEARING (A, P) (CONT'D. BY CT.)	2.0
7/22/98	CRYSTAL – DISCOVERY – FORENSIC	1.5
7/22/98	REVIEW ALL FORENSIC REPORTS	3.5
7/22/98	RESPONSES TO MOTIONS (3)	1.0
7/24/98	INVESTIGATION RE: MEETING WITH SPOUSE/SISTER	2.5
7/24/98	TEAM MEETING	1.0
7/27/98	TRANSFER TO PRISON WIFE –NO SHOW- 7/23 PREPARATION	6.0
7/28/98	RESPONSES TO MOTIONS (2)	2.0
7/29/98	REVIEW AND PREPARATION	3.5
7/31/98	MEMO	1.0
7/31/98	(T) DA STANTON -CLIENT-PRISON-	.5
7/31/98	MEMO RE: CLIENT'S MENTAL STATUS – NSP.	1.0

(62.5)

(456.5)

8/1/98	INVESTIGATION MEMO	1.5
8/3/98	PREPARATION	1.0
8/4/98	PRPEARATION – HEARING	2.0
8/4/98	STATUS HEARING	1.5
8/4/98	COURT'S FIRST MOTION'S ORDER	1.5
8/5/98	HEARING MEMORANDUM	2.5

8/6/98	REVIEW	2.0
8/7/98	TEAM MEETING	1.0
8/11/98	N.S.P. – INTERVIEW CLIENT	3.5
8/11/98	MEMO	1.0
8/12/98	REVIEW AND PREPARATION	2.0
8/12/98	REVIEW TRANSCRIPT – NOTES/MEMO	2.0
8/12/98	JURY BOOK - INDEX	2.0
8/13/98	MEETING WITH DA – DISCOVERY	2.0
8/13/98	PREPARATION - MEMOS, BOOKS, WITNESSES	3.5
8/14/98	MEMORANDUM	1.5
8/14/98	MEMORANDUM – UPDATE	2.5
8/14/98	INVESTIGATION MEETING	2.5
8/16/98	JURY QUESTIONAIRRE	6.0
8/17/98	JURY QUESTIONAIRRE	5.0
8/18/98	LETTER - D.A. - LAB PERSONNEL - DISCOVERY	1.0
8/20/98	RESPONSE MOTIONS (1)	1.0
8/21/98	TEAM MEETING	1.0
8/21/98	INVESTIGATION - WITNESSES	1.0
8/24/98	MOTIONS/GRANTED/DENIED/SUBMISSION	2.0
8/24/98	(T) DAVID GOODMAN	.5
8/26/98	FORENSIC REPORT - BLOOD SPLATTER	1.0
8/31/98	INVESTIGATION MEETING - MEMO	2.5
8/31/98	DISCOVERY	1.0
	(57.5)	
	(514.0)	

9/1/98	DISCOVERY	1.0

9/2/98	DISCOVERY - SALT LAKE CITY	3.0
9/3/98	PREPARATION	1.0
9/3/98	DISCOVERY - DNA	1.0
9/4/98	STATUS HEARING	1.0
9/4/98	MEMO	1.0
9/4/98	INTERVIEW WITNESSES LOSA, CORRINA - MEMO (NO SHOW 3X- WAITED 2 HOURS)	1.5
9/4/98	WCJ (DEFENDANT RETURNED)	3.0
9/8/98	MEMO...MOTIONS...NEWSPAPER...LETTER	5.5
9/9/98	MEMO, REVIEW, MOTIONS	5.0
9/10/98	DISCOVERY PRINT COMPARISONS	1.0
9/10/98	VANISI (L) PENALTIES - OTHER CAHRGES	1.5
9/10/98	(L) DA. PRISON EVALUATIONS	1.5
9/11/98	DRAFT - MEDICAL RELEASE - NOTE -EXECUTE	1.5
9/11/98	WCJ - MEMO	3.5
9/12/98	MEMO - INVESTIGATOR FOR L.A.	2.5
9/12/98	LAB REPORTS - REVIEW - (L) CLIENT	2.5
9/14/98	MOTIONS - REVIEW - FOR SUBMISSION	4.5
9/14/98	MOTIONS FOR SUBMISSION - PETTY - MEMO	1.0
9/14/98	CONTACT DA - NO RESPONSE TO MOTION # 46	.5
9/15/98	INVESTIGATION UP-DATE REQUEST	.5
9/15/98	WCJ - MEMO	3.0
9/15/98	DISCOVERY - (R)	.5
9/16/98	REQUEST FOR SUBMISSION OF PRE-TRIAL MOTIONS	2.5
9/16/98	PRELIM. TRANSCRIPT BREAKDOWN	2.5
9/16/98	MEMO - INVESTIGATIONS	.5
9/17/98	MURDER TEAM MEETING MEMO	1.5
9/17/98	MODIFIED INDEX	4.5
9/17/98	DNA - REPORT	.5

9/21/98	REVIEW PRISON MEDICAL RECORDS	1.0
9/22/98	D.A. LETTER RE: STIPULATION (UTAH COPS) & TRIAL WITNESSES	.5
9/23/98	DISCOVERY - DNA REPORT	.5
9/23/98	WCJ - CLIENT	2.0
9/24/98	BRIEFING - STEVE GREGORY, PRPEPARATION	4.0
9/25/98	WCJ - MEMO	2.5
9/26/98	REVIEW FILES	6.0
9/28/98	HEARING - MENTAL STATUS - MEMO	3.5
9/28/98	MEMO TO STEVE GREGORY RE: WITNESSES	1.5
9/29/98	WCJ - MEMO	3.0
9/30/98	REVIEW, MEMO, INVESTIGATION, PREPARATION	8.0
9/30/98	MEETING WITH EVO AND CRYSTAL	1.0
	(93)	
	(607)	
10/1/98	WCJ - MEMO	3.0
10/1/98	CONFIDENTIAL LETTER TO CLIENT	2.0
10/1/98	SET UP INVESTIGATION MEETING	.5
10/5/98	SET UP WCJ INTERVIEW	.5
10/5/98	TRIAL ASSIGNMENTS	1.5
10/5//98	E-MAIL, MEMOS TRIAL TEAM	1.5
10/6/98	MEETING - INVESTIGATION	1.5
10/6/98	C- - JEREMY BOSLER	.5
10/7/98	WCJ- WITH INVESTIGATORS	3.5
10/8/98	WCJ - MEMO	3.0
10/8/98	DEFENSE TEAM MEETING (ALL)	2.5
10/9/98	NOTICE OF ASSOCIATION OF COUNSEL	1.0
10/9/98	INVESTIGATION REPORT	.5

10/9/98	MEMOS - TO DEFENSE TEAM - ATTORNEYS	2.5
10/11/98	REVIEW INVESTIGATION REPORT (FINAU)	1.0
10/12/98	WCJ	2.5
10/13/98	MEMO - RE: TRIAL TEAM - INVESTIGATORS	1.0
10/14/98	(L) CLIENT - STATE'S WITNESSES	1.0
10/14/98	(L) CLIENT - SON OF SAM LAW	1.5
10/15/98	(L) CLIENT - UTAH - HAT	1.0
10/15/98	REVIEW INVESTIGATION REPORT (GARNER)	2.0
10/15/98	(T) - CLIENT - ARIZONA PATERNITY - MEMO - TEAM	1.5
10/16/98	(L) CLIENT - BLOOD/DNA/GLOVE	2.5
10/18/98	(T) COLLECT - HOME	1.0
10/19/98	(L) (T-C)	2.0
10/19/98	REPRODUCTION	4.0
10/20/98	(L) COPIES	2.0
10/20/98	REPRODUCTION	4.0
10/20/98	(T) CLIENT -	.5
10/21/98	(L) COPIES	1.0
10/21/98	REPRODUCTION	3.0
10/21/98	CORRESPONDENCE - DISTRICT ATTORNEY RE: UTAH WITNESSES STATE'S GUILT PHASE WITNESSES HATCHET	4.0
10/21/98	(L) COPIES	1.0
10/22/98	REPRODUCTION - NEWSPAPERS	2.0
10/22/98	REPRODUCTION; (L)	4.0
10/23/98	WCJ - MEMO	3.5
10/23/98	LETTERS TO CLIENT - RESEARCH AND OTHER	6.0
10/24/98	REVIEW FILES	5.5

(79.5)

(686.5)

11/4/98	REVIEW CORRESPONDENCE	1.5
11/4/98	(C) INVESTIGATOR	.5
11/4/98	REVIEW EVALUATIONS	1.5
11/5/98	REVIEW LETTER TO WIFE (COPIED)	1.0
11/5/98	PREPARATION - HEARING	1.0
11/5/98	REVIEW DNA CORRESPONDENCE OF DA	1.5
11/5/98	(T) CLIENT	.5
11/6/98	MEMO	1.0
11/6/98	MEDIA INTERVIEW	1.0
11/6/98	(A) HEARING RE: EVALUATIONS	1.0
11/9/98	SET TEAM MEETING	.5
11/9/98	TRIAL PREPARATION	5.5
11/10/98	(A) HEARING - SELF -REPRESENTATION	1.0
11/10/98	WCJ	2.5
11/10/98	MEMO	1.0
11/10/98	TRIAL PREPARATION	2.5
11/11/98	TRIAL PREPARATION	5.0
11/12/98	REVIEW, PREPARATION - MOTIONS	4.0
11/13/98	TRIAL PREPARATION	4.0
11/15/98	REVIEW WITNESS' STATEMENTS	5.0
11/16/98	WCJ	2.5
11/16/98	MEMO	1.0
11/17/98	REVIEW MATERIAL OF D.A. RE: DNA/RIOLO	2.0
11/17/98	COLLECT CALL - CLIENT	.5
11/19/98	PREPARATION - MOTIONS	3.0
11/19/98	SENT MOTION TO CLIENT; (r) INVESTIGATION REQ.	1.5

11/20/98	TEAM MEETING - MEMOS	2.5
11/20/98	MISC.:	
	CAR INVENTORY - STANTON	
	DAVID KINIKINI - "O.C." - VAINGA	
	REVIEW OTHER DISCOVERY MATERIAL	2.5
11/21/98	PRPEPARATION - MOTIONS	2.0
11/22/98	PREPARATION - MOTIONS	2.5
11/23/98	PREPARATION - MOTIONS	4.0
11/23/98	MEMO - KINKINI	1.0
11/23/98	MEMO - MITIGATORS	1.0
11/24/98	HEARING - MOTIONS	6.0
11/24/98	TRIAL PREPARATION	2.5
11/24/98	MEMO - RE: MOTIONS	1.0
11/25/98	TRIAL PREPARATION - MEMOS	6.0
11/25/98	MEMO - COWBOY HAT - HILL VEHICLE	1.0
11/29/98	COLLECT CALL - WCJ - HOME	1.0
11/30/98	JAIL CLASSIFICATION - RELEASING HAND DURING ATTORNEY VISIT	.5
11/30/98	WCJ - CLIENT	3.0
11/30/98	MEMO, (O)	1.5
	(88.0)	
	(774.5)	
12/1/98	WCJ - MEMO	3.0
12/1/98	REVIEW, RESEARCH AND (L) CLIENT: DAVID KINIKINI VAINGA KINIKINI SISTER, WIFE (T) - INVESTIGATOR NEWSPAPER ARTICLE - SALT LAKE CITY TOYOTA INVENTORY	2.5

12/1/98	REVIEW TRANSCRIPT - 11/6/98 HEARING	1.0
12/2/98	CORRESPONDENCE; OTHER	2.0
12/3/98	CORRESPONDENCE	1.0
12/4/98	OTHER	2.0
12/5/98	MISCE.LL.; LETTERS - WIFE TAPED STATEMENT INVESTIGATION MEMOS TRANSCRIPT OF 11/24 HEARING COURT ORDER - MOTIONS MEMO TO TEAM REVIEWING, COPYING, ETC.	8.0
12/7/98	WCJ	3.5
12/7/98	MEMO	1.5
12/7/98	MEETING - JUDGE - TRIAL/COURTROOM SECURITY (cancelled as to parties - Memo)	1.0
12/8/98	POST TRIAL MEMORANDUM	6.0
12/9/98	SET TEAM MEETING; (C); (O)	3.0
12/10/98	HEARING - MOTIONS -	2.5
12/10/98	COURT REPORTER - REAL TIME LETTERS - WIFE TRANSCRIPT OF TAPED EXAMINATION	4.0
12/11/98	MEMO RE: VANISI TESTIMONY	3.5
12/11/98	MEMO - FINAL PREPARATION	2.0
12/11/98	MURDER TEAM MEMO	1.0
12/12/98	REVIEW STATE'S WITNESS TESTIMONY PREPARE CROSS-EXAMINATION	6.5
12/12/98 - 12/23/98:	E- MAILS WITH D.A. GAMMICK	3.0
12/13/98	PREPARATION- PREPARE AND UP-DATE TRIAL BOOK REVIEW NEW DISCOVERY REVIEW NEW LAB REPORTS PREPARE PACKGE FOR VANISI TO REVIIEW JURY QUESTIONNAIRE	7.0
12/14/98	TEAM MEETING - MEMO	3.0

12/15/98	(L) - JUDEG RE; MOTIONS	.5
12/15/98	CORRESPONDENCE - VANACEY	2.0
12/15/98	(T) MAFFI	.5
12/15/98	(L'S) JUDGE - DA RE: JURY QUESTIONNAIRE	.5
12/16/98	WCJ - MEMO	3.0
12/16/98	DISCOVERY - TAPE OF SCENE; (O)	2.5
12/16/98	CRYSTAL (T) - SAN BRUNO	.5
12/18/98	(R)	4.0
12/21/98	WCJ AND (R)	4.0
12/23/98	TEAM MEETING; (P); (O)	4.0
12/24/98	PHOTOS	1.0
12/28/98	TRIAL PREPARATION	6.0
12/28/98	SLC - TAPE 1/14/98	1.0
12/28/98	JAIL "PICTURE" DA - INVESTIGATOR	.5
12/29/98	TRIAL PREPARATION	6.0
12/29/98	E-MAILS - GAMMICK - PHOTOS	1.0
12/29/98	MEMO - SUBPEONAS	1.0
12/30/98	COLLECT CALL - HOME	.5
12/30/98	TRIAL PREPARATION	6.0
12/30/98	CONFERENCE CALL - DA- COURT	.5
12/30/98	MEMO RE: EVIDENCE - JURORS	1.0
12/31/98	PREPARATION AND SUBPEONAS	3.5
12/31/98	MEETING WITH D.A	1.0
12/31/98	MISCELLANEOUS AND CLEAN-UP	3.0

(130.5)

(905)

1999

1/2/99	MEMO AND REVIEW, INSTRUCTIONS	3.5
1/3/99	PREPARATION OF TRIAL BOOK #4	5.0
1/4/99	WCJ; PREPARATION; JURY;	5.0
1/4/99	JURY ADMONISHMENT	2.0
1/5/99	PREPARATION; REVIEW	5.0
1/5/99	JURY QUESTIONNAIRES; LETTERS; OTHER	2.5
1/6/99	PREPARATION	5.0
1/6/99	CONFERENCE - TEAM; LETTERS	2.5
1/7/99	TRIAL PREPARATION	5.0
1/7/99	HEARING(s) RE: MOTIONS, SECURITY, JURY SELECTION	4.0
1/8/99	PREPARATION	5.0
1/8/99	MARKING EVIDENCE	2.0
1/10/99	PREPARATION	8.0
1/11/99	TRIAL (DAY ONE); PREPARATION	10.0
1/12/99	TRIAL (DAY TWO); PREPARATION	10.0
1/13/99	TRIAL (DAY THREE); PREPARATION	10.0
1/14/99	TRIAL (DAY FOUR); PREPARATION	10.0
1/15/99	TRIAL (DAY FIVE); PREPARATION	10.0
----------	MISTRIAL ----------	
1/17/99	REVIEW AND PREPARATION	3.0
1/19/99	HEARING - RE-SET - CHANGE OF VENUE - PREP.	5.0
1/20/99	TELEPHONE CPT. GANYON - MOVE VANISI - N.S.P. MEMO - OTHER	1.5
1/21/99	WCJ	2.0
1/25/99	E-MAILS - D.A. - DISCOVERY	1.0
1/26/99	POST-MISTRIAL JUROR INTERVIEWS - INVESTIGATORS' REPORTS	2.0

1/27/99	PREPARATION AND RE-FORMULATION AND PREPARATION OF CAPITAL CASE QUESTIONNAIRE	6.0
1/28-29/99	DISCOVERY - 600 PAGES OF UNRPD REPORTS 76 AUDIO AND VIDEO TAPES	8.0
1/29/99	SPOUSE LETTERS	2.5
1/29/99	CHAITRA HANKE TAPES	1.5

(136)

(1,041)

2/1/99	CAUTIONARY LETTER TO CLIENT REGARDING CHOICE IF DEFENSE	3.0
2/2/99	DISCOVERY - TAPES	4.5
2/9/99	"HELLO, BABY" CORRESPONDENCE	3.5
2/23/99	CONFERENCE - DEFENSE STRATEGY EVIDENCE: DIAGRAM - UNR BY RPD - MC MENOMY; PICTURE OF "DOBIE"; CASSETTE INTERVIEW OF CHRISTIAN LAUDERDALE; REVIEW FILES	5.5
2/24/99	AMENDED NOTICE TO SEEK THE DEATH PENALTY; OPPOSITION TO AGGRAVATORS; "HELLO, BABY" LETTERS; TAPES OF LAUDERDALE	5.5
2/25/99	DISCOVERY...STATEMENTS OF: CATHLEEN KRUTZ AND JEANNE OHLSON. CRIME SCENE AND VICTIM PHOTOS. PROPERTY/EVIDENCE LOGS. PICTURES OF "DOOBIE", VANISI AND POLICE REPORTS (LAUDERDALE)	5.5

(27.5)

(1,068.5)

3/1/99	"HELLO, BABY" CORRESPONDENCE	1.0
3/3/99	"	1.0
3/4/99	"	1.0
3/8/99	"	1.0
3/10/99	"	1.0
3/11-12/99	PREPARED MEMO AND DOCUMENTS FOR GREGORY AND BOSLER REPRESENTATION OF VANISI	3.0
	(8.0)	
	(1,076.5)	
5/14/99	DISCOVERY	1.0
5/21/99	TAPES (EXTRICATION)	3.0
5/27/99	NSP – ESCAPE ATTEMPT REPORTS	1.0
5/28/99	SCR – POST – TRIAL MEMORANDUM	10.0
	(15.0)	
	(1,091.5)	
6/1/99	MOTIONS HEARINGS	2.5
6/7/99	VIDEO – 7/11 ROBBERY	1.0
6/23/99	COMPETENCY; MOTION TO TERMINATE COUNSEL REVIEW MOTION, RESPONSE, TIME RECORDS PREPARE NOTES IN OPPOSITION	4.0
7-8-9/99	ADVISING COUNSEL DEFENDANT'S MOTION TO REPRESENT HIMSELF STATE BAR COUNSEL MOTION TO WITHDRAW WRIT TO THE SUPREME COURT TRIAL PREPARATION, STRATEGY	200.0
	(207.5)	
	(1,299)	

Case re-assigned to other counsel
Total hours: 1,299

SVANIS6-TQualls01845

State v. Siaosi Vanisi
CR98-0516

Time Record of Laura Bielser

Event	Date	Time
Transcribe tape of car viewing	1/22/98	1.0
Catalog discovery	2/19/98	0.5
Format, correct motions	4/13/98	3.0
Format, correct motions	4/14/98	3.0
Format, file motions	4/15/98	1.0
Meeting w/ team	4/16/98	1.0
Format, correct motions	4/20/98	2.0
Format, correct motions	4/21/98	3.5
Format, correct motions	4/22/98	2.0
Format, file, copy, dist. Motions	4/23/98	1.0
Format, correct, copy, dist. Motions	4/28/98	2.0
Internet research Tongan chatlines	4/20/98	2.5
E-mail Ptukia,Australian Anthro-Pologist, Sphillips, Center for Capital Assistance	4/20/98	3.0
Correspondence w/ Dr. McGrath	4/29/98	0.5
Correspondence w/ Adrienne Kaeppler	4/29/98	0.5
Meeting w/ team	5/01/98	1.0
Motion meeting w/ Petty	5/13/98	1.0
Cut, paste, correct, format motions	5/26/98	3.0
Cut, paste, correct, format motions	5/27/98	3.0
Copy, file, dist. Motion	5/28/98	1.0
Meeting w/ team	5/29/98	1.0
Transcribe tape MRS California trip	6/1/98	1.0
Cut, paste, correct, format motions	6/01/98	2.0
Cut, paste, correct, format motions	6/02/98	2.0
File, copy, dist. Motion	6/05/98	0.5
File, copy, dist. Motion	6/08/98	0.5
File, copy, dist. Motion	6/09/98	0.5
File, copy, dist. Motion	6/17/98	0.5
File, copy, dist. Motion	6/18/98	0.5

Meeting w/ team	6/26/98	1.0
Meeting w/ team	7/10/98	0.5
Format, correct motions	7/13/98	2.0
File, copy, dist. Motion	7/14/98	0.5
File, copy, dist. Motion	7/15/98	0.5
File, copy, dist. Motion	7/16/98	0.5
File, copy, dist. Motion	7/21/98	0.5
File, copy, dist. Motion	7/22/98	0.5
Meeting re: Discovery	7/20/98	1.5
Meeting w/ team	7/24/98	0.5
Meeting w/ team	8/07/98	0.5
Meeting w/ DA Discovery	8/13/98	1.5
Prepare minutes of meeting	8/13/98	1.0
Meeting w/ team	8/21/98	0.5
Format, copy, file motion	9/16/98	0.5
Meeting w/ team	10/8/98	0.5
Format, copy, file motion	10/9/98	0.5
Transcribe Gregory tape	12/4/98	1.0
Transcribe Gregory tape	12/7/98	0.5
Transcribe Gregory tape	12/8/98	0.5
Transcribe Gregory tape	12/9/98	0.5
Cut/paste Jury Questionnaire	12/14/98	2.0
Meeting w/ team	12/14/98	0.5
Format Jury Questionnaire	12/15/98	2.0
Final Jury Questionnaire	12/16/98	1.0
DA's office re: evidence	12/31/98	1.5
Meeting w/ team	01/4/99	0.5
Review, revise jury questionnaire	01/4/99	1.0
Evo, RPD, evidence	01/5/99	1.0
Prepare out of state subpoenas	09/1/99	3.0
Prepare out of state subpoenas	09/2/99	2.0
Coordinate arrangements	09/3/99	1.5
Meeting re: Nev State Bar call	9/15/99	0.5

Copy and distribute correspondence	11/9/98	5	minutes
" "	11/30/98	5	
" "	12/7/98	5	
" "	12/8/98	5	
" "	12/9/98	5	
" "	12/11/98	5	
" "	12/15/98	5	
" "	12/17/98	5	
" "	12/22/98	5	
" "	12/28/98	5	
" "	12/29/98	5	
" "	12/30/98	5	
" "	12/31/98	5	
" "	12/31/98	5	
" "	01/4/99	5	
" "	01/20/99	5	
" "	01/21/99	5	
" "	01/25/99	5	
" "	01/26/99	5	
" "	01/28/99	5	
" "	02/1/99	5	
" "	02/2/99	5	
" "	02/8/99	5	
" "	02/9/99	5	
" "	02/10/99	5	
" "	02/12/99	5	
" "	02/16/99	5	
" "	02/23/99	5	
" "	02/25/99	5	
" "	03/1/99	5	
" "	03/2/99	5	
" "	03/3/99	5	
" "	03/4/99	5	
" "	03/10/99	5	
" "	03/11/99	5	
" "	03/16/99	5	
" "	03/17/99	5	
" "	03/29/99	5	

"	"	04/20/99	5
"	"	04/21/99	5
"	"	04/27/99	5
"	"	05/3/99	5

**Several mailings, quick tasks, chats, short meetings, etc. 10.0

Approximate Total: 90 hours

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JEREMY BOSLER STATE V. SIAOSI VANISI

10/9/98 associated as counsel

reviewed memo from Mike, files, motions, police reports 10 hours

11/25/99 motions hearing

Talked to Mike Stoudt .5 hours

Contacted National Jury Project in Oakland .25 hours

Reviewed and prepared jury questionaire 4.0 hours

12/11/98 questionaire submitted

12/16/99 mitigation witnesses reviewed with investigators

vacation in vegas 20.0+ hours reviewing police reports

1/4/99 eyeballed jurors-questionaire filled out

1/8/99 eyeballed jurors-questionaire filled out

Renewed motion for additional peremptory challenges

4/13/99 motion for individual voir dire prepared and submitted submitted 3.5 hours

1/5/99 lunch with Annabelle, discussed voir dire strategies, mitigation witnesses 1.0 hour

1/11/99 trial begins

1/16/99 mistrial declared

1/21/99 reviewed jury debriefings 2.5 hours

4/23/99 bi-weekly meeting 1.0 hour

5/7/99 bi-weekly meeting, talked with steve after morning calendar 1.5 hours

5/4/99 meeting with Vanisi at WCJ 1.5 hours

5/5/99 meeting with Vanisi and jail personnel 1.5 hours

5/12/99 in chambers status hearing re: custody placement, discussion with steve re: medication.
2.0 hours

5/21/99 bi-weekly meeting, met with Steve to discuss case after morning calendar 1.5 hours

6/29 – 7/1 Capital Seminar vegas (22 hours)

7/6 drafted letter to client re: double jeopardy
discussed pleading out robbery, etc. with Steve. (client may not commit)
talked about rescheduling bi-weekly meetings. 1.5 hours

7/5 Talked to mike stout, made arrangements for capital jury seminar 2.0 hours

7/9 meeting with investigators, Steve: discussed defense, compelling out of state witnesses, forensic expert re: wounds to Vanisi, def. Carrying hatchet in California, pleading out to robberies before trial, compelling out of state witnesses. 1.25 hours.

7/12/99 prepare out-of-state sub.'s for trial, discussed ex-parte drug regimen request with Steve. 1.25 hours

7/20/99 visited vanisi at jail. He would not talk about anything other than double-jeopardy motion, despite attempts to discuss new trial. He would not commit to any particular defense and refuses to tell us what strategy he would like to pursue. 1.5 hours

7/22/99 discussed "administrative conference call" with Steve. We will object to client not being available and that our request to medicate defendant has now been stalled, so that effectiveness of regimen is called into question as trial is now approaching. 30 minutes

8/1/99 visit Vanisi at jail. He insists he doesn't have all discovery, but won't tell us what he thinks is missing. He also says he believes there are many defenses to case, but doesn't want to tell us what they are. He says he wants us to "sit on our hands" during the trial, because there is no defense. 1.25 hours

Spoke to attorney Shedwill, he will file sub. applications for us. .5

Reviewed applications, discussed witnesses to be sub'd with Crystal, Steve and Specchio. 1.0

8/3/99 visit Vanisi at jail. Client will not elaborate on defense. Client wants to proceed pro se. Client agreed to talk about medication at today's hearing and put off decision on Faretta until medication kicks in . Client says he will be prepared by September date. 1.5 hours

Hearing on medication motion. Court ordered Steve to contact WCJ and if they agree to follow regimen outlined by Dr. Lynn, medication can begin. If they disagree, hearing needs to be set.

Client indicated he wants to represent himself. Court ordered him to file a written motion?

8/4/99 reviewed client's request for discovery (again). Specchio says he has sent 2 complete copies. Spoke to Gregory about newspaper motion tomorrow, sorted through discovery, gave copies of discovery to Laura to be sent out for reproduction. 2.5 hours

8/5/99 hearing

8/10 hearing

8/11 hearing

refiled motion for jury questionaire, signed Gregorys motion for reconsideration, reviewed old motions, reviewed witness statements 3.0 hours

8/12/99 discussed reconsideration motion with gregory. Spoke with Crystal regarding Monday meeting in S.F. 1.5 hours

8/16/99 trip to San Francisco: reviewed capital jury handout, met with crystal, went to San Mateo muni court, went to redwood city, met with private counsel.

Attempted to serve subpeona's .

Met with Mr. Fry

9 hours

8/17/99 attempted to serve other witnesses, spoke to Judity Celeste, Samuel Johnson. Discusses strategy with Crystal.

10 hours

8/18/99 reviewed Steves motion, State's oposition, advised specchio of development. 2.5 hours

8/22-8/23 drove to S.F., appeared at hearing in San Mateo to compel attendance of Samuel Johnson, Jr. and Janet Yee. Reviewed mitigation witnesses information. 15 hours

7 hours

9/13/99 Spoke with Victor Sherman about ethical dilemna, discussed information with Steve, petty and Spec., reviewed file 4.0

9/14/99 met with Spech., Steve, petty, discussed strategy options, reviewed witness statements 3.5

9/15/99 met with Spech. steve, petty, conference call with bar counsel, reviewed questionaries. 4.0

9/16/99 met with spech., Steve, Petty about strategy, reviewed questionaires 5.0

9/17 met with Ryan ,reviewed jury lists; met with Spec. , Gregory, Petty, decided not to approach judge about issue of ethics, but rather maintain our current strategy. 2.0 hours

9/18/99 reviewed jury materials
3.0 hours

9/19/99 tabulated juror information, structured voir dire questions, graded jurors based upon questionaires 7.5 hours

9/20 trial: jury selection, prepared questions for second day of selection 9.0 hours

9/21/99 trial: jury selection, reviewed voir dire questions, cases 9.5 hours

9/21/99 trial

9/22/99 trial half-day

9/23/99 trial

9/27 final day. Waived final argument. Spoke with Crystal, Steve and John DiGiacinto about mitigation witnesses. 5.0 hours

9/28/99 status hearing. Spoke with Gregory, Crystal and DiGiacinto about compelling out of state witneseses. Faxed more information to John. Steve and I decided not to call Dr. Bucklin and rest of state's medical evidence that all wounds were "contemporaneous" and none was inflicted after death. 4.5 hours

9/29 no court. talked with DiGiancinto, Crytsal, Steve about out-of-state witnesses, prepared jury instructions; reviewed mitigation witnesses 7.0 hours

9/30/99 hearing on pre-sentencing motions; prepared sentencing instructions, reviewed with Maizie, John Petty, Steve and Ryan; reviewed citations for State's instructions. Talked about mitigating witnesses to call for tomorrow. Reviewed crytsal's reports on Sione Peaua and Rene. 11 hours

10/1/99 sentencing hearing. Called renee and sione as witnesses 9.0 hours

10/3/99 reviewed sentencing instructions; bi-polar information, met with mitigation witnesses; prepared sentencing argument; reviewed transcripts of prior witnesses. 7.0 HOURS

10/4/99 prepared opening statement, reviewed mitigation evidence, reviewed instructions, sentencing hearing, kept in court settling instruction until 8:00 14 hours

10/5/99 reviewed instructions, met with steve, discussed additional mitigating witnesses, interviewed and prepared Deeann Vanacey, prepared closing argument 12 hours

10/6/99 finished penalty hearing, argued case. 8 hours

10/7/99 met with Steve, discussed post trial motions 1 hour

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STATE V. SIAOSI VANISI, CR98-0516

TIME RECORD

STEPHEN GREGORY

TOTAL AS OF 10/8/1999: 577.95 HOURS

VANISI TIME RECORD

September:	Meetings/Preparation/Research/Hearings/Trial	Hours
9-22	Specchio/review discovery	2
9-23	Specchio/review discovery	3
9-24	Vanisi	1.75
9-25	Review discovery	2
9-28	Hearing	1
9-29	Review discovery	4
9-30	Review discovery	3
October:		
10-1	Review discovery	3
10-2	View crime scenes etc.	3.5
November:		
11-2	Review discovery	2.5
11-3	Review discovery	1.75
11-4	Review discovery	4.25
11-12	Vanisi/prep	2/1
11-19	Vanisi/prep	2/3
11-20	Vanisi/prep	1/3
11-24	Vanisi/prep	2/1
December:		
12-11	Vanisi/prep	2/1
12-15	Vanisi/prep	2/2
12-16	Vanisi/prep	2/1
12-22	Vanisi/prep	2/2
12-23	Vanisi/prep	2/3
12-28	Vanisi/prep	2/2
12-29	Vanisi/prep	2/3
12-30	Vanisi/prep	2/3
12-31	Vanisi/prep	2/2
January:		
1-4	Court/Vanisi/prep	8.5
1-5	Prep	9
1-6	Vanisi/prep	7.75
1-7	Vanisi/prep	8.5
1-8	Vanisi/prep	8
1-11	Trial	8
1-12	Trial	8
1-13	Trial	8
1-14	Trial	8
1-15	Mistrial/Vanisi/meetings	9
1-19	Court/Vanisi	8
1-20	Vanisi	2
1-21	Vanisi	3

1-22	Review	1.25
1-25	Review	1.5
1-26	Review	2
2-4	Vanisi	1.5
2-11	Vanisi	1
3-3	Review/research	4.25
3-10	Motions	3.7
4-8	Vanisi/investigators/Bosler	7
4/9	Vanisi/investigators/Bosler	4
5/14	Meeting-team	1.25
5/28	Meeting-team	1.5
6/1	Motions hearing	4
6-3	Vanisi/phone	.25
6-10	Prison	4
6-11	Meeting-team	1.25
6-15	Stanton	.5
6-18	Meeting-team	1.5
6-23	Motions hearing/preparation	5
7-9	Meeting-team	1.5
7-12	Prep	4
7-16	Jail	2
7-19	Jail	2
7-20	Jail	2
7-21	Jail	2
7-22	Jail	2
7-23	Jail	2
7-26	Jail	2
7-27	Jail	2
7-28	Jail	2
7-29	Jail	2
7-30	Jail	2
8-2	Jail	2
8-3	Jail	2
8-4	Jail/motions	5
8-5	Jail/motions	6
8-6	Jail	2
8-9	Jail	2
8-10	Jail	2
8-11	Jail	2
8-12	Jail	2
8-13	Jail	2
8-16	Jail	2

8-17	Jail	2
8-18	Jail	2
8-19	Jail	2
8-20	Jail	2
8-23	Jail	2
8-24	Jail	2
8-25	Jail	2
8-26	Jail	2
8-27	Jail	2
8-30	Jail/ trial prep	8
8-31	Jail/ trial prep	8
9-1	Jail/ trial prep	10
9-2	Jail/ trial prep	8
9-3	Jail/ trial prep	8
9-7	Jail/ trial prep	9
9-8	Jail/ trial prep	7
9-9	Jail/ trial prep	8
9-10	Jail/ trial prep	6
9-11	Trial prep	10
9-13	Jail/ trial prep	8
9-14	Jail/ trial prep	9
9-15	Jail/ trial prep	7
9-16	Jail/ trial prep	8
9-17	Jail/ trial prep	8
9-20	Trial/prep	10
9-21	Trial/prep	11
9-22	Trial/prep	10
9-23	Trial/prep	8
9-24	Trial/prep	11
9-25	Jail/prep	8
9-26	Prep	6
9-27	Trial/prep	11
9-28	Prep	12
9-29	Prep	10
9-30	Prep/ hearing	12
10-1	Penalty	8
10-2	Jail	2
10-3	Prep	9
10-4	Penalty/prep	10
10-5	Penalty/prep	12
10-6	Penalty	7

WASHOE COUNTY PUBLIC DEFENDER

INVESTIGATOR CALDERÓN TIME LOG

DATE	HOURS	INVESTIGATION CONDUCTED
01-20-98	1	Review newspaper articles, research the internet
01-27-98	2.5	Meet with Mr. Vanisi
02-03-98	2	Review material
02-20-98	4	Preliminary hearing
03-24-98	3	Photograph Mr. Vanisi's injuries; prepare report
03-26-98	.5	Review and finalize report
04-14-98	1	Review memos
04-15-98	3.5	Review memos; case documents
04-16-98	1	Consult with attorney
04-20-98	.5	Consult with attorney
04-29-98	1.5	Review Tongan chat line
05-18-98	2	Contact Channel 2, attempt to obtain copy of entire i/v of Vanisi
06-01-98	2.5	Meet with Mr. Vanisi; reading material; sergeant
06-02-98	2	Attempt to locate and contact witnesses
06-04-98	1	Attempt to locate and contact witnesses
06-05-98	2.5	Meet with Mr. Vanisi
06-09-98	1.5	Attempt to locate and contact witnesses; phone contact included
06-10-98	1	Consult with attorney
06-11-98	1	Waited for witnesses; no show; including phone contact
06-12-98	1	Waited for witnesses; no show; including phone contact
06-15-98	1	Attempts to locate and contact witnesses
06-16-98	1	Attempts to locate and contact witnesses
06-17-98	2	Review case material
06-18-98	4	Interview witnesses
06-19-98	1	Attempt to locate and contact witnesses
06-22-98	.5	Consult with attorney
07-07-98	2.5	Meet with Mr. Vanisi
07-15-98	1	Attempt to locate and contact witnesses
07-16-98	1	Attempt to locate and contact witnesses
07-17-98	1.5	Attempt to locate and contact witnesses
08-06-98	1	Attempt to locate and contact witnesses
08-13-98	2	Consult with Prosecutors re: evidence list
09-22-98	1	Attempt to locate and contact witnesses
09-25-98	1	Attempt to locate and contact witnesses
10-05-98	1	Consult with attorney; read memos
10-16-98	1	Consult with attorney; read memos
11-09-98	1	Attempt to locate and contact witnesses
11-12-98	1	Contact with witnesses
11-20-98	1	Consult with attorney; read memos
11-21-98	1	Contact with witnesses

12-02-98	4	Interview witnesses
12-07-98	4	Interview witnesses
12-11-98	3	Contact witnesses
12-13-98	10	Travel; interview witnesses
12-14-98	8	Interview witnesses
12-15-98	10	Locate and interview witnesses, includes attempts
12-16-98	12	Locate and interview witnesses, includes attempts
12-17-98	12	Locate and interview witnesses, includes attempts
12-18-98	8	Interview witnesses; travel
12-21-98	10	Travel; interview witnesses
12-22-98	6	Travel; interview witnesses
12-23-98	7	Prepare reports
01-04-99	4	Finalize reports; consult with attorney
01-05-99	1	Consult with attorney
01-12-99	7	Trial
01-13-99	7	Trial
01-14-99	10	Trial; interview witness
01-15-99	6	Trial; mistrial
01-18-99	1	Contact witnesses
02-03-99	2.5	Meet with Mr. Vanisi
02-05-99	.5	Consult with attorney
04-05-99	1.5	Review letters and memos
04-22-99	1	Consult with attorney
05-03-99	2.5	Meet with Mr. Vanisi
06-02-99	2	Search the internet; expert
06-04-99	1	Search the internet; expert
06-16-99	1	Out of state witness arrangements, phone calls, etc.
06-24-99	1	Out of state witness arrangements, phone calls, etc.
07-08-99	2	Consult with attorneys, investigators, support staff re: CA attorney, phone calls, etc.
07-09-99	1	Prepare letters for out of state witnesses
07-13-99	3	Attempts to locate and contact out of state witnesses; prepare documents for out of state service
07-14-99	2	Arrangements for out of state service of witnesses
07-16-99	1	Calls to other investigators re: expert
07-22-99	2	Search the internet, expert
07-23-99	.5	Search the internet, expert
07-24-99	1	Search the internet, phone calls, expert
07-26-99	.5	Consult with attorney re: expert
08-16-99	12	Consult with attorneys; court clerks; locate witnesses
08-17-99	14	Locate witnesses
08-18-99	5	Travel; locate witnesses
09-10-99	.5	Phone calls, e-mails re: witness arrangements
09-12-99	1.5	Phone calls re: witness arrangements
09-14-99	1	Phone calls re: witness arrangements

09-15-99	1	Phone calls re: witness arrangements
09-16-99	2	Phone calls; locate attorney to assist in Butte county
09-17-99	2	Phone calls; locate attorney to assist in Butte county
09-20-99	3	Phone calls re: witness arrangements
09-21-99	2	Phone calls re: witness arrangements
09-24-99	6	Trial; phone calls re: witness arrangements
09-25-99	3	Phone calls re: witness arrangements
09-27-99	7	Trial; phone calls re: witness arrangements
09-28-99	7	Trial; phone calls re: witness arrangements
09-29-99	8	Trial; phone calls re: witness arrangements
09-30-99	3	Phone calls re: witness arrangements
10-01-99	4	Penalty phase began; phone calls re: witness arrangements
10-03-99	5	Witness contact
10-04-99	14	Penalty phase; witness preparation
10-05-99	12	Penalty phase; witness arrangements
10-06-99	8	Penalty phase; witness arrangements

Total 338.5 Hours (does not include the time spent interviewing either juries)

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PUBLIC DEFENDER

INVESTIGATOR CASE LOG

INVESTIGATOR E. NOVAK CASE OPENED _____ CLOSED _____

DEFT. - VANISI, SIAOSI

CR99-0516 ATTORNEY:

PD # CHARGES: MURDER

DATE	HOURS	INVESTIGATION CONDUCTED	MILES
9-10-98	3	REC'D AND REVIEWED REPORTS ON VANISI CASE.	
9-12-98	.5	REC'D AND REVIEWED MEMO FROM ATTY SPECCHIO	
10-1-98	.5	REC'D AND REVIEWED MEMO FROM ATTY.	
10-2-98	6	INTERVIEW VANISI COUSIN (FINAU) IN REDONDO BEACH CALIF. COMPLETED REPORTS	
10-3-98	3.5	INTERVIEW VANISI ROOMMATE (GARNER) IN REDONDO BEACH, CALIF. COMPLETED REPORTS	
10-5-98	1	CONSULT WITH ATTORNEY	
10-12-98	1.5	MET WITH VANISI AT JAIL WITH ATTORNEY - DISCUSSED CASE	
10-13-98	1	MET WITH ATTORNEY DISCUSSED CASE	
10-22-98	2	JAIL - MET WITH VANISI - CONSULT WITH ATTORNEY'S	
11-6-98	.5	REC'D AND REVIEWED ATTORNEY MEMO	
11-20-98	1	CONSULT WITH ATTORNEYS	
11-21-98	1	CONTACT WITH WITNESSES	
2-7-98	1	CONSULT WITH ATTORNEYS	
2-22-98	1	CONSULT WITH ATTORNEYS	
2-30-98	2	SERVED SUBPOENAS TO WITNESSES - REVIEWED MEMO'S	
2-31-98	2	SERVED SUBPOENA ON WITNESSES	
3-31-98	2	ATTEMPT TO LOCATE WITNESSES FOR SERVICE OF SUBPOENA	
4-5-99	2	CONSULT WITH ATTORNEYS. ATTEND ENID VIEW WITH C. CALDERON AT RRD.	
4-6-99	2	OBTAIN CLOTHING FOR VANISI TRIAL - SERVED SUBPOENAS	
4-12-99	5	TRIAL	
4-15-99	2	NOTIFIED ADDITIONAL WITNESSES - MISTRIAL - REVIEWED MEMO'S FROM ATTORNEY	
	40.5	TOTAL PAGE 1 TOTAL 1498	

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PUBLIC DEFENDER

INVESTIGATOR CASE LOG

INVESTIGATOR E. NOVAK CASE OPENED _____ CLOSED _____

DEFT - VANISI, SIAOSI

CR 99-0516 ATTORNEY:

PD # CHARGES: MURDER

DATE	HOURS	INVESTIGATION CONDUCTED	MILES
1-19-99	.5	REVIEWED MEMO'S	
1-20-99	4.5	CONTACTED AND INTERVIEWED 4 JURORS	
1-21-99	3.5	CONTACTED AND INTERVIEWED 3 JURORS	
1-2-99	.5	REVIEWED MEMOS	
1-24-99	.5	REVIEWED MEMOS	
1-22-99	1	CONSULT WITH ATTORNEY	
2-1-99	1	CONSULT WITH ATTORNEY REGARDING ESCAPE ATTEMPT AT N.S.P.	
2-18-99	2.5	PREPARE DOCUMENT REQUESTS TO 3 LAW ENFORCEMENT AGENCIE IN CALIF.	
2-6-99	2.5	ATTEMPT TO LOCATE EXPERT WITNESS	
2-12-99	2	PREPARE NEW DOCUMENT REQUEST FOR MANHATTAN BEACH P.D.	
2-26-99	1	CONSULT WITH ATTORNEY	
3-3-99	1	ATTEMPT TO LOCATE EXPERT WITNESS	
3-11-99	.5	REVIEWED MEMO'S	
3-16-99	1	CONSULT WITH ATTORNEYS	
3-18-99	.5	REVIEWED MEMO'S	
3-6-99	.5	REVIEWED MEMO'S	
3-31-99	.5	REVIEWED MEMO'S	
3-13-99	1.5	ARRANGED FOR CLOTHING FOR VANISI TRIAL	
3-3-99	1.5	CONTACTED EXPERT - DR BUCLIN. SET UP CALL WITH GREGORY	
4-99	2.5	PREPARED AND SENT OUT PHOTO'S AND DOCUMENTS TO DR. BUCKLIN	
	29	TOTAL PAGE 2	1499
		TOTAL	

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PUBLIC DEFENDER

INVESTIGATOR CASE LOG

INVESTIGATOR E. NOVAK CASE OPENED _____ CLOSED _____

DEFT. - VANISI, SIAOSI

CR99-0516 ATTORNEY:

PD # CHARGES: MURDER

DATE	HOURS	INVESTIGATION CONDUCTED	MILES
9-15-99	2.5	REC'D AND REVIEWED FLIGHT ARRANGEMENTS FOR OUT OF STATE WITNESSES	
9-21-99	2.5	TRIAL STARTED 9-20-99 - ASSIST WITH WITNESSES	
9-22-99	1	TRANSPORT WITNESS	
9-23-99	2	ASSIST WITH WITNESSES — TRIAL	
9-24-99	4	TRIAL CONSULT WITH ATTORNEYS RE: JUDGES WITNESS RULING	
9-27-99	4	TRIAL OBTAINED AND SERVED SUBPOENAS ON 2 WITNESSES (KINIKINI)	
9-28-99	4	TRIAL CONSULTED WITH INVESTIGATOR CALDERON RE: OUT OF STATE WITS	
10-3-99	8	TRANSPORT WITNESSES FOR PENALTY PHASE OF TRIAL	
10-4-99	3.5	ASSIST WITH WITNESSES PREPARATION AND TRANSPORTATION	
10-5-99	3.5	ASSIST WITH WITNESS PREPARATION AND TRANSPORTATION	
	35	TOTAL PAGE 3	1500
		TOTAL	

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CERTIFICATION

The undersigned, Michael R. Specchio, Washoe County Public Defender, Bar Number 1017, certifies that the within Memorandum has been completed, pursuant to Supreme Court Rule 250, within thirty (30) days of the imposition of sentence in the within referenced matter.

That an Affidavit indicating compliance has been filed with the Clerk of the Court;

That copies of the Affidavit have been provided to the Court and the Office of the District Attorney;

That the undersigned has logged over one thousand two hundred (1,200) hours in representation of the Defendant herein; the Office expended over two thousand five hundred (2,500) hours in the representation of this defendant.

That the within Memorandum satisfies the requirements of SCR 250.

Respectfully submitted.

Michael R. Specchio
State Bar No. 1017
Washoe County Public Defender
Attorneys for Defendant,
Siaosi Vanisi

Exhibit 34

Exhibit 34

CASE NO. CR98P0816
DEPT. NO. 4

FILED
JAN 18 2002
RONALD M LONGTIN JR., CLERK
DEPUTY

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

SIAOSI VANISI #63376
ELY STATE PRISON
P.O. BOX 1989
ELY, NV, 89301

V.S.

WARDEN OF ELY STATE PRISON
AND THE STATE OF NEVADA
RESPONDENT

(DEATH PENALTY CASE)

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

1. NAME OF INSTITUTION AND COUNTY IN WHICH YOU ARE PRESENTLY IMPRISONED OR WHERE AND HOW YOU ARE PRESENTLY RESTRAINED OF YOUR LIBERTY: NEVADA STATE PRISON, CARSON CITY, NV.
2. NAME AND LOCATION OF COURT WHICH ENTERED THE JUDGMENT OF CONVICTION UNDER ATTACK: SECOND JUDICIAL DISTRICT COURT RENO, NEVADA.
3. DATE OF JUDGMENT OF CONVICTION: NOVEMBER, 22, 1999
4. CASE NUMBER: CR98-0816
5. (A) LENGTH OF SENTENCE: DEATH
   (B) IF SENTENCE IS DEATH, STATE ANY DATE UPON WHICH EXECUTION IS SCHEDULED: N/A

6. ARE YOU PRESENTLY SERVING A SENTENCE FOR A CONVICTION OTHER THAN THE CONVICTION UNDER ATTACK IN THIS MOTION?

YES ___ NO X

IF YES, LIST CRIME, CASE NUMBER AND SENTENCE BEING SERVED AT THIS TIME: X

7. NATURE OF OFFENSE INVOLVED IN CONVICTION BEING CHALLENGED: FIRST DEGREE MURDER

8. WHAT WAS YOUR PLEA? (CHECK ONE)

(A) NOT GUILTY X

(B) GUILTY ___

(C) GUILTY BUT MENTALLY ILL ___

(D) NOLO CONTENDERE ___

9. IF YOU ENTERED A PLEA OF GUILTY OR GUILTY BUT MENTALLY ILL TO ONE COUNT OF AN INDICTMENT OR INFORMATION AND A PLEA OF NOT GUILTY TO ANOTHER COUNT OF AN INDICTMENT OR INFORMATION, OR IF A PLEA OF GUILTY OR GUILTY BUT MENTALLY ILL WAS NEGOTIATED GIVE DETAILS: N/A

10. IF YOU WERE FOUND GUILTY AFTER A PLEA OF NOT GUILTY WAS THE FINDING MADE BY: (CHECK ONE)

(A) JURY X

(B) JUDGE WITHOUT A JURY ___

11. DID YOU TESTIFY AT THE TRIAL? YES ___ NO X

12. DID YOU APPEAL FROM THE JUDGMENT OF CONVICTION?

YES X NO ___

13. IF YOU DID APPEAL, ANSWER THE FOLLOWING:

(A) NAME OF COURT: NEVADA SUPREME COURT

(B) CASE NUMBER OR CITATION: 35259

(C) RESUL: AFFIRMED
(D) DATE OF RESULT: MAY 17, 2001

14. IF YOU DID NOT APPEAL, EXPLAIN BRIEFLY WHY YOU DID NOT: N/A

15. OTHER THAN A DIRECT APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, HAVE YOU PREVIOUSLY FILED ANY PETITIONS, APPLICATIONS OR MOTIONS WITH RESPECT TO THIS JUDGMENT IN ANY COURT, STATE OR FEDERAL? YES X NO

16. IF YOUR ANSWER TO NO. 15 WAS "YES", GIVE THE FOLLOWING INFORMATION:

(A)(1) NAME OF COURT: U.S. SUPREME COURT
(2) NATURE OF PROCEEDING: WRIT OF CERTIORARI
(3) GROUNDS RAISED: SIXTH AMENDMENT
(4) DID YOU RECEIVE AN EVIDENTIARY HEARING ON YOUR PETITION, APPLICATION OR MOTION? NO
(5) RESULT: DENIED
(6) DATE OF RESULT: [redacted],
(7) IF KNOWN, CITATIONS OF ANY WRITTEN OPINION OR DATE OF ORDERS ENTERED PURSUANT TO SUCH RESULT: N/A

(B) AS TO ANY SECOND PETITION, APPLICATION OR MOTION, GIVE THE SAME INFORMATION:
(1) NAME OF COURT: N/A
(2) NATURE OF PROCEEDING: N/A
(3) GROUNDS RAISED: N/A
(4) DID YOU RECEIVE AN EVIDENTIARY HEARING ON YOUR PETITION, APPLICATION OR MOTION? N/A
(5) RESULT: N/A

(6) DATE OF RESULT: N/A

(7) IF KNOWN, CITATIONS OF ANY WRITTEN OPINION OR DATE OF ORDERS ENTERED PURSUANT TO SUCH RESULT: N/A

(C) AS TO ANY THIRD OR SUBSEQUENT ADDITIONAL APPLICATIONS OR MOTIONS, GIVE THE SAME INFORMATION AS ABOVE, LIST THEM ON A SEPARATE SHEET AND ATTACH.

(D) DID YOU APPEAL THE HIGHEST STATE OR FEDERAL COURT HAVING JURISDICTION, THE RESULT OR ACTION TAKEN ON ANY PETITION, APPLICATION OR MOTION? N/A

(1) FIRST PETITION, APPLICATION OR MOTION?

YES ___ NO ___

CITATION OR DATE OF DECISION: _____

(2) SECOND PETITION, APPLICATION OR MOTION?

YES ___ NO ___

(3) THIRD OR SUBSEQUENT PETITIONS, APPLICATION OR MOTION?

YES ___ NO ___

CITATION OR DATE OF DECISION: _____

(E) IF YOU DID NOT APPEAL FROM THE ADVERSE ACTION ON ANY PETITION, APPLICATION OR MOTION, EXPLAIN BRIEFLY WHY YOU DID NOT. (YOU MUST RELATE SPECIFIC FACTS IN RESPONSE TO THIS QUESTION. YOUR RESPONSE MAY BE INCLUDED ON PAPER WHICH IS 8½ BY 11 INCHES ATTACHED TO THE PETITION. YOUR RESPONSE MAY NOT EXCEED FIVE HANDWRITTEN OR TYPEWRITTEN PAGES IN LENGTH.) N/A

17. HAS ANY GROUND BEING RAISED IN THIS PETITION BEEN PREVIOUSLY PRESENTED TO THIS OR ANY OTHER COURT BY WAY OF PETITION FOR HABEAS CORPUS, MOTION, APPLICATION OR ANY OTHER POST-CONVICTION PROCEEDING? NO IF SO, IDENTIFY: N/A

18. IF ANY OF THE GROUNDS LISTED IN NOS. 23(A),(B),(C) AND (D), OR LISTED ON ANY ADDITIONAL PAGES YOU HAVE ATTACHED, WERE NOT PREVIOUSLY PRESENTED IN ANY OTHER COURT, STATE OR FEDERAL, LIST BRIEFLY WHAT GROUNDS WERE NOT SO PRESENTED, AND GIVE YOUR REASONS FOR NOT PRESENTING THEM. (YOU MUST RELATE SPECIFIC FACTS IN RESPONSE TO THIS QUESTION. YOUR RESPONSE MAY BE INCLUDED ON PAPER WHICH IS 8½ BY 11 INCHES ATTACHED TO THE PETITION. YOUR RESPONSE MAY NOT EXCEED FIVE HANDWRITTEN OR TYPEWRITTEN PAGES IN LENGTH.) INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL. THESE MATTERS ARE NOT PROPERLY RAISED ON DIRECT APPEAL.

19. ARE YOU FILING THIS PETITION MORE THAN 1 YEAR FOLLOWING THE FILING OF THE JUDGMENT OF CONVICTION OR THE FILING OF A DECISION ON DIRECT APPEAL? NO, IF SO, STATE BRIEFLY THE REASONS FOR THE DELAY. (YOU MUST RELATE SPECIFIC FACTS IN RESPONSE TO THIS QUESTION.

20. DO YOU HAVE ANY PETITION OR APPEAL NOW PENDING IN ANY COURT EITHER STATE OR FEDERAL, AS TO THE JUDGMENT UNDER ATTACK? YES ___ NO X

IF "YES", STATE WHAT COURT AND THE CASE NUMBER: N/A

21. GIVE THE NAME OF EACH ATTORNEY WHO REPRESENTED YOU IN THE PROCEEDING RESULTING IN YOUR CONVICTION AND ON DIRECT APPEAL:

TRIAL ATTORNEY: STEPHEN GREGORY ESQ.

APPEAL ATTORNEY: JOHN PETTY ESQ.

22. DO YOU HAVE ANY FUTURE SENTENCE TO SERVE AFTER YOU COMPLETE THE SENTENCE IMPOSED BY THE JUDGMENT UNDER ATTACK? YES ___ NO X

IF "YES", SPECIFY WHERE AND WHEN IT IS TO BE SERVED, IF YOU KNOW: N/A

23. STATE CONCISELY EVERY GROUND ON WHICH YOU CLAIM THAT YOU ARE BEING HELD UNLAWFULLY. SUMMARIZE BRIEFLY THE FACTS SUPPORTING EACH GROUND. IF NECESSARY YOU MAY ATTACH PAGES STATING ADDITIONAL GROUNDS AND FACTS SUPPORTING SAME.

(A) GROUND ONE: 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.

SUPPORTING FACTS (TELL YOUR STORY BRIEFLY WITHOUT CITING CASES OR LAW) I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME COMPLETE THIS PETITION AND FILE A SUPPLEMENTAL PETITION.

(B) GROUND TWO: 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.

SUPPORTING FACTS (TELL YOUR STORY BRIEFLY WITHOUT CITING CASES OR LAW.) I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME COMPLETE THIS PETITION AND FILE A SUPPLEMENTAL PETITION.

EXECUTED AT NEVADA STATE PRISON ON THIS 17TH DAY OF JANUARY, 2002.

Siaosi Vanisi

SIAOSI VANISI #63376
PETITIONER IN PROPER PERSON
NEVADA STATE PRISON
I.D. NO.
P.O. BOX 607
CARSON CITY, NEVADA, 89702

SVanisi2JDC06046

CASE NO. CR98-0516
DEPT. NO. 4

FILED
JAN 18 2002
RONALD A. LONGTIN, JR., CLERK
BY: DEPUTY

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

SIAOSI VANISI #63376
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301
VS.
WARDEN OF ELY STATE PRISON
AND THE STATE OF NEVADA
RESPONDENT

MOTION FOR APPOINTMENT
OF POST-CONVICTION COUNSEL

COMES NOW, PETITIONER, SIAOSI VANISI, IN PROPER PERSON, AND HEREBY REQUEST APPOINTMENT OF EFFECTIVE COUNSEL TO ASSIST HIM IN STATE POST-CONVICTION PROCEEDINGS. THIS MOTION IS MADE AND BASED UPON NRS. 34.820(1)(a), THE ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE ENTIRE RECORD ON FILE HEREIN.

DATED THIS 17TH DAY OF JANUARY, 2002.

SUBMITTED BY:

SIAOSI VANISI #63376
IN PROPRIA PERSONA

1

MEMORANDUM OF POINTS AND AUTHORITIES

1. I HAVE BEEN AN INMATE ON NEVADA'S DEATH ROW SINCE 1999 I NEEDED AND OBTAINED ASSISTANCE IN THE PREPARATION OF THESE DOCUMENTS.

2. I AM PRESENTLY WITHOUT COUNSEL TO LITIGATE MY CONSTITUTIONAL CLAIMS IN STATE COURT. AS A LAYMAN, I AM NOT COMPETENT TO REPRESENT MYSELF. I AM PRESENTLY UNDER A SENTENCE OF DEATH, AND I HAVE FILED A PETITION FOR WRIT OF HABEAS CORPUS ATTACKING MY JUDGEMENT OF CONVICTION AND SENTENCE, AND A REQUEST TO PROCEED IN FORMA PAUPERIS, DEMONSTRATING THAT I AM INDIGENT. NRS 34.750 (1). APPOINTMENT OF COUNSEL TO PROVIDE REPRESENTATION FOR ME IN THESE PROCEEDINGS IS MANDATORY. NRS 34.820 (1)(a).

3. I AM ENTITLED UNDER NRS 34.820(1)(a) TO EFFECTIVE ASSISTANCE OF COUNSEL IN STATE HABEAS PROCEEDINGS. Crump v. Warden 113 Nev. 293, 934 P.2d. 247, 253 (1997). I THEREFORE REQUEST THAT THIS COURT APPOINT ME COUNSEL WHO WILL ENSURE THAT ALL AVAILABLE CLAIMS ARE DISCOVERED AND LITIGATED EFFECTIVELY ON MY BEHALF IN THE NEVADA STATE COURT SYSTEM. I DO NOT CONSENT TO WAIVING ANY OF THE CLAIMS RAISED IN THE PETITION NOW ON FILE OR ANY OTHER AVAILABLE CONSTITUTIONAL CLAIM.

IN ANY STATE PETITION FOR WRIT OF HABEAS CORPUS FILED BY APPOINTED COUNSEL SHOULD BE EXPRESSLY DEEMED TO BE WITHOUT MY CONSENT AND AGAINST MY WILL. SEE, E.G., RACQUEPAW V. STATE, 108 NEV. 1020 (1992); STEWART V. WARDEN, 92 NEV. 588 (1976) MY AUTHORIZATION ALLOWING APPOINTED COUNSEL TO REPRESENT ME, AND TO BIND ME BY HIS OR HER ACTIONS AS MY AGENT, IS CONDITIONAL UPON COUNSEL PERFORMING EFFECTIVELY AS MY COUNSEL; DISCOVERING, INVESTIGATING AND LITIGATING ALL AVAILABLE CLAIMS ON MY BEHALF; AND MAINTAINING UNDIVIDED LOYALTY TO MY INTERESTS THAT MAY BE AFFECTED BY THE VIGOROUS DISCOVERY AND LITIGATION OF MY CLAIMS AND REGARDLESS OF THE IMPACT OF SUCH LITIGATION ON COUNSEL'S PROSPECTS OF COMPENSATION, APPOINTMENT IN OTHER CASES, OR TREATMENT IN OTHER CASES BY THE PRESIDING JUDGE IN THIS MATTER, OR BY ANY OTHER JUDICIAL OFFICIALS. ANY ACTION BY COUNSEL WHICH IS INCONSISTENT WITH EFFECTIVE PERFORMANCE OF THESE DUTIES IS OUTSIDE THE SCOPE OF MY AUTHORIZATION TO COUNSEL TO ACT AS MY AGENT, AND THE STATE IS HEREBY PLACED ON NOTICE NOT TO RELY UPON COUNSEL'S AUTHORIZATION TO ACT AS MY AGENT IF COUNSEL PERFORMS ANY ACT INCONSISTENT WITH THESE DUTIES WITHOUT MY EXPRESS AND INFORMED CONSENT. SEE. DEUTSCHER V. ANGELONE, 16 F.3d 981 (9th CIR. 1994).

4. THE CONSTITUTIONAL CLAIMS ALREADY IDENTIFIED IN MY CASE, WHICH I DIRECT APPOINTED COUNSEL TO RAISE ON MY BEHALF, INCLUDE, BUT ARE NOT LIMITED TO, THE FOLLOWING:

A. ALL ISSUES RAISED ON MY BEHALF ON DIRECT APPEAL, BECAUSE I WAS PREVENTED FROM PREVAILING ON THEM DUE TO ERRONEOUS COURT RULINGS. LOZADA V. STATE, 110 NEV. 349, 871 P.2d 944 (1994) (ERRONEOUS COURT RULINGS CONSTITUTE IMPEDIMENT EXTERNAL TO THE DEFENSE WHICH JUSTIFIES RELITIGATION OF SAME ISSUES IN SUBSEQUENT COURT PROCEEDINGS).

B. CLAIMS OF INEFFECTIVE PRE-TRIAL, TRIAL AND APPELLATE COUNSEL.

C. ANY AND ALL COGNIZABLE ISSUES NOT RAISED ON DIRECT REVIEW BUT WHICH BECOME KNOWN TO EFFECTIVE POST-CONVICTION COUNSEL AFTER BOTH COMPREHENSIVE INVESTIGATION OF THE FACTS SURROUNDING MY CASE AND A THOROUGH AND EXHAUSTIVE SEARCH OF THE RECORD.

5. I FURTHER CONDITION MY AUTHORIZATION FOR APPOINTED COUNSEL TO REPRESENT ME UPON COUNSEL PERFORMING EFFECTIVELY IN SEEKING AN EVIDENTIARY HEARING(S) ON EACH OF THE ABOVE ISSUES, SEE NRS 34.770, 34.780(2), 34.790, TO PROVIDE THE REQUISITE FACTUAL BASIS FOR THE DEVELOPMENT AND REVIEW OF THE ABOVE CLAIMS.

I FURTHER direct my COUNSEL TO SEEK COURT AUTHORIZATION TO EXPEND ANY AND ALL FUNDS NECESSARY TO FULLY AND FAIRLY develop AND PRESENT MY CLAIMS, INCLUDING WHATEVER FUNDS ARE NECESSARY FOR EXPERT. INVESTIGATIVE, AND OTHER ANCILLARY SERVICES, SEE NRS 7.135, AND TO CONDUCT ALL DISCOVERY PROCEEDINGS, SEE NRS 34.780, NECESSARY TO THE IDENTIFICATION AND DEVELOPMENT OF ALL AVAILABLE CLAIMS.

DATED THIS 17th DAY OF JANUARY, 2002

SUBMITTED BY:

Siaosi Vanisi

SIAOSI VANISI #63376

Exhibit 35

Exhibit 35

Svanisi, 12JD04635

ORIGINAL

FILED

AUG 18 1999

AMY HARVEY, CLERK

By: DEPUTY

1670
MICHAEL R. SPECCHIO
BAR# 1017
WASHOE COUNTY PUBLIC DEFENDER
P.O. BOX 30083
RENO NV 89520-3083
(775) 328-3464
ATTORNEY FOR: DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,
Plaintiff,
vs.
SIAOSI VANISI,
Defendant.
_____/

Case No. CR98-0516

Dept. No. 4

EX-PARTE (NEVADA SUPREME COURT RULE 172) MOTION TO WITHDRAW

COMES NOW the Defendant, by and through his counsel, STEPHEN D. GREGORY, and JEREMY BOSLER, and moves to withdraw as counsel for the Defendant. This Motion to Withdraw is

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supported by the following points and authorities herein, an Affidavit of Counsel (attached hereto as Exhibit "A"), and Rule 172 on NSCR (attached hereto as Exhibit "B").

DATED this 18th day of August, 1999.

MICHAEL R. SPECCHIO
Washoe County Public Defender

By: _____
STEPHEN D. GREGORY
Chief Deputy Public Defender

MICHAEL R. SPECCHIO
Washoe County Public Defender

By: _____
JEREMY BOSLER
Deputy Public Defender

1+9C

POINTS AND AUTHORITIES IN SUPPORT OF EX-PARTE MOTION TO WITHDRAW AS COUNSEL

Nevada Supreme Court Rule 166 reads as follows:

Rule 166. Declining or terminating representation.

1. Except as stated in subsection 3, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
   (a) the representation will result in violation of the rules of professional conduct or other law;
   (b) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
   (c) the lawyer is discharged.

2. Except as stated in subsection 3, a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interest of the client, or if:
   (a) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
   (b) the client has used the lawyer's services to perpetrate a crime or fraud;
   (c) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

1097

(d) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(e) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(f) other good cause for withdrawal exists.

3. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

4. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. (added 1-27-86, eff. 3-28-86.)

1050

Counsel conducted a telephonic conversation with counsel for the State Bar of Nevada concerning a hypothetical representation of a defendant who insists on counsel proffering a defense that violates Rule 166 of the Nevada Supreme Court. Counsel was advised by the State Bar to immediately submit a motion to withdraw as counsel. Furthermore, the State Bar advised counsel to comply with Supreme Court Rule 172 (attached hereto as Exhibit "B") as soon as the Court deems it appropriate to inquire into the matters covered by Rule 172.

DATED this 18th day of August, 1999.

MICHAEL R. SPECCHIO
Washoe County Public Defender

By: _____
STEPHEN D. GREGORY
Chief Deputy Public Defender

MICHAEL R. SPECCHIO
Washoe County Public Defender

By: _____
JEREMY BOSLER
Deputy Public Defender

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
)ss
County of Washoe)

I,STEPHEN D. GREGORY , do hereby affirm that the assertions of this affidavit are true:

1. That I am a duly licensed attorney assigned to represent the Defendant, SIAOSI VANISI;
2. That I have suggested a defense to the Defendant in February, 1999, that the Defendant categorically refuses to allow me to represent to the Court and Jury since March, 1999;
3. That this defense is supported by the evidence;
4. That this defense does not violate the prohibitions embodied in Nevada Supreme Court Rule 166;
5. That the Defendant insists on a defense that is not supported by the evidence;
6. That counsel has been advised by counsel for the State Bar that the presentation of the Defendant's defense will result in a violation of Supreme Court Rule 166;

///

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[redacted]

1st

7. That counsel will, according to the State Bar, violate Rule 172 of the Supreme Court if counsel is ordered to present the Defendant's theory of the case;

8. FURTHER AFFIANT SAYETH NOT.

DATED this 18th day of August, 1999.

STEPHEN D. GREGORY

SUBSCRIBED and SWORN to this 18th day of August, 1999.

NOTARY PUBLIC

KELLIE ROBERSON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 96-0524-2 - EXPIRES JAN. 8, 2000

[redacted]

Rule 172. Candor toward the tribunal.

1. A lawyer shall not knowingly:

(a) make a false statement of material fact or law to a tribunal;

(b) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(c) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(d) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

2. The duties stated in subsection 1 continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 156.

3. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

4. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. (Added 1-27-86, eff. 3-28-86.)

Editor's Note. — Former Rule 172 was repealed effective March 28, 1986.

EXHIBIT "B"

Exhibit 36

Exhibit 36

ORIGINAL

CODE: 4105
SCOTT W. EDWARDS, ESQ.
State Bar No. 3400
729 Evans Ave., Reno, Nevada 89512
(775) 786-4300
THOMAS L. QUALLS, ESQ.
State Bar No. 8623
216 E. Liberty St., Reno, NV 89501
(775) 333-6633
Attorneys for Petitioner, SIAOSI VANISI

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

vs.

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

Respondents.

Case No. CR98P0516

Dept. No. 4

DEATH PENALTY CASE

(FILED UNDER SEAL)

SUPPLEMENTAL POINTS & AUTHORITIES TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

STATEMENT OF CASE

The State charged Siaosi Vanisi ("Vanisi") with first degree murder for the death of Sergeant George Sullivan, a police officer at the University of Nevada, Reno. Specifically, the State charged that Vanisi committed the killing "during the course of and in furtherance of an armed robbery..." Additionally, the State charged Vanisi with one count of Robbery with the Use of a Deadly Weapon, two counts of Robbery with the Use of a Firearm, and one count of Grand Larceny.

The first trial was held in January of 1999, and resulted in a mistrial. The second trial was held in September of 1999, and resulted in convictions on all five charges. At the penalty phase, the jury imposed the death penalty on Vanisi, finding three aggravating circumstances: (1) the murder occurred in the commission of or an attempt to commit robbery; (2) the victim was a peace officer engaged in the performance of his official duties, and the defendant knew or reasonably should have known the victim was a peace officer; and (3) the murder involved mutilation.

A direct appeal was filed in the Nevada Supreme Court. Additionally, the Nevada Supreme Court reviewed under mandatory review provisions of NRS 177.055(2) regarding death penalty cases. The Nevada Supreme Court affirmed the conviction and sentence. Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). This timely Petition for writ of habeas corpus (post-conviction) and Supporting Points & Authorities follows.

STATEMENT OF FACTS

In the early morning of January 13, 1998, UNR Police Sergeant George Sullivan was found dead, apparently murdered and robbed, on the UNR campus. At trial, evidence was presented that two witnesses, including UNR Police Officer Carl Smith, observed Vanisi near the murder site shortly before the time of the killing. Additionally, several witnesses testified that Vanisi had told them he wanted to kill and rob a police officer. Another witness testified that she was with Vanisi when he purchased a hatchet and a pair of gloves and that he told her that he wanted to kill a police officer. A hatchet and gloves were later found at an apartment where relatives of Vanisi's stayed. Evidence at trial showed that stains on the hatchet and jacket contained Sullivan's DNA. Additionally, evidence showed that the gloves contained DNA from both Sullivan and Vanisi.

At trial, Vanisi's lawyers, who had earlier been denied in their motion to withdraw from representation, did not cross-examine the vast majority of the State's witnesses, did not put on any evidence in his defense, and refused to give either opening statements or closing arguments at the guilt phase of the trial. Vanisi, who had earlier been denied his request to represent himself, declined to testify in his defense, calling the proceedings a joke.

Further relevant facts of this case are set forth in each individual claim.

INTRODUCTION

The petitioner Siaosi Vanisi, by and through counsel, hereby files this supplemental petition for a writ of habeas corpus, pursuant to Nev. Rev. Stat. § 34.724 and Nev. Rev. Stat. § 34.820. Petitioner alleges that he is being held in custody in violation of the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States of America, and the rights afforded him under international law enforced under the Supremacy Clause of the United States Constitution, U.S. Const., Art VI, and Article I, Sections 3, 6, 8 and 9, and Article IV, Section 21 of

the Constitution of the State of Nevada.

Statement with Respect to Previous Proceedings

i. The failure to raise any of the claims asserted in this petition which were susceptible to decision on direct appeal was the result of ineffective assistance of counsel on appeal.

ii. The failure to raise any of the claims asserted in this petition which were susceptible of being raised in the state trial proceeding and appeal was the result of ineffective assistance of counsel, in a proceeding in which petitioner had a right to effective assistance of counsel under state law and under federal law; was the result of representation by counsel that violated state and federal constitutional due process standards; and was induced by the state trial court's refusal to permit appointed counsel adequate time or resources or authority to identify and present all of the available constitutional claims in violation of the right to an adequate opportunity to be heard guaranteed by the due process clause of the Fourteenth Amendment, and Article I sect. 8 of the Nevada Constitution.

iii. Petitioner Vanisi has not competently, knowingly and intelligently waived, deliberately withheld, or consented to the failure to raise, any of the constitutional claims raised in this petition.

iv. None of the claims alleged in this petition are subject to any state procedural default rule which is adequate to prevent state review or is independent of state or federal constitutional law.

a. The Nevada Supreme Court's administration of its procedural rules is arbitrary and capricious and violates the equal protection and due process clause of the Fourteenth Amendment, and the due process clause of the Nevada Constitution.

b. Petitioner alleges that the provisions of Nev. Rev. Stat. § 34.726 do not apply to him. This petition is petition is timely filed and not successive.

c. In the event this Court perceives some procedural bar, there is cause to allow this Court to entertain petitioner's claims on the merits. There is no evidence that any delay in filing this petition was due to petitioner's own "fault" and, as the claims in this petition show, he would suffer substantial prejudice if his claims are not entertained. Petitioner is entitled to an evidentiary hearing to demonstrate that he has left the litigation of his claims to counsel, and that there is no element of fault attributable to him.

d. Nev. Rev. Stat. § 34.726(1)(a) provides that there is good cause for filing a

petition for writ of habeas corpus more than one year after the finality of the conviction on appeal if the delay is not the petitioner's "fault." The use of the term "the fault of the petitioner" shows that the legislative intent of Nev. Rev. Stat. §37.726(1)(a) is that petitioner himself must act or fail to act to cause the delay. That language is consistent with other legal applications of a subjective fault standard: that is, to be found at fault, it must be proven that the person seeking relief has personally acted or failed to act in a manner that constitutes fault. To be at fault, a party must have acted in a manner that goes beyond negligence because "[f]ault contemplates more than mere negligence, and includes intentional acts." Slade v. Farmers Ins. Exchange, 5 P.3d 280, 285 (Colo. 2000); see e.g., Nev. Rev. Stat. §104.1201(16) ([f]ault means wrongful act, omission or breach"); Nev. Rev. Stat. §104A.2103(1)(f) ("[f]ault means wrongful act, omission, breach or default"); Nev. Rev. Stat. §128.105(2) (fault of parent or parents can be established by proving abandonment, neglect, parental unfitness, failure of parental adjustment, risk of serious physical, mental or emotional injury to child, or token efforts by the parent(s)); In re Termination of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126, 133 (2000) (adopting a best interests/parental fault standard in termination of parental rights cases; best interests of child necessarily include considerations of parental fault and/or conduct and both best interests of the child and parental fault must be proven by clear and convincing evidence); Hill v. State, 955 S.W.2d 96, 100 (Tex. Crim. App. 1997) ("[t]he word "fault" implies wrongdoing; "[f]ault" is defined as "a weakness in character, failing imperfection, impairment, . . . misdemeanor . . . mistake . . . responsibility for something wrong") (citation omitted); State v. Jackson, 94 Ariz. 117, 112, 382 P.2d 229, 232 (Ariz. 1963) ("[f]ault implies misconduct not lack of judgment" (citation omitted)); Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984) (the determination of whether a social security recipient is "at fault" for having received an overpayment "is highly subjective, highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation"). In Pellegrini v. State, 117, Nev. 860, 36 P.3d 519 (2001), the Supreme Court adopted a subjective standard arising from the legislature's use of the term "fault" and held that counsel's failure to act cannot be considered the petitioner's fault under Nev. Rev. Stat. § 34.726:

For example, in Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676,

> 679 (1995), we concluded that good cause excused the procedural bar at NRS 37.726(1) for untimely filing of a second petition where the first petition had been timely filed, but not pursued by counsel, and any delay in filing the second petition was not the petitioner's fault.

Pellegrini, 34 P.3d at 526 n.10 (emphasis supplied).

e. In the alternative, this Court cannot apply procedural bars to avoid consideration of the merits of petitioner's claims, because the cumulative effect of the error alleged amounts to a miscarriage of justice. The cumulative effect of the constitutional errors make petitioner "innocent" of the death penalty. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440, 445 (2002) (en banc).

f. This Court is obligated to address the merits of petitioner's claims, despite the default rules contained in Nev. Rev. Stats. §§ 34.726; 34.800; 34.810, based upon federal equal protection principles which require that similarly situated litigants be treated consistently. The Nevada Supreme Court has disregarded Nevada's default rules and addressed constitutional claims in the exercise of its complete discretion to do so, at any point in the direct or collateral proceedings. See, e.g., Bejarano v. Warden, 112 Nev. 1466, 1471 n. 2, 929 P.2d 922 (1996) (addressing claim on merits despite default rules); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998) (addressing merits claims raised for first time on appeal from denial of third post-conviction petition because claims "of constitutional dimension which, if true, might invalidate Hill's death sentence and the record is sufficiently developed to provide an adequate basis for review."); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995) (addressing claims asserted to be barred by default rules; "[w]ithout expressly addressing the remaining procedural bases for the dismissal of Bennett's petition, we therefore choose to reach the merits of Bennett's contentions.") (emphasis supplied); Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992) (addressing issue of delay in probable cause determination without indicating that issue not raised at trial or on appeal); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) (vacating aggravating factor finding based on instructional error on mandatory review error without noting issue not raised at trial or on appeal); Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388 (1990) (on appeal from denial of collateral relief, "[w]e consider sua sponte whether failure to present such [mitigating] evidence constitutes ineffective assistance"); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995) (addressing claim of error in court's mandatory sentence review on direct

appeal raised for first time on appeal in second collateral attack, without discussing or applying default rules); *cf.* Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)), Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1978) (court "choose[s] to entertain" second post-conviction petition which could have been barred); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974) (trial court's "choice" to rule on barred claim "within its discretionary power"); Gunter v. State, 95 Nev. 886, 887, 620 P.2d 859 (1980) (court "obligated" to consider constitutional issues raised for the first time on appeal); Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968); Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991) ("Normally a proper objection is a prerequisite to our considering the issue on appeal. However, since this issue is of constitutional proportions, we elect to address it now.") (citation omitted).

g. The Nevada Supreme Court has reached inconsistent results on the issue of whether a procedural rule that does not exist at the time of a purported default may preclude the review of the merits of meritorious constitutional claims. *See* Pellegrini v. State, 117 Nev.860, 34 P.3d 519 (2001).

h. This Court and the Nevada Supreme Court cannot apply any supposed default rules to bar consideration of petitioner's claims when it has failed to apply those rules to similarly-situated petitioners, and thus has failed to provide notice of what default rules will be enforced, without violating the equal protection and due process clauses of the Fourteenth Amendment. Bush v. Gore, 531 U.S. 98, 104-109 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (per curiam); Ford v. Georgia, 498 U.S. 411, 425 (1991); *see* US Const. Art. VI (state courts bound by federal constitution). Petitioner realizes, of course, that the Nevada Supreme Court has taken the position that it does apply default rules consistently. See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 536 (2001).[1] But Pellegrini did not address the arguments raised by petitioner with

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[1]Petitioner notes that the Nevada Supreme Court and the Ninth Circuit Court of Appeals have reached the exact opposite conclusion with respect to the adequacy of Nevada's procedural rules to preclude the review of the merits of meritorious claims in capital cases. Compare Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 536 (2001); with Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); Petrocelli v. Angelone, 248 F.3d 877, 886-88 (9th Cir. 2001); McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995).

respect to unpublished dispositions, and therefore, Pellegrini cannot be authority for rejecting petitioner's position. *See* In re Tartar, 52 Cal.2d 250, 339 P.2d 553, 557 (1959) (cases not authority for propositions not considered). Second, petitioner raises this issue as a violation of the equal protection and due process clauses of the Fourteenth Amendment. State courts must afford petitioner a hearing on that claim that is adequate to allow him to litigate his federal constitutional claims, Franks v. Deleware, 438 U.S. 154, 171-72 (1978), and this Court must therefore grant petitioner an adequate hearing on this issue. Third, whatever the Nevada Supreme Court has said with respect to the application of default rules, without analyzing the federal constitutional issues presented by petitioner, this Court is bound under the Supremacy Clause, U.S. Const. Art. VI, to apply the federal constitutional guarantees invoked by petitioner. Accordingly, this Court must address the merits of petitioner's constitutional claims, or at the very least, grant petitioner an evidentiary hearing to determine the adequacy of Nevada's procedural rules to bar this Court's review of the merits of petitioner's claims.

II. CLAIMS OF ERROR.

CLAIM 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.

Supporting Facts.

Mr. Vanisi is a citizen of Tonga. He is not a citizen of the United States. Both nations are signatories to an international treaty providing that Mr. Vanisi should have been informed of certain rights as an accused in a foreign land. Mr. Vanisi was not so informed and did not exercise those rights. Recent precedent of the International Court of Justice dictates that Mr. Vanisi be accorded relief for this violation of his rights under the international treaty. One state court of the United States (Oklahoma) has already accorded relief to a death row inmate similarly situated, by removing the death sentence for the individual. (That opinion is attached to this opinion as Exhibit A for ease of

reference.) Many other individuals have laid claim to relief under the same circumstances. The United States Supreme Court has granted certiorari upon the issue of what relief should be accorded and is expected to hear the case shortly (The petition for writ of certiorari is attached to this pleading as Exhibit B for ease of reference.)

Had Tongan consular officials in San Francisco been provided an opportunity to assist Mr. Vanisi at the time of his arrest and prosecution, he would not be on death row today. Consular officials have already indicated their willingness to assist Mr. Vanisi had they been appraised of his circumstances. The most important assistance the Tongan consulate could have provided would have been the assistance of effective and conflict free counsel. They could have also coordinated the presentation of mitigation evidence relative to Mr. Vanisi's formative experiences in Tonga. As it turns out, Mr. Vanisi ended up enduring a trial with virtually no representation. His appointed counsel moved to withdraw from representation (with the approval of the State Bar of Nevada) but they were denied by the trial court. They were compelled to remain on the case, essentially moot and ineffective. They presented little evidence and no closing argument at all. Mr. Vanisi even tried to represent himself rather than suffer the prejudice of attorneys who were unable to assist in the crucible of adversarial testing. Again, the trial court denied the constitutional request. Thus, the prejudice to Mr. Vanisi from the denial of his rights under the international treaty are readily apparent.

There is no question that Nevada authorities failed to comply with Article 36 of the Vienna Convention on Consular Relations, which requires local authorities to notify a detained foreign national, without delay, of his right to communicate with his consulate. At the detainee's request, the authorities must also notify consular officials – again, without delay – of his incarceration. Vienna Convention, art. 36, 21 U.S.T. at 100-01. Because local authorities failed to carry out this mandate,Tongan consular officials were effectively precluded from providing the assistance described above.

Legal Argument.

While numerous state and federal courts have grappled with the application of Article 36, no court has squarely addressed the June 27, 2001 decision of the International Court of Justice ("ICJ") in the *LaGrand Case (Germany v. United States)*, 2001 ICJ 104 (Judgment). This authoritative

decision – which is directly applicable to the case of Mr.Vanisi – will affect all cases of foreign nationals sentenced to severe penalties, who have alleged a violation of Article 36.

The ICJ's jurisdiction in *LaGrand* was founded upon the Optional Protocol to Article 36 of the Vienna Convention, a treaty ratified by the United States. Under the Optional Protocol, the United States chose to submit all "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" to the ICJ for resolution. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325. As a result, the court's decision is binding on the United States under the Optional Protocol, Article 94 of the U.N. Charter, and customary international law.

Confronting a factual scenario strikingly similar to the case of Mr. Vanisi, the *LaGrand* court resolved several issues that had divided the lower courts of the United States. First, the ICJ unequivocally held that Article 36, paragraph 1 creates an individual right to consular notification and access. *LaGrand*, paras. 77, 128(3). Second, the court held that a foreign national deprived of his Article 36 rights, and sentenced to a "severe penalty," is entitled to "review and reconsideration" of his conviction and sentence. *Id.*, para. 128(7). Third, the court held that domestic rules of procedural default, as applied in the case of the *LaGrand* brothers, violated the United States' obligation to give "full effect" to the purposes of Article 36. *Id.*, paras. 91, 128(4). Thus, *LaGrand* definitively establishes that petitioners such as Mr. Vanisi– whose case cannot be distinguished from *LaGrand* – are entitled to a judicial review of their Article 36 claims.

The Court also established important guidelines for judicial review of such arguments. In *LaGrand*, Germany argued that there was a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. *Id.* at para. 71. Specifically, Germany argued that consular officials would have been able to present persuasive mitigating evidence that would have changed the outcome of the LaGrand cases. *Id.* The United States countered that such arguments were speculative, and challenged Germany's assertions that it would have provided such assistance in 1984. *Id.* at para. 72. The Court ultimately concluded that it was "immaterial" whether consular assistance from Germany would have affected the verdict. Put differently, the Court rejected the notion that a foreign national must demonstrate he was prejudiced by the Article 36 violation, before he is entitled

to an effective remedy for the violation.

Finally, the court addressed the question of remedies for Article 36 violations. The United States had argued Germany was entitled to no more than an apology for the breach of Article 36. The court squarely rejected this argument, observing that an apology was an insufficient remedy in any case where a foreign national was not advised without delay of his rights under Article 36, paragraph 1, of the Vienna Convention, and was facing prolonged detention or a severe penalty such as penalty of death. Id. paras 63, 123, 125.

In considering the remedy appropriate in the case of Mr.Vanisi, this Court should also look to the advisory opinion issued by the Inter-American Court on Human Rights3 on October 1, 1999. OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999). The Inter-American Court[2] received briefs and heard oral argument from eight nations – including the United States – and eighteen non-governmental organizations, academics, and individuals appearing as *amici curiae*. After analyzing the text of the treaty, the intent of the parties, and its application in capital cases, the court concluded that Article 36 provides one of the "minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial" – a right embodied in Article 14(3)(b) of the International Covenant on Civil and Political Rights ("ICCPR").[3] *Id.* at para. 122. The Inter-American Court concluded that international law prohibits the execution of an individual whose consular notification rights were violated. *Id.* at para. 7.

In the wake of *LaGrand* – particularly when viewed in tandem with the Inter-American Court's decision and other principles of international law – there can be no doubt that Mr.Vanisi is entitled to judicial review of the substance of his arguments, and a meaningful remedy for the violation of his Article 36 rights.

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[2]The Inter-American Court on Human Rights has jurisdiction to issue advisory opinions "regarding the interpretation of the [American] Convention or other treaties concerning the protection of human rights in the American States." American Convention on Human Rights, Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996).

[3] International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976). The United States ratified the ICCPR on June 8, 1992, and has not adopted any reservations with regard to Article 14.

A. The ICJ's Judgment Is Authoritative and Binding Precedent In the Case of Mr. Vanisi.

1. The State of Nevada Is Bound To Apply the ICJ's Decision Under the Charter of The United Nations.

The United Nations Charter is a multilateral treaty, duly ratified by the U.S. Senate. United Nations Charter, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, June 26, 1945. Under the Supremacy Clause of the United States Constitution, the State of Nevada is bound by its terms. U.S. Const. Arts. VI, cl. 2; *Hines v. Davidowitz,* 312 U.S. 52, 62-63 (1941)("[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land").

The ICJ is the "principal judicial organ of the United Nations," U.N. Charter, art. 92. Pursuant to the U.N. Charter, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." U.N. Charter, art. 93. Thus, the provisions of the Statute of the ICJ also constitute the "supreme Law of the Land" and are binding on Nevada.

Article 94 of the U.N. Charter provides that "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." The language of article 94 is clear and unequivocal. As one commentator has observed, this provision, "as well as corresponding provisions of the ICJ Statute, transfer adjudicatory authority to the U.N. and its organs, and the attribution of binding legal force to their decisions."[4] Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene,* 23 HASTINGS INT'L & COMP. L. REV. 27, 50 (1999). *See also* International Court of Justice, *A Guide to the History, Composition, Jurisdiction, Procedure, and Decisions of the Court: The Decision,* http://www.ICJ-cij.org/ICJwww/igeneralinformation/ibbook/Bbookchapter5.HTML [hereinafter "History of the ICJ"](ICJ "has always taken the view that it would be incompatible with the spirit and the letter of the Statute and with judicial propriety to deliver a judgment the validity of

[4]As *LaGrand* makes clear, foreign nationals have a right to judicial review of Article 36 violations – and it is Article 36 that provides the basis for Mr. Vanisi's claim for relief, not the U.N. Charter. Thus, Mr. Vanisi's case is distinguishable from *Committee of United States Citizens v. Reagan,* 859 F.2d 929, 937 (D.C. Cir. 1987).

which. . . would have no practical consequences so far as their legal rights and obligations were concerned")(citing *Free Zone of Upper Savoy & the District of Gex*, 1932 P.C.I.J. (ser. A/B) No. 46, p. 35 (Judgment)).

Mr. Vanisi, a Tongan, respectfully requests that this Court give effect to the ICJ's decision in *LaGrand*, and enforce the United States' obligations under the U.N. Charter, the ICJ Statute, the Vienna Convention, and the Optional Protocol to that Convention.

2. Customary International Law

The decisions of the ICJ are also binding under customary international law. Shabtai Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE 127 (1965); *Committee of United States Citizens v. Reagan*, 859 F.2d 929, 938 (1987). It is equally settled that customary international law is part of the law of the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Although the D.C. Circuit sought to limit the application of this norm of customary international law in *Committee of United States Citizens*, the court acknowledged that "[i]n special agreement cases – in which both parties to a dispute simultaneously submit to the ICJ's jurisdiction--adherence to the Court's judgment may well be the norm." 859 F.2d at 941. *LaGrand* was a special agreement case. The ICJ's jurisdiction in *LaGrand* was founded upon the Optional Protocol to Article 36 of the Vienna Convention, a treaty ratified by the United States. The Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. 1, 21 U.S.T. 325. Thus, unlike the situation in *Committee of Citizens*, the United States consented to the ICJ's jurisdiction in *LaGrand*, and participated fully in written and oral proceedings before the court.

Customary international law requires that nations obey the rulings of an international court to whose jurisdiction they submit – particularly when, as here, the court's jurisdiction is founded upon a binding treaty obligation.

3. The ICJ's Judgment Applies to All Foreign Nationals Sentenced to Severe Penalties.

While the *LaGrand* court addressed a claim brought by Germany on behalf of two German nationals, the principles announced by the court apply with equal force to the case of Mr. Vanisi. The court explicitly acknowledged the position of equally situated foreign nationals when addressing the issue of an adequate remedy for the breach of Article 36:

> The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.

LaGrand, para. 123.

While the ICJ's judgment in *LaGrand* is ostensibly "binding" only on the parties to the litigation,[5] the principles announced in the opinion serve as authoritative precedent for all states party to the Vienna Convention. History of the ICJ, *supra* (court maintains "consistency in its decisions" that "influence the attitude of States towards questions that have already been dealt with by the Court"). It is equally apparent that, in the event of future breaches of Article 36 by the United States involving non-German nationals, parties to the Optional Protocol would be entitled to invoke the ICJ's jurisdiction and obtain a similar judgment. *Id.* (it is "reasonable to suppose that where the ICJ has decided a case it would have to have serious reasons for thereafter deciding in a similar case to adopt a different approach").

Any attempt by the United States to limit the application of *LaGrand* to German nationals would violate the Fourteenth Amendment's proscription against discrimination based on national origin. *See, e.g., Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973); *Makhija v. Deleuw Cather & Co.*, 666 F. Supp. 1158, 1175 (N.D. Ill. 1987). Moreover, the courts of the United States cannot provide a remedy to German nationals that is not equally available to non-Germans, without running afoul of the United States' obligations under both the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination

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[5] Statute of the International Court of Justice, art. 59, Oct. 24, 1945, 59 Stat. 1055.

("CERD").[6]

Article 26 of the ICCPR specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." ICCPR, art. 26. In relevant part, the Race Convention obligates member states to "prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, **or national or ethnic origin**, to equality before the law," including the "right to equal treatment before the tribunals and all other organs administering justice." CERD, Article 5(a), *emphasis added.* This principle is also recognized as a norm of customary international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITE D STATES §711 cmt. C (1987).

In Mr. Vanisi's view, any attempt to limit *LaGrand's* application to German nationals would violate these cardinal principles of non-discrimination.

B. The Application of Procedural Default Rules to Bar Merits Review of This Claim Would Violate the Supremacy Clause.

The State may suggest that state rules of procedural default justify the dismissal of Mr. Vanisi's state post-conviction application. This Court should reject such an invitation, in light of *LaGrand* and the supremacy of treaties over inconsistent state laws.

In *LaGrand,* the ICJ analyzed the application of procedural default rules in a case factually indistinguishable from the case of Mr. Vanisi. There, Germany argued that the courts' application of procedural default rules was inconsistent with the United States' obligations under Article 36(2) of the Vienna Convention. The Court concurred, noting that the waiver of this argument was attributable to the failure of American authorities to comply with their Article 36(1)(b) obligations.

> As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private

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[6]The Convention for the Elimination of All Forms of Racial Discrimination opened for signature May 7, 1966, and was signed by the United States September 28, 1966. 600 U.N.T.S. 195. The Senate ratified the convention October 21, 1994. 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

> counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36.

LaGrand, para. 91.

This conclusion is entitled to deference from state courts considering identical claims. By ratifying the Optional Protocol, the United States conceded the exclusive jurisdiction of the ICJ over "disputes arising out of the interpretation or application of the Convention." The ICJ's authority to decide such issues cannot be questioned. Because Mr.Vanisi's failure to preserve this issue by objecting at trial was directly attributable to the failure of local authorities to advise him of his rights – as in *LaGrand* – the application of the procedural default doctrine here cannot be squared with the ICJ's judgment.

The application of state procedural default rules would also violate the Supremacy Clause of the United States Constitution. Supreme Court has repeatedly recognized the supremacy of treaties over state laws, policies, and constitutions. *United States v. Belmont*, 301 U.S. 324, 327 (1937); *United States v. Pink*, 315 U.S. 203 (1941). State law "must yield when it is inconsistent with, *or impairs the policy or provisions of,* a treaty or of an international compact or agreement. *Pink*, 315 U.S. at 231 (emphasis added).

There can be no doubt that the application of procedural default rules in this case would "impair" this Court's ability to review and consider the merits of the treaty violation here. Thus, the procedural default doctrine must give way to the United States' obligations to give "full effect" to the purposes of Article 36. *See* Douglass Cassel, *Judicial Remedies for Treaty Violations in Criminal Cases*, 12 LEIDEN J. INT'L L. 851, 885 (1999); Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 A.J.I.L. 691, 692 (1998)(federal judges may not fashion procedural rules to subvert the domestic effect of a treaty).

The State may suggest that *Breard v. Greene*, 523 U.S. 371 (1998), supports the application of procedural default rules when considering article 36 claims. *Breard*, however, addressed the application of *federal* rules of procedural default. It has long been accepted that federal statutes and treaties are on the same footing. *Whitney v. Robertson*, 124 U.S. 190 (1888). The same cannot be said

for *state* statutes – which, as noted above, must yield when they impair the United States' treaty obligations. Article 36(2) requires that states give "full effect. . . to the purposes for which the rights accorded are intended." This treaty provision, which supercedes any inconsistent state laws, clearly mandates review of Mr.Vanisi's Article 36 claim.

Finally, it should be noted that Mr. Vanisi's Article 36 claim can be reviewed as an allegation of ineffective assistance of trial and appellate counsel, a claim that is timely and not procedurally barred. Had his previous counsel been cognizant of the right to consular notification and assistance, they could and should have acted to preserve Mr. Vanisi's rights under the treaty. Their failure to do so, constitutes prejudicial ineffective assistance of counsel that warrants relief by the vacating of the conviction and sentence stemming from the violation.

C. Mr.Vanisi's Death Sentence should be Vacated in Accordance with the Remedies Prescribed by International Law for Treaty Violations.

It is axiomatic that international law requires strict observance of due process in death penalty cases. The Inter-American Court on Human Rights has observed that, since the lack of consular notification is "prejudicial to the guarantees of due process," a state may not impose the death penalty in the cases of individuals deprived of their Article 36 rights. OC-16/99 at para. 137. The court concluded that the execution of a foreign national under these circumstances would constitute an arbitrary deprivation of life in violation of article 6 of the ICCPR. *Id.*

The remedy prescribed by the Inter-American Court is consistent with the remedy required under established principles of international law. While Article 36(1)(b) of the Vienna Convention fails to specify an appropriate remedy, this omission should not be taken to mean that no remedy is available to individuals whose rights are violated under the treaty. "[I]t is not unusual for "substantive rights [to] be defined by [treaty] but the remedies for their enforcement left undefined or relegated wholly to the states." Carlos Manuel Vasquez , *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1144 (1992)(quoting Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (1988). Indeed, the International Court of Justice has recognized that a remedy must be imposed for the breach of an international agreement – even where the remedy is not provided in the text of a Convention. *Factory at Chorzow* (Jurisdiction)(Ger. v. Pol.), 1927 P.C.I.J.

(ser. A) No. 6, at 21 (July 27).

The preamble to the Vienna Convention provides some guidance in this regard: it specifies that matters not expressly covered by the treaty are subject to customary international law. 21 U.S.T. at 79. Norms of customary international law therefore determine what consequences should flow from a state's breach of Article 36(1) in a capital case. Vasquez, *supra*, at 1157; Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 Am. J. Int'l L. 341 (2001).

Of the remedies commonly provided under international law, *restitutio in integrum* is the only one suited to the facts of Mr. Vanisi's case. *See People v. Madej*, 2000 Ill. LEXIS 1215 at *16 - *22 (Ill. August 10, 2000)(McMorrow, J., concurring in part and dissenting in part)(advocating that a defendant's death sentence be vacated as a remedy for Article 36 violation, citing OC/16). *Restitutio in integrum* calls for "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification." *Velasquez Rodriguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 26 (1989). *See also Factory at Chorzow* (Merits)(Germ. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 47 (Sept. 13); *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thail.), 1962 ICJ 37 (June 15); International Law Commission: Draft Articles on State Responsibility, 37 I.L.M. 440 (1998); U.N. GAOR, 51st .

The need for an effective remedy is particularly acute in a capital case. An apology – like a promise to refrain from similar violations in the future – will provide no comfort to Mr. Vanisi, who is facing execution. International law requires that procedural guarantees of fairness and due process be strictly observed when a country seeks to impose the death penalty. *See Reid v. Jamaica* (No. 250/1987), Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, *reprinted in* 11 Hum. Rts. L.J. 321 (1990)("in capital punishment cases, the duty of States parties [to the ICCPR] to observe rigorously all the guarantees for a fair trial. . . is even more imperative"); G.A. Res. 35/172, Dec. 15, 1980 (member states must "review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases"); NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 225-28 (1999); Case 11,139, Inter-Am. C.H.R. at para. 171, Report No. 57/96

of 6 December 1996, OEA/Ser/L/V/II.98, Doc. 7, rev., (February 19, 1998)("before the death penalty can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes those rights and freedoms enshrined in the American Declaration [of the Rights and Duties of Man]").

To fulfill the United States' obligations under Article 36, the International Covenant on Civil and Political Rights, and customary international law, this Court should grant Mr. Vanisi's application for post-conviction relief, and vacate his conviction and death sentence.

D. Mr. Vanisi was Prejudiced by the Violation of the Vienna Convention.

The International Court of Justice has unequivocally rejected the notion that a defendant must demonstrate "prejudice" before he is entitled to a remedy for an Article 36 violation:

> It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

LaGrand, para. 74.

The Inter-American Court on Human Rights has likewise implied that a defendant need not show prejudice, before he is entitled to a meaningful remedy for the violation. The decisions of these international tribunals call for revision of the "prejudice" standard adopted by some lower courts considering Vienna Convention claims.[7] Particularly in a capital case, prejudice should be presumed. Should this Court adopt a prejudice test – despite the rejection of this standard by international tribunals – a full evidentiary hearing is warranted. (See discussion, *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994)(holding violation ~~of INS consular notification regulations~~ did not implicate "fundamental" right, therefore alien must demonstrate prejudice); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998)(applying prejudice standard based on *Faulder*).

Although he is not required to demonstrate prejudice, Mr. Vanisi has amply demonstrated the harm resulting from the Article 36 violation in his case. The evidence establishes that at the time of

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[7] *See, e.g., Faulder v. Johnson*, 81 F.3d 515, 520 (Cir. 1996)

his arrest, Mr. Vanisi was a bipolar psychotic who would have benefited greatly from consular assistance. Tongan consular officials, like their Mexican counterparts have done, could have assisted trial counsel in locating witnesses, communicating with non English-speaking family members, and persuading prosecuting authorities to dismiss capital charges. *See, e.g.*, Laura Lafay, *Virginia Ignores Outcry*, THE ROANOKE TIMES, July 6, 1997 (noting that Mexican consulate negotiated plea bargains on behalf of two Mexican citizens facing the death penalty); Claire Cooper, *Foes of Death Penalty Have a Friend: Mexico*, SACRAMENTO BEE, June 26, 1994. (noting Mexico's intervention in Kentucky and California capital cases where death penalty avoided) Tonga could have served as a liaison between the defendant and his trial counsel.[8] Perhaps most important, given the facts of this case,Tonga could have assisted Mr. Vanisi in locating competent defense counsel and effective mental health and other experts. All of these efforts are consistent with the non-exhaustive list of functions enumerated in article 5 of the Vienna Convention.12 21 U.S.T. 77, art. 5.

Tongan consular officers could have sought out assistance in Mr. Vanisi's case, and could have consulted attorneys regarding standards of representation in capital cases. The consulate could also have retained a lawyer to advise trial counsel.. If trial counsel appeared to be mishandling Mr. Vanisi's case, the consulate could have petitioned the court to appoint more experienced counsel, or – if those efforts were unsuccessful – could have sought funds from the Tongan Foreign Ministry to retain additional legal counsel.

In addition to assisting Mr. Vanisi obtain competent legal representation, the consulate could have provided funds for an investigator or mitigation specialist, if trial counsel lacked the resources to obtain their assistance. The consulate would have been willing to assist in gathering records from Tonga, facilitating contact with Tongan witnesses, and arranging the transport of Tongan witnesses to trial. In the other words, the Tongan Consulate could have played as active a role as necessary to help ensure Mr. Vanisi avoided the death penalty.

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[8] The U.S. Department of State also recognizes that a consular official should serve as "effective liaison with attorneys, court officials and prosecutors," 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL §423.3, and should help "arrestees understand what is happening to them" as "a yardstick against which they can measure attorney performance." *Id.* at §413.4

Had Tongan consular officials been promptly notified of Mr. Vanisi's detention, they would have been in a position to assist him and his counsel in preparing for trial. At that point, their efforts would have made a qualitative difference in his defense. Once Mr. Vanisi was sentenced to death, there was nothing they could do to change the outcome.

CLAIM 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.

Supporting Facts.

The record shows that Mr. Vanisi was charged in Count I with murder in the first degree, a violation of NRS 200.010 and NRS 200.030 and NRS 193.165, a felony, in that:

> the said defendant during the course of and in furtherance of an armed robbery did willfully and unlawfully murder Sergeant George Sullivan in that the said defendant on or about January 13, 1998, did kill and murder Sergeant George Sullivan, a human being, in the perpetration and/or furtherance of an armed robbery...

(TT, Vol. VI, 1009).

Further, the record shows that when the jury imposed a death sentence for the murder, it found three aggravating circumstances: (1) *the murder occurred in the commission of or an attempt to commit robbery*; (2) the victim was a peace officer engaged in the performance of his official duties, and the defendant knew or reasonably should have known the victim was a peace officer; and (3) the murder involved mutilation.

The inclusion of this first aggravator: that the murder occurred in the commission of or an attempt to commit robbery, which is based upon the predicate felony used to find felony murder, brings rise to the instant claim.

Legal Argument.

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. In 1972, the Supreme Court held that capital sentencing schemes which do not adequately guide the sentencers' discretion and thus permit the arbitrary and capricious imposition of the death penalty violate the

Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 206-07, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (plurality opinion) (summarizing Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)); Id. at 220-21 (White, J., concurring) (same).

The Eighth Amendment applies to the individual states through the Fourteenth Amendment's Due Process Clause. Robinson v. California, 370 U.S. 660, 666, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962); U.S. Const. amend. XIV, § 1. As a result, the U. S. Supreme Court has held that to be constitutional a capital sentencing scheme **"must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."** Zant v. Stephens, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)(emphasis added).

The Nevada Supreme Court recently recognized that "Nevada's current definition of felony murder is broader than the definition in 1972 when Furman temporarily ended executions in the United States." McConnell v. State, 120 Nev. Adv. Op. No. 105, 102 P.3d 606, 622 (2004)(citation omitted).

On the issue of narrowing as required by Furman, the McConnell court recognized that one legal scholar concluded: "At a bare minimum, then, a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-Furman capital homicide class." Richard A. Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C.L. Rev. 1103, 1124 (1990).

Accordingly, the Nevada Supreme Court in McConnell found:

> **So it is clear that Nevada's definition of felony murder does not afford constitutional narrowing.**

McConnell, 102 P.3d at 622 (emphasis added).

The McConnell court then concluded:

> **We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated.**

McConnell, 102 P.3d at 624 (emphasis added).

The McConnell court clarified its ruling:

> [I]n cases where the State bases a first-degree murder conviction in whole or part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony.

McConnell, 102 P.3d at 624.

Concerning this clarification, the McConnell court went one step further and cautioned the State:

> We further prohibit the State from selecting among multiple felonies that occur during "an indivisible course of conduct having one principal criminal purpose" and using one to establish felony murder and another to support an aggravating circumstance.

McConnell, 102 P.3d at 624-25.

Thus, under the authority of McConnell, the first aggravator found in this case, that *the murder occurred in the commission of or an attempt to commit robbery*, is unconstitutional, and therefore invalid.

Remedy.

The State must prove beyond a reasonable doubt that this error did not effect the ultimate sentence of death. Because it cannot be known to what degree the jury was influenced by this aggravating circumstance, the State cannot meet its burden. It cannot be known how much weight the jury gave this aggravating circumstance, in comparison to the other two, and in light of any mitigating circumstances. Therefore, the sentence of death in this case must be overturned and a new jury empaneled to consider the appropriate sentence.

For this court -- or any other -- to reweigh the aggravating circumstances on its own, or to conduct a "harmless error" analysis in the face of this invalid aggravating circumstance would violate the Due Process clause of the Fourteenth Amendment to the United States Constitution. Any finding by this court that harmless error occurred as a result of this invalid aggravator would be mere speculation and conjecture. To uphold anything as serious as the penalty of death upon such improper conjecture would be to admit, as Justice Marshall feared, that **"the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system."** Godfrey v. Georgia, 466 U.S. at 440, 100 S.Ct. at 1770 (J. MARSHALL, Concurring).

Moreover, the United States Supreme Court decision of Ring v. Arizona, 536 U.S. 584, 153

L.Ed.2d 556, 122 S.Ct. 2428, (2002) held that a court may not reweigh the aggravating and mitigating circumstances in light of a finding that one or more aggravating circumstances were found to be invalid. The Court in Ring considered a situation in which the Supreme Court of Arizona agreed with Ring on appeal that the evidence presented at the trial court level was insufficient to support the aggravating circumstance of depravity, State v. Ring, 200 Ariz. 267, 281-82, 25 P.3d 1139, 1153-1154 (2001), but it upheld the trial court's finding on the aggravating factor of pecuniary gain. The Arizona Supreme Court then reweighed that remaining aggravating factor against the sole mitigating circumstance (Ring's lack of a serious criminal record), and affirmed the death sentence. Id., 200 Ariz. at 282-284, 25 P.3d at 1154-1156. The U. S. Supreme Court reversed the judgment of the Arizona Supreme Court. Ring, 536 U.S. at 596. *See also*, Apprendi v. New Jersey, 530 U.S. 466, 147 L.Ed.2d 435, 120 S. Ct. 2348, (2000); Commonwealth of the Northern Mariana Islands v. Bowie, 236 F.3d 1109 (9th Cir.2001); Moore v. Morton, 255 F.3d 95 (3d Cir. 2001); State v. Ward, 555 S. E. 2d 251 (N. C. 2001); State v. Allen, 353 N.C. 504, 546 S.E. 372 (N.C.2001); People v. Kuntu, 196 Ill. 2nd 105, 752 N.E. 2nd 380, (Ill. 2001).

The Supreme Court in Ring based its decision upon Apprendi v. New Jersey, 530 U.S. 446 (2000), in which the Court unequivocally held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." Id. Citing its previous decision in Jones v. United States, 526 U.S. 227 (1999), the Court held:

> With that exception [of the fact of a prior conviction], we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S.Ct. I215 (opinion of STEVENS, J.); see also id., at 253, 119 S.Ct. 1215 (opinion of SCALIA, J.).

Id. (footnote omitted).

The concurring opinions of the Court's most conservative justices were equally unequivocal:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee - - what it has been assumed to guarantee throughout our history - - the right to have a jury determine those facts that determine the maximum sentence the law allows.

...

> [T]he guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Id. at 17 (Scalia, J., concurring) (emphasis supplied).

> In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury.
>
> ...
>
> [A] "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - - of whatever sort, including the fact of a prior conviction - - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crime, has provided for setting the punishment of a crime based on some fact - - such as a fine that is proportional to the value of stolen goods - - that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since McMillan [v. Pennsylvania, 477 U.S. 79 (1986)], is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. at l, 8-19 (Thomas, J., concurring).

Under this analysis, there can be no doubt that the aggravating circumstances prescribed by Nev. Rev. Stat. § 200.033 are "elements" of capital murder. Nev. Rev. Stat. § 200.030 defines the degrees of murder and prescribes the maximum punishments allowed.[9] First degree murder is punishable by various terms of imprisonment, §200.030(4)(b), but it is punishable by death "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances

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[9]Nev. Rev. Stat. § 200.030(4) provides:

A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances; or

(b) By imprisonment in the state prison;

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a maximum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

which are found do not outweigh the aggravating circumstance or circumstances...." §200.030(4)(a) (emphasis supplied). The crucial role of aggravating circumstances as elements of capital-eligible first degree murder is further demonstrated by the last sentence of § 200.030(4): "A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole."

Thus, under state law both the existence of aggravating factors, and the determination that the aggravating factors are not outweighed by the mitigating factors, are necessary elements of death eligibility and are necessary to increase the maximum punishment provided for first degree murder from the various possible sentences of imprisonment to death. Under Apprendi, the due process guarantee of the federal Constitution requires those elements to be decided by a jury. Accordingly, any procedure which would allow judges to make those findings, by post-conviction reweighing or otherwise, is unconstitutional.

The unconstitutionality of the Nevada procedure is further demonstrated by the distinction drawn in Apprendi between its holding and the holding in Walton v. Arizona, 497 U.S. 639 (1990). ,In Apprendi, the Court distinguished Walton, holding that the rule it announced would not "render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." Id. at 16 (citation omitted; emphasis added). The court relied on the reasoning in Justice Scalia's opinion in Almendarez-Torres v. United States, 523 U.S. 224, 257 n. 2 (1998) (Scalia, J., dissenting):

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death. it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

Apprendi at 16 (emphasis supplied). Under the Arizona scheme at issue in Walton, the statute provides that the maximum penalty for first degree murder is death. Ariz. Rev. Stat. § 131 lO5(C)("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703."); Walton v. Arizona, 497 U.S. at 643 (expressly overruled by Ring, *supra*).

By contrast, under Nevada law the penalty of death is not the maximum penalty for first degree

murder simpliciter: the statute itself provides that the penalty is not available for first degree murder unless additional elements - - the existence of aggravating circumstances, and the failure of mitigating circumstances to outweigh the aggravating circumstances - - are found. *See* Apprendi at 29 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment - - for establishing or increasing the prosecution's entitlement - - it is an element.") Simply put, a jury's verdict of first degree murder under Nevada law is not "a jury verdict holding a defendant guilty of a capital crime," Id. at 16, because the statute itself provides that the punishment of death is not available simply on the basis of that verdict, but can be imposed "only if" further findings are made to increase the available maximum punishment.

Under Ring & Apprendi, the courts of Nevada cannot constitutionally proceed to make the findings in this case regarding the existence of aggravating factors and/or the weighing of mitigating factors to aggravating factors which are necessary to increase the maximum punishment for the offense to a death sentence. Findings of these elements of capital murder can constitutionally be made only by a jury.

Finally, this Court is bound to follow Apprendi and Ring under the supremacy clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI; Powell v. Nevada, 511 U.S. 79 (1994) (state court cannot refuse to apply federal constitutional retroactivity doctrine); Nev. Const. Art. 1 § 2.

Because neither this court not the Nevada Supreme Court can constitutionally make the findings of elements necessary to impose a death sentence, this Court must impanel a new jury to determine the appropriate sentence.

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CLAIM 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.

Supporting Facts:

On June 23, 1999, a closed hearing was held before the District Court to address the Motion of Mr. Vanisi to dismiss his counsel, the Washoe County Public Defender's Office, and to appoint new counsel. The court heard from Mr. Vanisi, who informed the court that his counsel had not given him all the information that he needed and that, as a result, he was being forced to make decisions based upon limited information. Further, Vanisi informed the court that his own research contradicted what his attorneys were telling him. (Transcript of Proceedings, hereinafter "TOP", June 23, 1999, 5).

The court would not accept Mr. Vanisi's claim of a conflict of counsel without specific information about the alleged conflict. (TOP, June 23, 1999, 5-6). Vanisi repeatedly asked the Court for guidance in what it wanted him to explain. (TOP, June 23, 1999, 7, 8, 9). Vanisi explained that: (1) his attorneys weren't giving him sound advice; (2) they were not spending adequate time with him; and (3) he was getting limited information from them. The court required more. (TOP, June 23, 1999, 12). Mr. Vanisi then stated that his research had shown that he could not be prosecuted twice, that the State could not retry his case after the initial mistrial. (TOP, June 23, 1999, 15, 17). He complained that his lawyers did not know the law on the issue of double jeopardy. (TOP, June 23, 1999, 17). Further, Vanisi explained that Mr. Specchio, his lead counsel, had put on the record that he and his investigator had seen Vanisi over 20 times, but that the visitation records showed that he had not been there even 10 times. (TOP, June 23, 1999, 28-29).

The court expressed its opinion then that Mr. Vanisi was merely attempting to delay the trial. (TOP, June 23, 1999, 33-34). The court denied Mr. Vanisi's motion. (TOP, June 23, 1999, 34). Afterward, one of Vanisi's lawyers, Mr. Gregory, implored the court to take into consideration how difficult it was for him to have a substantive conversation with Mr. Vanisi. (TOP, June 23, 1999, 37-38). Then Mr. Gregory requested that Mr. Vanisi be medicated in order to make dealing with him easier. (TOP, June 23, 1999, 38). The Court indicated that Vanisi would have to be canvassed after the administration of any medications to verify his competence under the medications. (TOP, June 23, 1999, 39). On July 12, 1999, an Ex-parte Order for Medical Treatment was entered to provide Vanisi with Lithium and Wellbutrin and Titrate.

On August 03, 1999, another sealed hearing was held in which Mr. Gregory informed the Court that Mr. Vanisi had been refusing to cooperate with them. (TOP, August 03, 1999, 1). Mr. Gregory informed the Court that he had informed Mr. Vanisi of his right to represent himself under Faretta, *infra*, and Vanisi had indicated that he wished to do so. (TOP, August 03, 1999, 1). Mr. Vanisi then personally requested the same from the court. Then court answered that Vanisi would have to put the motion in writing. (TOP, August 03, 1999, 2).

On August 05, 1999, Vanisi filed a written Motion for Self-Representation. On August 10, 1999, a hearing was held on the motion. The Court canvassed Vanisi pursuant to SCR 253 and heard testimony from a psychiatrist who had treated Vanisi. On August 11, 1999, the Court entered an Order denying Vanisi's Motion for Self-Representation. The Court based its decision upon three grounds: (1) the motion was made for purpose of delay; (2) Vanisi was abusing the judicial process and presented a danger of disrupting subsequent court proceedings; and (3) the case was a complex, death penalty case, and the court had concerns about Vanisi's ability to represent himself and receive

a fair trial. The Nevada Supreme Court ruled that the third reason was invalid. Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001).

The other two grounds are not supported by the record. The dispute between Vanisi and his lawyers was long-standing and by all appearances, actual and legitimate. Therefore, the finding that the *Faretta* motion was made for the purpose of delay was arbitrary and capricious. Indeed, as mentioned, *supra*, another time when Vanisi announced his legitimate and protected intention to appeal the court's denial of his motion to dismiss his counsel, the court unexplainedly expressed its opinion then that Mr. Vanisi was merely attempting to delay the trial. (TOP, June 23, 1999, 33-34). Accordingly, the record reflects that by the filing of his *Faretta* motion, Mr. Vanisi was merely attempting to resolve a documented and long-standing conflict between himself and the Public Defender's Office. Because the court had refused to grant his motion for new counsel, Vanisi was left with no other option than to ask to represent himself.

Accordingly, no abuse of process nor intentional disruption is shown on the record. The record merely reflects an ongoing dispute between Mr. Vanisi and the Washoe County Public Defender's Office. Mr. Vanisi first attempted to dismiss his counsel. When he was not successful, he attempted to represent himself. Further, as set forth *supra*, Vanisi raised actual and specific conflicts, as well as intelligent and discrete legal issues in his motions. There were not repetitive motions filed, nor any patently frivolous arguments raised. Although it sometimes took Mr. Vanisi some time to express his thoughts and arguments to the court, he was at all times respectful of the court and polite in his requests. For example, in imploring the Court's assistance to free one of his hands during the proceeding so he could review his papers for his argument, he referred to himself as "an English gentleman." (TOP, June 23, 1999, 16).

Indeed, in one hearing when Mr. Gregory was complaining about Mr. Vanisi being manic, the Court disagreed, finding him "excitable," but not manic. (TOP, June 23, 1999, 37). Specifically, the court found that Mr. Vanisi was no worse than trial counsel, Mr. Gregory. (TOP, June 23, 1999, 37). These facts belie any finding that Mr. Vanisi was abusing the process or somehow intolerably disruptive.

Even the Concurring Opinion in the Nevada Supreme Court agreed that the District Court erred in denying Vanisi's request to represent himself on the grounds that his request was for the purpose of delay. Vanisi, 22 P.3d at 1174. Further, the Concurring Opinion found that the record did not reflect that Vanisi had been or indication that he would be disruptive. Id. 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.

Justice Rose (with whom Justices Agosti and Becker agreed) continued:

> 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...
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> 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, 22 P.3d at 1174-75.

Finally, the Concurring Opinion noted that counsel for the State as well as counsel for the defense agreed that Vanisi had been "anything but disruptive." Vanisi, 22 P.3d at 1175. The District

Court's decision otherwise is belied by the record and should be reversed.

Legal Argument.

Structural Error.

In Arizona v. Fulminate, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991), Chief Justice Rehnquist, speaking for a majority of the court, distinguished between "trial error" and "structural error" in determining whether a federal constitutional violation could be analyzed under the Chapman test or required automatic reversal. The Court explained that "structural error" is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 310. Examples of structural error include total deprivation of the right to counsel at trial, a judge who is not impartial, the unlawful exclusion of members of the defendant's race from a grand jury, deprivation of the right to self-representation at trial, and deprivation of the right to public trial. Id. at 309-10. Because the entire conduct of the trial is affected, structural error defies analysis by "harmless-error" standards. Id.

In Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), the United States Supreme Court indicated that a violation of the right to counsel may be error that is reversible *per se*. Chapman explained "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *citing* Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), as support. Chapman, 386 U.S. at 23 & n.8.

The Nevada Supreme Court has agreed that automatic reversal occurs where the defendant is denied substantive due process. Manley v. State, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing* Guyette v. State, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968).

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The Application of Faretta.

In Faretta v. California, 422 U.S. 806, 821 (1975), the Supreme Court held that an accused has a Sixth Amendment right to conduct his or her own defense in a criminal case. *See also* Martinez v. Court of Appeals, 528 U.S. 152, 154 (2000); U.S. v. Purnett, 910 F.2d 51, 54 (2d Cir. 1990) ("The right to self-representation and the assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin."); Fowler v. Collins, 253 F.3d 244, 249 (6th Cir. 2001) ("The Sixth Amendment implies a right of self-representation.").

In *Faretta*, the Court considered whether the Sixth Amendment required, through the Due Process Clause of the Fourteenth Amendment, that states recognize the right of self representation in criminal trials. The Court concluded that such was required. *Id.*, at 818-820. The Court also found that this right did not arise from a defendant's power to waive the right to assistance of counsel; it was held to be ***an independent right found in the structure and history of the Constitution***. *Id.*, at 820.

In discussing the language of "assistance of counsel," the Court observed that "the Sixth Amendment contemplated that *counsel ... shall be an aid to a willing defendant* — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." Id. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." Id., at 821.

As the *Faretta* Court pointed out, "In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted the practice of forcing counsel upon an unwilling defendant in criminal proceedings" — the Star Chamber. Id.

The Petitionert fared no better, in regards to his choice of counsel vs. self representation, than did defendants in the Star Chamber. The Star Chamber specialized in trying "political offenses," and

"for centuries symbolized disregard of basic individual rights." Id. Considering some of the political aspects of the prosecution of Mr. Vanisi, he may well feel that he was tried in a modern Star Chamber. The parallels are ominous. The Star Chamber was efficient and arbitrary at enforcing high state policy. Id., at 822, fn 17.

The right of self representation in colonial times was fervently insisted upon. *Id.*, at 826. Lawyers at that time were "synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives." Id.

The notion of compulsory counsel was totally foreign to the Founders. Id., at 833. **"[T]here is no evidence the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel."** Id. [Emphasis added].

The Eleventh Circuit has imagined what the Framers did not, holding that the right to self-representation is inferior to the right to counsel, and does not attach until asserted. Stano v. Dugger, 921 F.2d 1125, 1143 (11th Cir. 1991). That holding directly contradicts the historical analysis of the Supreme Court in *Faretta*. It also confounds logic and common sense. How can the right to have "assistance of counsel" in defending oneself be preeminent over the prior right to defend oneself? How can the right to speak through an agent be superior to the prior right to speak directly?

At the time of the formation of this country, the words "attorney" and "counselor" were understood a bit differently than they may be today. "Attorney" was defined in Samuel Johnson's *Dictionary of the English Language* (1770), as "such a person as by consent, commandment, or request ... takes upon him the charge of other men's business, *in their absence*." [Emphasis added].

This brings to mind today's similar "power of attorney."

"Counselor," on the other hand, was defined as: "One that gives advice; confident [sic], bosom friend; one that is consulted in a case of law." Samuel Johnson's *Dictionary of the English Language* (1770).

The attorneys appointed to represent Mr. Vanisi at trial, were not his representatives, not in any sense other than that of *tenuous and unacceptable legal fiction.* At the time the Framers adopted the Constitution, the term "representative" was defined to mean "one exercising the vicarious power given by another." Samuel Johnson's *Dictionary of the English Language* (1770).

"Counsel [advice] is only given to those who are willing to have it." *On Municipal Government, The Works of James Wilson* [Supreme Court Justice] (1804), quoting Baron Puffendorf.Mr. Vanisi did not willingly accept counsel from nor delegate his right to speak to his attorneys.

The Founders believed that self-representation was a basic right, a natural right. Faretta, 422 U.S. at 830. The right to self-representation is nothing more than an expression of the natural right of self defense, the right of self-preservation, the first right recognized by any civilized people. *See Blackstone's Commentaries*, bk. 1, ch. 1, 129. The right of self-representation didn't need to be spelled out in a Constitution or a Bill of Rights — no one would have thought to deny it. It preexisted the Constitution, remains an unenumerated right, and, as such, still prevails. See the Ninth Amendment, United States Constitution. The right to *assistance of counsel* was more tenuous than the right of self representation, and apparently was thought in need of an express written guarantee. Thus, the Sixth Amendment guarantee.

The Supreme Court in *Faretta* analyzed whether the defendant had knowingly and intelligently

chosen to forego the benefits of counsel, counsel which was later forced upon him. Faretta, 422 U.S. at 835. Substituting the Petitioner's name and appropriate facts, the *Faretta* analysis would now read: Here, [months] before trial, VANISI clearly and unequivocally declared to the court that he wanted to represent himself and did not want counsel. The record affirmatively shows that VANISI was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The court had warned VANISI that he thought it was a mistake not to accept the assistance of counsel, and that VANISI would be required to follow all the "ground rules" of trial procedure. We need make no assessment of how well or how poorly VANISI had mastered the intricacies of the hearsay rule and the [federal code provisions] ... For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

In forcing VANISI, under these circumstances, to accept against his will a [court-appointed attorney], the court deprived his of his constitutional right to conduct his own defense. Accordingly, the judgment before us is vacated ... Paraphrasing *Faretta*, 422 U.S. at 835-836.

It is no answer to the Petitioner's challenge to say that he acquiesced in accepting his court-appointed counsel. The record is clear that he was coerced and threatened into accepting counsel, that he was deprived of any meaningful possibility of conducting his own defense, and that the Court would do nothing to help him gain access to what he needed to handle his own defense. His court-appointed counsel admitted to the magistrate judge that he had coerced him into accepting his "assistance." Locking up the Petitioner prior to trial and depriving him of any meaningful ability to conduct his own defense resulted in "interposing an organ of the State between an unwilling defendant and his right to defend himself personally." This unwanted counsel "represented" Defendant only through a *tenuous and unacceptable legal fiction.*

CLAIM 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.

Supporting Facts.

On August 26, 1999, after the court had denied Mr. Vanisi's motion for new counsel and his motion to represent himself under Faretta, *supra*, a new in camera hearing was held to hear from Vanisi's counsel on their ex parte motion to withdraw as counsel under SCR 172. During that hearing, counsel for Vanisi, Mr. Gregory, revealed to the court that in February of 1999, he had a conversation with Mr. Vanisi in which Vanisi admitted that he in fact killed the alleged victim, Officer Sullivan. (TOP, August 26, 1999, 3). Gregory explained that as a result of this admission, Vanisi's counsel attempted to fashion a defense based upon provocation, but 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. (TOP, August 26, 1999, 3, 10). Vanisi's counsel explained to him that they would not put on such a defense in light of his confession to them, because they had ethical responsibilities. (TOP, August 26, 1999, 3-4). At some point, Vanisi inquired as to his right to represent himself. As has been set forth elsewhere herein, Counsel advised Vanisi this was possible, Vanisi so moved the court and the same was denied. (TOP, August 26, 1999, 4-6). Accordingly, counsel for Vanisi then contacted bar counsel, Michael Warhola, and presented their dilemma to him. "Without hesitation" bar counsel advised that they had to withdraw as counsel pursuant to SCR 166 and 172. (TOP, August 26, 1999, 6, 13). Counsel cautioned the court that if they were not allowed to withdraw, they would have to certify themselves as ineffective. (TOP, August 26, 1999, 6, 9). Gregory cautioned the court that if they were required to stay on the

case, Vanisi would wind up not having a defense, that counsel would wind up sitting "like bumps on a log doing nothing." (TOP, August 26, 1999, 10). Additionally, bar counsel informed counsel for Vanisi -- and they were of the same mindset -- that to offer evidence or cross-examine vigorously or select a jury under those circumstances would be a prohibited ethical violation. (TOP, August 26, 1999, 13, 18).

In contrast to the defense presented to Vanisi by counsel, Vanisi wished to put on a defense that he wasn't there and that he was being used as a scapegoat. (TOP, August 26, 1999, 17). Vanisi intended to testify accordingly. (TOP, August 26, 1999, 18). Accordingly, counsel for Vanisi requested to be able to withdraw as counsel. (TOP, August 26, 1999, 22).

The District Court denied their request.

Legal Argument.

A conflict of counsel violates the Sixth Amendment; prejudice to the client is presumed and need not be shown.

It is well established that the right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Indeed, the Sixth Amendment guarantees a criminal defendant the right to conflict-free representation. Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992); Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993).

The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, she deprives her client of his Sixth Amendment right as surely as if he failed to appear at trial. *See* Holloway v. Arkansas, supra, 435 U.S., at 490, 98 S.Ct., at 1181 ("The mere physical presence of an attorney does not fulfill the Sixth

Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters").

For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial. Cuyler v. Sullivan, 446 U.S. 335, 349-350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980).

The right to conflict-free counsel is simply too important and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); *accord*, Cuyler v. Sullivan, *supra*, 446 U.S., at 349, 100 S.Ct., at 1718. "We should be no more willing to countenance nice calculations as to how a conflict adversely affected counsel's performance. The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.' " Cuyler v. Sullivan, *supra*, at 349, 100 S.Ct., at 1719 (*quoting* Glasser v. United States, *supra*, 315 U.S., at 76, 62 S.Ct., at 467).

The Nevada Supreme Court has ruled:

> **Where an attorney's loyalty to a defendant in a criminal case is diluted by that attorney's obligation to others, the defendant's sixth amendment right to effective assistance of counsel is not satisfied.**

Coleman, 109 Nev. at 3, 846 P.2d at 277.

Trial counsel had a personal and ethical conflict regarding their representation. The Nevada Supreme Court has found defense counsel to be ineffective whenever "[a]n actual conflict of interest which adversely affects a lawyer's performance," is present. Coleman, *supra*; Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1375 (1992). The Court has repeatedly held that prejudice is presumed in these cases. See Clark, *supra*; Coleman, *supra*; Mannon v. State, 98 Nev. 224, 645 P.2d 433 (1982);

Harvey v. State, 97 Nev. 477, 634 P.2d 1199 (1981); Harvey v. State, 96 Nev. 850, 619 P.2d 1214 (1980).

It is obvious from the language of these cases that in situations of ethical obligation which create conflicts of interest in the representation of a client: (1) the attorney can no longer provide effective assistance of counsel under the Sixth Amendment; (2) that the attorney must bring the matter before the court; and (3) the court has an obligation to remedy the situation.

The United States Supreme Court has recognized that where a court has denied counsel's request to be replaced because of a conflict of interest, a showing of prejudice is not required in order to obtain a reversal, as prejudice to the defendant is presumed. Flanagan v. United States, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing* Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

Sixth Amendment Right to Counsel Extends to Sentencing.

The Sixth Amendment right to counsel at a sentencing hearing has been established. Mempa v. Rhay, 389 U.S. 128, 134- 35, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967). The recognition of this right involved the acknowledgment that sentencing is one of "the various stages in a criminal proceeding." Id. at 134, 88 S.Ct. at 256.

See also the Nevada Supreme Court:

> It is well established that "***the sentencing (of the defendant) is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.***" *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). See also *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Smith v. Warden*, 85 Nev. 83, 450 P.2d 356 (1969).

Cunningham v. State, 94 Nev. 128, 130-131, 575 P.2d 936, 938 (1978).

Accordingly, the conflict extended through the Penalty Phase of this trial and therefore Mr.

Vanisi should be granted a separate penalty phase with different counsel in order to remedy the prejudice which is presumed from the actual conflict which exists on the record in this case.

CLAIM 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.

Supporting Facts.

The record shows that counsel revealed privileged information to the court during their motion to withdraw as counsel. As set forth above, on August 26, 1999, after the court had denied Mr. Vanisi's motion for new counsel and his motion to represent himself under Faretta, *supra*, a new in camera hearing was held to hear from Vanisi's counsel on their ex parte motion to withdraw as counsel under SCR 172. During that hearing, counsel for Vanisi, Mr. Gregory, revealed to the court that in February of 1999, he had a conversation with Mr. Vanisi in which Vanisi admitted that he in fact killed the alleged victim, Officer Sullivan. (TOP, August 26, 1999, 3). Gregory explained that as a result of this admission, Vanisi's counsel attempted to fashion a defense based upon provocation, but 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. (TOP, August 26, 1999, 3, 10). Therefore, counsel for Mr. Vanisi revealed privileged attorney-client information to the court, in violation of their professional responsibilities, a well as Mr. Vanisi's constitutional rights.

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Legal Argument.

THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This is the appropriate place in which to raise the questions regarding the effectiveness of counsel through the forum of a Petition for Writ of Habeas Corpus (Post Conviction). Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994). The question of ineffective assistance of counsel should not be considered in a direct appeal from a judgment of conviction. Instead, the issues should be raised, in the first instance, in the district court in a petition for post-conviction relief so that an evidentiary record regarding counsel's performance at trial can be created. Wallach v. State, 106 Nev. 470, 796 P.2d 224 (1990).

In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to independent review. The Supreme Court reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984).

The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland. The Court revisited this issue in Warden v. Lyons, 100 Nev. 430 (1984) and Dawson v. State, 108 Nev. 112 (1992). The Nevada Supreme Court has adopted Strickland's two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency.

In Smithart v. State, 86 Nev. 925 (1970), the Nevada Supreme Court held that it will presume that an attorney has fully discharged their duties and that such presumption can only be overcome by

strong and convincing proof to the contrary. The court went on in Warden v. Lischko, 90 Nev. 220 (1974), to hold that the standard of review of counsel's performance was whether the representation of counsel was of such low caliber as to reduce the trial to a sham, a farce or a pretense.

The standard for reviewing claims of ineffective assistance of counsel -- as set forth by the Strickland Court -- is as follows: First, Petitioner must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness. Second, appellant must show that counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the results of the trial would probably have been different. Davis v. State, 107 Nev. 600, 601-02, 817 P.2d 1169, 1170 (1991) (*citing* Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984)). The Strickland test, also requires a showing of prejudice regarding the error(s) alleged.

The Nevada Supreme Court has found ineffective assistance of counsel for a wide range of errors or failures, from *failure to properly investigate*, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), to *failure to call certain key witnesses*, Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996), to errors involving *counsel's conflict-of-interest*, Coleman v. State, 109 Nev. 1, 846 P.2d 276 (1993), to matters as simple as a *counsel's failure to object* to a prosecutor's impermissible comments on defendant's post-arrest silence, Washington v. State, 112 Nev. 1054, 921 P.2d 1253 (1996), or a *counsel's inability to phrase his questions* to a witness so as to elicit proper responses to his attempt to rebut certain inferences made by the State, Knorr v. State, 103 Nev. 604, 607, 748 P.2d 1, 3 (1987).

In addressing an issue on point with the instant case, the Supreme Court of North Carolina determined that prejudice may be presumed where defense counsel improperly concedes his client's guilt. The Nevada Supreme Court responded by holding:

> Although this Court still adheres to the application of the Strickland test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'

Jones v. State, 110 Nev. 730, 877 P.2d 1052, 1057 (Nev. 1994).

But for the numerous failures of trial and appellate counsel to raise the critical issues addressed herein, the numerous violations of Petitioner's constitutional rights would likely have been remedied before now. The Nevada Supreme Court has recently clarified the standard of proof required to establish claims of ineffective assistance of counsel:

> Choosing consistency with federal authority, we now hold that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence. To the extent that our decision today conflicts with the "strong and convincing" language of Davis and its predecessors, we expressly overrule those cases. Therefore, when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence. Next, as stated in Strickland, the petitioner must establish that those facts show counsel's performance fell below a standard of objective reasonableness, and finally the petitioner must establish prejudice by showing a reasonable probability that, but for counsel's deficient performance, the outcome would have been different.

Means v. State, 120 Nev. Adv. Op. No. 101 (2004).

The Petitioner respectfully submits that his trial counsel's disclosure of privileged attorney client information to the trial court fell below an objective standard of reasonableness. It created an actual conflict of interest between counsel and Mr. Vanisi. Moreover, as the privileged information, which was originally submitted under seal, was turned over to the State, (TOP, August 26, 1999, 2) the disclosure completely foreclosed the possibility of Mr. Vanisi pursuing the defense he wished and compromised his right to testify in his defense. Thus, the trial court compounded the prejudice to Mr. Vanisi from the disclosure of his privileged admissions to

counsel by disclosing the admissions to the State, who could subsequently use them against him, in the event he testified or otherwise supported his defense theory that he did not commit the offense. These facts have been established in the record by a preponderance of the evidence. The prejudice from the disclosure is apparent. However, because the disclosure unequivocally demonstrates an actual conflict of interest between Mr. Vanisi and the individuals compelled to represent him, prejudice must be presumed.

The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, she deprives her client of his Sixth Amendment right as surely as if he failed to appear at trial. *See* Holloway v. Arkansas, supra, 435 U.S., at 490, 98 S.Ct., at 1181 ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters").

For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial. Cuyler v. Sullivan, 446 U.S. 335, 349-350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980).

The right to conflict-free counsel is simply too important and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); *accord*, Cuyler v. Sullivan, *supra*, 446 U.S., at 349, 100 S.Ct., at 1718. "We should be no more willing to countenance nice calculations as to how a conflict adversely affected counsel's performance. The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.' " Cuyler v. Sullivan, *supra*, at 349, 100 S.Ct., at 1719 (*quoting* Glasser v. United States, *supra*, 315

U.S., at 76, 62 S.Ct., at 467).

The Nevada Supreme Court has ruled:

> **Where an attorney's loyalty to a defendant in a criminal case is diluted by that attorney's obligation to others, the defendant's sixth amendment right to effective assistance of counsel is not satisfied.**

Coleman, 109 Nev. at 3, 846 P.2d at 277.

Trial counsel had a personal and ethical conflict regarding their representation. The Nevada Supreme Court has found defense counsel to be ineffective whenever "[a]n actual conflict of interest which adversely affects a lawyer's performance," is present. Coleman, *supra*; Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1375 (1992). The Court has repeatedly held that prejudice is presumed in these cases. See Clark, *supra*; Coleman, *supra*; Mannon v. State, 98 Nev. 224, 645 P.2d 433 (1982); Harvey v. State, 97 Nev. 477, 634 P.2d 1199 (1981); Harvey v. State, 96 Nev. 850, 619 P.2d 1214 (1980).

It is obvious from the language of these cases that in situations of ethical obligation which create conflicts of interest in the representation of a client: (1) the attorney can no longer provide effective assistance of counsel under the Sixth Amendment; (2) that the attorney must bring the matter before the court; and (3) the court has an obligation to remedy the situation.

The United States Supreme Court has recognized that where a court has denied counsel's request to be replaced because of a conflict of interest, a showing of prejudice is not required in order to obtain a reversal, as prejudice to the defendant is presumed. Flanagan v. United States, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing* Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

Sixth Amendment Right to Counsel Extends to Sentencing.

The Sixth Amendment right to counsel at a sentencing hearing has been established. Mempa v. Rhay, 389 U.S. 128, 134- 35, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967). The recognition of this right involved the acknowledgment that sentencing is one of "the various stages in a criminal proceeding." Id. at 134, 88 S.Ct. at 256.

See also the Nevada Supreme Court:

> It is well established that "***the sentencing (of the defendant) is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.***" *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). See also *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Smith v. Warden*, 85 Nev. 83, 450 P.2d 356 (1969).

Cunningham v. State, 94 Nev. 128, 130-131, 575 P.2d 936, 938 (1978).

CLAIM 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.

Supporting Facts.

The record shows that due to the fact that the court denied Vanisi's motion to represent himself under Faretta, *supra*, as well as his trial counsel's motion to withdraw as counsel, trial counsel were forced to provide ineffective assistance under the Sixth and Fourteenth Amendments. As a result of having their legal and ethical hands tied, counsel for Vanisi failed to vigorously cross-examine witnesses or put on evidence in Vanisi's defense. (*See Generally*, TT, Vol. 1-6). (For examples of failure to cross-examine, or failure to meaningfully cross-examine, *see* TT, Vol. 3, 542 (testimony of Dr. Ellen Clark, key State's witness re: autopsy and evidence of mutilation),

611, 627, 647; TT, Vol. 4, 687, 704, 778, 783, 789; TT, Vol. 5, 834, 841, 844, 855, 864; TT, Vol. 6, 928, 940, 953, 991).

Counsel for Vanisi did not even give the jury an opening statement nor closing argument at the guilt phase of the trial. (TT, Vol. 6, 997-998, 1034).

As a result of his counsel's failure -- or inability -- to put on a defense or cross-examine witnesses, Vanisi refused to testify. He told the court, "This is a joke. I am not going to testify." (TT, Vol. 6, 971).

Legal Argument.
Structural Error.

In Arizona v. Fulminate, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991), Chief Justice Rehnquist, speaking for a majority of the court, distinguished between "trial error" and "structural error" in determining whether a federal constitutional violation could be analyzed under the Chapman harmless error test or required automatic reversal. The Court explained that "structural error" is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 310. Examples of structural error include total deprivation of the right to counsel at trial, a judge who is not impartial, the unlawful exclusion of members of the defendant's race from a grand jury, deprivation of the right to self-representation at trial, and deprivation of the right to public trial. Id. at 309-10. Because the entire conduct of the trial is affected, structural error defies analysis by "harmless-error" standards. Id.

In Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), the Supreme Court indicated that a violation of the right to counsel may be error that is reversible *per se*. Chapman explains "that there are some constitutional rights so basic to a fair trial that their

infraction can never be treated as harmless error," *citing* Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), as support. Chapman, 386 U.S. at 23 & n.8.

The Nevada Supreme Court has agreed that automatic reversal occurs where the defendant is denied substantive due process. Manley v. State, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing* Guyette v. State, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968).

In the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), the Nevada Supreme Court reversed a conviction, on the grounds of ineffective assistance of counsel, in which, *inter alia*, defense counsel failed to present evidence regarding the victim's violent tendencies and failed to pursue an available self-defense theory, thereby failing to present an adequate defense. The Court reasoned:

> **Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and Strickland, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.**

Sanborn, 107 Nev. at 404, 812 P.2d at 1283.

The Court in Sanborn went on to find that if the jury had been presented with evidence of self-defense, the outcome may have been different:

> **Had the jury been properly presented with the evidence apparently available to support Sanborn's claim of self-defense, the outcome may very well have been different. Thus, counsel's efforts both before and during trial were sufficiently deficient "to deprive the defendant of a fair trial." Id. Accordingly, as discussed in greater detail below, Sanborn has stated a claim of ineffective assistance of counsel that warrants reversal of his conviction.**

Sanborn, 107 Nev. at 404, 812 P.2d at 1283.

Finally, the Court determined that prejudice resulted and the Strickland standard for reversal based upon ineffective assistance was met:

> Sanborn's defense was clearly prejudiced by his counsel's failure to develop and present evidence which would have corroborated Sanborn's testimony and discredited the state's expert witness. **Because of counsel's lack of due diligence, Sanborn was deprived of the opportunity to present testimony material to his defense, and we are therefore unable to place confidence in the reliability of the verdict**. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Sanborn, 107 Nev. at 405, 812 P.2d at 1284.

The trial of Mr. Vanisi in this case was -- to use an older Nevada term -- a sham or a farce. Mr. Vanisi was correct to call it a "joke." Trial counsel admittedly laid down, sat like "bumps on logs" and did not put up a defense, did not engage in any meaningful cross-examination of the vast majority of witnesses and refused to give either opening statement nor closing argument. This is not the right to effective counsel envisioned by the Sixth Amendment. It fact it constitutes a de facto denial of counsel. The State's case was not subjected to the crucible of adversary testing as envisioned by the Constitution. The trial process broke down in clear violations of Mr. Vanisi's Fifth, Sixth, and Fourteenth Amendment right under the United States Constitution. There was a clear structural error. Prejudice must be presumed under these circumstances and Mr. Vanisi's conviction and sentence must be reversed.

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CLAIM 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.

Supporting Facts

1. Mr. Vanisi hereby incorporates each and every allegation contained in this petition as if fully set forth herein.

2. The Nevada capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. Nev. Rev. Stat. §. 200.030(4)(a). The statutory aggravating circumstances are so numerous and so vague that they arguably exist in every first degree murder case. See Nev. Rev. Stat. §. 200.033. Nevada permits the imposition of the death penalty for all first degree murders that are "at random and without apparent motive." Nev. Rev. Stat. §. 200.033(9). Nevada statutes also permit the death penalty for murders involving virtually every conceivable kind of motive: robbery, sexual assault, arson, burglary, kidnaping, to receive money, torture, to prevent lawful arrest, and escape. See Nev. Rev. Stat. §. 200.033. The scope of the Nevada death penalty statute makes the death penalty an option for all first degree murders that involve a motive, and for first degree murders that involve no motive at all. The administration of the Death Penalty Statute by the Nevada Supreme Court also routinely validates constructions of and findings of aggravating circumstances which are not based upon any evidence.

3. The death penalty is in practice permitted in Nevada for all first degree murders,

and first degree murders are not restricted in Nevada to those cases traditionally defined as first degree murders. As the result of the use of unconstitutional definitions of reasonable doubt, premeditation and deliberation, and implied malice, first degree murder convictions occur in the absence of proof beyond a reasonable doubt, in the absence of any rational showing of premeditation and deliberation, and as a result of the presumption of malice aforethought. A death sentence is in practice permitted under Nevada law in every case where the prosecution can present evidence that an accused committed an unlawful killing.

4. As a result of plea bargaining practices, and imposition of sentences by juries and three-judge panels, sentences of less than death have been imposed in situations where the amount of mitigating evidence was significantly and qualitatively less than the mitigation evidence that existed in the present case. The untrammeled power of the sentencer under Nevada law to decline to impose the death penalty, even when no mitigating evidence exists at all, or when the aggravating factors far outweigh the mitigating evidence, means that the imposition of the death penalty is necessarily arbitrary and capricious.

5. Nevada law provides sentencing bodies with no rational method for separating those few cases that warrant the imposition of the ultimate punishment from the many that do not. The narrowing function required by the Eighth Amendment is accordingly non-existent under Nevada's sentencing scheme.

6. Because the Nevada capital punishment system provides no rational method for distinguishing between who lives and who dies, such determinations are made on the basis of illegitimate considerations. In Nevada capital punishment is imposed disproportionately on racial minorities: Nevada's death row population is approximately 50% minority even though Nevada's

general minority population is approximately 17%. All of the people on Nevada's death row are indigent and have had to defend with the meager resources afforded to indigent defendants and their counsel. As this case illustrates, the lack of resources provided to capital defendants virtually ensures that compelling mitigating evidence will not be presented to, or considered by, the sentencing body. Nevada sentencers are accordingly unable to, and do not, provide the individualized, reliable sentencing determination that the constitution requires.

7. The defects in the Nevada system are aggravated by the inadequacy of the appellate review process.

8. These systemic problems are not unique to Nevada. The American Bar Association has recently called for a moratorium on capital punishment unless and until each jurisdiction attempting to impose such punishment "implements policies and procedures that are consistent with . . . longstanding American Bar Association policies intended to (1) Ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed . . . ." As the ABA has observed in a report accompanying its resolution, "administration of the death penalty, from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency ." The ABA concludes that these deficiencies have resulted from the lack of competent counsel in capital cases, the lack of a fair and adequate appellate review process, and the pervasive effects of race.

9. The Nevada capital punishment system suffers from all of the problems identified in the ABA Report -- the underfunding of defense counsel, the lack of a fair and adequate appellate review process and the pervasive effects of race. The problems with Nevada's process are exacerbated by overly broad definitions of both first degree murder and the accompanying

aggravating circumstances, which permits the imposition of a death sentence for virtually every homicide. This arbitrary, capricious and irrational scheme violates the constitution and is prejudicial per se. The scheme also violates petitioner's rights under international law, which prohibits the arbitrary deprivation of life.

CLAIM 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.

Supporting Facts.

1. The Eighth Amendment guarantee against cruel and unusual punishment prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

2. The worldwide trend is toward the abolition of capital punishment and most civilized nations no longer conduct executions. Portugal outlawed capital punishment in 1867; Sweden and Spain abolished the death penalty during the 1970's; and France abolished capital punishment in 1981. In 1990, the United Nations called on all member nations to take steps toward the abolition of capital punishment. Since this call by the United Nations, Canada, Mexico, Germany, Haiti and South Africa, pursuant to international law provisions that outlaw "cruel, unusual and degrading punishment," have abolished capital punishment. The death penalty has recently been abolished in Azerbaijan and Lithuania. Many of the "third world" nations have rejected capital punishment on moral grounds. As demonstrated by the world-wide

trend toward abolition of the death penalty, state-sanctioned killing is inconsistent with the evolving standards of decency that mark the progress of a maturing society.

3. The death penalty is unnecessary to the achievement of any legitimate societal or penalogical interests in Mr. Vanisi's case. Mr. Vanisi's neurological deficits (bipolar disorder with psychosis) and the absence of any basis upon which to anticipate that Mr. Vanisi would pose any danger if incarcerated make a death sentence cruel and unusual punishment.

4. The death penalty constitutes cruel and unusual punishment under any and all circumstances, and constitutes cruel and unusual punishment under the circumstances of this case. Petitioner's death sentence also violates international law, which prohibits the arbitrary deprivation of life, and cruel, inhuman or degrading treatment or punishment.

CLAIM 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.

Supporting Facts.

1. The International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life and restricts the imposition of the death penalty in countries which have not abolished it to "only the most serious crimes in accordance with the law in force at the time of the commission of the frame and not contrary to the provisions of the present Covenant..." ICCPR, Article VI, Sect. 2. The Covenant further prohibits torture and "cruel, inhuman or degrading treatment or punishment," (Article VII); and guarantees every person a fair and public hearing by a competent, independent and impartial tribunal. (Article XIV.)

2. Among the additional protections secured by the Covenant for any person charged with a criminal offense are the guarantees: to be informed promptly and in detail in a language which [the accused] understands of the nature and cause of the charge against him; to have adequate time and facilities for the preparation of his defense and to communicate with counsel of

his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed of this right to legal assistance and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and to not be compelled to testify against himself or to confess guilt. (Article XIV).

3. All of the specific rights listed above that are guaranteed in the Covenant were violated in petitioner's case. The rights afforded under Article XIV are guaranteed "in full equality," and thus apply in full force to Mr. Vanisi, the indigent petitioner in this capital case.

4. The violations of Mr. Vanisi's rights under international law are prejudicial per se and require that his conviction and sentence be vacated.

CLAIM 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.

Supporting Facts

1. Nevada law requires that execution be inflicted by an injection of a lethal drug. Nev. Rev. Stat. §. 176.355(1).

2. Competent physicians cannot 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 Medical Association, Judicial Council, Current Opinion 2.06 (1980). Non-physician staff from the Department of Corrections will have the responsibility of locating veins and injecting needles which are connected to the lethal injection

machine.

3. In executions in states employing lethal injection prolonged and unnecessary pain has been suffered by the condemned individual by difficulty in inserting needles, and by unexpected chemical reactions among the drugs or violent reactions to them by the condemned individual.

4. The following lethal injection executions, among others, have produced prolonged and unnecessary pain:

a. **Stephen Peter Morin** -- March 13, 1985 (Texas) -- Had to probe both arms and legs with needles for 45 minutes before they found the vein.

b. **Randy Woolls** -- August 20, 1986 (Texas) -- A drug addict, Woolls had to help the executioner technicians find a good vein for the execution.

c. **Raymond Landry** -- December 13, 1988 (Texas) -- Pronounced dead 40 minutes after being strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. Two minutes into the killing, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward the witnesses. The execution team had to reinsert the catheter into the vein. The curtain was drawn for 14 minutes so witnesses could not see the intermission.

d. **Stephen McCoy** -- May 24, 1989 (Texas) -- Had such a violent physical reaction to the drugs (heaving chest, gasping, choking, etc.) that one of the witnesses (male) fainted, crashing into and knocking over another witness. Houston attorney Karen Zellars, who represented McCoy and witnessed the execution, thought that the fainting would catalyze a chain reaction. The Texas Attorney General admitted the inmate "seemed to have a somewhat stronger reaction," adding "The drugs might have been administered in a heavier dose or more rapidly."

e. **Rickey Ray Rector** -- January 24, 1992 (Arkansas) -- It took medical staff more than 50 minutes to find a suitable vein in Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the

ordeal, Rector (who suffered serious brain damage from a lobotomy) tried to help the medical personnel find a vein. The administrator of the State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The administrator said "that may have contributed to his occasional outburst."

f. **Robyn Lee Parks** -- March 10, 1992 (Oklahoma) -- Parks had a violent reaction to the drugs used in the lethal injection. Two minutes after the drugs were administered, the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag. Death came eleven minutes after the drugs were administered. Said Tulsa World Reporter Wayne Greene, "the death looked ugly and scary."

g. **Billy Wayne White** -- April 23, 1992 (Texas) -- It took 47 minutes for authorities to find a suitable vein, and White eventually had to help.

h. **Justin Lee May** -- May 7, 1992 (Texas) -- May had an unusually violent reaction to the lethal drugs. According to Robert Wernsman, a reporter for the Item (Huntsville), Mr. May "gasped, coughed and reared against his heavy leather restraints, coughing once again before his body froze . . ." Associated Press reporter Michael Graczyk wrote, "He went into coughing spasms, groaned and gasped, lifted his head from the death chamber gurney and would have arched his back if he had not been belted down. After he stopped breathing his eyes and mouth remained open."

i. **John Wayne Gacy** -- May 19, 1994 (Illinois) -- After the execution began, one of the three lethal drugs clogged the tube leading to Gacy's arm, and therefore stopped flowing. Blinds, covering the window through which witnesses observe the execution, were then drawn. The clogged tube was replaced with a new one, the blinds were opened, and the execution process resumed. Anesthesiologists blamed the problem on the inexperience of the prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error.

j. **Emmitt Foster** -- May 3, 1995 (Missouri) -- Foster was not pronounced dead until 30 minutes after the executioners began the flow of the death chemicals into his arms. Seven minutes after the chemicals began to flow, the blinds were closed to prohibit witnesses from viewing the scene; they were not reopened until three minutes after the death was pronounced. According to the coroner, who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the gurney; it was so tight that the flow of chemicals into his veins was restricted. It was several minutes after a prison worker finally loosened the strap that death was pronounced. The coroner entered the death chamber twenty minutes after the execution began, noticed the problem and told the officials to loosen the strap so that the execution could proceed.

k. **Richard Townes, Jr.** - - January 23, 1996 (Virginia) - - This execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes's right foot.

l. **Tommie Smith** -- July 18, 1996 (Indiana) -- Smith was not pronounced dead until an hour and 20 minutes after the execution team began to administer the lethal combination of intravenous drugs. Prison officials said the team could not find a vein in Smith's arm and had to insert an angio-catheter into his heart, a procedure that took 35 minutes. According to authorities, Smith remained conscious during that procedure.

m. **Scott Carpenter** - - May 8, 1997 (Oklahoma) - - Two minutes after the lethal chemicals began flowing into the body of Scott Carpenter at 12:11 a.m., he began to make noises, his stomach and chest began pulsing, and his jaw clenched. In total, his body made 18 violent convulsions, followed by 8 milder ones. His face, which first turned a yellowish gray, had turned a deep purple and gray by 12:20 a.m. He was officially pronounced dead at 12:22 a.m.

n. **Michael Elkins** - - June 13, 1997 (South Carolina) - - Elkin's execution was delayed for 40 minutes while numerous attempts were made to insert the IV needles in a

suitable vein for the lethal injection. Because of Elkins' poor physical condition, the first needle was ultimately inserted in Elkin's neck (attempts to use his arms, legs, feet were not successful) and the second needle was not used.

o. **Joseph Cannon** - - April 23, 1998 (Texas) - - It took two attempts to complete the execution of Joseph Cannon. The first time, a vein in his arm collapsed and the needle popped out, after Cannon had made a final statement. Cannon had laid back and closed his eyes when he realized what had happened. "It's come undone" he told witnesses. Officials pulled a curtain to block witnesses from seeing what was happening. Fifteen minutes later, a weeping Cannon made a second final statement and the second execution attempt began.

Roderick Abeyta - - October 5, 1998 (Nevada) - - It took 25 minutes for the execution team to find a vein suitable for the lethal injection.

q. **Bennie Demps** - - June 7, 2000 (Florida)- - Prior to being injected with the lethal drugs, Florida death row inmate Bennie Demps proclaimed his innocence and asked his attorney for an investigation into what he described as a "very painful procedure." According to newspaper accounts of the execution, Demps stated that it took nearly an hour for officials to "prepare" him for the execution and that, in the process, he was cut in the leg and groin. "This is not an execution, this is murder," said Demps. "I am an innocent man."

r. **Bert Leroy Hunter** - - June 28, 2000 (Florida) - - Hunter had repeatedly coughed and gasped for air before he lapsed into unconsciousness. An attorney who witnessed the execution reported that Hunter had "violent convulsions. His head and chest jerked rapidly upward as far as the gurney restraints would allow, and then he fell quickly down upon the gurney. His body convulsed back and forth like this repeatedly. . . . he suffered a violent and agonizing death."

s. **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.

5. The procedures utilized to conduct the executions described above are substantially similar to those utilized by the State of Nevada.

6. Because of inability of the State of Nevada to carry out Mr. Vanisi's execution without the infliction of cruel and unusual punishment, the sentence must be vacated. The practice is also invalid under international law, which prohibits cruel, inhuman or degrading treatment or punishment.

CLAIM 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.

Supporting Facts.

1. Mr. Vanisi does not, at this time, assert that he is incompetent to be executed. Petitioner alleges that he may become incompetent before the execution is carried out.

2. Under recent authority in this Circuit, see Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997), affirmed sub nom. Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618 (1998), it appears that a claim anticipating incompetence to be executed should be raised in an initial petition for writ of habeas corpus.

3. Mr. Vanisi therefore asserts the allegations of this claim pursuant to Martinez-Villareal v. Stewart in order to avoid any possible implication of waiver of this claim.

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CLAIM TWELVE:

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.

Supporting Facts.

1. The tenure of judges of the Nevada state district courts and of the Nevada Supreme Court is dependent upon popular contested elections. Nev. Const. Art. 6 §§ 3, 5.

2. The justices of the Nevada Supreme Court perform mandatory review of capital sentences, which includes the exercise of unfettered discretion to determine whether a death sentence is excessive or disproportionate, without any legislative prescription as to the standards to be applied in that evaluation. Nev. Rev. Stat. § 177.055(2).

3. At the time of the adoption of the United States Constitution, the common law definition of due process of law included the requirement that judges who presided over trials in capital cases, which at that time potentially included all felony cases, have tenure during good behavior. All of the judges who performed the appellate function of deciding legal issues reserved for review at trial had tenure during good behavior. This mechanism was intended to, and did, preserve judicial independence by insulating judicial officers from the influence of the sovereign that would otherwise have improperly affected their impartiality.

4. Nevada law does not include any mechanism for insulating state judges and justices from majoritarian, "lynch mob," pressures which would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally-sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can

exploit popular sentiment against the jurist's pro-capital defendant rulings, and poses the threat of ultimate removal from office. These threats "offer a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927). Judges or justices who are subject to these pressures cannot be impartial within due process and international law standards in a capital case.

5. Judges and justices who are subject to popular election cannot be impartial in any capital case within due process and international law standards because of the threat of removal as a result of unpopular decisions in favor of a capital defendant.

6. Conducting a capital trial or direct appeal before a tribunal that does not meet constitutional standards of impartiality is prejudicial per se and requires that petitioner's capital conviction and sentence be vacated.

CLAIM 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.

Supporting Facts.

1. Both the United States and Nevada Constitutions bar the execution of innocent persons. Under the due process clause of the Fourteenth Amendment, the execution of the innocent is "contrary to contemporary standards of decency," Ford v. Wainwright, 477 U.S. 399 (1986), "shocking to the conscience," Rochin v. California, 342 U.S. 165 (1952), and offensive to "a principle so rooted in the traditions and conscience of our people as to be ranked as fundamental." Medina v. California, 505 U.S. 537 (1992). Under the Eighth Amendment, the execution of the innocent is cruel and unusual since it is arbitrary, Furman v. Georgia, 408 U.S. 238 (1972), and excessive. Coker v. Georgia, 433 U.S. 917 (1977).

2. The Nevada Constitution is violated by the irreparable mistaken application of the

death penalty. Nev. Const. Art. 1., § 6 (prohibiting cruel and unusual punishment); Art. 1 § 8, (prohibiting deprivation of life, liberty or property without due process of law.)

3. In Nevada and elsewhere across the United States, numerous innocent persons who were once condemned to die have been exonerated. In January, 2000, Illinois Governor George Ryan declared a moratorium on capital punishment after the number of men who were wrongly convicted and released from Illinois's death row -- 13 -- exceeded the numbers of persons executed for their crimes since the reinstatement of capital punishment. In April 2002, the Illinois Governor's Commission on Capital Punishment issued a report containing the Commission's recommendations, which are designed to ensure that Illinois capital punishment is administered fairly, justly, and accurately. All committee members were unanimous in the conclusion that, given human nature and its frailties, no system could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death. On January 10, 2003, Governor Ryan pardoned four more individuals, all former death row inmates, on the grounds that they were not guilty of the offenses for which they were convicted and sentenced to death. On January 11, 2003, Governor Ryan commuted the death sentences of all remaining death row inmates in Illinois.

4. Since the reinstatement of capital punishment in 1976, at least 107 inmates have been freed from death row due to serious flaws in the legal process, including recantation of witness testimony, incompetent or negligent counsel, withholding of exculpatory evidence by prosecutors or the police, and exoneration through DNA testing. Since 1982, more than 100 inmates, including 12 on death row, have been exonerated by DNA evidence alone.

5. A comprehensive study recently conducted by the Columbia University School of Law, revealed that the error rate in death penalty cases in America is indicative of a system that is "collapsing under the weight of its own mistakes." The death penalty system in the United States is "persistently and systematically fraught with serious error. Indeed, capital trials produce so many mistakes that it takes three judicial inspections to catch them, leaving grave doubt whether

we catch them all."

6. These serious legal errors are no less common in Nevada, which has the highest death penalty rate in the country. The same Columbia University study concluded that seven out of ten Nevada death penalty cases fully reviewed by the state and federal courts are overturned for egregious errors such as those noted above.

7. Because of the inability of the State of Nevada to prevent execution of innocent persons, the Nevada capital sentencing scheme is invalid and it cannot be applied to uphold the sentence imposed in this case.

CLAIM 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.

Supporting Facts:
The United States Supreme Court has repeatedly held that "the protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." *Herrera v. Collins*, 506 U.S. 390, 430, 432 (1993) (Blackmun, J., dissenting, joined by Stevens, J., and Souter, J.) (citing *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986)). The State of Nevada may not constitutionally **inflict** the punishment of death upon Mr. Vanisi. Such punishment would only be cruelly arbitrary, because it would serve neither of the recognized goals of the capital sanction.

Mr. Vanisi's execution would violate the Eighth Amendment because no reasonable person could conclude that, in light of his reformation of character, society's interest in deterrence and retribution outweigh any concomitant consideration of his rehabilitation. When a "sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished `criminal conduct is so atrocious that society's interest in deterrence and retribution **wholly outweighs** any considerations of reform or rehabilitation of the perpetrator.'" *Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J., joined by Blackmun,

J., dissenting) (emphasis added). The examination *infra* of public polling, statutes, declarations by religious organizations, executive commutations, and treaty law reveals that, despite the reinstatement of the death penalty in the states and widespread retributive sentiment, rehabilitation remains as prominent a punishment goal as retribution, and as deeply held public value as swift and certain punishment. Deterrence has faded as a punishment goal. Due to the fact that the standards of decency in American society, not excepting in the State of Nevada, have evolved to the point, at present, where retribution and rehabilitation are valued equally, the execution of an authentically reformed perpetrator would violate public morality and shock the conscience. The U.S. Supreme Court has held that when the execution of an offender makes no "measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless infliction of pain and suffering," it must be barred as excessive under the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (explaining the Court's holding in *Gregg v. Georgia, supra*). The Supreme Court has recognized retribution and deterrence as the principal goals to be achieved by the capital sanction, while also noting the role of incapacitation of the individual offender. *Gregg v. Georgia*, 428 U.S. at 183 & n.28; *see also Tison v. Arizona*, 481 U.S. 137, 148-49 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *Enmund v. Florida*, 458 U.S. 782, 798-99 (1982); *Ford v. Wainwright*, 477 U.S. 399, 407-410 (1986) (finding that neither deterrence nor retribution are served in the execution of the insane).

Although incapacitation clearly would be served as well by a life sentence, retribution might be conceded to have some residual value in relation to his execution, in view of the heinousness of the offense. The Eighth Amendment, however, requires infliction of punishment not only with a view to the offense but to the character of the offender. *See e.g., Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Vanisi's **status** as a reformed offender does not serve society's interest in retribution. The retributive principle that organized society must be willing to inflict punishment on criminal offenders that they **deserve** is well challenged by the status of a

reformed offender. *See Gregg*, 428 U.S. at 183 (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring) in defining "retribution").Mr. Vanisi is no longer the same person who committed the offense. That radically challenges his present "desert." He could only be executed with an abstract view toward the unquestionable outrageousness of the crime, without consideration of his present moral status. The fact that **someone**, in socicty's view, may have "deserved" to die for the offense does not support the execution of Mr. Vanisi if he truly is no longer the same moral entity alleged to have committed the offense. The public's continued strong support for the rehabilitative purpose of punishment demands, along with the retributive concern for proportionate punishment, "consideration" of Mr. Vanisi's rehabilitation.

Over the course of this century, the United States Supreme Court's jurisprudence regarding rehabilitation and retribution as punishment goals has developed in tandem with the Court's perception of the status of the goals in the mind of the public. At the time of the zenith of corrections reform popularity, the Court held that rehabilitation and reformation had unseated retribution as the "dominant objective in the criminal law." *Williams v. New York*, 337 U.S. 241, 248 (1949). Consistent with all current scientific polling, the Court has always viewed retribution and rehabilitation as adversarial public punishment goals. *See, e.g., Morrisette v. United States*, 342 U.S. 246, 251 (1952) (speaking of the "tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution"). The Court has always refrained from announcing that either of the goals had replaced the other. *See, e.g., Powell v. Texas*, 392 U.S. 514, 530 (1968) (Justice Marshall commenting that the Court "has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects"); *see also Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting) (noting the existence of a "profound dispute about whether we should punish, deter, rehabilitate or cure"); *Furman v. Georgia*, 408 U.S. 238, 414, 452 n.43 (1972) (Powell, J., dissenting, joined by Rehnquist, Burger, and Blackmun, JJ.) (listing these and additional cases). By merely viewing the punishment goals as vying for prominence, however, and

giving retribution an almost preemptive role in its capital jurisprudence the Court has seriously underestimated and miscalculated public support for rehabilitation as a punishment alternative, even in the context of **capital** punishment. The reality demonstrated by all public polling, state statutory schemes, and the behavior of courts is that rehabilitation and retribution are appreciated by the public not only as vying contestants for prominence as punishment criteria but, more importantly, as **equally high ideals** in punishment with some vacillation in strength between them over time.

Members of the Court announced in *Furman* that retribution and rehabilitation were incompatible, suggesting that rehabilitation had little role to play in capital litigation. For some, this factored into their conclusion that the death penalty was unconstitutional. For the four dissenting Justices, the fact that retribution had never been eliminated by the Court as a proper punishment goal in cases evoking strong community outrage enabled them to accept it over rehabilitation as a dominant basis for preserving the death penalty. All the Justices on both sides of the death penalty issue assumed that, because death terminates the life of the offender, it makes rehabilitation **theoretically** irrelevant once the punishment is imposed. This perception, which forms the basis of the Court's later "death is different" analysis, leads the Court to direct its concern about rehabilitation within the death penalty context into the capital sentencing procedure, i.e., making sure that capital juries can meaningfully use information about a defendant's "prospects for rehabilitation" in their sentencing decisions. *Lockett v. Ohio*, 438 U.S. 586, 594 (1978) (holding statute unconstitutionally limited sentencer's ability to consider evidence that Sandra Lockett had a good "prognosis for rehabilitation" if returned to society); *Franklin v. Lynaugh*, 487 U.S. 164, 177-78, 179-80 (1988) (holding that the Texas statute allowed jurors to consider the mitigating evidence of Donald Franklin's good prison record).

The Supreme Court has generated a line of cases responsive to its concern that jurors not be arbitrarily prevented from considering any evidence, including such evidence as rehabilitation, that could lead to a penalty less than death. Mr. Vanisi bases his instant claim for relief, however,

on the other chief line of Supreme Court precedent arising from the Court's concern, expressed in *Furman*, that sentencers be meaningfully directed in "distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (Stewart, J., concurring); *see Callins v. Collins*, 510 U.S. 1141 (Blackmun, J., dissenting).Mr. Vanisi's execution would be cruel and arbitrary, because retribution is only abstractly served in his case, and deterrence is not served at all. The national moral consensus, suitably expressed by Justice Stevens, *supra*, requires consideration of his rehabilitation, and the commutation of the sentence of such an offender who is rehabilitated.

In short, Mr. Vanisi may not presently, nor in the future, be executed because such infliction of punishment would be constitutionally disproportionate due to his **status** as a reformed errant. *Delo v. Lashley*, 507 U.S. 272, 279, 288 (1993) (Stevens, J., joined by Blackmun, J., dissenting) (recognizing that youth has been considered as an exempt status from execution because of potential for rehabilitation); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (considering youths as a class of offenders ineligible for the death penalty); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (considering persons with mental retardation as a class of offenders ineligible for the death penalty); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that persons who are currently insane are, as a class, ineligible for the death penalty).

The Supreme Court has been reluctant to establish classes that are ineligible for the death penalty, relying instead, as noted above, on "sentencer discretion guided by statutory criteria rather than court mandate" to delimit the death-eligible with minimum arbitrariness. This same tendency to focus on guided sentencer discretion, rather than classes of offenders, may account for the paucity of recent comment by the courts, state or federal, on the relative strengths of retribution and rehabilitation as guiding principles in the infliction of the death penalty. This tendency accounts for the general lack of alternative punishment statutes in death penalty states or other kinds of statutes, such as clemency directives, that address rehabilitation of capital offenders. As will be shown below, in Claim Fifteen, the polls are way ahead of the legislatures and the courts in

revealing the deep-set respect for rehabilitation as a punishment goal, the relatively equal strength of rehabilitation and retribution, and ways rehabilitation can be applied in capital sentencing. As will also be shown, however, legislatures have continued to encode the public's strong support for rehabilitation and, thus, essentially all capital punishment states still make provision for rehabilitation as a dominant goal in punishment. Legislatures adequately portray the public's desire that rehabilitation be given a prominent place. Due to political pressure and misperception about the public's value of rehabilitation vis a vis retribution, legislators have been slow to generate any laws that would mandate, for instance, the commutation of the sentence of a defendant like Mr. Vanisi, even though such legislation may be required because some procedural mechanism must be made available to prevent the kind of constitutional error present here. The paucity of procedural solutions cannot be held to demonstrate the absence of such error.

Since Mr. Vanisi's execution would not serve the punishment goals of deterrence and retribution, it is banned by the Eighth Amendment. In the words of an Illinois prison warden, *infra*, to execute Mr. Vanisi would be to "commit capital vengeance, not punishment." In view of Mr. Vanisi's rehabilitation, there is utterly no reason to believe that his execution would serve any penal purpose more effectively than the less severe punishment of imprisonment. *Furman*, 408 U.S. at 305 (Brennan, J., concurring). "The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." *Id.* at 305, 343 (citing *Weems v. United States*, 217 U.S. at 381)).

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CLAIM 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.

Supporting facts.

Mr. Vanisi asserts that Nevada's death penalty violates the Federal constitutional bars against cruel and unusual punishment as well as the rights to due process and equal protection. The death penalty should be stricken as unconstitutional, under the Federal Constitutions, because it violates prohibitions against cruel and unusual punishment, deprives defendants of their fundamental right to life, and is arbitrary and discriminatory.

Where the Eighth Amendment is concerned, one oversight in the law continues to strike the undersigned counsel as deeply and sadly profound: the fact that examination of whether the death penalty is "cruel and unusual" is repeatedly and exclusively limited to a discussion of whether the condemned suffers "cruel and unusual" pain or suffering during the actual act of execution.

In the law, our considerations of disputes and or accusations consistently turn up what is at risk. A good example is the burden of proof assigned to various types of cases. In a civil case, in which only money is at stake, a plaintiff must prove his case by a preponderance of the evidence. That is, in order to deprive someone of money or property, it must be shown that it is more likely than not that the plaintiff's allegations are true. At the next level, if we are dealing with a family conflict, such as child custody, the burden is raised to one of "clear and convincing" evidence. So where the well-being of a minor person is involved, the bar is raised a notch. As this court is aware, when dealing with criminal matters, it is not simply money, property or the well-being of another at stake, it is a person's liberty. In this country, in our legal system, we hold a person's liberty to be paramount. It is for this reason that we require the State to prove its case "beyond a

reasonable doubt" before it can take away the liberty -- the freedoms guaranteed by the Constitution -- of one of our citizens.

Of the rights guaranteed by the Constitution, "life, liberty, and the pursuit of happiness," the **right to life** comes first. Even though the bar gets raised progressively upward for all other rights, unfortunately, there is no ascension of this bar from the deprivation of liberty to the deprivation of life. Even though our common sense, our innate sense of justice, our empirical knowledge of what is good and fair and right, all demand that there should be such a higher level of certainty. But that is the law. It is not a perfect system. It is not a very dynamic one. A former Chief Justice once explained that the law is only a shadow of the truth. It has failed to be in reality what it desires to be in our hearts.

Nowhere is this more true than in the sad fact that there is literally no consideration given to whether depriving one of our own of the rest of his natural days, of the natural progression of his life, is cruel and unusual. Because that is what we are talking about. It is about depriving one of the liberty of living out his life, even under the most strict type of confinement. It is cutting off any chance that person may have to make use of a life. To learn to read. To become educated, to write, to paint, to help others in his bleak situation. To find a god, inside or out. To form thoughts. To take breath in and out. It is a grave offense that the "cruel and unusual" consideration is only about the few minutes it takes to kill a person -- as if after the uncertain pain of death, the condemned were able to get back up and continue a life, eat breakfast, shave, despite the brief but agonizing pain he may have suffered.

There are those in the world who would say anyone in the towers of the World Trade Center or the Pentagon, or anyone in one of the four destroyed planes on September 11th deserved their deaths simply because they were part of a Western way of life which the religious-fundamentalist planners deem unholy. But we know without question, without hesitation, that this way of thinking is tragically flawed. We know that just because a belief system or a set of rules,

no matter how interpreted, says that one deserves death does not make it so. If killing is wrong, then all killing is wrong.

If we are truly to evolve as a society, if we are to become worthy of the platitudes we espouse daily in our lives and in the media, we must consider the question of what a life is worth. And whether it is cruel and unusual to take such a thing away from another, whatever the reason, whatever the cost.

A. Nevada's Death Penalty Constitutes Cruel and Unusual Punishment

Having stated the argument above, the undersigned are now compelled to make the traditional arguments regarding the "cruel and usual" analysis. The constitutional history of the cruel and unusual punishment clause — adopted against the backdrop of divisive debate about capital punishment — invites this Court to give special consideration to the death penalty's cruelty.

Since the prohibition of flogging, *see* Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968), death remains the only punishment that intentionally inflicts physical pain. "No other existing punishment is comparable to death in terms of physical and mental suffering." Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring); *see* District Attorney of Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980).

The cruelty of capital punishment lies not only in the execution, but also in imprisonment preceding it. Awaiting execution tortures the death row prisoner psychologically and emotionally. In Watson, in which the Massachusetts Supreme Court struck down the Commonwealth's death penalty, the majority explained, "[t]he mental agony is, simply and beyond question, a horror," 411 N.E.2d at 1283; one justice wrote:

> For over two years, Henry Arsenault "lived on death row feeling as if the Court's sentence were slowly being carried out." Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution. "There was a day-to-day choking, tremulous fear that quickly became suffocating." If he slept at all, fear of death snapped him awake sweating.
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> His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide. . . .

> The time came. He walked to the death chamber and turned toward the chair. Stopping him, the warden explained that the execution would not be for over an hour. Arsenault sat on the other side of the room as the witnesses filed in behind a one-way mirror. When the executioner tested the chair, the lights dimmed. Arsenault heard other prisoners scream. After the chaplain gave him last rites, Arsenault heard the door slam shut and the noise echoing, the clock ticking. He wet his pants. Less than half an hour before the execution, the Lieutenant Governor commuted his sentence. Arsenault's legs would not hold him up. Guards carried him back to his cell. He was trembling uncontrollably. A doctor sedated him.

Id. at 1290 (Liacos, J., concurring).[10]

Second, because it makes no "measurable contribution to acceptable goals of punishment" the death penalty will result in the "purposeless and needless imposition of pain and suffering." People v. Hooks, 96 A.D.2d 1001, 1002 (3d Dept. 1983); *see* Broadie, 37 N.Y.2d at 112. It does not deter violent crime, particularly in comparison to the alternative of life-imprisonment-without-parole; it actually fosters social violence. Although some 25 years ago the Supreme Court characterized the empirical evidence on the deterrent effect of the death penalty as inconclusive, *see* Gregg v. Georgia, 428 U.S. 153, 184-87 (1976), the same cannot be said today. Studies since Gregg have uniformly and conclusively shown no demonstrable deterrent effect from capital punishment laws or actual executions, while confirming the "brutalization" effect of such punishment, including a corresponding increase in homicides. *See* David C. Baldus, The Death Penalty Dialogue Between Law and Social Science, 70 Ind. L.J. 1033, 1035 (1995); William J. Bowers & Glenn L. Pierce, Deterrence or Brutalization: What is the Effect of Executions?, 26 Crime & Delinq. 453, 470, 481 (1980) (examining New York execution and homicide statistics between 1906 and 1964, and showing that on average two to three *additional* homicides occurred in months following executions); *cf.* New York State Temporary Commission on Revision of the Penal Law and Criminal Code, Special Report on Capital Punishment 88-89 (1965) (capital

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[10] Expert studies confirm that "prisoners who spend many years facing impending execution may suffer serious psychological trauma." James R. Acker, New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives, 54 Alb. L. Rev. 515, 577 (1990) [hereinafter Acker, New York's Proposed Death Penalty], and authorities cited.

punishment's deterrent value is highly doubtful) [hereinafter Temporary Commission, Report].[11] This Court should not defer to the Legislature's erroneous judgment otherwise. *See* People v. Smith, 63 N.Y.2d 41, 76 n.7 (1984) (rejecting contention that "evaluating deterrence and alternate punishments is for the Legislature, not the courts" and concluding that "such considerations are hardly to be ignored by us" in determining legality of death penalty for killings by defendants already serving life sentences).

Nor may sheer vengeance or retribution — the only other possible legislative rationales for capital punishment — support Nevada's death penalty. As one court has held, "the punishment or treatment of convicted offenders is directed toward one or more of three ends," deterrence, incapacitation,[12] or rehabilitation, but "[t]here is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." People v. Oliver, 1 N.Y.2d 152, 160 (1956); *see* Broadie, 37 N.Y.2d at 112, 114; Hooks, 96 A.D.2d at 1002.

Third, the death penalty conflicts with evolving standards of decency because of the likelihood that it will result in the execution of innocent people — long considered important in assessing use of the sanction. *Cf., e.g.*, People v. Higgins, 5 N.Y.2d 607, 626 (1959) (reversing

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[11] See also, e.g., Raymond Bonner & Ford Fessenden, States with No Death Penalty Share Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, at A1 (**during last 20 years, homicide rates in states with the death penalty have been 48 to 101 percent higher than rates in states without death penalty**; homicide rates have fluctuated in relatively similar paths in states with and without the death penalty); Lawrence R. Klein *et al.*, The Deterrent Effect of Capital Punishment: An Assessment of the Estimates, in Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 336, 338-49 (Blumstein, Cohen & Nagin, eds. 1978); Thorsten Sellin, The Penalty of Death 122-23 (1980); Franklin E. Zimring & Gordon J. Hawkins, Capital Punishment and the American Agenda 167 n.119 (1986); Craig J. Albert, Challenging Deterrence: New Insights On Capital Punishment Derived From Panel Data, 60 U. Pitt. L. Rev. 321 (1999); Jon Sorensen *et al.*, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime and Delinq. 481-93 (1999).

[12] Nor is Nevada's death penalty necessary to incapacitate dangerous felons, given the alternative punishment of life-without-parole. In addition, those convicted of murder have a notoriously low rate of recidivism, a rate far below that of other violent criminals. *See* Sellin, The Penalty of Death at 103-20; Richard O. Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case For Capital Punishment, 79 Mich. L. Rev. 1177, 1189-90 (1981).

conviction and death sentence because conviction contrary to weight of evidence); People v. Hayner, 300 N.Y. 171, 175 (1949) (same); People v. Crum, 272 N.Y. 348, 357 (1936) (same); *see also* People v. Williams, 292 N.Y. 297, 302 (1944) ("[W]e cannot see in the testimony of [two jailhouse informants] a sufficient basis for the signing of a warrant for the death of this defendant."); People v. Spickler, 255 N.Y. 408, 408-09 (1931) (reversing conviction and death sentence where identification of defendant "was at least doubtful enough to make it improper to execute the death penalty without every reasonable safeguard for the avoidance of mistake").

Historically, courts have been unable to avoid executing the innocent. For example, in the twentieth century, New York executed no fewer than eight innocent people. Michael Lumer & Nancy Tenney, The Death Penalty in New York: An Historical Perspective, 4 J. L. & Pol'y 81, 98 (1995) [hereinafter Lumer & Tenney, The Death Penalty in New York]; *see* Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 72, 118 (1987) [hereinafter Bedau & Radelet, Miscarriages of Justice].[13] And, time and again, New York has sent innocent men to death row. *See* Bedau & Radelet, Miscarriages of Justice at 23.

To name a few:

- In 1915, Charles Stielow had his death sentence stayed only after he was strapped into the electric chair. He ultimately won pardon and release after the real culprit confessed and newly uncovered ballistics evidence proved his innocence. Id. at 119.

- In 1932, Pietro Matera's death sentence was commuted. Almost thirty years later, in 1960, the real culprit's wife (a key prosecution witness) confessed on her death bed that she had falsely accused Matera to save her husband, and Matera was released. Id. at 144.

- In 1937, the death sentence of Isidore Zimmerman — "two hours away from execution (his head had been shaved and he had eaten his last meal)" — was

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[13] Everett Applegate, for example, was executed in 1936, after having been convicted solely on the inconsistent testimony of an accomplice who had committed two previous murders and who claimed to have committed this killing on Applegate's insistence. The governor, believing Applegate innocent, sought permission from the prosecutor to commute the death sentence, but the prosecutor refused. *See* Bedau & Radelet, Miscarriages of Justice at 92. Similarly, Thomas Bambrick was executed in 1916, although evidence that another man had committed the murder was later discovered. The prison warden said: "It is almost as certain that Bambrick is innocent as that the sun will rise tomorrow." Id. at 93.

commuted. Released after prevailing on appeal some 24 years later, Zimmerman won $1 million in reparations from the State. Id. at 171.

- In 1963, Samuel Williams was released after almost sixteen years in prison — and 22 months on death row — when he was granted habeas corpus relief on the grounds that his confession had been coerced. He, too, was compensated for malicious prosecution. Id. at 169.[14]

Nothing ensures that Nevada can avoid the documented and intolerable risk of wrongful execution. Just as executing an innocent defendant would constitute cruel and unusual punishment, even were the defendant properly tried, convicted, and sentenced, *see* Herrera v. Collins, 506 U.S. 390, 417 (1993), a capital sentencing scheme that will necessarily condemn unidentified innocents is antithetical to the moral underpinnings of Nevada society and should not stand.[15]

Fourth, the lack of standards for seeking and meting out the death penalty, as well as the accompanying risk of racial disparities, render the penalty inconsistent with the State prohibition against cruel and unusual punishment. Among other problems with Nevada's death penalty are that "aggravating factors" rendering a murder death-eligible include the commission of intentional murder "in the course of" and "in furtherance of" robbery, burglary, and other frequently committed felonies,, a category so broad as to allow a vast array of second-degree murders to be charged as capital. *See* Stewart F. Hancock, Jr. *et al.*, Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute, 59 Alb. L. Rev. 1545, 1561-62 (1996) [hereinafter Hancock *et al.*, Race, Unbridled Discretion]; New York State Division of

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[14] Another "recent study documents fifty-nine wrongful homicide convictions in New York between 1965 and 1988." Acker, New York's Proposed Death Penalty at 603 & n.485 (citing New York State Defenders Ass'n, Wrongful New York State Homicide Convictions Since 1965 (1990)). A 1965 commission relied heavily on the demonstrated risk of executing the innocent in proposing that the Legislature abolish capital punishment. See Temporary Commission, Report at 69, 95.

[15] The risk of executing the innocent does not belong solely to history. See, e.g., Dirk Johnson, Illinois, Citing Faulty Verdicts, Bars Executions, N.Y. Times, Feb. 1, 2000, at A1 ("Citing a 'shameful record of convicting innocent people and putting them on death row,' Gov. George Ryan of Illinois today halted all executions in the state . . . .").

Criminal Justice Services, 1998 Crime and Justice: Annual Report at 18, table 9 (1999) (of homicides with "known circumstances," 29.5% were "felony connected"); *see also* Acker, New York's Proposed Death Penalty at 582 (under section 125.27(1)(a)(vii), "[r]oughly one-third of the homicides in New York State . . . could be prosecuted as capital crimes"). And, though the Legislature empowered individual district attorneys to decide which eligible murders warrant a possible death sentence, *see* C.P.L. § 250.40, it provided no guidelines, procedures, or criteria to guide or review that selection; hence, such decisions potentially turn on the identity of the district attorney, the prominence of the victim, or the notoriety of the case.

Given the broad discretion provided prosecutors to seek death and juries to impose it, there is scant chance that Nevada will wholly sidestep the race-of-defendant and race-of-victim discrimination that has plagued the administration of the death penalty elsewhere in this country. *See* McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting); David C. Baldus *et al.*, Equal Justice and the Death Penalty: A Legal and Empirical Analysis 384-86 (1990) [hereinafter Baldus, Equal Justice]. A 1990 United States General Accounting Office ("GAO") report analyzed 28 studies of racial discrimination in death sentencing (which had analyzed 23 sets of data from 1972 through 1988) and confirmed the prevalence of such discrimination. The GAO found that race-of-victim discrimination was "remarkably consistent across data sets, states, data collection methods, and analytic techniques" and that a majority of the studies had established "that race of defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty." General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. Gov. Doc. GAO/GGD-90-57, Feb. 1990, at 5.[16]

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[16] A recent study concerning application of the death penalty in Philadelphia confirmed such results. *See* David C. Baldus, Racial Discrimination and the Death Penalty in the Post-Furman Era: an Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638 (1998). Further, the studies analyzed by the GAO reveal strong and statistically significant correlations between race and capital sentencing results in Colorado, Florida, Georgia, Illinois, Louisiana, Mississippi, New Jersey, North Carolina, Oklahoma, and South Carolina. *See, e.g.*, Baldus, Equal Justice; Arnold Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. Davis L. Rev. 1327 (1985); Leigh B. Bienen *et al.*, The

Nevada's lack of exact standards — particularly given the near-inevitable race-based outcomes of death penalty prosecutions — is incompatible with its notion of decency. A capital punishment system infected by arbitrary considerations would be cruel and unusual.[17] *See* Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (Marshall, J., concurring) ("[T]he effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it — and the death penalty — must be abandoned altogether.").

More generally, capital sentencing law has resulted in two competing commands: The law must closely guide a jury's discretion to ensure that the death sentence is "based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Yet the law may not limit the jury's discretion to exercise mercy and not impose death. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); see also U.S. Const. amend. VIII. Justice Blackmun correctly described this conundrum: "Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness — individualized sentencing." Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari) (citation omitted).

In all, the death penalty inflicts an excessive and disproportionate punishment in an arbitrary and discriminatory manner and cannot be justified by *any* legitimate purpose. Capital

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Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion, 41 Rutgers L. Rev. 27 (1988); Linda A. Foley, Ph.D., Florida After the Furman Decision: The Effect of Extralegal Factors on the Processing of Capital Offense Cases, 5 Behav. Sci. & L. 457 (1987); Elizabeth Lynch Murphy, Application of the Death Penalty in Cook County, 73 Ill. B.J. 90 (1984); Raymond P. Paternoster & Ann Marie Kazyaka, The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years, 39 S.C. L. Rev. 245 (1988); Michael L. Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981); M. Dwayne Smith, Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana, 15 J. Crim. Just. 279 (1987).

punishment is contrary to contemporary notions of human decency in Nevada and cannot constitutionally stand.

B. Nevada's Death Penalty Deprives Persons of the Fundamental Right to Life Without Compelling Justification.

Nevada's death penalty also violates the constitutional guarantees of due process and equal protection, because there is no compelling governmental interest to justify depriving Mr. Vanisi of his fundamental right to life. A less restrictive punishment, life-imprisonment-without-parole, would adequately serve the State's interests.

The right to life — an indispensable predicate for the exercise of all other rights — is a "fundamental human right." People v. Felder, 47 N.Y.2d 287, 295 (1979). Courts have unambiguously expressed the fundamental nature of the right to life. *See* People v. Isaacson, 44 N.Y.2d 511, 520 (1978) ("[E]very person's right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice.") (citations omitted).

A law that impinges a fundamental right requires strict judicial scrutiny. The government must prove that the law is necessary to promote a "compelling state interest" and that the law advances that interest by the least restrictive means available. *See* Rivers v. Katz, 67 N.Y.2d 485, 498 (1986) (due process); People v. Onofre, 51 N.Y.2d 476, 492 n.6 (1980) (equal protection).[18] The prosecution here cannot meet its burden.

The prosecution cannot show that Nevada's death penalty is narrowly tailored to serve a compelling state interest. The punishment does not have a direct and substantial relationship to

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[18] Significantly, the arbitrariness unavoidable in the administration of Nevada's death penalty violates equal protection guarantees regardless of the racial discrimination that adheres to its use. *See* Trump v. Chu, 65 N.Y.2d 20, 25 (1985) ("[T]he equal protection clause does not prevent [the] Legislature[] from drawing lines that treat one class of individuals . . . differently from others unless the difference in treatment is palpably arbitrary or amounts to invidious discrimination.") (internal quotation marks omitted); People v. Liberta, 64 N.Y.2d 152, 163 (1984) (equal protection clause prohibits statutory provisions that "arbitrarily burden a particular group of individuals"); People v. Acme Markets, Inc., 37 N.Y.2d 326, 330 (1975) ("The underlying concept is elemental — that persons similarly situated should be treated the same and that criminal justice should and must be evenly and equally dispensed.").

preventing crime, either by through deterrence or incapacitation; it does not measurably achieve any legitimate penological goal. Extensive evidence demonstrates otherwise. Nor can the prosecution prove that the death penalty is the least restrictive means of accomplishing its goals. Demonstrably it is not: Evidence convincingly demonstrates that life-imprisonment-without-parole equally — and more efficiently — serves State interests in deterrence and incapacitation. *See* Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring) (death penalty violates state due process protection of fundamental right to life; state did not demonstrate deterrent effect of capital punishment or otherwise carry burden of showing it is least restrictive means to accomplish compelling interests).[19] Accordingly, Nevada's Death Sentencing Scheme should be invalidated and the judgment should be reversed,[20] or, alternatively, remand the case to the trial court for re-sentencing to a sentence less than death, or this Court should reduce the death sentences to life-without-parole.

C. The Current Standards of Decency Require Reversal of the Death Penalty.

Infliction of the death penalty upon Mr. Vanisi would be cruel and arbitrary, because it would be unacceptable in light of current American standards of human decency. "The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." *Herrera*, 506 U.S. at 430, 432 (1993) (Blackmun, J., dissenting, joined by Stevens, J., and Souter, J.); *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Ford v. Wainwright*, 477 U.S. 399

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[19] In O'Neal, 339 N.E.2d 676, the Massachusetts Supreme Judicial Court held that the death penalty violated that state's constitutional protection of the fundamental right to life under the state due process clause. While O'Neal was decided before Gregg, the Massachusetts Supreme Judicial Court reaffirmed its holding subsequent to, and with direct reference to, Gregg. *See* Opinion of the Justices to the House of Representatives, 364 N.E.2d 184 (Mass. 1977) (advisory opinion to state legislature in which, with respect to O'Neal, court counseled that legislature's proposed death penalty law still would be unconstitutional); Watson, 411 N.E.2d at 1283 (holding state's death penalty law unconstitutional in declaratory judgment action brought by district attorney).

[20] The very process of death qualifying Mr. Vanisi's jury — occasioned by his being on trial for his life — caused many otherwise-qualified jurors to be dismissed.

(1986)). Mr. Vanisi cannot be constitutionally executed, because contemporary American society would find the execution of an offender who has been rehabilitated morally offensive and at odds with current standards of human decency.

The "respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of **inflicting** the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 407-410 (1986). The State of Nevada may not constitutionally inflict the death penalty on Mr. Vanisi, because of his character and record as a rehabilitated offender. Such sanction would deeply offend contemporary standards of human decency, reflected in the American public's constant high valuation of rehabilitation as a punishment goal. The American public, in fact, rejects punitive justice in favor of a community-based, restorative model of justice.

All evidence shows that the American public holds retribution and rehabilitation to be competing and commensurate avenues to the restoration of public order following a capital offense. Such a statement may initially seem surprising, given the apparent widespread support for the capital sanction. Public opinion polls and social science findings demonstrate, however, that since the reinstatement of the death penalty in the majority of states, public support for rehabilitation in **those states** has not waned dramatically in inverse proportion to the popularity of strict and certain punishment. Real-life sentences that embrace rehabilitative goals of community safety as well as reparation for crime are actually **universally** more popular than the death penalty itself as punishment options for capital offenders, even in states long considered bastions of capital punishment. For that reason, clear and convincing demonstration by a capital offender of authentic rehabilitation must disable the State from carrying out his execution, because execution would not only be contrary to the public's punishment-type preference but would also offend contemporary moral concern for the rehabilitation of errants. There is every indication that the public recoils at

the death penalty when rehabilitation can actually be achieved, because rehabilitation defeats sentiment toward vengeance, restores the moral order, meets the community's need for specific incapacitation and, when coupled with proportionately strict sentencing, meets the community's need for general deterrence. Recent public opinion polling shows that the public is aware that there remains no need nor justification for the death penalty when such goals can be achieved.

Social science evidence, legislative enactments, public pronouncements by religious bodies, executive commutation actions, and international law and opinion all support this conclusion. As a result, execution of Mr. Vanisi would not be acceptable as justice, would be merely arbitrary, wanton infliction of pain on an individual and would be, in itself, a severe disruption of the moral social order.

1. The Social Science Evidence

The Supreme Court, on occasion, has looked to social science data as evidence of evolving standards of human decency. *E.g.*, *Gregg v. Georgia*, 428 U.S. 153 (1976). Sociological research and opinion polling since the "reinstatement" of the death penalty via *Gregg* clearly demonstrates that the public's high for rehabilitation of offenders has not been devalued by the popularity of punitive measures; that, in fact, a **preferred alternative to the death penalty** that requires rehabilitation of the offender has been universally found in every polled state. *See* William J. Bowers, Margaret Vandiver, & Patricia H. Duggan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22:1 Am. Jnl. Crim. Law 77 (1994); Richard C. McCorkle, *Research Note: Punish and Rehabilitate? Public Attitudes Toward Six Common Crimes*, 39:2 Crime and Delinquency 240 (April 1992); Francis T. Cullen, Sandra Evans Skovron, Joseph E. Scott, Velmer S. Burton, Jr., *Public Support for Correctional Treatment*, 17:1 Criminal Justice and Behavior 6 (March 1990); Mark Warr & Mark Stafford, *Public Goals of Punishment and Support for the Death Penalty*, 21:2 Journal of Research in Crime and Delinquency 95 (May 1984); *see also* Andrew Skotnicki, *Religion and Rehabilitation*, 15:2 Criminal Justice Ethics (Summer/Fall 1996) (noting the reemergence in recent years of the rehabilitative ideal, but lack of appreciation for religious conversion as "a key factor in solving the riddle of wilful human

rejection of law and behavioral norms").

Warr and Stafford set out specifically to: (1) "identify the goals or justifications of punishment held by the public at large," and (2) "examine the relation between these goals and public support for capital punishment." Warr, *supra*, at 97. The relative strengths of public justifications for the death penalty are examined through justifications for imprisonment. *Id.* at 99. The authors point out that, since rehabilitation and retribution are logically incompatible, the only way to measure their relative strength in relation to capital punishment is to look at incarceration goals. Imprisonment is commensurate with all punishment goals, whereas it is nonsense to ask whether execution accomplishes rehabilitation. *Id.* The results from the authors' survey indicated:

> [A] large majority of respondents see retribution as a legitimate (if not the primary) purpose of punishment. At the same time, however, rehabilitation looms much larger by this reckoning. While less than one-fifth of respondents choose rehabilitation as the most important goal of punishment, fully 59% choose it as one of the three most important goals of punishment, a figure second only to retribution itself. [Incapacitation was third.]
>
> [I]t is interesting to note that those who choose retribution as the most important reason for punishment are most likely to choose rehabilitation as their second most important reason. This finding is similar to that reported by Cullen et al. (1983), who found that their Illinois respondents tended to favor rehabilitation and punishment simultaneously for juvenile offenders.

Id. at 102. Interestingly, a full 50 percent of those who held rehabilitation to be the most important punishment goal also supported capital punishment. *Id.* at 106. Warr and Stafford concluded:

> None of the goals of punishment [among retribution, incapacitation, rehabilitation, specific deterrence, general deterrence, and normative validation] is endorsed by more than a minority of respondents, meaning that there is -- at least at present -- no single dominant ideology of punishment. Even if such an ideology did exist it must be interpreted cautiously. Our findings indicate that a preference for one goal of punishment does not necessarily imply utter rejection of others (recall the case of rehabilitation). Rather than viewing public goals of punishment as a binary (either/or) variable, or imputing monolithic consensus to public opinion, we suggest that such opinion can best be viewed as a set of ordered priorities, the order of which changes with time and circumstance.

Id. at 106. Similarly, McCorkle (1993) and Cullen et al. (1990, 1988, 1987, 1985, 1983, 1982, 1977) concur that the public continues to believe violent offenders should not only be punished but also rehabilitated. McCorkle studied public attitudes toward punishment goals for violent and nonviolent offenders (robbery, rape, molestation, burglary, drug sale, drug possession) in a 1992

survey of respondents in the Las Vegas, Nevada, area. McCorkle, *supra*, at 242. The respondents consistently showed "strong punishment orientations," support for "increased use of prisons to ensure offenders received their just deserts." *Id.* at 250. Public attitudes, however, were multifaceted:

> [T]his punitiveness represented only one facet of their attitudes toward criminals. There was, in addition, broad support for addressing the underlying causes of their criminal behavior. Most believed that these offenders could still turn their lives around, and renewed efforts should be made to provide them with the treatment, education, and training *inside* the prison that would facilitate their repentance.

Id. (emphasis in original).

The following poll results taken from the Sourcebook of Criminal Justice Statistics show widespread corroboration of the findings of these scholars that the relationship among punishment goals is complex and that retribution and rehabilitation are both high on the public agenda:

1) Louis Harris Poll, 1970, 1978, 1981, 1982: Question A: "Do you think the main emphasis in most prisons is on punishing the individual convicted of a crime, trying to rehabilitate the individual so that he might return to society as a productive citizen, or protecting society from future crimes he might commit?" Question B: What should be the main emphasis?

> A: For the four years, punishment ranged from 21 to 27 percent, rehabilitation from 25 to 35 percent, and protection from 8 to 13 percent.
>
> B: For the four years, punishment ranged from 8 to 23 percent, rehabilitation from 44 to 73 percent, and protection from 12 to 32 percent. Support for rehabilitation went down from 73 percent in 1970 to 44 percent in 1982, while support for "punishment" went up and down from 8 percent in 1970 to 19 percent in 1982.

The Harris Survey (New York: The Chicago Tribune-New York News Syndicate, May 24, 1982), in Sourcebook of Criminal Justice Statistics 1982, at 252.

2) The Gallup Poll reported in 1982 results from a poll on the following question: "In dealing with men in prison, do you think it is more important to punish them for their crimes, or more important to get them started `on the right road'?" 30 percent responded to punish them and 59 percent opted for getting them started right. George H. Gallup, *The Gallup Report*, Report No. 200 (Princeton, N.J.: May 1982), in Sourcebook of Criminal Justice Statistics 1982, at 254.

The same poll was run in 1989, with the results that 38 percent chose punishment and 48 percent rehabilitation. George H. Gallup, *The Gallup Report*, Report No. 285 (Princeton, N.J.: June 1989), in Sourcebook of Criminal Justice Statistics 1990, at 198.

3) More recent polls seem to suggest a more punitive attitude on the part of the public relative to rehabilitation, but also a steadfast belief by the public that most violent offenders can be rehabilitated.

A Roper national poll in 1992 asked the following: "Most people are concerned about the

increase in crime and lawlessness that has been taking place across the country today. On which would you like to see us rely more heavily?"

Stricter law enforcement/severer penalties 44 percent
Corrective programs 31 percent

The Roper Organization, Inc., in Sourcebook of Criminal Justice Statistics 1992, at 195.

A 1993 Los Angeles Times poll asked the following: "Where does government need to make a greater effort these days: in trying to rehabilitate criminals who commit violent crimes or in trying to punish and put away criminals who commit violent crimes?

Rehabilitate 25 percent
Punish 61 percent

Los Angeles Times Poll, in Sourcebook of Criminal Justice Statistics 1994, at 177.

The same poll was conducted in 1994 by the Los Angeles Times, and 1995 by researchers at Sam Houston University.
1994 results:

Rehabilitate 32 percent
Punish 49 percent

Sourcebook of Criminal Justice Statistics 1994, at 176.
1995 results:

Rehabilitate 26.1 percent
Punish 58.2 percent

Sourcebook of Criminal Justice Statistics 1995, at 177.

4) Finally, polls conducted in 1994 and 1995 demonstrate that, although there has been an apparent recent shift toward more punitive than rehabilitative attitudes, public belief in the effectiveness of rehabilitation as a punishment purpose continues to run high.

The Los Angeles Times and Sam Houston researchers asked, "Thinking of criminals who commit violent crimes, do you think most, some, only a few, or none of them can be rehabilitated given early intervention with the right program?"
1994 results:

Most 17 percent
Some 47 percent
Only a few 25 percent
None 6 percent

Sourcebook of Criminal Justice Statistics 1994, at 176.
1995 results:

Most 14.4 percent
Some 44.8 percent
Only a few 28.7 percent
None 9.1 percent

Sourcebook of Criminal Justice Statistics 1995, at 177.

Although the polls reported in the Sourcebook demonstrate continued public support for both retribution and rehabilitation in relation to violent offenders, they can be faulted for not being specifically applicable to the death penalty, due to the logical difficulty inherent in attempting to apply rehabilitation in the capital punishment context. Arguably, however, a set of polls that have been conducted since 1986 do succeed in measuring the public support for rehabilitation in the death penalty context with the remarkable consequence that a rehabilitative punishment alternative has been observed that is **universally preferred** over the death penalty for capital murder offenders.

This set of post-*Furman* surveys has shown undeviating preference on the part of the public for a kind of compensatory, rather than solely retributive, punishment that necessarily implies a concomitant public belief in rehabilitation of capital defendants. Public opinion polls invariably show that, where respondents are given the alternative punishment choice of a real life sentence, coupled with restitution to the family members of the offender's victim(s), support for the death penalty evaporates. Bowers, *supra*, at 144. Researchers have noted that the standard polling question -- Do you support the death penalty? -- reflects an acceptance of the death penalty but not a **preference** for that punishment over other alternatives:

> When people are presented with an alternative to the death penalty that incorporates both lengthy imprisonment and restitution to murder victims' families, and are then asked whether they would prefer the death penalty to such an alternative, they consistently choose the non-death penalty alternative.

Id. at 79. In polls from 1986-1995, a majority of respondents in Arkansas, California, Florida, Georgia, Kansas, Massachusetts, New York, and Indiana have stated a preference for life without parole plus restitution over the death penalty as punishment for capital offenders. *Id.* at 91. The death penalty has not been preferred over life plus restitution in any state poll. Researchers conclude that:

> [F]or most people [life imprisonment without parole plus restitution] is "harsh enough" while **the death penalty lacks sufficient restorative or compensatory value.** In most people's minds, the attractiveness of having convicted murderers work in prison for recompense, combined with personal misgivings about capital

> punishment, **concern for the humane and restorative priorities it denies**, and satisfaction with the harshness of the alternative, converts expressed death penalty support into preference for the [life imprisonment without parole plus restitution] alternative. The result is that most people, even most who profess strong death penalty support, would choose the alternative.

Id. at 145 (emphasis added). Whereas the U.S. public supports the strictness of the capital sanction as an expression of community outrage, the polls indicate that the public also embraces the idea that the punishment of capital offenders, like that of other prisoners, must be undertaken with a view to the comprehensive needs and rights within the community. The firm public support for life without parole plus restitution demonstrates an evolving standard of decency in punishment that transcends -- in its holistic, self-conscious attentiveness to the needs in every community sector -- the more ritualized, historical capital sanction. It recognizes, furthermore, the value of the life of the perpetrator, at least as dedicated to restoration of the community breach caused by his actions.

The behavior of the *Furman* commutees in Texas demonstrates empirically that the public's belief in rehabilitative options is not misplaced. Forty-seven inmates were physically present on death row when *Furman v. Georgia* was announced in 1972. James W. Marquart, Sheldon Ekland-Olson, & Jonathan R. Sorenson, The Rope, The Chair, and the Needle 123 (Univ. of Texas Press 1994). Governor Price Daniel commuted all forty-seven inmates to life imprisonment or ninety-nine years. Thirty-seven had been convicted of murder, seven of rape, and three of armed robbery. *Id.* Seventy-five percent committed no serious infractions during their confinement in the general population. *Id.* at 124. Sixty-six percent (31 prisoners) were eventually released to the community. *Id.* at 125. Eighty-six percent were not convicted of a new felony while in the free community, compared to 94 percent of a comparable research control group. *Id.* The recidivism rate in both *Furman* and control groups was low. *Id.*

2. Legislative Enactments

The public support for restorative justice reflected in widespread polling has been incorporated into our states' penal laws, including the law of Nevada. Although the widespread support for strict, certain, and restorative penalties has not been expressed by way of the elimination of post-*Furman* capital murder statutes or the passage of laws that provide the jury

more capital offense punishment options, Congress and a majority of state constitutions and legislatures have mandated that **all procedures and punishments** in their criminal codes, not excluding capital offenses, be governed by concern for rehabilitative and restorative values. Almost all states show fundamental respect for rehabilitative principles by way of the codification of their criminal laws or interpretation of statutory provisions for punishment by state high courts. Almost states make some provision for restitution as an adjunct to criminal sentencing. Most of these states do not restrict the obligation of restitution to persons sentenced to life or years. Many states explicitly tie restitution to rehabilitation of the defendant or make restitution a function of rehabilitation. *See also* Stephen Schafer, Compensation and Restitution to Victims of Crime 119-22 (2d ed. 1970).

There is no meaningful contrast between death penalty and non-death penalty states in relation to the emphasis given rehabilitation as a punishment goal. For every Wisconsin and Minnesota, there is a Wyoming, Oregon, or Indiana; the latter all having the death penalty **and constitutional** provisions mandating that rehabilitation be considered the preeminent goal in punishment. Retribution as vengeance is not advocated by any state; whereas, retribution as it is represented in the concern for proportionate sentencing is found in many of the states' statutory provisions. The coexistence of the death penalty, retribution, and rehabilitation, along with the omnipresent option of restitution is remarkable, and demonstrates by way of a pattern among the states' statutes not only the resilience of rehabilitation as a punishment goal, but the **dual high punishment priorities** found in public opinion polls and their mutual and productive interaction.

a. The Federal Government

Prior to Congress' sentencing reform in 1984, federal sentencing policy was based almost exclusively upon a rehabilitation model. Continuing Appropriations, 1985--Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221 (1984)("[C]riminal sentencing is based largely on an outmoded rehabilitation model."). On the basis of concerns similar to those driving the Supreme Court's revamping of death penalty jurisprudence -- chiefly the complete discretion afforded sentencers

and wide disparities in sentencing results -- and concern about the capacity of the prison setting to foster rehabilitation, the Senate Judiciary Committee pushed sentencing reform toward greater uniformity in sentencing and less emphasis on rehabilitation. *Id.* at 3220-23. The product of the Senate's finding that other concerns than rehabilitation should also guide sentencing was the Sentencing Reform Act, which outlined four purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. 18 U.S.C. § 3553 (a) (2) (1988). The Judiciary Committee maintained that all four should be considered in sentencing and that no one should be viewed abstractly as being more important than the others. 1984 U.S.C.C.A.N. 3220, 3250-51. The Senate recognized, however, that in any individual case one goal might take on more importance than others, and that not every purpose would be relevant in every case. *Id.* at 3250-51, 3260. The Senate Judiciary Committee expressed the intent of Congress:

> The intent of subsection (2) is to recognize the four purposes that sentencing in general is designed to achieve and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.

Id. at 3260. Rehabilitation, thus, survived sentencing reform on equal par with retribution and deterrence (the two purposes maintained by the Supreme Court as the bases for the capital sanction) as a Congressionally mandated goal in punishment. Interestingly, the overarching policy statute also includes as a factor to consider in imposing sentence "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3353 (a) (7) (1997). The new code embraces the death penalty for murder and, like many state codes, requires sentencing consideration of a number of mitigating factors that would include concerns about rehabilitation. 18 U.S.C. 1111 (murder); 18 U.S.C. 3592 (a) (1) (impaired capacity), (5) (no prior history), & (8) (catchall). Rehabilitation also plays a big role in the Sentencing Guidelines for non-capital offenses. *E.g.*, 18 U.S.C. Appx @ 3E1.1.

b. The Model Penal Code

Rehabilitation is one of the chief purposes listed by the American Law Institute, and retribution is notably absent, except as it is involved in proportionality:

The general purposes of the provisions under the code governing the sentencing and

treatment of offenders are:

(a) to prevent the commission of offenses;

(b) to promote the correction and rehabilitation of offenders;

(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;

(d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;

(e) to differentiate among offenders with a view to a just individualization in their treatment;

(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction.

Model Penal Code § 1.02 (West 1997).

c. State Constitutions Establishing Rehabilitation as One (or the Only) Punishment Priority.

Alaska (no death penalty), Indiana (death penalty), Oregon (death penalty), and Wyoming (death penalty) all have state constitutional provisions requiring that punishment be based upon rehabilitation.

3. The Behavior of Juries

The Supreme Court has often regarded the behavior of juries as an index of evolving standards of human decency. The Capital Jury Project, a massive social-science undertaking in a number of states, has unearthed some characteristics about capital juries that cast doubt about the reliability of their decisions as a gauge of public attitudes about punishment. *See* William J. Bowers, *Symposium: The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Indiana L. J. 1043 (Fall 1995); *see also* Craig Haney, *Taking Capital Jurors Seriously*, 70 Indiana L. J. 1223, 1227 (Fall 1995) (expressing skepticism that jurors understand the significance of mitigating evidence or its correct use in coming to a verdict); Peter Meijeres Tiersma,

Dictionaries and Death: Do Capital Jurors Understand Mitigation?, 1995 Utah L. Rev. 1. The Capital Jury Project study has revealed that a majority of jurors enter the punishment stage of capital trials with their minds already made up about whether they will impose the death penalty. More than six out of ten jurors have responded that their **guilt stage** deliberations focused a "great deal" or a "fair amount" on future dangerousness and the punishment to be imposed. *Id.* at 1087. Thirty-seven percent reported that there was open discussion at the guilt deliberations about whether the defendant should get the death penalty. *Id.* at 1088. After the guilt stage was over and the defendant had been found guilty, but before any punishment stage evidence had been presented, 30 percent had decided the defendant should get the death penalty and 20 percent had decided on life. *Id.* at 1089. By way of a follow-up question, it was determined that 64.6 percent of those who had decided on death or life were "absolutely convinced" while another 30.5 percent were "pretty sure." *Id.*

The Project has also found that jurors heavily displace responsibility for the punishment decision. Eight of ten responded that the defendant or the law was most responsible for the defendant's punishment. *Id.* at 1094. Three of twenty believed that the jury was the agent most responsible for the defendant's punishment. *Id.* at 1095.

The death bias entering the punishment stage along with the inscrutability of most juries' decisions in "directed" and "threshold" statute states make any conclusions about juror treatment of rehabilitation in sentencing speculative. More research must be done among jurors participating on juries that ultimately voted for life before any reasonable arguments can be advanced on juror sentencing as an index of the moral consensus favoring life for rehabilitated capital defendants.

4. Statements by American Religious Bodies

The policy positions taken by church bodies regarding the death penalty and rehabilitation are indicators of contemporary standards of decency that should inform consideration of the Eighth Amendment questions. Churches are in the business of religious transformation, and represent a large segment of American society. *See e.g., Thompson*, 487 U.S. at 830 (plurality opinion) (valuing the opinions of respected organizations with expertise in the relevant area). Religious

bodies have played an integral role in the development of American penal policy and reform from the time of the founding. *See, e.g.*, Gerald A. McHugh, Christian Faith and Criminal Justice: Toward a Christian Response to Crime and Punishment (1978) (illustrating the roots of American penology in contrasting ideologies toward crime and punishment held by Puritans and Quakers). In particular, churches have also been involved since before we became a nation state in the policy and practice of the death penalty. *See, e.g.*, Daniel A. Cohen, Pillars of Salt, Monuments of Grace: New England Crime Literature and the Origins of American Popular Culture, 1674-1860 (1993); Louis P. Masur, Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865 (1989); J. Gordon Melton, The Churches Speak on: Capital Punishment: Official Statements from Religious Bodies and Ecumenical Organizations (Gale Research Inc. 1989) [hereinafter Melton]. It is only recently, in fact, that most American church bodies, other than traditional "peace" churches such as Quakers, have issued public pronouncements raising questions about the use and fairness of the death penalty. A large number of churches, however, now have issued such statements (some of which are represented *infra*). Churches are split on the issue of the acceptability of the punishment, primarily along liberal-moderate/conservative lines, with many conservative (or evangelical) churches not taking a public stand on the issue. Recent social science studies, however, reveal a significant correlation between retributivist attitudes toward punishment and conservative American Protestant religion. Harold G. Grasmick, et al., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30 Criminology 21, 25, 38 (1992) (noting mounting evidence that religious beliefs play a crucial role in public attitudes about criminal justice policy matters); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. Sci. Stud. Religion 76, 85 (1992) (finding an association between religious fundamentalism and social support for the death penalty).

Churches that have issued statements on the death penalty -- whether for or against the penalty in general -- have registered special concern regarding the incompatibility of capital punishment with personal, spiritual reformation and rehabilitation. The concern is overwhelmingly present in statement after statement. For example, the Texas Catholic Bishops on October 20,

1997, "reiterate[d]" their opposition to the death penalty, calling for "more support for the families of victims and urg[ing] reconciliation as well as rehabilitation of the perpetrators of the sometimes heinous crimes." Statement by the Catholic Bishops of Texas on Capital Punishment, October 20, 1997 This statement is consistent with the Pope's own recent declaration against the death penalty (except in the most extreme circumstances). A 1980 Statement on Capital Punishment by the National Conference of Bishops of the Roman Catholic Church does not **per se** reject the death penalty, but rather finds it incommensurate punishment in most cases, precisely because it denies rehabilitation of the offender:

> We believe that the forms of punishment must be determined with a view to the protection of society and its members and to the reformation of the criminal and his reintegration into society (which may not be possible in certain cases).

Statement on Capital Punishment 1980, at I (8), under "Purposes of Punishment." Melton, at 18. Directly in line with the polling results, *supra*, the national bishops find a "difficult[y] inherent in capital punishment" that "infliction of the death penalty extinguishes possibilities for reform and rehabilitation for the person executed as well as the opportunity for the criminal to make some creative compensation for the evil that he or she has done." *Id.* at III (14); Melton at 19. In rejecting the death penalty in 1983, the Catholic Bishops of Oklahoma commented:

> Putting human beings to death, even when done by lawful sanctions and after proven terrible crimes, seems to be a kind of rejection of hope regarding those persons. There are many instances of persons guilty of terrible crimes coming to a complete moral change. In our own lives, have we not seen this movement from sin to repentance take place?

Statement in Opposition to Capital Punishment (1983), Roman Catholic Bishops of Oklahoma; Melton, at 27.

As early as 1958, the American Baptist Churches in the U.S.A. issued a statement advocating the abolition of the death penalty, in part on the ground that the church held the "conviction that the emphasis in penology should be upon the process of creative, redemptive rehabilitation, rather than on punitive retribution." The American Baptist Churches were among the first churches to advocate abolition. American Baptist Churches in the U.S.A., Resolution on Capital Punishment (1958); Melton, at 53.

The Disciples of Christ issued a national statement in 1985 calling for abolition, in part on the ground that "the use of execution to punish criminal acts does not allow for repentance or restitution of the criminal." Christian Church (Disciples of Christ), Resolution Concerning Opposition to Use of the Death Penalty (1985); Melton, at 58.

A statement was issued by an ad hoc group of Protestant, Orthodox, and Roman Catholic leaders in Florida in 1984, in opposition to the reinstatement of the death penalty in that state, noting that execution "eclipses" possibilities for reconciliation, and stressing the duties of an offender to participate in rehabilitative activities and practice restitution "however inadequate or symbolic, as a serious attempt toward reconciliation with the person to whom he has caused a life of suffering." Christian Leaders of Florida, The Moral Consequences of Capital Punishment (1984); Melton, at 61.

The Episcopal Church issued statements in 1958 and 1969 opposing capital punishment. Melton, at 105.

The Friends United Meeting has issued an undated statement expressing its historic opposition to the death penalty, observing members' belief that "the Christian way to deal with crime is to seek the redemption o[r] rehabilitation of the offender." Friends United Meeting, Statement on Capital Punishment; Melton, at 111.

The National Council of Churches issued an abolition statement in 1968, announcing its "preference for rehabilitation rather than retribution in the treatment of offenders." National Council of Churches of Christ in the U.S.A., Abolition of the Death Penalty (1968); Melton, at 120.

The Reformed Church in America issued a statement in 1965 opposing capital punishment, noting in particular that, "Capital punishment ignores the entire concept of rehabilitation." Reformed Church in America, Statement on Capital Punishment (1965); Melton, at 124.

The Presbyterian Church (U.S.A.) issued a statement in 1965, since reaffirmed, against the death penalty, in part because of belief in "God's . . . power to redeem and restore the lost to meaningful and useful life." Presbyterian Church (U.S.A.), On Capital Punishment (1965);

Melton, at 121.

Having produced a number of statements against the death penalty, the United Church of Christ issued a statement on Alternatives in Criminal Justice in 1981 advocating "legislation to establish programs including restitution, which require perpetrators of crimes to compensate their victims." Melton, at 134-35.

In 1984 the United Methodist Church issued a statement of policy on criminal sentencing: "[W]e urge the creation of a genuinely new system and programs for rehabilitation that will restore, preserve, and nurture the total humanity of the imprisoned. . . . Capital punishment should be eliminated since it . . . is contrary to our belief that sentences should hold within them the possibilities of reconciliation and restoration." United Methodist Church, Criminal Justice (1984); Melton, at 140-41.

The Union of American Hebrew Congregations (Reformed Judaism) issued a statement in 1959 opposing capital punishment, pledging to "foster modern methods of rehabilitation of the wrongdoer in the spirit of the Jewish tradition of tshuva (repentance)." Union of American Hebrew Congregations, Opposing Capital Punishment (1959); Melton, at 143.

As examples of conservative denominations, the Missouri Synod Lutheran Church and the Christian Reformed Church have issued lengthy and thoughtful statements on the question of capital punishment. Both churches conclude that, although the penalty may be biblically permissible, the State is not mandated by God to exercise it. Pointedly, the Christian Reformed Church concludes that executions should only rarely be utilized:

> States are not called upon to convert sinners or even to reshape them, but they ought, insofar as possible, to leave room for repentance and amendment, and not unnecessarily shorten the time in which these wholesome things can occur. Death should therefore not be visited upon a person unless this extreme measure is necessitated by overriding social considerations. . . .
>
> Justice alone does not require the death of the murderer. Justice requires only that he be punished and that his punishment be, not equivalent to, but in proportion to his crime. Justice can be served when the murderer is appropriately imprisoned.

Statement on Capital Punishment (1981); Melton, at 95.

The Missouri Synod statement declares that "neither the Scriptures nor the Lutheran Confessions state that the government *must* impose the death penalty in order to serve as the "minister of God" by punishing flagrant wrongdoing, including murder," and advocates support of humane and progressive systems of reformation within the capital context. Report on Capital Punishment (1976); Melton, at 118-19.

The National Association of Evangelicals has issued a short statement on capital punishment that places the values of retribution and rehabilitation in tension:

> The place of forgiveness and rehabilitation of the criminal must not be minimized by those who are concerned with the administration of justice. However, concern for the criminal should not be confused with proper consideration for justice. Nothing should be done that undermines the value of life itself, or the seriousness of a crime that results in the loss of life.

National Association of Evangelicals (1972); Melton, at 119.

To the best of Mr. Vanisi's knowledge the religious bodies having issued the above representative number of statements of policy have not changed their positions, to date, on the death penalty or (for the most part) the primary emphasis on rehabilitation over retribution in punishment. These policy statements represent a sea-change in perspective on the issue of capital punishment, accomplished over the last two hundred years, accelerated during the middle part of this century, and accompanied by the rise of the rehabilitative ideal and evolving legal doctrine about individualized sentencing and proportionality. The breadth and depth of support for the rehabilitative ideal is notable. Most of these institutions also, for the most part, make the presumption noted above in regard to the Supreme Court that rehabilitation and retribution pose an either/or choice. Among the foregoing statements, the one that corresponds most to the societal consensus on punishment alternatives found in current polling was issued by the National Conference of Catholic Bishops in 1980, not eschewing the death penalty in theory, but finding the alternative of a life sentence plus restitution the most desirable option.

In the days of swift justice when our Puritan forefathers, Cotton and Increase Mather, had to rush to beat the hangman for a conversion, (almost-symbolic and coerced) salvation, not rehabilitation, was the religionists' and society's goal for the offender, and reestablishment of the

public order was separately accomplished through the inherently oppressive scaffold spectacle rather than any real reconciliation:

> On execution day, ministers expected the prisoner to enact the drama of penitence and redemption. Condemned to die by civil authorities who believed they acted in accordance with divine precepts, criminals were encouraged and manipulated to recant publicly their sins and plead for the mercy of God. Clergy offered the "true penitence" of the prisoner as proof of the saving grace of God; the execution spectacle dangled before the spectators['] eyes the journey "from the gallows to glory." In this way the ritual of execution served multiple purposes. The idea that the criminal "would this day be in heaven" made the hanging more palatable to some.

Masur, *supra*, at 41. Christian ministers routinely gave execution day sermons, distributed pamphlets, and produced the condemned for a public recantation of his sins for the purpose of imposing social order in the name of the "God of Order." *Id.* at 41, 45. Minister Perez Fobes, for example, instructed the crowd assembled to witness the hanging of a burglar that the condemned believed he deserved to die, that the "pardoning mercy" of God would save him, and that the spectators had better get on with the business of their own repentance. Masur, *supra*, at 41. Fobes "clarified the relationship of the criminal to the populace-at-large" by asserting that "the difference [between the criminal and the crowd] may consist only in this, that he is detected and condemned, but they as yet are concealed from human eye." *Id.* at 43.

Even the most conservative modern church statements reveal an **entirely different sensibility** -- rejection of a religiously-sanctioned mandatory death penalty and a desire for the life of the offender in *this* world, not only in the next. This sensibility was most eloquently expressed by the Rev. Pat Robertson on the CBS News show "60 Minutes," in a specific plea for the life of a woman on Texas's death row:

> In her case compassion should overrule the "so-called" sense of justice. There is a certain right that society has against killers. I support that. I'm not opposed to the death penalty. I think [Governor Bush] should commute her sentence.

Robertson affirmed that he believed in a "pro-life policy for people who have committed heinous crimes if they have completely changed." He added that inmates' lives should be spared, also, when they no longer posed any risk of danger to others. This policy, representative of the "religious right" and also akin to the views on rehabilitation held by the broader church spectrum,

springs not only from gracious concern for the individual offender, but also from a sense that reestablishment of the social order following a criminal breach is better accomplished by concrete acts of penitence and restitution than a public punishment ritual. This attitude supports the argument that our evolving standards of decency have brought us to a new place, where even among the most conservative churchmen, execution of Mr. Vanisi would be a wanton and arbitrary waste of life.

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5. Commutation Actions by Governors and State Boards

Rehabilitation has played a large role in decisions by Governors and State Boards to grant commutation of death sentences. Michael Radelet and Barbara Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Richmond L. Rev. 289, 303 (1993) (noting that rehabilitation plays a "secondary role" in many cases. Post-*Furman* Governors in nine states have granted humanitarian commutations. In three of the nine states (Montana, Virginia, and Georgia), post-*Furman* Governors commuted death sentences based primarily on the grounds that the inmate had undergone Christian rehabilitation.. These commutations were granted after enormous outpourings of public support for the inmates. The post-*Furman* practice of commutation based on rehabilitation merely continues a long established practice in the states.

Post-*Furman* Nevada Governors have not granted commutation of any death sentence based on any kind of humanitarian reason (including rehabilitation). For that reason, Nevada is an exception to the rule represented in the other states.

The actions of the governors in death-penalty states in relation to rehabilitation as a clemency ground are a clear measure of the evolving standards of decency of our society, because executives are politically loathe to take such actions without a sense of strong support from the people.

6. International Opinion and Law

A number of times, the Supreme Court has considered international law as a moral index of evolving standards of decency. *Stanford*, 492 U.S. at 369-71; *McCleskey v. Kemp*, 481 U.S. 269, 300 (1987). Of course, evidence of international opinion against the death penalty, and the

growing number of non-death penalty states, must be read as consistent with rehabilitation as a punishment goal. At least one hundred and nine foreign states have abolished the death penalty in law or practice. Report of the Secretary General, Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, U.N. Doc. E/1995/78 (1995).

More importantly, however, the United States and the State of Nevada are bound by international treaty to at least provide meaningful commutation review to rehabilitated capital inmates. The United States is a party to, and has ratified, the International Covenant on Civil and Political Rights, which announces two non-derogative rights that pertain to Mr. Vanisi:

> **Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.**
>
> **Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.**

International Covenant on Civil and Political Rights (entered into force March 23, 1976; ratified by the United States on September 8, 1992), at Article 6, §§ 1 & 4 (emphasis added). Under the Supremacy Clause of Article VI, Section 2, United States Constitution, all treaties made by the federal government are binding on the states. Nevada is currently in violation of Article 6 of the Covenant, because it has **de facto** eliminated clemency and commutation as a relief option for capital prisoners[21]. As applied to Mr. Vanisi in particular, the State might be in further violation of

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[21]NRS 213.085 Board prohibited from commuting sentence of death or imprisonment for life without possibility of parole to sentence that would allow parole.

1. If a person is convicted of murder of the first degree before, on or after July 1, 1995, the board shall not commute:

(a) A sentence of death; or

(b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.

2. If a person is convicted of any crime other than murder of the first degree on or after July 1, 1995, the board shall not commute:

(a) A sentence of death; or

(b) A sentence of imprisonment in the state prison for life without the possibility of parole, to a sentence that would allow parole.

the treaty if it provided Mr. Vanisi with no meaningful clemency or commutation review, because Article 6, Section 4 necessarily implies that the State must respect rehabilitation of an offender as a ground for meaningful commutation review. *See, e.g.*, Shigemitsu Dando, *Toward the Abolition of the Death Penalty*, 72:7 Indiana Law Journal 16 (1996) (observing that the "right to seek pardon or commutation of anyone sentenced to death" presupposes respect for rehabilitative potential).

The right of death row prisoners in Nevada to apply for commutation of sentence does not exist. The literal absence of meaningful clemency/commutation review in Nevada directly violates Sections 1 and 4 of Article 6 of the International Covenant on Civil and Political Rights, which has been signed and ratified by the United States and is binding on the states through Article VI, Section 2, of the United States Constitution. Specifically, the death penalty clemency/commutation process in Nevada violates, by its total absence of process, these two non-derogative (against which the United States has made no reservation):

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

International Covenant on Civil and Political Rights (entered into force March 23, 1976; ratified by the United States on September 8, 1992), at Article 6, §§ 1 & 4. The United Nations General Assembly has made clear, by way of a resolution adopted on December 15, 1980, that the purpose of Article 6, Section 4, is to guarantee that signatory countries provide **meaningful** commutation review:

> *The General Assembly,*
> *Having regard* to the provisions bearing on capital punishment in the International Covenant on Civil and Political Rights, particularly its Articles 6, 14 and 15,
>
> *Recalling* its resolution 2393 (XXIII) of 26 November 1968, in which it invited Governments of Member States, *inter alia*, to ensure the most careful legal procedures and the greatest possible safeguards for the accused in capital cases in countries where the death penalty obtains,
>
> *Alarmed* at the incidence in different parts of the world of summary executions as well as of arbitrary executions,

Concerned at the occurrence of executions which are widely regarded as being politically motivated,

1. *Urges* Member States concerned:

> (a) To respect as a minimum standard the content of the provisions of Articles 6, 14 and 15 of the International Covenant on Civil and Political Rights and, where necessary, to review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases;
> (b) To examine the possibility of making automatic the appeal process, where it exists, in cases of death sentences, as well as the consideration of an amnesty, pardon or commutation in these cases;
> (c) To provide that no death sentence shall be carried out until the procedures of appeal and pardon have been terminated and, in any case, not until a reasonable time after the passing of the sentence in the court in the first instance;

2. *Requests* the Secretary-General to use his best endeavors in cases where the minimum standard of legal safeguards referred to in paragraph 1 above appears not to be respected. . . .

United Nations General Assembly Resolution 35/172 (adopted on December 15, 1980).

In addition, execution of Mr. Vanisi without meaningful clemency/commutation review would violate customary international law, as reflected in numerous important conventions and documents. An ever-growing number of countries are rejecting the death penalty as contrary to civilized norms and the fundamental right to life. *See, e.g.*, Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (in force as of July 11, 1991) (outlawing the death penalty in all parties to the Optional Protocol); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty (Convention signed on November 4, 1950) (abolishing the death penalty in European member states); Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty (in force October 6, 1993) (abolishing the death penalty in member states, in part specifically because it does not allow for rehabilitation of the offender). International instruments repeatedly stress that those countries which retain the death penalty must provide procedures for meaningful commutation review. International Covenant on Civil and Political Rights (entered into force March 23, 1976; ratified by the United States on September 8, 1992), at Article 6, §§ 1 & 4; Safeguards Guaranteeing Protection of the

Rights of Those Facing the Death Penalty (adopted by the United Nations Economic and Social Council in resolution 1984/50 at its Spring session on May 25, 1984, and endorsed by the United Nations General Assembly in resolution 39/118, adopted without a vote on December 14, 1984) (Article 7: "Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment"); American Convention on Human Rights (entered into force on July 18, 1978) (Article 4, Section 1: "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception.") (Article 4, Section 6: "Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.").

This Court must stay Mr. Vanisi's execution and review the Nevada's clemency/commutation rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases (including his case), so as to prevent the execution of him under circumstances that would clearly violate the International Covenant on Civil and Political Liberties and the Supremacy Clause of the United States Constitution, as well as customary international law. *See supra* U.N. Resolution 35/172.

U.S. Supreme Court Justice Douglas wrote:

> When society acts to deprive one of its members of his life . . . it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.

Douglas v. People of the State of California, 372 U.S. 353, 357 n.2 (1963).

It is clear that it is a principle of fundamental fairness "rooted in the traditions and conscience of our people" that an inmate be given some forum, whether it be in the judicial process or clemency, for the presentation of evidence that she is no longer eligible for the punishment society has allotted her, so that miscarriage of justice may be avoided. *Herrera*, 506

U.S. at 411-12. Noting the severity of every country's criminal code, Andrew Hamilton commented in the Federalist Papers that if there were no "easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Herrera, 506 U.S. at 413-14 (quoting Federalist No. 74). We can be assured that our society has not deviated from that standard, and if a petitioner can show that he is "innocent" of the punishment to be inflicted, he must be given the opportunity to make his case.

CLAIM 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.

Mr. Vanisi asks this court to strike the death sentence against him because Nevada's capital punishment scheme empowers prosecutors to seek death, and secure death sentences, in an arbitrary, idiosyncratic, and discriminatory manner, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Under Nevada's scheme, prosecutors may seek a death sentence against virtually any defendant indicted for first-degree murder. Neither NRS 200.033, nor any other statutory provision sufficiently guides prosecutors in determining whether to seek the death penalty in a particular case; nor are district attorneys required either to promulgate their own guidelines or to explain their reasons for seeking or declining to seek death in a particular case. Such a scheme allows for the random and capricious selection of death-eligible defendants, and ensures that any discriminatory, bad faith, or otherwise improper decisions to seek death remain hidden: No procedural mechanisms ensure review of the rationales for death-notice decisions in individual cases, or even the factors generally taken into account by prosecutors in making such decisions. This deprives defendants of their right to be free from cruel and unusual punishment and

theirrights to due process and equal protection under the Constitution. The State's capital punishment legislation is thus unconstitutional on its face and as administered.[22]

A. Unguided and Unreviewed Prosecutorial Discretion Violates the Constitutional Proscription Against Cruel and Unusual Punishment.

A capital punishment scheme that allows for the arbitrary and capricious selection of capital defendants violates both the Eighth and Fourteenth Amendments to the United States Constitution. See Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). In Furman, the death sentences under review were deemed

> cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes] . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

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[22] There is an acknowledged difference between a "groundless prosecution" and an "arbitrary and capricious prosecution," State v. Smith, 495 A.2d 507, 515-16 (N.J. Super. Ct. Law Div. 1985). It is the latter concern — as to the inherent arbitrariness and inconsistency of the method by which death penalty decisions are made in Nevada — that animates Mr. Vanisi's arguments. *Cf.* Maynard v. Cartwright, 486 U.S. 356, 360-64 (1988) (in light of Eighth Amendment's concern for minimizing arbitrary and capricious action, vagueness challenge under the Amendment to aggravating factor is facial, not based on facts of the case at hand); Matter of Nicholas v. Kahn, 47 N.Y.2d 24, 28-29, 33-34 (1979) (conflict of interest rules held unenforceable against all agency employees, whatever their circumstances, as the accompanying exemption procedure vested unfettered discretion in chairman to grant or deny exemption, without any guidelines, rendering his decision "arbitrary and capricious as a matter of law"). Mr. Vanisi is making both a facial challenge to NRS 200.033 and to its overall administration, not just a challenge based on its application in his case. *Cf.* People v. Galak, 80 N.Y.2d 715, 721-22 (1993) (notwithstanding defendant's lawful stop and arrest, unconstitutional inventory search policy of Police Department, which was "arbitrary" and also afforded an "impermissible level of discretion" to officers in the field, mandated suppression of contraband discovered); Nicholas, 47 N.Y.2d at 28-29, 34 (where neither Legislature nor administrative agency established guidelines for administrative action, and chairman of agency was vested with unfettered discretion to act, exemption procedure under review was "arbitrary and capricious as a matter of law" and could not be enforced against any person who had sought exemption under "fatally flawed" system).

408 U.S. at 309-10 (Stewart, J., concurring) (footnotes omitted); see Gregg, 428 U.S. at 188 (quoting Furman with approval). To rationalize the selection of those defendants who are to die, the sentencer's discretion must instead be guided and circumscribed. Furman mandates that "'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (quoting Gregg, 428 U.S. at 189).

Furman addressed the problem of unguided discretion as exercised by the jury in determining sentence. In Nevada, the district attorneys' discretion to select defendants for capital prosecution, which directly implicates sentencing, similarly lacks sufficient guidance. Thus, a key component of the process leading to a death sentence — only those defendants chosen by prosecutors can receive this punishment — rests potentially on whim, and the possibility of facing a death sentence is akin to being "struck by lightning." Furman, 408 U.S. at 309.

Relying on certain passages in the plurality and concurring opinions in Gregg, numerous courts of other states have rejected complaints about the standardless exercise of discretion by prosecutors in capital cases. *See, e.g.*, Keenan v. Superior Court, 177 Cal. Rptr. 841, 845-46 (Ct. App. 1981); *see also* cases cited therein.

To be sure, a prosecutor is afforded broad discretion in deciding what charges to bring against a defendant. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). Deciding whether to seek the death penalty, however, is not a charging decision. This decision — which is bound to be subjective and laden with value judgments — implicates only the sentencing, and not the charging, function: The prosecutor does not determine, based on the definitions within the Penal Law, which charges are warranted, but instead decides that certain defendants are eligible to face qualitatively more severe punishment than others indicted on identical charges.

The Supreme Court of Utah has recognized this crucial distinction between charging decisions, as to which prosecutors have historically exercised broad discretion, and decisions that go beyond charging, as to which prosecutors are not entitled to unbounded discretion. In State v. Mohi, 901 P.2d 991 (Utah 1995), the court examined a scheme that gave prosecutors uncircumscribed power to decide whether to prosecute certain juveniles as adults. Holding that the scheme violated the state constitution, the court observed that, under the scheme,

> prosecutors [have] total discretion in deciding which members of a potential class of juvenile offenders to single out for adult treatment. Such unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decisionmaking. . . . The type of discretion incorporated in the Act is unlike traditional prosecutor discretion. Selecting a charge to fit the circumstances of a defendant and his or her alleged acts is a necessary step in the chain of any prosecution. It requires a legal determination on the part of the prosecutor as to which elements of an offense can likely be proved at trial. . . . The elements of the offense are determined by the charging decision, *and it is only the charging decision that is protected by traditional notions of prosecutorial discretion.*

Id. at 1002-04 (emphasis added); see also Deal v. United States, 508 U.S. 129, 133-34 & n.2 (1993) (government's proposed interpretation of a sentencing-enhancement statute "would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions . . . by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment. . . . We are not disposed to give the statute a meaning that produces such strange consequences"; while traditional prosecutorial discretion "pertains to the prosecutor's universally available and unavoidable power to charge or not to charge an offense," the government's "reading would confer the extraordinary new power to determine the punishment for a charged offense by simply modifying the manner of charging"); State ex rel. Schillberg v. Cascade Dist. Court, 621 P.2d 115, 119 (Wash. 1980) (court's statutory authority, after the defendant's arraignment, to refer him for evaluation as candidate for deferred prosecution did not invade prosecutor's traditional charging function: "[T]he court's disposition of the [defendant's] petition [for deferred prosecution] follows the prosecution's decision to charge; once the accused has been charged and is before the court, the charging function ceases."); State v. Leonardis, 375

A.2d 607, 617 (N.J. 1977) (deferred prosecution "entails more than merely the charging function, and hence, cannot be said to fall solely within the discretion of the prosecutor").

In Nevada, similarly, a district attorney's decision to seek a death sentence is not a charging decision as such; rather, prosecutors have been granted an open-ended license to determine which first-degree murder defendants should be exposed to a qualitatively different punishment upon conviction of the same charge. Thus, the constitutional infirmities of NRS 200.033's death-notice provision cannot be dismissed by reliance on the doctrine of traditional prosecutorial discretion in charging decisions.

Finally, the Supreme Court's consideration of prosecutorial discretion in Gregg also reflected the realization that some discretion in the process culminating in the imposition of a death sentence was not only inevitable but beneficial:

> At each of these stages [in the processing of a murder case] an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards . . . .

428 U.S. at 199. Absent appropriate channeling, the prosecution's life and death decisions can be based on a coin toss, a prosecutor's political ambitions, racial consciousness, or on any or no reason at all. Even if every prosecutor tries to behave responsibly by the light of his or her individual judgments, there can be no consistency among the myriad assistants involved in capital cases across the state: Nothing requires that the factors driving NRS 200.033 decisions be articulated, vetted, shared, or reviewed.

Since Nevada's statutory scheme does not provide guidance to prosecutors, or demand that factors governing death-notice determinations be established and subject to judicial oversight, the scheme authorizes arbitrariness in the ultimate imposition of capital sentences. *Compare* Nicholas, 47 N.Y.2d at 28-29, 34 (where neither Legislature nor administrative agency established guidelines for administrative action, and agency's chairman was thus vested with unfettered discretion to act, exemption procedure under review was "arbitrary and capricious as a matter of

law"), *with* Matter of Big Apple Food Vendors' Assoc. v. Street Vendor Review Panel, 90 N.Y.2d 402, 408 (1997) (in contrast to the "untrammeled, unreviewable discretion" in Nicholas, "the statutory delegation [reviewed in Big Apple] itself provides an adequate objective, intelligible standard for administrative action"). As held in Furman, 408 U.S. 238, a death sentence imposed under such a scheme necessarily violates the Eighth Amendment, and should be held to violate the ban against cruel and unusual punishment under the State Constitution as well.

B. Unguided and Unreviewed Prosecutorial Discretion Violates Due Process

The Due Process Clause protects an individual against arbitrary government action, Wolff v. McDonnell, 418 U.S. 539, 558 (1974), and promotes "fairness" "[b]y requiring the government to follow appropriate procedures" when it seeks to deprive a person of life, liberty, or property, Daniels v. Williams, 474 U.S. 327, 331 (1986). State action that moves a defendant from a large "death-possible" group (people indicted for first-degree murder) to a small "death-eligible" group (defendants against whom an NRS 200.033 notice has been filed) is subject to the constraints of procedural due process, as this is the first, critical step in the selection process for imposition of the death penalty. See Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 294-95 (1998) (Stevens, J., concurring in part and dissenting in part) (procedural due process applies to clemency proceedings, "the final stage of the decisional process that precedes an official deprivation of life").

Thus, that the prosecutor does not have the authority to impose a death sentence, but only to seek such a sentence by filing a notice of intent under NRS 200.033, cannot insulate his or her decision from the need for procedural safeguards. The channeling of discretion at later points in the process neither negates nor cures arbitrariness at this earliest stage: But for affirmative action by the district attorney, a defendant would not be subject to the death penalty at all. Surely, a defendant has a protected life interest in the very decision by which it is determined whether his life will ever be in jeopardy.

As Woodard made clear, moreover, due process protection can apply even to decisions committed entirely to the unfettered discretion of the executive branch. See id. at 290-92 (Stevens, J., concurring in part and dissenting in part); id. at 288-89 (O'Connor, J., concurring, joined by Souter, Ginsburg, & Breyer, JJ.) (holding death-sentenced prisoners are entitled to procedural due process with respect to governor's determination to grant or deny clemency).[23] Thus, notwithstanding the prosecutor's "wide discretion" in conducting grand jury proceedings, his or her actions are subject to review and correction even if the evidence supporting the indictment suffices. *See* People v. Huston, 88 N.Y.2d 400, 406, 410 (1996) (indictment dismissed due to prosecutorial misconduct); see also People v. Caracciola, 78 N.Y.2d 1021, 1022 (1991) (same relief, based on confusing legal instructions given to grand jurors); People v. Louissant, 240 A.D.2d 433, 433-34 (2d Dept. 1997) (same relief, improper cross-examination of defendant); People v. Grafton, 115 A.D.2d 952, 952-53 (4th Dept. 1985) (same relief, prosecutorial misconduct). If it is "as important" that a defendant "'be fairly and justly accused . . . as that he be fairly and impartially tried,'" Matter of Jaffe v. Scheinman, 47 N.Y.2d 188, 195 (1979) (citation omitted), *legislative overruling recognized by* Matter of Attorney General v. Firetog, 94 N.Y.2d 477 (2000), it must be equally important that he be fairly and justly subjected to capital punishment.

In sum, to withstand constitutional scrutiny, the district attorneys' exercise of discretion under NRS 200.033 must be channeled and subject to review. *Cf.* Galak, 80 N.Y.2d at 721 (noting, in striking down police inventory search policy as unconstitutional, "when 'uncanalized discretion' is ceded to those in the field, there is created not just the possibility but the probability that the search and seizure of a citizen's personal effects will be conducted inconsistently, subject to caprice and the personal preferences of the individual officers — in short, it will be conducted arbitrarily") (citation omitted). At the very least, a list of factors applicable to NRS 200.033

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[23] Similarly, equal protection guards against laws that grant unfettered discretion to select among similarly situated individuals and thereby create arbitrary classifications. *See* Yick Wo v. Hopkins, 118 U.S. 356, 367-68, 373 (1886).

determinations should be compiled and available for inspection, so that improper or irrelevant considerations can be weeded out; these factors should be applied uniformly across the state, to foster consistency in the selection of capital defendants; and prosecutors should be required to file, in every first-degree murder case, a contemporaneous statement explaining the rationale for filing or choosing not to file a notice of intent to seek the death penalty.

These safeguards would not only reduce the risk of arbitrary, capricious, and inconsistent decisionmaking, they would also advance this Court's eventual proportionality review: Written records explaining every NRS 200.033 determination — whether it be to seek death or to not seek death — would be available for both individual and comparative consideration. *See* State v. Cooper, 731 A.2d 1000, 1024 (N.J. 1999) ("The lack of a contemporaneous and reliable summary by the prosecutors of the various factors that were considered in arriving at the decision to forego capital prosecution diminishes the effectiveness and reliability of our [proportionality] review.").

Such safeguards would also foster public confidence in the administration of the death penalty. *Cf.* Gardner v. Florida, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant *and to the community* that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion.") (emphasis added); Nicholas, 47 N.Y.2d at 30 ("It is not only essential that . . . [Public Service Commission] employees in fact avoid basing their decisions on personal financial considerations, it is also critical that they appear to the public to be avoiding that evil."). Equally significant, these protections would hardly be burdensome to district attorneys. If a legitimate need for confidentiality were identified in a particular case, provisions could be made to accommodate these concerns, *e.g.*, *in camera* appellate review of a prosecutor's reasons for reaching the decision. *See* People v. Castillo, 80 N.Y.2d 578, 586-87 (1992); *cf.* Gardner, 430 U.S. at 360-61 ("Since the State must administer its capital-sentencing procedures with an even hand, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence.") (citation omitted).

As Nevada's death penalty legislation is currently drafted and administered, however, nothing requires that these safeguards — or indeed any safeguards at all — be implemented. For

all the reasons stated, the vesting of unlimited and unreviewable discretion in district attorneys to select capital defendants renders the State's scheme unconstitutional. Given the acknowledged and undeniable fact that "death is a different kind of punishment from any other . . . in both its severity and its finality," Gardner, 430 U.S. at 357 (internal quotation marks and citation omitted), this Court should be especially vigilant in ensuring fairness, rationality, and a modicum of uniformity in the determination of defendants' eligibility for this ultimate penalty.

Nevada's death penalty statutes fail to narrow the class of defendants who are death eligible. *See, e.g.,* Arave v. Creech, 507 U.S. 463, 470-74, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (a capital sentencing scheme must direct and limit the sentencer's discretion to minimize the risk of arbitrary and capricious action and must genuinely narrow the class of persons eligible for the death penalty).

The Nevada Supreme Court defines too broadly the scope of aggravating circumstances, specifically its definition of prior convictions and "at random and without apparent motive." *See* NRS 200.033(2) and (9).

Since the current system violates the ban against cruel and unusual punishment and defendants' rights to Due Process and Equal Protection, the NRS 200.033 notice filed against Mr. Vanisi must be stricken, and either the judgment reversed, or, in the alternative, the death sentence vacated. This Court should either remand this matter to the trial court for re-sentencing or reduce the sentences to life-without-parole.

CLAIM 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.

Death qualification results in a conviction-prone jury for the guilt phase and disproportionately and unlawfully excludes certain cognizable groups from the jury venire. This prejudice was unnecessary, because the State's interests could be fully reconciled with his rights to a fair and representative jury by death qualifying jurors *after* (and if) he was convicted of a capital offense.

Death qualification should be prohibited because of its distinct unfairness to the defendant.

Thus, pretrial death qualification violates a Nevada defendant's rights to an impartial jury and due process, as well as other constitutional and statutory rights. *See* U.S. Const. amends. V, VI, VIII, XIV.

A. The Constitution Prohibits Pretrial Death Qualification

Pretrial death qualification undermines a capital defendant's right to a fair trial. First, the process conditions jurors toward a guilt verdict because it requires them to assume the defendant's guilt. Protracted discussions with potential jurors regarding penalty implicitly suggest the defendant's guilt, thereby undermining the presumption of innocence and impairing the impartiality of potential jurors.[24]

Second, the surviving jury, when compared to a traditionally composed jury, is conviction-prone and possesses pro-prosecution attitudes.[25] The social science research demonstrating the conviction proneness of death-qualified juries came from numerous researchers using diverse subjects and varied methodologies. "The key to the studies' importance . . . is the remarkable consistency of data. [A]ll reached the same monotonous conclusion: Death-qualified juries are prejudicial to the

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[24] *See* Grigsby v. Mabry, 569 F. Supp. 1273, 1302-05 (E.D. Ark. 1983) (discussing studies and expert testimony on the "process effect," and noting that subjects exposed to pretrial death qualification are "(1) more predisposed to convict the defendant, (2) more likely to assume . . . that the defendant will be convicted and sentenced to death, and (3) more likely to assume that the law disapproves of persons who oppose the death penalty and (4) more likely to assume that the judge, the prosecutor and the defense attorney all believe the defendant to be guilty and that he will be sentenced to die and (5) are themselves far more likely to believe that the defendant deserves the death penalty" and that (6) "imagining . . . an event and publicly affirming one's commitment to it . . . increases the likelihood that [the juror] will allow that event to occur"), *aff'd*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986); National Jury Project, Jurywork: Systematic Techniques § 23.01[4], n.3 (Elissa Krauss & Beth Bonora eds., 2d ed.) (1998) [hereinafter Jurywork: Systematic Techniques]; Craig Haney *et al.*, 'Modern' Death Qualification: New Data On Its Biasing Effects, 18 Law & Hum. Behav. 619 (1994) [hereinafter Haney *et al.*, 'Modern' Death Qualification]; Craig Haney, Examining Death Qualification: Further Analysis of the Process Effect, 8 Law & Hum. Behav. 133, 134-35 (1984) [hereinafter Haney, Examining Death Qualification]; Craig Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121, 128-32 (1984).

[25] *See* Grigsby 569 F. Supp. at 1287-1313; Keeten v. Garrison, 578 F. Supp. 1164, 1171-79 (W.D.N.C.), rev'd, 742 F.2d 129 (4th Cir. 1984). For a listing of pro-prosecution attitudes, see R. 1670-71; see also authorities cited in n. 122, *post*.

defendant." Jurywork: Systematic Techniques at § 23.04[4][a].[26] "The true impact of death

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[26] *See* James R. Acker *et al.*, The Empire State Strikes Back: Examining Death- and Life-Qualification of Jurors and Sentencing Alternatives Under New York's Capital-Punishment Law, 10 Crim. Just. Pol'y Rev. 49 (1999) [hereinafter Acker *et al.*, The Empire State Strikes Back]; Jane Goodman-Delahunty *et al.*, Construing Motive in Videotaped Killings: The Role of Jurors' Attitudes Toward the Death Penalty, 22 Law & Hum. Behav. 257 (1998); Ronald C. Dillehay & Marla R. Sandys, Life Under *Wainwright v. Witt*: Juror Dispositions and Death Qualification, 20 Law & Hum. Behav. 147 (1996); Haney *et al.*, 'Modern' Death Qualification at 619; Phoebe C. Ellsworth, To Tell What We Know or Wait for Godot? 15 Law & Hum. Behav. 77 (1991); Michael L. Neises & Ronald C. Dillehay, Death Qualification and Conviction Proneness: *Witt* and *Witherspoon* Compared, 5 Behav. Sci. & L. 479 (1987); Michael Finch & Mark Ferraro, The Empirical Challenge to Death-Qualified Juries: On Further Examination, 65 Neb. L. Rev. 21 (1986); Irwin A. Horowitz & David G. Seguin, The Effects of Bifurcation and Death Qualification on Assignment of Penalty in Capital Crimes, 16 J. Applied Soc. Psych. 165 (1986); Rick Seltzer *et al.*, The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example, 29 How. L.J. 571 (1986); Gary Moran & John C. Comfort, Neither "Tentative" Nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment, 71 J. Applied Psych. 146 (1986); Samuel Gross, Determining the Neutrality of Death-Qualified Juries, 8 Law & Hum. Behav. 7 (1984); Robert Fitzgerald & Phoebe C. Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984) [hereinafter Fitzgerald & Ellsworth, Due Process vs. Crime Control]; Claudia L. Cowan *et al.*, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984); Phoebe C. Ellsworth *et al.*, The Death-Qualified Jury and the Defense of Insanity, 8 Law & Hum. Behav. 81 (1984); William C. Thompson *et al.*, Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts, 8 Law & Hum. Behav. 95 (1984); Joseph B. Kadane, After *Hovey*: A Note on Taking Account of the Automatic Death Penalty Jurors, 8 Law & Hum. Behav. 115 (1984) [hereinafter Kadane, After *Hovey*]; Haney, Examining Death Qualification at 133.

For a detailed analysis of both the studies and expert testimony, *see* Grigsby, 569 F. Supp. at 1291-1304; Keeten, 578 F. Supp. at 1171-79; Hovey v. Superior Court, 616 P.2d 1301, 1314-46 (Cal. 1980), *superseded by statute on other grounds as recognized in* People v. Box, 5 P.3d 130 (Cal. 2000). Insofar as Lockhart criticized the results of these studies, the criticism is unwarranted. The Court's analysis — which failed to consider the studies collectively — disregarded sound academic principles. "[T]he one-by-one elimination of studies from a consistent body of research shows an ignorance of the principle of convergent validity." Phoebe C. Ellsworth, Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment, in Challenging Capital Punishment: Legal and Social Science Approaches 177, 194-97 (Kenneth C. Haas & James A. Inciardi, eds. 1988); *see* Lockhart, 476 U.S. at 189 (Marshall, J., dissenting) ("Where studies have identified and corrected apparent flaws in prior investigations, the results of the subsequent work have only corroborated the conclusions drawn in the earlier efforts."); Jurywork: Systematic Techniques at § 23.04[4][a]; *see also* Hovey, 616 P.2d at 1341-46

qualification on the fairness of a trial is likely even more devastating than the studies show" because prosecution use of peremptory challenges "expand[s] the class of scrupled jurors excluded as a result of the death-qualifying voir dire." Lockhart, 476 U.S. at 190-91 (1986) (Marshall, J., dissenting); *see also* Grigsby, 569 F. Supp. at 1308-10; Bruce J. Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich. L. Rev. 1 (1982).

Nor should this Court accept the contention that life qualification[27] somehow mitigates this prejudice. All jurors — regardless of whether they are life- or death-oriented — fall prey to the conditioning effects of the pretrial process in which the defendant's guilt is assumed. *infra*. In fact, in life qualifying a jury, the defense may be drawn into the conditioning process, appearing to advocate — not a finding of innocence — but imposition of a lesser sentence. Nor does life qualification's outcome alleviate the conviction proneness or attitudinal bias of the resulting jury. Its failure to produce excusals in numbers comparable to those from death qualification renders illusory any such statutory symmetry. *See* Craig Haney *et al.*, 'Modern' Death Qualification at 628 (finding that the relatively few potential jurors excused because of life qualification has little effect on the overall disposition of the surviving jury); Kadane, After *Hovey* at 119.[28]

Third, death qualification substantially reduces jury diversity. African Americans and other racial minorities, women, persons of certain religions, and members of other cognizable groups will be less likely to survive the process. *See* Acker *et al.*, The Empire State Strikes Back at 69 ("The

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(addressing criticisms of studies).

[27] Life qualification seeks to identify those jurors whose views in favor of the death penalty preclude or substantially impair them from rendering an impartial sentence. See C.P.L. § 270.20(1)(f); Morgan v. Illinois, 504 U.S. 719, 737 (1992); *see also* Point X., *post.*

[28] In upholding, by a bare majority, pre-guilt-phase death qualification against a state constitutional attack, the Connecticut Supreme Court invoked a capital case pending before it where the ratio of jurors removed through life qualification as opposed to death qualification was 3 to 2. See State v. Griffin, 741 A.2d 913, 934 (Conn. 1999). The majority thereupon opined that — assuming death penalty beliefs are predictive of jury voting behavior — it could "not [be] conclude[d]" that pre-guilt-phase death and life qualification results in a "Connecticut jury that is more, rather than less, 'conviction prone.'" Id. The instant case stands in stark contrast.

death- and life-qualification process causes a greater than 50 percent reduction in the proportion of non-whites eligible for capital jury service."); Samuel R. Gross, Update: American Public Opinion on the Death Penalty — It's Getting Personal, 83 Cornell L. Rev. 1448, 1451 (1998) ("Race and sex, the two major demographic predictors of death penalty attitudes, continue to be influential on every survey."); William J. Bowers *et al.*, A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer, 22 Am. J. Crim. L. 77, 128-30 (1994) (1991 poll reveals that race and gender are "statistically significant predictors" for support for capital punishment in New York State); Fitzgerald & Ellsworth, Due Process vs. Crime Control at 46 (blacks and women disproportionately excluded).[29] Indeed, a recent poll indicates that, nationwide, a mere 36% of African Americans continue to support the death penalty. *See* Zogby International, Zogby America June 21, 2000 Poll — Likely Voters, Question 8.

In addition to diminishing the representation of particular cognizable groups, death qualification in Nevada will, by all appearances, serve to disqualify a large percentage of the population from participating in the resolution of the State's most serious criminal cases. This phenomenon will be particularly pronounced in some counties, making capital juries there peculiarly unrepresentative.

This Court should interpret the right to an impartial jury and other guarantees of the State Constitution as forbidding pretrial death qualification. Numerous jurists have reached the same conclusion. *See* Griffin, 741 A.2d at 948 (Berdon, J., dissenting) ("[P]utting the studies aside, anyone with any common sense and who has the experience of life, would be compelled to come to the conclusion that venire persons who favor the death penalty are more conviction prone than those who oppose it."); id. at 953, 955 (Norcott & Katz, JJ., dissenting) (finding empirical evidence convincing but also expressing "intuitive agreement with the claim that death qualified juries are disposed to convict at the guilt phase"; while cognizant of state's interest in conserving "cost, time and judicial

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[29] Mr. Vanisi has standing to raise this claim. See Powers v. Ohio, 499 U.S. 400, 402 (1991); see also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128 (1994).

resources," "given the stakes involved, these concerns are [not] compelling enough" to justify death qualifying a jury before the guilt phase); State v. Bey, 548 A.2d 887, 923 (N.J. 1998) (Handler, J., dissenting) (criticizing Lockhart and noting "in no other context has this Court accepted the proposition that mere prosecutorial convenience — or any state interest — justifies procedures that render the jury somewhat more conviction prone") (citations and internal quotations omitted); State v. Ramseur, 524 A.2d 188, 295-99, 344-48 (N.J. 1987) (O'Hern, J., concurring; Handler, J., dissenting) (questioning Lockhart and urging that defendant had independent state constitutional right to traditionally composed jury on ground that "pricing the expediency and efficiency of trials at the expense of a capital defendant's right to be tried before an impartial jury conflicts with our traditional sense of fairness and justice"); Commonwealth v. Maxwell, 477 A.2d 1309, 1319-22 (Pa. 1984) (Nix, C.J., dissenting) (finding death qualification violates state constitution and noting "the time has come to acknowledge on the basis of the considerable reliable empirical data now available that which common sense has long suggested to be true, namely, that the death qualification process . . . produces juries that are both prosecution-prone and unrepresentative"); State v. Young, 853 P.2d 327, 394 (Durham, J., dissenting) (criticizing Lockhart and arguing that "the dual forms of conviction-proneness that death qualification causes . . . violates a defendant's right to 'trial by an impartial jury,' as guaranteed by [the State Constitution,] which requires that 'in capital cases the right of trial by jury shall remain inviolate'"); State v. Irizarry, 763 P.2d 432, 435-36 (Wash. 1988) (Utter, J., concurring).[30]

B. Because the Defendant's Interest in a Fair Determination of Guilt or Innocence by an Impartial and Representative Jury Outweighs Nevada's Interest In Pretrial Death Qualification, the Process Violates the Federal Constitution.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court first confronted the issue whether death qualification produces an unconstitutionally biased jury for the purpose of determining guilt. Although the Court held that the defendant had not substantiated his claim, it recognized that

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[30] Alternatively, given Nevada's overriding interest in fairness and jury diversity, the Court should consider invoking its supervisory powers to eliminate the practice of pre-guilt-phase death qualification. *See* Griffin, 741 A.2d at 955 (Norcott, J., & Katz, J., dissenting).

further proof might have done so. Id. at 517, 520-21 & n.18. In that event, the Court speculated that under the Federal Constitution:

> [T]he question would then arise whether the State's interest in [a neutral penalty-phase jury] may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence — given the possibility of accommodating both interests by means of [alternate procedures].

Id. at 520-21 & n.18. Therefore, at a minimum, the Constitution requires "balancing of the harm to the individual . . . against the benefit sought by the government." Cooper v. Morin, 49 N.Y.2d 69, 79 (1979). And, even were this Court to accept the notion that a State interest *could* outweigh a capital defendant's state constitutional right to a determination of guilt or innocence by a wholly neutral and representative jury, Nevada would not have such an interest.

CLAIM 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.

Supporting Facts.

The high media profile which this case received and the emotional testimony from the State's witnesses unfairly prejudiced Mr. Vanisi in the eyes of the jury, causing the jury to base its decision upon these factors instead of the facts of the case. Accordingly, there is a strong indication that the death sentence was then imposed under the influence of passion, prejudice, or other arbitrary factors.

In Godfrey v. Georgia, 466 U.S. 420, 100 S.Ct. 1759, 64 L.Ed 398 (1980), Justice Marshall in his Concurring Opinion, explains the problem of passion and prejudice inherent in the capital sentencing context:

> ...I think it necessary to emphasize that even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. See *ante*, at 428. **To give the jury an instruction in the form of the bare words of the statute — words that are hopelessly ambiguous and could be understood to apply to any murder, see *ante*, at 428-429; *Gregg v. Georgia*, 428 U.S., at 201 — would effectively grant it unbridled discretion to impose the death penalty.** Such a defect could not be cured by the *post hoc* narrowing construction of

an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

* * *

The preceding discussion leads me to what **I regard as a more fundamental defect in the Court's approach to death penalty cases.** In *Gregg*, the Court rejected the position, expressed by my Brother BRENNAN and myself, that **the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments**. Instead it was concluded that in "a matter so grave as the determination of whether a human life should be taken or spared," it would be both necessary and sufficient to insist on sentencing procedures that would minimize or eliminate the "risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." 428 U.S., at 189, 188 (opinion of STEWART, POWELL, and STEVENS, JJ.). Contrary to the statutes at issue in *Furman v. Georgia*, 408 U.S. 238 (1972), under which the death penalty was "infrequently imposed" upon "a capriciously selected random handful," *id.*, at 309-310 (STEWART, J., concurring), and "the threat of execution [was] too attenuated to be of substantial service to criminal justice," *id.*, at 311-313 (WHITE, J., concurring), it was anticipated that the Georgia scheme would produce an evenhanded, objective procedure rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Gregg v. Georgia, supra*, at 198, quoting *Furman, supra*, at 313 (WHITE, J., concurring).

For reasons I expressed in *Furman v. Georgia, supra*, at 314-371 (concurring opinion), and *Gregg v. Georgia, supra,* at 231-241 (dissenting opinion), **I believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an evenhanded manner. But events since *Gregg* make that possibility seem increasingly remote.** Nearly every week of every year, this Court is presented with at least one petition for certiorari raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny. **On numerous occasions since *Gregg*, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment, frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers of arbitrariness in violation of *Gregg* and its companion cases.** These developments, coupled with other persuasive evidence, n6 strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*. **The disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences.** And while hundreds have been placed on death row in the years since *Gregg*, only three persons have been executed. Two of them made no effort to challenge their sentence and were thus permitted to commit what I have elsewhere described as "state-administered suicide." *Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (dissenting opinion). See also *Gilmore v. Utah*, 429 U.S. 1012 (1976). **The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system -- and perhaps any criminal justice system -- is unable to perform**. In short, it is now apparent that the defects that led my Brothers Douglas, STEWART, and WHITE to concur in the judgment in *Furman* are present as well in the statutory schemes under which defendants are currently sentenced to death.

Godfrey, 466 U.S. at 437-440, 100 S.Ct. at 1770-1771 (emphasis added).

Justice Marshall then gave a powerful conclusion:

> I believe that the Court in *McGautha* was substantially correct in concluding that **the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system.** For this reason, I remain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, **it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it -- and the death penalty -- must be abandoned altogether.**

Godfrey, 466 U.S. at 442, 100 S.Ct. at 1772 (emphasis added).

CLAIM 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.

Supporting Facts.

The authority of *Finger* was not available for Petitioner at the time of trial. Therefore, his constitutional ability to present relevant issues regarding his mental health and intoxication regarding his state of mind during the alleged crime, were never before the court. Likewise, the Nevada Supreme Court could not have reviewed the same on direct appeal. The record is clear that Vanisi suffered from Bipolar Disorder with psychosis at the time of his arrest, diagnosed first upon his incarceration. Moreover, it is also clear that Vanisi was under the influence of speed and marijuana and suffering from lack of sleep at the time of the crime.(TT Volume XI, 1720) The jury in the guilt phase was not presented with said information by counsel for Vanisi or the State. Nor was the jury instructed how it might consider such information in it determination of Vanisi's state of mind at the time of the offense.

Legal Argument.

Under Finger v. State, 117 Nev.548, 27 P.3d 66 (Nev. 2001), *cert. denied*, -- U.S. --, 122 S. Ct. 1063, 151 L. Ed. 2d 967 (2002), the state of mind of a defendant in a self-defense case is material and essential to the defense. In *Finger*, the Nevada Supreme Court held that evidence of a mental state that does not rise to the level of legal insanity may still be considered in evaluating whether the prosecution has proven each element of an offense beyond a reasonable doubt, for example, in determining whether a killing is first- or second-degree murder or manslaughter or some other argument regarding diminished capacity.

Additionally, in *Finger*, the Nevada Supreme Court found the 1995 amended version of NRS 174.035(4), abolishing the defense of legal insanity, to be unconstitutional and unenforceable. *Id.* 117 Nev. at 575, 27 P.3d at 84. The Court held the portion of NRS 174.035(4) creating a plea of guilty but mentally ill unconstitutional and rejected the amended version of NRS 174.035(3) "in its entirety." *Id.* at 576, 27 P.3d at 84. The *Finger* Court further determined that "legal insanity is a well-established and fundamental principal of the law of the United States" protected by the Due Process Clauses of the United States Constitution. Id. at 575, 27 P.3d at 84. The Court concluded that the pre-existing statutes that were amended or repealed by the 1995 statute should remain in full force and effect. *Id.* at 576, 27 P.3d at 84.

Therefore, under the Due Process Clause of the U.S. Constitution, Mr. Vanisi must be afforded the means and the permission to put on a defense of legal insanity. *See also* O'Guinn v. State, 118 Nev. Adv. Op. No. 85, 59 P.3d 488 (2002). His conviction and sentence must therefore be reversed to acomodate this right.

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Inadequate Review by Nevada Supreme Court.

Constitutionally-adequate review in a capital case, including the mandatory review required by NRS 177.055(2), must take into account the entire record of the proceedings.

Any attempt to conduct the review of the capital sentence in this matter without consideration of the mental state of Mr. Vanisi during the alleged crime would violate the due process right to fundamentally fair review on an adequate record, the equal protection right to review on the same basis of a complete record afforded to other defendants, and the Eighth Amendment right to a reliable sentence under procedures which must satisfy "heightened standards of reliability," Ford v. Wainwright, 474 U.S. 399 (1986) (plurality), in capital cases.

> **It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.**
>
> **Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the fact finder is necessarily inadequate.**

Id, at 414. E.g., Dobbs v. Zant, _ U.S. _, 113 S.Ct. 835, 836 (1993) (per curiam), infra; In re Stevens B., 25 Cal.3d 1, 548 P.2d 480, (1979):

> **On appeal there must be an adequate record to enable the court to pass upon the questions sought to be raised (citation omitted) This requirement is particularly important where...the sufficiency of the evidence is challenged.**

Id, at 484; *see also* Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1995), wherein the court explained that an "independent review" - as required in a habeas action - must include the entire record.

> **The record must show that the district court examined all relevant parts of the state court record. Since it does not, we cannot affirm the dismissal of the habeas petition.**

Id, at 961. The court recognized that a review of the "complete state court record:"

> **...is indispensable to determining whether the habeas applicant received a full and fair state court evidentiary hearing resulting in reliable findings.**

Id, at 962.

CLAIM 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.

Supporting Facts.

Trial counsel for Vanisi did not contact a mitigation expert to assist them with the Penalty Phase of the trial, even though one was made available to them. Moreover, they did not present a mitigation expert of any kind during the penalty phase of the case. Had they called a mitigation expert during the penalty phase, the outcome, i.e. sentence, would have been different.

Legal Argument.

The failure of trial counsel to investigate, among other things, Vanisi's state of mind and the effects of substance abuse on his state of mind, as well as mitigation evidence at sentencing, was ineffective and prejudiced Vanisi, as it pertains to his sentencing, as well as his guilt.

Defense counsel has a duty to reasonably investigate possible mitigating evidence. See Haberstroh v. State, 109 Nev. 22 (1993).

In the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), the Court determined that prejudice resulted and the *Strickland* standard for reversal based upon ineffective assistance was met:

> Sanborn's defense was clearly prejudiced by his counsel's failure to develop and present evidence which would have corroborated Sanborn's testimony and discredited the state's expert witness. **Because of counsel's lack of due diligence, Sanborn was deprived of the opportunity to present testimony material to his defense, and we**

> **are therefore unable to place confidence in the reliability of the verdict**. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Sanborn, 107 Nev. at 405, 812 P.2d at 1284.

Further, the Nevada Supreme Court has recognized the right to effective assistance of counsel at sentencing:

> It is well established that "***the sentencing (of the defendant) is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.***" *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). See also *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Smith v. Warden*, 85 Nev. 83, 450 P.2d 356 (1969).

Cunningham v. State, 94 Nev. 128, 130-131, 575 P.2d 936, 938 (1978).

For example, if mental health records indicate that a psychological evaluation may produce favorable reports sufficient to mitigate a sentence of death, counsel's failure to request such an evaluation is both inadequate and prejudicial. *See, e.g.*, Deutscher v. Whitley, 946 F.2d 1443, 1446 (9th Cir.1991), *vacated,* 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992), *aff'd sub nom.* Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir.1994); Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994).

In Evans v. Lewis, 855 F.2d 631 (9th Cir.1988), counsel's failure to investigate defendant's mental condition for the purpose of presenting evidence in mitigation of a death sentence was ineffective where the defendant had a prior diagnosis of schizophrenia that could have shown he had an impaired mental state at the time of the crime. Evans, at 636.

In other cases, a trial attorney's failure to investigate or to offer mental health mitigation has been held to be constituted ineffective assistance of counsel. *See, e.g.*, Kenley v. Armontrout, 937 F.2d 1298, 1303-1308 (C.A.8), *cert. denied*, Delo v. Kenley, 502 U.S. 964, 112 S.Ct. 431, 116 L.Ed.2d 450

(1991); Thompson v. Wainwright, 787 F.2d 1447, 1451 (CA11 1986), *cert. denied*, Thompson v. Dugger, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Therefore, trial counsel's failure to investigate, among other things, available defenses, Vanisi's state of mind and the effects of drug abuse on his state of mind, as well as mitigation evidence was ineffective and prejudiced Vanisi as it pertains to his sentencing, as well as his guilt, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

CLAIM 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.

Supporting Facts.

Petitioner hereby incorporates by reference all Supporting Facts from all claims related to the *Faretta* and ineffective assistance claims in the instant Petition, as if set forth herein verbatim.

Legal Argument.

Said failures, individually and collectively, constituted ineffective assistance of counsel by trial counsel, in violation of SIAOSI VANISI' Fifth, Sixth, Eighth and Fourteenth Amendments. *See also* Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1034 (1995); Lay v. State, 110 Nev. 1189, 1199, 886 P.2d 448, 454 (1994); Aesop v. State, 102 Nev. 316, 322, 721 P.2d 379 (1986); Pertgen v. State, 110 Nev. 554, 875 P.2d 36, 368 (Nev. 1994).

All Legal Arguments set forth in all claims of ineffective assistance of trial counsel within the instant Petition are incorporated by reference as if set forth verbatim herein.

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CLAIM TWENTY ONE:

INEFFECTIVE ASSISTANCE OF 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.

Supporting Facts.

All claims of error alleged herein were apparent on the face of the record and therefore could have been raised by appellate counsel. Appellant Counsel only raised three: (1) the *Faretta* error; (2) the Reasonable Doubt Instruction was impermissible; and (3) that the Death Penalty was excessive and was unfairly influenced by passion and prejudice.

Legal Argument.

All other errors alleged herein which were not raised by appellate counsel should have been. Jones v. State, 110 Nev. 730, 877 P.2d 1052 (Nev. 1994). All legal arguments from all Claims set forth above, are incorporated by reference as if set forth verbatim herein.

WHEREFORE, Petitioner requests this Court order a hearing on the merits of his Petition for Writ of Habeas Corpus (Post-Conviction) and requests the Court grant his Petition for Writ of Habeas Corpus, including granting him a new trial.

DATED this ____ day of February, 2005.

SCOTT EDWARDS, ESQ
State Bar No. 3400
729 Evans Ave.
Reno, Nevada 89512
(775) 786-4300

THOMAS L. QUALLS, ESQ
State Bar No. 8623
216 East Liberty St.
Reno, Nevada 89501
(775) 333-6633

CERTIFICATION OF COUNSEL

Undersigned Counsel for the Petitioner, SIAOSI VANISI, hereby certify that despite the court's February 18, 2005, ruling that Mr. Vanisi is competent to continue in this collateral proceeding, his degree of communication and assistance in this proceeding falls below the standard necessary to render effective assistance of counsel. Counsel are of the belief that Mr. Vanisi remains legally incompetent to continue in these proceedings. Pursuant to NRS 34.820(4) this Court has never admonished either Petitioner or counsel that all claims must be joined in a single petition. Under these circumstances, Petitioner reserves the right to amend and/or supplement this petition with further claims, factual allegations and legal authority.

DATED this 22nd day of February, 2005.

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CERTIFICATE OF SERVICE:

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Scott W. Edwards, and that on this date, I served the foregoing ***Supplemental Points & Authorities to Petition for Writ of Habeas Corpus (Post-conviction) -- Death Penalty Case*** on the party(ies) set forth below by:

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

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

__X__ Reno/Carson Messenger service.

addressed as follows:

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

Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

SIAOSI VANISI

DATED this 22nd day of February, 2005.