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 20 of 38

APPELLANT'S APPENDIX

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

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EXHIBIT

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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EXHIBIT A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

OSBALDO TORRES, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)))))))	Case No. PCD-04-442

ORDER GRANTING STAY OF EXECUTION AND REMANDING CASE FOR EVIDENTIARY HEARING

Osbaldo Torres was tried by jury, convicted of first degree murder and other charges, and received the death penalty in the Oklahoma County District Court, Case No. CF-1993-4302. This Court affirmed Torres's conviction for murder, and the United States Supreme Court denied Torres's petition for certiorari.[1] This Court denied Torres's first Application for Post-Conviction Relief on August 4, 1998.[2] Torres's application for federal habeas relief was denied.[3] This Court subsequently denied Torres's second Application for Post-Conviction Relief.[4] Torres's execution date is set for Tuesday, May 18, 2004. On April 29, 2004, Torres filed a Subsequent Application for Post-Conviction Relief. The State filed a Response on May 11, 2004. Briefs were also filed on behalf of *amici curiae* the Government of the Republic of Mexico and international law experts and former diplomats.

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[1] *Torres v. State*, 1998 OK CR 40, 962 P.2d 3, *cert. denied*, 525 U.S. 1082, 119 S.Ct. 826, 142 L.Ed.2d 683 (1999).
[2] *Torres v. State*, Case No. PCD-1998-213 (Okl.Cr. August 4, 1998) (Order not for publication).
[3] *Torres v. Mullen*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, 540 U.S. ___, 124 S.Ct. 562, 919, 157 L.Ed 2d 454 (2003).

After consideration of the pleadings filed with this Court, we order that Torres's execution date be **STAYED** indefinitely, pending further order of this Court.

We further order that Torres's request for an evidentiary hearing is **GRANTED**.[5] This case is **REMANDED** to the District Court of Oklahoma County for an evidentiary hearing on the issues of: (a) whether Torres was prejudiced by the State's violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate; and (b) ineffective assistance of counsel.

The evidentiary hearing shall be held within sixty (60) days from the date of this Order. The trial court shall file findings of fact and conclusions of law with this Court within forty-five (45) days of the conclusion of the evidentiary hearing, together with the transcripts and record of the proceedings. Torres shall file a supplemental brief addressing the trial court's findings of fact and conclusions of law within twenty (20) days after the District Court's findings and conclusions are filed with this Court. The State shall file a response brief within fifteen (15) days after Torres's supplemental brief is filed.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13 day of May, 2004.

[4] *Torres v. State*, 2002 OK CR 35, 58 P.3d 214, *cert. denied*, 538 U.S. 928, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003).

CHARLES A. JOHNSON, Presiding Judge

STEVE LILE, Vice Presiding Judge

GARY L. LUMPKIN, Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

ATTEST:

Clerk

[5] 22 O.S.2001, §1089(D)(5); Rule 9.7(D)(4)-(7), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2004).

CHAPEL, J., SPECIALLY CONCURRING:

I specially concur in this decision staying Torres's execution and remanding the case for an evidentiary hearing. I write to comment on the dissent's conclusion that the International Court of Justice decision here is not binding, and on dissent's statement that, under that case's terms, all this Court need do is to review Torres's case to see whether his trial and conviction afforded him minimal due process.

This case presents an issue of first impression for this Court, and for any other court within the United States. Torres bases his subsequent application for relief on the International Court of Justice decision, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [*Avena*].[1] That case was brought by the Government of Mexico against the United States of America to resolve a diplomatic dispute over alleged violations of the Vienna Convention on Consular Relations [Vienna Convention][2] in the United States criminal cases of fifty-two Mexican nationals, including Torres. In *Avena*, the International Court of Justice found that Torres's rights under the Vienna Convention were violated, and ordered the United States to review and reconsider Torres's conviction and sentence in light of the treaty breach. This Court must determine how to apply that ruling.

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1 2004 I.C.J. 128 (Judgment of March 31, 2004). The existence of this specific judgment in Torres's case distinguishes this situation from the one this Court faced in *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703. In *Valdez*, the petitioner attempted to rely on an International Court of Justice case to which neither he nor his complaining government were party, and which did not specifically discuss his Vienna Convention claims.

The Vienna Convention is a multinational treaty respecting consular relations, which provides that law enforcement authorities shall inform detained foreign nationals of their right to contact consular officials for assistance.[3] Both the United States and Mexico are signatories to the Convention.[4] The Convention itself does not specify an enforcement mechanism. That mechanism is contained in the Optional Protocol, ratified along with the Convention itself, which provides that states may bring disputes under the Vienna Convention to the International Court of Justice for binding resolution. Under the treaty's terms, while states ratifying the Vienna Convention are free to accept or reject the Optional Protocol, acceptance creates a binding obligation. The United States proposed this provision on dispute settlement and was instrumental in drafting the Optional Protocol,[5] was the first state to bring a case under its provisions,[6] and has consistently looked to the International Court of Justice for binding decisions in international treaty disputes, including those brought under the Vienna Convention.[7] The United States was the first to bring a case in the

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[2] Multilateral Vienna Convention on Consular Relations and Optional Protocol on Disputes, 21 U.S.T. 77 (1969), T.I.A.S. No. 6820.

[3] Vienna Convention, 21 U.S.T. 77, art. 36, ¶ 1.

[4] The United States Senate ratified the treaty and optional protocol on October 12, 1969, and President Richard Nixon ratified it on November 12, 1969. It was entered into force with respect to the United States on December 24, 1969, and President Nixon proclaimed the treaty's entry into force on January 29, 1970. 115 Cong. Rec. 30997 (Oct. 22., 1969); 21 U.S.T. 77, 373.

[5] Report of the United States Delegation to the Vienna Conference on Consular Relations, reprinted in Sen. Exec. E. 91st Cong., 1st Sess., May 8, 1969, at 41-59-61.

[6] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, 1979 I.C.J. 7; 1980 I.C.J. 3, 5, 24-26.

[7] "Under the fundamental principle of *pacta sunt servanda*, which states that 'treaties must be observed,' the United States has consistently invoked the Vienna Convention to protest other

International Court of Justice specifically under the Optional Protocol.[8] The United States has also defended against eleven cases brought in the International Court of Justice, including *Avena*.[9]

There is no question that this Court is bound by the Vienna Convention and Optional Protocol. The Supremacy Clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[10] The federal government's power to make treaties is independent of and superior to the power of the states.[11] Every state

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nations' failures to provide Americans with access to consular officials." *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D.Virgin Islands, 1999).

[8] *Tehran Hostages*, *supra* Note 13 ; *Treatment in Hungary of Aircraft and Crew of the United States of America* (*United States v. Hungary*), 1954 I.C.J. 99, 103 (Vienna convention claim dismissed because Hungary had not consented to International Court of Justice jurisdiction). *See also Case Concerning Elettronica Sicula S.p.A.* (*ELSI*) (*U.S. v. Italy*) 1989 I.C.J. 15 (1948 Treaty of Friendship, Commerce and Navigation between Italy and United States, the Protocol and 1951 Supplementary Agreement); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), 1984 I.C.J. 246 (1958 Convention on the Continental Shelf); *Aerial Incident of 7 November 1954* (*United States v. USSR*) (1959); *Aerial Incident of 4 September 1954* (*United States v. USSR*) (1958); *Aerial Incident of 27 July 1955* (*United States v. Bulgaria*) (1957-1960); *Aerial Incident of 7 October 1952* (*United States v. USSR*) (1955-1956); *Aerial Incident of 10 March 1953* (*United States v. Czechoslovakia*) (1955-1956); *Treatment in Hungary of Aircraft and Crew of the United States of America* (*United States v. Hungary*) (1954); *Treatment in Hungary of Aircraft and Crew of the United States of America* (*United States v. USSR*) (1954).

[9] *See Case Concerning the Vienna Convention on Consular Relations* (*Paraguay v. United States*) 1998 I.C.J. 426, and the *LaGrand Case* (*F.R.G. v. United States*) 2001 I.C.J. 104, all brought under the Vienna Convention. The *Paraguay* case was dismissed at Paraguay's request after Virginia executed its subject, defendant Angel Francisco Breard. *LaGrand* found that Germany's and Walter LaGrand's rights under the Vienna Convention were violated when Arizona failed to inform LaGrand of his right to contact the German consulate; LaGrand was also executed during the pendency of International Court of Justice proceedings.

[10] U.S. Const. art. VI cl. 2. *See, e.g., Antoine v. Washington*, 420 U.S. 194, 201, 95 S.Ct. 944, 949, 43 L.Ed.2d 129 (1975) (treaties are binding upon affected states under the Supremacy Clause); *Mezquita v. State*, 125 S.W.3d 161, 169 (Ark., 2003); *State v. Prasertphong*, 75 P.3d 675, 688 (Ariz., 2003); *Garcia v. State*, 17 P.3d 994 (Nev., 2001); *State v. Issa*, 752 N.E.2d 904, 915 n.2 (Ohio, 2001); *State v. Miranda*, 622 N.W.2d 353, 355 (Minn.App., 2001); *U.S. v. Carrillo*, 70 F.Supp.2d 854, 859 (N.D.Ill.,1999); *U.S. v. Emuegbunam*, 268 F.3d 377, 389 (C.A.6 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 (C.A.5 2001); *U.S. v. Li*, 206 F.3d 56, 60 (C.A.1, 2000). *See also Busby v. State*, 40 P.3d 807, 8098 n.2 (Alaska App., 2002) (Convention on Road Traffic).

[11] *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 52, 49 S.Ct. 223, 224, 73 L.Ed. 607 (1929); *U.S. v. Emuegbunam*, 268 F.3d 377 (C.A.6 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 (C.A.5

or federal court considering the Vienna Convention, for any reason, has agreed that it is binding on all jurisdictions within the United States, individual states, districts and territories. Several courts have expressed concern that any failure of United States courts to abide by the Vienna Convention may have significant adverse consequences for United States citizens abroad. "Treaty violations not only undermine the "Law of the Land," but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens."[12] I share those concerns.

2001); *Murphy v. Netherland*, 116 F.3d 97, 100 (C.A.4, 1997); *Busby v. State*, 40 P.3d 807, 809 (Alaska App., 2002).

[12] *U.S. v. Carrillo*, 70 F.Supp.2d 854, 860 (N.D.Ill.,1999). "Accordingly, the State Department has intervened and attempted to persuade state authorities to honor the Vienna Convention when state law enforcement officers have neglected or refused to inform detained foreign nationals of their right to contact consular officials. For example, the Secretary of State recently asked the Governor of Virginia to stay the execution of Paraguayan death-row prisoner Angel Francisco Breard until the International Court of Justice could consider whether Virginia's violation of the Vienna Convention warranted a new trial. The Secretary expressed concern that "[t]he execution ... could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention." [FN4] As the Secretary recognized, continued violation of the treaty imperils the rule of law, the stability of consular relations, and the safety of Americans detained abroad." *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D.Virgin Islands, 1999); "The United States, through this treaty [the Vienna Convention], has clearly granted certain specified rights to foreign nationals. The purpose behind those rights is two-fold: i) to afford minimal protections to foreign nationals detained by authorities in this country and ii) to assure minimal protections to United States (U.S.) citizens detained by authorities in foreign countries who are also signatories to the Treaty. In my judgment, the decision of this Court in this case, and the decision of the United States Supreme Court puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials. Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a 60 Minutes piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases." *Flores v. State*, 1999 OK CR 52, 994 P.2d 782, 788 (Chapel, J., concurring in result).

At its simplest, this is a matter of contract. A treaty is a contract between sovereigns.[13] The notion that contracts must be enforceable against those who enter into them is fundamental to the Rule of Law. This case is resolved by that very basic idea. The United States voluntarily and legally entered into a treaty, a contract with over 100 other countries. The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty.

As this Court is bound by the treaty itself, we are bound to give full faith and credit to the *Avena* decision. I am not suggesting that the International Court of Justice has jurisdiction over this Court – far from it. However, in these unusual circumstances the issue of whether this Court must abide by that court's opinion in Torres's case is not ours to determine. The United States Senate and the President have made that decision for us. The Optional Protocol, an integral part of the treaty, provides that the International Court of Justice is the forum for resolution of disputes under the Vienna Convention.[14] The negotiation and administration of treaties is reserved to the Executive

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[13] *United States v. Stuart*, 489 U.S. 353, 365-66, 109 S.Ct. 1183, 1190-91, 103 L.Ed.2d 388 (1989); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 238 (C.A.D.C., 2003); *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1301 (C.A.11 2003); *U.S. v. Emuegbunam*, 268 F.3d 377, 389 (C.A.6 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 195 (C.A.5 2001); *U.S. v. Li*, 206 F.3d 56, 60 (C.A.1, 2000); *Tabion v. Mufti*, 73 F.3d 535, 537 (C.A.4 1996).

[14] "The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as 'the Convention', adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963, Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period, Have agreed as follows: Article I. 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." 21 U.S.T. 77, 325-29.

Branch, with Senate ratification.[15] Therefore, when interpreting a treaty, we give great weight to the opinion and practice of the government department primarily responsible for it.[16] The State Department has consistently taken the position that the only remedies under the Vienna Convention are diplomatic, political, or exist between states under international law.[17] As noted above, the State Department has also consistently turned to the International Court of Justice to provide a binding resolution of disputes under the Vienna Convention, and has relied on the binding nature of International Court of Justice decisions to enforce United States rights under the Convention. The *Avena* decision mandates a remedy for a particular violation of Torres's, and Mexico's rights under the Vienna Convention.[18] *Avena* is the product of the

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[15] U.S.Const., art. II §2 cl. 2.

[16] *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S.Ct. 662, 671, 142 L.Ed.2d 576 (1999); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982); *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1282 (C.A.11 2002); *Emuegbunam*, 268 F.3d at 392; *United States v. De La Pava*, 268 F.3d 157, 165 (2nd Cir.2001); *Li*, 206 F.3d at 63.

[17] In a First Circuit case, the State Department submitted answers to questions posed by the Court regarding its interpretation of the Vienna Convention. The Court subsequently cited that response: "[In] Department of State Answers to the Questions Posed by the First Circuit in United States v. Nai Fook Li ('Answers') at A-2, the State Department has concluded that [t]he [Vienna Convention] and the US-China bilateral consular convention are treaties that establish state-to-state rights and obligations.... They are not treaties establishing rights of individuals. The right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals when consular relations exist between the states concerned. Id. at A-3; see also id. at A-1. "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." See id. at A-3." *Li*, 206 F.3d at 63. These Answers have been subsequently cited in a number of state and federal cases. *See, e.g., State v. Navarro*, 659 N.W.2d 487, 491, (Wis.App., 2003) *Review Denied by State v. Navarro*, 661 N.W.2d 101, (Wis. 2003) (TABLE, NO. 02-0850-CR); *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1282 (C.A.11 2002); *State v. Martinez-Rodriguez*, 33 P.3d 267, 272 n. 5 (N.M., 2001); *U.S. v. Carrillo*, 70 F.Supp.2d 854, 860 (N.D.Ill.,1999); *U.S. v. Superville*, 40 F.Supp.2d 672, 676 (D.Virgin Islands, 1999);

[18] This essential aspect of the case distinguishes it from *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C.Cir. 1988). The plaintiffs in *Nicaragua* attempted to invoke an International Court of Justice decision made under international law and a treaty with Nicaragua. However, the plaintiffs were not parties to the International Court of Justice decision, and the treaties relied on were not self-executing. By contrast, *Avena*

process set forth in the Optional Protocol, under which Mexico brought a suit against the United States for alleged treaty violations. This process is promulgated by the treaty itself and exists between states as a result of international law – well within the State Department's definition of an appropriate remedy for violations of the Vienna Convention.

Having determined that this Court is bound by the treaty and the *Avena* decision, I turn to the decision itself. The International Court of Justice found that Torres's, and Mexico's, rights under the Vienna Convention were violated when he was not informed of his right to contact his consulate for aid after his Oklahoma arrest for murder. I note that neither the State of Oklahoma nor the United States has ever disputed (a) that Torres is a Mexican national, or (b) that he was not informed of his rights under the Vienna Convention. At the time of his arrest, Torres was registered as a resident alien with the Immigration and Naturalization Service.[19] As a remedy for this violation, *Avena* directs the United States to review and reconsider Torres's conviction and sentence in light of the consequences of the treaty violation.[20] That review and reconsideration falls to this Court. This is the first state pleading in which Torres has raised his Vienna Convention claim, and normally this Court would consider it procedurally barred. However, while leaving the particular method of review and reconsideration up to the United States, *Avena* states that a

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applies directly to Torres's case, and the Vienna Convention is self-executing through the Optional Protocol.

[19] Exhibits Q, S, Appendix, Subsequent Application for Post-Conviction Relief. As the dissent notes, the State claims that there is conflicting information regarding when Mexico was first told of Torres's detention. However, any such conflict does not change the fact that Torres was never personally informed of his right to contact the consulate, as required under the treaty.

complete application of procedural bar will not fulfill the mandate to review and reconsider the conviction, if procedural bar prevents the Vienna Convention claim from being heard.[21] In order to give full effect to *Avena*, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar. Common sense and fairness also suggest this result. Torres, like many foreign nationals, was unaware he had the right to contact his consulate after his arrest for murder.[22] Torres's Vienna Convention claim was generated by the State of Oklahoma's initial failure to comply with a treaty. I believe we cannot fulfill the goal of a fair and just review of Torres's case if we refuse to look at his Vienna Convention claims on the merits.

Torres argues that the violation of his Vienna Convention rights deprived him of the substantial investigative, legal, and financial assistance which would have been, and eventually was, afforded him by the Mexican government. He claims that the information developed with this assistance would, if presented to a jury, have resulted in a different outcome. He also claims that trial counsel was ineffective for failing to inform him of his right to

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[20] *Avena*, slip op. at 52.

[21] *Avena*, slip op. at 51-52. This holding distinguishes this case from cases in which Vienna Convention claims were brought to United States state and federal courts in the first instance. Courts, including this court, have routinely applied procedural bar to such claims. *See, e.g.*, *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703, 709; *Breard v. Greene*, 523 U.S. 371, 375, 118 S.Ct. 1352, 1354, 140 L.Ed.2d 529 (1998). *Murphy v. Netherland*, 116 F.3d 97, 100 (C.A.4, 1997); *Mezquita v. State*, 125 S.W.3d 161 (Ark., 2003); *Ademodi v. State*, 616 N.W.2d 716, 717 n. 2 (Minn., 2000); *State v. Reyes-Camarena*, 7 P.3d 522 (2000); *State v. Ameen*, 183-84, 1 P.3d 330 (Kan. App. 2000).

[22] In an earlier opinion in Torres's case, Justice Stevens noted it was "manifestly unfair" to apply procedural bar to "a foreign national who is presumptively ignorant of his right to notification." *Torres v. Mullin*, __ U.S. __, 124 S.Ct. 919, 919, 157 L.Ed.2d 454 (2003) (Stevens, J., dissenting to denial of petition for writ of certiorari).

consular assistance under the Vienna Convention and was rendered ineffective by counsel's lack of experience and funds, which could have been remedied had the Mexican government been notified of his detention and the charges against him.

In determining the merits of these claims, I first look to see whether Torres has shown prejudice. In dicta, the United States Supreme Court has noted that any claim of error under the Vienna Convention is subject to a requirement of prejudice.[23] Other courts, considering Vienna Convention claims brought initially in state and federal courts, have used a three-prong test to determine prejudice: (1) the defendant did not know he had a right to contact his consulate for assistance; (2) he would have availed himself of the right had he known of it; and (3) it was likely that the consulate would have assisted the defendant.[24] I would adopt this test. The first of these prongs is uncontested. Regarding the second prong, Torres has provided this Court with an affidavit stating that he would have asked the Mexican consulate for help.[25] This assertion is bolstered by the fact that Torres did request help from the

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[23] *Breard v. Greene*, 523 U.S. 371, 377, 118 S.Ct. 1352, 1356, 140 L.Ed.2d 529 (1998) (refusing to stay Breard's execution during pendency of International Court of Justice case, case was decided on procedural bar grounds).

[24] *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo.App., 2002); *Zavala v. State*, 739 N.E.2d 135, 142 (Ind.App., 2000); *State v. Cevallos-Bermeo*, 754 A.2d 1224, 1227 (N.J.Super.A.D., 2000); *U.S. V. Chaparro-Alcantara*, 37 F.Supp.2d 1122, 1126 (N.D.Ill. 1999); *United States v. Esparza-Ponce*, 7 F.Supp.2d 1084 (S.D.Cal.1998); *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir.1989), overruled on other grounds, *United States v. Proa-Tovar*, 975 F.2d 592 (9th Cir.1992).

[25] Affidavit of Osvaldo Torres Aguilera, Exhibit W, Appendix, Subsequent Application for Post-Conviction Relief [Appendix].

Mexican government when he became aware of his right to do so, after his direct appeal had been filed.[26]

Torres offers this Court a great deal of material regarding the third prong. The Mexican government has actively assisted Mexican nationals since well before Torres's 1993 arrest. This tradition of active assistance extends back to the 1920s.[27] In 1993, the Mexican government monitored and participated in capital cases throughout the United States involving Mexican nationals through consulates, Mexican government departments, and retained counsel in the United States.[28] Mexico has a systematic procedure to offer very specific consular assistance in defending these cases.[29] Consular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings; officials often assist in gathering evidence in preparation for both stages of capital trials.[30] Mexico provides funds for experts and investigators, particularly regarding discovery and presentation of mitigating evidence, but for DNA testing, jury consultants, and

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[26] Torres's family contacted the Mexican Consulate in 1997. Affidavit of Arturo A. Dager Gomez, ¶¶ 29-31, Exhibit A, Appendix..

[27] Affidavit of Everard Kidder Meade IV, Exhibit G, Appendix.

[28] Affidavit of Arturo A. Dager Gomez, Exhibit A, Appendix; Affidavit of Ramon Xilotl Ramirez, Exhibit B, Appendix; Affidavit of Scott J. Atlas, Exhibit C, Appendix; Affidavit of Barbara K. Strickland, Exhibit D, Appendix; Affidavit of Jaime Paz Y Puente Gutierrez, Exhibit E, Appendix; Affidavit of Bonnie Lee Goldstein, Exhibit F, Appendix; Declaration of Michael Iaria, Exhibit H, Appendix.

[29] Affidavit of Ramon Xilotl Ramirez, ¶¶ 13, 14, Exhibit B, Appendix; Affidavit of Jaime Paz Y Puente Gutierrez, ¶ 4, Exhibit E, Appendix; Affidavit of Scott J. Atlas, ¶¶ 4, 5, 7, Exhibit C, Appendix; Affidavit of Barbara K. Strickland, *passim*, Exhibit D, Appendix. In one example, after a thorough criminal investigation by the Mexican consulate, capital charges against a Mexican national in Texas were dismissed. Affidavit of Arturo A. Dager Gomez, ¶ 10, Exhibit A, Appendix.

[30] Affidavit of Arturo A. Dager Gomez, ¶ 7, Exhibit A, Appendix.

other specialized testimony where appropriate.[31] Mexico obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation.[32] In addition to aiding retained or appointed counsel, the consulate also helps capital defendants obtain qualified capital counsel.[33] Taken as a whole, this material overwhelmingly indicates the ability of the Mexican government to assist Torres at the time of his arrest and trials,[34] and the intention of the Mexican government to assist Mexican nationals charged with capital crimes in the United States at the time of Torres's arrest and trials.[35]

These services were all available to Torres. This assistance would have been offered at the time of his arrest, had the Mexican consulate been informed of Torres's detention under the Vienna Convention.[36] After the Mexican government was told of Torres's case, consular staff interviewed appellate counsel, Torres, and his family, and determined Torres had no criminal record in Mexico.[37] Mexico retained counsel to review Torres's case and assist his court-appointed attorney, and retained two investigators, a social worker, a mitigation specialist, two gang experts, and a bilingual neuropsychologist to

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[31] *Id.* at ¶¶ 8, 9.
[32] *Id.* at ¶ 12; Declaration of Michael Iaria, ¶¶ 6-8, Exhibit H, Appendix.
[33] Affidavit of Arturo A. Dager Gomez, ¶¶ 17, 18, Exhibit A, Appendix; Declaration of Michael Iaria, ¶¶ 4-5, Exhibit H, Appendix.
[34] Torres's first trial ended in a mistrial on the issue of guilt or innocence.
[35] As this Court found in *Valdez*, the Mexican government was prepared to assist a Mexican national facing a capital Oklahoma charge in 1989. *Valdez*, 46 P.3d at 710.
[36] *Id.* at ¶¶ 32-41; Affidavit of Ramon Xilotl Ramirez, ¶¶ 6-8 Exhibit B, Appendix.
[37] Affidavit of Arturo A. Dager Gomez, ¶ 30, Exhibit A, Appendix.

develop evidence in Torres's case.[38] Torres provides this Court with information generated by these investigations. Torres has raised enough significant questions to warrant an evidentiary hearing on these issues.

In accordance with the *Avena* decision, I have thoroughly reviewed and reconsidered Torres's conviction and sentence in light of the consequences of the violation of his rights under the Vienna Convention. I have concluded that there is a possibility a significant miscarriage of justice occurred, as shown by Torres's claims, specifically: that the violation of his Vienna Convention rights contributed to trial counsel's ineffectiveness, that the jury did not hear significant evidence, and that the result of the trial is unreliable. This Court has decided to remand the case for an evidentiary hearing on the Vienna Convention and ineffective assistance of counsel issues. This decision comports with the *Avena* requirement of review and reconsideration.

[38] *Id.* at ¶ 32.

LUMPKIN, J.: DISSENTS

I must respectfully dissent to the Court's decision to stay the execution and remand the case for evidentiary hearing.

A review of the history of this case reveals the issue of ineffective assistance of counsel was raised and adjudicated in Appellant's direct appeal and that issue is now barred by *res judicata*. *See Torres v. State*, 1998 OK CR 40, 962 P. 2d 3. Appellant's original application for post-conviction relief, PC-1998-213, also sought to raise the issue of ineffective assistance of trial counsel. That application was denied in an unpublished opinion and not appealed. His second application for post-conviction relief was filed in case number PCD-2002-1047, but the two propositions of error did not raise any errors relating to ineffective assistance of counsel. *See Torres v. State*, 2002 OK Cr 35, 58 P.3d 214. The United States Supreme Court denied certiorari in that case on March 24, 2003. *See Torres v. State*, 538 U.S. 928, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003). The Appellant did not raise the issue of failure to notify him of his right to notify the Mexican consular office of his arrest in any of these appeals.

I find the legal issues barred by *res judicata* and waiver. I have reviewed the briefs and materials presented and do not find any of the proffered evidence brings into question the guilt of the Appellant. The Appellant's guilt was proven beyond a reasonable doubt by sufficient evidence as an aider and abetter. *See Conover v. State*, 933 P.2d 904, 914-16 (Okl.Cr.1997). Trial

counsel was determined to have rendered effective assistance of counsel in the direct appeal pursuant to the standard established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 674 (1984) and that decision has not been found to be in error through the reviews completed by the federal courts during the years this case has proceeded through the review process.

As with any case that has been pending in some stage since 1993, someone will be able to look back and say something else could or should have been done. However, that is exactly what the U.S. Supreme Court in *Strickland* told us not to do. As was pointed out in the original opinion, the original trial ended in a mistrial in 1995. There were no surprises during the second trial. My reading of the materials submitted with this subsequent application for post-conviction relief reflect those items dealt with mitigation evidence. And, while mitigation evidence was presented during the trial leading to the verdict in this case the proffered items reveal more of the same type could have been presented, all be it in more depth and by different witnesses with better credentials. In reality, that could be said of every case of this type we review. Therefore, I find no basis in law or fact to require a further evidentiary hearing.

I also do not find *Avena and other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. ___ (March 31, 2004) binding on this Court. And, I must note the State raised a very interesting point of fact in Footnote 4 of their Response Brief filed in this case. In that footnote the State points out that

Mexico has made conflicting admissions of when they learned of Appellant, i.e. December 1997 and March 1996. But more pointedly, the State says,

> In addition, trial counsel for Mr. Torres has advised undersigned that she contacted Mexico and informed them of Mr. Torres' case prior to his trial. The undersigned has been unable to obtain an affidavit from trial counsel and has filed a motion asking this Court to compel counsel to prepare an affidavit. This motion has not been ruled upon by this Court.

If this Court were to take any action, it should be to afford the State the opportunity to file an affidavit of trial counsel. If the affidavit comports with the proffer of the footnote then the entire issue is moot. Consular rights were afforded. Mexico was given notice.

Regardless, the legal basis for this claim has been available since Appellant's arrest in 1993. The *Avena* decision cannot revive a stale claim. At most *Avena* asked us to review the case to ensure Appellant received the benefit of the process that was due him, and which would have been assured him if he had been advised of his consular rights.

In *Avena*, the International Court of Justice stated in pertinent part:

> 152. . . . The Court has rejected Mexico's submission that, by way of *restitutio in integrum*, the United States is obliged to annul the convictions and sentences of all of the Mexican nationals the subject of its claims . . .. The review and reconsideration of conviction and sentence required by Article 36, paragraph 2, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out. The Court considers that in these three cases it is for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in paragraphs 138 *et. seq.* of the present Judgment.
>
> 153. For these reasons, The Court,

. . .

(7) By fourteen votes to one,

Finds that, in relation to the 34 Mexican nationals referred to in paragraph 106 (4) above, the United States of America deprived the United Mexican States of the right, in a timely fashion, to arrange for legal representation of the nationals, and thereby breached the obligations incumbent upon it under Article 36, paragraph 1(c) of the Convention . . .

. . .

(9) By fourteen votes to one,

Finds that the appropriate reparation in this cases consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentence of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment . . .

(11) Unanimously,

Finds that, should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b) of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment.

Without a doubt Appellant has been afforded his rights under *Avena*. He has been represented by competent lawyers at each stage of these proceedings and afforded all the rights guaranteed to citizens of the United States. That is reflected in the volumes of trial and appellate records amassed over the last eleven years. The argument that has been made in the voluminous filings on behalf of Appellant in this subsequent post-conviction application is that if we

had known then what we know now we would have hired more expensive, experienced lawyers and provided more experts. That is very commendable and each citizen hopes his or her sovereign country would take that same individualized interest in them should the occasion arise. However, that is not the legal standard. If it were, we would be affording the same benefit to American citizens on a daily basis. Since it is not, we must judge by the Rule of Law that applies to all persons convicted of crimes.

Appellant's submissions constitute possible additional mitigation evidence. He has now had the opportunity to present that evidence to the Pardon and Parole Board, and ultimately to the Governor, for consideration. As I reviewed the proffered documents I could not find any matters that brought into question the validity of the judgment and sentence in this case. His ability to present these additional matters through the executive clemency process is another example of the due process that has been afforded to him. As a matter of law I do not find the subsequent application meets the requirements of 22 O.S.2001, §1089.1(8)(9) and should be denied.

I am authorized to state that Judge Lile joins in this dissent.

EXHIBIT B

QUESTIONS PRESENTED
CAPITAL CASE

The United States and Mexico are party to the Vienna Convention on Consular Relations and its Optional Protocol Concerning the Compulsory Settlement of Disputes. Acting on the consent set forth in the Optional Protocol, Mexico initiated proceedings in the International Court of Justice seeking relief for the violation of Petitioner's Vienna Convention rights. On March 31, 2004, the Court rendered a judgment that adjudicated Petitioner's rights. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31). The *Avena* Judgment built on the Court's rulings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27), an earlier case also brought under the Optional Protocol.

On Petitioner's application for a certificate of appealability of the denial of his petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit held that precedents of this Court and its own barred it from complying with the *LaGrand* and *Avena* Judgments.

3. In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

4. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

International Cases

Federal Cases

State Cases

Constitutional Provisions

Treaties, Federal Statutes And Legislative Materials

Other Authorities

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), and reproduced herein at 119A. Earlier opinions in this proceeding are reproduced herein at 1A-135A, 174A-275A.

JURISDICTION

The Court of Appeals entered judgment on May 20, 2004. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

Clause 2 of Section 2 of Article II, Clause 1 of Section 2 of Article III, and Clause 2 of Article VI of the United States Constitution.

1. Article 36 of the Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

2. Article I of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

3. Articles 92, 93(1), and 94(1) of the Charter of the United Nations, *opened for signature* June 26, 1945, 59 Stat. 1031.

4. Articles 1, 3(1), 9, 36(1), and 59 of the Statute of the International Court of Justice, 59 Stat. 1055.

STATEMENT OF THE CASE

A. The Vienna Convention and Its Optional Protocol.

The Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." DEP'T OF STATE TELEGRAM 40298 TO THE U.S. EMBASSY IN DAMASCUS (February 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Article 36 of the Convention enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended." The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens abroad.[1]

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[1] ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, at 161 (1973). As Judge Stephen Schwebel, the former United States Judge on the International Court of Justice, has observed, "the citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens

The Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261, provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I.

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See* Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. E, 91st Cong. at 59-61 (1st Sess. 1969). Among other things, the United States proposed the binding dispute settlement provision that became the Optional Protocol and successfully led the resistance to efforts by other states to weaken or eliminate altogether the dispute settlement provisions. *See id.* at 72-73.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for approval on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously ratified the instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). To date, 166 States have ratified the Vienna Convention and 45 States the Optional Protocol.[2] The Vienna Convention is among the most

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of the United States." Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

[2] *See Status of Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

widely ratified multilateral treaties in force today. LEE, at 23-25.

B. The International Court of Justice.

Often referred to as the "World Court," the International Court of Justice is "the principal judicial organ of the United Nations." U.N. CHARTER art. 92; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 1, 59 Stat. 1055 ("ICJ STATUTE"). The Court's Statute is annexed to the U.N. Charter, so that States that become Members of the United Nations also become parties to the Statute. U.N. CHARTER art. 93, para. 1.

Here, too, the United States proposed the draft ICJ Statute and led the effort to create the Court. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 865 (1958). The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:

> Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter which places justice and international law among its foundation stones, it would naturally accept and use an international court to apply international law and to administer justice.

EDWARD R. STETTINIUS, JR., SECRETARY OF STATE AND CHAIRMAN OF THE UNITED STATES DELEGATION, CHARTER OF THE UNITED NATIONS: REPORT TO THE PRESIDENT ON THE

RESULTS OF THE SAN FRANCISCO CONFERENCE 137-38 (1945).[3]

The United States has brought ten cases to the Court either as an applicant or by special agreement with another State. In another eleven cases, including *Avena*, the United States has been a respondent in an action brought by another State or States.[4]

C. The *Avena* Judgment.

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellin and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See* Mexico's Application Instituting Proceedings (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003).[5]

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims. On November 3, 2003, the United States filed a 219-page Counter-Memorial and 2500-

[3] The Court is composed of fifteen judges, none of whom may have the same nationality. ICJ STATUTE, art. 3(1); *see also id.*, arts. 4, 9. "Judges are picked in their individual capacity, and are not political appointees of their respective governments." David J. Bederman et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76 (2003). As a result, "the judges of the ICJ are rarely politicized." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 240 (2001).

[4] *See* International Court of Justice: List of Contentious Cases by Country, *at* http://www.icj-cij.org/icjwww/idecisions/icasesbycountry.htm#UnitedStatesofAmerica.

[5] The parties' written and oral pleadings as well as the orders and press releases of the Court in the *Avena* case are available at http://www.icj-cij.org/icjwww/idecisions.htm.

page Annex, also containing written testimony and documentary evidence in rebuttal. Both parties' submissions exhaustively addressed the factual predicate for each of the Vienna Convention violations alleged, including those in the case of Mr. Medellin, and argued all relevant points of law.

During the week of December 15, 2003, the International Court held a hearing. *Avena* Judgment, para. 11 (188A). The 18-person United States team was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and included lawyers from the Departments of State and Justice and distinguished professors of international law and comparative criminal procedure from France and Germany.

On March 31, 2004, the International Court issued its Judgment. The *Avena* Judgment built on the Court's earlier holdings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand* Judgment"), which Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated.[6] However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed.

As a result, in *Avena*, the International Court expressly adjudicated Mr. Medellin's own rights. *First*, the International Court held that the United States had breached Article 36(1)(b) in the cases of 51 of the Mexican nationals,

[6] In *LaGrand*, the International Court held that, *first*, Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; *second*, by applying procedural default rules in the circumstances of those cases, the United States had applied its own law in a manner that failed to give full effect to the rights accorded under Article 36(1) and hence violated Article 36(2); and *finally*, if the United States failed to comply with Article 36 in future cases involving German nationals who were subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* Judgment, paras. 77, 90-91, 125.

including Mr. Medellin, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena* Judgment, paras. 106(1)-(2), 153(4) (244A-245A, 272A).

Second, the International Court held that in 49 cases, including that of Mr. Medellin, the United States had violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals." *Id.*, paras. 106(3), 153(5)-(6)(245A, 273A). The International Court also held that in 34 cases, including that of Mr. Medellin, the breaches of Article 36(1)(b) also violated the United States's obligation under paragraph 1(c) "to enable Mexican consular officers to arrange for legal representation of their nationals." *Id.*, paras. 106(4), 153(4), 153(7) (245A-246A, 272A, 273A).

Finally, as to remedies, the International Court first denied Mexico's request for annulment of the convictions and sentences. *Id.*, para. 123 (255A). The Court held, however, that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.*, paras. 121-22, 153(9) (254A, 274A). The International Court explained, *first*, that the required review and reconsideration must take place as part of the "judicial process;" *second*, that procedural default doctrines could not bar the required review and reconsideration; *third*, that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, that the forum in which the review and reconsideration occurred must be capable of "examin[ing] the facts, and in particular

the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, paras. 113-14, 122, 134, 138-39, 140 (249A-250A, 254A, 259A-260A, 262A-263A).

The International Court reached each of these holdings by a vote of fourteen to one. Both the United States and Mexican judges voted with the majority.

D. Mr. Medellin's Proceedings.

On June 29, 1993, law enforcement authorities arrested Jose Ernesto Medellin Rojas, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellin, a Mexican national, told the arresting officers he was born in Laredo, Mexico,[7] and informed Harris County Pretrial Services that he was not a United States citizen.[8] Nevertheless, as the Court of Appeals found, Mr. Medellin was not advised of his Article 36 right to contact the Mexican consul. 23A.

The United States recognizes that the consular assistance Mexico provides its nationals in capital cases is "extraordinary." 1 Counter-Memorial of the United States of America at 186 (Nov. 3, 2003) (*Avena* Case). At the time Mr. Medellin was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and most importantly, ensuring that Mexican nationals were represented by competent and experienced

[7] State's Ex. 113 at 000076 (Statement of Jose Ernesto Medellin Rojas).

[8] 165A.

defense counsel.[9] As a result of the Article 36 violation in his case, however, Mr. Medellin had no opportunity to receive the assistance of Mexican consular officers either before or during his trial.

The Texas trial court appointed counsel to represent Mr. Medellin, who was indigent. Unbeknownst to the court, lead counsel was suspended from the practice of law for ethics violations during the investigation and prosecution of Mr. Medellin's case. Memorial of Mexico, App. A ¶ 232 (June 20, 2003) (*Avena* Case). Counsel failed to strike jurors who indicated they would automatically impose the death penalty,[10] and called no witnesses at the guilt phase of trial. On September 16, 1994, Mr. Medellin was convicted of capital murder. *State v. Medellin*, No. 675430, Judgment (339th D. Ct., Tex. Oct. 11, 1994).

At the penalty phase, the only expert witness the defense presented was a psychologist who had never met Mr. Medellin. S.F. Vol. 35 at 294-349. Mr. Medellin's parents testified only briefly. *Id.* at 279-92. The entire penalty phase defense lasted less than two hours. Tr. at 343-441 (Docket).

The jury recommended a death sentence, and on October 11, 1994, the trial court sentenced Mr. Medellin to death. On March 19, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellin's conviction and sentence in an unpublished opinion. 61A.

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[9] *See* Memorial of Mexico at 11-38 *(Avena* Case*); see also Valdez v. State,* 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national); Michael Fleischman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals In United States Death Penalty Cases,* 20 ARIZ. J. INT'L & COMP. L. 359, 365-74 (2003) (describing Mexico's consular assistance in capital cases in Texas and elsewhere over the last several decades).

[10] *See, e.g.,* S.F. Vol. 15 at 113; Vol. 16 at 205; Vol. 16 at 286.

On April 29, 1997, Mexican consular authorities learned of Mr. Medellin's detention when he wrote to them from death row and promptly began rendering assistance to him. Memorial of Mexico, App. A ¶ 235 (*Avena* Case).

On March 26, 1998, Mr. Medellin filed a state application for a writ of *habeas corpus* arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. In support of this claim, Mr. Medellin submitted an affidavit from Manuel Perez Cardenas, the Consul General of Mexico in Houston, explaining that Mexico would have provided immediate assistance if consular officers had been informed of his detention. 172A-173A.

After refusing to grant an evidentiary hearing, the trial court denied relief. Without changing so much as a comma, the court adopted the State's proposed findings of fact and conclusions of law, including the State's argument that the claim had been procedurally defaulted or, in the alternative, that Mr. Medellin "failed to show [his] foreign nationality," "lacked standing" to raise the Vienna Convention claim, and could not show that the violation affected the constitutional validity of his conviction or sentence. 46A-48A. On September 7, 2001, the Texas Court of Criminal Appeals affirmed in an unpublished order. 33A.

On November 28, 2001, Mr. Medellin filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellin again raised an Article 36 claim.

On June 26, 2003, the District Court denied relief and a certificate of appealability ("COA"), finding the Vienna Convention claim procedurally defaulted under "an adequate and independent state procedural rule." 82A. In the

alternative, the District Court concluded that it was compelled to deny relief by Fifth Circuit precedent to the effect that the Vienna Convention does not create individually enforceable rights, that no judicial remedy is available for its violation, and that Mr. Medellin could not show prejudice unless the Vienna Convention violation also qualified as a violation of a constitutional right. 84A-85A & n.17.

On May 20, 2004, the Court of Appeals also denied Mr. Medellin's request for a COA. 135A. The Court recognized that *Avena*, which had issued since the District Court's ruling, had been brought on behalf of Mr. Medellin, among others. It also recognized that the International Court had held in *LaGrand* and reiterated in *Avena* that, *first*, the application of procedural default rules to bar review of the Vienna Convention claim on the merits violated Article 36 of the Convention, and *second*, that Article 36 conferred individually enforceable rights. It held, however, that the first holding "contradict[ed]" this Court's brief *per curiam* order in *Breard v. Greene*, 523 U.S. 371 (1998), and that the second contravened its own ruling in *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001). It held, therefore, that it was bound to disregard *LaGrand* and *Avena* unless and until this Court or, in terms of the second holding, the *en banc* Court of Appeals, decided otherwise. 131A-133A.

ARGUMENT

Because the United States is party to the Vienna Convention and its Optional Protocol, the *Avena* Judgment constitutes a binding adjudication of the Vienna Convention rights of Mr. Medellin and fifty other Mexican nationals. Although the Court of Appeals recognized the impact of that Judgment on Mr. Medellin's case, it held that it was barred by prior precedent from giving effect to the Judgment. Hence, this Court should grant the petition in order to prevent the United States from breaching its freely undertaken commitment to the international community to abide by the *Avena* Judgment. This Court should also grant the petition in order to resolve the conflicts among this Court, the International Court of Justice, and other United States courts on the proper interpretation and application of the Vienna Convention.

I. The Court Should Grant the Petition In Order To Bring The United States Into Compliance With Its Obligation To Abide By The *Avena* Judgment.

A. The Court of Appeals Was Bound to Give Effect to the *Avena* Judgment As the Rule of Decision in Mr. Medellin's Case.

1. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding International Law.

The *Avena* Judgment is binding on the United States as a matter of international law for the simple reason that the United States agreed that it would be binding.

The jurisdiction of the International Court of Justice is based entirely on consent.[11] Under Article 36(1) of the Statute of the Court, the Court has jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." ICJ STATUTE, art. 36(1). The Optional Protocol to the Vienna Convention constitutes a compromissory clause covering just such a "class of matters specially provided for." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 242 (2001). 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, art. I.

Hence, by ratifying the Optional Protocol, the United States both gained the right to sue and agreed to be subject to suit in the International Court of Justice in order to resolve disputes with other parties to the Optional Protocol regarding the "interpretation and application" of the Vienna Convention.[12] Though neither the United Nations Charter nor the ICJ Statute, both treaties to which the United States is party, provide the requisite consent, the binding character of

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[11] David J. Bederman et al., *International Law: A Handbook for Judges*, 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76, 76-77 (2003). ("Every matter that comes before the ICJ does so because of the consent of the litigants. The only question is how that consent is manifested. The Court does not – and cannot – exercise a mandatory form of jurisdiction over states.").

[12] Indeed, the United States was the first State to take advantage of that instrument, when in 1979 it sued Iran in the International Court to enforce rights, among others, under the Vienna Convention, and founded the Court's jurisdiction in part on the Optional Protocol. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), *reprinted in* 19 I.L.M. 553 (1980).

the Court's adjudication in cases in which a State has given consent is reinforced by both those instruments. Article 59 of the ICJ Statute provides that decisions of the Court are binding on the parties to the case. And by Article 94(1) of the Charter, the United States unequivocally agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." RESTATEMENT (THIRD) FOREIGN RELATIONS § 903 cmt. g (1987).

The rule of *pacta sunt servanda* – that parties should perform their treaty obligations in good faith – "lies at the core of the law of international agreements and is perhaps the most important principle of international law." RESTATEMENT (THIRD) FOREIGN RELATIONS § 321 cmt. a (1987).[13] Here, the application of the rule could not be more straightforward: having agreed to submit disputes involving the Vienna Convention to the International Court, the United States must now abide by its adjudication of those disputes.[14]

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[13] *See* THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[A] treaty is only another name for a bargain[;] it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.") (emphasis in original). *See also Am. Dredging Co. v. Miller*, 510 U.S. 443, 466 (1995) (Kennedy, J., dissenting) ("Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce.").

[14] *See* ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill, ed., 6th ed. 2003) ("Neither the Charter of the United Nations, nor any general rule of present-day international law, imposes on States the obligation to refer their legal disputes to the Court—but once consent has been given, the decision of the Court is final and binding and without appeal, and the States parties to the litigation are obliged to comply with that decision."); *see also La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the

2. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding Federal Law.

The United States Constitution places the power to make treaties in the hands of the democratically elected branches of the federal government. Article II, section 2, clause 2, provides that the President "shall have Power . . . to make Treaties." U.S. CONST. art. II, § 2, cl. 2. The President may do so, however, only "with the Advice and Consent of the Senate." *Id.* For the Senate to grant consent, "two thirds of the Senators present [must] concur." *Id.* This structure ensures that the United States takes on international treaty obligations only with the clear support of the elected representatives of the American people. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 36-37 (2d ed. 1996).

Under the Supremacy Clause, a ratified treaty has the status of preemptive federal law.[15] Hence, as this Court has long held, a ratified treaty

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced

integrity of the tribunal itself.").

[15] Emphasis added, Article VI, clause 2, provides: "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." *See* Sandra Day O'Connor, *Federalism of Free Nations, in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (1996) ("The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

> in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598-99 (1884) (emphasis added).

The treaty obligations reflected in the Vienna Convention and its Optional Protocol are entirely self-executing; they required no implementing legislation to come into force. *See Hearing Before the Senate Comm. on Foreign Rel.*, S. EXEC. REP. NO. 91-9, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State). As President Richard M. Nixon stated when he announced their entry into force

> the [Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

21 U.S.T. 77, 185.

B. The Court Should Ensure the United States's Compliance with its International Obligations.

Because the Vienna Convention and its Optional Protocol are fully effective as federal law, the Court of Appeals should have applied *Avena* as the rule of decision in determining whether to grant a certificate of appealability.[16] Given the United States's commitment to abide by that judgment, the district court's resolution of Mr. Medellin's Vienna Convention claim was not just "debatable," but plainly wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).[17] For the same reason, there also can be no debate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). By failing to issue the certificate, the Court of Appeals both erred as a matter of

[16] For example, in *Wildenhus's Case*, 120 U.S. 1 (1887), New Jersey sought to try a Belgian crewmember who was subject to a treaty allocating criminal jurisdiction over sailors on ships in American ports between the local courts and the Belgian consulate. Asserting a right under the treaty to try the crewmember, the Belgian consul sought a writ of habeas corpus. After noting that "[t]he treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere," this Court held that "[i]f it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." 120 U.S. at 17. *Cf. Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004) (denying relief under Alien Tort Statute, 28 U.S.C. § 1350, in part because treaties at issue were not self-executing and thus could not "establish the relevant and applicable rule of international law").

[17] Should there be any doubt on this point, one need only look to the decision in *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations and thus "undermin[es] a major premise of [*Breard*]").

federal law and placed the United States in breach of its international obligations.[18]

This Court should grant the petition in order to prevent the breach of treaty that would otherwise result from the Court of Appeals' error. To be sure, this Court does not sit to correct routine error. But the Framers gave treaties the status of supreme federal law and included cases arising under treaties within the federal judicial power precisely in order to enable this Court to prevent the lower courts of the United States from breaching an international obligation by refusing to enforce a treaty or other international obligation. U.S. CONST. art. III, § 2, cl. 1; art VI, cl. 2.

As James Madison emphasized at the Constitutional Convention:

> The tendency of the States to th[e] violations [of the law of nations and of treaties] has been manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

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[18] *See, e.g.*, IAN BROWNLIE, STATE RESPONSIBILITY, PART 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *see also* Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), paras. 75-76, 2002 ICJ 121 (Feb. 14) (issuance of arrest warrant by Belgian investigative judge violated rule of customary international law recognizing head-of-state immunity); *LaGrand* Judgment, paras. 111-15 (failure of U.S. State Department, U.S. Solicitor General, Governor of Arizona, and this Court to "take all measures at [their] disposal" to prevent execution violated United States's treaty obligation to abide by order of provisional measures); Iran v. United States, Case No. 27, Award No. 586-A27-FT, 1998 WL 1157733, para. 71 (Iran-U.S. Cl. Trib. June 5, 1998) (refusal of U.S. courts to enforce Iran-U.S. Claims Tribunal award violated United States's obligation under Algiers Accords to treat Tribunal awards as final and binding).

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1966). Alexander Hamilton made the same point when he said that "the peace of the whole ought not to be left at the disposal of a part," so that "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

To achieve that end, the Framers gave this Court the final authority to ensure enforcement of our treaty obligations.

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[19]

This case presents precisely the circumstances in which the Framers expected this Court to intervene. Acting on behalf of the United States, the President, with the consent of the Senate, has agreed to abide by the *Avena* Judgment. But the Court of Appeals has concluded – in large part on the basis of this Court's own precedent – that the United States cannot comply. Left undisturbed, that decision would be the kind of "national calamit[y]" against which Madison warned

[19] *See also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881) ("[T]he provision for judicial power over cases arising under treaties], sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.") (statement of James Wilson).

– because it would send a message to the world that we preach, but do not practice, adherence to the rule of law.

While the death penalty itself is not at issue in this case, the death penalty context makes the petition all the more compelling. The next step in this case will be Mr. Medellin's execution. If there were any case in which this Court should not send a message to friends and allies that the United States is indifferent to its international commitments, it is this one, in which the Court would send at the same time a message that the United States is indifferent to human life.

II. The Court Should Grant The Petition In Order To Resolve The Conflicts Among This Court, The International Court of Justice, And Other United States Courts About The Vienna Convention And The *LaGrand* And *Avena* Judgments.

In *Breard v. Greene,* 523 U.S. 371 (1998), by a brief *per curiam* order, this Court refused to stay the imminent execution of a foreign national who had been convicted and sentenced to death in proceedings that Virginia conceded had violated the Vienna Convention, but who had been held to have procedurally defaulted the Vienna Convention claim. [20] The Court observed that the Convention "arguably" conferred an individual right that the foreign national, as well as the State party to the Convention, could enforce. *Id.* at 376. It stated, however, that as a matter of international law, absent a clear and express statement to the contrary, implementation of the Vienna Convention was subject to the procedural rules of the forum state. *Id.* at 375. Hence, the Court concluded, the Convention did not preclude the United States from procedurally barring Breard's claim. *Id.*[21]

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[20] By the *Breard* order, the Court denied four discretionary applications (two petitions for certiorari, an application for a bill of original complaint, and an application for an original writ of *habeas corpus*), on the eve of an execution, without full briefing and oral argument, in carefully couched language. The opinion thus has limited precedential value. *See, e.g., Teague v. Lane*, 489 U.S. 288, 296 (1989) ("[O]pinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits."); *United States Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 24 (1994) (noting the Court's "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion" even when issued on the merits).

[21] In the *Breard* order, this Court also suggested that the section of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), now codified at 28 U.S.C. §2254(e)(2) (2002), would have barred review of Breard's conviction and sentence as later-in-time federal law. *Breard*, 523 U.S. at 326. That issue does not affect this petition, however. Unlike Breard, Petitioner Medellin raised his

Since the *Breard* order, however, the legal universe has fundamentally changed. In its 2001 *LaGrand* Judgment, the International Court expressly held, *first*, that, as this Court had suggested, the Vienna Convention conferred rights on the individual national as well as the sending State, and *second*, that the application of the procedural default doctrine to bar a Vienna Convention claim when the receiving State had failed in its obligation to advise the foreign national of his or her Vienna Convention rights, constituted a violation of Article 36(2) of the Convention. *LaGrand* Judgment, paras. 77, 90-91. Needless to say, this Court did not have the benefit of those specific holdings on the interpretation and application of the Vienna Convention when it made its more general observations in the *Breard* order.

In the *Avena* Judgment, the International Court of Justice reiterated both of those holdings. Moreover, it did so in a

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Vienna Convention claim in state post-conviction proceedings, filed an affidavit in support of the claim, and requested an evidentiary hearing, which the state court denied. Under these circumstances, section §2254(e)(2) does not bar a federal evidentiary hearing on Mr. Medellin's claim. *See, e.g., Mason v. Mitchell,* 320 F.3d 604, 621 n.6 (6th Cir. 2003) (§2254(e)(2) does not apply where petitioner sought but was denied state court evidentiary hearing); *Morris v. Woodford,* 229 F.3d 775, 781 (9th Cir. 2000), *cert. denied*, 532 U.S. 1075 (2001) (same). Presumably for that reason, respondent state officials did not raise, and the Fifth Circuit had no occasion to decide, any issues concerning section 2254(e)(2). Even if that provision might somehow prove relevant in the future, moreover, it would remain the case that the issues that the Fifth Circuit *did* decide will be faced again and again by both state courts (which would be bound by the Supremacy Clause to apply *Avena* and would remain unaffected by any restriction on federal courts imposed by AEDPA) and federal courts (which would have to decide the questions presented here before reaching any alleged AEDPA bar). Finally, Petitioner respectfully submits that if provided full briefing and argument, the Court would hold, in accord with *Murray v. Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804), that the Congress that enacted section 2254(e)(2) did not intend the United States to breach its treaty obligation to abide by the Vienna Convention, the Optional Protocol, and the *Avena* Judgment.

case that *adjudicated Petitioner Medellin's own rights.* Specifically, the Court held that the United States had violated Article 36(1) of the Convention by failing to afford Mr. Medellin the opportunity to secure the assistance of the Mexican consul, and that under Article 36(2), the United States courts could not apply the procedural default doctrine to avoid assessing on the merits the impact of the violation on the proceedings that led to his conviction and sentence. *See Avena* Judgment, paras. 128-134, 140 (257A-260A, 263A).

The Court of Appeals expressly acknowledged the holdings of *LaGrand* and *Avena*, and it fully appreciated their import. It concluded, however, that existing precedent, including the *Breard* order, prevented it from complying with *LaGrand* and *Avena*. 131A-134A. This Court should grant the petition in order to resolve no less than three conflicts reflected in the decision of the Court of Appeals.

First, the Court should grant the petition in order to resolve the conflict between, on the one hand, the common holdings of *Breard*, *LaGrand*, and *Avena* that the Vienna Convention creates individually enforceable rights and, on the other, numerous United States courts' holdings to the contrary. On this issue, the Fifth Circuit held itself precluded from applying the holdings of *LaGrand* and *Avena* by prior precedent, this time its own. 133a (5th Cir. 2004) (applying *United States v. Jimenez-Nava*, 243 F.3d 192,195-98 (5th Cir. 2001)).

The Fifth Circuit is not alone. While at least one District Court has recognized an individually enforceable right,[22] at least four other Courts of Appeals and numerous other

[22] *See Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y 2001) (finding that the Vienna Convention affords a private right of action to individuals).

federal and state courts have concluded that Article 36 does not create such a right.[23] That conclusion is contradicted not only by the express holdings of *LaGrand* and *Avena*, but by this Court's own suggestion in *Breard*.

Second, the Court should resolve the conflict between this Court's order in *Breard* and the holdings of the International Court of Justice in *LaGrand* and *Avena* on the issue of whether Article 36(2) precludes the application of procedural default doctrines when the United States has itself failed in its obligation of notification. On this issue, the Fifth Circuit stated flatly that *LaGrand* and *Avena* "contradict" the *Breard* order. 132A. It held, however, that it did not have the authority to "disregard the Supreme Court's clear holding that ordinary procedural default rules can bar Vienna Convention claims." *Id.* It believed itself bound to follow that decision "until taught otherwise by the Supreme Court." *Id.*

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[23] *See United States v. Pineda*, 57 Fed. Appx. 4, 6-7 (1st Cir. 2003) (unpublished); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002); *United States v. Emuegbunam*, 268 F.3d 377, 392 (6th Cir. 2001); *United States v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *Gordon v. State* 863 So. 2d 1215, 1221 (Fla. 2003); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *Cauthern v. State*, No. M2002-00929-CCA-R3-PD, 2004 Tenn. Crim. App. LEXIS 149, *144-48 (Tenn. Crim. App. 2004); *State v. Flores*, No. 01-3322, 2004 Wisc. App. LEXIS 446, *4-5 (Wis. Ct. App. May 26, 2004); *see also Mendez v. Roe*, 88 Fed. Appx. 165, 167 (9th Cir. 2004) (unpublished) (Vienna Convention claim not cognizable on federal habeas petition "because no clearly established federal law directs that Article 36's consular access provision institutes a judicially enforceable right"); *United States v. Nambo-Barajas*, No. 02-195(2), 2004 U.S. Dist. Lexis 6422, at *7-8 (D. Minn. Apr. 13, 2004) ("Eighth Circuit has not recognized an individually-enforceable right under article 36(b) of the Vienna Convention.").

Again, the Fifth Circuit is not alone. While at least one District Court has applied *LaGrand*,[24] at least five other Courts of Appeals and numerous other federal and state courts have concluded that the *Breard* order precludes them from following *LaGrand* or have simply ignored *LaGrand*.[25]

Finally, the Court should grant the petition in order to resolve the conflict between the Fifth Circuit and the Oklahoma Court of Criminal Appeals on the issue of whether the adjudication in *Avena* of a Mexican national's own rights must be given effect in the United States courts notwithstanding any inconsistent United States precedent. The Fifth Circuit failed to perceive a difference between *LaGrand*, in which the International Court of Justice addressed the Vienna Convention in a case that was binding only between Germany and the United States, and *Avena*, in which, after adjudicating Mr. Medellin's own rights, the Court gave a judgment that required the United States to take specific steps in his case. 131A-133A. By contrast, in

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[24] *See United States ex rel. Madej v. Schomig*, 223 F.Supp.2d 968 (N.D. Ill. 2002) (*LaGrand* forecloses strict reliance on procedural default doctrine for Convention violations).

[25] *See, e.g., Villagomez v. Sternes*, 88 Fed. Appx. 100, 101 (7th Cir. 2004) (unpublished) (without referring to *LaGrand*, holding Vienna Convention claim procedurally defaulted); *United States v. Nishnianidze*, 342 F.3d 6, 18 (1st Cir. 2003) (same); *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 426 (6th Cir. 2003) (same); *Drakes v. INS*, 330 F.3d 600, 606 (3d Cir. 2003) (same); *United States v. Sanchez*, 39 Fed. Appx. 10, 11 (4th Cir. 2002) (unpublished) (same); *Mckenzie v. Dep't of Homeland Security*, No. 3:04cv0067, 2004 U.S. Dist. LEXIS 7041, at *6-8 (D. Conn. Apr. 23, 2004) (same); *Nambo-Barajas*, 2004 U.S. Dist. Lexis 6422, at *9 (same); *Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003) (same); *State v. Escoto*, 590 S.E.2d 898, 906 (N.C. Ct. App. 2004) (same); *Valdez v. State*, 46 P.3d 703, 709 (Okla. Crim. App. 2002) (acknowledging *LaGrand*, but holding, in light of *Breard*, Vienna Convention claim procedurally defaulted). *See also Plata v. Dretke*, No. 02-21168, slip op. (5th Cir. Aug. 16, 2004) (denying certificate of appealability in post-*Avena* case).

Torres v. Oklahoma, 142A-163A, the Oklahoma Court of Criminal Appeals recently recognized that prior precedent cannot control in the case of a Mexican national subject to the *Avena* Judgment.

In *Torres*, the Court stayed the execution of a Mexican national subject to the *Avena* Judgment and, in accord with that Judgment, remanded the matter for an evidentiary hearing to determine the prejudice resulting from the Vienna Convention violation. Though the *Torres* order did not set forth the Court's reasoning, the concurring and dissenting opinions make it clear that, but for the *Avena* Judgment, the Court would have held the Vienna Convention claim procedurally defaulted.[26] 142A-163A. However, as Judge Chapel stated in a concurring opinion, and the majority presumably recognized, "this Court is bound by the Vienna Convention and Optional Protocol" and hence required to give full effect to the *Avena* decision. 147A, 150A. Thus, although the Oklahoma Court's own precedent would have required that it disregard *LaGrand* in favor of *Breard*'s treatment of procedural default, the Oklahoma Court was now bound to follow, as a matter of federal law, the holding in the *Avena* Judgment that Torres's Vienna Convention claim could not be procedurally barred. 153A & n.21.

By the *Avena* Judgment, the International Court of Justice determined the rights of 49 Mexican nationals in addition to Messrs. Torres and Medellin. Thus, in 49 more cases, United States courts will face the question on which the Court of Appeals here and the Oklahoma Court of

[26] Hours after the Court of Criminal Appeals ruled, Governor Brad Henry commuted Mr. Torres's sentence to a term of life without parole, stating "[u]nder agreements entered into by the United States, the ruling of the ICJ [in *Avena*] is binding on U.S. courts." Press Release, Office of Governor Brad Henry, *Gov. Henry Grants Clemency to Death Row Inmate Torres* (May 13, 2004), http://www.governor.state.ok.us/display_article.php?article_id= 301&article_type=1.

Criminal Appeals split – whether *Avena*'s adjudication of the Article 36 rights of individual Mexican nationals must be given effect in United States courts notwithstanding the *Breard* order or any other inconsistent United States authority.

Each of these issues will be faced again and again by both state and federal courts addressing applications by other Mexican nationals whose rights have been adjudicated in *Avena* and other foreign nationals seeking to invoke the authority of *Avena* and *LaGrand*. This Court should grant the petition in order to resolve the disabling conflicts over the proper legal rule and thereby free United States courts from the straightjacket that, they erroneously believe, requires them to breach the solemn promises made by this country's elected representatives in the Vienna Convention and its Optional Protocol. *See Tennard v. Dretke*, 124 S.Ct. 2562, 2569 (2004) (correcting the legal standard on certiorari review of denial of a COA); *Miller-El v. Cockrell,* 537 U.S. 322, 341 (2003) (same).

III. The Court Should Grant the Petition To Ensure International Judicial Comity and Uniform Treaty Interpretation.

Even if the *Avena* Judgment did not constitute an adjudication of Mr. Medellin's own rights to which United States courts are obligated to give effect as a matter of both international and United States law, the International Court's rulings in *LaGrand* and *Avena* should be given effect in the interest of international comity and uniform treaty interpretation.

A. The Court Should Grant the Petition in the Interest of International Judicial Comity.

This Court has long promoted the goal of comity between the courts of different nations. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In a world of enormous economic interdependence and regular international travel and migration, the courts of more than one nation will frequently have jurisdiction to address disputes arising from any given course of events. RESTATEMENT (THIRD) FOREIGN RELATIONS § 421 (1987). As a result, our courts will frequently have occasion to accord respect to proceedings in another State's courts. That respect can take a variety of forms, including the recognition of a foreign judgment, *see Hilton*, 159 U.S. at 164; forbearance from adjudicating a given case in favor of more efficient proceedings before the courts of a foreign country, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981); forbearance from exercising jurisdiction in recognition of the greater interest of a foreign country, *see Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 818-19 (1993) (Scalia J., dissenting); and forbearance from interference by antisuit injunction with proceedings in the courts of another country, *see Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354-55 (6th Cir. 1992). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing agreement to arbitrate before foreign arbitral tribunal); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (enforcing agreement to litigate before foreign court).

This "comity of courts" cannot be confined to the judgments and proceedings of national courts. As many have remarked, the subject matter and frequency of international adjudication continue to expand. *See, e.g.,* Dietmar Prager, *The Proliferation of International Judicial Organs*, *in* PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 279 (Niels M. Blokker et al., eds., 2001). As individual States

continue to entrust the resolution of specific categories of disputes to international tribunals, national courts will need to extend the same respect to those tribunals.

This case presents the most compelling opportunity possible for according judicial comity to the ruling of an international tribunal. Not only has the United States agreed to the jurisdiction exercised by the International Court of Justice, the most important court in the international legal system, but that Court, in rendering its judgment, has itself sought to engage the United States courts in a collaborative judicial enterprise. Specifically, though that Court had jurisdiction to grant Mexico's request for annulment of the convictions and sentences, *see Avena* Judgment, para. 119 (252A-253A), it chose not to do so. Instead, the Court ordered that the United States courts themselves conduct review and reconsideration of the convictions and sentences tainted by the violations, in accord with the criteria laid down in the judgment, and then fashion relief for any prejudice. *Id.*, para. 153(9) (274A).

"If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation that melds the once distinct planes of national and international law." Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003); *see also* Anne Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998). This Court should accept that invitation by granting the petition to ensure compliance by United States courts with the "authoritative interpretation of Article 36" pronounced in the *LaGrand* and *Avena* Judgments. *Torres v. Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J.).

B. This Court Should Grant the Petition to Ensure Uniform Interpretation of a Multilateral Treaty.

The parties to a treaty should be presumed to intend a uniform interpretation in all jurisdictions in which the treaty may apply. *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1232 (2004) (Scalia, J., dissenting). Here the United States and some 44 other signatories to the Convention also agreed to submit disputes concerning the interpretation and application of the treaty for binding adjudication by the International Court of Justice. Surely those parties' agreement to that single forum strengthens the presumption that the parties were looking for a consistent interpretation of the treaty provisions. It follows that a State party to the Vienna Convention should defer to the interpretation of the Convention by that Court – especially, needless to say, when that State is not only party to the Convention, but party to the very case in which the Court issued the interpretation.

Again, the *Avena* Judgment confirms that the International Court recognized its own responsibility to ensure uniform interpretation of the treaty. The Court stated that it had approached the case "from the viewpoint of the general application of the Vienna Convention" and advised that its interpretation and application of the Convention would apply in any future cases between parties to the Convention. *See Avena* Judgment, para. 151 (269A-270A). Again, therefore, this Court should reciprocate by granting the petition in order to ensure that United States courts abide by the Court's authoritative interpretation of the Convention.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Dated: New York, New York
August 18, 2004

Respectfully submitted,

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Exhibit 37

Exhibit 37

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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

REPLY TO STATE'S RESPONSE TO MOTION FOR PROTECTIVE ORDER

Petitioner Siaosi Vanisi, through his counsel, SCOTT W. EDWARDS and THOMAS L. QUALLS, hereby replies to the State's response to his Motion for a protective order covering all confidential materials falling under the attorney-client privilege and those materials covered by the work product doctrine. This reply is made and based upon the attached memorandum of points and authorities, all documents and papers on file herein, and any oral argument deemed appropriate.

DATED this 16TH day of MARCH, 2005.

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MEMORANDUM OF POINTS AND AUTHORITIES

The State's response to the motion for protective order is largely misdirected. The State argues that there is no constitutional right to a post-conviction proceeding. (State's Response at 3). This is not an issue raised by Vanisi in this matter. Therefore, it is not necessary to argue this point, as Vanisi is not asserting a constitutional right to a post-conviction proceeding, but violations of his constitutional rights at the trial and appellate level. Specifically, as relevant to the instant Motion, Vanisi's rights under the Sixth Amendment are at issue. *See* Bittaker, *infra*. (Incidentally, Vanisi's Fifth and Fourteenth Amendment rights also overlap in these matters.)

The State has argued that the case of Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003), relied upon by Vanisi in his Motion, was "wrongly decided." (State's Response at 3). Respectfully, whether a decision by the Ninth Circuit Court of Appeals is "wrongly decided" is not a matter within this Court's discretion or jurisdiction. Bittaker involved a requested protective order covering attorney-client privileged communications in the context of a Sixth Amendment claim raised in a federal habeas petition. This Court has previously acknowledged in this case that, on matters of federal constitutional law, decisions of the Ninth Circuit are controlling over this court, as well as all state courts within the jurisdiction of the Ninth Circuit. (Oral Findings and Conclusions, Competency Hearing, February 18, 2004.)

The State also argues that the decision in Bittaker was "clearly limited...to actions arising in federal court." (State's Response at 3, *citing* to 331 F.3d at 726). This is simply not a true statement. Indeed, the Bittaker decision, at 331 F.3d at 726 explains just the opposite:

> [W]e hold that the scope of the implied waiver must be determined by the court imposing it as a condition for the fair adjudication of the issue before it.

Id. The Bittaker Court further explains that both state and federal courts have the power to limit the scope of the waiver involved in litigating any discrete issue:

> The power of courts, state as well as federal, to delimit how parties may use information obtained through the court's power of compulsion is of long standing and well-accepted.

Id. (citations omitted.)

Finally on this point, the Bittaker Court explained the importance of a court's (be it state or federal) power to limit the use of sensitive information:

> Courts could not function effectively in cases involving sensitive information--trade secrets, medical files and minors, among many others--if they lacked the power to limit the use parties could make of sensitive information obtained from the opposing party by invoking the court's authority.

Id.

Also, the State quotes Wardleigh v. Second Jud. Dist. Ct., 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995), "where a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." (State's Response at 4). It seems that the State is misguided here as well as to the request at issue by Mr. Vanisi. Wardleigh stands for the position that a waiver of part of a privileged communication under the attorney-client privilege is a waiver of the whole communication regarding the subject matter. Id. This is a somewhat unremarkable legal conclusion. Indeed, it is hardly applicable to the issue at hand. As the Wardleigh Court explains in the next paragraph after the language quoted by the State:

> In other words, "where a party injects part of a communication as evidence, fairness demands that the opposing party be allowed to examine the whole picture."

Wardleigh, 111 Nev. at 355, 891 P.2d at 1186 (citation omitted).

Unlike Bittaker, Wardleigh does not address the use of sensitive information in other proceedings or the court's inherent authority to order a restriction regarding the same. Mr. Vanisi is not attempting to limit the State's use of the sensitive information in the post-conviction habeas proceedings at issue. Further, Vanisi is not attempting to use only part of the information in question and hide the rest from the State. Accordingly, Wardleigh is inapposite to this matter.

On the merits, the State offers no legal basis for denying the Motion. The theory of the necessity for a protective order is simple. Mr. Vanisi had a constitutional right to effective assistance of counsel at trial and on appeal. In order to prove that he was deprived of those rights, Mr. Vanisi will have to disclose information that would otherwise be protected from disclosure by the attorney-

client privilege, the work-product doctrine, the privilege against self-incrimination, or other privileges. But since these disclosures are effectively compelled as a result of the deprivation of his constitutional rights in the previous proceedings, it is unfair to allow the State to exploit those disclosures in any proceeding other than the habeas proceeding itself, such as in a re-trial or in a separate prosecution. This rather obvious analysis is the basis of Bittker v. Woodford, 331 F.3d 715, 722 (9th Cir. 2003) (en banc), upon which petitioner relies. *Accord*, Osband v. Woodford, 290 F.3d 1036, 1042-1043 (9th Cir. 2002).

The State argues that petitioner is attempting to use his privileges as both a sword and a shield by raising claims of ineffective assistance but baring the State from using the evidence upon which the claims are based. (State's Response at 5). This is not the case. Petitioner's motion makes it clear that the relief sought is only an order that prevents the State from using any otherwise privileged information against Mr. Vanisi in the event of a re-trial of his case and from disseminating that information to other agencies that would use it against him. *See* Osband, 290 F.3d at 1042. The relief sought does not attempt to prevent disclosure, as so limited, to the district attorney for the purpose of litigating this habeas proceeding. The State's arguments on this point do not address the actual position taken by the petitioner and they therefore do not form a basis for denial of the motion.

As for the State's position on the limitation of dissemination to the press, there is not much need for discussion. The petition has been filed under seal. Accordingly, it is not currently available as a public document. Therefore the press -- like the rest of the public -- does not have access to the same. The Motion for Protective Order filed by Vanisi simply seeks to prevent the State from future dissemination of the sensitive information to the press.

For these reasons, the motion for a protective order should be granted.

///

///

WHEREFORE, based on the foregoing points and authorities, petitioner Vanisi respectfully requests that this Court grant a protective order regarding the privileged information at issue, as set forth herein.

DATED this 16TH day of MARCH, 2005.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an agent of the law offices of Thomas L. Qualls, and that on this date, I served the foregoing ***Reply to State's Response to Motion for Protective Order*** on the party(ies) set forth below by:

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

_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

XX Reno/Carson Messenger service.

addressed as follows:

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

Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

DATED this 16TH day of MARCH, 2005.

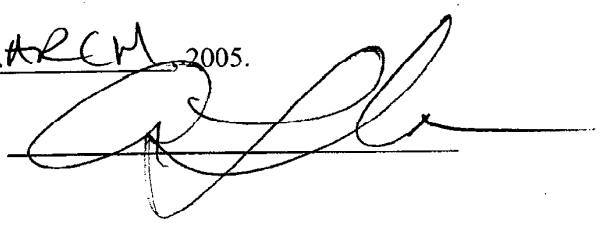

Exhibit 39

Exhibit 39

Code No. 4185

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

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

TRANSCRIPT OF PROCEEDINGS

POST-CONVICTION HEARING

MONDAY, MAY 2, 2005

RENO, NEVADA

Reported By: DENISE PHIPPS, CCR No. 234

APPEARANCES:

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-and-

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For the Respondent:

TERRENCE P. McCARTHY
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I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
STEPHEN GREGORY	4	30	39	39
JEREMY BOSLER	43	57	61	
JOHN PETTY	62	79	84	
LAURA BIELSER	89	91	95	95

EXHIBITS:		ID:	AD:
J	MEDICAL RECORDS	88	88

RENO, NEVADA, MONDAY, MAY 2, 2005, 11:10 A.M.

-oOo-

THE COURT: This is the time set for hearing. Today we're going to proceed with the writ of habeas corpus hearing.

Counsel, are you ready to proceed?

MR. EDWARDS: Yes, Your Honor.

MR. McCARTHY: State's ready.

MR. EDWARDS: Your Honor, before I forget, before we adjourn for the day, we'd like another date not too far out for continuation of evidence and argument upon the petition and I guess the motion to dismiss.

THE COURT: And you need to have Mr. Specchio available at that time?

MR. EDWARDS: Yes, Your Honor.

THE COURT: And someone from the Consulate?

MR. EDWARDS: Well, maybe.

THE COURT: So when do you want us to start looking for that date?

MR. EDWARDS: About 30 days, Your Honor.

THE COURT: You think it will be that long before Mr. Specchio is back?

MR. EDWARDS: I think two weeks is what I hear

from his former staff.

THE COURT: Okay. We'll start looking.

MR. EDWARDS: About two weeks or more.

THE COURT: Go ahead.

MR. EDWARDS: And at this time, Your Honor, I'd like to call Mr. Gregory, Stephen Gregory, to the stand.

STEPHEN GREGORY

called as a witness on behalf of the Petitioner,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EDWARDS:

Q Could you please state your name and spell your first name.

A Stephen Gregory, S-t-e-p-h-e-n.

Q What's your occupation?

A I'm a lawyer.

Q How long have you been licensed as a lawyer?

A 32 years, over 30 years.

Q Is that all here in the state of Nevada?

A Yes.

Q Did you have occasion to represent an individual

named Mr. Siaosi Vanisi?

A Yes.

Q Was that in a trial that took place in this court in 1999?

A It was.

Q And you worked for the Public Defender at that time?

A Yes.

Q Are you still employed there?

A No, I am not. I retired as of the first week of January of this year.

Q Congratulations.

A Thank you.

Q Was Mr. Vanisi -- well, Mr. Vanisi's trial was a capital trial, correct?

A It was.

Q And was this your first capital case?

A No.

Q And how long had you been qualified under Supreme Court Rule 250?

A For years. I can't give you the date.

Q Long before Mr. Vanisi's case?

A Yes.

Q So you had experience litigating capital trials

prior to this case?

A Yes.

Q In cases that actually proceeded to trial?

A Yes. Both as a prosecutor and as a defense attorney.

Q How long had you been doing defense work before 1999? Long time?

A Yes, 15 years.

Q And you had many jury trials, I assume?

A I had.

Q In this case you had co-counsel to assist you?

A I did.

Q And who was that?

A Well, actually when the case started, Mike Specchio was lead counsel and I was supporting him. After the mistrial, I took the case over, and Jeremy Bosler was my co-counsel.

Q So you were lead counsel by the time --

A I was indeed.

Q -- of the second trial?

A I was.

Q That was the trial that resulted in a guilty verdict and a death sentence?

A Yes.

Q And did you have support resources like investigators, paralegals and the like to assist you?

A I did.

Q And did you also have the assistance of your appellate division within the Public Defender's Office to consult regarding legal issues?

A Yes.

Q And did you in fact make use of that throughout the course of your representation?

A We did.

Q Do you recall how many hours you ended up working on this case, Mr. Gregory?

A No, I do not.

Q If I represented to you that the Supreme Court Rule 250 memorandum that you offered after the trial shows that you worked in excess of 500 hours on this matter, would that --

A That would be accurate.

Q Okay. Let's talk about the case. Aside from the trial itself, did you review the discovery in the case?

A Yes.

Q And did you meet with Mr. Vanisi?

A Many times, yes.

Q Can you tell us approximately how many times you

met with him?

A I met with him once or twice a week from the time I got on this case, I believe.

Q And did you review the discovery in this case with him?

A Yes.

Q Took it up to the jail with you?

A Always had a file with me, yes.

Q What kind of relationship did you establish with Mr. Vanisi?

A I think I established a good relationship with him.

Q Did there ever come a time that that changed?

A No.

Q Did you make an assessment of Mr. Vanisi's mental health at the time leading up to the trial in this case?

A Did I make an assessment?

Q Yes.

A Or did I have someone make an assessment?

Q Well, both.

A Yes to both.

Q And on what basis did you make this assessment? On the basis of actions of Mr. Vanisi? Did you have him examined?

A We had him examined before the first trial.

Q And what kind of results did you get from that?

A We were told that he was competent to stand trial.

Q Did you ever witness Mr. Vanisi engage in any bizarre behavior during the course of your representation?

A Did I witness it?

Q Yes.

A I would say no.

Q Were you able to communicate effectively with him?

A Most of the time. Sometimes he'd get off track, but most of the time, yes.

Q And did he seem to understand what you were telling him?

A Yes.

Q So at the time you proceeded to trial, did you have any concerns about Mr. Vanisi's competency, mental competency to proceed?

A No.

Q Did you ever consider a defense theory of not guilty by reason of insanity?

A No.

Q Why not?

A It wasn't the law.

Q Are you telling us that the law didn't exist at the time that this case proceeded to trial?

A That's correct.

Q So that legal defense wasn't available to defendants in Nevada?

A No.

Q What defense strategy did you develop relative to the guilt phase of the trial in this case, not the first trial, but the actual one that proceeded to completion?

A Ultimately?

Q Yes.

A Because we had an ethical conflict, it was a very limited defense. In my opinion it was about as weak a defense as could have been provided to him under the circumstances.

Q What was the defense? What was the defense theory?

A Our theory?

Q Yes.

A It was based on a self-defense. His theory was someone else did it.

Q What was the theory that was pursued during the trial from the defense perspective?

A All we could do as far as questioning the State's witnesses were to ask questions that suggest that maybe their credibility might be in doubt as far as their observations. That was it.

Q What evidence did you plan to present during the guilt phase of the trial?

A The attorneys?

Q Pardon me?

A The attorneys or Mr. Vanisi? See, there are two different things happening here.

Q There was a defense strategy I imagine at one point, right; before trial commenced you settled on what you would do and could do to defend Mr. Vanisi during the guilt phase, correct?

A Yes.

Q And I just want to know what that was, what that strategy was.

A Again, just to establish that a witness' perceptions were maybe incorrect, that sort of thing. That's all we could do as to each witness. We couldn't suggest our defense and we couldn't support what we knew to be a false defense.

Q So your hands were tied in terms of what you could present; is that what you're saying?

A That's correct.

Q Let's get into that. Why did this come about?

A Mr. Vanisi admitted to us that he had committed this murder under circumstances that suggested that there might be a self-defense, based on what he had said to us. However, he refused to allow us to put on this defense, insisting that his preference was to put on a defense that someone else had committed the crime.

Q Was that his decision to make or yours, as counsel in the case?

A What decision?

Q About what defense would be presented.

A Well, as far as how far we as attorneys were going to go, it was my decision.

Q And on the basis of this disclosure by Mr. Vanisi to you, did you --

A He also made it to all of us I believe, to Mr. Specchio, and also in writing.

Q And as a result of that, did you file a motion to withdraw from representation in the case?

A We did indeed.

Q And what was the basis of that motion?

A That we had an ethical conflict with Mr. Vanisi representing him.

Q Had you been in consultation with the bar counsel from the State of Nevada Bar?

A We had.

Q And presented this ethical issue to him?

A We did.

Q And what was the advice you were given?

A We were told to get off the case immediately.

Q And I assume you then filed the motion to withdraw from the case?

A We also contacted the task force for the National Association for Criminal Defense Lawyers for their assistance, and they put us in touch with an attorney who advised us to get off the case immediately.

Q Can you tell us what the legal basis for your motion to withdraw was?

A That there was a conflict between our ethical obligation and what Mr. Vanisi wanted to do.

Q And your ethical obligation you're referring to is the one not to present the defense he had chosen?

A Not to -- yes. Let's put it this way: Not to present a fraud to the court.

Q By having him testify or present evidence contrary to what he told you in the past?

A That's correct.

Q And you discussed this at length with State Bar counsel?

A Yes.

Q Was there any equivocation there about what you should do?

A No.

Q And, well, what happened? If you had such a large ethical conflict that you ended up going to trial in this case, tell us what happened.

A Again, it's back to your question about what we did. We were limited to just very shallow questioning of any witness that was presented, to try to avoid either a conflict with his intended defense or presenting an impression to the jury of a false impression to the jury through our own defense.

Q Somewhere in the record you've referred to your representation as being a bump on a log during the trial. Does that ring a bell with you?

A Yes.

Q Did you feel like that?

A Yes.

Q Did you feel like you could effectively represent Mr. Vanisi?

A No.

Q You didn't present an opening statement to the jury during the guilt phase; is that correct?

A That's correct.

Q And you didn't present a closing argument either; is that correct?

A That's correct.

Q You didn't present any physical evidence or witnesses during the defense case in chief during the trial phase; is that right?

A That's correct.

Q And would it also be fair to say that your cross-examination of the State's witnesses to the extent it took place was very limited?

A Very limited, yes.

Q And there were some witnesses that weren't examined at all by you or Mr. Bosler; is that right?

A That's correct.

Q So how was the State's case put through the crucible of adversarial testing? Have you heard of that phrase?

A Yes.

Q How was the State's case tested?

MR. McCARTHY: It seems to call for a long restricted narrative for several days.

THE COURT: With regard to broadness, I'll sustain the objection.

BY MR. EDWARDS:

Q During your representation of Mr. Vanisi, Mr. Gregory, did you become aware that he was a citizen of the Nation of Tonga?

A Early on, yes.

Q Were you aware of the provisions of the Vienna Convention on Consular Relations?

A No.

Q Did you have any contact with Mr. Vanisi regarding his citizenship and diplomatic status or status as a noncitizen in this country, I should say?

A Did I have conversations with him?

Q Yeah.

A No.

Q So you were just aware that he was from Tonga?

A Well, I believe we contacted the consulate early on.

Q You believe you contacted the consulate early on?

A I believe they were contacted.

Q You personally or someone --

A No, no. I believe it was Laura Beelser.

Q So that's nothing you have firsthand knowledge

about, right?

A That's correct.

Q You personally didn't have contact with Tongan diplomatic authorities?

A I did not.

Q While on this topic of international law, were you aware at the time of your representation with Mr. Vanisi of the provisions of the International Covenant on Civil and Political Rights?

A No.

Q What was your strategy during the sentencing phase of the case?

A To present as much mitigation evidence as we could.

Q And where did you get this mitigation evidence from?

A All over. We had our investigator locate family members, people that knew Mr. Vanisi when he was in high school, his bishop from his church. Just as many witnesses as we could locate that we thought was relevant.

Q So did you feel like you were able to help him during that phase of the proceeding?

A Yes. I feel we presented as much mitigation as we could.

Q Certainly able to render a lot more assistance than you were during the guilt phase?

A Absolutely.

Q Did you consult a mitigation specialist regarding capital crimes?

A No.

Q But would it be fair to say that somebody, either you or someone on your staff, had thoroughly researched Mr. Vanisi's upbringing and his past history before the crime?

A Yes.

Q And that's where these witnesses came from that you presented during the mitigation phase?

A Pardon me?

Q That's where you gained knowledge of these witnesses that you presented during --

A That's correct, yes.

Q One of the aggravating circumstances put before the jury and which the jury found was that the murder occurred in this case during the commission of a robbery, do you recall that?

A Yes.

Q Is it true to the best of your recollection that your client was, Mr. Vanisi was also charged in the guilt

phase of the case with felony murder?

A That's correct.

Q And that is in that he committed the murder in the course and furtherance of an armed robbery?

A That's correct.

Q Did you perceive any problem with basing this aggravating circumstance in this capital prosecution on a felony upon which the felony murder was predicated? I know that's a complicated question.

A No, it's not complicated. No, I didn't see any legal problems. We had done some research. There were no legal problems that I know of at that time.

Q As far as you knew the State was allowed to charge felony murder and then use that same --

A As an aggravator.

Q -- that same felony as an aggravator?

A That's correct.

Q Are you aware of the McConnell decision by the Nevada Supreme Court?

A The one that came down the last few months?

Q Yes. It's not very old.

A Yes. Vaguely aware of it.

Q I think it came out of your office. I don't know whether you were there at that time.

A Well, I don't know if I was there when the decision came down. But I believe the case stands from the proposition you cannot use a felony murder as an aggravator.

Q Right.

A Yes.

Q Was there any consideration about challenging this beforehand in Mr. Vanisi's case?

A Well, like I said, legal research was done and the law seemed to be settled. So beyond that, I don't know. You'd have to ask Mr. Petty.

Q Mr. Petty handled the appellate issues and things like that in this case; is that right?

A He does indeed, yes. He did indeed.

Q Was there a time that Mr. Vanisi attempted to fire you and represent himself?

A Yes.

Q What happened there? How did that come about?

A We refused to -- we told him that we would not put on his requested defense. We refused to aid him in any way in that regard. And he wanted to represent himself.

Q Was that after you moved to withdraw from the case or probably before, huh?

A Yeah, it was before, I'm sure. I don't know how many times we moved to withdraw. But...

Q In the course of this motion to withdraw, you disclosed to the Court the admission that Mr. Vanisi made to you or your office, right?

A That's correct.

Q Was that disclosure, was that provision of the statement to the Court in your motion done with the approval of State Bar counsel?

A Yes.

Q That was upon his recommendation?

A Yes.

Q What did you advise Mr. Vanisi regarding his right to testify in his own behalf?

A Well, we advised him that he could make a statement if he wanted to without our assistance.

Q During the penalty phase? Are you referring to like allocution, the right of allocution?

A Yes, I think that would be fair to say, yes.

Q Do you have any recollection regarding what you would have advised him about his right to testify during the guilt phase of the case?

A Other than the fact that we told him he could testify if he wanted to.

Q Did you tell him --

A But, again, we were not going to assist him in telling this Court a lie or this jury.

Q Did you provide him with any advice about that statement that he had made to you, admission about committing a crime, right?

A Yes.

Q Did you tell him whether or not it would be used against him if he chose to testify in his behalf?

A I don't have an independent recollection, but I'm sure I did, that he would be impeached.

Q With that statement?

A Oh, no, not with the statement he gave to us, no. Because that was not disclosed. The State would not know about it.

Q Do you know whether the State ever received the statement?

A No.

Q No, meaning they didn't or, no, you don't recall?

A Well, I believe we made our motion to withdraw, and subsequent to that the Court unsealed that particular record and gave it to the State so they would have known. They would have known that that admission had been made.

Q And that unsealing took place prior to the

commencement of the trial?

A I believe so.

Q So the State was in possession of that?

A They were. I'm sorry, I misunderstood you. I thought you had implied we had given it to the State.

Q No, oh no.

So it was likely, is that what you're saying, that you would have advised Mr. Vanisi that now that the State had the admission, if he chose to testify in his own behalf, he would be impeached with that?

MR. McCARTHY: That's a little leading, Your Honor.

THE COURT: It is leading. Sustained.

BY MR. EDWARDS:

Q Did you --

THE COURT: Counsel, I'm a little confused and I don't know if the witness is. I'm confused about which motion to withdraw you're talking about and which statements made by Mr. Vanisi, because there were several sealed transcripts and some have never been unsealed. So maybe best to make that clear.

MR. EDWARDS: We have a sealed transcript of June 23rd, 1999. These were unsealed -- everything was unsealed pursuant to a motion of mine, Your Honor.

THE COURT: Well, the latest order unsealed it. But your question implied that it was unsealed some time ago and before trial.

MR. EDWARDS: Yes, Your Honor. There is evidence in the record that in fact took place.

THE COURT: Not all of the hearings held outside the presence of the jury were unsealed prior to trial, and so I'm asking you to make it clear which one you're talking about so the witness knows what you're talking about when you say the State had something. Some of it was not unsealed even at appeal, as I understand it.

MR. EDWARDS: If I could have a moment, I'll point you to the portion of the record.

THE COURT: That's probably the best way to do it.

MR. EDWARDS: Your Honor, is there anything that hasn't been unsealed, as far as you know?

THE COURT: Well, I think your question was asking a historic question, about what was unsealed prior to trial, and there were items unsealed at trial. They were still in a sealed condition. Pretrial hearings that were held in camera that the State was not present, and those transcripts were not unsealed prior to trial.

MR. EDWARDS: Okay. Your Honor, what I was

referencing --

THE COURT: Now you all received a complete record, as I understand it, sealed and unsealed, when you began representing Mr. Vanisi. But I'm just -- the State hasn't received all of that. Now, in the latest order I refused to seal your petition. I unsealed your petition. And I refused to seal these hearings. But that order in and of itself did not unseal any previously sealed documents. The discussion of those sealed documents in your petition may make it necessary for me to unseal those. But right now there's been no order entered other than on petition.

MR. EDWARDS: Your Honor, I think Mr. McCarthy and I entered into a stipulation early on in this case, I'd have to look back, providing for sealed information to both of us.

MR. McCARTHY: And I assume we did. But I think the two of you and the Court and my friend are talking about different things.

THE COURT: Right. We are. I'm talking about the historical. Just because we unsealed it, you started representing him and got everything, doesn't mean that Mr. Gregory, it was unsealed when Mr. Gregory was representing Mr. Vanisi.

MR. McCARTHY: Just a second, Your Honor.

MR. EDWARDS: Okay, Your Honor, I think we can clarify this whole issue now.

On August 26, 1999, the Court conducted an ex parte hearing in camera regarding the motion to withdraw.

THE COURT: Which motion to withdraw?

MR. EDWARDS: Well, a motion to withdraw in which -- this was the day -- let's see. This was the one that was supported by affidavit, Your Honor. I don't have the motion sitting right here in front of me. But there was a motion to withdraw.

What the record reflects is that Mr. Gregory, talking to the Court, "Pursuant to Supreme Court Rule 172. We made an ex parte motion to withdraw supported by affidavit. Subsequent to filing this motion, this Court deemed it necessary to share that information with the State."

And that's what I'm referring to.

August 26, 1999.

MR. McCARTHY: In that case, Your Honor, if we're discussing Mr. Gregory's understanding of what this Court said, then it's hearsay. I suspect the Court made the prosecutor aware of the existence of an ex parte motion, but if the question is to this witness what did the Court

tell the prosecutor, it's either lack of personal knowledge or hearsay or something.

THE COURT: I don't understand. Are you asking him if the Court outside the presence of the court reporter disclosed something?

MR. EDWARDS: No, Your Honor. There was a motion made by affidavit by Mr. Gregory. He says it here on the record. He made a motion to withdraw by an affidavit.

THE COURT: But this August 26, 1999 transcript was sealed, and it's my understanding that Mr. Gammick was excused from the room.

MR. EDWARDS: Yes. Mr. Gregory says on the record, line 21, page 2, "This Court deemed it necessary to share that information with the State." This is prior to trial. I'm asking, clarifying, I guess, with Mr. Gregory what that information was, that this Court deemed necessary to share with the State.

THE COURT: I don't --

MR. EDWARDS: You don't get it?

THE COURT: No, because the Court didn't share anything with the State. So I don't know what we're talking about. And I have to read the whole transcript, and I think if Mr. Gregory reviewed the transcript and knows where you're at, then I don't necessarily have to be

with you, if Mr. Gregory knows what was going on on that transcript.

THE WITNESS: I do not, Your Honor, I'm sorry.

THE COURT: Hand him the transcript. Maybe he'll remember.

MR. EDWARDS: I'll be glad to, Your Honor.

THE COURT: This is page 2 of that August transcript.

MR. EDWARDS: August 26, 1999, page 2, line 21.

BY MR. EDWARDS:

Q Mr. Gregory, have you had an opportunity to look at that portion of the transcript?

A I have.

Q Can you tell us what you were referring to when you said the Court deemed it necessary to share that information with the State?

A Having read the entire paragraph, it appears that Mr. Stanton had made an argument of some sort indicating that Rule 172 did not apply under the circumstances and it suggests that the State had knowledge of the contents of our affidavit and our motion. I don't know that they did, but it certainly suggests that.

Q And you said the Court deemed it necessary; is that right?

A Well, if you wish, I'll read the entire paragraph.

Q I'm just asking for clarification, if there's anything you can provide us to tell us what you meant by that.

A It appears that I was suggesting exactly what you believe I was suggesting, that the Court had indeed shared information regarding our conflict with the State, and that Mr. Stanton, who was lead counsel, had made an argument against the application of Supreme Court Rule 172.

Q Thank you.

MR. McCARTHY: In which case I object. You're asking for this witness to speculate now about what he meant then when he was describing what the Court did. I don't know how many objections I have, but I make all of them.

THE COURT: I don't understand. I thought you were asking the witness about something that was unsealed. If you're asking the witness now if he remembers if there was an allegation of the Court somehow outside the presence of counsel disclosed something to the State, then he has no memory of what it was, the objections would be sustained. If that was your question. I thought you were

asking a question about the unsealing of that affidavit in a formal method.

MR. EDWARDS: I don't know how it was done, Your Honor.

THE COURT: Well, it wasn't done. What happened was he stood up and he said he had a motion; they had to be off the case. Mr. Stanton figured out what rule that applied. But there wasn't any disclosure to anybody. And it's my memory nothing was unsealed. That's what I was asking you about, was something unsealed.

Do you remember anything being officially unsealed?

THE WITNESS: I do not.

THE COURT: Go on.

BY MR. EDWARDS:

Q Do you have any recollection in your conversations or dealings with either Mr. Gammick or Mr. Stanton that would indicate they were aware of this admission by Mr. Vanisi to you?

A I don't recall any conversations.

MR. EDWARDS: No further questions, Your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. McCARTHY:

Q Thank you, Your Honor.

Mr. Gregory, in addition to your other duties, you were at the Public Defender's Office assigned to the ECR program; is that right?

A That's correct.

Q What's that?

A The Early Case Resolution program.

Q And in that capacity you spent a lot of time in the county jail?

A Daily.

Q Did you get any special accommodations from the county jail because of that?

A Yes.

Q Like what?

A Well, I have free access to the entire jail.

Q Without being noted on a visitors log?

A Oh, yes.

Q And if you brought someone with you, for instance, Mike Specchio, could he also access the jail without being noted --

A He could go through with me, yes.

Q When you contacted bar counsel and the NACDL for

their advice, they advised you to make an effort to get off the case, right?

A Told us categorically to get off the case.

Q Did they suggest what you ought to do if that effort was not allowed?

A We had to avoid -- I don't specifically remember them suggesting anything. I believe it was State Bar counsel that if we were forced to proceed, we had to avoid the potential conflict at all costs.

Q Did you receive any advice that you should avoid undercutting your clients' proposed defense?

A Yes.

Q As you prepared for trial and as you conducted the trial, did you know from Mr. Vanisi how he proposed to defend?

A Generally, yes.

Q Did he tell you he proposed to testify that through his theory that somebody else did it?

A Yes.

Q Did he also suggest to you that there were other defenses that he wasn't telling you what they were?

A Yes.

Q Did he suggest to you how many other defenses he might have?

A I don't recollect, I'm sorry.

Q Multiple?

A Multiple, yes.

Q And your advice was to not -- the advice you received was to not, by your cross-examination, undercut whatever secret defense he may propose to present later on; is that right?

A That's correct. Or bolster, for that matter, or help those defenses.

Q I suppose I may ask a stupid question. Does that make it any easier to defend Mr. Vanisi?

A No, it makes it much more difficult.

Q Impossible?

A Well, he set the parameters, so we did what we could.

Q Did you ask him to please divulge to you the nature of his proposed defense?

A Many times, yes.

Q Would "beg" be too strong a word?

A Plead, maybe.

Q Plead. And your pleadings were without avail?

A Without avail.

Q You arranged for a psychiatric evaluation of Mr. Vanisi before trial, right?

A That's correct.

Q You mentioned you got a report indicating that he was competent?

A That's correct.

Q That same doctor opined that your client was also sane?

A Yes.

Q Did you have any other evidence available that would have encouraged you to look at the defense of insanity?

A No, I think we were satisfied.

Q Did you ever discuss with your client, Mr. Vanisi, his relatively bizarre behavior within the jail and the prison?

A I believe we discussed incidents as they occurred.

Q Did he ever say to you anything that he was just doing it for the fun, to annoy his jailers?

A I can't remember him making that kind of statement. I do know that I was comfortable in my relationship with him that the activities he was involved in were more a sport than something he was compelled to do.

Q You were convinced of that?

A I was, yes.

Q In retrospect, if Finger decision had been announced before this trial and the defense of insanity was clearly available, can you think of any good faith basis you might have had for advancing that defense?

A At that time, no.

Q The defense that you wanted to pursue, you called it self-defense. That was based in part upon prior contacts between Mr. Vanisi and the police officers?

A That's correct.

Q Tell me, would it be more self-defense or irresistible impulse, which do you think is closer?

A You're asking me to split legal hairs. It was a defense. The most -- I almost said the most viable. I think it was the only viable defense.

Q And some sort of irresistible rage could theoretically have gotten you a manslaughter?

A Yes.

Q Unlikely, though, right?

A Yes.

Q Did you have discussions with Mr. Vanisi regarding the proposed defense of irresistible impulse or self-defense, did you and he talk about it?

A Yes. No, we set forth our theory of the case and

how we intended to defend. I don't believe he participated. I think he just refused to even talk about that and we went into great detail over and over again and he refused to accept that as a defense.

Q That great detail include letting him know that as a practical matter you would have to admit the act, the homicidal act?

A Yes.

Q Did he authorize you to admit to the jury the homicidal act?

A No.

Q So you were somewhat hampered by advancing that defense?

A Without his cooperation, we were not only hampered, we were prohibited from presenting that defense.

Q And he wouldn't tell you what defense he wanted to present?

A That's correct.

Q Mr. Gregory, by the time of this trial, 1998, 1999, your observations of lawyers in the community, can you think of anyone else that had advanced a claim based on violation of the Vienna Convention on Consular Relations?

A No.

Q Is that the claim that would be generally familiar to the bar in this jurisdiction?

A I would think not. I didn't know about it until I read it in the petition.

Q And how about the other treaty, what was it, Civil and Political Rights Treaty mentioned in the petition?

A Somebody in the state department, a lawyer in the state department might know about that stuff.

Q But you, as an experienced defense attorney, you knew if you wished you could call the Tongan Consulate and ask them for help?

A Yeah, I think that was the gist of the conversation Ms. Beelser had with the consulate.

Q You have no personal knowledge of that?

A No.

Q If you wanted, if you were hoping the consulate could provide an interpreter or money or experts or anything else, you have a telephone available to you; right?

A That's correct.

Q Do you recall how long after Siaosi Vanisi was arrested before your office got involved in the case?

A I think we got into the case immediately upon his

return to Nevada from Utah.

Q Do you know if anyone in your office in fact called the Salt Lake City Public Defender's Office and had them get in the act earlier?

A I do not know.

Q When you went to trial, did you and Mr. Bosler have a division of labor?

A Yes.

Q Your interest was primarily the guilt phase and Mr. Bosler's was primarily the penalty phase?

A That's correct. However, I don't want to imply in that statement that Mr. Bosler was responsible for the mitigation phase. I approved everything that was done.

Q And, of course, the two of you worked closely together?

A That's correct.

Q Consulted at every opportunity?

A Yes.

Q I don't know if you were asked earlier, if you know your office employed the services of a mitigation specialist?

A Not at that time, no.

Q Earlier, later, any other time?

A Later. We do now.

Q You have someone on staff now?

A Yes.

MR. McCARTHY: That's all.

THE COURT: Okay. Counsel.

REDIRECT EXAMINATION

BY MR. EDWARDS:

Q Regarding this psychological evaluation that you indicate gave you results that Mr. Vanisi was both competent and sane was your testimony; is that correct?

A That's correct.

Q So regarding the notion that he was sane, did this psychological examination actually address the legal standard of insanity?

A I believe that was the issue, yes.

MR. EDWARDS: No further questions.

THE COURT: Anything further?

MR. McCARTHY: Yes, if I may; it reminded me.

RECROSS EXAMINATION

BY MR. McCARTHY:

Q On that subject, the psychiatric examination you arranged before trial, did you ask that doctor to also comment about possible mitigation?

A I would say yes.

Q Remorse?

A Yes.

Q Was it helpful?

A No.

MR. McCARTHY: That's all.

THE COURT: Mr. Edwards, did you have something further?

MR. EDWARDS: No, Your Honor.

THE COURT: You may step down. May this witness be excused or do you want to hold him?

MR. McCARTHY: You know, I discussed with all the lawyers this witnesses, the possibility that I might have to recall them later. But I think, with the Court's permission, maybe for today he can be excused.

THE COURT: That's fine. Thank you.

Counsel, this is a good time to take our noon recess. We'll be back on the record with this case -- you have two more witnesses this afternoon.

MR. EDWARDS: Yes, Your Honor. Actually, three. Three witnesses, one relatively brief, I think.

THE COURT: Do you want to start at 1:15 or 1:30?

MR. EDWARDS: 1:30 is fine.

THE COURT: Then we'll be in recess on this case

until 1:30. As soon as we're ready to go on the next case let me know.

(Recess taken.)

RENO, NEVADA, MONDAY, MAY 2, 2005, 2:15 P.M.

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THE COURT: Please be seated. Counsel, go ahead and call your next witness.

MR. EDWARDS: Before we proceed, Mr. McCarthy and I have a stipulation to admit as evidence as part of this hearing the Supreme Court Rule 250 memorandum that was previously provided to both of us pursuant to our request, and it may have some relevance later on. So with that, I think Mr. Qualls is going to examine the next witness.

THE COURT: Is it in the file?

MR. EDWARDS: It's in your file. That's where we got it. If you'd like --

THE COURT: That's what they're supposed to do. It's supposed to be filed in our file.

MR. McCARTHY: It's under seal. I agree what you have is authentic and admissible and may be considered for whatever you want to consider it for.

THE COURT: Are we opening it? Are we unsealing it?

MR. McCARTHY: Sure. If it's admitted as evidence, I guess it is.

THE COURT: Do you want it marked or just we'll

stipulate that what's in the Court's file is the original and is accurate?

MR. EDWARDS: Yes, Your Honor.

THE COURT: And we'll order it unsealed.

MR. EDWARDS: Your Honor, I can provide a copy of this if you'd like and make it separately filed.

THE COURT: It doesn't matter. I can take judicial notice of anything in the file as long as it's unsealed, as long as you're stipulating it being unsealed.

MR. McCARTHY: Yes, Your Honor.

MR. EDWARDS: Yes, Your Honor.

THE COURT: That will be the order.

MR. QUALLS: Your Honor, our next witness would be Jeremy Bosler.

THE COURT: Mr. Bosler, go ahead and face the court clerk and be sworn.

JEREMY BOSLER

called as a witness on behalf of the Petitioner,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUALLS:

Q Good afternoon, Mr. Bosler.

A Good afternoon.

Q Could you please state your full name and spell it for the record.

A Jeremy Bosler. J-e-r-e-m-y. Last name Bosler, B-o-s-l-e-r.

Q What's your occupation?

A I'm a public defender.

Q How long have you been licensed as an attorney in Nevada?

A 11 years, about eight months, something like that.

Q Have you been with the Public Defender's Office the whole time?

A I have.

Q You represented Siaosi Vanisi in a capital case that went to trial in 1999; is that correct?

A I did, yes.

Q And you had co-counsel to assist you with that case; is that correct?

A That's correct.

Q Who was your co-counsel?

A Steve Gregory for a portion of the first proceeding. Mr. Specchio, obviously. But I believe in the second trial it was Mr. Gregory and I.

Q Were you the lead attorney on that case?

A I considered it co-counsel, but I don't think there was really a set division as who was first chair, second chair.

Q Was that your first death penalty trial?

A No, I think it was my second. I think I had done Geary with Mr. Gregory earlier.

Q So in the Geary case, would that be when you were first qualified under Supreme Court Rule 250 to serve as counsel on a capital case?

A I think the Vanisi case and me acting as co-counsel was the last piece for me to become 250 qualified.

Q Could you tell us briefly what kind of support resources, investigator staff and the like, you had when you were working on the Vanisi case?

A Well, as like all cases in the Public Defender's Office, you have the resources of the other attorneys in the office, investigators. We had, I believe, two investigators at least assigned to this case, even though other investigators took parts along the way.

I contacted the Capital Defense Resource Center about jury questionnaires. I think Mike had contacted them. Obviously, as you heard earlier, we contacted the

National Association of Criminal Defense Lawyers task force. So although most resources were in the office, there was outside office resources we also took advantage of.

Q And did you also work with the appellate division of the Washoe County Public Defender's Office?

A Yes.

Q Did you work with Mr. Petty in that case, John Petty?

A Yes.

Q Do you recall what legal issues you consulted with Mr. Petty on?

A No. Formally, no.

Q Do you have any memory about how many hours you actually worked on the case?

A I've reviewed my 250 memorandum. It would be only an estimate, because even if I looked at the memorandum, it's not complete as to time allotted to each task. I'd say at least 200 hours. I traveled to California and spent some time in California with an investigator looking for mitigation witnesses. So obviously that took a large portion of time.

Q You mentioned there was a first trial that ended in a mistrial, and then there was a full, complete second

trial. Were you involved in the first trial as well?

A Yes, but not as actively as I was in the second trial.

Q And so did you review all the discovery, police reports, et cetera, leading up to the first as well as the second trial?

A Yes.

Q And during the course of preparing for trial, did you meet with Mr. Vanisi?

A Yes.

Q And approximately how many times, do you have any idea?

A I'd say over a dozen.

Q Did you review discovery of Mr. Vanisi when you were on your visits?

A I reviewed portions of discovery with him. As I said earlier, Mr. Specchio and Mr. Gregory originally were the lead counsel for the first trial. Essentially all the discovery had been reviewed before the second trial began and I took a more active part in the trial. So we would talk about specific witnesses, specific parts of the defense, things that Mr. Vanisi wanted to have done. We did discuss those things. Did I go over the whole of discovery after the mistrial? I can't say I did.

Q As far as you mentioned trial strategy and each witnesses that would be important, you discussed those things?

A Yes.

Q Were you able to establish some rapport, some relationship with Mr. Vanisi?

A I believe so, yes.

Q Was he cooperative with you?

A I wouldn't characterize him as cooperative, no.

Q What about his ability to kind of track your conversations and have rational conversations with you?

A I think Mr. Vanisi tended to track his own conversations and things that he thought were important. I also believed he was a fairly rational, intelligent person. Although we didn't see eye to eye on most things.

Q Was there ever a time leading up to and during the second trial that you had cause to question Mr. Vanisi's mental health?

A Well, we had a diagnosis of bipolar disorder. Did I question his competence? No. Did I think maybe there was a mental health issue involved? Yes.

Q Did you ever consider, based on the evidence that you had reviewed and Mr. Vanisi's comments to you, perhaps he was not sane at the time of the crime, from a legal --

that would be defined legally?

A I never had that opinion, no.

Q So you never considered that option?

A I considered it, but to me there wasn't evidence to support a defense like that.

Q Was such a defense, by that, I mean not guilty by reason of insanity, was that available to you at that time?

A No.

Q Did that weigh into your decision on whether to pursue that option?

A Yes.

Q I'm going to move a little bit ahead. There came a time during your representation that you moved the Court for an order allowing you to withdraw as counsel; is that correct?

A That's correct.

Q What was the basis for that motion?

A Mr. Vanisi's insistence upon presenting a defense that was contrary to facts that he had given us earlier. So the chance that we would be suborning perjury or acting a fraud upon the court. Because we weren't at least in the position, willing to do that, we moved to withdraw. So that was the nuts and bolts of the nature of the

conflict.

Q And what was the result, what did the Court ultimately rule on the motion?

A That we were not able to withdraw.

Q Also around this same time did Mr. Vanisi move to have you removed as counsel on his own?

A Yes.

Q Did he also move to represent himself?

A Yes.

Q Under Faretta?

A Yes, he did.

Q What were the results of both of those?

A The Court denied those motions also.

Q As a result of those three denials, what was the situation you found yourself in in trial?

A I think the defense, we tried to be as effective as we could under those circumstances. But each witness would present a problem because if Mr. Vanisi's intent was to provide a defense that someone else was responsible for the murder, things that we had available to us, intoxication, mental health, our attempt to raise those issues for any one witness, even in cross-examination, had potentially the possibility of undercutting Mr. Vanisi's ability as historian.

So as each witness was considered, we had to worry, are we going to do things to limit Mr. Vanisi's ability to be a witness if he decided to take the stand in his own defense. So it became nearly impossible to conduct meaningful cross-examination without impinging upon things he might want to do as part of his ability to testify.

Q So as a result, the vast majority of the witnesses you didn't cross-examine, correct?

A That's correct.

Q Because your hands were essentially tied?

A That's correct.

Q Was it because of the same reason that you gave no opening statement?

A Yes.

Q And no closing argument?

A That's correct.

Q In your professional opinion, and based upon your experience, do you believe you had a conflict of interest in representing Mr. Vanisi during the trial?

MR. McCARTHY: Your Honor, what matters here is the Court's legal conclusion, not this witness' opinion. This Court has ruled and the Supreme Court reviewed it.

MR. QUALLS: It goes to the reasons why he asked

to withdraw and why he was essentially forced to sit on his hands here in court.

MR. McCARTHY: Asked and answered.

THE COURT: I'll sustain the objection.

Sounded like an expert witness opinion anyway.

BY MR. QUALLS:

Q Did you assert to the Court you had a conflict of interest during your motion to withdraw?

A I don't know whether I personally did. I think as an office we submitted the conflict of interest.

Q And was that based upon any consultations you had with State Bar counsel?

A Yes.

Q And that was his opinion as well, correct?

A That's correct. And I called NACDL and asked for their task force ethics representative, and I called Mike Sherman in Los Angeles and had discussion with him about the same circumstances, obviously hypothetically, and he concurred in that same opinion; he said we had to withdraw.

Q They advised you, accordingly, that there was a conflict?

A Yes.

Q Did you advise Mr. Vanisi regarding his right to

testify on his own behalf?

A I think I would have or one of the other attorneys would have. I can't specifically recall talking to him about that, the actual details of testifying.

Q Do you recall any conversations you had with him regarding whether he would testify or not?

A I remember discussing his willingness or his wanting to put on the defense that someone else was responsible. That would come from him. So that's as far as I can go with that question.

Q He didn't testify during the trial, did he?

A He ultimately chose not to testify, yes.

Q During the course of your representation of Mr. Vanisi, did you become aware that he wasn't a U.S. citizen?

A I know that the office had contacted the Tongan Consulate. I assumed he was a U.S. citizen, to tell you the truth.

Q What's the basis of your knowledge that the office contacted the Tongan Consulate, do you know?

A Reviewing the notes from the file, things that were preserved as part of the original trial record.

Q So they contacted the Tongan Consulate prior to your, when you got really involved in the case?

A That's correct, that's my understanding, yes.

Q To your knowledge, after this conflict arose in which you asked to be withdrawn as counsel, was there any contact with the Tongan Consulate?

A No, I have no information in that regard.

Q Did you have any familiarity with the provisions of the Vienna Convention that allowed for assistance of counselor relations?

A I had familiarity, yes.

Q But you believe that avenue had already been explored?

A Yes.

Q Were you at all familiar at the time of this trial, preparing for the trial, with the provisions of the International Covenant on Civil and Political Rights?

A No.

Q Could you tell us a little bit about your strategy during the sentencing phase of the case?

A Well, ideally, I think in any capital case you try to front load your mitigation as part of the trial phase; but since we were unable to do that, we had to essentially back load all of our mitigation.

I know that Mr. Specchio, from memos, had gone to, I believe, Redondo Beach to find friends and people

familiar with Mr. Vanisi. Christa Calderon, an investigator in our office, she and I traveled to San Mateo and used the services of the San Mateo Public Defender's Office to track down and discuss mitigation evidence, witnesses, school teachers, friends, family members. He also, I believe, used Dr. Teenhouse as far as the mental health aspect mitigation piece of the case. Did all we could under the circumstances, back loading the mitigation.

Q Do you know if he had any relatives still living in Tonga at the time?

A I believe, although the family history is a little bit complex as to children being handed off to nonbiological parents, I believe he still has, maybe even to this day has some relatives in Tonga.

Q Were any of them contacted, do you know?

A I know a lot of that was done before I came on the case with the original investigation. I believe the family members that were here that had contact with people in Tonga, they all knew about the case and what we were looking for as witnesses. Were any calls made directly from our office to Tonga? I can't say.

Q Do you know if anybody traveled to Tonga either at the time you were on the case or before it?

A I don't believe anyone traveled to Tonga.

Q One of the aggravating circumstances that was sought and the jury found was that it was based upon the felony murder rule that the murder occurred during the commission of a robbery, correct?

A That's correct.

Q And that was also, as the case was originally charged, it was charged under the felony murder rule, correct?

A That's correct.

Q Did you see any problem, any legal problem at the time with that aggravator?

A Not in the way that Nevada law existed at that time.

Q Did you consult with Mr. Petty and the appellate office regarding that?

A I've had the issue come up in my own trials, so I was already familiar with Nevada's at least willingness to allow the felony murder rule be used as an aggravator in a capital case.

Q That's why you didn't challenge it?

A That's why I didn't see a basis to challenge it.

MR. QUALLS: No further questions at this time, Your Honor.

THE COURT: Mr. McCarthy, cross-examination.

CROSS-EXAMINATION

BY MR. McCARTHY:

Q In the course of investigating, trying to track down potential mitigation type witnesses, did you experience any lack of cooperation?

A Yes.

Q From the witnesses?

A Yes.

Q Resistance to appearing?

A Yes.

Q There were times, in fact, when you had to use the Uniform Act to secure the attendance of witnesses from without the state; is that right?

A Contested hearings in San Mateo.

Q That was for friends, relatives?

A I believe the people who were most resistant were school teachers who had nice things to say over the phone about Mr. Vanisi, but once they learned they may be present at a trial began to experience reluctance about the information they had.

Q And other sorts of witnesses, friends and relatives, did you experience that same sort of reluctance

with them?

A Yes.

Q Now eventually you rounded up some, didn't you?

A Yes.

Q Did your client suggest to you any potential mitigating witnesses that you did not follow up on?

A No.

Q Did he give you names of some people that could say nice things about him?

A When I came into the case, we already had some family names and contacts in California. We went with those and expanded upon those.

Q Did you seek counsel of other lawyers experienced in the field on how to gather mitigating evidence?

A I believe Mr. Specchio contacted Charlotte Holdman, a recognized expert in presenting mitigation evidence, consulted with her and gave information to the other attorneys on how to create a mitigation case.

Q Were you satisfied you had done all you could in gathering mitigation?

A Yes.

Q When you got advice from outside agencies like the bar counsel on the subject of what has been termed a conflict of interest, conflict anyway, did you get advice

on what to do if the Court said no, you may not withdraw?

A The information I gathered was that it is a conflict and do all that you can to express that to the Court to be removed from the case.

Q I'm sorry, did you have any direct contact with bar counsel or NACDL?

A I contacted NACDL. I didn't participate with the direct conversation with Mr. Barrer.

Q And earlier, for the benefit of the court reporter, when you say NACDL --

A National Association of Criminal Defense Lawyers.

Q I noticed a little glimpse.

Okay. Were you involved in any discussions with Mr. Vanisi about him exercising his right to testify at trial?

A Yes.

Q Did you tell him he could testify if he wished?

A I was present when the conversations took place. He was advised he had the right to testify; we couldn't take that away from him. What he was going to say on the stand, we didn't know.

Q But you asked, didn't you?

A Yes. And there's correspondence where various defenses are raised and Mr. Vanisi is asked to commit to a

version, which he doesn't do.

Q Several times you asked him please tell you how he wished to defend himself?

A Those things were asked. I can't say I personally asked them, but those things were asked.

Q Did he ever tell to you or say something in your presence that he wished us to "sit on our hands" during the trial?

A I can't recall that statement.

Q I'm going to show you part of Rule 250 memo, see if that refreshes your recollection.

A That's my Rule 250 memo?

Q I can't tell you whether it is. Does that refresh your recollection?

A Yes.

Q Do you know now recall Mr. Vanisi asked if you would just sit on your hands during the trial?

A I put it in quotes. Those were his exact words, yes.

Q And he also told you he believes there are many defenses to the case but he wouldn't tell you what they were?

A That's correct.

Q You believe that hampered your ability to defend

your client?

A Yes, as I stated earlier, yes.

Q I'm sorry, what?

A As I stated earlier, yes, I believe that hampered our ability to take part in the trial.

MR. McCARTHY: That's it.

THE COURT: Redirect.

MR. QUALLS: Court's indulgence one second.

REDIRECT EXAMINATION

BY MR. QUALLS:

Q During the discussions with Mr. Vanisi regarding his right to testify about which you were either there or had personal knowledge, was it discussed or was Mr. Vanisi informed that he had the right to testify and put on his defense?

A I believe he was informed he had the right to testify and we couldn't tell him what he could say or couldn't say in his own defense.

MR. QUALLS: Thank you.

THE COURT: Anything further?

MR. McCARTHY: Nothing else.

THE COURT: You may step down. I think you're supposed to stick around, not today, but be available.

MR. McCARTHY: I know where he works, Your Honor. I can find him.

MR. QUALLS: Next witness, Your Honor, is John Petty.

JOHN PETTY

called as a witness on behalf of the Petitioner,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUALLS:

Q Good afternoon, Mr. Petty.

A Good afternoon.

Q Please state your full name and spell it for the court reporter.

A First name is John, common spelling J-o-h-n. Last name is Petty, P-e-t-t-y.

Q And what is your occupation?

A I'm a public defender.

Q And you work in the appellate division?

A I do.

Q How long have you been licensed as an attorney in Nevada?

A Since 1980.

Q How long have you been in the appellate division for the Public Defender's Office?

A Over 11 years.

Q And when were you first qualified pursuant to Supreme Court Rule 250 to serve as counsel in a capital case?

A I don't have a recollection, but I've handled many capital cases on appeal over the years.

Q Could you give us an estimate?

A Estimate of how many cases?

Q Yes.

A I'd say about ten.

Q You represented Siaosi Vanisi in direct appeal on the capital case that went to trial in 1999, correct?

A I did.

Q Did you handle that appeal by yourself or did you have co-counsel on that?

A I did it myself.

Q What kind of support resources are at your disposal and did you use, when you were doing this direct appeal?

A Well, I have a deputy public defender who does appeals as well. So we would talk. But she wasn't

actively involved in preparation of the appeal. And then I had staff, computers, access to West Law and the research engines.

Q So other than your associate, did you consult with any other death penalty lawyers during your representation of Mr. Vanisi?

A No. Aside from Mr. Gregory and Mr. Bosler.

Q Do you have an estimate of how many hours you worked on this appeal?

A You know, when you asked that question of Mr. Bosler, I was trying to think about it. But you figure that this is a death penalty case, so I get the complete record that has to be reviewed. Then we filed opening briefs and answering briefs.

Prior to the conviction we also had done a writ to the Supreme Court on the issue of should we be allowed to withdraw.

And at the conclusion of the case and at the conclusion of briefing and argument in the Supreme Court, we filed a petition for writ of certiorari in the United States Supreme Court that was denied.

So you put that all together, I can't give you a sufficient number of hours, but it was over a very long period of time.

Q Did you meet with Mr. Vanisi while you were working on this appeal?

A I talked to him on the telephone. I did not go out to any of the prison facilities that he was being housed at. I would talk to him briefly on the telephone, and I did have some contact with him during the course of the trial when I would be here to back up Mr. Bosler or Mr. Gregory with regards to some questions.

Q Do you have any idea how many times you talked to him on the phone while you were --

A No, I couldn't tell you. Sometimes the conversations were really, this is after the matter had been briefed, could you tell Jeremy to give me a call. Could you tell Mr. Gregory to give me a call or contact me. So some of those were very short conversations.

Q Were you able to communicate effectively with him at that time?

A Over the phone, I think we did.

Q What about backing up, since you were talking about you worked on the case during trial as well, as sort of a back-up legal advisor, did you have -- were you able to communicate rationally with Mr. Vanisi at that time?

A Yes, I was. But most of my conversations involving Mr. Vanisi were directed at Mr. Bosler or

Mr. Gregory and we would have exchanges and that would be about it. But I didn't have any -- I didn't feel as though there was difficulty communicating with him or understanding what was going on.

Q So did you ever review the issues on appeal with him either prior to filing the opening brief or sometime thereafter?

A Well, I don't recall talking with him about the issues raised on appeal. I mean there was one issue that was, I mean it was a dynamite issue that had to go and that was the Faretta issue that had to go. And at the conclusion of writing and filing, I supplied Mr. Vanisi with everything that was supplied to the Supreme Court.

And that issue, by the way, the Faretta issue is the issue we writted to the United States Supreme Court.

Q Thank you. Since you brought up the Faretta issue, let's go there. Essentially you challenged the trial court's decision based upon an argument that the Court's findings were belied by the record, correct?

A That's correct. Because what the record consisted, of after the Faretta motion was filed, Judge Steinheimer had a lengthy hearing one afternoon, might have even been all day, where arguments were made. The State was represented by Mr. Stanton, and Judge

Steinheimer did a Faretta canvass but also did a rule, Supreme Court Rule 153 canvass, which is essentially the same thing, to make the determination whether or not if Mr. Vanisi was making his request with his eyes wide open.

We differ about how that conclusion or how that hearing should have been resolved, because I thought, and so did Mr. Stanton, I think everybody in the courtroom thought that if there was ever anybody who successfully navigated through a 153 canvass, Mr. Vanisi had.

MR. McCARTHY: By the way, I object to the speculation about what the Court thought, Stanton thought or anybody --

THE COURT: Obviously the Court didn't think it because I didn't grant it. Obviously the Supreme Court agreed with me.

THE WITNESS: But did you read that scathing concurring opinion?

THE COURT: No.

MR. QUALLS: For the record, I believe Mr. Stanton made his thoughts clear regarding what Mr. Petty was saying on the record.

THE WITNESS: That's right. I think Mr. Stanton, and I think people were surprised, that he had come to the conclusion that he thought Mr. Vanisi could conduct

himself accordingly in court, that he was intelligent obviously because he had been reading books on physics and things of that nature. So he was -- he had intelligence.

BY MR. QUALLS:

Q So just following up on that: Your argument was that the record showed there was no indication that Mr. Vanisi would disrupt the proceedings, correct?

A That's part of the argument. And that was based on Nevada case law, Tankleys, T-a-n-k-l-e-y-s. Because as I read that case, there has to be some indication that the defendant is going to be disruptive and that indication has to be in prior court proceedings. And the record in this case reflected that every time that Mr. Vanisi was in court, he comported himself in a good fashion.

Q Additionally, the record showed that Mr. Vanisi showed that he was aware of his rights and of the possible punishment; is that true?

A Correct.

MR. McCARTHY: I'm willing to stipulate Mr. Petty disagrees with the Court's conclusion and raised that argument. I'm willing to stipulate that the record shows what it shows. I don't know why we're doing any of this.

THE COURT: Unless you have a question.

BY MR. QUALLS:

Q I'm getting there. That was my last question on that point, Your Honor. My next question is something completely different.

THE COURT: This is not supposed to be about what he thinks I did wrong; it's supposed to be about what you think he did wrong.

MR. QUALLS: I agree. That's where we're going.

BY MR. QUALLS:

Q Do you know what a structural error is?

A Generally speaking, that's an error that would cause the reliability of the verdict to be in question. Usually involves questions of something that's happened during the course of the trial that doesn't really go to testimony.

Q And based upon your review of the record and your involvement in the case, do you think there was a structural error in this case?

A I don't believe there was, because if I had found structural error, I would have argued that as such. I think the way we framed the Faretta issue, that was error. Whether or not that becomes structural, I'd have to think about that. Puzzle that.

Q You don't think the combination of the denial of

the Faretta motion plus the denial of the motion to withdraw counsel caused a structural error? Just clarification, Your Honor.

MR. McCARTHY: Your Honor --

THE COURT: Go ahead.

MR. McCARTHY: It doesn't matter. He raised what he raised. Whether he thinks -- relevance. I object.

THE COURT: I'm going to sustain that. He raised the issue. I don't think it mattered if he called it a particular name. So sustained.

MR. QUALLS: Your Honor, for the record, structural error is more than just calling something a name, because --

THE COURT: Is there something that you believe he should have pled to the Supreme Court that he didn't?

MR. QUALLS: I believe he should have raised a structural error because it avoids a harmless error analysis.

THE COURT: But he did raise the Faretta issue and he did raise the issue of not being allowed to withdraw as counsel.

MR. QUALLS: No, I don't believe he did raise that.

THE WITNESS: I can clarify that. We raised that

issue by way of the writ that went to the Supreme Court that was denied. The conflict never really resolved itself, but it never completely materialized either when Mr. Vanisi elected not to testify.

Had Mr. Vanisi elected to testify, he would have been able to give his story as he wished, and there is a mechanism by which counsel who still stays on the case can sort of navigate that problem; that is, as set forth in a case called Nix versus Whiteside, I think it is. And Nix is N-i-x. It's a very awkward situation.

Q During the course of your involvement in Mr. Vanisi's case, were you aware that he wasn't a U.S. citizen?

A You know, I wasn't aware of that. That wasn't something that I was focused on. I was really trying to answer questions that were put to me from time to time by Mr. Gregory or Mr. Bosler.

Q What about on appeal, once you read the record were you aware that he was a Tongan national?

A I think, having read the record, yes. But that wasn't raised as an issue on appeal. Primarily it wasn't raised as an issue on appeal because it was never litigated at the trial stage. As you know, if you don't give the district court an opportunity to resolve an issue

first the Supreme Court doesn't have any, doesn't have any obligation to review an issue not raised at the trial level.

Q With the exception of, for instance, a Jones error, which is a plain error on the face, you could technically raise claims of ineffective assistance and whatnot under direct appeal?

A Well, actually my understanding is that you cannot raise claims of ineffective assistance of counsel on direct appeal; but that would be, even assuming you could, the hurdle we would have there is that I would be claiming my deputies as being ineffective which would make me have to get off the case because of that conflict. So it's -- the answer to your question you cannot raise ineffective assistance of counsel on direct appeal. You have to wait to do that in post-conviction proceedings.

If there is a Jones error, if it's just so fundamentally wrong, like there's a case DUI case, I think Smith v. State, or in Jones where the record shows that without the client's permission, the attorney, if this is the one you're thinking about, the attorney conceded his client's factual guilt to a second degree murder case without any okay from his client.

Q Are you familiar with the International Covenant

on Civil and Political Rights?

A I am not.

Q Do you, as a death penalty qualified appellate lawyer, do you have to or have an obligation kind of to go above and beyond your normal appellate duties?

A Well, I like to think that I bring what talent I have to all the appeals I write. But a death penalty case is significant. I mean we're all familiar with that, death is different.

Q So you seek out additional information and experts and authorities from other parts of the country and whatnot, don't you?

A I do research. And I have sent letters off to other people. But basically it's -- I'm the author of my work.

Q But during that research you never came across the International Covenant on Civil and Political Rights?

A Not that I'm aware of, no.

Q You're aware of the recent McConnell decision by the Nevada Supreme Court?

A I am.

Q It came out of your office?

A It did.

Q Did you assist, I know you're not the named

author on the decision, but did you assist in that case?

A To the extent that I would talk to Cheryl Bond, who wrote that brief, or Maizie Pusich, who was his trial attorney, still is his trial attorney, our conversations, we would have those kind of conversations, but she's the one who brought that appeal.

Q And you're aware that one of the aggravators in this case is identical to the aggravator in McConnell, correct?

A I am, and McConnell was decided, what, it was the last case decided in 2004, literally the last case published that was decided in 2004. And then the State petitioned for rehearing which was openly denied in 2005. Prior to Ms. Bond getting that fantastic victory, that was not the state of the law in the state of Nevada so it was not even something that I thought about raising on appeal.

Q So you didn't consider raising that?

A No.

Q You do, however, your office, does fairly consistently raise issues, what comes to mind is the reasonable doubt instruction, to try to change the law, correct?

A Uh-huh.

Q And that's essentially what Ms. Bond did in the

McConnell decision?

A That's exactly what Ms. Bond did in McConnell. It was excellent.

Q Is there a reason why you didn't try that in the Vanisi case?

A I don't want to speculate on that, but that issue really was not floating as something to look at until an earlier decision by Maupin -- I think in a concurring decision or decent, I think it was concurring, sort of flagged that issue as sort of maybe something that should be percolated in the system, and I think that's what sparked Ms. Bond's interest and got her to write the issue.

Q Did you consider an Eighth Amendment challenge that the death penalty was itself cruel and unusual in this case?

A I know that early on at the trial court level we raised a variety of those kinds of motions, variety of those kinds of motions to the trial court's attention, but I ultimately didn't take it up on appeal because that case is, I mean that issue has never been successful on direct appellate review. In fact, it's never been successful in the state of Nevada.

Q So you just answered my second question; that's

why you didn't bring it forward, just because you didn't think it would be successful?

A Uh-huh.

Q Do you ever raise such issues in order to preserve them for federal appeal?

A I'm sure I have. I'm trying to think if I've raised that kind of issue before. But there are issues we do raise. The reasonable doubt issue, for example, is one we raised knowing full well that with the language of our Supreme Court we won't have much success but maybe up on federal review something will happen.

But, see, our Supreme Court also cites a Ninth Circuit case for the proposition that our current reasonable doubt instruction is good and that's not what the case stands for.

Q So along those same lines, why didn't you raise a cruel and unusual argument, for instance, to preserve it for the Feds?

A I couldn't tell you. I don't know.

Q Okay. Did you consider an argument that Nevada's death penalty statutes fail to meaningfully narrow the class of persons eligible for the death penalty?

A Yeah, we have raised that in the past. I don't believe that was one of the issues here. Like I said, the

issue for me, what I thought was going to be the driving issue for this particular appeal was the Faretta issue and also the fact that if you put together the mitigating factors that were offered to the jury, that perhaps they did outweigh the aggravating circumstances.

Q Did you consider any claims regarding competence to be executed?

A No, because that -- I've been involved in that kind of situation. I think back to when I was a trial attorney in the Public Defender's Office, one of the cases that I took to the Nevada Supreme Court was whether or not Priscilla Ford was competent to be executed, because she had been found to be incompetent. Then we put on a hearing for her with a lot of doctors which we thought was better evidence presented to the Court and they found her competent. So we took that to the Supreme Court. But that would have happened post-judgment on some kind of writ or something like that. It wasn't something that was even litigated below to be preserved for direct appeal.

Q Okay. Thank you.

Did you consider an issue related to constitutional standards of impartiality as it relates to the judiciary?

A Can you clarify that for me?

Q Sure. It's based upon an historical claim that we have presented on behalf of Mr. Vanisi, related to the judiciary as an elected body and therefore subject to the intense pressure related to death penalty cases?

A I'm sure that we may have filed something like at the district court level, but if what you're getting at is that statistically a sentencing panel will impose death more often than a jury, you know, that's just something that's been recognized in the state of Nevada. Those issues have been raised before the Nevada Supreme Court on more than one occasion without success.

Q Did you consider any other standard challenges to the death penalty regarding possibility of rehabilitation or unacceptable risk of executing an innocent person?

A Those issues were not raised on direct appeal.

Q What about an appeal issue regarding the discretion, the wide discretion of prosecutors in the state of Nevada to make the decision on whether to seek the death penalty?

A That issue has been raised, not necessarily by my office, but in published Supreme Court, Nevada Supreme Court cases, again without success.

Q And, again, is there a reason why you decided not to raise that issue or any of these other death penalty

issues other than the Eighth Amendment which we've already covered for federal review?

A No.

Q Finally, Mr. Petty, did you consider any appeal issues regarding allowing a death qualified jury to determine guilt or innocence?

A That wasn't raised on direct appeal, but I know we've talked about that around the office. I mean I think I might have mentioned it already. In fact, I was talking to some high school kids on Friday and pointed out the jury selection process in a capital case, that you ultimately end up with people who say, okay, I could impose the death penalty. When you get enough of them together, odds are you're going to get the death penalty imposed. But it's not an issue on appeal.

MR. QUALLS: No further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. McCARTHY:

Q So you've been in the criminal appellate business more than 11 years?

A Correct.

Q Do you have a counterpart in Clark County?

A You know, I believe in Clark County the trial deputies, at least in the Public Defender's Office, they handle their own appeals. But then there's also a special office for death penalty cases.

Q I gave you a copy of the claims that were being pursued on habeas, right?

A Right.

Q By the way, Your Honor, that was with the permission of Mr. Edwards before the Court ruled.

Did you read that over?

A I glanced through it, yes.

Q Of the putative potential appellate arguments, were you familiar with them all?

A I'm trying to -- I would have to have that document in front of me to go through it, to answer that question intelligently.

Q How about the substantive due process, that might have been a new one?

A Substantive due process? Uh-huh.

Q Were there any great surprises in that document that I gave you?

A No, nothing came leaping out at me.

Q When you did this appeal, you knew you had the option of raising frontal attacks on the death penalty if

you wished?

A Uh-huh.

Q You know what they are; you know what's available? You have to answer out loud.

A I'm sorry, yes.

Q Not used to being a witness, are you?

How do you choose?

A Well, you know, I guess if I wanted to -- and I remember when Justice Young was on the Supreme Court, this used to drive him crazy where they would get these briefs from Clark County, primarily, that had everything and the kitchen sink thrown in there. Some issues so firmly established against the accused that it was just ridiculous to keep raising those things. You get frustrated.

The other thing, I think about my audience. You don't just bombard them with a whole host of frivolous issues and hope they pick one out and go, hey, I like this one. You have to pick and choose your issues.

Q Why?

A Well, first, I'm on a page limitation requirement. Without court permission you can't file an opening brief or any brief, for that matter, in excess of 30 pages.

But, also, as I said, I don't want to bury a good issue in a forest of bad issues.

Q And in this case you considered your best issue to be what?

A The Faretta issue. Not only in the Nevada Supreme Court, but also in the U.S. Supreme Court.

Q So you had in your arsenal what you considered to be your best issue and then a whole flock of other available issues?

A Uh-huh.

Q And you chose based on what you thought had the best odds of getting relief for your client?

A Well, think of it in this way: Had the Supreme Court agreed with me and found that the Faretta issue as an absolute right, and as long it's not being used to disrupt the proceedings or it's not being -- or it has been timely filed and would have reversed, then all those other issues we just talked with Mr. Qualls about would be gone.

On the other hand, none of the issues that I talked with Mr. Qualls about really had a remote chance of getting some kind of positive relief for Mr. Vanisi, particularly considering the evidence that was presented at trial in this case.

Q In your other appeals in other cases, you'll do that from time to time, you'll raise an argument that you know has been repeatedly rejected, right?

A Yes.

Q When you have something better, do you do that?

A No. If I have what I consider to be a hot button issue or something that is so intriguing that it's got justices up there interested, I don't put in some of my stuff. I mean I try to weed that out.

Q Do you know if other regular appellate practitioners take that same approach?

A I think that we do. I understand from Supreme Court, United States Supreme Court case law, and the case that's coming to mind is Barnes, but I can't think of what the secondary name is, it says it's not, appellate counsel in a criminal case is not required to raise each and every frivolous issue but can cherry pick, if you want, the issues they want to have brought to the attention of the Appellate Court.

Q Can and should?

A Can and should.

Q That's what you did?

A Yes.

MR. McCARTHY: Nothing else.

THE COURT: Mr. Qualls.

REDIRECT EXAMINATION

BY MR. QUALLS:

Q Death penalty law is fairly dynamic, wouldn't you say; that it changes a lot due to decisions of state and federal courts, U.S. Supreme Court?

A I will agree with you on that. But when you said that, I was reminded of the fact that ever since Renquist has been the chief justice of the United States Supreme Court, that dynamic shift in death penalty cases hasn't been in the favor of the accused. I mean just recently you got a favorable ruling in a death penalty case saying you cannot execute a person who committed a murder at the age of 16 or 17. But no one saw that coming.

Q That's correct. But there's also Ring and Apprendi?

A Yes.

Q And there's a decision that you can't execute mentally retarded people?

A Correct.

Q And there's a decision from the Nevada Supreme Court which we just spoke about, McConnell, correct?

A Correct.

Q So when you make a decision about a narrowing decision about what issues you're going to raise and you sweep these other possible claims over here and you don't raise them, those are waived for purposes of federal review, correct?

A I believe that's true, yes.

Q And so relief cannot be granted then on those ever? Perhaps ever was strong. You can clarify that.

A I don't want to say ever. The rules are always changing.

Q As a general rule?

A As a general rule.

Q And that's due to just, for the record, the principles of comity, correct; the federal courts won't review something that's high stake prioritizing?

A Correct.

MR. QUALLS: No more.

THE COURT: Anything further?

MR. McCARTHY: No thank you.

THE COURT: You may step down.

MR. McCARTHY: I can't anticipate recalling Mr. Petty.

THE COURT: Maybe you're excused.

THE WITNESS: Even though I disagree with you, I

do so with respect.

THE COURT: That's fine.

MR. EDWARDS: There's one additional witness that Mr. McCarthy has arranged to show at 3:45. I think it will be a brief recess.

THE COURT: You want to recess until 3:45?

MR. EDWARDS: If we could.

THE COURT: No problem. Court's in recess.

(Recess taken.)

THE COURT: Okay. Counsel, let's deal with the continuation real quick before we hear this witness. The clerk has a suggested time.

THE CLERK: I'm looking at May 20th.

MR. EDWARDS: I can't, Your Honor. I have to be in Las Vegas at 1:00 that day.

THE COURT: Okay.

MR. EDWARDS: I can do it the day before if you like.

MR. QUALLS: I can't do it the day before, Your Honor.

MR. McCARTHY: I was going to get a haircut that day.

THE CLERK: May 18th at 10:00.

MR. McCARTHY: Okay by me.

MR. QUALLS: Okay with me.

MR. EDWARDS: Would that be until noon?

THE COURT: No, we have to finish up. I don't know how long it's going to take. You have Mr. Specchio and then you had arguments.

MR. EDWARDS: I have a hearing at 1:30 across the street.

THE COURT: Is it a death penalty case?

MR. EDWARDS: No, Your Honor. I'll tell them about you.

THE COURT: Okay. We have to move things around. Is it something --

MR. EDWARDS: It's a family law case.

THE COURT: Think you can get on the calendar fairly quickly after that again?

MR. EDWARDS: I'll talk to them about it. I'll contact their department.

THE COURT: Okay. So at the conclusion of today's hearing, we will allow Mr. Vanisi to leave and go back to the prison and not be brought back until May 18th for the 10 a.m. hearing.

Okay. Counsel, go ahead -- there's one other thing. The prison brought up the defendant's medical history. Have you all seen it?

MR. EDWARDS: Not since the original records were produced. Is this --

THE COURT: This is just the current, and it would be filed under seal. It's his personal medical records, but you're welcome to come see it. You may approach.

(Bench conference between Court and counsel.)

THE COURT: I'm going to have the clerk mark the medical record and seal it along with the other medical records. But counsel has had an opportunity to review it. It's my understanding that Mr. Vanisi has not had the Haldol or the other two medications that he normally, that he might have normally had, at his request. It's admitted under seal.

THE CLERK: Exhibit J marked.

(Exhibit J was marked and admitted.)

THE COURT: Just want to remind you, even though we unsealed your petition, his medical records have an ongoing ability to be sealed. That's not the same as the allegations that you raised in your petition for writ of habeas corpus. So there are some documents that are sealed from public access still.

MR. EDWARDS: Thank you, Your Honor.

THE COURT: Okay. Go ahead, and are we calling a

witness out of order?

MR. McCARTHY: Yes. Even though the petitioner hasn't rested, there's a witness who doesn't work at the courthouse all day and I'd like to accommodate her. Laura Bielser.

THE COURT: You're all stipulating?

MR. EDWARDS: We've agreed to this.

THE COURT: Come forward and face the court clerk and be sworn.

LAURA BIELSER

called as a witness on behalf of the Respondent,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McCARTHY:

Q Would you introduce yourself, please.

A My name is Laura Bielser, B-i-e-l-s-e-r.

Q Are you currently working with the County Public Defender?

A Not any longer.

Q You have previously been employed by the Public Defender here?

A I have.

Q In what capacity?

A I was Mike Specchio's administrative assistant.

Q For about how long?

A Close to 13 years.

Q You and Mr. Specchio developed an efficient working relationship?

A Absolutely.

Q Were you working with Mr. Specchio in '98 and '99?

A Yes.

Q Do you recall in '98, I think, having occasion to contact the Tongan Consulate?

A I do.

Q And did that come about because Mr. Specchio had you do that?

A Yes.

Q Do you remember, either generally or specifically, the nature of that communication to them?

A We contacted them because we wanted some assistance in representing Siaosi Vanisi, and we also wanted to gain more information on the Tongan culture.

Q Did you hear back from the Consulate?

A Eventually I did. I think I needed to -- if I

recall correctly, I haven't seen anything in seven years, but I had to call them or e-mail them or fax them repeatedly, and then I did hear back from them.

Q And do you recall, either generally or specifically, the nature of that response from the Tongan Consulate?

A They wanted nothing to do with us.

Q Had you explained the nature of the charge?

A We did.

Q Had you explained that the accused was a citizen of Tonga?

A We did.

MR. McCARTHY: That's all I have.

CROSS-EXAMINATION

BY MR. EDWARDS:

Q Where is the Tongan Consulate, Ms. Bielser?

A I think it was in San Francisco, but I think all of my correspondence was via e-mail.

Q So you contacted them by an e-mail?

A I believe so. And maybe fax, too. I don't remember.

Q Did you save any of that in the record any place?

A I'm sure it's in there. We don't throw anything

away.

Q So there would be proof of this contact that you made?

A Yes.

Q And who you contacted and when?

A Sure, yeah.

Q Have any idea where that might be, that proof, that written documentation?

A I would imagine, if it was a fax, it would be in the original file. Or an e-mail, I would have printed out the e-mail and that would be in the original file.

Q You were using e-mail in 1998 to communicate with?

A Yeah, I'm sure.

Q Did you know of the Vienna Convention on Consular Relations at the time that you made this contact?

A I don't recall, no.

Q Anybody ever mention that to you in the course of having you contact the Tongan Consulate?

A No.

Q When you say --

A Not that I recall. I don't know. I haven't --

Q Did they respond to you in writing or was that by telephone? Do you have any recollection?

A If it was by phone, I would have memoed it, made a physical memo of it. If it was by e-mail, I would have printed it. So I don't recall. I don't recall if it was fax or e-mail.

Q But you recall them, I believe your statement was not having, wanting to have anything tod o with us?

A Yes, exactly.

Q You don't recall how that was communicated to you, though?

A Pretty much we're not going to help you, pretty much.

Q Either by fax or phone or e-mail?

A Yeah, that, you know, sorry, but we're not going to get involved.

Q Did you keep a time record of the hours that you spent on Mr. Vanisi's case?

A Yes.

Q If I showed it to you, would you recollect it?

A I'm sure.

MR. McCARTHY: I've seen it.

MR. EDWARDS: Your Honor, may I approach the witness?

THE COURT: Yes.

MR. EDWARDS: For the record, Your Honor, this is

a portion of the 250 memorandum relating to the time record of Laura Bielser.

BY MR. EDWARDS:

Q Ms. Bielser, if you could look at that and tell me if there's any indication there of the -- first of all, is that your time record?

A Yes, I'm sure it is, yes.

Q Related to the time that you spent in the Siaosi Vanisi case, right?

A Yes.

Q And you apparently logged 90 hours during the course of the Public Defender's representation of Mr. Vanisi; is that right?

A If that's what it says. Yes.

Q So it looks pretty detailed, like everything that you did in the case is logged in there, right?

A It does, uh-huh.

Q Can you show me anywhere in that time record where it shows that you contacted the Tongan Consulate?

A I don't see it specifically.

Q Okay. Thank you. No further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. McCARTHY:

Q Still looking at that. If you would look at the entry for April 20th, 1998. And there's a reference, an e-mail, someone named, something named P-U-T-K-I-A, do you know who that is?

A I don't remember, it could have been someone from the Tongan Consulate.

Q By the way, when you got the response, whatever it may have been, did you tell Mr. Specchio about that response?

A Yes.

MR. McCARTHY: Nothing else.

RECROSS-EXAMINATION

BY MR. EDWARDS:

Q You're not sure about this entry on 4-20-98 being the Tongan Consulate, right?

A Am I absolutely sure? No. But if I were to guess, I would say that's it.

Q Why does it say "Australian Anthropologist, Center for Capital Assistance"?

A Because somehow -- let me think. There was a connection with a specific Australian anthropologist who

did either Tongan culture research or something like that. Mike had found somebody familiar with I believe the Tongan culture. I know it looks odd, but we were trying to do everything that we could, and that was one of the things we tried. The S. Phillips, I don't know, is that what you're talking about, S. Phillips? Because I don't know what that is.

Q Center for Capital Assistance. See, it says "E-mail Putkai, Australian anthropologist," right?

A I think what I did, this was one letter sent to several different people, now that I recall. We were asking a lot of people for help. And I would bet that the Putkai is somebody's name at the consulate, but I can't guarantee that.

Q But somewhere out there there's a more detailed record of what you did, is that what you're saying?

A I would think the original e-mail would be in the file that I sent to all five of these people.

Q It would be your practice to make a copy of something like that?

A To print a copy.

Q And this took three hours; is that right?

A The Internet search along with it, it says two and a half, yeah.

Q The Internet research is logged for two and a half on its own, right? The e-mail to Putkai Center for Capital Assistance, it says three hours, right?

A Maybe, yeah.

Q Okay. Thank you. No further questions, Your Honor.

MR. McCARTHY: Nothing else.

THE COURT: Okay. Thank you. You are excused.

MR. McCARTHY: Your Honor, looks like neither of us have additional evidence today.

MR. EDWARDS: That's correct, Your Honor.

THE COURT: So we're set for the 18th at 10 a.m. and that would be, we'll have -- now have you had a chance, I suppose we say we're set. Do we think Mr. Specchio will be back in town?

MR. EDWARDS: Oh, Your Honor --

THE COURT: Did you just lose the person who might tell you?

MR. EDWARDS: Since he's retired, I don't think she works with him anymore; but Mr. Petty did say, and Mr. Bosler, that two weeks from now would be safe.

MR. McCARTHY: They were guessing.

MR. EDWARDS: I think maybe -- we'll try to verify that tomorrow, how is that?

THE COURT: That would be good.

MR. EDWARDS: And I'll work on my family law issue as well.

MR. McCARTHY: I have a member of my able investigative staff available who I will ask to see if he can find out when Mr. Specchio will be back.

THE COURT: That's what we need to hear, Mr. Specchio. And then you think that will be the end of the witnesses and then there will be some argument?

MR. EDWARDS: I think so, Your Honor. We're deliberating about one additional witness not relative to the Tongan Consulate, an additional witness, perhaps an expert and that would be it. And then my opinion is that the motion to dismiss is really, the argument thereon would really be a rehash of the substantive issues in the petition itself. So I don't see why we should separate the two for argument purposes, why we can't just argue it all at once, if that's all right with the Court.

MR. McCARTHY: I don't know what to say. It seems that we're going to decide whether to have a hearing after the hearing. If that's the way it's going to be, it's okay with me.

MR. EDWARDS: I think you're going to decide whether to dismiss it or deny it.

THE COURT: Right. There is a difference.

MR. McCARTHY: Yes. And I would prefer -- I don't object to taking additional evidence before that, but I would prefer the Court rule on the procedural, the potential procedural defenses before considering the merits of the claims.

THE COURT: So the argument will be just first your motion to dismiss, and then you may respond, Mr. Edwards. And you will have an opportunity to present, if I don't grant the motion to dismiss, you will be able to present your argument with regard to the petition and the witnesses.

MR. McCARTHY: Then I can go last.

THE COURT: Then you can respond. But I might let him go after you, Mr. McCarthy.

MR. EDWARDS: I have the burden at this stage.

THE COURT: That's right.

So I'm just thinking we should be able to finalize this, though, on the 18th, if we have Mr. Specchio.

MR. EDWARDS: I believe so, Your Honor.

THE COURT: Great. Court's in recess.

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

-oOo-

STATE OF NEVADA,)
)
COUNTY OF WASHOE.)

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

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

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

DATED: At Reno, Nevada, this 05/02/2005.

DENISE PHIPPS, CCR No. 234

Exhibit 40

Exhibit 40

Code No. 4185

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

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

TRANSCRIPT OF PROCEEDINGS

CONTINUED POST-CONVICTION HEARING

WEDNESDAY, MAY 18, 2005

RENO, NEVADA

Reported By: DENISE PHIPPS, CCR No. 234

SVan 1s 12JDC05182 5

APPEARANCES:

For the Petitioner:

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-and-

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For the Respondent:

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I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	VDIRE
MICHAEL SPECCHIO	5	12	14	15	
RICHARD CORNELL	17,26	53	58		22

RENO, NEVADA, WEDNESDAY, MAY 18, 2005, 10:00 A.M.

-oOo-

THE COURT: Mr. Edwards.

MR. EDWARDS: Good morning, Your Honor.

THE COURT: Ready to proceed?

MR. EDWARDS: Yes, Your Honor, ready to proceed. It's my goal here this morning to finish this process by noon or thereabout, as best I can. So perhaps if we could finish with the taking of testimony, and if there's time left for some minor argument, I'd like to present that as well.

THE COURT: If we aren't finished by 12:00, we can always start again at 1:00.

MR. EDWARDS: At this time I'd like to call Mr. Specchio, please.

THE COURT: Mr. Specchio, please go ahead and face the court clerk and be sworn.

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MICHAEL SPECCHIO

called as a witness on behalf of the Petitioner,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EDWARDS:

Q Good morning, sir. Could you please state and spell your name for the record.

A Mike Specchio, S-p-e-c-c-h-i-o.

Q And Mr. Specchio, you were the long-time Washoe County Public Defender; is that correct?

A Yes.

Q And recently retired, I gather?

A Yes.

Q Congratulations.

A Thank you.

Q You had an opportunity to represent now my client Mr. Siaosi Vanisi; is that correct?

A That's correct.

Q Can you give us a little insight into what phases of the representation you were involved in?

A I was involved in the -- there were two trials. I was involved in the first trial. And I had heart

surgery, and the case was turned over to Steve Gregory and Jeremy Bosler, I think.

Q Did you author what's known as the 250 Memorandum in this case, do you have any recollection about that?

A That's possible.

Q If I showed you a copy of it, would you have a look at it, see if you can refresh your recollection?

A Sure.

MR. EDWARDS: Your Honor, for the record, I believe we entered this into the record at the last proceeding.

THE COURT: I believe we did.

THE WITNESS: It could very well be, I mean authored by me.

BY MR. EDWARDS:

Q It could have been authored by you?

A Yeah.

Q I'd like you to look through there. And there's some statements that I've highlighted that I want to make sure were actually statements, assertions, conclusions made by you or with your hand. So if we could address them. First of all, there are no page numbers on this. So I'm referring to a statement under a heading Services Performed, about five pages in on the memo.

A Okay.

Q Do you see the first highlighted statement there?

A Yes.

Q Could you read that, please?

A "Defendant is Tongan. Unfortunately, the local Tongan community who had professed aid and assistance for the defendant became disenchanted and have ignored our requests to confer with them."

Q Is that your statement, conclusion?

A Yes.

Q You have recollection of composing that?

A Yes.

Q How about the next highlighted statement on that page.

A "We contacted the Tongan Consulate without success."

Q Can you tell me what that means, "contacted the Tongan Consulate"?

A We contacted the Tongan Consulate in San Francisco, and they asked us for information about the case. We initially, I think, just sent them the headlines, the newspaper --

Q Newspaper headlines?

A Yeah, I think that's all we sent initially.

Q How was this contact made? Telephonically or in writing?

A I don't remember. I don't remember.

Q Do you personally have any recollection speaking to anyone in the Tongan Consulate?

A I think I did, but I don't remember.

Q Were you aware of the Vienna Convention on Consular Relations at the time of your representation of Mr. Vanisi?

A No.

Q So would it be fair to say that there was no attempt to contact the Consular of Tonga to fulfill some obligation under that international agreement?

A That would be a fair statement.

Q Do you recall if you ever had any discussions with Mr. Vanisi about contacting the Tongan Consulate?

A I don't remember. I would imagine, but I don't remember.

Q Thank you. If you could proceed to the next item I've highlighted there. And we're probably about 20 pages in now, is that fair? If you could read the highlighted portion into the record, what you're reviewing.

A "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."

Q Is that the totality of the highlighted area?

A No. Next paragraph, "He was advised that his creation of a conflict of interest for us prevented us from representing him at trial and moved the Court to represent himself."

Q Is that your --

A He moved the Court.

Q Okay. Is that statement your personal statement? Did you write that, compose it?

A I'm sure I wrote this, yeah.

Q So you're advising the record, I guess, through this memo that you had a conflict of interest; is that correct, your office, I suppose?

A Well, I don't know what it says in these 20 or 30 pages before this, but I would think that if in fact he indicated, as I stated, that, yeah, we would have a conflict of interest.

Q If you could move to the next one. And we're probably about 30 pages into the memo now, right?

A Yeah, I'd say, at least.

Q Could you read the highlighted section into the record?

A "The trial left little room for meaningful cross-exam and presentation of any viable defense."

Q Is that your personal conclusion?

A Well, yeah, it's based on these pages of statements that I'm not familiar with. But from what I remember about this case that's probably correct.

Q So is that your assessment about the way the trial was and the performance of your attorneys in this case?

A Yeah.

Q Last conclusion or statement, if you could kindly read it. It's now probably about 40 pages in in a different spacing; is that right?

A Yeah. Probably 30 or 40 pages from the rear.

Q Would you please read that highlighted portion into the record.

A "The defendant's medical condition" -- "mental condition and his election to act in such a bizarre fashion made him unable to assist counsel in his own defense."

Q Is that a statement you wrote and agreed with?

MR. McCARTHY: He is not being offered as an expert psychiatric witness. I object for lack of foundation.

MR. EDWARDS: I'm asking if he adopts that statement as one made by himself, Your Honor.

THE COURT: When was that, at what point in the litigation?

MR. EDWARDS: I just want to know if he authored that because it's in a different typeset.

THE WITNESS: Yeah.

THE COURT: Want to know if that's something that he wrote in the memo?

MR. EDWARDS: Right, rather than a conclusion of someone else, like Mr. Gregory or --

THE COURT: You're not offering it for the truth of the matter?

MR. EDWARDS: No, just --

THE COURT: Just what he said, if he said it.

MR. EDWARDS: If that was an authentic --

THE WITNESS: I think I said everything in here because I think I wrote this.

BY MR. EDWARDS:

Q Thank you. Do you have any written proof that we might present regarding your notification or your contact with consular authorities from Tonga?

A I haven't had access to the file in years.

Q Sure. Thank you, sir.

No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. McCARTHY:

Q Mr. Specchio, as county public defender, you were charged with supervising the performance of, what, how many lawyers?

A 32 when I left. Probably 30 in 19 -- this would be 2001, I guess. So probably 30 lawyers at the time.

Q Handled an occasional case yourself as well?

A Yes.

Q Did your office have a budget for investigations, interpreters, experts and the like?

A Yes.

Q How long were you a public defender?

A From 1992 until last month.

Q And in that time did you ever run short in your budget?

A One time we had to ask for additional funds.

Q Did you get it?

A Yes.

Q Do you recall when Vanisi was first arrested in Salt Lake City asking Salt Lake City counterparts to visit him in the jail?

A Yes.

Q Was that, as far as you know, your first involvement in the case?

A I think that probably was. I know we got -- we got some calls on this case right off the bat from some members of the Tongan community that wanted to make sure that Mr. Vanisi's rights were protected, and I think that was before Salt Lake City, if I'm not mistaken. Might have been -- or it was right around the same time.

Q So you became involved in trying to protect Vanisi's rights perhaps even before he was arrested?

A Yes.

Q Certainly not long after?

A No, it was definitely before.

Q When you wrote in your memo there was a conflict of interest, is the conflict, were you actively representing someone else's interests?

A No.

Q The conflict arose because you felt you were ethically limited?

A If he would have followed through with what he indicated. That statement is kind of out of context.

Q Not exactly a conflict of interest?

A Not yet. Could have been created.

Q Certainly hampered your ability to do so?

A I would think so. And we have an obligation to advise the Court in so many words as to the existence of the conflict or the way that Mr. Vanisi would have had to testify.

MR. McCARTHY: That's all I have.

REDIRECT EXAMINATION

BY MR. EDWARDS:

Q Just one question, Your Honor.

On this meeting in Salt Lake City, you asked your public defender counterpart to meet with Mr. Vanisi; is that your testimony?

A Yes, tell him to keep his mouth shut.

Q Was there any talk or discussion that you're aware of about consular relations and all that?

A No. You mean with Salt Lake?

Q Yeah.

A No.

Q When you use the term "conflict of interest," you realize that has a legal term of art to it, correct?

A I do.

Q And was it used in that sense in your statement that we'd been talking about?

MR. McCARTHY: Somewhat leading, Your Honor.

THE COURT: Sustained.

BY MR. EDWARDS:

Q Did you mean the legal definition of conflict of interest when you used it in your statement?

MR. McCARTHY: Still is.

THE COURT: You can ask him what he meant.

BY MR. EDWARDS:

Q What did you mean?

A What I meant, that statement, I haven't read the entire report, but my understanding, that statement said if Mr. Vanisi was to act in a certain way, that a conflict of interest would be created. Namely, some admissions that he made, and then his willingness to get on the stand and testify contrary to that would put us in a very difficult position. Or a conflict of interest.

MR. EDWARDS: Thank you. Nothing further, Your Honor.

THE COURT: Mr. McCarthy, anything further?

RECROSS-EXAMINATION

BY MR. McCARTHY:

Q At the time your office represented Mr. Vanisi at any time in the litigation, was anyone in your office

actively representing competing interests?

A No.

MR. McCARTHY: That's all.

MR. EDWARDS: Nothing further.

THE COURT: You may step down.

MR. QUALLS: Your Honor, we'll call Richard Cornell.

MR. McCARTHY: I promised earlier that I have an objection to Mr. Cornell's testimony, and indeed I do.

THE COURT: Go ahead and sit down for a minute, Mr. Cornell.

MR. McCARTHY: This was originally -- this hearing was originally scheduled for three days. We quit at 3:00 on the first day with the promise that the purpose of the continuance was to hear from Mr. Specchio and any representative of the Tongan Consulate that might decide to appear. That was the only purpose of the continuance. As far as I'm concerned, we're done.

MR. EDWARDS: Your Honor, I'd like to respond to that.

THE COURT: Go ahead.

MR. EDWARDS: Page 99 of the May 2nd, 2005 hearing transcript. The Court is inquiring of me. Your statement is: "That's what we need to hear, Mr. Specchio,

and then you think there will be the end of the witnesses and there will be some argument?" And I respond to you saying, "I think so, Your Honor. We're deliberating about one additional witness, not relative to the Tongan Consulate, an additional witness, perhaps an expert, and that would be it."

MR. McCARTHY: That was what Mr. Edwards said. That's not what the Court said.

THE COURT: Okay. I'm going to allow the witness to go forward. But if you didn't have enough notice and you need additional time, Mr. McCarthy, to call a rebuttal witness, I'll allow that.

MR. McCARTHY: If it comes up, I'll feel free.

MR. EDWARDS: Thank you, Your Honor.

THE COURT: Mr. Cornell, go ahead and face the court clerk and be sworn.

RICHARD CORNELL

called as a witness on behalf of the Petitioner,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. QUALLS:

Q Good morning, sir.

A Good morning.

Q Could you please state your name and spell your last name for the court reporter.

A Richard F. Cornell, C-o-r-n-e-l-l.

Q And what's your occupation, Mr. Cornell?

A I'm an attorney.

Q And do you do appellate work?

A Yes.

Q And are you also qualified under Supreme Court Rule 250?

A I believe so, based on my experience. I mean I don't have a piece of paper saying that I'm hereby designated as so qualified. But I think that I would meet the qualifications.

Q Let's talk about that a little. What are some of your qualifications?

A Well, I have handled six capital murder cases in the post-conviction realm, both state and federal, and also one at trial. Well, handled five in the post-conviction realm, both state and federal. Gerald Gallego, William Leonard, Michael Hogan, Abram Nika and Tracy Petrocelli. And I had a sixth one, which was Raymond Currington at the pretrial stage where I was appointed as second counsel and the case never proceeded

to a capital hearing because we were able to get the notice of death penalty stricken and that upheld on an extraordinary writ.

Q Just to follow up, as far as other appellate experience, do you know approximately how many direct appeals you have --

A Between the time I was in the appellate division in the District Attorney's Office in the early '80s and private practice since then, I couldn't hazard an exact number. But I would say in excess of 200.

Q And that's criminal?

A Yes.

Q And then --

A Criminal post-conviction.

Q Then some additional civil cases?

A Yes. Not as many, but yes.

Q And so having that kind of experience with post-conviction cases, are you familiar with the Strickland standard?

A Yes.

Q And could you tell us what your understanding of that is?

A Yes. Strickland is a two-prong standard that does away with the sham pretense standard and essentially

it's a two-prong standard. Number one, did counsel act below the standard of reasonably effective counsel, either in presenting evidence, not presenting evidence, objecting to evidence, not objecting to evidence, making motions, not making motions and that sort of thing. And then number two, if counsel was below the standard and his performance, was the defendant prejudiced by that deficient performance.

Q Thank you. In preparing to give your testimony in this case today, did you review certain documents?

A Yes.

Q And what were those, if you recall?

A Yes. In fact, I brought some of them with me to help me out here. I reviewed the supplemental petition that you and Mr. Edwards prepared and filed in February of this year and a list of claims that summarized them. I reviewed the penalty transcript in terms of how the Court instructed the jury at penalty. I reviewed the briefs in this case, Mr. Petty's briefs and Mr. McCarthy's brief. I reviewed the formerly sealed transcripts that went on at time of trial or prior to trial regarding the Public Defender asserting the conflict of interest to the trial judge.

I reviewed the published opinion of Vanisi versus

State, which is 117 Nevada 300 something, if I remember right. I reviewed selected portions of the trial transcript from the guilt phase.

Q Thank you. And based upon your review, do you have an opinion as to any errors, including Strickland errors, that occurred at the trial level?

MR. McCARTHY: Objection, Your Honor. If the witness here is being called as an expert for the standards in the community, I'd like to talk about that. If he's being called to say that the Supreme Court would have reversed or something else, it's not relevant. Whether there was error or not, this witness can't speak to it.

THE COURT: You're asking for a conclusion that's a determination by this Court or the Supreme Court, or some other court. He certainly can testify as to the standard in the community both for appellate representation, you can ask those specific things. You can even make a representation whether or not he believes some attorney in the case fell below that standard. But he can't reach the ultimate conclusion.

MR. QUALLS: Thank you, Your Honor.

BY MR. QUALLS:

Q I misworded that.

A I appreciate that clarification, because I really wouldn't want to be talking about prejudice anyway. That's clearly a judicial call.

Anyway, go ahead.

Q So the question restructured is: Do you have an opinion relevant to Strickland as to whether the performance of the trial counsel fell below the standard of reasonableness as defined there?

MR. McCARTHY: Your Honor, now that there's been a question posed asking the opinion, I'd like to voir dire, please.

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. McCARTHY:

Q Let's see. Mr. Cornell, you do not devote a great deal of your attention to trials, do you?

A Not anymore. I've tried about 30 cases to a jury. But the last jury trial I handled was 1997.

Q And have you tried any capital cases?

A To a verdict, no. Like I say, the one capital case I had at the trial level was the Currington case and it never got to a penalty phase.

Q And now you, in your appellate capacity, you

generate a lot of paperwork, I would imagine?

A Yes.

Q Do you work alone?

A Yes.

Q Do you get to observe other lawyers advancing appeals?

A Yes.

Q In what way? How do you do that?

A Well, I mean I read the finished product of what they've done.

Q The opinions or the briefs?

A The opinions, certainly. The briefs in a few selected cases, yes.

Q Is that common that you would read someone else's briefs on appeal?

A If I'm not being asked to do this kind of work. Not common, but not unheard of. If I had spotted an issue that I've never litigated, for example, this Vienna Convention issue that we're talking about here, I would definitely want to look at someone else's brief bank on this to see what they've raised. Similarly, in federal court, there's quite an uproar over the Booker case and the effect of that on federal sentencing guidelines, and I've certainly looked at what the Federal Public

Defender's Office has done brief-wise in presenting memoranda, because I've ghost written a bunch of sentencing memoranda since Booker.

Q I get the sense, the nature of your practice, you don't get to spend your days hanging out in court, then?

A No. Except in the law library.

Q People in our business were once known as library rats.

A Yeah, I think that would characterize me.

Q When you discussed the Strickland standard earlier, did you intend to leave out the requirement that the standard be objective?

A Well, certainly. It's reasonable. That's absolutely correct. It's a reasonable standard, and typically -- in one way it's different, say, than medical malpractice is. Courts on review basically look at the record. Whereas in medical malpractice, you have to have an expert come in and say this act fell below the standard of medical care because blah, blah, blah. In fact, if you don't have that, you can't proceed.

Q I'm sorry, I interrupted. We have a couple of types of standards from the objective standard?

A Yes. Then you have the Hill Lockhart variation on what happens when the guy pleads guilty and, of course,

you have the Ebbets v. Lucy and Jones v. Barnes and Smith standard on appeals.

Q One of the sources of an objective standard would be ABA guidelines?

A Yes. The Supreme Court has made that pretty clear from Wiggins.

Q And then in that same Wiggins, they also commented that it was a custom in that jurisdiction in Maryland for lawyers in capital cases to take certain specific actions; is that not right?

A I believe that's correct, yeah.

Q That's what you would mean by an objective standard, one capable of being ascertained externally?

A Yes.

MR. McCARTHY: Your Honor, I object to the question. The question was referencing trial lawyers, and Mr. Cornell has said that he does not get to spend his days hanging out in courtrooms watching trial lawyers perform.

MR. QUALLS: Your Honor, may I address that?

THE COURT: Yes.

MR. QUALLS: May I address it through redirect?

THE COURT: Certainly. You can ask additional questions.

DIRECT EXAMINATION

(Resumed)

BY MR. QUALLS:

Q You testified that you have represented six different capital clients on post-conviction relief; is that correct?

A Yes.

Q And were you appointed on any of those?

A All of them. It's pretty rare to find a capital defendant with money to pay for a lawyer for the kind of investigations and the expenses and so forth that are required.

Q Were you appointed on any of those cases through this department, or can you tell us?

A I don't believe so. Gallego, of course, was Lovelock. Leonard was Carson City. Hogan is Las Vegas. Nika was Department 6 and ultimately Department 7. Petrocelli is Department 7. And the Currington case was Department 3. So no.

MR. QUALLS: I would ask, based upon Mr. Cornell's prior appointments as someone that's qualified under 250 to review the performance of trial counsel and appellate counsel on post-conviction, that he be allowed to give his opinion here today.

THE COURT: Mr. McCarthy.

MR. McCARTHY: Mr. Cornell has extraordinary experience in alleging that lawyers are ineffective. The question is whether he's qualified, based on some special training or experience, to voice an opinion receivable by this Court as to whether those lawyers were effective. I don't doubt he's imminently qualified to allege and attempt to prove that some lawyer did a poor job. But that doesn't make him qualified as an expert witness on whether they actually did a poor job.

THE COURT: I'm going to overrule your objection. I find that the objection goes to the weight that I should give his objective analysis. I will weigh the opinions that this witness gives based on my knowledge and his testimony of his experience.

MR. QUALLS: Thank you, Your Honor.

BY MR. QUALLS:

Q Back to your opinion as to any Strickland errors, any errors of trial counsel that fell below the standard of care, the standard of reasonableness that we've talked about here today. Can you --

MR. McCARTHY: Excuse me. Before Mr. Cornell answers, I guess it's an objection. I ask that the question be limited to errors that are pleaded.

THE COURT: Yes.

MR. QUALLS: Your Honor --

THE COURT: You better ask him if his opinion is as to a nonpleaded error. He has the petition and the supplemental petition. He said he's reviewed --

THE WITNESS: I don't have the petition, but I'm assuming we're going forward on the supplemental petition really anyway, because that's usually how it goes.

THE COURT: Exactly. So if your opinion relates to something that is not in the supplemental petition, then we're going to litigate that before the opinion is given.

THE WITNESS: Your Honor, I think, in fairness, where counsel is going to go with me, is my opinions regarding trial counsel and appellate counsel. And I think what I have to say about trial counsel is pleaded. What I have to say about appellate counsel may not be.

THE COURT: Okay. Then let's start with trial counsel. Don't go into appellate counsel until Mr. McCarthy as an opportunity to be heard on his objection.

THE WITNESS: Very well.

BY MR. QUALLS:

Q Do you remember the question posed?

A Yes. Respectfully, Mr. Gregory and Mr. Bosler were put in a horrible position. They were, as I've read the record, they were believing that they were directed as trial counsel by their client to direct and engineer a defense that they felt was based on fraud, and ultimately it would have to be based on perjury; and they, as ethical lawyers, weren't about to do that. They did exactly what they're supposed to do in that instance, which is to move to withdraw. Of course, their motion was denied.

So now they're in the position of having to try a case that they think or try a defense which they think is based on perjury. And they brought the conflict to the attention of the Court. And I think that the record that they made was quite to the effect that Mr. Vanisi didn't agree to the conflict. Indeed, Mr. Vanisi wanted to represent himself.

So in looking at cases such as Holloway versus Arkansas and Cuyler versus Sullivan, I do believe that they were put into a position of presuming prejudice. I mean they were really put into a box.

Now based on standards, what could they have done to get out of the box based on what I know of this case, I think they could have done this based on case law and well established case law first, and I say this, by the way,

with regard to the interesting catch back that Mr. Vanisi didn't testify. So ultimately they were trying to present a defense that really wasn't based on perjury as it turned out. But they believed going in that that's what was going to happen, apparently.

First off, per Nix and Whiteside, I don't think they had a duty to present a defense that was based on perjury. Second off, per Matthews versus U.S., they could have presented inconsistent defenses. But third off, I think there would have been a way for them to harmonize the two approaches. As I understand it, the defense they would have wanted to run would have centered on Mr. Vanisi's state of mind, whereas the state of defense that Mr. Vanisi wanted to present was an alibi. It was incorrectly referenced as a self-defense defense. I think, as I read the record and what he wanted to do and supposedly told his counsel, was a defense that someone else killed Sergeant Sullivan and he was being unfairly blamed for it.

It would seem to me that the approach that counsel could take per Nix and per Matthews and lower court cases, flushing those out, is he could have taken a two-fold approach: A, what did the perpetrator do? What was in the mind of the perpetrator at the time he acted?

And B, is the defendant that perpetrator? And that way counsel could have argued that the perpetrator was either insane, if not insane, acted compulsively, consistent with a secondary murder. And if the jury found that to be so and rejected the "some other dude did it" quote, unquote defense, they could come in with the result that the trial counsel wanted without compromising what the defendant wanted to do.

By the way, on one of the 30 jury trials I had, I was put in that position, that's exactly what I did. I tried it on a -- it was a case in Department 7. I tried it on the theory that what did the perpetrator do and is the defendant that perpetrator, because I had a case where the defendant was claiming he didn't do it and I thought he was lying to me.

Anyway, it would seem to me, looking at this record, that this, frankly, was an extremely difficult case to defend on any theory. But it would seem to me that what trial counsel would rationally want to do and objectively want to do is to try to present a mental defense in that way so that if the jury came back guilty with first degree, which certainly the jury is going to do if they believed the witnesses who testified that Mr. Vanisi told them before the fact that he wanted to

kill a cop and so on and so forth, at least they would be set for what I would think would be the primary area of arguing and penalty phase which is we've got the sub (2) mitigator statute, or that he was acting under extreme emotional disturbance and so forth.

By virtue of the fact that they defended the case, they couldn't really do that even in penalty. They presented a defense which is no defense. They did no opening statement, no closing statement, no defense witnesses. Minimal cross-examination. Essentially they've sent the message to the jury that our client is plainly guilty of first degree murder and there's nothing to say about the facts of the case. Essentially what they've done is doomed themselves to fail on the sub (2) mitigator by doing that because they've already told the jury there's really nothing to say on the facts of the case.

And when you look at the record, as I understand it, it really comes out. They brought in the one psychiatrist to say that Mr. Vanisi has a bipolar disorder, but they didn't bring out that he was in a manic phase on January 13, 1998, that the mania was exacerbated severely by drug use and that it is treatable.

Now, maybe the psychiatrist couldn't say that.

Knowing what I know of psychiatrists, I have a difficult time believing there's no psychiatrist out there that wouldn't say such a thing.

MR. McCARTHY: I'll object to this witness speculating about how some other witness might have testified.

THE COURT: Sustained.

THE WITNESS: But the point is that they didn't make that record, so they couldn't really fairly effectively argue the sub (2) mitigator, when it seems to me that that's what, that's where they really want to go with this case.

So that's basically my conclusion on trial counsel.

MR. QUALLS: Court's indulgence.

BY MR. QUALLS:

Q As to issues that are raised in the supplement, do you have an opinion as to whether any reasonableness standard, pardon me, as to whether appellate counsel's performance fell below the standard of reasonableness as articulated in Strickland?

A Well --

Q I could be specific if you would like.

A Yes, please. I will say this. The defense

counsel had a terrific Faretta issue, and he was number one to spotlight and emphasize that. I have no quarrel with what Mr. Petty did in that regard, I will say that.

Q What is your understanding, just briefly, of the Faretta area and the impact of alleging a Faretta error?

A If you could prove --

MR. McCARTHY: That particular error was indeed alleged. So further discussion doesn't seem relevant.

MR. QUALLS: This goes to how it was alleged. And, again, as I brought up with Mr. Petty, whether it was alleged as a structural error or not. If you'll recall, Mr. Petty stated his opinion in the last hearing that he didn't believe it was a structural error. So that's where I'm going with this.

MR. McCARTHY: It was alleged to be error.

THE COURT: The Supreme Court has ruled on that. It was alleged as error. You're going to have to lay more of a foundation, if Mr. Cornell wants to say that the Supreme Court couldn't figure out the difference. It's raised as error unless somebody briefs it specifically, then let him say that, then we'll move on, see if it's really relevant.

BY MR. QUALLS:

Q What is your understanding of a structural error?