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 22 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

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LEGAL ARGUMENT

THE DISTRICT COURT'S DETERMINATION THAT VANISI WAS COMPETENT TO PROCEED WITH COLLATERAL ATTACK ON HIS CONVICTION AND SENTENCE WAS CLEARLY ERRONEOUS.

"*Fiat justicia ruat coelum*"-"Let justice be done, though the heavens fall." These words were delivered by Lord Mansfield, Lord Chief Justice, in the case of *Rex v. Wilkes*, 4 J. Burrow 289 (K.B. February 5, 1770). They were also quoted with approval in several cases of this Court, notably *Calambro, by and through Calambro v. District Court*, 114 Nev. 961, 980 P.2d. 794, 806 (1998). The State's approach to this claim of Vanisi rejects such long settled jurisprudence and instead calls for a rule requiring an incompetent capital prisoner to proceed with his collateral attack, lest he be killed for inaction despite his deranged, demented inability to do so. This argument is an invitation to folly and must be rejected and corrected.

Rohan v. Woodford, 334 F.3d 803, (9th Cir. 2003) is the supreme law of this federal jurisdiction. The district court recognized as much in the habeas proceedings, much to the State's vexation. Accordingly, the effort expended by the prosecution in this appeal attempting to convince this Court that *Rohan* should not be followed and that it has no application to these proceedings is unconvincing and no basis for the rejection of this claim. (See, State's Answering brief, page 4, lines 13 through 26 wherein the State argues the Rohan decision is "nonsense" and has "no application to these proceedings" and page 5, line 11 and page 7, line 3, wherein the ruling is deemed a "non-sequitur" and an "absurdity.") Quite to the contrary, the legal issue raised in *Rohan* has been decided. It was deliberately examined and should be considered settled. *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947). The doctrine of stare decisis is an indispensable principle necessary to this Court's jurisprudence and to the due administration of justice. *Warden v. Harte*, 124 Nev. Adv. Op. No. 82 (October 30, 2008). The State's cavalier

dismissal of that principle and conclusion that the considered opinion of the Ninth Circuit Court of Appeal is nonsense must be disregarded.

Similarly, the State's reliance on this Court's decision in *Calambro, by and through Calambro v. District Court*, 114 Nev. 961, 964 P.2d. 794 (1998) does not govern the issue litigated in lower court proceedings. Vanisi did not seek appointment of a next friend to litigate on his behalf. He did not wish to abandon litigation and volunteer for execution. Instead, he presented his mental health as a basis for staying proceedings rather than being compelled to go forward in an incompetent state.

What is really at the heart of this issue and its prominence in this and lower court proceedings, is not whether this Court should obey federal precedent. The lower court did. The issue is whether the factual determinations made by the lower court in obedience to the federal decision are worthy of any respect and correctness. Vanisi respectfully submits they are not.

The opening brief in this matter sets forth the facts relative to the incompetence issue in great detail. The State discusses the record in a few vapid sentences at the conclusion of its response. Predictably supportive of the district court's competency finding because it was based on the opinion of "a doctor" who used "objective testing" the State maintains that substantial evidence supports the district court rejection of this issue. Nothing could be further from the bare truth of the record. Amazaga was a psychologist, with no medical training degree or licensure permitting him to analyze, prescribe or opine on Vanisi's powerful psychotropic medication regimen. His "objective testing" consisted of posing secret questions that to this day have not been revealed. How could the district court conclude there was any objectivity in the process without even knowing what the process consisted of? Such fact-finding deserves no deference, especially in this capital setting.

The issue before this Court remains whether the district court ruling rests on a substantial basis. It does not. The State has not demonstrated otherwise, instead embarking on a recasting of the issue to discuss the absurdity of binding federal precedent. The district court's final support for a conclusion of Vanisi's competency was that he cracked a smile during proceedings, thereby demonstrating that he was "connected". A ghastly grin should not form the basis for such an important matter. Again, it is respectfully requested that this Court bring justice to this matter by reversing the lower court determination, adopting the applicable federal precedent and issue a stay in compliance with those actions.

CLAIM ONE OF THE HABEAS PETITION:
VANISI WAS DENIED HIS RIGHT TO CONSULAR CONTACT UNDER ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS.

The State makes a big deal of the assertion that the record does not contain proof beyond any doubt that Vanisi is not a United States citizen, but a Tongan national. In the State's view, this alone should be the basis for denial of the claim. Fortunately, the district court did not find that a basis alone for denial of the claim, instead finding the alleged violation of international treaty as non-prejudicial.[1] However, the State's reliance on the paucity of proof regarding Vanisi's nationality does point up one of the prejudices stemming from the immediate previous issue concerning his competency. As was revealed during the record-making relative to the *Rohan* issue, Vanisi was not competent to assist counsel. Moreover, both experts found him unable to engage

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[1] Perhaps someday, in other court proceedings, the circumstances surrounding the nonappearance of a Tongan consulate representative at the lower court proceedings in this case, will come to greater light. Such future discussions might even delve into the legal process of compelling appearance of those with diplomatic privileges in state habeas proceedings and strategic decision making of habeas counsel not to seek public funding to travel to Tonga, verfiy Vanisi's ancestry and family history, along with other mitigating circumstances of his life outside the United States. If such alleged failure of proof were the sole basis for lower court denial of this claim, perhaps a *mea culpa* by present counsel would be in order. As things stand, that must wait for another day.

in truthful testimony. Accordingly, the prospect of an incompetent habeas petitioner ascending the witness stand and establishing his nationality (especially when he considered himself an independent sovereign and "Dr. Pepper") was dubious at best.

Staying thematically consistent with their overall response throughout the Answering brief, this issue like others, is belittled for its legal viability and persuasive force. ("The greater question, of whether the Convention gives rise to a private remedy that has any application to any case, can wait another day..." , Answering brief page 9, lines 21-23) The State is mistaken to do so. Violation of the Vienna Convention remains the subject of vigorous litigation and relief for many. Case in point, the federal appeals court ruling in *Osagiede v. U.S.*, 543 F.3d 399 (7th Cir. 2008), decided after the filing of Vanisi's opening brief in the instant case (September 8, 20008). Therein, the Seventh Circuit Court of Appeals ruled:

> (1) failure to notify defendant of his right to contact the Nigerian consulate violated his consular rights under the Vienna Convention;
>
> (2) right of a detained foreign national to receive notice of his right to contact his consulate under the Vienna Convention was an individually enforceable right; (emphasis added)
>
> (3) counsel's performance in failing to invoke defendant's right to consular access was deficient; and
>
> (4) defendant would be entitled to evidentiary hearing, if he could make credible assertion of the assistance that Nigerian consulate would have provided to him.

Any help the Tongan consulate could have provided in this case would have been material, considering Vanisi proceeded to trial with virtually no counsel at all. The district court erred in basing its denial of this claim on the fact he had not established enough prejudice from the treaty violation.

CLAIM TWO OF THE HABEAS PETITION:

ONE OF THE THREE AGGRAVATING CIRCUMSTANCES FOUND IN THIS CASE: THAT *THE MURDER OCCURRED IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT ROBBERY*, WAS IMPROPERLY BASED UPON THE PREDICATE FELONY-MURDER RULE, UPON WHICH THE STATE SOUGHT AND OBTAINED A FIRST DEGREE MURDER CONVICTION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Asked and Answered.

The State begins its Answer of this claim with the argument that *McConnell* should not be applied to this case, because "The inclusion of the felony-murder theory added nothing to the prosecution of this case..." (State's Answer, 10).

Despite being rebuffed numerous times by this Court in similar attempts[2], the State continues to argue that this Court's decision in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004),either must be overturned or doesn't apply to cases clearly on point with *McConnell*. In *McConnell* I, *McConnell* II, *Bejarano* and *Bennett*, *inter alia*, this Court consistently made it clear that it will not allow the State to circumvent the intent of its rulings. It is worth the effort to include here several quotes which illustrate this point.

In *McConnell I*, after explaining that its decision prohibited the State from charging a felony murder theory followed by an alleged aggravating circumstances which is based upon the same felony, the Court added:

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

McConnell I, 102 P.3d at 625 (emphasis added).

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[2]*See McConnell v. State* , 120 Nev. Adv. Op. 105, 102 P.3d 606 (2004); *McConnell v. State*, 121 Nev. Adv. Op. 5, 107 P.3d 1287 (2005); *Bennett v. Eighth Judicial Dist. Ct.*, 121 Nev. Adv. Op. 78, 121 P.3d 605 (2005); *Bejarano v. State*, 122 Nev. Adv. No. 92, 146 P.3d 265 (2006); and *Rippo v. State*, 122 Nev. ____, 146 P.3d 279, 282-283 (2006).

In *McConnell II*, the Court answered the State's plea for reconsideration with the following:

> Citing Schad[3], the State also inquires what should be done "if all of the charged theories have been proved, or if the jury is split regarding the theory of liability." **McConnell makes clear that if one or more jurors decide to convict based only on a finding of felony murder, then prosecutors cannot use the underlying felony as an aggravator in the penalty phase.**

McConnell II, 107 P.3d at 1290-91 (emphasis added).

The *McConnell II* Court – along with rebuffing every argument posited by State and Amicus – also disagreed with the argument that the State could get away with charging felony murder and seek the death penalty with the same felony, because mitigating circumstances could ameliorate the harm done:

> **...amicus advances the novel and unsound argument** that an aggravator that fails to constitutionally narrow death eligibility is of no concern because of the possibility that a jury may not return a death sentence due to mitigating circumstances.

McConnell II, 107 P.3d at 1292 (emphasis added).

In *Bennett*, the Court chastised the State's behavior in language akin to judicial estoppel:

> Despite predicating this entire matter on its assertion before the district court that McConnell applies to Bennett's case, the State has retreated from this initial position and has expressed shifting positions about whether the holding announced in McConnell even applies to Bennett's case at all...
>
> Because Bennett is awaiting a new penalty hearing, his conviction, at least in regard to his sentence, is clearly no longer final. Thus, *McConnell* applies to the penalty hearing to be conducted in this matter, and its retroactive application is simply not an issue.

Bennett, 121 P.3d at 608-09 (emphasis added).

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[3] *Schad v. Arizona*, 501 U.S. 624, 630-45, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991) (plurality opinion).

Further, even after two published decisions clearly stating the holding of *McConnell*, the State still attempted to wiggle free from its confines:

> The State later asserts in its answer that "there was no specific finding by the jury that Defendant was found guilty based solely on a felony murder theory." The State maintains that it is therefore "unclear whether the felony murder aggravating circumstances [based] on burglary and robbery are in fact improper as to Defendant's case." **The State's assertion that it is "unclear" whether McConnell applies to Bennett's case** because there was no specific finding by the jury that Bennett was convicted based solely on a theory of felony murder **is troubling.**
>
> Bennett's murder conviction need not have been based solely on felony murder for McConnell to apply.

Bennett, 121 P.3d at 609 (emphasis added). The State's position in this appeal is no different than its previous attempts to discredit the ruling in *McConnell* and its applicability.

B. *Genuine, Sufficient,* or *Adequate* Narrowing.

The State presents a semantics-based argument which infers that this Court used the wrong standard when reviewing whether Nevada's statutory scheme provides the requisite constitutional narrowing. Specifically, the State infers that this Court's use of the words "sufficient" or "adequate" – instead of "genuine" – to describe the narrowing at issue, indicates that it used the wrong standard. The State's argument is without merit.

To begin, in the initial *McConnell* decision, this Court recognized that the U.S. Supreme Court "has held that to be constitutional a capital sentencing scheme 'must *genuinely* narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *McConnell*, 102 P.3d at 620-621, *quoting Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)(emphasis added). *See also McConnell*, 102 P.3d at 623:

> The question is, in a case of felony murder does either of these two aggravators "*genuinely* narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant

> compared to others found guilty of murder"? We conclude that the narrowing capacity of the aggravators is largely theoretical.

(emphasis added).

Finally, the *McConnell* Court concluded, "the felony aggravator fails to *genuinely* narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies." *McConnell*, 102 P.3d at 624 (emphasis added). Having relied upon the wording which the State prefers no less than three time in the original *McConnell* decision, it would appear that the Court properly understood the law upon which it formed its conclusion.

Again on rehearing, in *McConnell v. State*, 121 Nev. Adv. Op. 5, 107 P.3d 1287 (2005), the Court acknowledged that, in order "to meet constitutional muster, a capital sentencing scheme "must *genuinely* narrow the class of persons eligible for the death penalty..." Id., 107 P.3d at 1288-89 (*quoting Leslie v. Warden*, 118 Nev. 773, 784-86, 59 P.3d 440, 448-49 (2002) (Maupin, J., concurring)(emphasis added), and *citing Lowenfield v. Phelps*, 484 U.S. 231, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988).

In *Bejarano v. State*, 122 Nev. Adv. Op. 92, 146 P.3d 265, 272 (2006), the Court again recognized that the statues in question must "genuinely" narrow the class of persons at issue. And again the Court relied upon the same language no less than three times in forming its conclusion that, "the statutes in 1988 failed to *genuinely* narrow death eligibility." Id., 146 P.3d at 275 (emphasis added).

If all this language were not evidence sufficient to assuage the State's concerns whether this Court has employed proper reasoning in the decisions at issue, the High Court, too, in its controlling decisions, has used both terms which the State finds suspicious. For example, it used "adequate" to describe the requisite narrowing in *Zant*, *supra*, 462 U.S. at 886, 894, and also the

word "sufficient" at 895. *See also Brown v. Sanders*, 546 U.S. 212, 223-224, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

C. Whether Nevada's Murder Statutes Provide Requisite Narrowing.

The Supreme Court has ruled that statutes must meet the narrowing requirement by: (1) narrowing the definition of capital offenses by including a list of specific aggravating circumstances as elements of the crime that make a person eligible for the death penalty; or (2) defining capital offenses broadly and requiring the finder of fact to consider whether specified aggravating circumstances exist during the sentencing phase. *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The State argues that, due to a number of other distinctions -- such as vehicular manslaughter, voluntary manslaughter and second degree murder -- Nevada's definition of first-degree murder provides constitutionally-adequate narrowing of the class of individuals eligible to receive the death penalty. Therefore, the state argues, the use of aggravating factors under Nev. Rev. Stat. § 200.033 is not required under *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and the aggravating factors that merely duplicate the theory of first-degree murder are of no constitutional significance because the constitutionally-required narrowing is already satisfied by the definition of first-degree murder. Again, the State's position is meritless.

As this Court explained in *McConnell*, Nevada's first degree murder statute is extraordinarily broad. (This fact alone, logic tells us, requires the narrowing to occur at sentencing, pursuant to *Zant*, et al.) The felony-murder portion of the statute extends to all the forms of common law felony murder, *see* 120 Nev. at 1065-1068, including some far broader than the

common law definition.[4] The other sections of the statute extend the definition of first-degree murder to a broad range of murders that, like the felony-murder definition, do not qualify for imposition of the death penalty under the Eighth Amendment standards of *Tison v. Arizona*, 481 U.S. 137, 157-158 (1987) and *Enmund v. Florida*, 458 U.S. 782, 797 (1982). *See* Nev. Rev. Stat. § 200.030(1); *Deutscher v. State*, 95 Nev. 669, 667, 601 P.2d 407 (1979) (murder by torture does not require intent to kill). The scope of the statute is, in fact, expanding: just this session, the Legislature added a new theory making murder of a "vulnerable" person a first degree murder. 2007 Nev. Stat. ch. 35, amending Nev. Rev. Stat. § 200.030(1). The Nevada statute is thus the archetype of a definition of first-degree murder that does not meet the "genuinely narrowed" requirement.

D. Theoretically Distinguishable Is Not the Same Thing as More Narrow.

In *Lowenfield*, the Supreme Court reviewed the Louisiana murder statute. In contrast to the Nevada statute, the Louisiana statute requires a showing greater than, for instance, felony-murder to establish first-degree murder: felony-murder simpliciter constitutes only second-degree murder in the Louisiana scheme, while first degree felony murder requires as elements that the defendant have the specific intent to kill, or to inflict great bodily harm, in addition to the particular aggravated offense underlying the felony murder theory. *Lowenfield*, 484 U.S. at 241-242 and n. 5.

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[4] For instance, a killing committed in the perpetration of a burglary is a first degree murder by statute. Nev. Rev. Stat. § 200.030(b). Under the common law burglary required an actual breaking and entry of a residence during the night. *See, e.g., Taylor v. United States*, 495 U.S. 575, 594 (1990). Under the Nevada definition of burglary, a daytime entry into an open commercial establishment during the daytime can be burglary. *See* Nev. Rev. Stat. § 2005.060(1); *State v. Adams*, 94 Nev. 503, 505, 581 P.2d 868 (1978).

The other Louisiana theories of first degree murder are similarly circumscribed, for instance, by requiring that the victim be a peace officer or firefighter, or that the victim be younger than twelve or older than sixty-five, or that the perpetrator have the specific intent to kill or inflict great bodily harm on more than one person. *Lowenfield*, 484 U.S. at 242, citing La. Rev. Stat. Ann. § 14.30.1. These elements of first degree murder under the Louisiana scheme are strikingly similar to the aggravating factors under Nevada law. *See* Nev. Rev. Stat. § 200.033. The Louisiana scheme is thus fundamentally different from the Nevada one, and the Nevada scheme fits squarely within the category of statutes in which the definition of first degree murder does not satisfy the narrowing requirements of the Eighth Amendment.

Instead of addressing the actual relationship between the scope of the Nevada statute and the analysis of *Lowenfield* in *McConnell*, the state's brief discusses hypothetical situations in which individual first degree murders in Nevada might be aggravated to the point that the narrowing requirement imposed by the state and federal constitutions would be satisfied. (Opening Brief, at 4-6). The State's argument here provides little, if anything, but the proverbial smoke and mirrors.

Given the fact that the Nevada scheme does not employ the requisite narrowing at the guilt phase, as the Louisiana scheme does, the issue then is whether the requisite narrowing at the penalty phase exists. Because Louisiana had adopted a system in which first degree murder included "a narrower class of homicides," more restricted than intentional murder or felony murder, that categorical restriction satisfied the narrowing required by the Eighth Amendment. As this Court acknowledged in the first McConnell decision, regarding felony murder,"a killing involving the same enumerated felonies was only second-degree murder when the offender 'has no intent to kill or to inflict great bodily harm.'" *McConnell*, 102 P.3d at 621, *citing Lowenfield*, 484 U.S. at 241 n.5, *quoting* La. Rev. Stat. Ann. § 14:30.1(A)(2). The focus, then, is on whether the system

as a whole provides "genuine" narrowing.

Indeed, the Court in *Lowenfield* focused on the system as a whole: "the Legislature may itself narrow the class of capital offenses . . . so that the jury finding of guilt response to this concern, or the Legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield*, 484 U.S. at 246. Comparative analysis shows us that Nevada has opted for the latter process: the statute includes a long list of theories of first degree murder, including traditional felony-murder, Nev. Rev. Stat. § 200.030(1)(6), and a laundry list of other means or circumstances in addition to premeditation and deliberation. Nev. Rev. Stat. § 200.030(1)(a,c-e). As the *McConnell* decision itself acknowledged, the felony-murder theory by itself is too broad under *Lowenfield* to perform the required narrowing at the guilt phase. *McConnell*, 120 Nev. at 1065-1066. A fortiori, the felony-murder theory of first degree murder, plus the other non-felony-murder theories, is too broad under *Lowenfield* to make an aggravating factor that duplicates the theory of felony murder constitutionally acceptable.

Further, this Court addressed these very objections in the second *McConnell* decision:

> We further pointed out that Nevada's definition of felony murder is broader than that set forth in the death penalty statute extant in 1972 when the Supreme Court temporarily ended executions in the United States. Consequently, felony murder in Nevada is so broadly defined that further narrowing of death eligibility by the finding of aggravating circumstances is necessary. Amicus fails to address this analysis, let alone show that it is in error.

McConnell, 107 P.3d at 1292.

This is no small matter for consideration. The State takes a factor – felony murder – which actually *broadens* the class of persons eligible for first degree murder in Nevada, and attempts to reason that this scheme is akin to the requisite narrowing under *Furman v. Georgia*, 408 U.S. 238,

33 L Ed 2d 346, 92 S Ct 2726 (1972), *Gregg, Zant*, et al. Which is more of an argument to do away with felony murder than it is to affirm its dual use. The reality is that while the rest of the country is moving away from the death penalty, despite the legal mandate otherwise, Nevada continues to broaden its death eligibility, making the decision in *McConnell* not only legally sound, but legally necessary.

Finally, the structure imposed by *Lowenfield* establishes the constitutional minimum required by the federal due process guarantee and the Eighth Amendment. This Court's decision in *McConnell* is based on the state constitution's requirement of narrowing as well, *see McConnell*, 120 Nev. at 1063, and the *McConnell* analysis is thus not circumscribed by *Lowenfield*. The state's argument offers no rationale for this Court to reconsider the *McConnell* decision to the extent that it is based on state law, much less for ignoring the federal constitutional minimum prescribed by *Lowenfield*. Accordingly, this Court should reject the state's misdirected attempt to discredit *McConnell*.

E. Other Jurisdictions.

A review of the decision in *Enberg v. Meyer*, 820 P.2d 70 (Wyo. 1991), which was *cited* by this Court in *McConnell*, 102 P.3d at 620, and which the State attempted to distinguish in *McConnell*, 107 P.3d at 1291, reveals additional helpful material, as the *Enberg* Court explained:

> Black's Law Dictionary, 60 (5th ed. 1979) defines "aggravation" as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of the crime or tort itself."* (emphasis added)
>
> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the *Furman/Gregg* weeding-out process fails.

Enberg, 820 P.2d at 90.

The Court recognized that this failure to narrow, under the circumstances, created precisely the sentencing scheme found unconstitutional in *Furman*:

> This statute provided no requirements beyond the crime of felony murder itself to narrow and appropriately select those to be sentenced to death and therefore, on its face, permitted arbitrary imposition of the death penalty. This statutory scheme of death sentencing preserved in felony murder the very evil condemned and held unconstitutional in *Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726*. It permitted in felony murder cases a sentence to death without applying any standards that generally narrowed the class of crimes and persons who were given the death penalty. The statute recreated a sentencing scheme that the United States Supreme Court found resulted in death sentences being imposed unevenly, unfairly, arbitrarily and capriciously.

Enberg, 820 P.2d at 89.

Likewise, as noted elsewhere, this Court recognized in *McConnell*, that Nevada's definition of felony murder is broader than that set forth in the death penalty statute in 1972 when the Supreme Court in *Furman* temporarily ended executions in the United States. Id., 102 P.3d at 622. The State presents no argument which refutes this. Nor does it explain, in rational terms, how such finding is in error.

The State's argument that there is a narrowing that takes place between the felony murder and the felony murder aggravator is disingenuous. The Court in *Engberg* addresses this logical fallacy as well:

> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in *W.S. 6-4-102* that at least one "aggravating circumstance" be found for a death sentence becomes meaningless.

Enberg, 820 P.2d at 90.

Also, as noted in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), the High Court has consistently mandated that the *genuine narrowing* must be done through a process which "reasonably justifies" the imposition of the more severe penalty:

> As a constitutionally necessary first step under the Eighth Amendment, the Supreme Court has required the states to narrow the sentencers' consideration of the death penalty to a smaller, more culpable class of homicide defendants than the pre-*Furman* class of death-eligible murderers. *See Pulley v. Harris, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).* **A state, however, must not only genuinely narrow the class of death eligible defendants, *but must do so in a way that reasonably justifies* the imposition of a more severe sentence on the defendant compared to others found guilty of murder.** *Zant v. Stephens, supra, 462 U.S. at 877, 103 S. Ct. at 2742, 77 L. Ed. 2d at 249-50.* A proper narrowing device, therefore, provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not, *Godfrey v. Georgia, supra, 446 U.S. at 433, 100 S. Ct. at 1767, 64 L. Ed. 2d at 409*, and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed. *Zant, supra, 462 U.S. at 879, 103 S. Ct. at 2744, 77 L. Ed. 2d at 251.* As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers -- those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate. *See Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).*

Middlebrooks, 840 S.W.2d at 343 (emphasis added). Hence, despite the State's protestations otherwise, there is more to the question than simply whether the class is "genuinely" narrowed.

The *Middlebrooks* Court looked also to the North Carolina Supreme Court, and agreed with its reasoning that the use of the felony murder aggravating circumstances defeats the purpose of the narrowing requirement in that it actually broadens the class of eligibility, establishing a system in which one who did not intend to kill is more likely to get the death penalty than one who planned, premeditated and deliberated the killing:

> . . . A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and

> deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. **This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.**
>
> ....
>
> We are of the opinion that, nothing else appearing, **the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death** due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first-degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.

Middlebrooks, 840 S.W.2d at 341-342, *quoting State v. Cherry*, 257 S.E.2d 551, 567 (N.C. 1979) (emphasis added). In this situation, the death penalty scheme neither narrows the class eligible nor reasonably justifies itself, as required by *Zant, supra.* This is in accord with the High Court's position that, after restricting the class of death-eligible offenses, a state must still utilize additional procedures that assure reliability in the determination that death is the appropriate punishment in a given capital case. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Put another way:

> A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability.

Middlebrooks, 840 S.W.2d at 345.

The State makes much of a *mens rea* difference between the felony murder and the felony murder aggravator. This is legal fiction. As stated, felony murder broadens, not narrows the class. Further, a system of "narrowing" that is based upon felony murder does not "reasonably justify" itself, and not does it provide any assurance of reliability in the determination that death is the

appropriate sentence, under *Zant* and *Woodson*. Moreover, as explained in *Middlebrooks*, using the presence or absence of the *men rea* associated with felony murder cannot be seen to narrow the class of eligibles:

> [T]he Supreme Court case of *Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)*, now places a nationwide threshold of culpability at the reckless indifference level, meaning that **a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty**. *Id., 481 U.S. at 157-58, 107 S. Ct. at 1687-88, 95 L. Ed. 2d at 144-45*. Therefore, since the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants.

Middlebrooks, 840 S.W.2d at 345 (emphasis added).

Nevada's death penalty statutory scheme does not genuinely narrow the class eligible nor does it reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder, as required by *Zant, supra*. Accordingly, the State's argument that this Court should overturn *McConnell* is without merit.

There was no indication from the jury as to whether they decided the murder was deliberate and premeditated or felony murder. Thus, under the authority of *McConnell*, the two aggravators: (1) that *the murder occurred in the commission of a robbery*, and (2) that *the murder occurred in the commission of or an attempt to commit burglary*, are unconstitutional, and therefore must be vacated as invalid.

Because neither the district court nor the Nevada Supreme Court can constitutionally make the findings of elements necessary to impose a death sentence, this Court must order the impanelment of a new jury to determine the appropriate sentence

F. Remedy & the Prejudice Analysis.

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

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

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

By contrast, under Nevada law the penalty of death is not the maximum penalty for first degree murder simpliciter: the statute itself provides that the penalty is not available for first degree murder unless additional elements - - the existence of aggravating circumstances, and the failure of mitigating circumstances to outweigh the aggravating circumstances - - are found. *See Apprendi* at 29 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment - - for establishing or increasing the prosecution's entitlement - - it is an element.")

Simply put, a jury's verdict of first degree murder under Nevada law is not "a jury verdict holding a defendant guilty of a capital crime," *Id.* at 16, because the statute itself provides that the punishment of death is not available simply on the basis of that verdict, but can be imposed "only if" further findings are made to increase the available maximum punishment.

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

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

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

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

The *Brown* Decision.

Accordingly, there was no error in the *McConnell* decision, or its progeny, as it concerns this case. There was no error in the District Court's applying *McConnell* to this case. The error was in the District Court's prejudice analysis. As argued in the Opening Brief, the decision in *Brown*: (1) applies prospectively (*Brown*, 546 U.S. at 220, 126 S.Ct at 892 (*Brown* was not decided until January 11, 2006)); and (2) does not render harmless the error in this case.

The State misinterprets the *Brown* decision. First, the State manipulates the law by arguing that it is the *facts* which are to be weighed, and not the number of aggravators. This is not true. The State argues that "the facts available to be weighed are unchanged by the number of aggravators." This is simply not an accurate description of the legal process. As appropriately explained by Justice Scalia, writing for the majority in the *Brown* decision:

> This test is not, as Justice Breyer describes it, "an inquiry based solely on the admissibility of the underlying evidence." *Post, at 241, 163 L. Ed. 2d, at 746* (dissenting opinion). If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here. See *supra, at 219, 163 L. Ed. 2d, at 732*; see also n 6, *supra*. [7] **The issue we confront is the skewing that could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty**. See, *e.g., Stringer, 503 U.S., at 232, 112 S. Ct. 1130, 117 L. Ed. 2d 367* ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale").

Brown, 546 U.S. at 220-21, 126 S.Ct. at 892 (emphasis theirs and added).

Moreover, while it is true that, in Nevada, the death penalty is not a numbers game, i.e., jurors do not calculate the number of aggravating circumstances versus mitigating circumstances to determine whether the death penalty is imposed, the State skews the process with its argument. The State makes it sound as if the jury simply weighs the facts of the murder, alone, in its weighing process. This argument completely discounts the two-stage process of determination of eligibility and then determination of aggravating and mitigating circumstances. Again, as explained by Scalia, the facts of the death have already been placed before the jury, including the alleged theft of the weapon, during trial. (As prohibited by *McConnell* and its progeny.) The question is whether it is proper to emphasize those facts/factors again in the penalty phase, under the guise of narrowing the class of persons eligible, when what is actually happening is that the class is being broadened.

Next, the State argues that the theft of the weapon was admissible to show that Vanisi knew he was killing a police officer in the performance of his duties. Again, the explanations of Justices Scalia and Breyer are important here. The evidence that the weapon was stolen was presented at trial and was alleged in the charging document, under the felony murder rule. Hence, the prohibition against using the theft as an aggravating factor under *McConnell*. These facts are not then "available" to support another aggravating factor. The officer in question was dressed in full uniform and standing next to his patrol car when the incident occurred. Accordingly, the State's argument that it was the service revolver which tipped Vanisi to the fact that the deceased was a police officer is disingenuous to say the least. Instead, it is but another attempt by the State to make an end run around the rule in *McConnell* as it has tried repeatedly since that decision. The interests of justice would be well served by this Court's rejection of this, the State's latest theory of avoidance, as well.

Because neither the district court nor the Nevada Supreme Court can constitutionally make the findings of elements necessary to impose a death sentence, this Court must order the impanelment of a new jury to determine the appropriate sentence.

CLAIM THREE:

THE DISTRICT COURT'S FAILURE TO ALLOW VANISI TO REPRESENT HIMSELF, PURSUANT TO *FARETTA v. CALIFORNIA*, RESULTED IN A STRUCTURAL ERROR AMOUNTING TO "TOTAL DEPRIVATION OF THE RIGHT TO COUNSEL," IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State misconstrues this claim, self-styling it as "The District Court Properly Declined to Overrule the Supreme Court." (Answering Brief, 19). This was neither the title of the claim nor the substance of the claim. As set forth in the Opening Brief, the fact is that *this* Court has the authority to re-visit the *Faretta* claim at this time, as well as the new arguments, along with the

more complete record available to the Court after the post-conviction habeas hearings. The State's arguments focus on whether the district court should have overruled this court, instead of the substance of the claim, largely – if not completely – ignoring the considerable facts and legal argument.

The State's reliance upon Indiana v. Edwards, 128 S.Ct. 2379 (2008), is also misplaced. The decision in *Edwards* is inapposite to the instant case, as there were no severe mental health reasons cited for denying Vanisi's *Faretta* motion. These are slick maneuvers by the State, to be sure. But this Court should not be fooled. Accordingly, the State's inference that a mental health issue of the nature contemplated by the *Edwards* Court had anything to do with the denial of the *Faretta* motion is simply more smoke to cloud the Court's reflection.

The essence of this claim is that the district court placed trial counsel and Vanisi between the Scylla and Charybdis, by not allowing counsel to withdraw and by not allowing Vanisi to represent himself, even though actual conflicts of interest existed, there appeared no valid reason not to allow Vanisi to represent himself, and the result was a trial whereby trial counsel were forced to sit on their hands, forcing a structural error. As this Court has acknowledged, automatic reversal occurs where the defendant is denied substantive due process. *Manley v. State*, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing Guyette v. State*, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968). The denial of the *Faretta* motion resulted in structural error, including a total deprivation of the right to counsel at trial and the deprivation of the right to self-representation at trial, in violation of the 5th, 6th, 8th, and 14th Amendments of the United States Constitution.

CLAIM FOUR:

THE DISTRICT COURT ERRED IN REFUSING TO ALLOW TRIAL COUNSEL TO WITHDRAW DUE TO IRRECONCILABLE CONFLICT, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

It is true that this claim is inexorably linked to the previous claim regarding the *Faretta* error. And while it admittedly takes a backseat to the *Faretta* claim, it is not without merit.

The State is unhelpful in its oversimplification of this claim when it argues that there is no conflict of interest, only a question of whether Vanisi had the right to an unethical lawyer. (State's Answer, 19-20). Setting aside for the moment the accuracy of the State's allegation, as set forth in the Opening Brief, there were many issues raised besides what defense to raise and why.

To recount: There were issues of inadequate advice and inadequate time spent with Vanisi in preparation for trial (SA, 8-10, 16-18), including an issue of the veracity of counsel and of counsel's candor to the court (SA, 29-30). Also, there were issues of difficulties in communication between counsel and Vanisi and of forced medication. (SA, 38-40) .

It is true, as the State argues, that a defendant should not be able to play the courts by continually creating ethical conflicts which would require the replacement of counsel either ad infinitum or until the defendant found an attorney who would put on whatever defense the defendant wanted, ethical or not. However, despite the State's (mis)characterization, that is not the case here. As shown, the conflict was about more than simply which defense was proper. More important, however, is the fact that Vanisi was *not* asking for a new attorney (or string of new attorneys). He was asking for the right to represent himself. Which, barring a situation like the one found in *Edwards* (one of "severe" mental health barriers), is a constitutional right which we all enjoy.

The cases relied upon by the State – beyond being decisions from other states – all involve matters in which the defendant was asking for a new attorney, not seeking to represent himself. In fact, in *Sanborn v. State*, 474 So.2d 309 (Fla.App. 1985), the attorney in question was already the defendant's fourth attorney and if the court would have granted the request to withdraw, it would have meant a fifth attorney. That is obviously not the case in Vanisi's trial, in which the public defenders were the first and only attorneys to represent Vanisi, and as stated, he was not seeking to replace them with new attorneys, but with himself. Finally, the *Sanborn* court recognized that such situations create "an irreconcilable conflict ... between counsel and the accused." Id., 474 So.2d at 314. Which is exactly what Vanisi is saying.

Indeed, the *Sanborn* Court looked to the Arizona Supreme Court in recognizing the problem and its possible solutions:

> If "irreconcilable conflicts" arise between a particular defendant and **a string of attorneys**, we trust the trial court will, when the orderly administration of justice requires, refuse permission to withdraw. In such a case, counsel must, within the confines of the law and his or her professional duties and responsibilities, present the client's case as well as he or she can. A criminal defendant is entitled to full and fair representation within the bounds of the law. If he or she is dissatisfied with the representation to which he or she is entitled in our system, **self-representation is available**. Counsel must not compromise the integrity of his or her client, the court, or the legal profession by exposing a client's proclivities or by engaging in unethical conduct at a client's request.

Sanborn, 474 So.2d at 314, *citing State v. Lee*, 142 Ariz. 210, 689 P.2d 153, 163-164 (1984) (En Banc)(emphasis added).

Again, neither a string of attorneys were involved here, nor was Vanisi given the opportunity of self-representation. In other words, the authority relied upon by the authority cited by the State relies upon the same logic put forth by Vanisi in these proceedings.

CLAIM FIVE:

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL RE: ACTIONS DURING ATTEMPT TO WITHDRAW AS COUNSEL, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

In response to Vanisi's claim that it was improper for his counsel to disclose his admissions to the district court then use that as an excuse for failing to provide a trial defense, the State urges this court to engage in nice calculations as to the amount of prejudice stemming from the disclosure. With all due respect, such analysis misses the point. Admitting a client's guilt, without permission, clearly points out a conflict of interest. Prejudice should be presumed under such circumstances. The claim should not be brushed off as harmless. Further, it is supremely ironic that revealing their client's admissions during the trial phase was the most significant action taken by trial counsel during the guilt phase. They did not bother to even give opening or closing statements, presenting no defense at all. If this was the situation envisioned when the *Sanborn* court required an attorney to "within the confines of the law and his or her professional duties and responsibilities, present the client's case as well as he or she can," *Sanborn*, 474 So.2d at 314, (1984), what a sad state of affairs is legally tolerated. Effective representation in a capital case has become nothing more than a quaint notion that must yield to the dictates of disclosing a client's culpability in featly to ethical requirements of candor with the tribunal.

CLAIM SIX:

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL RE: FAILURE TO PUT ON AN ADEQUATE DEFENSE, INCLUDING FAILURE TO MAKE A CLOSING ARGUMENT DURING THE GUILT PHASE, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This is a claim of structural error. The State argues that it is not properly a structural error claim, because counsel "did indeed participate in the trial." (State's Answer, 24). To recap, here

are all the ways that trial counsel did not participate in trial: For examples of failure to cross-examine, or failure to meaningfully cross-examine, *see* AA, I, 57 (testimony of Dr. Ellen Clark, key State's witness re: autopsy and evidence of mutilation); *and see* AA, I, 126, 142, 162; AA, II, 206, 224, 299, 304, 310; AA, II, 358, 365, 368, 379, 388; AA, III, 455, 467, 480, 518). Also, **counsel for Vanisi did not even give the jury an opening statement nor closing argument at the guilt phase of the trial**. (AA, III, 524-25, 561). Further, as a result of his counsel's failure -- or inability -- to put on a defense or cross-examine witnesses, Vanisi refused to testify. He told the court, "This is a joke. I am not going to testify." (AA, III, 498).

It is true, as the State argues, that counsel did participate in the penalty phase of the trial. This, however, does not cure the absolute lack of participation at the guilt phase. Even a cursory read of the guilt phase transcripts shows that trial counsel's participation in that phase. Out of nineteen State's witnesses at the guilt phase, the defense cross-examined only a five. Only one of nineteen in any depth.

CLAIM SEVEN:

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE THE NEVADA CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. CONST. AMENDS. V, VI, VIII & XIV; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ART. VI; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The State does not address the substance of the claim in its Answering brief, electing instead to say that the claim was not likely to succeed in an appellate forum. Respectfully, Vanisi disagrees and submits the claim has merit and relief should have been granted.

CLAIM EIGHT:

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS HIS RIGHTS UNDER INTERNATIONAL LAW, BECAUSE THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT. U.S. CONST. ART. VI, AMENDS. VIII & XIV; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ARTS. VI, VII; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The State does not directly address this claim in its Answering brief. Vanisi respectfully maintains that the death penalty is inconsistent with the evolving standards of decency that mark the progress of a maturing society. Accordingly, it should be abolished and his sentence should be vacated.

CLAIM NINE:

VANISI'S CONVICTION AND SENTENCE ARE INVALID PURSUANT TO THE RIGHTS AND PROTECTIONS AFFORDED HIM UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS. U.S. CONST. ART. VI; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

Vanisi's rights under the Covenant were violated and the district court erroneously declined to afford him relief. Most notably, Vanisi was not afforded the opportunity to defend himself. Nor was he permitted to be defended by counsel of his own choosing. These errors are per se prejudicial and require that Vanisi's death sentence and conviction be vacated. The State's argument that the United States is not a signatory and thereby bound by the terms of the Covenant are without merit.

CLAIM TEN :

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE EXECUTION BY LETHAL INJECTION VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS. U.S. CONST. ART. VI, AMENDS. VIII & XIV; U.S. CONST., ART. VI; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ART. VII.; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

Right Time, Right Place.

The State argues that the instant claim "is not an attack on the judgment or sentence" and therefore must be brought in a separate civil action. (Answering brief, p. 20). The State relies upon *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096 (2006) and *Bowen v. Warden*, 100 Nev. 489, 686 P.2d 250 (1984).

The High Court's decision in *Hill* is distinguishable from the instant case and does not bar the instant claim. *Hill* involved a petitioner who had exhausted his habeas remedies. Thereafter, Hill filed a civil action pursuant to 42 U.S.C.S. §1983. In that action, Hill challenged the method of execution, but not the execution itself. Therefore, the Court determined that the claim was not a disguised habeas claim which would have been barred as a successive petition. The question was whether there was another acceptable means of execution available. The Florida legislature had provided for death sentences to be carried out by lethal injection, unless the person sentenced preferred to be executed by electrocution. *Id.*, 547 U.S. at 576-77, *citing* Fla. Stat. § 922.105(1). Moreover, the Court noted that the Florida Department of Corrections "[had] not issued rules establishing a specific lethal-injection protocol." *Id.*

Accordingly, without deciding the merits of the underlying §1983 case, the High Court determined that the claim should be allow to go forward, in part, because the State's law did not require the use of the challenged procedure. *Id. at 580; see also Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004).

Conversely, in Nevada, NRS 176.355(1) mandates lethal injection as the method of execution. There are no alternatives available. And the Nevada Department of Corrections has set forth a specific protocol which appears unconstitutional in light of *Baze*. Accordingly, McConnell's claim is not barred by *Hill*. Indeed, as recognized in *Nelson* and referenced in *Hill*, the U. S. Supreme Court acknowledged:

> [I]n a State where the legislature has established lethal injection as the method of execution, "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself."

Hill, at 579, *quoting Nelson*, 541 U.S. at 644. Such is the position in which Vanisi finds himself.

Bowen is inapposite to the instant case, as it involves the appropriate means of challenging the conditions of confinement, including beatings and punitive segregation. *Bowen* does not cite to nor reference *Hill* in any way.

CLAIM ELEVEN:

VANISI'S CONVICTION AND SENTENCE OF DEATH ARE INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION AND A RELIABLE SENTENCE BECAUSE PETITIONER MAY BECOME INCOMPETENT TO BE EXECUTED. U.S. CONST. AMENDS. V, VI, VIII & XIV; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

This claim was raised as a precaution against executing Vanisi in an incompetent state. By presenting it to this Court and the lower court, federal intervention at a later date will not face procedural barriers.

CLAIM TWELVE:

PETITIONER'S CONVICTION AND SENTENCE VIOLATE THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS AND A RELIABLE SENTENCE AND INTERNATIONAL LAW BECAUSE PETITIONER'S CAPITAL TRIAL AND REVIEW ON DIRECT APPEAL WERE CONDUCTED BEFORE STATE JUDICIAL OFFICERS WHOSE TENURE IN OFFICE WAS NOT DURING GOOD BEHAVIOR BUT WHOSE TENURE WAS DEPENDENT ON POPULAR ELECTION. U.S. CONST. ART. VI, AMENDS. VIII, XIV; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ART. XIV; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The members of the Nevada judiciary are popularly elected, and thus face the possibility of removal if they make a controversial and unpopular decision. This situation renders the Nevada judiciary insufficiently impartial under the federal due process clause to preside over a capital case. At the time of the adoption of the constitution, which is the benchmark for the protection afforded by the due process clause, *see, e.g., Medina v. California*, 505 U.S. 437, 445-447 (1992), English judges qualified to preside in capital cases had tenure during good behavior.

The tenure of judges during good behavior was firmly established by the time of the adoption: almost a hundred years before the adoption, a provision required that "Judges' Commissions be made *quamdiu se bene gesserint* . . . ." was considered sufficiently important to be included in the Act of Settlement, 12, 13 Will. III c. 2 (1700); W. Stubbs, *Select Charters* 531 (5th ed. 1884); and in 1760, a statute ensured their tenure despite the death of the sovereign, which had formerly voided their commissions. 1 Geo. III c.23; 1 W. Holdsworth, *History of English Law* 195 (7th ed., A. Goodhart and H. Hanbury rev. 1956). Blackstone quoted the view of George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown." 1 W. Blackstone, *Commentaries on*

the Laws of England *258 (1765). The framers of the constitution, who included the protection of tenure during good behavior for federal judges under Article III of the Constitution, would not likely have taken a looser view of the importance of this requirement to due process than George III. In fact, the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" was one of the reasons assigned as justification for the revolution. Declaration of Independence § 11 (1776); see Smith, *An Independent Judiciary: The Colonial Background*, 124 U.Pa.L. Rev. 1104, 1112-1152 (1976). At the time of the adoption, there were no provisions for judicial elections in any of the states. Id. at 1153-1155.

The absence of any such protection for Nevada judges results in a denial of federal due process in capital cases, because the possibility of removal, and at minimum of a financially draining campaign, for making an unpopular decision, are threats that "offer a possible temptation to the average [person] as a judge ... not to hold the balance nice, clear and true between the state and the [capitally] accused." Tumey v. Ohio, 273 U.S. 510, 532 (1927); *see* Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing, Ass. Conc. Res. No. 3 (file No. 7, Statutes of Nevada 2001 Special Session), meeting of February 21, 2002, partial verbatim transcript (testimony of Rose, J., noting that lesson of election campaign, involving allegation that justice of Supreme Court "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'"); Beets v. State, 107 Nev. 957, 976, 821 P.2d 1044 (1991) (Young, J., dissenting) ("Nevada has a system of elected judges. If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability.")

As usual, the State is quite astute at twisting words, meanings, and sometimes, entire claims. In this instance, it wants the Court to believe that Vanisi has accused it of acting like a lynch mob and of being bloodthirsty. (State's Answer, 27). In simple terms, as explained quite completely herein and in the Opening Brief, the claim alleges that the Court is unduly influenced by the desire to get re-elected, not that it has any innate bloodthirst.

Considering all of these factors, it is clear that any death sentence imposed in Mr. Vanisi's case cannot be constitutionally reliable under the Eighth and Fourteenth Amendments, unless it is imposed by a fully informed and properly instructed jury. Accordingly, the death sentence must be vacated and a new penalty phase ordered.

CLAIM THIRTEEN:

VANISI'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE SENTENCE, AS WELL AS UNDER INTERNATIONAL LAW, BECAUSE OF THE RISK THAT THE IRREPARABLE PUNISHMENT OF EXECUTION WILL BE APPLIED TO INNOCENT PERSONS. U.S. CONST. ART. VI, AMENDS. VIII & XIV; U.S. CONST., ART. VI; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ART. VII.; NEV. CONST. ART. I, §§ 3, 6, AND 8; ART. IV, § 21.

The State suggests that Vanisi is not innocent so he should be accorded no relief viat the instant claim. In response, one must wonder how the state can be so cocksure of the guilt in this case, considering the structurally flawed, lopsided, sham of a trial that took place with Vanisi virtually unrepresented by counsel. Almost anyone could be found guilty under such circumstances. There was no crucible of adversary testing. The finding of guilt signifies nothing.

CLAIM FOURTEEN:

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FORBID THAT THE COURTS OR THE EXECUTIVE ALLOW THE EXECUTION OF VANISI BECAUSE HIS REHABILITATION AS AN OFFENDER DEMONSTRATES THAT HIS EXECUTION WOULD FAIL TO SERVE THE UNDERLYING GOALS OF THE CAPITAL SANCTION.

Over the course of this century, the United States Supreme Court's jurisprudence regarding rehabilitation and retribution as punishment goals has developed in tandem with the Court's perception of the status of the goals in the mind of the public. At the time of the zenith of corrections reform popularity, the Court held that rehabilitation and reformation had unseated retribution as the "dominant objective in the criminal law." *Williams v. New York*, 337 U.S. 241, 248 (1949). Consistent with all current scientific polling, the Court has always viewed retribution and rehabilitation as adversarial public punishment goals. *See, e.g., Morrisette v. United States*, 342 U.S. 246, 251 (1952) (speaking of the "tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution"). The Court has always refrained from announcing that either of the goals had replaced the other. *See,*

e.g., *Powell v. Texas*, 392 U.S. 514, 530 (1968) (Justice Marshall commenting that the Court "has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects"); *see also Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting) (noting the existence of a "profound dispute about whether we should punish, deter, rehabilitate or cure"); *Furman v. Georgia*, 408 U.S. 238, 414, 452 n.43 (1972) (Powell, J., dissenting, joined by Rehnquist, Burger, and Blackmun, JJ.) (listing these and additional cases). By merely viewing the punishment goals as vying for prominence, however, and giving retribution an almost preemptive role in its capital jurisprudence the Court has seriously underestimated and miscalculated public support for rehabilitation as a punishment alternative, even in the context of capital punishment. The reality demonstrated by all public polling, state statutory schemes, and the behavior of courts is that rehabilitation and retribution are appreciated by the public not only as vying contestants for prominence as punishment criteria but, more importantly, as equally high ideals in punishment with some vacillation in strength between them over time.

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

177-78, 179-80 (1988) (holding that the Texas statute allowed jurors to consider the mitigating evidence of Donald Franklin's good prison record).

The Supreme Court has been reluctant to establish classes that are incligible for the death penalty, relying instead, as noted above, on "sentencer discretion guided by statutory criteria rather than court mandate" to delimit the death-eligible with minimum arbitrariness. This same tendency to focus on guided sentencer discretion, rather than classes of offenders, may account for the paucity of recent comment by the courts, state or federal, on the relative strengths of retribution and rehabilitation as guiding principles in the infliction of the death penalty. This tendency accounts for the general lack of alternative punishment statutes in death penalty states or other kinds of statutes, such as clemency directives, that address rehabilitation of capital offenders. As will be shown below, in Claim Fifteen, the polls are way ahead of the legislatures and the courts in revealing the deep-set respect for rehabilitation as a punishment goal, the relatively equal strength of rehabilitation and retribution, and ways rehabilitation can be applied in capital sentencing. As will also be shown, however, legislatures have continued to encode the public's strong support for rehabilitation and, thus, essentially all capital punishment states still make provision for rehabilitation as a dominant goal in punishment. Legislatures adequately portray the public's desire that rehabilitation be given a prominent place. Due to political pressure and misperception about the public's value of rehabilitation vis a vis retribution, legislators have been slow to generate any laws that would mandate, for instance, the commutation of the sentence of a defendant like Mr. Vanisi, even though such legislation may be required because some procedural mechanism must be made available to prevent the kind of constitutional error present here. The paucity of procedural solutions cannot be held to demonstrate the absence of such error.

CLAIM FIFTEEN:

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FORBID THAT THE COURTS OR THE EXECUTIVE ALLOW THE EXECUTION OF VANISI BECAUSE HIS EXECUTION WOULD BE WANTON, ARBITRARY INFLICTION OF PAIN, UNACCEPTABLE UNDER CURRENT AMERICAN STANDARDS OF HUMAN DECENCY, AND BECAUSE THE TAKING OF LIFE ITSELF IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD VIOLATE INTERNATIONAL LAW.

The State again gave little attention to this claim in its Answering brief, other than pointing

out that it should have been raised on direct appeal and was therefore procedurally barred. Vanisi respectfully submits the claim should indeed been litigated by appellate counsel as it has merit and is supported by substantial evidence in the record.

CLAIM SIXTEEN

NEVADA'S DEATH PENALTY SCHEME ALLOWS DISTRICT ATTORNEYS TO SELECT CAPITAL DEFENDANTS ARBITRARILY, INCONSISTENTLY, AND DISCRIMINATORILY, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The State has argued this Court's decision in *Thomas v. State*, 112 Nev. 1261, 148 P.3d 727, 737 (2006), in which this Court held:

> This court has indicated that the decision to seek the death penalty is a matter of prosecutorial discretion, to be exercised within the statutory limits set out in NRS 200.030 and NRS 200.033 and reviewable for abuse of that discretion, such as when the intent to seek the death penalty is not warranted by statute or is improperly motivated by political considerations, or race, religion, color or the like.

While it sounds as if prosecutorial discretion is being reviewed and subjected to judicial oversight, there really are no articulated public standards guiding the exercise of prosecutorial discretion regarding the decision to seek the death penalty in Nevada.

However, the federal system has a clear protocol in place. The Justice Department's capital case review procedure is governed by a protocol set out in section 9-10.010 et seq. of the United States Attorneys' Manual (USAM). The procedure "is designed to promote consistency and fairness." The protocol provides that "[a]s is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty." USAM 9-10.080. The protocol requires United States Attorneys to submit cases involving a pending charge of an offense for which the death penalty is a legally authorized sanction, regardless of whether or not the U.S. Attorney recommends seeking the death penalty. The death penalty cannot be sought without the prior written authorization of the Attorney General.

The U.S. Attorneys' capital case submissions are sent to the Criminal Division and must include a death penalty evaluation form for each defendant charged with a capital offense, a detailed prosecution memorandum, copies of indictments, written materials submitted by defense counsel in opposition to the death penalty, and other significant documents and evidence as

appropriate. The Capital Case Unit of the Criminal Division reviews the submission, seeks additional information when necessary, and drafts an initial analysis and proposed recommendation.

The case is then forwarded to a committee of senior Justice Department lawyers, the Attorney General's capital case review committee. The review committee meets with the Capital Case Unit attorneys, the U.S. Attorney and/or the prosecutors in the U.S. Attorney's office who are responsible for the case, and defense counsel. During this meeting, defense counsel are afforded an opportunity to present any arguments against seeking the death penalty for their client. The review committee considers "all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty." USAM 9-10.050. The review committee thereafter meets to finalize its recommendation to the Attorney General, to whom all submitted materials are forwarded. The Attorney General makes a final decision as to whether a capital sentence should be sought in the case.

Why such a system is not in place in Nevada speaks volumes about the unfettered, unguided, capricious death penalty decision making process in Washoe County. Tragically, this Court approved of the present state of affairs in *Thomas v. State*, 148 P.3d at 736:

> This court has held that "[t]he matter of the prosecution of any criminal case is within the entire control of the district attorney," absent any unconstitutional discrimination.
>
> Thomas points us to no authority in any jurisdiction for the proposition that the Constitution or Nevada law requires a prosecutor to allow a defendant any participation in the death penalty charging process.

Apparently, the litigants in *Thomas* did not bring the federal protocol to the attention of this Court.

The decision to dismiss this claim on the grounds that it had no reasonable ground for success is clearly erroneous in light of the USAM and the argument above. (AA XIII, 2637). Since the current system violates the ban against cruel and unusual punishment and defendants' rights to Due Process and Equal Protection, the NRS 200.033 notice filed against Vanisi must be stricken, and either the judgment reversed, or, in the alternative, the death sentence vacated. This Court

should either remand this matter to the trial court for re-sentencing or reduce the sentences to life-without-parole.

CLAIM SEVENTEEN:

NEVADA'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL INSOFAR AS THEY PERMIT A DEATH-QUALIFIED JURY TO DETERMINE A CAPITAL DEFENDANT'S GUILT OR INNOCENCE.

The State unfairly characterizes this claim as one in which Vanisi is claiming entitlement to jurors who will disregard the law. Contrary to the State's argument, the effect of death-qualification is far from hypothetical. For example, three jurors were improperly excluded for cause, Raul Frias, Caballero Salais, and Joy Ashley, because they expressed that they did not want to sign a death warrant as a foreman. (Second Supplemental Appendix (SSA) I, 186-189; SSA II, 484-485). There is no requirement in the law that a juror have to act as a foreman or sign a death warrant in order to be qualified to serve on a capital jury. It was error for the District Court to exclude them for cause.

Further, there was considerable and ongoing difficulty regarding the issue of Vanisi's right to ask potential jurors whether they were willing to consider the aggravating factors and the mitigating factors pursuant to *Morgan v. Illinois*, 504 U.S. 719 (1992). (SSA I, 13-16). The District Court improperly relied upon state court decisions over the controlling precedent of the United States Supreme Court in *Morgan*. ("Objection is overruled pursuant to Nevada Supreme Court rulings.")(SSA I, 16-17). There are also numerous examples of persons who clearly said they could not be fair in light of the circumstances, or they would always believe that the death penalty was appropriate for first degree murder, or that they believed in an eye for an eye and many of Vanisi's challenges for cause were improperly denied by the Court and the Court often improperly limited voir dire in violation of *Morgan*. (*See* SSA I, 54-56, 58, 61, 74, 186-87, 222, 226, 227; SSA II, 254, 265-67, 270, 271, 273, 274, 279-80, 285-86, 287, 288, 289-90, 296, 301-338, 353, 457, 458, 460, 484).

In *Szuchon v Lehmen*, 273 F.3d 299 (3rd Cir.2001), the Court explained that a *Witherspoon* violation requires habeas relief even where a single prospective juror was improperly excluded. "The question posed did not probe willingness to vote in a certain way, but, rather, sought out any

scruples or hesitation. In *Szuchon*, a prospective juror apparently interpreted a voir dire question as seeking his views and, in responsive fashion, he noted his lack of belief in capital punishment. At that point, the prospective juror's views on the death penalty became the issue, and the prosecutor asked, "You do not believe in the death penalty?" He simply replied "no," and the prosecutor moved to exclude him. The prosecutor failed, however, to meet his burden under *Witt* of asking even a limited number of follow-up questions to show the prospective juror's views would render him biased. Thus, the Court found that the only supportable inference on the record was that the potential juror was excluded because he voiced opposition to the death penalty. Even those firmly opposed to the death penalty can serve as jurors if they are "willing to temporarily set aside their own beliefs in deference to the rule of law."

Conversely, in *State v. Jacobs*, 789 So. 2d 1280 (La. 2001), the Court found that the denial of defendant's for-cause challenges to two prospective jurors who unequivocally stated they could only impose a death sentence if defendant were convicted was error. The Court explained that, in view of trial judge's failure to further question those jurors (or invite the prosecutor attempt to rehabilitate) to clarify their position on the death penalty and their understanding of requirement that they consider mitigating evidence and a life sentence.

In *Green v. Commonwealth*, 546 S.E. 2d 446 (Va.. 2001), the trial court committed reversible error in not removing for cause two jurors. The first juror possessed a firm belief in the adage, "an eye for an eye, tooth for a tooth." He stated that if the Commonwealth proved beyond a reasonable doubt that the defendant had committed a capital offense, he would vote to fix the defendant's penalty at death and that he would not give any consideration to a lesser penalty because the defendant "didn't give his victim consideration when he took [her] life." *Id.*, at 448-49. Even though the trial court and the State were able to partially rehabilitate the prospective juror, the Court found that "(w)e can only conclude from [the juror's] responses to the voir dire questions that he had formed a fixed opinion about the punishment that the defendant should receive if the defendant were convicted of a capital offense and, thus, [the juror] was not impartial and 'indifferent in the cause.'" *Id.*, at 452.

In *Warner v. State*, 29 P.3d 569 (Okla.Crim. 2001), the trial court abused its discretion in declining to remove a juror because he was strongly biased in favor of the death penalty. The prospective juror stated at the beginning of his voir dire that he had a "strong bias towards the death penalty." *Id.*, at 573. He went on to indicate that he had difficulty conceiving of a situation where the death penalty would not be appropriate for someone convicted of this type of crime. After questioning by the trial court, the prospective juror stated that he thought he could give both sides a fair trial and he would consider all three punishment options. However, he again indicated that he had a strong bias toward the death penalty. Defense counsel noted that the prospective juror had stated he could consider all three punishments, but when asked directly whether he could *fairly consider* all three, he responded, "I would say that I would be biased towards the death penalty." The court held that "(w)hen the voir dire of this prospective juror is considered in its totality, it is clear that his strong bias towards the death penalty would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.*, at 573.

Accordingly, pretrial death qualification undermines a capital defendant's right to a fair trial. First, the process conditions jurors toward a guilt verdict because it requires them to assume the defendant's guilt. Protracted discussions with potential jurors regarding penalty implicitly suggest the defendant's guilt, thereby undermining the presumption of innocence and impairing the impartiality of potential jurors, in violation of Vanisi's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM EIGHTEEN:

VANISI'S SENTENCE OF DEATH WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR ARBITRARY FACTOR(S), IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Citing to the law of the case doctrine, the State concludes that this Court has already determined that Vanisi's death sentence was not imposed under the influence of passion or prejudice. It is axiomatic that the law of the case doctrine is not absolute. Accordingly, this Court should frankly revisit the conclusion that the death sentence of a cop-killer who was virtually unrepresented by counsel at trial was not imposed as a result of prejudice.

CLAIM NINETEEN:

VANISI WAS NOT COMPETENT DURING THE CRIME, HIS LEVEL OF INTOXICATION AND PSYCHOSIS AMOUNTED TO LEGAL INSANITY UNDER THE AUTHORITY OF *FINGER v. STATE*; THE LEGISLATURE'S BAN ON A VERDICT OF "NOT GUILTY BY REASON OF INSANITY" PREVENTED TRIAL COUNSEL FROM PUTTING ON EVIDENCE OF VANISI'S STATE OF MIND, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The State ignored virtually everything related to mental health in this case except the testimony from one of the two defense attorneys. In fact, both attorneys testified that part of the reason they did not pursue a not-guilty by reason of insanity defense was because, at the time, it was not legally available. (AA XI, 2092-2093; 2131-2132).

Also, the State ignored the part of the claim in which, under *Finger v. State*, 117 Nev.548, 27 P.3d 66 (Nev. 2001), *cert. denied*, -- U.S. --, 122 S. Ct. 1063, 151 L. Ed. 2d 967 (2002), the state of mind of a defendant in a self-defense case is material and essential to the defense. In *Finger*, the Nevada Supreme Court held that evidence of a mental state that does not rise to the level of legal insanity may still be considered in evaluating whether the prosecution has proven each element of an offense beyond a reasonable doubt, for example, in determining whether a killing is first- or second-degree murder or manslaughter or some other argument regarding diminished capacity.

Accordingly, under the Due Process Clause of the U.S. Constitution, Vanisi must be afforded the means and the permission to put on a defense of legal insanity. *See also O'Guinn v. State*, 118 Nev. Adv. Op. No. 85, 59 P.3d 488 (2002). His conviction and sentence must therefore be reversed.

CLAIM TWENTY:

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE POSSIBLE MITIGATING FACTORS AND/OR TO PUT ON WITNESSES AND/OR EVIDENCE IN MITIGATION DURING SENTENCING, INCLUDING AN EXPERT ON MITIGATION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As previously discussed, the State has consistently maintained that Vanisi should be compelled to litigate his collateral attack on his conviction and death sentence despite the virtual overwhelming evidence presented of his mental incapacity. That same mental incapacity explains why more mitigating evidence was not presented to the district court. Vanisi's inability to

communicate in any meaningful way with counsel or investigators rendered him unable to develop any further evidence, thus allowing the district court to deny his claim as unproven. The unfairness of disposing of the claim is apparent. It is no better than rejecting a mute man for failing to speak up. Further, it should be noted that the mental health evidence presented in the course of litigating the *Rohan* motion was far more extensive and probative than the analysis presented to the jury by Dr. Thienhaus. Had the jury been presented with such evidence, it is likely they would have more favorably approached the weighing of aggravators and mitigation evidence. (That calculation has already been altered by the rejection of one of the aggravators in this case by the district court during habeas proceedings.)

CLAIM TWENTY ONE:

BUT FOR THE INDIVIDUAL AND COLLECTIVE FAILURES OF TRIAL COUNSEL, VANISI WOULD HAVE BEEN ABLE TO PUT ON A MEANINGFUL DEFENSE; THEREFORE, THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL HAS PREJUDICED VANISI IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This is a cumulative error claim. The State cleverly tries to shift the burden to the defense in this claim, alleging that Vanisi never explained "the nature" of the defense which should have been mounted. (State's Answer, 31). Because several of the ineffective assistance claims are based in structural error, this claim need not explain what defense(s) might have been marshaled and mounted, but is subject to "automatic reversal" pursuant to *Arizona v. Fulminate*, 499 U.S. 279, 306-12, 113 L.Ed.2d 302, 11 S.Ct. 1246 (1991).

The Court is reminded that "structural error" is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. Examples of structural error include **total deprivation of the right to counsel** at trial, a judge who is not impartial, the unlawful exclusion of members of the defendant's race from a grand jury, **deprivation of the right to self-representation at trial**, and deprivation of the right to public trial. Id. at 309-10. Because the entire conduct of the trial is affected, structural error defies analysis by "harmless-error" standards. *Id.*

Because what occurred in the trial below was the virtual deprivation of counsel, as well as the complete deprivation of the right to self-representation, structural error occurred in more than

one aspect of the case. This Court has agreed that automatic reversal occurs where the defendant is denied substantive due process. *Manley v. State*, 115 Nev. 114, 123, 979 P.2d 703, 708 (1999), *citing Guyette v. State*, 84 Nev. 160, 166-67 n.1, 438 P.2d 244, 248 n.1 (1968). Accordingly, the District Court erred in denying this claim, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CLAIM TWENTY TWO:
INEFFECTIVE ASSISTANCE OF OF APPELLATE COUNSEL FOR FAILURE TO RAISE ALL CLAIMS OF ERROR LISTED IN THIS PETITION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of counsel on appeal. *See Evitts v. Lucey*, 469 U.S. 387, 396-99 (1985).

It is reasonably probable that a more favorable result would have been obtained if all of these claims had been properly asserted and if the standard of prejudice of Chapman v. California, 386 U.S. 18 (1967), requiring the state to show beyond a reasonable doubt that any error was harmless, had been applied. Further, the petition alleges that counsel had no tactical or strategic basis for failing to raise these claims. (JA I, 164-65).

The State's reliance upon *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001), is misplaced. (State's Answer, 31-32). In *Evans,* the opening brief contained a section that asserts that *trial* counsel were ineffective "for the reasons set forth" in the issues raised in the rest of the brief. Such is not the case here, as the Petition clearly sets forth first the issues, including the facts, the law, and the constitutional errors for each. (AA X, 1819-1943). The Petition also alleges that *appellate* counsel was ineffective *for failing to raise these issues*, complete with supporting facts and constitutional grounds. (AA X, 1859-62; 1861: 5-8; 1943). These facts are clearly distinguishable from *Evans*, in which there was no discerning how the other issues raised would amount to ineffective assistance of *trial* counsel. Accordingly, the State's argument is not persuasive.

Appellate counsel's failure to raise the issues prior was ineffective, in violation of Mr. Vanisi's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution. These issues, including structural error issues would have reasonably lead to a new trial.

CLAIM TWENTY THREE

THE DISTRICT COURT ERRED IN DENYING VANISI'S MOTION FOR PROTECTIVE ORDER, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State mischaracterized this claim as well. The motion in question never sought to have the State defend the petition (for writ of habeas corpus) without knowing the claims. (State's Answer, 32). It is agreed, such an effort would be nonsensical, as is the State's Answer. The motion sought only "to preclude the State from sharing or using [the privileged and previously sealed communications] for any purpose other than the litigation of Mr. Vanisi's... habeas petition." (AA IX, 1786: 1-4; 1777-86).

It is unclear as to how much of the rest of the State's argument applies to this claim, as it generally consists of a diatribe against letting a defendant perjure himself without fear of impeachment, which has nothing to do with the matter at hand. The motion in question had largely to do with conversations which were held between Vanisi's counsel and the District Court.

The State implied that the case of *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), relied upon by Vanisi in his motion for protective order, was somehow wrongly decided, as "[n]o court, save the 9th Circuit, has ever adopted such a rule of law. This Court ought not to be the first." (State's Answer, 33). Respectfully, whether the State, the district court, or this Court, agrees or disagrees with a decision by the Ninth Circuit Court of Appeals 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. It is axiomatic 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.

The State also argues that the decision in *Bittaker* was "limited to federal habeas corpus claims..." (State's Answer, 33, *citing* to 331 F.3d at 726). This is 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. In short, there is nothing unique about federal habeas proceedings that would allow the protective order sought, where a state habeas proceeding would not. Indeed, as explained, the claims at issue involve federal constitutional rights, which are the same no matter where they are litigted.

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 Answer, 34). *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. One which 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, by his motion, was not attempting to limit the State's use of the sensitive information in the post-conviction habeas proceedings at issue. Further, Vanisi was 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.

Finally, 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 seeking to prevent the State from using the evidence upon which the claims are based. (State's Answer, 34). 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 v. Woodford*, 290 F.3d 1036, 1042 (9th Cir. 2002). The relief sought did 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.

The necessity of a protective order in this case 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 had 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 were 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).

CONCLUSION

The Appellant, SIAOSI VANISI, respectfully requests that this Honorable Court find that there were multiple errors made in this case and those errors unfairly prejudiced SIAOSI VANISI.

It is further respectfully requested that this Honorable Court vacate the judgment of conviction and sentence.

RESPECTFULLY SUBMITTED this 01 day of December, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

I hereby certify that, pursuant to 239B.030, no social security numbers are contained within this document.

DATED this 2nd day of December, 2008.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Scott Edwards, Esq., and that on this date, I served the foregoing Supplemental Appendix 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.

__X__ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

_____ Reno/Carson Messenger service.

addressed as follows:

TERRENCE McCARTHY
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P.O. Box 30083
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(Via Personal Delivery)

DATED this 12th day of December, 2008.

Linda G. Marcus

Exhibit 45

Exhibit 45

CR98P0516
D4

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 50607

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Siaosi Vanisi's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Vanisi killed University of Nevada, Reno Police Sergeant George Sullivan in 1998. A jury convicted him of first-degree murder and several related crimes and sentenced him to death. This court affirmed his convictions and sentence on direct appeal. Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001).

In 2002, Vanisi filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent him and counsel filed a supplemental petition. Following an evidentiary hearing, the district court denied the petition.

On appeal, Vanisi claims that the district court erred by concluding that he was competent to participate in post-conviction proceedings, denying a motion for a protective order, and denying each of the 22 claims in his petition. For the reasons stated below, we conclude

that Vanisi's claims lack merit and affirm the judgment of the district court.

Competency determination

Vanisi claims that the district court erred when it determined that he was competent to proceed with litigation of his post-conviction petition.[1] After his appointment, post-conviction counsel filed a motion to stay the proceedings in light of Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 813-15 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals concluded that where a capital defendant has a statutory right to the effective assistance of post-conviction counsel, he also has the right to be competent to assist counsel and, if incompetent, to a stay until he becomes competent. As a result, the district court ordered that Vanisi be evaluated by two mental health experts and held an evidentiary hearing.

At the hearing, psychiatrist Dr. Thomas Bittker opined that Vanisi was being incompletely treated for his mental problems and had "residual evidence of psychosis" to the extent that, while he was able to assist his counsel, he was irrationally resistant to doing so. On the other hand, psychologist Dr. Alfredo Amezaga testified that Vanisi was competent to assist counsel. Acknowledging that the experts diverged, the district court concluded that based on the entirety of the evidence—which included its own observations—Vanisi had the "present capacity, despite his mental illness, to assist his attorneys if he chooses to do so." We

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[1]Vanisi also claims that while he is not presently incompetent to be executed, he may become so in the future. This claim was raised below and we conclude that the district court did not err in denying it as no relief was requested. We note that specific procedures are in place in the event that Vanisi becomes incompetent to be executed. See NRS 176.425–.455.

conclude that the district court's competency determination was based on substantial evidence and uphold its decision. See Doggett v. Warden, 93 Nev. 591, 594, 572 P.2d 207, 209 (1977).[2]

Protective order

Vanisi claims that the district court erred by denying his motion for a protective order and unsealing his supplemental petition. He argues that he was entitled to a protective order precluding the State from disclosing any privileged information to law enforcement authorities, using the information at a second trial, or disclosing it to any "public or private entity, including the news media." Vanisi fails to demonstrate that the district court erred.

Vanisi's motion for a protective order was based on Bittaker v. Woodford, 331 F.3d 715, 717, 722 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals limited the implied waiver of the attorney-client privilege in a habeas corpus proceeding to "what is needed to litigate the claim[s]" and upheld a protective order precluding the State from disclosing privileged materials "to any other persons or offices." However, in this case, Vanisi expressly waived his attorney-client privilege as it

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[2]Because the district court's finding that Vanisi was competent was supported by substantial evidence, we do not reach the question of whether the procedures set forth in Rohan should be adopted in Nevada, but leave that question for resolution in a more appropriate case. See, e.g., Paul v. U.S., 534 F.3d 832, 848 (8th Cir. 2008) (finding it unnecessary to decide whether there is a statutory right to competency because the district court found the petitioner competent and the finding was not clearly erroneous), cert. denied, ___ U.S. ___, 130 S. Ct. 51 (2009).

related to his representation at trial.[3] Furthermore, Vanisi wholly failed to articulate compelling reasons for sealing his post-conviction proceedings from the public. See Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006). And the admissibility of any of the disclosed information at a subsequent trial is a question better left until the issue arises. See Bittaker, 331 F.3d at 730 n.3 (O'Scannlain, J., concurring); Molina, 120 Nev. at 193 n.25, 87 P.3d at 539 n.25.

Procedurally barred claims

In his petition below, Vanisi claimed that his convictions and sentence should be overturned because (1) he was denied the right to consular contact under the Vienna Convention;[4] (2) he was denied the right to represent himself; (3) the district court erred in refusing to allow

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[3]We also note that, in Nevada, the implied waiver of the attorney-client privilege in a habeas proceeding is limited to that proceeding by statute. See NRS 34.735; Molina v. State, 120 Nev. 185, 193 n.25, 87 P.3d 533, 539 n.25 (2004). A district court order is unnecessary to limit the implied waiver.

[4]Vanisi's claim that the procedural bars do not apply to Article 36 claims is without merit. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 337 (2006).

Also, in his petition below, Vanisi stated that this claim "can be reviewed as an allegation of ineffective assistance of trial and appellate counsel." To the extent that it was raised as such, the claim is without merit because the evidence presented shows that the Tongan consulate was contacted and refused to provide Vanisi with assistance. See Osagiede v. U.S., 543 F.3d 399, 413 (7th Cir. 2008) (holding that in order to succeed on a claim of ineffective assistance of counsel based on an Article 36 violation, a petitioner must demonstrate that the consulate could have assisted the petitioner with his case and that the consulate would have done so).

counsel to withdraw; (4) Nevada's death penalty scheme operates arbitrarily and capriciously; (5) the death penalty violates the Eighth Amendment; (6) his conviction and sentence are invalid under the International Covenant on Civil and Political Rights; (7) lethal injection violates the Eighth Amendment; (8) his trial and appellate judges were elected; (9) there is a risk that an innocent person will be executed; (10) his rehabilitation outweighs the government's interest in retribution and deterrence; (11) the death penalty violates international law; (12) prosecutors can apply Nevada's death penalty scheme arbitrarily; (13) he had a "death-qualified" jury; (14) his sentence was imposed under the influence of passion, prejudice, or other arbitrary factors; (15) he is insane and was precluded from entering an insanity plea; and (16) the robbery aggravating circumstance is invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). The district court denied each of these claims finding that they were procedurally barred, barred by the doctrine of the law of the case, or without merit. The district court did not err.

All of these claims could have been raised on direct appeal and are procedurally barred absent a showing of good cause and actual prejudice. NRS 34.810(1)(b). With the exception of his challenge to the robbery aggravator, Vanisi failed to demonstrate good cause or prejudice. And Vanisi's claims that he was denied the right to represent himself and that his sentence was the result of passion or prejudice were addressed on direct appeal. They are therefore barred by the doctrine of the law of the case. See Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006); Vanisi v. State, 117 Nev. 330, 337-41, 344, 22 P.3d 1164, 1169-72, 1173-74 (2001).

As to Vanisi's challenge to the robbery aggravator, because McConnell has retroactive application, see Bejarano, 122 Nev. at 1078, 146 P.3d at 274, Vanisi established good cause to raise this claim in a post-conviction petition.[5] However, he failed to show prejudice.

Here, McConnell is implicated because Vanisi was charged with first-degree murder under three alternative theories—(1) the murder was a felony murder based on robbery; (2) the murder was willful, premeditated, and deliberate; or (3) the murder was perpetrated by lying in wait—and the jury verdict did not specify upon which theory it relied in finding Vanisi guilty of first-degree murder. See McConnell, 120 Nev. at 1069, 102 P.3d at 624 ("deem[ing] it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated"); see also Bejarano, 122 Nev. at 1079, 146 P.3d at 274 (McConnell "applies in cases where the defendant was charged with alternative theories of first-degree murder and a special verdict form failed to specify which theory or theories the jury relied upon to convict").

To uphold a death sentence after striking an invalid aggravating factor, this court must reweigh. Archanian, 122 Nev. at 1040, 145 P.3d at 1023. A McConnell error is harmless if, after reweighing, this court can conclude beyond a reasonable doubt that the jury would have found the defendant death eligible, and likewise conclude that the jury

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[5]To the extent that Vanisi claimed that his appellate counsel was ineffective for failing to raise this claim on direct appeal, he failed to demonstrate that counsel's performance was deficient because the legal basis for this claim was not available at the time his appeal was filed.

would have selected the death penalty absent the erroneous aggravating circumstance. See Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1240-41 (2008); Bejarano, 122 Nev. at 1082-83, 146 P.3d at 276-77; Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002).

Absent the invalid aggravator, two remain: (1) the murder was committed upon a peace officer engaged in the performance of his official duty and the defendant knew he was a peace officer and (2) the murder involved the mutilation of the victim. Of the three aggravators found by the jury, the invalid robbery aggravator was the least compelling. The two remaining aggravators are strong, and none of the mitigating evidence is particularly compelling. Accordingly, we conclude that it is beyond a reasonable doubt that, absent the robbery aggravator, the jury would still have found Vanisi death eligible and that the jury would have imposed a sentence of death. Therefore, Vanisi failed to show prejudice sufficient to overcome the procedural bars, and the district court did not err in denying this claim.

Ineffective assistance of trial counsel

In his petition, Vanisi claimed that his trial counsel were ineffective for (1) breaching the attorney-client relationship, (2) failing to present a defense or argue at closing, and (3) failing to investigate or consult with a mitigation specialist. Vanisi also claims that he was prejudiced by the cumulative impact of counsel's deficiencies.

To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To

establish prejudice, a defendant must show that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. Id. at 694.

Breach of attorney-client relationship

Vanisi argues that the district court erred by denying his claim that trial counsel were ineffective for breaching attorney-client confidentiality. Prior to trial, defense counsel filed a motion to withdraw and requested an ex-parte hearing on the motion. The trial court granted counsel's request and held a sealed proceeding in the courtroom without the presence of the State. During that hearing, defense counsel relayed confidential communications to the district court, including Vanisi's stated intention to perjure himself. Vanisi claimed that this disclosure was a breach of attorney-client confidentiality and amounted to ineffective assistance of counsel.

Vanisi failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The United States Supreme Court has specifically stated that an attorney's duty of confidentiality "does not extend to a client's announced plans to engage in future criminal conduct," including the intent to commit perjury. Nix v. Whiteside, 475 U.S. 157, 174 (1986). Accordingly, defense counsel's decision to attempt to withdraw and inform the court of Vanisi's intended perjury—in a sealed hearing outside the presence of the jury and the prosecution—was not unreasonable. Furthermore, because the disclosed information was not provided to the prosecution or the jury, Vanisi failed to demonstrate a reasonable probability that absent counsel's disclosure, the result of trial would have been different.

Failure to present a defense or argue in closing

Vanisi contends that the district court erred by denying his claim that trial counsel were ineffective for failing to present an adequate defense or argue on his behalf at the close of the guilt phase of trial. The district court concluded that trial counsel were not deficient because they did all they could in light of the circumstances and that Vanisi had failed to demonstrate prejudice. The district court did not err.

At an evidentiary hearing, Vanisi's attorneys testified that Vanisi told them that he had multiple defenses but refused to disclose them. As a result, they limited their efforts at trial in order to avoid undercutting Vanisi's undisclosed defenses. In light of Vanisi's refusal to cooperate with his counsel and his specific direction that they "sit on [their] hands" during trial, we conclude that counsel's actions did not fall below an objective standard of reasonableness.

Furthermore, even if counsel's performance was deficient, Vanisi failed to show prejudice because there was overwhelming evidence of his guilt, including: (1) his repeated statements that he intended to rob and kill a police officer, (2) the testimony of witnesses who were with him when he purchased the murder weapon, (3) the testimony of eyewitnesses who placed him at the scene, (4) the DNA and physical evidence linking him to the crime, and (5) his statements to family members admitting what he had done. Therefore, the district court did not err in denying this claim.

Failure to investigate or consult with a mitigation specialist

Vanisi contends that the district court erred in denying his claim that trial counsel were ineffective for failing to investigate the possible effects of substance abuse on his state of mind and for failing to

call a mitigation expert. Vanisi failed to show that counsel's performance was deficient or that he was prejudiced.

Vanisi did not present any significant additional mitigating evidence or demonstrate how a mitigation specialist could have added to the mitigating evidence. The testimony of attorney Richard Cornell that there might be a psychiatrist out there willing to testify that Vanisi was in a manic phase aggravated by drug use was purely speculative. Furthermore, it conflicted with the trial testimony of Vanisi's expert that there was no evidence that a violent manic episode occurred at the time of the crime or that Vanisi abused methamphetamines. Therefore, the district court did not err in denying this claim.

Cumulative error

Vanisi agues that the district court erred by denying his claim that, but for the collective failures of counsel, he would have been able to put on a meaningful defense. Other than claiming that someone else killed Sergeant Sullivan—which would have amounted to perjury—Vanisi did not identify what defenses he could have offered at trial. Because Vanisi failed to demonstrate that counsel performed deficiently or that he was prejudiced, the district court did not err by denying this claim.

Ineffective assistance of appellate counsel

Other than those addressed above, Vanisi failed to raise any specific claims that his appellate counsel was ineffective. Rather, in both his petition below and his briefs on appeal, he included a generic claim that "all other errors alleged herein which were not raised by appellate counsel should have been." This court has previously stated that we "will not accept such conclusory, catchall attempts to assert ineffective assistance of counsel." Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 523

(2001). Because Vanisi failed to provide specific argument that his appellate counsel was ineffective, we decline to consider this claim. See id.

Having reviewed all of Vanisi's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, C.J.

Hardesty, J.

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

cc: Hon. Connie J. Steinheimer, District Judge
Scott W. Edwards
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

Exhibit 46

Exhibit 46

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SIAOSI VANISI,

Appellant,

Case No. 50607

Death Penalty Case

vs.

THE STATE OF NEVADA,

Respondent.

_____/

PETITION FOR REHEARING

Appellant SIAOSI VANISI, by and through his attorneys, SCOTT W. EDWARDS and THOMAS L. QUALLS, petitions this Court for rehearing of its Order of Affirmance, filed April 20, 2010.

NRAP 40(2) grants this Court authority to consider rehearing in the following circumstances:

> (i) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
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> (ii) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

NRAP 40(2).

In the instant case, though Vanisi disagrees with the Court's analysis, application of facts to law, and final rulings on many issues in its Order of Affirmance, rehearing is appropriate under NRAP 40(2), regarding the following:

(1) Mr. Vanisi requests rehearing on the ground that this Court's order misapprehended the substance of his claim that appellate counsel were ineffective in failing to raise the due process claims which were factually and legally presented in extensive detail in his Supplemental Points and Authorities to the district court, and

which were reiterated in his Opening Brief to this Court.

"Appeals from a district court to the Supreme Court are governed by the Nevada Rules of Appellate Procedure" except to the extent that they are "inconsistent or in conflict with the procedure and practice provided by the applicable statute . . . . applications for extraordinary writs in the Supreme Court are government by the Civil Rules of Appellate Procedure." Nev. R. Civ. P. 81(a). Also, Rule 250 (7)(c) of the Nevada Supreme Court Rules indicate that "[b]riefing shall proceed in accordance with NRAP 28 through 32, inclusive."

Rule 28(a)(C)(8) of the Nevada Rules of Appellate Procedure requires that the argument must contain: "(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)."

Rule 21(3) of the Nevada Rules of Appellate Procedure requires that the contents of a petition must state "'the relief sought, the issues presented, the facts necessary to understand the issue presented by the petition, and the reasons why the writ should issue, including points and legal authorities."

In addition to the first claim of error regarding Mr. Vanisi's incompetency to proceed with habeas proceedings, pursuant to Rohan ex rel Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003), Mr. Vanisi's opening brief raised twenty-one points of error for which he provided detailed specific factual allegations and were supported by points of constitutional, statutory, and case authority and allegations of prejudice. These claims of error contained specific references to the appendix which contained a copy of the petition and supplemental petition filed in the district court, multiple transcripts of proceedings, motions, and various evidentiary documents. In his twenty-second claim of error, Mr. Vanisi specifically alleged that appellate counsel had been ineffective for failing to raise on direct appeal the prior twenty-one claims of error:

> All claims of error alleged herein [Opening Brief at 11-43] were apparent on the face of the record and therefore could have been raised by appellate counsel. Appellate Counsel only raised three: (1) the Faretta error, (2) the Reasonable Doubt instruction was impermissible; and (3) that the Death Penalty was excessive and was unfairly influenced by passion and prejudice. All other errors alleged herein which were not raised by appellate counsel should have been. Jones v. State, 110 Nev. 730, 877 P.2d 1052 (Nev. 1994).

Opening Brief at 76.

In his Reply Brief, Mr. Vanisi went on to argue that:

> It is a reasonable probability that a more favorable result would have been obtained if all of these claims had been properly asserted and if the standard of prejudice of Chapman v. California, 386 U.S. 18 (1967), requiring the state to show beyond a reasonable doubt that any error was harmless, had been applied. Further, the petition alleges that counsel had no tactical or strategic basis for failing to raise these claims. (JA I, 164-65).

Reply Brief at 43.

Mr. Vanisi's Opening Brief clearly sets forth the factual issues, law, constitutional errors and prejudice which he plainly incorporated by reference in Claim Twenty-Two of his Opening and Reply briefs. The proceedings at issue were the first post-conviction proceedings (not successive, nor proceedings pursuant to Crump v. Warden) and those proceedings (and this appeal from the denial of the first habeas petition) were the first opportunity for instant counsel to raise a claim of the ineffective assistance of appellate counsel.

Similarly, Mr. Vanisi utilized the same format in his Supplemental Points and Authorities to Petition for Writ of Habeas Corpus (Post-Conviction). In Claims One through Twenty-One, he provided points of error for which he provided detailed specific factual allegations of errors supported by points of constitutional, statutory and case authority and allegations of prejudice. In Claim Twenty-Two, he alleged that appellate counsel only raised the previously referenced three claims of errors, and went on to state that "[a]ll other errors alleged herein which were not raised by appellate counsel should have been. [citation omitted] All legal arguments from all Claims set forth above, are incorporated by reference as if set forth verbatim herein." Supp. Points and Authorities at 125.

Rule 10(c) of the Nevada Rules of Civil Procedure states that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes." (Emphasis added).

Rule 8(a) of the Nevada Rules of Civil Procedure requires the pleading to contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the petitioner seeks. The pleading must set forth sufficient facts to establish all of the necessary elements of a claim for relief so that the adverse party has adequate notice of the nature of the claim and relief sought. Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). Courts must liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party. Id. Pleadings of conclusions, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim. Crucil v. Carson City, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979).

Mr. Vanisi, therefore, clearly incorporated by reference his claims that appellate counsel was ineffective for failing to raise meritorious due process claims regarding: (1) the denial of consular contact under the Vienna Convention; (2) the denial of trial counsel's motions to withdraw; (3) that Mr. Vanisi was harmed by his counsel's conflict of interest; (4) that Nevada's Death Penalty scheme allows for a death-qualified jury; (5) that Nevada's death penalty scheme operates in an arbitrary and capricious manner; (6) that the death penalty violates the Eighth Amendment and the International Covenant on Civil and Human rights; (7) the inherent conflict posed by popularly elected judges; (8) that Nevada's lethal injection violates the protections against cruel and unusual punishment; (9) the risk that innocent persons will be executed; (10) that rehabilitation outweighs the government's interest in retribution; (11) that the death penalty presents a wanton, arbitrary infliction of pain; (12) that Nevada's death penalty scheme allows district attorneys to select defendants arbitrarily, inconsistently and discriminatorily; (13) that the sentence was imposed under the influence of arbitrary factors; and (14) that Mr.

Vanisi was unconstitutionally statutorily precluded from entering an insanity plea.

The district court ruled on the merits that appellate counsel was not ineffective for failing to raise: (1) the denial of consular contact under the Vienna Convention, Judgment at 3; (2) the denial of trial counsel's motions to withdraw, Judgment at 7; (3) that Mr. Vanisi was harmed by his counsel's conflict of interest, Judgment at 7; (4) that Nevada's death penalty scheme allows for a death-qualified jury, Judgment at 11; (5) that Nevada's death penalty scheme operates in an arbitrary and capricious manner, Judgment at 8; (6) that the death penalty violates the Eighth amendment and the International Covenant on Civil and Human rights, Judgment at 9; (7) the inherent conflict posed by popularly elected judges, Judgment at 10; (8) that Nevada's lethal injection violates the protections against cruel and unusual punishment, Judgment at 10; (9) the risk that innocent persons will be executed, Judgment at 11; (10) that rehabilitation outweighs the government's interest in retribution, Judgment at 11; (11) that the death penalty presents a wanton, arbitrary infliction of pain, Judgment at 11; (12) that Nevada's death penalty scheme allows district attorneys to select defendants arbitrarily, inconsistently and discriminatorily, Judgment at 11; (13) that the sentence was imposed under the influence of arbitrary factors, Judgment at 11; and (14) that Mr. Vanisi was unconstitutionally statutorily precluded from entering an insanity plea, Judgment at 12.

The district court, thus, ruled upon Mr. Vanisi's claim Twenty-Two that appellate counsel was ineffective for failing to raise the properly detailed claims, not by procedural bar due to a lack of specificity, but by finding that "appellate counsel made reasonable tactical decisions concerning the issues to raise, and that none of the various potential issues were reasonably likely to succeed." Judgment at 13.

This Court's ruling that "[a]ll of these [ineffective assistance of appellate] claims could have been raised on direct appeal and are procedurally barred absent a showing of good cause and actual prejudice," in combination with this Court's ruling that "[o]ther than those addressed above, Vanisi failed to raise any specific claims that his appellate counsel was ineffective" is belied by both the Petition, Supplemental Petition and points

and authorities, and the Opening and Reply briefs. Vanisi v. State, No. 20607 at 10 (Nev. 4/20/2010). Moreover, these two findings appear to be in conflict with one another. Especially if one considers that ineffective assistance (for failure to timely or effectively raise a claim or claims in this matter) has been found to meet the cause and prejudice requirement. Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct 2639, 2645 (1986); Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).

Further, since this Court's ruling in Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001), this Court has repeatedly reached the merits of ineffective assistance of counsel claims which incorporated by reference due process claims pled in other parts of petitions and briefs. It is an Equal Protection violation for this Court to deny Mr. Vanisi the same type of review that this Court has been applying to other Petitioners since the Evans ruling.

It is notable that even in Mr. Vanisi's direct appeal, this Court *sua sponte* addressed an issue that had not been raised in the district court or in either parties' briefing regarding the defective jury instruction given about mutilation. Vanisi v. State, 117 Nev. 330, 343, 22 P.3d 1164, 1173 (2001) ("Although Vanisi does not specifically challenge the jury instruction on appeal, we note that it included some language no longer mandated by the statutory aggravating circumstance. The jury was instructed: 'The term 'mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect, or other serious and depraved physical abuse beyond the act of killing itself. This instruction is largely the same as the one we have approved. However, the emphasized language appears to come from an instruction based on a former version of NRS 200.033(8), which referred to 'depravity of mind' as well as torture and mutilation. In 1995, the Legislature amended the statute to delete 'depravity of mind.' Use of the instruction here was not prejudicial since the State did not argue depravity of mind and there was compelling evidence of mutilation, as discussed above. We take this opportunity, however, to clarify that language referring to 'other serious and depraved physical abuse' should no longer be included in a definition of mutilation.").

Finally, this Court has set the limit for Opening Briefs at 80 pages, and has repeatedly denied requests to extend the page limit. Hernandez v. State, 117 Nev. 463, 465, 24 P.3d 767, 768 (2001). This Court, in defending its page limit requirements has said, "[a] reasonable page limit does not prevent an appellant from presenting arguments, but merely limits the manner in which he can present them." Hernandez v. State, 118 Nev. 513, 533, 50 P.3d 1100, 1114 (2002). To require Mr. Vanisi to restate every single stand alone claim in the section where he addresses the ineffective assistance of direct appeal counsel would severely impair Mr. Vanisi's ability to present his meritorious claims to this Court. The "incorporation by reference" procedure enables an appellant to give fair notice of the facts, arguments and prejudice that he is arguing and comply with this Court's page limit restrictions.

Accordingly, rehearing must be granted and this Court accept and review these claims on their merits.

(2) This Court's decision to re-weigh and find harmless the sentence of death, in the face of the acknowledged McConnell error, misapplies or fails to consider the Nevada statutory scheme for capital cases and the federal constitution, including the rights to due process and equal protection. The McConnell error resulted in the jury considering an aggravating factor that was improperly applied in Mr. Vanisi's case. This error affected the assessment of death-eligibility and the ultimate selection of the sentence. *See, e.g.*, Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450 (2002) (weighing of aggravation against mitigation element of death eligibility). Further, the jury has the complete discretion to decline to impose a death sentence, *e.g.* Bennett v. State, 111 Nev. 1099, 1110, 902 P.3d 676 (1995), and impermissible aggravating factor may have swayed at lest one juror not to exercise mercy in this case.

Since there is no case too egregious that the imposition of a death sentence is a foregone conclusion, such an assumption – under any circumstances – would be contrary to the premises of individualized sentence under the Eighth Amendment, *e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978); Sumner v. Shuman, 483 U.S. 66, 75-77 (1987), and to the

Supreme Court's own jurisprudence. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 395-397 (2000) (failure to present mitigation prejudicial, where aggravating evidence included extensive criminal history, including killing with mattock that was capital robbery-murder offense; previous convictions for armed robbery, burglary and grand larceny; two additional auto thefts; two "separate violent assaults" after capital offense, including one "brutal" assault that left the victim in a "vegetative state;" an arson while in jail awaiting capital trial; and expert testimony of "high probability" that defendant would continue to pose threat to society), Caro v. Woodford, 280 F.3d 1247, 1257-1258 (9th Cir. 2002) (aggravation included killing two teenagers and assault with multiple gunshot wounds on the same night, and previous kidnapping and sexual assaults). Simply put, there is no such thing as a "natural" death penalty case, or one in which death is a foregone conclusion.

In State v. Haberstroh, 69 P.3d at 683-84, this Court held that it could not find the inclusion of an invalid aggravating factor in the sentencing calculus harmless beyond a reasonable doubt, even though four valid aggravating factors remained. *See also* Browning v. State, 120 Nev. 347, 91 P.3d 39, 51-52 (2004) (invalid aggravating factor not harmless despite existence of four other valid aggravators). The same error in Vanisi's case cannot then be found harmless beyond a reasonable doubt. This Court continues to misapply or fail to consider both the subjective nature of the Nevada statutory scheme and the constitutional requirements at issue. In short, it is a legal impossibility for this Court, upon review of a cold record, to know what was in the hearts and minds of each of the jurors in this case. Accordingly, pursuant to the acknowledged McConnell error, the sentence of death must be vacated.

Conclusion.

This Petition for Rehearing is based on grounds that this Court has either overlooked, misapplied, erroneously omitted, or failed to consider a number of facts and authorities presented in the appeal in this matter, including, the nature and factual grounds of the claims presented, as well as the legal authorities of the United States

Supreme Court, this Court and the Nevada Statutes, upon which those claims were based.

WHEREFORE, for all the reasons set forth herein, this Court must rehear these matters pursuant to NRAP 40 (2).

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned hereby affirms that this document does not contain the social security number of any person.

RESPECTFULLY SUBMITTED this 10th day of May, 2010.

/s/ Thomas L. Qualls

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Attorney for Appellant,
SIAOSI VANISI

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFR 9, I certify that I am an employee of THOMAS L. QUALLS, ESQ, that I am over the age of 18 years and not a party to the within action. I am familiar with the practice of the Law Offices of Thomas L. Qualls, Esq., for the service of documents via facsimile, U.S. mail and electronic mail and that, in accordance with the standard practice, I caused a true and correct copy of the foregoing ***PETITION FOR REHEARING*** to be served on the parties below via the following method(s):

__X__ Via the Nevada Supreme Court ECF system to the following:

_____ Via Hand Delivery

_____ Via Facsimile

_____ Via Overnight Delivery

__X__ Placing the foregoing document(s) in a sealed envelope with postage thereon fully prepaid in the United States Mail, at Reno, Nevada, addressed as follows:

Washoe County District Attorneys Office
Appellate Division
P.O. Box 30083
One South Sierra Street, 4th Floor
Reno, Nevada 89520

DATED this 10th day of May, 2010.

/s/ Michelle D. Harris
Michelle D. Harris

CODE: 3220

ORIGINAL

FILED

DEC 27 2004

RONALD A. LONGTIN, JR., CLERK
By: DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

VS.

WARDEN, ELY STATE PRISON, AND

THE STATE OF NEVADA,

Respondent.

Case No. CR98P-0516

Dept. No. 4

ORDER

On November 22, 2004 this Court heard argument and received evidence upon the Petitioner's motion to stay post-conviction proceedings and have the Petitioner's competence evaluated. Having duly considered the matter, this Court finds and orders that the Petitioner should be evaluated regarding his present competency to maintain and participate in a capital post-conviction habeas proceeding. Specifically the Petitioner's mental competence to assist and communicate with counsel, understand and knowingly participate in the habeas proceeding as a litigant and witness, should be evaluated by mental health experts. Further, the Court needs an evaluation of the Petitioner's understanding of the difference between the truth and a lie and the consequences of lying as a witness in court. Accordingly, it is hereby ordered that pursuant to NRS 178.415, two psychiatrists, two psychologists, or one psychiatrist and one psychologist, are to examine the Petitioner in the Nevada prison facility and report back to this Court with any and all findings relative to the Petitioner's present mental competence. The experts appointed

pursuant to this Order should be given access to review all medical records of the Petitioner held by the Department of Corrections. Further, the appointed experts shall complete their respective evaluations and send their written reports to this Court and respective counsel no later than January 26, 2005. On January 27, 2005, this Court shall receive the expert reports in open court, consider all evidence and argument and make a determination of the Petitioner's competence or incompetence. Once the Court has made a competency determination, it will then rule upon the request for a stay of post-conviction habeas proceedings. Good cause appearing therefore, it is hereby ordered that Dr. Thomas Bittker and Dr. Alfredo Amezaga, Jr. are appointed to conduct a psychiatric/psychological evaluation of the Petitioner at public expense. Further, the appointed experts shall complete their respective evaluations and send their written reports to this Court and respective counsel no later than January 26, 2005 and appear at the hearing on January 27, 2005 at 2 pm and testify to their findings if requested by the Court or one of the parties.

DATED this 27th day of December, 2004.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that I am an employee of JUDGE CONNIE STEINHEIMER; that on the 27th day of December, 2004, I deposited in the county mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the order for psychiatric/psychological evaluation, addressed to:

Washoe County District Attorney, Appellate Division
Via: Interoffice mail

Scott Edwards, Esq.
1030 Holcomb Avenue
Reno NV 89502

Thomas Qualls, Esq.
443 Marsh Avenue
Reno NV 89509

Dr. Thomas Bittker
80 Continental Drive #200
Reno NV 89509

Dr. Alfredo Amezaga, Jr.
18124 Wedge Parkway #538
Reno NV 89511

S. Schueller

Exhibit 48

Exhibit 48

Svanisi2JDC06110

CODE: 3220

ORIGINAL

FILED

DEC 27 2004

RONALD A. LONGTIN, JR., CLERK

By: DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

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S. Schueller

Exhibit 49

Exhibit 49

Thomas E. Bittker, M.D., Ltd.

Diplomate, American Board of Psychiatry and Neurology
Fellow, American Psychiatric Association
Diplomate in Forensic Psychiatry, American Board of Psychiatry and Neurology

80 Continental Drive, Suite 200
Reno, NV 89509
(775) 329-4284

FORENSIC PSYCHIATRIC ASSESSMENT

Re: VANISI, SIAOSI
BAC No.: 63376
Date: 01/14/05

REASON FOR ASSESSMENT: To evaluate Siaosi Vanisi regarding his present competence to maintain and participate in the capital post-conviction habeas proceedings. Specifically, the assessment of competence should address the ability of Mr. Vanisi to assist and communicate with counsel, understand and knowingly participate in the habeas proceedings as a litigant and witness, and understand the difference between the truth and a lie, and the consequence of lying as a witness in the court.

SOURCES OF INFORMATION:

1) Supreme Court opinion of May 17, 2001 regarding the appeal of Mr. Vanisi's first conviction of first degree murder with use of a deadly weapon, three counts of robbery with the use of a deadly weapon, and one count of grand larceny.
2) Interview with Scott Edwards, Esq., and Thomas Qualls, Esq., co-counsels for Mr. Vanisi, on Friday, 1/14/05.
3) Review of the medical records provided to me by the infirmary at the Nevada State Penitentiary.
4) Interview with Mr. Vanisi on Friday, 1/14/05.

BACKGROUND INFORMATION: Mr. Vanisi is a 34 year old, Tongan man (date of birth, 6/26/70), who was convicted of the murder of a police officer, Sergeant George Sullivan. The murder occurred on 6/13/98. Following the murder, Mr. Vanisi also was involved in three counts of robbery and one count of grand larceny. His trial resulted in a jury verdict of conviction of one count of first degree murder with the use of a deadly weapon, three counts of robbery with the use of a deadly weapon, and one count of grand larceny.

His attorneys are in the process of appealing the death penalty and have requested, with the endorsement of the court, a competency assessment.

SUMMARY OF REVIEW OF MEDICAL INFORMATION: The chart material I reviewed referenced only the medical care of Mr. Vanisi while housed at the Nevada State Prison. Note, for much of his incarceration, Mr. Vanisi has been housed in Ely, Nevada.

The chart review indicates the following diagnoses:
1) Bipolar Disorder.
2) Polysubstance Dependence.
3) Antisocial Personality Disorder.

Mr. Vanisi is currently being treated with Depakote 500 mg b.i.d., Haldol decanoate 50 mg IM every two weeks, and Cogentin 1 mg b.i.d.

Review of laboratory studies performed on 11/8/04 indicate the presence of hyperlipidemia, an elevated red blood cell count, elevated hemoglobin, and an elevated hematocrit, suggestive of a diagnosis of emerging polycythemia. In addition, Mr. Vanisi had a valproic acid level of 66 (low therapeutic range).

INTERVIEW WITH CO-COUNSELS: Co-counsels reported that at Mr. Vanisi's hearing on 11/22/04, he was markedly guarded, displayed blunted affect and appeared to be heavily sedated. In addition, they reported their concerns about Mr. Vanisi's bizarre behavior while incarcerated including draping himself in a cape, remaining outdoors for 24 hours, and requiring multiple disciplinary interventions. They stated that Mr. Vanisi was not forthcoming in dialogue with them and consistently maintained a high degree of suspicion of them. Specifically, they stated that Mr. Vanisi never discussed with them the circumstances preceding the instant offenses. Both co-counsels concluded that they had great difficulty representing Mr. Vanisi coincident to his lack of disclosure about key elements in the case.

INTERVIEW WITH MR. VANISI: My interview with Mr. Vanisi occurred between 9:45 a.m. and 11:45 a.m., at the Nevada State Penitentiary.

Mr. Vanisi and I were in an interview room alone, with a guard waiting outside the interview room. Mr. Vanisi was shackled at the wrists and ankles. He greeted me appropriately and shook my hand when offered.

Note, according to the medical records, Mr. Vanisi had not yet received his biweekly dosage of 50 mg of Haldol on the day of my interview with him. The Haldol was to be administered following my interview with him.

After I introduced myself to Mr. Vanisi, I advised him that the product of our interview would not be confidential and that it would be available to the court.

Mr. Vanisi was extremely guarded during the early parts of our interview. His affect was blunted. He offered a blank stare when asked questions and frequently would respond by stating "I don't

know" or "I don't want to talk about that." He was most guarded when discussing his background, the circumstances prior to the instant offenses, and his divorce from his wife of two years.

Mr. Vanisi did offer the following elements in his history:

He moved from Tonga to San Francisco at approximately age six. His parents were divorced sometime in his childhood.

He described himself as an average student, earning Ds and Cs in high school. He played football and earned a letter as an offensive and defensive lineman. He aspired to continue his football career, but stated he was not good enough to advance his ambitions.

He acknowledged working in a variety of jobs and stated that his favorite job was to be working as a lighting technician.

MEDICAL HISTORY: Mr. Vanisi stated that he never suffered from a seizure disorder. His principal encounters with physicians occurred following incarceration.

He acknowledged taking Depakote, Haldol, and Cogentin. He acknowledged significant ambivalence about taking these medications. He stated that the medicines, on the one hand, helped control his bizarre behavior and helped him conform, but on the other hand they did not permit him to be himself and, in particular, on the medicines, he believed that he was not spontaneous, he could not be creative nor could he concentrate.

He made reference to frequent natural highs, stating that during these natural highs he would sing, be energetic, creative, "vivacious," spontaneous, and extremely intuitive.

He also acknowledged periods of lows marked by hypersomnia and depressed mood. He admitted to feeling chronically suicidal and stated he has felt suicidal for years, but he has never acted out in a suicidal way.

He denied experiencing auditory or visual hallucinations, but did admit to feeling frequently depersonalized, having nihilistic delusions (nothing really matters), and being specifically uncaring about whether or not he lived or died.

SUBSTANCE ABUSE HISTORY: Mr. Vanisi admitted to use of alcohol, commencing at approximately age 18, and acknowledged drinking to intoxication on the average of once a week since that time, until his arrest.

Similarly, he used marijuana at least on a weekly basis. He denied use of any other street drugs.

PRIOR PSYCHIATRIC HISTORY: Mr. Vanisi denied any involvement with psychiatrists or mental health professionals prior to his arrest.

PSYCHIATRIC REVIEW OF SYSTEMS: Mr. Vanisi admits to a longstanding history of fluctuating moods. He stated it was not until he reached adulthood that he realized the significance of this and elaborated that he had been struggling with suicidal ideation for years.

He denied ever experiencing perceptual distortions, but did admit to being bothered by thoughts inside of his head.

He made several references to God during the interview, stating that he was not sure that God existed, but on the other hand felt that God pervaded everything in his life.

His attitude toward himself, toward life and the proceedings that he is about to confront was marked by ambivalence. On the one hand, he stated that he wished to die, but on the other hand he stated he was not sure death made any difference and that in the afterlife he might be confronted with the same dilemmas that he is experiencing currently without the power to act.

"It's like you have this craving to smoke or this craving to have sex, but you can't do anything about it because you don't have a body anymore."

PRIOR LEGAL INVOLVEMENT: Mr. Vanisi admitted to moving violations, but no felony convictions prior to his arrest.

DEVELOPMENTAL HISTORY: Mr. Vanisi specifically denied any history of childhood abuse victimization and acknowledged no significant major losses in his life outside of his second marriage.

APPELLANT'S REPORT OF MOTIVATION AT THE TIME OF THE INSTANT OFFENSE: Mr. Vanisi was particularly guarded about his motivation, his thinking and his behavior in the days prior to the instant offense. He would acknowledge only that he did resent police coincident to an altercation with a police office in a bar in the week prior to his move to Reno, Nevada.

COMPETENCY, SPECIFIC EXAMINATION: Mr. Vanisi was aware of the charges of which he has been convicted. He is also aware that he is confronting the death penalty. He is ambivalent about accepting the death penalty.

He alleges that he is "competent" to stand trial. He reported to me that he was forthcoming with his defense counsels, but that he could not trust me because he knew that my report would go to the court. On the other hand, when I interviewed defense counsels, they stated that he was as guarded with them as he was with me during my interview. He only a vague awareness of the expectations for his behavior in the courtroom and could not specifically respond as to what he would say or do if somebody told a lie about him in court. Furthermore, his nihilistic delusions penetrated his awareness of the distinction between the truth and a lie. When asked about the importance of the distinction, Mr. Vanisi responded merely that a lie was perjury, but could not elaborate further and did not seem to fully capture the significance of being transparent with his defense counsels. On a number of occasions, I attempted to inquire about the nature of his inner life and on each occasion, he would response either "I can't talk about that" or "I don't want to talk about that" or "I don't know." He had limited insight as to what apparently, through other observers, appeared to be the bizarre motivation associated with the instant offenses for which he has been convicted.

MENTAL STATUS EXAMINATION: The appellant's demeanor during my examination was bifurcated.

Initially, he was guarded, appeared quite distrusting, and his duration of utterance was quite brief. In an effort to encourage Mr. Vanisi to be more forthcoming, I responded to his guardedness by asking him to leave and then, as he was about to leave, call him back to the interview room for "a few more questions." At the second point of the interview, Mr. Vanisi became more transparent and with his increasing transparency, the fluidity of his speech grew, as did his emotional lability. During the second part of the interview, his speech was pressured, excited, and displayed flight of ideas. He was able to disclose greater concerns about his medications, feeling not himself, and feeling particularly disconnected from himself while on the medicines. On the other hand, he had sufficient insight to appreciate that the medications were successful in inhibiting bizarre behavior. Although, initially stating that he had never seen me before, in the second part of the interview he did acknowledge recall from my previous examination and specifically remembered that I considered him to be malingering at that time (note, Mr. Vanisi attempted to feign psychotic mutism during my initial examination). He confessed that he had been given bad advice by the amateur attorneys on his cell block prior to my previous interview. During the second part of our examination, he made frequent references to his intuitive abilities, his special philosophy about life and the after life, and how he felt both disconnected with God and that God pervaded

every element of his life.

His affect during the second part of the interview was expansive and he acknowledged feeling good. In spite of this positive acknowledgment, he also acknowledged ongoing thoughts of death and his intent to die.

As for the specific cognitive elements in the mental status exam, Mr. Vanisi was oriented to time, place, person and circumstance. He could recall the details of his previous meal. He declined to perform arithmetic exercises, but was capable of spelling world backwards, and had a full awareness of current events. He was able to correctly identify the similarity between a grape and a banana. He could not distinguish misery from poverty, but proverb interpretation was excellent. He specifically interpreted the proverb "people in glass houses" as a proverb reflecting the proscription against judging others and the proverb "the tongue is the enemy of the neck" as reflecting the principle that talking too much could get you into difficulty (at this point in the interview, he made reference Minnesota Viking wide-receiver, Randy Moss, and some of his most recent public disclosures).

His recent and remote memory were intact. His social judgment was compromised by his nihilistic delusional system and his narcissistic sense of entitlement.

He had sufficient insight to appreciate his need for medication, but also acknowledged that he felt that the current medication was depriving him of his identity.

FORMULATION: Mr. Vanisi presents with a complicated history.

Unfortunately, I do not currently have access to prior psychiatric assessments, however, in reading the abstraction of Dr. Thienhaus prior testimony, I note that Dr. Thienhaus affirmed that Mr. Vanisi suffered Bipolar Disorder, but it was not extreme or severe.

Mr. Vanisi's current presentation is consistent with a diagnosis of Bipolar Disorder, mixed type, with psychosis. The psychotic manifestations are reflected in his bizarre behavior, his nihilistic delusions, his narcissistic entitlement, and his marked ambivalence about issues such as life, death, and the nature of reality.

Defense counsels report that at the time of the trial, he was nonspontaneous, showed blunted affect, markedly sedated. This is most likely a consequence of Mr. Vanisi receiving a dose of 50 mg of Haldol two days prior to his court presentation. In contrast,

his interview with me occurred 14 days following the Haldol injection. He was more spontaneous, forthcoming, and as his rapport with me improved, he was able to disclose a greater range of affect and more florid manic symptoms.

Although he has a reasonable level of sophistication about the trial process, his guardedness, manic entitlement and paranoia inhibit his ability to cooperate with counsel.

Mr. Vanisi's comments regarding the medication are most revealing. His reports about the effects of haloperidol are consistent with my clinical experience with the agent, as well as reports in the literature. Specifically, haloperidol will contain the positive symptoms of psychosis, but leaves Mr. Vanisi feeling numb and lacking spontaneity.

DIAGNOSES:

AXIS I:
1) Bipolar Disorder, Mixed, With Psychosis, 296.64
2) Alcohol Abuse, By History, 305.00
3) Cannabis Abuse, By History, 305.20

AXIS II:

AXIS III: No diagnoses immediately relevant to psychiatric presentation, however, evidence of hyperlipidemia and polycythemia.

AXIS IV: Incarcerated, confronting death penalty, isolation from family.

AXIS V: 30/30, behavior is considerably influenced by delusions and serious impairment in judgment.

OPINION REGARDING COMPETENCY: *Although possessing a rudimentary understanding of the information required in the court, in the appeal process, and aware of both the charges that he has been convicted of and the consequent penalties, Mr. Vanisi does not currently have the requisite emotional stability to permit him to cooperate with counsel or to understand fully the distinction between truth and lying. This latter deficit emerges directly as a consequence of his incompletely treated psychotic thinking disorder.*

RECOMMENDATIONS: Mr. Vanisi's current medications are not ideally suited to assist him in reestablishing competency. Although the medications serve well to contain Mr. Vanisi's aberrant behavior,

the cognitive impact of his Bipolar Disorder and the side-effects of medicines significantly compromise his ability to cooperate with counsel. I would recommend the court's consideration of a modification in Mr. Vanisi's medication regimen, to include the following:

1) A trial of increasing the Depakote to mid to high therapeutic levels, e.g., 1500 to 2000 mg per day. Note, we may also have an unrealistically high valproic acid level, given that Mr. Vanisi is currently taking Depakote on a b.i.d. basis. It is possible that his most recent laboratory study in November occurred immediately following the administration of Depakote (ideally, the Depakote should be administered as an evening dose).
2) The variations in Mr. Vanisi's mental status may be a consequence of the periodicity of his haloperidol administration. Assuming his ability to cooperate with the administration of medications, I would suggest discontinuing haloperidol and substituting one of several newer generation antipsychotic agents. In particular, ziprasidone (Geodon) in dosages of 160 to 240 mg per day (dosage adjusted coincident to Mr. Vanisi's size and metabolism) or aripiprazole in dosages of 15 to 30 mg per day would be warranted. Both of these agents have an advantage in that they are less likely to compromise Mr. Vanisi's health, particularly his hyperlipidemia and his obesity.

After a 90 day trial of the above regimen, Mr. Vanisi would warrant another evaluation regarding competency.

Thomas E. Bittker, MD
TEB:accu\ctc
pc: Scott Edwards, Esq.
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Exhibit 50

Exhibit 50

ama SM

A.M. Amézaga, Jr., Ph.D.

Nevada Licensed Psychologist - PY0327
California Licensed Psychologist - PSY14696
Nevada Licensed Alcohol & Drug Counselor (LADC) - No. 1431
Certified by the APA College of Professional Psychology in the Treatment of Alcohol & Other Psychoactive Substances - No. AD003460
Credentialed by the National Register of Health Service Providers in Psychology - No. 44207

February 15, 2005

Second Judicial District Court
Washoe County
Honorable Connie J. Steinheimer
District Judge
Department Four
75 Court Street
Reno, NV 89520

Re: Psychological Evaluation: Competency to Proceed

Defendant: **Siaosi (NMI) Vanisi**
Case #: CR98P-0516 **Evaluation Date:** 02.03.2005
DOB: **Report Date:** 02.15.2005

Judge Steinheimer:

At the request of the Court, I examined **Siaosi Vanisi** on the above listed date at the Nevada State Prison (NSP) in Carson City, Nevada. The purpose of the evaluation was to determine his competency to proceed with trial.

Referral History

By order of the Court, arrangements were first made to conduct the evaluation on January 20, 2005. As was previously arranged, I arrived at the NSP on this date to conduct the examination. However, Mr. Vanisi chose not to cooperate with the examination by refusing to exit his cell and participate with the assessment process. Given his refusal, he was provided by correctional staff with Nevada Department of Corrections Form Number NDOP 2523 ("*Release of Liability for Refusal of Medical Treatment.*") Mr. Vanisi refused to sign this release. Given his refusal to endorse the document, the form was signed by the correctional officers who had presented it to him with a written entry made on the form noting his refusal to sign (see attachment #1).

In the afternoon hours of January 20, 2005, I advised the Court via fax of Mr. Vanisi's refusal to participate with the evaluation. On or about January 24, 2005, I received a phone call from Tom Qualls, attorney for the defendant, who informed me that his client, Siaosi Vanisi, was now willing to cooperate with the evaluation. The evaluation was rescheduled and completed on February 3, 2005. Overall, Mr. Vanisi was cooperative and compliant with the interview process and I believe the information to be sufficient to offer an opinion.

Voice/Fax (Bilingüe): 775/853.8993 & 866/262.7431
E-mail: amezaga_am@sbcglobal.net // www.askapsych.com
Operations: 18124 Wedge Parkway - Suite 538 - Reno, Nevada 89511-8134 - USA/EUA

Dusky Standard

The U.S. Supreme Court articulated the *Dusky* standard for competency in a single sentence: "The test must be whether he has sufficient present ability (emphasis mine) to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him" (*Dusky v. United States, 1960*).

Efforts to deconstruct the Dusky standard have resulted in several competing models, the most encompassing makes operational each component of *Dusky* as:

(a) factual understanding of the courtroom proceedings
(b) rational understanding of the courtroom proceedings
(c) rational ability to consult with counsel about his defense

Overall, factual understanding involves the simple recall of repeated or common knowledge information within the context of a courtroom proceeding such as the duties and responsibilities of the various participants of the court. Rational abilities involve a much more complex cognitive or thinking process such as abstraction, deduction abilities, reasoning and problem solving skills. The assessment of both factual and rational abilities must be made as part of any valid determination of competency to proceed.

In addition, given the nature of the referral, the issue of feigning psychiatric symptoms must also be considered as part of this evaluation.[1] Malingering or the feigning of mental health symptoms occurs in psycho-legal situations with sufficient frequency to warrant consideration. A number of studies have concluded that the demonstration or exaggeration of psychiatric symptoms routinely occurs in 20% to 30% or more of forensic examinations conducted for personal injury cases and in at least 15% to 20% of examinations conducted for criminal matters (*Evaluation of Competency to Stand Trial-Revised: Professional Manual, 2004*). The prevalence of such behavior points to the need for the objective assessment of feigning or of the misrepresentation of symptoms that is not exclusively or primarily dependent on subjective clinical judgment or clinical opinion even if the clinician has had years of professional experience or significant contact with a given clinical population.

The decision about any psycho-legal issue, such as competency to proceed, should reflect a convergence of evidence from a variety of sources including direct contact, relevant history, clinical judgment and the results of objective measures of assessment, including validated measures of feigning or the misrepresentation of abilities. Apart from the use of such objective measures of assessment, one is dependent on the exclusive use of oftentimes unreliable subjective clinical judgment as well as the "good faith" intentions of the test taker as the primary means for arriving at an accurate, reliable conclusion.

[1] Malingering is defined in the Text Revision of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR; American Psychiatric Association, 2000) as the "Intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives " (p. 739).

Report Conclusions
1. Mr. Vanisi has a factual understanding of courtroom proceedings
2. His rational ability to assist his attorney with his defense is at most mildly impaired
3. His rational understanding of the courtroom proceedings is not impaired

Tests Administered
1. Clinical Interview and Mental Status Examination
2. Evaluation of Competency to Stand Trial-Revised (ECST-R)
3. Validity Indicator Profile-Nonverbal Subtest (VIP)

Apart from the possibility of a developmental disability such as a mental retardation, tests of intelligence are irrelevant to the question of competency to proceed. In like manner, measures of personality or personality style (e.g., MMPI, etc.) are also irrelevant to the ultimate question.

Clinical Interview and Mental Status Examination
Mr. Vanisi was escorted to the interview room by correctional staff. He wore clean, navy-blue sweat pants and a loose fitting white t-shirt. He was washed, neatly groomed and shaven. He was handcuffed at his wrists and ankles. He stated no discomfort in being handcuffed ("No problem...") He sat in a chair across from a small size interview table. Throughout the interview, he postured himself in his chair at a right angle from the table so as to avoid direct eye contact. Approximately two hours was spent in one-to-one contact with Mr. Vanisi as part of this evaluation.

Overall, he was guarded but cooperative with the interview process. As part of the evaluation, he demonstrated no behaviors or mannerisms to suggest antagonism, fear, aggression or hostility. The majority of his answers to questions were limited to one or two word responses.

He described his mood as "good." He denied complaints associated with his present incarceration. His affect or emotional state was quiet, subdued, reserved with no demonstrations of emotional intensity or variability. At the onset of the interview, his body posture at times was mechanical and robotic. He literally would stiffen in his chair as he contemplated the question asked of him, only to relax his posture after he answered the question. After approximately the first 10 minutes of the evaluation, his stiffening behavior ceased in its entirety.

Though limited in his answers to questions asked of him, his responses were clear, coherent and rational. Though English is his second language, he demonstrated no difficulties in comprehending or rationally responding to the inquiries that were made of him. On those few occasion in which he provided an extended response to a specific question, his language was comprehensible and his ideas were logical and well connected. As part of this evaluation, he demonstrated no idiosyncrasies in his word usage. He often answered more difficult or emotionally laden questions with an "I don't know" response or the statement, "I'm not going to respond to that" (e.g., "How do you feel about all that has happened to you?")

He denied the experience of all psychotic symptoms. He claimed that he has never experienced any form of hallucination, be it auditory or visual. He demonstrated no flight of ideas, loose associations, thought blocking or derailment that might suggest an ongoing psychotic process. As part of the evaluation, he admitted to what might be defined as a delusion of memory. He claimed he could not possibly be guilty of the charges he has incurred because he "never lived in Reno or Nevada before." He stated that he is not now suicidal or homicidal.

Overall, his cognitive functioning was relatively intact and without significant impairment. Though attentive and able to concentrate on the questions asked of him, he was at times unable or unwilling to maintain his concentration for a significant period of time. His short-term memory may be mildly impaired in that he was only able to verbally recall two of three words after a five minute delay. His recall required a verbal cue or reminder to assist him with his recollection. Initially, he could not remember what he had for breakfast that morning. After approximately a five minute delay and after proceeding to a different topic he spontaneously stated, "I had eggs for breakfast today." When asked about what might account for his memory difficulties he immediately responded, "My [psychiatric] medicine doesn't give me any zest or zeal anymore..., I'm veggin' out, can't remember anything. This is how the prison wants me..., [I] hate it."

Review of Measures
As part of this evaluation, two standardized psychological testing instruments were administered. A brief review of these instruments is as follows.

Evaluation of Competency to Stand Trial-Revised (ECST-R)
The ECST-R is a measure that enables a psychologist to systematically assess the legal and psychological abilities and skills considered essential in the determination of competency. The test is organized into two parts. The first part is composed of 18 items developed to measure specific competency related abilities specified by the Dusky prongs: Consultation with Counsel, Factual Understanding and Rational Understanding. The second part of the ECST-R consists of 28 Atypical Presentation items (ATP) designed to identify defendants who might be attempting to feign incompetence (i.e., possible malingering).

Validity Indicator Profile (VIP)
The VIP Non-verbal subtest consists of 100 picture matrix problems with two answer choices, one correct and one incorrect. The test is used to identify when the results of psychological testing may be invalid because of the *intention* to perform sub-optimally (feigning impoverished performance) or because of a decreased *effort*, be it intentional or not. The measured results of intention and effort assessed by the VIP are combined to provide four possible response styles, one of which dominates and typifies the response style employed by the test taker in the completion of the VIP assessment:

1) Compliant Response Style.....(Valid Results)
2) Inconsistent Response Style.....(Invalid Results)
3) Irrelevant Response Style.....(Invalid Results)
4) Suppressed Response Style.....(Invalid Results)

On the VIP, the intention to willfully under-perform or to under-perform because of decreased effort is characterized by any of the three invalid response styles (Inconsistent, Irrelevant or Suppressed). The response style categories are intended to characterize the test-taker's *performance* on the VIP test, leaving the clinician to draw conclusions about the test taker's *motives* on this measure as well as on the overall assessment process.

Analysis of the Results-ECST-R (Evaluation of Competency to Stand Trial-Revised)
ECST-R: The administration of all testing instruments proceeded in a straightforward manner. Although his answers to the questions of the instruments administered were at times short and abrupt, his responses in general were reasonable, rational and gave no indication of being significantly influenced by whatever psychotic symptoms he may or may not be experiencing.

Potential Feigning on the ECST-R: An examination of his ATP (Atypical Presentation) scores revealed no evidence of feigning incompetency. His scores were very low and did not exceed the established cut-off limits.[2] However, an ATP-R (Atypical Presentation-Realistic Responses) score of less than 5 may suggest excessive defensiveness in his response to the assessment material. Mr. Vanisi obtained an ATP-R score of 3 (see attachment #3-Summary Form). This means that he may be under-reporting his actual experience of personal and emotional stressors which may indicate an overall level of defensiveness or guardedness in responding to the questions of the ECST-R assessment.

According to the ECST-R Professional Manual, most non-feigning defendants (>85.0%) endorse in an affirming manner items number 17 ("Do you miss things?") and 20 ("Would you like to have charges dismissed?") of the ATP-R scale. Failure to endorse these specific items (score=0) would strongly suggest that the defendant may be purposely under-reporting or denying otherwise expected experiences and complaints. The defendant obtained a score of 1 ("sometimes" response) on question 17 and a score of 2 ("yes" response) to question 20. These two responses constituted his only affirmations on the ATP-R scale and resulted in a total ATP-R score of 3. Though suggestive of a defensive, guarded style in his approach to the assessment (ATP-R score = <5), it is not indicative of an invalid profile.

In considering possible explanations for his defensive posture, it is possible that his guarded, protective style of responding (i.e., denying common or expected symptoms and complaints) may be associated with his stated desire to discontinue his psychiatric medications ("Meds don't give me any zest or zeal...I hate it") or, at the very least, to avoid the possibility that his medication dosage may be increased.

In summary, as was observed as part of his overall presentation, the results of his ECST-R testing indicate no effort to feign or exaggerate psychiatric symptoms in order to suggest the possibility of incompetency. Point in fact, he is attempting to minimize whatever stressors or legitimate complaints he may actually be experiencing, possibly in an attempt

[2] His Atypical Presentation Scores (ATP) are as follows: ATP-R=3, ATP-P=0, ATP-N=0 and ATP-B=0. These scales are depicted in Attachment #2- Profile Form.

to present himself as an individual who does not require the regime of potent psychiatric medications that he is now, involuntarily, receiving.

Factual Understanding on the ECST-R: Mr. Vanisi has a basic factual understanding of the charges against him. Though he was initially resistant in identifying his charges ("I don't remember"), when provided with a few seconds of time he identified his charges as "homicide-murder." As part of this evaluation, he was asked to define murder. He responded, "The victim involved is dead." He identified the possible consequences associated with his murder charge as "death penalty—I'm subject to die." He was able to correctly appreciate the roles and responsibilities of both the defense ("My attorney, helps defend my case") and opposing counsel ("...McCarthy, prosecutes the case..., against me.") He identified the primary responsibility of the judge as "[to] preside over the court." He identified the primary responsibility of the jury as "[to] deliberate." He obtained a T-score of 38 on the "Factual Understanding of Courtroom Proceedings (FAC) scale of the ECST-R Competency Scales (attachment #2). T-scores which range between 0 to 59 on this measure are considered in the mildly impaired to normal range. Based on his response to questioning and the pattern of his answers to the ECST-R, I conclude that he demonstrates no significant impairment in his level of factual understanding.

Rational Understanding on the ECST-R: He demonstrated no significant deficits in his level of rational understanding. His response to questioning was typically abbreviated, but otherwise clear, coherent and rational. In general, he offered no psychotic reasoning or irrational justifications for his past or present behaviors. His rational abilities were not significantly compromised by a psychotic process. He defined, for example, a plea bargain as "trying to reduce [the] sentence..., get a deal for less punishment." He was able to provide simple responses for decisions about plea bargaining ("Think about it. Talk to my attorney. Believe him if good offer.") Given the nature of his legal charges, he was able to define a good offer as "life in prison." He was aware of the adversarial nature of the proceedings and the importance of not speaking with opposing counsel without legal representation ("No, that would not be advantageous to me.") He identified the best possible outcome associated with his legal charges as "life [in prison]." His worst possible outcome was identified as "death." He described the most likely or probable outcome associated with his charges as "life, most likely." He was unable or unwilling to offer his reasoning for this expectation ("I don't know.") He claimed no particular stressors, psychotic influences or difficulty in his ability to cope whenever he is involved in a courtroom proceeding. He reported that he dislikes attending court because he is "chained up all the time, it's a nuisance." He obtained a T-score of 44 on the "Rational Understanding of Courtroom Proceedings (RAC) scale of the ECST-R Competency Scales (attachment #2). T-scores on this measure which range between 0 to 59 are considered in the mildly impaired to normal range. Based on his response to questioning and the pattern of his answers to the ECST-R, I conclude that he demonstrates no significant impairment in his level of rational understanding.

Capacity to Consult with Counsel on the ECST-R: He reported that he has two attorneys, Scott Edwards and Tom Qualls. He spontaneously provided the spelling for Mr. Qualls' name ("Q-U-A-L-L-S") as if he anticipated a problem in my spelling of the last

name. He expressed confidence and trust in the abilities of his attorneys to serve as his advisors and advocates ("[They] do what [they're] supposed to do, represent me.") He has a realistic expectation of his responsibilities as a defendant for his own defense ("To assist him, listen to him and do what he wants me to do.") He was unable to provide an example of a significant disagreement with either of his attorneys ("I agree to cooperate..., no examples [of disagreement].)" He was unable or unwilling to offer a definitive means of how he might resolve the possibility of a future conflict ("I don't know—just do what they say.") He obtained a T-score of 50 on the "Consult with Counsel" (CWC) scale of the ECST-R Competency Scales (attachment #2). T-scores on this measure which range between 0 to 59 are considered in the mildly impaired to normal range. It would appear, in spite of whatever psychiatric symptoms he now may or may not be experiencing, that Mr. Vanisi has the present ability and capacity to at least minimally, but rationally, communicate with his legal counsel as well as form a reality based working relationship with one or both of his current attorneys. Based on his response to questioning and the pattern of his answers to the ECST-R, I conclude that he demonstrates at most mild impairment in his capacity to consult with his legal counsel.

Analysis of Results-VIP (Validity Indicator Profile)
When the VIP indicates that the test taker's approach to the assessment is valid, the clinician can generally have confidence that the individual intended to perform well on the test and that a concerted effort was made to do so. When the VIP indicates invalidity, it should be known that concurrently administered assessments may suggest that an insufficient effort was made to respond in a fully accurate manner or that suboptimal attention and concentration was experienced during testing. In other instances, invalidity may indicate a purposeful lack of cooperation, reflecting a deliberate attempt to perform poorly. The results of Mr. Vanisi's VIP testing are as follows:

VIP Non-verbal Subtest Results-Suppressed Response Style

Overall subtest validity	*Invalid*
Subtest response style	*Suppressed*

The defendant's performance on the non-verbal subtest of the VIP is likely not an accurate representation of his maximal capacity to respond correctly. There is sufficient reliable evidence to support a conclusion that he intended to misrepresent himself as impaired on the test. An alternate conclusion is that he actually intended to do well, but he was extremely unlucky in guessing the correct answers for many of the test items that exceeded his problem-solving capacity[3].

Based on the presence of a pattern of prolonged incorrect responding (see Sector 3 of the profile depicted in attachment #4), the best, most likely conclusion is that the defendant intended to respond incorrectly to a majority of the *quite difficult* to *most difficult* test items. Of the four response style options offered by the VIP, his style is characteristic of a pattern of **suppressive responding**. His response pattern suggests that he deliberately suppressed correct answer choices and instead chose incorrect answers. Alternatively, his sustained very poor performance could be a result of incorrect, but yet improbable,

[3] See attachment #4 for a copy of the summary profile of his overall VIP results.

guessing. The probability that his extended demonstration of suppressed answers would result from guessing alone is less than .50 percent.

Evidence of Reasoning Abilities Based on VIP Results: The non-verbal test items have a wide range of difficulty and it is possible, according to the assessment manual, to provide fair estimates of reasoning ability based on the characteristics of the VIP results. If the presence of the suppressed pattern of responding exists as a result of intentional incorrect responding, his ability to deliberately choose the wrong answers to the items would suggest that he has the same cognitive capacity as someone who chooses the correct answers to the items. In order to willfully select an incorrect response for a given item, the correct answer must first be identified and then purposefully ignored. Individuals who are capable of choosing the correct answers to the same extent as was demonstrated by the defendant typically possess at least average to high average reasoning ability.

Conclusions About VIP Results: The results of his VIP testing provided a valid assessment which depicts an invalid response style. The defendant presented a **suppressed style** of responding on the measure.[4] It appears that he intentionally chose incorrect answers for at least some of the items on the VIP non-verbal subtest. The extended period of his incorrect responding occurred at a point on the measure where guessing (a 50/50 choice) was expected. If in fact he were merely guessing at this point, he would be statistically expected to obtain a certain proportion of correct answers. It is extremely unlikely that an individual could obtain such a pattern of incorrect results exclusively by chance. It is much more likely that his initial correct answering followed by an extended series of incorrect answers points to a sophisticated attempt at misrepresenting his cognitive abilities by choosing the correct response for moderately difficult items and intentionally choosing the incorrect response for only the more difficult items.

The results of his VIP assessment, specifically his apparent willingness to attempt to misrepresent his abilities, calls into question a number of different issues that are directly or indirectly associated with the question of competency. Two such examples include: 1) his willingness or capability to engage in truthful testimony, and 2) the legitimacy of his demonstrated psychiatric symptoms and complaints.

Is the defendant willing to engage in truthful testimony?
As was requested in the order of the court, an attempt was made to assess the defendant's understanding of the difference between the truth and a lie and the consequences of lying as a witness in court. As part of the ECST-R assessment (Question 13a), the defendant was asked, *"If your attorney suggested that you testify, how would you decide what to do?"* The defendant's response to this question was, *"Do it because it's the right thing to do."* He was then asked about his decision-making process if his attorney advised him against testifying and he responded, *"Do what he [attorney] says."* Given the absence of psychotic or impaired content in his response to these questions, the defendant was then asked the following:

[4] The term malingering is most commonly associated with a suppressed response style on the VIP (i.e., a concerted effort to answer items incorrectly).

Examiner: What is a lie?
Defendant: Dishonest about something you say..., [I] won't lie under oath
Examiner: What does it mean to take an oath?
Defendant: To swear, to swear to tell the truth
Examiner: Are you willing to tell the truth at testimony?
Defendant: Yes

At face value, the defendant appears to understand the difference between truth and the misrepresentation of that truth. If asked to testify, he purports a commitment to speak honestly. However, the suppressed pattern of responding demonstrated as part of his VIP assessment strongly suggests that, given the opportunity, he may be willing to engage in the misrepresentation of his person or of facts if he believes his efforts are not likely to be recognized or detected. It is assumed that most individuals called to testify believe it is important to be honest because lying is wrong and leads to negative consequences. In the case of Mr. Vanisi, he claims sincerity in his willingness to respond, but at the same time has clearly demonstrated his willingness to engage in sophisticated acts of deception which appear to be motivated by his awareness of the ultimate negative consequence that may await him (i.e., death penalty). I conclude, therefore, that his reliability to testify in a truthful manner or in a manner in which there is little chance that he might display a disruptive form of acting out behavior as part of his testimony is in serious doubt.

The legitimacy of the defendant's psychiatric history and symptoms
For reasons that parallel the argument made above, the legitimacy of his psychiatric symptoms and complaints can also reasonably be called into question. As is stated in the VIP instruction manual, clinicians conducting psychological evaluations should have a low, moderate or high threshold for considering whether or not the results of an assessment may be subject to distortion. For example, with evaluations pertaining to disability or criminal litigation, one should readily suspect the intention to perform poorly based on even very little evidence. In contrast, a job applicant assessment should involve a high threshold for the suspected feigning of psychiatric symptoms, but a low threshold for suspecting excessive defensiveness. In general, job candidates in need of employment have strong incentives to minimize their personal deficiencies. Given the context of the referral, it would be naïve to presume that sufficient incentives do not exist for this defendant to feign, exaggerate psychiatric symptoms or to misrepresent the nature of his actual skills and capabilities.

Independent, however, of the above argument, there are at least three additional facts that may call into question the legitimacy of his overall psychiatric status.

1. In the first instance, as part of my review of the defendant's medical record and notes, I discovered no documentation to indicate that he required or received any form of mental health intervention, assessment or treatment prior to his initial detention at the Washoe County Jail. In brief, the onset, detection and severity of his current psychiatric disorder is presumed to have coincided with his initial 1998 incarceration at the Washoe County Jail.

2. Throughout his medical record, references are repeatedly made by various medical professionals responsible for his care that call into question the authenticity of his alleged psychiatric symptoms. Examples of such entries include the following:

a) May 5, 1999- Medical note made during the defendant's incarceration at the Washoe County Jail. *"Manic with psychotic features. It is not possible for me at this time to rule out, with certainty, a factitious [malingering] component."*

b) June 6, 1999-Ph.D. Mental health evaluation. *"Mr. Vanisi does not believe that he is mentally ill, but he is smart and motivated..., he is attempting to manipulate us into believing that he is psychotic..., he is motivated to avoid a death sentence."*

c) December 1999-State Prison Evaluation. *"Denies any prior psychiatric, physical interventions prior to his incarceration. First encounter with psychiatrist at county jail in Reno. No psych hospitalizations..., not psychiatric illness in family. He received a diagnosis of bipolar disorder while incarcerated. Other evaluators have noted an exaggeration of symptoms consistent with malingering."*

Since the beginning days of his incarceration up to the most recent months, questions have persisted about the authenticity of his psychiatric symptoms and behaviors. Because of the experience his treatment professionals have acquired in detecting, recognizing and treating serious forms of mental illness, their repeated concerns about the authenticity of his symptoms should be seriously considered and not be summarily dismissed.

3. Prior to his arrival or relocation to the Reno area, the defendant lived in Los Angeles, California. He reports that while living in the Los Angeles area, he was briefly employed as a professional actor. He was willing to identify his agent, but only by her first name ("My agent's first name is Nancy.") He reports he was paid three thousand dollars to appear in a "Miller Lite TV commercial" sometime in early 1997 ("I'm not sure exactly when, maybe during the football season.") As part of his participation in past court-ordered competency evaluations, the defendant was housed for extended periods of time at the Lakes Crossing Psychiatric Detention Facility in Sparks, Nevada. This facility is an ideal place to learn, refine and rehearse the severity of psychiatric behaviors that some, by means of their repeated observations, have suspected he has attempted to exaggerate or feign.

Conclusions about Competency

Based on my review of the available documentation, direct contact with the defendant and the results of the objective measures of assessment that were administered to him, I conclude that defendant Siaosi Vanisi possesses sufficient present ability to meet competency to proceed criteria. The convergence of evidence strongly indicates that he possesses: 1) A factual understanding of courtroom proceedings, 2) the rational ability, with at most mild impairment, to assist his attorney(s) with his defense, and 3) a rational and competent understanding of the courtroom proceedings.

On the VIP measure he demonstrated a likely purposeful intent to misrepresent and understate his true cognitive abilities. While his pattern of providing suppressed responses to correct answers can only be generalized to other concurrent assessments of his cognitive skills, his willingness to misdirect and understate his capabilities places in serious doubt his overall commitment to present himself in an honest, straightforward manner regarding his overall psychiatric status, symptoms and behaviors.

Overall, as part of my evaluation, I detected no evidence of "scattered thinking." The results of his various assessments, specifically his VIP results, offer no evidence of a significant disruption in his overall cognitive capabilities. Even if such thinking did exist it would not, in and of itself, constitute sufficient grounds for a designation of incompetency to proceed.

The only possible limitation that may exist for him may be his inclination to provide abbreviated, one to two word replies to questions that are asked of him. This tendency resulted in my designation of a possible mild impairment in his ability to assist his counsel with his defense. However, at the same time, it was apparent that he was capable of providing extended, elaborative and reasoned responses to questions when he perceived such a response was necessary. Examples of these would include his replies of "*I'm not going to respond to that*" or "*No, that would not be advantageous to me*" or even "*My [psychiatric] medicine doesn't give me any zest or zeal anymore...*") I am left to conclude, therefore, that his decision to limit the length and detail of his replies or the quality of information he is willing to provide and share with his attorneys is largely volitional and subject to his own decision-making priorities and control.

Thank you for the referral. Please know that the opinions, conclusions and recommendations made as part of this evaluation are clinical in nature and do not constitute a legal decision. Ultimate legal questions are solely for the Court to decide. I appreciate the opportunity to be of service.

Respectfully submitted,

Alfredo M. Amézaga Jr., Ph.D.

Enclosed: Attachment #1: Nevada Department of Prisons, Form #2523
Attachment #2: ECST-R Profile Form (Evaluation of Competency to Stand Trial-Revised)
Attachment #3: ECST-R Summary Form
Attachment #4: Summary Profile of VIP Results

Attachment #1

SVanis106688

RELEASE OF LIABILITY FOR
REFUSAL OF MEDICAL TREATMENT

I hereby release the Nevada Department of Prisons from any and all liability and responsibility that might result from my refusal of examination, treatment or testing described below; and further release any and all personnel from any and all liability and/or responsibility that might be incurred.

CHECK ALL THAT APPLY:

_____ INFIRMARY APPOINTMENT FOR: _____

_____ DENTAL APPOINTMENT FOR: _____

__✓__ PSYCHIATRY/PSYCHOLOGY APPOINTMENT FOR: _____

_____ PHYSICAL THERAPIST APPOINTMENT FOR: _____

_____ OPTOMETRIST APPOINTMENT FOR: _____

_____ PODIATRIST APPOINTMENT FOR: _____

_____ OSHA PROTOCOL FOR TB/BLOOD BORNE PATHOGENS: _____

_____ OTHER. DESCRIBE: _____

COMMENTS: _____

This release has been signed under no duress and with full understanding of possible hazards which may occur due to refusal.

Vanisi, S. Refused to Sign INMATE/STAFF SIGNATURE	63376 DOP#/SS#	01-20-05 DATE
Sgt. [illegible] (Rose) STAFF WITNESS		01-20-05 DATE
C/O T. Irwin STAFF WITNESS (IF SECOND WITNESS NECESSARY)		01-20-05 DATE

==========

EVADA DEPARTMENT OF PRISONS

RELEASE OF LIABILITY

NAME _____
LAST FIRST MI

DOP #/SS # _____ UNIT _____

DOP 2523 (1769/93)

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Attachment #2

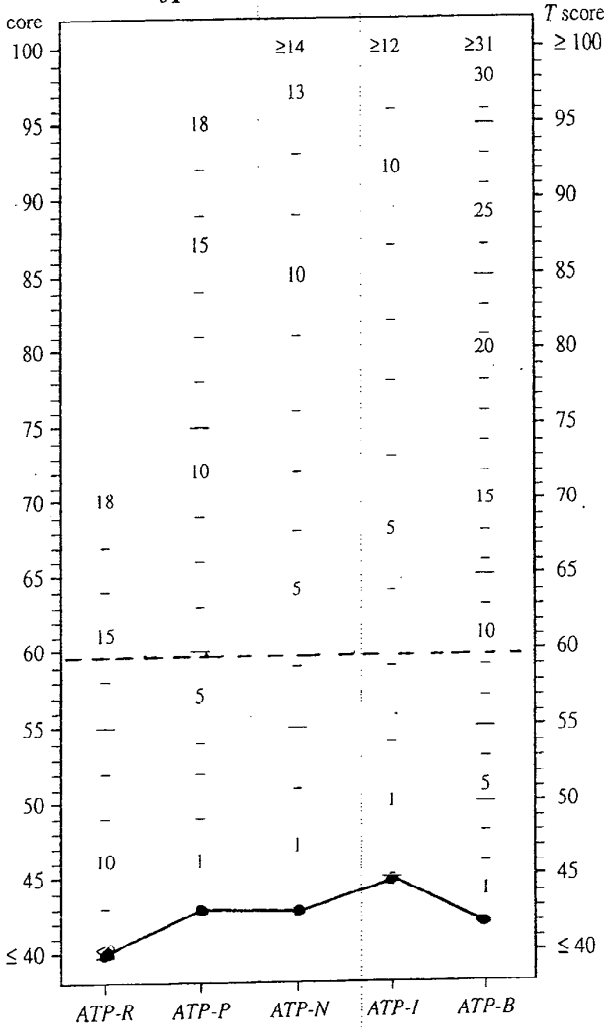
svanisi06689

ECST-R Profile Form

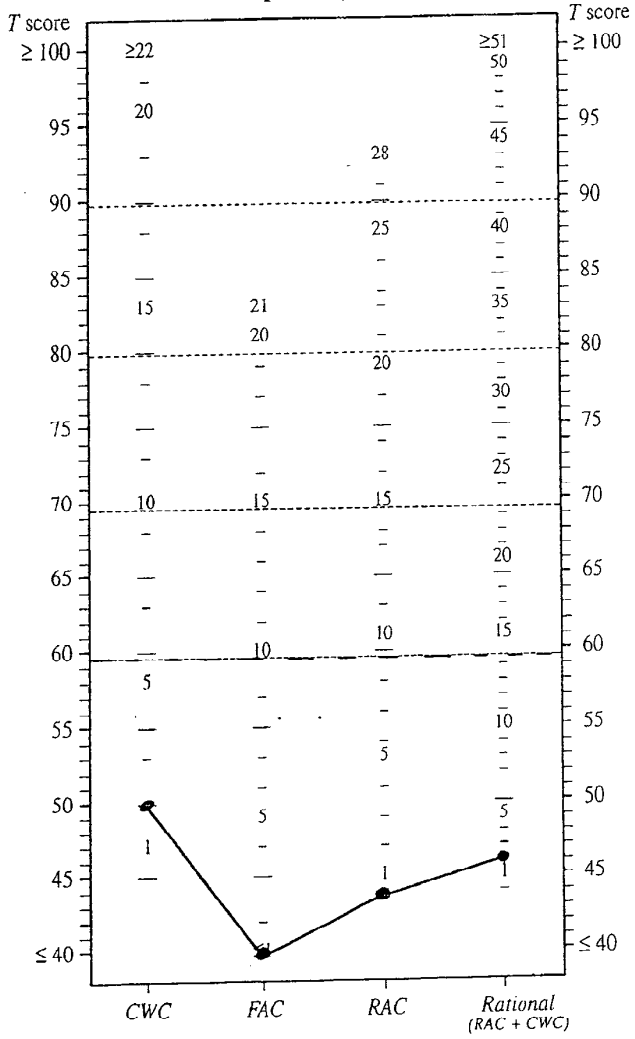
Name Siaosi Vanisi Age 34/6 Testing date 02/03/05 (Mo. / Day / Yr.)

Examiner AMA Place of evaluation NSP- Corrections

Atypical Presentation scales



Competency scales



	ATP-R	ATP-P	ATP-N	ATP-I	ATP-B
orc	25	43	43	45	42
e	3	ϕ	ϕ	ϕ	ϕ
	≅ 1.0	≅ 25	≅ 25	≅ 32	≅ 23

	CWC	FAC	RAC	Rational (RAC + CWC)
T score	50	38	44	46
Raw score	2	ϕ	ϕ	2
%ile	≅ 50	≅ 13	≅ 27	≅ 37

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TQUALLS06689
AA04607

Attachment #3

Svanis 10/26/06

ECST-R Summary Form

Response Styles

ssible defensiveness:

TP-R < 5 — Defendant's *ATP-R* raw score: 3

ssible overreporting[1]:

TP-P > 1 — Defendant's *ATP-P* raw score: ϕ

TP-N > 0 — Defendant's *ATP-N* raw score: ϕ

TP-I > 1 — Defendant's *ATP-I* raw score: ϕ

TP-B > 2 — Defendant's *ATP-B* raw score: ϕ

3. Ancillary data on feigning competency-related impairment[2]:

- *ATP-P* > 4 — Defendant's *ATP-P* raw score: ϕ
- *ATP-N* > 2 — Defendant's *ATP-N* raw score: ϕ
- *ATP-I* > 1 — Defendant's *ATP-I* raw score: ϕ
- *ATP-B* > 6 — Defendant's *ATP-B* raw score: ϕ

in the possible overreporting range do not signify feigning; they simply signal the need for a full evaluation of response styles.
scores are only meaningful if independently confirmed by the SIRS or other validated methods for assessing feigned mental disorders.

ıative Data for Competency Scales

ırment (*T* scores)	
:rate:	60 to 69
e:	70 to 79
me:	80 to 89
extreme:	> 90

Certitude (*T* scores)	*CWC*	*FAC*	*RAC*
Preponderant	60	60	60
Probable	65	64	64
Very probable	67	67	66
Definite	69	69	67

petency scales	*T* score	Impairment	Certitude
nal ability to consult with counsel (*CWC*)	T= 50	None	Definite
al understanding of the proceedings (*FAC*)	= 38		
nal understanding of the proceedings (*RAC*)	= 44		
ıll rational ability (*Rational*)	= 46		

Specific Deficits From Competency Scales

ATP-R Quest.
#17 - "Missdings?" = "Sometimes" = Score = 1
#20 - Dismiss Charges?" "yes" = Score = 2
ATP-R = 3

Additional copies are available for qualified mental health professionals from:
PAR Psychological Assessment Resources, Inc.
16204 N. Florida Avenue · Lutz, FL 33549 · 1.800.331.8378 · www.parinc.com

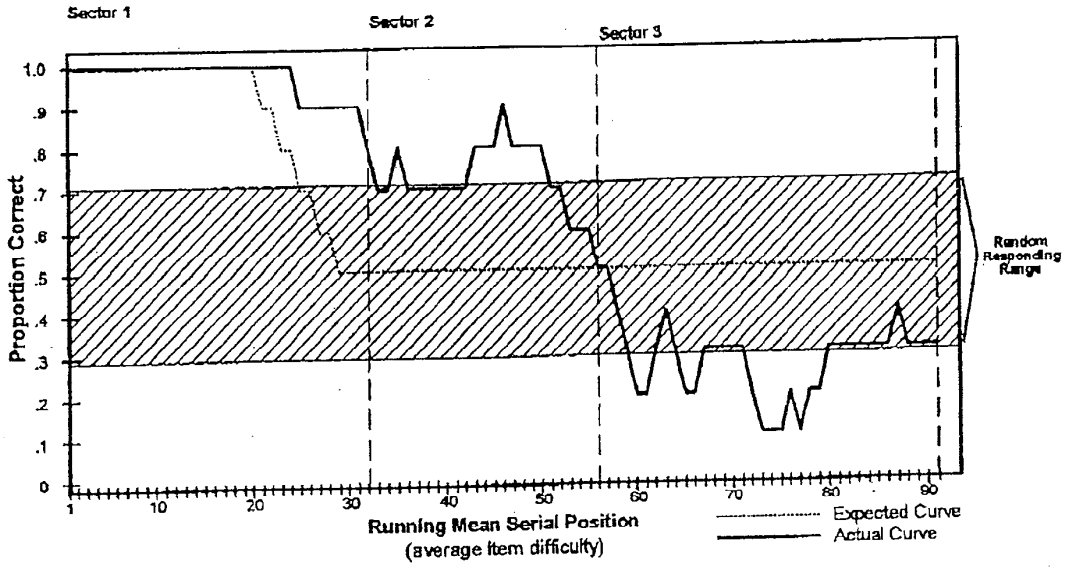
1771/47

Attachment #4

NONVERBAL SUBTEST

Performance Curve

Response Style: **Invalid/Suppressed**



Summary of Scores

Total Score 64

Adjusted Score 28

Performance Curve Measures

Sector 1 Distance 32
Sector 2 Distance 25
Sector 3 Distance 36
Sector 1 Residual 0.005
Suppression Sector ..... Yes
Suppression Sector Starting Point 64
Suppression Sector Ending Point 86
Suppression Sector Distance 23
Suppression Sector Probability ..... <.5%

Slope ..... -0.0110
Point of Entry 1.0
Peak Performance Interval 24
Patterned Responding ..... NA

1772 | 48

Exhibit 56

Exhibit 56

ORIGINAL

2005 MAR 16 PM 1:33

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

WARDEN, ELY STATE PRISON, AND THE STATE OF NEVADA,

Dept. No. 4

Respondents.

_____/

ORDER FINDING PETITIONER COMPETENT TO PROCEED

Petitioner was found guilty of the murder of Sergeant George Sullivan and was sentenced to death. He appealed but the judgment was affirmed. He then filed a timely petition for writ of habeas corpus. That petition, however, raised no claims for relief. This court appointed counsel and allowed the opportunity for a supplemental petition. The lawyers were initially Marc Picker and Scott Edwards. Thereafter, the case was delayed several times for various reasons. Mr. Picker withdrew and Tom Qualls was appointed, along with Mr. Edwards. After delays exceeding two years, counsel still did not file a supplemental petition. Instead, counsel filed a request to stay the proceedings, alleging that Petitioner Vanisi was not competent to proceed. The State opposed the motion, arguing inter alia that the allegation had no legal significance as state law allowed an incompetent prisoner to seek relief in his own name, and because Vanisi had successfully invoked the jurisdiction of the court in his own name.

The court, without initially determining the significance of the allegation, determined that

the best course would be to inquire into the issue. Accordingly, the court appointed two experts, a psychiatrist and a psychologist, to inquire into the present competence of petitioner Vanisi.

On the question of the legal significance of the alleged incompetence of the petition, this court is bound to follow the decision of the Ninth Circuit Court of Appeals in Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003). That court held that, in a capital case, there is a constitutional right to counsel in a habeas corpus action. That is in accord with the holdings of the Nevada Supreme Court to the effect that there is a statutory right to counsel in an initial Nevada habeas corpus action in a capital case. The Rohan court went on to hold that the right to counsel incorporates the right to be competent during the habeas corpus proceedings. Therefore, held the court, the habeas corpus proceedings must be stayed until such time as the prisoner regains competence.

This court notes the incongruities pointed out by the State. In particular, the court notes the possibility that the Rohan court would prohibit an incompetent prisoner from seeking relief from the conviction even if the prisoner wished to seek relief. That is contrary to the implications of the Nevada Supreme Court in various other cases. Nevertheless, this court is bound to follow the ruling of the Rohan court. Therefore, the court holds that if the petitioner is incompetent, then the habeas corpus action would have to be stayed.

The court also holds that the proper standard for competency is the standard generally applied in criminal cases. The court rejects that notion that a civil standard of incompetence should be determinative.

Having made those rulings, the question naturally arises as to whether Vanisi is, in fact, incompetent. The court initially received the report and the testimony of Thomas Bittker, M.D. Dr. Bittker had conducted an extensive clinical interview with Vanisi and opined that Vanisi was unable to fully assist his attorneys. Subsequently, the court received the testimony of Dr. Raphael Amézaga, Ph.D. Dr. Amézaga conducted a clinical interview with Vanisi and, in addition, administered more objective tests. Dr. Amézaga agreed that Vanisi was most likely suffering from bi-polar disorder and did not dispute the conclusion that he was psychotic. However, Dr. Amézaga opined that Vanisi still had the

capacity to assist his attorneys if he chose to do so. Both experts agreed that Vanisi understood the charges of which he was convicted and had a sufficient understanding of the proceedings that he had initiated. They diverged only on the question of whether Vanisi could assist his attorneys.

The court has given careful consideration to the reports and the testimony of the experts. In addition, the court has considered the documentary evidence presented and the affidavits of counsel. The court has also had its own opportunity to observe Vanisi in the courtroom. Based on the entirety of the evidence, the court finds that Vanisi understands the charges and the procedure. In addition, the court has given greater weight to the expert who administered objective tests and determined that Vanisi has the present capacity to assist his attorneys. The court agrees that Vanisi might present some difficulties for counsel. Nevertheless, the court finds that Vanisi has the present capacity, despite his mental illness, to assist his attorneys if he chooses to do so. In short, the court finds as a matter of fact that Vanisi is competent to proceed.

The motion to stay these proceedings is denied. The parties and the court shall expedite this matter by giving it the priority required by SCR 250.

DATED this 14 day of ~~February~~ March, 2005.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Scott W. Edwards, Esq.
729 Evans Avenue
Reno, NV 89512

Thomas L. Qualls, Esq.
216 East Liberty Street
Reno, NV 89501

DATED: March 16, 2005.

Exhibit 59

Exhibit 59

Siaosi Vanisi
Case No. CR98-0516
June 9, 1999 and June 15, 1999

Sanity Evaluation
Nevada State Prison
Carson City, Nevada

REASON FOR EVALUATION:
To determine whether or not the defendant is of sufficient mentality to be able to understand the nature of the criminal charge against him and to determine if he is of sufficient mentality to aid and assist counsel in his defense.

SOURCES OF INFORMATION:
Interview with the defendant on 6/9/99.
Interview with Sergeant William Stanley, Officer of the Day on 6/9/99.
Interview Senior Officer, Michael Proffer on 6/9/99.
Review of Nevada State Prison medical records on 6/9/99.
Telephone interview with Ronald Centric, D.O., on 6/14/99.
Interview with Steve Moonin, R.N., charge nurse in the Nevada State Prison infirmary on 6/15/99.
Review of Nevada State Prison mental health records on 6/15/99.
Interview with Mary O'Hare, psychiatric nurse on 6/15/99.

CONDUCT OF INTERVIEW:
I was escorted to a secured room where I met the defendant, Siaosi Vanisi, who was both in leg shackles and wrist bracelets. He stood at the side of the room as I entered and at my request sat at a bench opposite me. He offered me minimal eye contact, stared at the wall, and made no vocal utterances. I introduced myself to the defendant and advised him that our dialogue would not be confidential and would be shared with the prosecution, the defense, and the court. He declined to comment. When I asked him if he would be willing to speak with me, he declined to comment. When I advised him further that if he did not speak with me, I would be compelled to take information from other sources, he still refused to comment. Throughout this time, the defendant sat with hands clasped either staring at the floor or the wall and specifically avoiding my gaze.

He did not appear to be responding to any distracting auditory or visual stimuli. He made no unusual grimaces. There was neither evidence of choreiform or athetoid movements nor was there evidence of unusual muscle discharge. After several minutes of observing Mr. Vanisi, I left the interview room.

I next interviewed Sergeant William Stanley, the Officer of the Day at the prison at the time of my visit. Sergeant Stanley reported to me that the defendant had previously tried to dig out of his prison cell. He described an episode two weeks previously wherein the defendant attempted to close off visual access of his cell from the guards. When requested to remove the barriers, the defendant declined. After several warnings he was taken down by six officers, and the barriers

were removed. He then remarked to the officers, to paraphrase Sergeant Stanley, "You didn't have to do that. I would have taken them down." He questioned Sergeant Stanley about the whereabouts of other prison guards with whom he was more familiar. Sergeant Stanley also stated that in the moments prior to the defendant's interview with me he had a full and free conversation with one of the officers escorting him to the interview room. He discussed at that time a mutual acquaintance who had apparently played football with the escorting officer.

An interview with the senior officer, Michael Proffer disclosed the following. Several months ago while Officer Proffer was serving on the graveyard shift, the defendant was asking for medications and "acting crazy." According to Officer Proffer, he asked the defendant, "If you quit acting crazy, I'll give you what you want." The defendant then commented, "I can do that" and acted appropriately.

In my effort to obtain further information, I solicited a court order for the medical and mental health records of the defendant. Unfortunately, the court order was not sufficiently detailed to meet the requirements of the prison infirmary staff. I did meet with Donna Calhoun, Medical Records Coordinator I, who provided me medical records. The following encounters were reviewed:

5/8/99	"I am in good health, and I take some medications." According to the file, the patient had med sheets for Elavil 50 milligrams q h.s., Risperdal 0.5 milligrams increasing to 1 milligram.
5/11/99	The defendant stated, "I will kill myself if I don't get a TV."
5/27/99	Multiple complaints in particular a shoulder dislocation. Impression: factitious complaints.
5/31/99	"My laceration is infected." At the end of the evaluation, the defendant requested candy for examination of his arm from the nurse.

Physician orders include an order on 5/17/99 discontinuing psychiatric medications. A physical examination indicated scars on the wrist, thigh, and elbow, and that the defendant's tonsils were out. In the initial evaluation, the defendant denied ever attempting suicide or having any suicidal plans.

Regarding drug use, the defendant acknowledged using marijuana and methamphetamine infrequently.

Under family history, he acknowledged that his mother had diabetes mellitus and that she was on dialysis. On personal history, he acknowledged having a history of elevated blood sugar or diabetes.

There were a series of notes on 5/10/99. These include: "When I indicated medication in powder form, I was being facetious. I will acquiesce to whatever. . . Thank you."

On 5/11/99, the defendant submits, "I think I'm going to kill myself, cause I have no TV." Then something . . . "I kick you in the balls if I don't get a TV. Don't make me kill myself."

On 5/13/99, "If you listen to me, I can show you how to help me combat my hyperhidrosis problem. Please respond and return copy." "Mary, I want a special diet. Who do I talk to. Lunch can sure use the assistant (sic) of the hamburger helper. Please respond and return copy."

On 5/12/99, "My eyes have failed me at a young age. Will you please give me an eye exam and an ear exam. I need a hearing aid."

On 5/19/99, "Carol Viegener. If she is still around, please inform me on how to acquire reading glasses. Please respond and return copy."

On 5/19/99, "Please take me seriously. If you listen to me, I can show you how to help me combat my hyperhidrosis problem. Respond and return copy."

On 5/24/99, "Stephen, after you released me the CO hurt me badly. I have a knot that is the size of a doorknob under my chin. They dislocated my shoulder. Please help me treat the pain. Thank you. Return copy. Please also I have diarrhea."

On 5/30/99, "My laceration is infected. Will you please provide me with some first aid treatment. Thank you. Return copy for my records."

On 6/2/99, "Dr. Stephen: the CO's added more scars to my body on 6/1/99. Remind them that I am made out of the same molecular structure as they are made out of. Please advise on how to treat my laceration before it becomes infected. Please respond and return copy."

REVIEW OF MENTAL HEALTH RECORDS ON 6/15/99:
I reviewed the records from the Nevada State Prison, Washoe County Detention Facility, and interviewed psychiatric nurse, Mary O'Hare. The product of those reviews have been abstracted below.

INTERVIEW WITH MARY O'HARE:
In an interview with Mary O'Hare, psych nurse, on 6/14/99, Ms. O'Hare stated that Mr. Vanisi was first considered possibly bipolar disorder and was tried on antipsychotic and mood stabilizing agents, e.g., Depakote and Risperdal. However, he took the medications inconsistently and attempted to cheek the medicines and later distort them. Dr. Centric recommended that medications be discontinued.

COMMENTS OF W. MACE KNAPP, PH.D.:
The first document reviewed was a printed assessment from W. Mace Knapp, Ph.D., performed on 6/6/99. According to Dr. Knapp, Mr. Vanisi was placed in segregation because of "safe keeper from Washoe County Jail pending murder trial."

History of mental illness: none reported. Alcohol and drug use history: polydrug use.

Mental status exam. Appearance: bizarre. Mood and affect manic. Sensorium: no comment. Cognitive test normal. Intelligence normal. Thought processes speeded, pressured, jumps around. Thought content paranoid. Normal range for prisoner. Comments regarding appearance: still bad mask on forehead. Only one marked tattoo. Tee shirt was modified to shoulder ties and symbol with hole. Facial expression: expressive. Anxiety, fear, agitation, depression, and sadness, anger, and hostility were checked as slight. Clothing was checked as unusual and bizarre. There were slight unusual physical characteristics. Abnormal body movements and amplitude and quality of speech were considered normal.

Continuing on with the mental status exam by Dr. Knapp, "No attempt to fake mental illness. Wanted to please me in order to talk more. States that he only has visual hallucinations when smoking marijuana like others do on acid."

Intellectual functioning: excellent. He remembers names easily. Orientation: perfect. Insight: interested in what psychologists analyze about him. Judgment: sings loudly. Twice got naked ourside grounds. Memory: excellent. Stream of thought flow: increased.

Assessment of suicidal/homicidal ideation: none today. Serious mental illness but not psychotic.

Present problem: mania and serious behavioral misconduct. Criminal history pending trial for murder of UNR police officer.

Additional comments: Mr. Vanisi does not believe that he is mentally ill, but he is smart and motivated. Therefore, he is attempting to manipulate us into believing he is psychotic with a short-term goal of avoiding responsibilty for recent misbehavior (digging under a fence, setting fires, refusing direct orders, etc.). This will produce a future forensic problem: Mr. Vanisi is motivated to avoid a death sentence and is smart and manipulative. I am required by ethics to educate him regarding his mental illness. This results in his increased ability to fake and exaggerate symptoms. For example, he tried to tell me today that his "manic depression" makes him unaware (equals not responsible) of what he is doing. I told him he was not telling me the truth and explained that bipolar disorder could result in a decreased ability to make rational reasonable decisions to control his impulses. He understood the difference immediately and applied it. Diagnostic impression: Axis 1: Bipolar disorder, manic severe, without psychosis, 296.43. Axis 2: Psychopathic deviation.

On May 17, 1999, all psychiatric medications were discontinued.

REVIEW OF NEVADA STATE PRISON NOTES:
In the Nevada State Prison notes on 5/17/99, "inmate reported to have snorted meds. Dr. Centric notified and med discontinued. Inmate seen . . . He denied snorting meds and asked to be placed back on meds. He was told that Ryder would check on him Friday. He remembered Friday's conversation. He spoke of various subjects but was appropriate and knowledgeable."

On June 6, 1999, a printed note by Dr. Knapp. "Mr Vanisi made numerous complaints about his treatment at NSP and also made numerous far fetched excuses for his misbehavior. He is agreeable to a behavioral contract like we had the first time he was at NSP. He appears to be ending the manic phase of his bipolar cycle. My impression in (sic) that he stays in a manic stage for about six weeks then to normal range mood for four to eight weeks and then to a depressive state for an unknown present length of time. We agreed that if he does not seriously misbehave (set fire, refuse direct orders), he will be issued a State TV and radio. Taking lithium is a requirement to get yard time returned. (No commitment was agreed to.) W. Mace Knapp, Ph.D. 6/6/99"

On 6/11/99, "Made reasonable request regarding TV cable. (Gave him one today.) Canteen restriction (I can't do anything about that punishment) and yard access. He has complied so far without behavioral contract and has not been a problem this week. Mr. Vanisi has sent a kite to Dr. Centric for a lithium evaluation pursuant to my recommendation. Assessment: he is calm and rational today. The remission normal phase in a cycle in mood. Plan: I will keep reinforcing his positive behavior with whatever incentives the prison permits. W. Mace Knapp, Ph.D."

On 6/13/99, "I recommend that Mr. Vanisi be seen immediately for a medication evaluation. He is willing finally to take a lithium-type medication, and he has been a danger to himself (shot for digging) and others assault. W. Mace Knapp, Ph.D."

REVIEW OF CONSULTATION BY OLE THEINHAUS, M. D., PERFORMED AT WASHOE COUNTY DETENTION CENTER:
On 9/30/98, a psychiatric consultation was performed by Ole Theinhaus, M.D. at the Washoe County Detention Center. Dr. Theinhaus reported that the inmate complained of mood swings and described highs and lows. Low episodes last several weeks to a month. He feels like not doing much of anything just riding out the wave. The highs are marked by inability to sleep, increased level of self-confidence, and thought racing. He is not sure but thinks he might have some extra normal powers like ESP at these times. He says such mood swings have been part of his life "all my life." He denies drug use but describes binge drinking especially during times of depression. On mental status, he is alert, cooperative, and appears oriented. There is no evidence of cognitive function. No auditory hallucinations. No auditory blank. Remaining progress not available. However, the presumed follow-up note stated . . . "stiltedness of his verbal discourse. Recommend stay off Depakote. Try 25 milligrams of Elavil h.s." An MAR report indicates that Depakote was administered in dosages of 500 milligrams in the morning, 1000 milligrams in the evening supplemented with Elavil 25 milligrams h.s. The Depakote was discontinued as of October 23, 1998.

FURTHER REVIEW OF WASHOE COUNTY DETENTION CENTER FILE:
There are several requests drafted 12/1/98, 12/7/98, 12/13/98, and 2/20/98 all requesting psychiatric medication.

TELEPHONE INTERVIEW WITH RONALD CENTRIC, D.O., 6/14/99:
In a telephone interview with Dr. Ronald Centric, he stated that he was never asked to do a full psychiatric assessment. However, in his contact with Mr. Vanisi, he never saw him as responding to extraneous stimuli. He volunteered that Mr. Vanisi was able to recall both his name and the name of the resident that had seen him six months previously. Dr. Centric reports that Mr. Vanisi was pleasant, oriented, and disclosed no homicidal or suicidal ideation at the time of his contact with him. Dr. Centric offered no psychiatric diagnosis coincident to his contact. He does recall that Dr. Theinhaus had placed Mr. Vanisi on 0.5 milligrams of Risperdal nightly, but Vanisi discontinued medications on his own.

FORMULATION:
The defendant was mute during my examination. However, at no time during the examination did he appear to be responding to distracting stimuli in the form of auditory or visual hallucinations. He was able to respond to my requests to sit down, indicating his ability to follow first order commands. His conversation with the guards would reflect a person who was oriented and one who had reasonable recent and remote memory. His ability to switch from the presumed psychotic to the rational state as reported by Officer Proffer and the dramatic change in his behavior from the time he was being escorted to the interview time until the time I saw him would reflect more of a volitional than an involuntary process. In addition, he has written a number of complaints to the clinical staff several of which seem to be apparent efforts to seek special privileges, e.g., a television set or candy for cooperation. In addition, his written requests are offered in a coherent fashion and are not consistent with anybody dealing with a thought process disorder. At no time do his written forms indicate a desire to kill himself, and he was able to respond to written questionnaires in a rational fashion. The striking contrast between his interview behavior with me and the observations of the two officers whom I interviewed plus the evidence of his medical file would strongly suggest willful manipulation.

All of the above is consistent with the pattern of malingering: *an intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs. Malingering should be strongly suspected if any combination of the following is noted:*

> *"Medical legal context presentation, marked discrepancy between the person's claim, stress, or disability and the objective findings, lack of cooperation during the diagnostic evaluation and complying with the prescribed treatment regimen, the presence of antisocial personality disorder."*

The inmate has demonstrated a pattern of unstable moods and bizarre behavior. However, the pattern has a manipulative quality to it. Note the dramatic change in his behavior when with the guards and with me at my visit on 6/9/99. In addition his med seeking seems to be a reflection of an effort to get high rather than to pursue a therapeutic end. Although the inmate may have elements of bipolarity, his behavior appears to be largely willful and under volitional control.

DIAGNOSES:

Axis 1: Malingering V65.2.
Rule out bipolar disorder, NOS, 296.70.
Polysubstance abuse by history.

Axis 2: Presumed antisocial personality disorder, 301.70.

Axis 3: Self-report of elevated blood sugar.

Axis 4: Stressors: confronting incarceration.

Axis 5: ?

OPINION REGARDING COMPETENCY:

Although because of the defendant's lack of cooperation I was unable to specifically question him regarding his ability to understand the legal process, I can find no evidence of the defendant's incompetence based on the documents reviewed. As reflected in the defendant's written and reported oral communication and in numerous documented mental status examinations, he apparently has sufficient intelligence to grasp the significance of his situation, the charges, and the need to cooperate with counsel. From a psychiatric perspective, the defendant shows no positive indications of psychosis and shows multiple indications of malingering. On the basis of the above, I am of the opinion that the defendant is of sufficient mentality to be able to understand the nature of the criminal charge against him and is able to aid and to assist counsel.

Thomas E. Bittker, M. D.

/jb

Exhibit 60

Exhibit 60

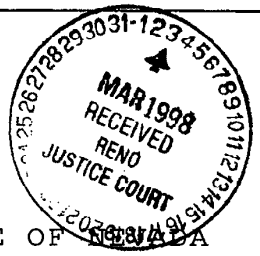
Case No. RJC 89,820

Department No. 2

CR98-0516

'98 MAR -4 P3:20

JUNE BAILEY, CLERK
BY Beuben
DEPUTY



IN THE JUSTICE'S COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE EDWARD DANNAN, JUSTICE OF THE PEACE

--o0o--

STATE OF NEVADA, Plaintiff, vs. SIAOSI VANISI, Defendant.	PRELIMINARY EXAMINATION February 20, 1998 Reno, Nevada

ORIGINAL

APPEARANCES:

For the Plaintiff: RICHARD GAMMICK
Washoe County District Attorney
DAVID STANTON
Deputy District Attorney
Washoe County Courthouse
Reno, Nevada

For the Defendant: MICHAEL SPECCHIO
Washoe County Public Defender
WALTER FEY
Deputy Public Defender
One S. Sierra Street
Reno, Nevada

Reported by: Lynda Clark, CCR #73

MERIT REPORTING (702) 323-4715

I N D E X

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I N D E X

STATE'S WITNESSES	DR	CR	REDR	RECR
Jim Duncan				
By Mr. Gammick	203			
Louis J. Lepera				
By Mr. Gammick	207			
By Mr. Fey		210		
Andrew Ciocca				
By Mr. Gammick	212			
Patricia Misito				
By Mr. Gammick	218			
By Mr. Fey		221		
By Mr. Specchio		223		
By Mr. Gammick			226	
Diana Shouse				
By Mr. Gammick	226			

STATE'S EXHIBITS	IDENTIFICATION	EVIDENCE
1, Photograph	4	31
2, Photograph	4	31
3, Photographs (A, B, C)	4	31
4, Photographs (A, B, C)	4	31
5, DNA	4	7
6, Photograph	4	31
7, Photograph	4	31
8, Photograph	4	31
9, Photograph	4	31
10, Photographs (A through F)	4	194
11, Hatchet	4	194
12, Photograph	4	31

RENO, NEVADA; FRIDAY, FEBRUARY 20, 1998; 9:00 A.M.

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(State's Exhibits 1 through 12 were previously marked off the record.)

THE COURT: Good morning. Please be seated.

This is the time set for the preliminary hearing in State versus Vanisi. It's case RJC 89,820.

We have a couple of preliminary matters we need to deal with first before we get started with the hearing.

There has been an amended complaint filed, and I need to arraign Mr. Vanisi on that complaint.

Mr. Gammick, Mr. Stanton, do you want to tell me what the difference is between the original and this one?

MR. STANTON: Yes, Your Honor. The amended complaint will have an additional count, which is reflected in Count V.

And in addition there is some language changes in Count I and Count III relative to the-- Strike that-- Count II regarding the mechanism and method of death.

THE COURT: All right. I did arraign Mr. Vanisi

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in January on these charges.

MR. SPECCHIO: We will waive the reading, Your Honor.

THE COURT: He does understand the additional count of Grand Larceny?

MR. SPECCHIO: Yes, Your Honor.

THE COURT: One other preliminary matter. Normally I don't use this courtroom. It's kind of a problem for my court reporter to take down testimony sitting there, and so as witnesses testify I would ask counsel to please not stand in front of my court reporter, if they can avoid that, so she will be able to hear the questions and answers.

Okay. Now, Mr. Gammick, you are representing the State in this case?

MR. GAMMICK: Myself and Chief Deputy District Attorney, Dave Stanton, Your Honor.

THE COURT: All right. And, Mr. Specchio--

MR. SPECCHIO: Mr. Fey is representing Mr. Vanisi, Your Honor. I'm just here trying to learn something.

THE COURT: Okay. How many witnesses do we have to call this morning, Mr. Gammick?

MR. GAMMICK: Your Honor, present we anticipate calling approximately 20 witnesses, depending on how

the evidence and testimony go. We may be able to not call some of those people.

THE COURT: They are all in court this morning?

MR. GAMMICK: To the best of my ability with this many witnesses, Your Honor.

I would ask-- I know we normally swear everyone at one time, but maybe at this time it would be best to swear each witness individually, because we have people coming and going. So I want to make sure we don't miss anyone.

THE COURT: I just wanted to do it for the sake of time, but I think that is probably a good idea. We will go ahead and begin then.

Mr. Gammick, if you will call your first witness.

MR. GAMMICK: Your Honor, if I may, pursuant to stipulation between the State and the defense, for the purposes of this preliminary hearing only I am presenting the Court with what has been marked as State's Exhibit 5. That is a DNA Report from the Washoe County Lab. It's a two-page report. It shows the presumptive testing for DNA.

I would call the Court's attention to the second page, right below the graph that is on that page. The first sentence I believe reflects information that DNA

testing was done. It concerns a jacket that-- Evidence will be produced as to that jacket during the course of the prelim, that it was presumptively positive for the defendant's or, excuse me, the victim's blood, George Sullivan's.

It also shows a hatchet that is involved in this case, which tested presumptively for George Sullivan's blood, and it also shows a UNR PD vehicle. All those are part of case.

We have stipulated to admit that for purposes of the prelim.

Is that correct, Mr. Fey?

MR. FEY: That is correct. For purposes of the preliminary examination we are stipulating to the admission of Exhibit 5.

THE COURT: All right. Then Exhibit 5 is admitted.

(State's Exhibit 5 was admitted.)

THE COURT: Go ahead. Call your first witness.

MR. STANTON: Your Honor, before the State calls its first witness I assume the defense will invoke the rule of exclusion.

MR. FEY: Yes, Your Honor.

THE COURT: The rule of exclusion has been invoked. The rule requires that I exclude all those

persons who are going to testify this morning from the courtroom until they are called to testify either Mr. Stanton or Mr. Gammick or Mr. Fey.

I would ask each of you not to discuss the case among yourselves or with any other person until you are called to testify.

And with that, if you will call your first witness, I would ask the other persons to please wait outside in the hall until they are called.

MR. STANTON: Pursuant to the previous order, the State will not be identifying the witness'es full, complete name, so the State would first call Mr. David K. to the stand.

THE COURT: Mr. David, last initial K., please come up to the stand. And the other witnesses please wait outside until you are called.

Sir, if you will come up to my right, I will swear you in, just behind my court reporter.

Please raise your right hand and be sworn.

(The Court administered the oath to the prospective witness.)

THE COURT: All right. Please be seated.

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DAVID K.,

produced as a witness herein, having been first duly sworn, was examined and testified as follows:

MR. SPECCHIO: Your Honor, may we approach?

THE COURT: Sure.

(The Court and counsel briefly conferred at the bench.)

THE COURT: Mr. Specchio asks that I make this part of the record, and that is that the Public Defender's Office knows the identity of David K., and the PD has agreed with the District Attorney's Office that the last name of this witness not be used for security purposes, and that both parties know who this person is.

MR. STANTON: That would also apply to the State's second witness, whose name is Vainga K. The first name is spelled V-a-i-n-g-a.

THE COURT: So both of those persons-- the identity of both of those persons is known to the Public Defender, and the Public Defender has agreed that the last name not be used.

MR. SPECCHIO: That is fine, Your Honor.

MR. STANTON: They do have their statements that

have previously been given.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. STANTON:

Q Sir, your first name is David?

A Yes.

Q The last name again begins with a K.?

A Yes.

Q Sir, you were interviewed in Salt Lake City by Detectives Jenkins, Douglas and Duncan from the Reno Police Department on January 23rd, were you not?

A Yes.

Q Do you see the individual sitting at counsel's table here to my left in the red jump suit?

A Yes.

Q And, sir, do you know that person?

A Yes.

Q Who is he, sir?

A He's my relative.

Q I'm sorry?

A Siaosi Vanisi.

Q I'm sorry, sir. Could you say that again so the court reporter can hear.

A He's my relative, Siaosi Vanisi.

Q And when you say he's your relative, what type of relationship is he to you, sir?
A He's a cousin on my father's side.
Q Cousin on your father's side?
A Yes.
Q David, do you live in Salt Lake City, Utah?
A Yes, I do.
Q And you have a large family there?
A Yes.
Q And it is a close-knit family?
A Excuse me?
Q Close-knit family?
A Yes.
Q Can you tell the Court how often you had seen the defendant in the past 10, 15 years.
A In the beginning of the '80s, mid '80s, we would get together for family gatherings. And then when I served a full-time mission for the LDS Church in Los Angeles, I came across Pe again, who was living in Manhattan Beach.
Q You used a name just a minute ago when you answered that question. You said "Pe"?
A Yes.
Q How is that spelled?
A P-e.

Q And is that a Tongan nickname?
A It's just a nickname that we have called him.
Q That you have called Mr. Vanisi?
A Yes.
Q Any other names that you know that he has gone by within the family?
A No.
Q Ever heard the name George?
A It's English for Siaosi, yes.
Q So that is the English name for the defendant that has been used on occasion?
A Yes.
Q What is it--
How do you normally call the defendant. What?
A Excuse me?
Q What name do you usually call him by when you address the defendant?
A Just call by him by Pe or just my cousin.
Q And you saw him in California when you were on your mission--
A Yes.
Q --what year was that?
A 1994.
Q And how often say on a weekly basis did you

see Pe?

A I visit him quite frequently, but I haven't seen him for a while, so probably about three to four times a week.

Q And was he living with somebody at that time?

A Yes, he was.

Q Who was that?

A A young lady by the name of Deana.

Q Did ultimately Deana become his wife as you knew?

A Yes.

Q Come January 14th of 1998 did you have occasion to see your cousin Pe in Salt Lake City?

A Yes, I did.

Q Was that a surprise to you, that you saw him then?

A Yes.

Q It wasn't a planned get-together?

A No.

Q Where did you first see Pe in Salt Lake City?

A In my living room when I returned home from school.

Q And where did you reside at that time?

A 1665 South Riverside Drive, Number 116.

Q And who lived with you at that location, sir?

A Me and my brother.

Q And your brother's first name?

A Vainga.

Q Could you spell that.

A V-a-i-n-g-a.

Q And anybody else?

A I'm a foster parent, so I had a young child, 14 years old, Jeremiah Tally (spelled phonetically).

Q Okay. And he was also living at your home through Utah's version of the DCFF or the Division of Child and Family Services?

A Yes.

Q Could you describe how you first observed your cousin Pe, what his appearance was, and what clothing he was wearing.

A I walked in the apartment, and he greeted me with a big hug as usual. I noticed that he had-- he was a little bit messier than usual, because he's a very clean, well-groomed person. He was wearing some light tan utility boots with some dark Levi's. He had a dark sweater around his waist and a cut-off shirt.

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Q When you say a cut-off shirt, can you tell me the color of that shirt and where it was cut off.

A He wore a dark, faded blue shirt cut off on the shoulders area.

Q So the sleeves were what was cut off?

A Yes.

Q And what was his demeanor or behavior like? Can you describe--

A He was very excited to see me and my brother. He was-- He is a very intelligent person, so he did expound on a lot of different subjects, but he just was curious on how the family members were doing in Salt Lake City, specific names he gave. They were just many, many cousins that he asked about their status and what they were doing.

Q And at the time that you hugged your cousin did you smell an odor about his person that you recognized?

A I wasn't quite sure what the smell was, it could be cigarettes, it could be marijuana, but it was a weird smell.

Q Okay. And who was present in your home when you first saw Pe?

A Just me and my brother.

Q Okay. Your brother Vainga?

A Yes.

Q Soon after you greeted your cousin, the defendant in this proceeding, did there come a time where the defendant went to the bathroom?

A Yes, he went to use the restroom.

Q And during that time period did Vainga comment to you or speak to you in some fashion about Pe?

A He didn't really know who Pe was previous to his visit for the reason he had never lived in Salt Lake a lot, but he asked me if he's like that all the time, meaning does he talk like that all the time.

I said, Yeah, he likes to talk a lot. And he said, You know, he might be in some trouble. And then I didn't understand what he meant. And then soon after he came back from the bathroom.

Q Did he mention something to you about a weapon? Did Vainga mention something to you about a weapon?

A Not at this time.

Q Not at that time?

After the defendant came out of the bathroom did there soon come an occasion where you went to a cousin by the name of Miles' home?

A Yes.

Q Who's went to Mile's home?

A Me, my brother, Pe.

Q Okay. Vainga?

A Yes.

Q And through the course of your testimony here when you say your brother, it would be a reference to Vainga, although you have another brother, but he's not involved in what happened?

A Yes.

Q After you went over to Miles' house do you remember what time of day it was when you first saw Pe? And then the second question would be do you recall what time of day it was that he went to Miles' house?

A I returned home from school about 1:30, approximately, 2:00.

Q Would that be in the afternoon?

A Yes.

Q And do you recall approximately what time you went to Miles' home?

A Probably just a little while later, because we had lunch, and then we drove to Miles' home probably half hour after that.

Q And who is it once again that went to Miles' home?

A Me and my brother and Pe.

Q And are you in the same car?

A Yes.

Q When you went to Miles', your cousin's, home, did you have occasion at that location to see a vehicle that your cousin, the defendant, said he had arrived in Salt Lake City in?

A No.

Q State's Exhibit 1, is that your cousin?

A Yes.

Q Is that how he appeared to you when you saw him on the first occasion that you just described at your home on January 14th, 1998?

A His beard has been altered a little bit.

Q How has his beard been altered?

A I don't remember.

Q Okay. It just looks different to you?

A (The witness nods his head.)

Q What did you do at Miles' house?

A I talked with Miles, who returned from work recently before we walked in. I asked Miles what time or when Pe had come over, and, Why is he here in salt lake? And Miles said, He just showed up. And I said, Well, let's go out-- let's go take him out.

And Miles had some plans with his wife, but he

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set those plans aside, as usual whenever Pe comes into town.

Q Was there some concern at this point when you talked to your cousin Miles that Pe might be in trouble?

A I told Miles that something was a little funny, that he might be in some trouble.

Q Now, based upon your understanding, your cousin, the defendant, had gone to Miles' first when he first came into Salt Lake City and prior to you seeing him at your home, is that correct?

A Yes.

Q So Miles already knew that Pe was in town?

A Yes.

Q Where did all of you go after you left Miles'?

A We went to a place to play pool.

Q Do you remember the name of the place that you went to play pool?

A A pool hall in West Valley City.

Q And who was going to the pool hall?

A Miles and his wife, me and my brother, and Pe.

Q And do you recall what time you get to the pool hall?

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A Probably close to 4:00.

Q Was there a time at the pool hall that the defendant left the pool hall by himself and went behind the building?

A Yes, there was. When we first got there, he said to give him a minute, he will be in. He went around back, and we went into the pool hall.

Q Did he go by himself?

A Yes.

Q Do you have an idea of what he was doing or why he went by himself?

A Pe is very respectful of our family, especially with Miles' wife there. He probably went around the building to get a smoke or something.

Q Okay. And after you left the pool hall did there come a time where you and your brother made up a story to tell to your cousin about where you were going and what you had to do?

A Yes.

Q Okay. Why did you--

A couple questions regarding that, sir. Why did you make up a story about what you guys were going to do?

A My brother was supposed to be off work that day, and myself fearing that he would get in some more

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trouble from his previous history of the system, I told him that I would take him somewhere else while I go to school. I had classes that evening, January 14th.

Q And your brother Vainga has been in trouble with the law before?

A Yes, he has.

Q And were you concerned about the condition that your cousin was in and whether or not he represented a danger to your family?

A Excuse me?

Q Did you have a concern at this point, David, that your cousin Pe represented a possible danger to you or members of your family?

A Yes.

Q And what was that concern? Why did you have that concern? What was it based on?

A It was my assessment during the few hours that we had been together already and the tip that my brother gave me that he might be in some trouble.

Q Was Pe acting like the Pe that you knew in 1994 in Los Angeles?

A No, he wasn't.

Q Can you describe what was different about him and how he was behaving during this time period.

A For those who know Pe we know that he's a very intelligent person, very clean, well-groomed, a very active person. And to see him at my home it was shocking, especially when I asked him what's he doing here, and he just-- I felt like he just dropped everything, wherever he was at, and then just came with basically him and his clothes on his back to be with his family in Salt Lake City.

Q Did there come a time where you knew or believed that your cousin had a gun on him?

A At that time, no.

Q Okay. That is the time when you are at the pool hall?

A Yes.

Q Now, after the pool hall did you go to Arby's to get something to eat?

A Yes. We decided we weren't going to eat there, so we went to an Arby's near my home.

Q And who went to the Arby's?

A Miles' wife, me, and my brother Pe.

Q And how was Pe acting at that time?

A He was just overexcited to see all of us, talking a lot, as usual, asking about family members, and just jumping from one person to another to another, just really antsy and hyper.

Q Okay. After being at Arby's did there come a time where you wanted to separate yourself from Pe so that he's not around you and your brother?

A I wanted to separate him from my boy, who was returning-- who would be home from school, and from my brother, who was like a magnet to trouble.

Q Okay. And that wasn't successful, was it?

A No.

Q Can you describe what happens next.

A We go home. I told Pe that my brother needs to go to work, and I need to go to school, and what he wanted to do. And we thought for a little while, and my brother said he needed to go home to take a shower and go to work.

So we went back to my home. And when we got there, my boy was there, Jeremiah. And then that is when I started to get a little bit afraid.

Q Okay. And what happens once you are home? What were the plans of the defendant Pe, Jeremiah, and yourself? What happens next?

A My boy goes to the local recreation center to play basketball everyday after school, so he offered to go play basketball. Pe was very excited to go play basketball as well. And so he went with my boy to the rec center to play basketball.

Q Okay. And that concerned you?

A Yes, very much so.

Q Now, after they leave to the rec center did there come a time, sir, when you had communication with your cousin Miles in a discussion about the police?

A No. Miles called my home after he left us from Arby's and asked where my brother was and told me to be careful for my brother so he doesn't get into any more trouble.

Q Okay. And was there any mention of police in that phone conversation?

A No, there wasn't.

Q Okay. When did the police come into play? When did you find out about the police looking for your cousin?

A Before we left my apartment I was getting ready to go to school, and I got a telephone call from Miles' older brother.

Q And what is his first name, and could you spell it?

A Muli, M-u-l-i.

Q Okay. And can you tell us about what happens in that conversation.

A Muli just returned home to his mom's home

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to visit his mother. At the same time Sgt. Townsend came to the home with a photo ID that probably was faxed over with the identity of Pe.

It wasn't very clear, but the name was clear to them. And so he called me and asked me if I knew about it.

Q And at that point you didn't?

A And at that point I didn't.

Q And what happens next?

A He then-- I then asked Muli why is he-- why did he come there for, and Muli said that he might be in some trouble in Reno.

Q And what happens next?

A I still wasn't sure, because Muli didn't see the picture very well.

Q You weren't sure that it was your cousin Pe?

A That it was Pe. And Muli asked me what he wanted me to do, and I told him that I knew where he was. I said he was playing basketball. And that was the end of that conversation.

Q Okay. Did there come a time after you talked with Muli that you were contacted by Townsend from the Salt Lake County Sheriff's Office?

A Yes, there was.

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Q And was that at your home?

A Yes, it was.

Q And what happened in that conversation?

A He asked me if I knew the name, and I said, The name sounds familiar.

Q What was the name that he gave you?

A The name was Siaosi Vanisi.

Q What happened next after he asked you about the name?

A He asked me if I remembered the name or if the name was familiar, and I said, Yes. I also told him that I had some relatives by that last name.

Q Okay. And what did Sgt. Townsend ask you next?

A He then came over.

Q To your home?

A Near my home.

Q Okay.

A And he gave me information. And I said, Why are you asking me about this person, and who-- and what did this person do.

Q What were you told?

A I was told that he was involved-- He was a suspect to a murder that took place in Reno, Nevada to a police officer, and that he might be involved in a

few armed robberies.

Q And did there come a time where you were presented with information by Sgt. Townsend that confirmed the identity, that indeed it was Pe, your cousin, they were looking for?

A He continued to tell me more about this person, and I wasn't a hundred percent sure yet who this person was. And then he pulled out a--I think it was faxed--picture ID of this person. And, yes, I did identify him.

Q And that was indeed your cousin Pe?

A Yes.

Q And what happened after that identification with Sgt. Townsend? What did you and Sgt. Townsend do?

A He asked me-- He drove me around the neighborhood, and he asked me if I knew where George was.

Q And you knew George to be the English name for Pe?

A Right, Siaosi.

Q And what did you tell Sgt. Townsend as far as the possible location of Pe?

A Well, I informed Sgt. Townsend that he was playing basketball at the rec center with a foster

child of mine.

Q It was determined that contacting Pe at the rec center wasn't an appropriate thing to do because of the number of people around. Is that a fair assessment?

A Yes.

Q What was your-- What did you do next?

A Sgt. Townsend said that he would-- he didn't think that the rec center was a safe place because of all the children who are around and especially he being with my boy.

Q And so what was ultimately the plan in order to contact your cousin Pe?

A Sgt. Townsend said he was going to contact some backup, and they were going to come to my apartment.

Q And he gave you specific instructions about what to do inside the apartment?

A Yes, he did.

Q When you returned--

You went to some other areas after the rec center with the Sergeant?

A No.

Q When you returned home, was your cousin Pe and your son, your foster child, home?

A Yes.

Q And what was your plan, or what did you want to do according to Sgt. Townsend's instructions?

A First of all, I didn't want to follow his plan. Coming into the house and seeing Pe there and my boy was there, I feared for the safety of my boy, and I wanted him out of the picture.

Sgt. Townsend's plan was at 6:00 to send my boy out the door. Then I needed to immediately follow him.

Q Okay. What did happen?

A My boy left the house, and then instead of following Townsend's plan I sat down and spent time with him.

Q With your cousin?

A (The witness nods his head.)

Q What were you doing with your cousin?

A He wanted to see pictures of our family. And knowing that Sgt. Townsend had a plan, I took about eight photo albums and sat next to him and went picture by picture.

Q And you knew that the police were-- or had a pretty good idea that the police were outside waiting for your cousin?

A Yes, I did.

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Q After you spent some time with your cousin in the home do you recall approximately what time you left the house?

A My boy left for good at 6:00. I stayed in there for another 45 minutes with him.

Q And did you leave one time and go back in?

A I started to walk out, and George jumped up and asked what I was doing. And I told him I was going to take the trash out, and he sat back down. And then I came back and sat down with him again.

Q What did you do with your cousin Pe the second-- that time?

A We have a two-seat couch, and I sat next to him, and I continued to go over the pictures of my family with him.

Q I show you what has previously been marked as State's Exhibit 12. Do you recognize what is depicted in that photograph?

A Yes.

Q And where is that photograph taken, if you know?

A In my kitchen.

Q Okay. In your home in Salt Lake City?

A Yes.

Q Does it accurately depict the condition of

especially that one wall of your home on January 14th, 1998?

A Yes.

MR. STANTON: Move for State's 12 into evidence.

MR. FEY: No objection.

MR. SPECCHIO: Your Honor, we won't object to any photographs so long as we get a copy of the photographs.

THE COURT: Okay. You mean after the hearing?

MR. SPECCHIO: Yes, Your Honor, or within a reasonable time thereafter.

THE COURT: Okay.

MR. SPECCHIO: That goes for all of the photographic exhibits. We have been shown them already.

MR. STANTON: For the record, that is State's Exhibits 1 through, I believe, 12.

THE COURT: All right.

(State's Exhibits 1, 2, 3, 4, 6, 7, 8, 9, 10 and 12 were admitted.)

BY MR. STANTON:

Q After you look through the photographs--the photo albums the second time, David, did you then leave the home?

A No, I didn't. I came back to my kitchen.

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I was making some food, and I wanted to stay there a little bit longer.

Q Okay.

A I then received a call from Sgt. Townsend.

Q In your home?

A Yes. He wanted to know what I was doing in there.

Q And based upon that telephone call did you-- were you instructed or did you decide to leave your home at that point?

A At that time I felt almost I didn't have a choice to stay in there much longer. I had been in there about-- almost 50 minutes with him when I was supposed to leave.

Q You love your cousin, don't you?

A Yes.

Q Did you leave the home?

A Yes, I did.

Q And what was the last thing that you saw or heard your cousin do when you left the home?

A The last thing I remember he was still sitting on the couch, looking at the pictures of our family.

Q And when you left your home, was there a large police presence that had surrounded your home?

A Yes, there was.

Q And can you just in a general fashion, David, tell the Court--

Your home and a lot of your valuables were destroyed by a Swat operation that took place involving your cousin, correct?

A Yes.

MR. STANTON: Thank you. I have no further questions.

THE COURT: All right. Mr. Fey.

MR. FEY: Thank you.

CROSS-EXAMINATION

BY MR. FEY:

Q David, the first time you saw Pe on that day was approximately one, 2:00, something like that?

A One, 1:30.

Q Okay. And at that time you had returned from school from the morning session, right?

A Yes.

Q All right. You had something to eat--

Your brother was also there at the house?

A I brought some lunch for us.

Q I'm sorry, sir?

A I brought some lunch.

Q You were not aware that he was in the house, were you?

A No.

Q Your brother was there, you all had lunch together, is that correct?

A Yes.

Q That is when you went over to Miles' house?

A Yes.

Q Your best estimate on time would be that you went to Miles' house when?

A Approximately between three and 4:00.

Q So between three and 4:00 you are at Miles' house. It was you, your brother Vainga, and Pe. Miles is there. His wife was there.

Do you know how long you stayed at Miles' house?

A No. Probably about 15 minutes.

Q That is when you went over bowling, right?

A I went to the bowling alley.

Q So that would be maybe you left there about 4:15, 4:30, something like that?

A Approximately, yes.

Q To the best of your recollection. I know it's difficult to estimate times. Okay.

When you are at the bowling alley, I think you said you were in there for awhile, but then after a

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certain period of time you wanted to go home because Jeremiah was coming home from school?

A Excuse me. Can you repeat that?

Q I'm sorry. You were at the bowling alley for a period of time, and then it was your idea to go home because Jeremiah was going to be coming home, is that right?

A Yes.

Q And the best estimate you've got-- Is that like 5:00, do you know?

A It was probably about-- close to 4:30.

Q Okay. So you didn't stay very long at the bowling alley at all, did you?

A No. We had to stop before we went home, and that was to Arby's.

Q Okay. So you stopped-- On the way home you went to Arby's, and you then went home from--

Do you know approximately what time it was that Jeremiah and Pe went out to the rec center to play basketball?

A It was close to 5:00.

Q So that is close to 5:00. And then how soon after that did you get the phone call from Muli?

Did he call you?

A Muli called me approximately right before I

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left the apartment before-- It had to be before 5:00.

Q So before 5:00. And Jeremiah is already at the rec center, is that right?

A Jeremiah and--

Q And Pe?

A --and Pe were walking.

Q So Muli called you and told you what Officer Townsend had talked to him about, is that right?

A Yes.

Q Now, you talked to Officer Townsend-- You left right away, or did you wait?

A No, I didn't.

Q What kind of delay? Can you estimate?

A Why the delay?

Q Yes. How much of a delay between the phone call and the time-- phone call from Muli and when you talked to Officer Townsend?

A Probably close to half an hour.

Q Okay. So did Officer Townsend actually came to your house? Is that right?

A No, he didn't.

Q Okay. Where did you talk to him?

A He called me at an uncle's house. We talked at my uncle's house.

Q And your uncle, what is his first name?

A Phil.

Q Phil.

And had you gone over there then after you had talked to Muli?

A Yes.

Q Okay. So this is all before 6:00, though, right?

A Yes.

Q So is it fair to say things were going fairly quickly that afternoon?

A Very quickly.

Q Ultimately you did talk to Officer Townsend. Officer Townsend then had this plan, and then you went back to your house--

A Yes.

Q --to help implement the plan?

A Yes.

Q I think you testified you were a little bit concerned about the plan, right?

A Yes, I was.

Q Okay. So the plan was that at 6:00 you were to send Jeremiah out, and then you were to follow him out, is that right?

A I was to follow immediately after him.

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Q And then we had you sitting down with Pe to look at the pictures, is that right?

A Yes.

Q Okay. So to the best of your estimate, though, the first part of the plan where Jeremiah went out, that took place at 6:00, is that right?

A Yes. He did leave at 6:00.

MR. FEY: Okay. No further, Your Honor.

THE COURT: Any redirect?

MR. STANTON: No, Your Honor.

THE COURT: All right. Thank you, David. You are excused.

And who is your next witness, Mr. Stanton?

MR. STANTON: It would be Vainga K.

THE COURT: I will have my bailiff call Mr. Vainga in.

MR. GAMMICK: Your Honor, just so the record is clear, Mr. Specchio said they would have no objection to photographic evidence that had been shown, and if I may, that is exhibit number 1, which is the photograph of the defendant, which has already been used in the courtroom.

THE COURT: All right.

MR. GAMMICK: Photograph number 2, which is a surveillance photograph taken at a store that will be

covered.

And photograph number 3-A, which is a photograph of the inside of the apartment with a jacket, photograph 3-B is a closer photograph of that. Photograph 3-C is a photograph of a hatchet.

Photograph 4-A is a white plastic bag with a Sam Brown belt in it.

THE COURT: Sir, if you would just please wait over there by the witness box, I will swear you in in just a moment.

MR. STANTON: Photograph 4-B is a picture of the Sam Brown belt with all the equipment that was found. Photograph 4-C is the back of a radio, a Saber radio.

Photograph 6 is a photograph of a weapon, a Glock pistol in what looks like a laundry stack.

Photograph 7 is the front of a vehicle with the license plate showing.

Photograph 8 is a photograph of the scene.

And photograph 12 is the one that was just discussed, the house and Mr. K.

MR. SPECCHIO: I would like to have-- We already have copies of those, judge.

THE COURT: You just need all but 1 and 2?

MR. SPECCHIO: Yes.

MR. GAMMICK: I would indicate that defense

counsel has had the opportunity to review all the photographs we have at this time. We will be glad to furnish copies of those specific ones.

THE COURT: All right. Mr. Vainga, would you please stand, raise your right hand.

(The Court administered the oath to the prospective witness.)

THE COURT: All right. Please be seated.

And you need to speak up a little bit, so that my court reporter can hear what you are saying and also so that counsel can hear what your answers are to their questions.

VAINGA K.,

produced as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANTON:

Q Sir, could you please state your full first and middle names, and spell both for the court reporter.

A Vainga Imoana, V-a-i-n-g-a, middle name, I-m-o-a-n-a.

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Q How old are you, sir?
A Twenty-three.
Q And do you know the gentleman sitting at that table in the red jump suit?
A Yes, sir.
Q How do you know him?
A He's a distant relative.
Q And prior to January of 1998 when was the last time that you saw the defendant?
A What was that?
Q Prior to January of this year when was the last time that you saw him?
A I never saw him after that.
Q I don't mean after that, before that.
A Oh, before that?
Q Right.
A Maybe 10 years, 12 years.
Q How do you know the defendant as far as name? What names do you know him by?
A Pe.
Q Okay.
A And George.
Q George. What is his formal name?
A Siaosi.
Q All right. And his last name?

A Vanisi.

Q And on January 14th, 1998 did you see the defendant in Salt Lake City?

A Yes.

Q And where were you staying at that time when you saw the defendant?

A I was at 1665 South Riverside Drive, number 116. That is in Salt Lake City.

Q You live there with your brother David?

A Yes.

Q And there was also a Jeremiah that was living there, too?

A Yes.

Q Sir, before I get into the contents of your testimony, have you suffered any felony convictions?

A Yes.

Q And how many?

A Four or five.

Q Okay. And what were the charges that you were convicted of?

A Aggravated Assault with a deadly weapon and Attempted Murder.

Q Some various different counts of both those offenses?

A Yes.

Q And was that in Texas?
A Yes.
Q How many years were you sentenced to off those offenses in Texas?
A Four to five.
Q Four to five years?
A Yes.
Q And how much time did you actually serve?
A About three and a half, four years.
Q And are you on parole now?
A No.
Q You flattened your time?
A Yes.
Q Now, as part of your trouble in Texas were you involved in gang activity in Texas?
A Yes.
Q And what gang were you a member of?
A Tongan Crypt Gang.
Q TCG?
A Yes.
Q In January of 1998, specifically on the morning of January 14th, when was the first time that you saw your cousin, the defendant?
A About 8:30 in the morning.
Q And what were you doing at that time?

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A I was just waking up.

Q Okay. Were you surprised to see him?

A Yes.

Q Did you have plans to see him, or did you know he was coming?

A No, not at all.

Q Did you recognize him?

A Not at first. It took awhile for me to recognize him.

Q How did you normally-- In the ten or so years before that how did you normally see the defendant? How did he appear to you?

A He was clean cut, skinnier, and, you know, no facial hair.

Q Okay. I show you State's Exhibit 1 in evidence. Is that how he looked when you saw him that morning?

A Yes.

Q Okay. What was the first thing he told you about why he was in town?

A He just said he was in town for some business-- to see his relatives.

Q Did he mention anything about seeing your cousin Miles?

A Yes.

Q Was that before he had seen you?
A Yes.
Q And how did he get to your home?
A My cousin Miles dropped him off on his way to work.
Q Okay. And how did he appear? What was his behavior like as you were watching him at this time?
A Real happy, excited, cheerful.
Q And did there come a time soon after you first saw him that he told you that he had killed somebody?
A Yes.
Q How long after your first seeing the defendant did he tell you that?
A Maybe 10, 15 minutes.
Q Did you believe him?
A No.
Q Did there come a time where you went outside to smoke a cigarette?
A Yes.
Q Why did you go outside to smoke?
A Because my brother is real strong in the church, LDS Church. He doesn't allow smoking in the house.
Q And would it be fair to say that you are

kind of the black sheep of the family?

A Yes.

Q Okay. When you are out smoking, did the defendant, your cousin, follow you?

A Yes, we both went out.

Q And at some point when you were outside did he ask you about whether or not you wanted to smoke something?

A Yes.

Q Describe that.

A Well, he had some marijuana, and he offered it to me, and I told him that I didn't smoke it anymore. I lost the taste of marijuana.

Q And, Vainga, why were you living with David at this point? What was kind of going on in your life at this point?

A I just moved back to catch up with my family and my brothers and sisters. And my brother was-- They sent me to my brother so he could straighten me out.

Q Your brother David?

A Yes.

Q He's kind of the straight arrow of the family?

A Yes.

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Q Very active in the church?
A Yes.
Q A very religious man?
A Uh-huh.
Q Now, when you were outside with your cousin, the defendant, did there come a time where he pulled out some money?
A Yes.
Q Can you describe that incident for us.
A Yeah, he had a wad of money, a wad of cash, and I noticed fives, and ones, and two-dollar bills.
Q You told the detectives from Reno that it looked like a certain type of money. Do you remember what term you used?
A I said, yes, it looked just like 7/Eleven money.
Q What does the term 7/Eleven money mean to you?
A I was involved with-- not involved, but I knew some people who had robbed a 7/Eleven. The money they had was exactly what it looked like.
Q Small denominations?
A (The witness nods his head.)
Q Did you go then back inside your home after smoking?

A Yes.

Q And what did you go when you went back in?

A We went back in and turned the t.v. on, started talking.

Q Okay. And what was the defendant, your cousin Pe, talking about?

A All kinds of stuff, family, wanting to go see all the family, getting together, all the boy cousins, so we can go play some hoops or something.

Q Okay. He was real interested in family?

A Yes.

Q Did he come back to the subject about killing somebody?

A Yes.

Q What did he say at this time?

A He said it was a police officer that he killed.

Q Okay. Did he say where that happened?

A Back in Reno.

Q And did he tell you anything more just at that time?

A No.

Q Who changed the subject?

A I think I did, because I still didn't believe it.

Q Did he change-- When changing subjects, did he talk about a robbery?

A Yes.

Q Okay. Now, is there a Tongan term that he used?

A Fahi kesi?

Q Yes. Could you spell that and say it one more time.

A F-a-h-i, K-e-s-i.

Q And what does that mean to you, sir?

A Fahi, which means break into; kesi, which means gas station.

Q And you speak Tongan fluently?

A Yeah.

Q Okay. So to translate for me, someone who doesn't speak Tongan, when someone says Fahi kesi, what does that mean to you?

A Robbing stores.

Q A particular type of store?

A Like gas stations.

Q Or convenience stores?

A Convenience stores.

Q Did he talk about his wife?

A Yes, at one time.

Q And was he upset about his wife when he was

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talking?

A Sort of-- Not really.

Q Okay. Did there come a time where he told you--

I'm trying to walk you through chronologically what he was saying to you. What did it mean to you when he said 1998 was going to be a special year for him?

A Yes, 1998 was the year for him to be free and get out, and find his roots, family.

Q Did he mention anything about wanting blood relatives to follow him?

A Yes.

Q And what did you take that to mean when he was telling you that?

A I still thought it was a joke, okay.

Q But what was it that you felt he meant by follow him, to get his blood cousins or relatives to follow him?

A Get everybody together so we can go, you know, do crime.

Q Do crime?

A (The witness nods his head.)

Q Now, did there come a time where you saw a gun on your cousin's person?

A Yes.

Q Can you describe what happened then when you first saw it.

A I still thought it was a-- You know, I recognized the gun as being a Glock .45.

Q How did you know what a Glock .45 is?

A Because I have been around them. I've handled guns.

Q To include a Glock .45?

A Yes.

Q And you knew immediately it to be a Glock and a .45 caliber?

A Yes, it would either be a Glock .45 or Glock .40, which they look similar.

Q Let me show you State's Exhibit 6. I represent that is a gun found in your brother David's home. Did that look like a gun that your cousin had?

A Yes.

Q When he pulled out the gun, did you ask him who he killed?

A Yeah, I did.

Q And what was his response? And at this point, Vainga, could you please try to use the exact words your cousin said to you.

A He said something about killing a po po

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(spelled phonetically), which means police officer or law.

Q The term po po to you means police officer?

A Yes.

Q And that is the term that your cousin used?

A Yes.

Q Did you believe him?

A No, not at all.

Q There came a time where you did believe him?

A Yes.

Q What was happening that convinced you that what he was telling you was the truth?

A Well, I asked to see the gun. And I held the gun, and I took the clip out. And it was hollow point bullets in the clip. And from my knowledge I know that only police officers carry hollow point bullets.

Q So at that point you thought--

A Yeah, it clicked.

Q Did there come a time where your cousin, the defendant, told you about what went on in Reno in more detail?

A Yes.

Q I want to first start off with, Vainga, the

statements made by the defendant to you regarding the night before the murder. Do you remember that?

A He said he went with one of his homeys.

Q When you say the term homeys, what does that mean to you?

A Friend.

Q Okay. And what did he say when he went with one of his homeys? What happened?

A That his homey backed out on him.

Q Okay. What were they doing?

A They were I guess surveilling the area.

Q For what?

A For someone to kill or something.

Q Okay. Someone to kill?

A Yes.

Q Did he describe to you who specifically they were looking for the night before to kill?

A Police officer.

Q And was it a particular type of police officer that they were going to kill?

A White police officer.

Q What happened to the homeboy according to your cousin?

A Backed out.

Q Did he tell you why he wanted to kill a

police officer?

A Because he was white.

Q After the incident with his homey backing out did he tell you that he went and bought something?

A Yes.

Q What did he tell you he went and bought?

A An axe or hatchet.

Q Okay. As best you can, Vainga, can you tell this Court what term the defendant used as to what he bought? Was it an axe or hatchet, or do you know?

A I don't remember-- It was an axe or a hatchet.

Q Did there come a time where you saw or a vehicle was pointed out to you by the defendant at Miles' house about how he came or what he drove to Salt Lake City?

A Yes.

Q State's Exhibit 7. Is that the vehicle and how it looked when you saw it at your cousin Miles'?

A It was at a distance. I did see the tarp, though.

Q Does that look--

A Yes.

Q --pretty close to what he was pointing out

to you?

A Yes.

Q I want to make some time here, Vainga, to go as detailed as you can remember about what the defendant told you happened involving the murder of the police officer. Can you remember that?

A He said he saw him prior to the time.

Q What was he doing when he saw him prior to the time he killed him?

A I guess he saw him pulling somebody over. I can't recall.

Q As best you can remember.

A I'm not-- I'm drawing a blank.

Q Okay. Do you recall him telling you that he had saw the police officer that he ultimately killed pull somebody over?

A Yes.

Q Okay. What did he tell you he did after he saw that?

A He waited awhile and came back.

Q How much time did he say he waited?

A I think it was 10, 15 minutes.

Q And did he tell you how he came up to the police officer?

A Creeped on him.

THE COURT: What was that?

THE WITNESS: Creeped on him.

THE COURT: Creeped on him.

BY MR. GAMMICK:

Q What did that mean to you when he said that?

A Sneaking up.

Q And did he tell you what the police officer was doing as he was creeping up on him?

A He was doing some kind of paperwork.

Q And anything else?

A Drinking coffee of some sort.

Q What did the defendant tell you he did when he gets up to the police car?

A Knock on the window and said, What's up.

Q Now, who says "What's up"?

A The defendant.

Q Your cousin?

A Yes.

Q And what did he tell you the police officer did after he said, What's up, and knocks on the window?

A He said something like, "Can I help you".

Q And then what happens?

A And then it was on.

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Q "It was on"?

A Yeah.

Q Okay. Did he describe to you what happened? Did he verbally tell you what happened, or did he demonstrate to you?

A It was, (The witness demonstrated).

Q Okay. Can you show us in court today what your cousin demonstrated to you?

A Like swinging overhead.

Q Now, you are left handed, right?

A Yes.

Q What hand was your cousin using?

A His right hand.

Q Okay. And, for the record, you were making a motion over your shoulder?

A Yes.

Q Is that what he was doing, swinging like this?

A Yes.

Q Did he say that the police officer fought back?

A Yes, he got in one.

THE COURT: What?

THE WITNESS: He got in one.

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BY MR. GAMMICK:

Q He got in one? What did you take that to mean, or what did he say?

A I guess the police officer got a punch on-- got a hit on.

Q That is what your cousin told you?

A Yes.

Q Once again, do you remember at this point him stating, as best you can, using your cousin's words, about how he described the beating?

A Am I allowed to--

THE COURT: Yeah.

THE WITNESS: --cuss?

THE COURT: Yeah, you can say anything.

THE WITNESS: "I beat his ass".

BY MR. STANTON:

Q "I beat his ass"?

A Yes.

Q Was there a statement about whether or not he knocked him out or not?

A Yes.

Q And after he knocked the police officer out what did he tell you he did next?

A I think he stomped on him.

Q Okay. And how was--

Did he make a statement to you right after that about how he felt about doing that?

A It felt good, that it was like a rush.

Q Did he tell you it was fun?

A Yes.

Q Did he show any remorse when he was talking to you about this?

A Not at the moment, no. He was just excited.

Q The time that you were going to the rec center did he come up and whisper something to you again about this subject?

A He said it felt good, that, They are not even onto me.

Q The police?

A Yes.

Q Okay. Did he tell you anything about the police officer's belt?

A Yeah, he said he took it.

Q Did he use a certain term about what he did with the belt when he was walking home?

A Sporting it.

Q Sporting it?

A Yes.

Q What did that mean to you?

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A Wearing it.
Q Did he talk to you about robberies?
A Yes.
Q What did he tell you about robberies?
A He said how he controlled the whole scene.
Q Did he tell you what kind of places he robbed?
A Gas station.
Q And when he said he controlled the whole scene, can you talk in detail about what he tells you about what happens inside the store on at least one robbery?
A Yes, he said-- you know, was asking them for the money with the people coming in. He says, It's okay. Get what you want. I will be out of here in a second.
Q Okay. So he indicated he was relatively polite?
A Yes, he was.
Q Did he talk about a disguise?
A Yes.
Q And what did he say he looked like in that disguise?
A Jamaican.
Q A Jamaican?

A Yeah.

Q Describe the disguise as he told you.

A He had a fuller beard and Jamaican beanie with fake dreadlocks hanging from the, you know-- attached to the beanie.

Q And how long were the dreadlocks?

A I don't recall.

Q Okay. What do you know dreadlocks to be as far as the length, Jamaican-type look?

A Yeah.

Q How long are the dreadlocks?

A They are usually-- They are long.

Q You are pointing down to your arms and upper shoulders.

A Yeah, they are different lengths. It takes a while to grow them.

Q Did he tell you about a time when he was watching while he was in Reno television news about the murder?

A Yes.

Q What did he tell you about him watching the news and why he was watching the news?

A To see if they were onto him.

Q Did he tell you that he had admitted it to anybody at the time of watching the news-- anybody

around there?

A Some girl.

Q And what did he tell you that he told the girl?

A "That is what I did".

Q Speaking about the murder?

A Yes.

Q Did he ask you whether or not you could get him or where to get another .45 caliber handgun?

A Yes.

Q Can you tell the Court about what your cousin was saying at this point and why he wanted another gun?

A He wanted another gun, because he wanted to be like those guys in Face Off with two .45's.

Q Okay. Face Off is a movie?

A It's a movie, yeah.

Q And you understood him that he wanted to have two .45's?

A Yeah, so he can go one like that, (demonstrating).

Q And you are pointing with him charging in with two guns?

A Both guns, yeah.

Q I would like you to take a look at

photograph 12 in evidence. Do you recognize that apartment or that portion of the apartment?

A Yes.

Q Okay. Is that your brother David's house?

A Yes.

Q I will leave that photograph in front of you, Vainga.

Did there come a time where your cousin talked about Lamanite warriors?

A Yes.

Q What is a Lamanite warrior as you understand it?

A As far as I know, we are descendents of the Lamanite warriors.

Q They are people of color?

A Yes.

Q And what was your cousin telling you about becoming a Lamanite warrior and what he wanted to do?

A He wanted to claim us to be Lamanites and Lamanite warriors. He wanted to gather our cousins or the gang members in that area so we can get together.

Q When you say "us", you mean Tongans?

A Yes.

Q And when they get together, what did he want to do?

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A "Let's do some crime".

Q Did he tell you an incident about what he did in Inglewood, California in talking to some TCG's?

A Yes.

Q What did he say occurred that he did in Inglewood?

A He said he went up to a dance in Inglewood. I guess it was a church dance. And all the TCG's gang members in Inglewood were outside the parking lot.

He said he went up to them and asked them if they wanted to join him. And he said, "Do you want to join me and go kill people?" And they said, "No".

Q Did there come a time--

That photograph I showed you earlier about the vehicle and the tarp, did there come a time where he used a particular term to describe that vehicle to you?

A G ride.

Q A G ride?

A Yes.

Q What does a G ride mean to you?

A G meaning gang, gang meaning stolen.

Q So when he called the car under the tarp a G ride, to you it meant that--

How did he get it?

A Stole it.

Q Did he admit to you that he did steal it?

A Yes.

Q The photograph in front of you has a series of pictures that hangs on your brother's wall. There is a picture there of Jesus Christ, and there is a picture of three white gentlemen.

Do you know who those three white gentlemen are?

A They are the prophets.

Q In the Mormon church?

A Yes.

Q They are the elders?

A Yes.

Q And did there come a time when the defendant made some direct reference towards those photographs?

A Yes.

Q What did he do?

A He pointed the-- He pointed the pistol at the pictures, saying, "Fuck that white man. I'll kill that white man."

Q And that is the pictures of Jesus Christ that he did that to as well as the elders in the Mormon Church?

A Yes.

Q Did there come a time where he mentioned that he was upset at his parents?

A Yes.

Q Is that about the same time that he's doing this with the photographs?

A Somewhere around that time.

Q Okay. What was he upset with his parents about or why?

A He said his parents should have left him in Tonga.

THE COURT: In where?

THE WITNESS: Tonga.

BY MR. STANTON:

Q And he indicated to you that he starts hating white people when?

A He starts talking about, you know, his parents should have left him in Tonga, you know, like, I would have learned my roots. Instead they stick me here, and I learn that the white people are bad.

Q Why was he upset at white people? What did he tell you that white people had done to make him so angry?

A Because our people being-- He claims that our people are being oppressed by the white man.

Q Did there come a time where he describes

events again in Reno, and specifically an incident involving police dogs?

A Yes, he said he watched them-- the canine searching the area, and there was a part in the fence that was already cut out. He was with his dog, and he got through, and his dog-- He let his dog go, and he watched the canine pick up that scent as well as taking off his hat-- whatever else was right by him.

Q Now, when he's saying the police and using canines, is that near the murder scene?

A Yes.

Q And once again could you describe what he told you that he did with the beanie and the dreadlocks that were attached to the beanie? What did he do with that?

A He threw it in a canal that was nearby or some kind of running water.

Q All right. At the time that you saw your cousin can you describe the type and color of the shoes that he had?

A He had light brown utility boots.

Q And did you notice anything unusual to be on those boots?

A I saw spots on there.

Q What did it look like those spots were?

A Well, it could be blood.

Q Okay. And how was he dressed? Starting with his upper torso, what kind of clothes did he have on? What color?

A Well, when he walked in, he had on this red jacket, and as time went by he had took it off. I saw a purplish cut-off, T-shirt he had on. He had on two sweaters, one almost darker than the other. They were both blue, and he had a pair of black pants like I have on.

Q Are those tight or baggy?

A Baggy.

Q Did he tell you what he did with the hatchet after he murdered the police officer?

A I think he took it to his relatives' house.

Q Okay. And what did he tell you he did with the gun belt?

A Said I guess his homeboy got it.

Q Did you take that to mean it was the same homeboy that went with him the night before?

A Yes, probably.

Q Did there come a time when he was talking about being a Tongan Robinhood?

A Yes.

Q What was he telling you about that?

A He meant that in helping our people out by getting us together and robbing and give it back to our people.

Q Did he ask you whether there were any TCG's in Salt Lake City?

A Yes.

Q And what did you tell him?

A I told him there was quite a few out there.

Q All right. And is there quite a few?

A Yes, there is.

Q Did he ask you whether or not they still are involved in criminal activity?

A Yes.

Q And what did you tell him about TCG's?

A I told him they were heavily involved in crime.

Q And what did he say right after you told him that?

A To hook up-- Why don't we go hook up with them.

Q And do what?

A And get together and do crime.

Q Was there specifically people he wanted to commit crimes against?

A White people.

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Q Now, at one point you tell the Reno detectives in quite a long quotation about a statement when the police ask you whether or not your cousin is insane, intelligent, smart. And you told them quote that your cousin told you about him using the term insane.

Do you remember that?

A Yes.

Q Can you tell us, as best you can recall, Vainga, the exact words that your cousin used?

A Something like, I was 100 percent insane.

Q Do you remember what he said after that?

A No.

Q Would looking at a transcript of your interview with the Reno detectives refresh your memory?

A Yes.

MR. STANTON: It's page 22, (showing).

(Counsel briefly conferred.)

BY MR. STANTON:

Q I would like to refer you to page 22 of this statement.

And if you would, sir, just read to yourself so you can kind of put this into context. Up here at line 11, this would be the question by Detective

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Jenkins, and then, of course, your name is here.

So if you could start at line 11-- And I'm interested in his response down here that you gave at line 25. So if you can just read that to yourself and tell me when you are done reading.

A (Reading.)

Q Does that refresh your recollection?

A Yes.

Q Does that accurately say there at lines 28 through 32 what your cousin told you?

A Yes.

Q Could you read those lines 22 through 38 out loud.

A Insane. He told me straight up, I am straight up 100 percent insane. You know, I don't care about anything anymore. I'm free. And this is what I want to live-- Once I kill I got to kill some more to keep my heart.

MR. STANTON: I have no further questions.

THE COURT: All right. Mr. Fey.

MR. FEY: No questions.

THE COURT: Thank you, Vainga. You are excused.

Okay. I am going to take a ten-minute break for my court reporter. We will reconvene at 20 till 11. Okay.

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(A break was taken.)

THE COURT: All right. Before Mr. Stanton calls his next witness there are a couple things I need to let people know.

Mr. Specchio has something he has to do in his office at 11:30, so we will break at that time. We will return at 1:00 to continue the hearing, but it will be in Courtroom E, which is on the other end of the building, because they need this courtroom this afternoon for verified citation trials.

So if people are coming back after lunch, please go to Courtroom E.

MR. SPECCHIO: Thank you, Your Honor.

THE COURT: All right. Mr. Stanton.

MR. GAMMICK: Your Honor, I would call Louis Hill, please.

THE COURT: Mr. Hill, if you will come up to my right, I will swear you in.

Please raise your right hand and be sworn.

(The Court administered the oath to the prospective witness.)

THE COURT: All right. Please be seated.

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LOUIS D. HILL,

produced as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GAMMICK:

Q Would you please state your name and spell your last name, sir.

A My name is Louis Daniel Hill. My last name is H-i-l-l.

Q Okay. Do you live in Reno, Nevada?

A Yes.

Q I would like to show you exhibit number 7. It has been admitted. It only shows a partial car there with a license plate, but do you recognize that?

A Yes, I do.

Q Whose car is that?

A It's my car.

Q And I would like to call your attention to January 13th, 1998. Were you driving your car on that day?

A Yeah.

Q And at about 10:15 at night do you recall where you were at?

A Yes, I do.
Q Where was that?
A On 1998 Helena Street.
Q Is that in Reno, Nevada?
A Yes.
Q And were you in your car?
A Unh-unh. I was in the house. I had the car outside, warming up. And I came out two minutes later, and it was gone.
Q Okay. You were inside, you had your car running, warming up, you came outside, and it was gone?
A Uh-huh.
Q Do you know where it went?
A Unh-unh.
Q I would like to call your attention to the person that is sitting right here in front of you in the red jump suit, the Defendant Vanisi. Do you know him?
A No, I don't.
Q Have you ever met him before?
A Nope.
Q Did you give him permission to take your car?
A No.

Q Did you get your car back?

A Yes, I did.

Q Did you have to go get it?

A Yeah.

Q Where was it?

A In Salt Lake City.

Q What year, what make, and what color is your car?

A It's a '91-- I mean '92 Camry Toyota. It's black and gold.

Q And when you went to Salt Lake City to get it, who had your car there?

A Well, my parents went and picked it up, so it was in impound at the Utah Police Department-- whatever.

Q The police department had it?

A Yeah.

MR. GAMMICK: That is all the questions I have. Thank you.

THE COURT: Mr. Fey.

MR. FEY: No questions.

THE COURT: Thank you, Mr. Hill. You are excused.

He's free to go?

MR. SPECCHIO: Yes, Your Honor.

THE COURT: You won't need to recall him?

MR. GAMMICK: No, Your Honor.

THE COURT: Next witness.

MR. STANTON: The State would next call Detective Keith Stephens.

THE COURT: Detective, if you will come up to my right, I will swear you in. Raise your right hand and be sworn.

(The Court administered the oath to the prospective witness.)

THE COURT: Please be seated.

KEITH STEPHENS,

produced as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANTON:

Q Could you please state your complete name and your occupation.

A Keith Stephens, S-t-e-p-h-e-n-s, Deputy Sheriff Investigator, Salt Lake County Sheriff's Office.

Q What is your current assignment?

A Investigator with the Homicide Unit.

Q How long have you been a police officer? How long have you been assigned to Homicide?

A Sixteen years with the Sheriff's Office, four years Homicide.

Q Directing your attention to January 14th, 1998, did you have occasion in your official capacity to be involved in an investigation of a wanted subject from Reno, Nevada?

A Yes, sir, I did.

Q And was your involvement at the scene of a residence in Salt Lake City?

A Yes, sir.

Q And do you recall that address?

A 1665 Riverside Drive.

Q And the apartment number?

A I believe it was 116.

Q During the course of your initial involvement was there a subject wanted for the murder of a police officer in Reno?

A Yes, sir, there was.

Q And what was your initial responsibilities at that scene?

A Our initial responsibilities were to get the other inhabitants of the apartment out safely and

then to secure the subject within the apartment until we could safely get him out of there.

Q Can you give just a brief overall assessment of what happened during the hostage and stand-off situation at that location.

A What part do you want me to start at, sir?

Q Start off at the point where Mr. Vanisi was hold up in the house.

A Myself, a supervisor of mine, and another detective put a perimeter on the apartment ourselves while Swat was responding and staging, so they could prepare to relieve us. We held the perimeter on that residence.

We could see the subject inside the residence. We were fairly comfortable that he was alone. There was some verbal contact with him. We gave him some commands when he attempted to exit the front door. He did not wish to comply with us, at that time closed the door, retreated back into the apartment.

Q Okay. Do you see that person in court today?

A Yes, sir, I do.

Q And could you describe physically where he is in the courtroom and what he's wearing.

A Sitting at counsel table with the red jump

suit on.

MR. STANTON: May the record reflect the identification of the defendant?

MR. SPECCHIO: We will stipulate, Your Honor.

THE COURT: All right, it will. Thank you.

BY MR. STANTON:

Q Generally, could you pick it up, detective, once again. Just in a general fashion what happens?

A Generally speaking, we were position by position relieved by Swat team members. They took over the perimeter and the external operation from them. And I did some peripheral things at the scene and away from the scene during the stand off.

Q At sometime there was a decision, a tactical decision, made by the Salt Lake County Swat Unit to enter the home or make contact with the subject, is that correct?

A A portion of the Swat team has an immediate response team, and their job is to upon their discretion act immediately upon emergency or any other situation that requires entry into the residence.

They felt that their actions were needed, because the residence in their opinion was beginning to be engulfed in fire. There was a fire set within the residence, and they believed they needed to make

entry immediately.

Q And that was a fire in what portion of the residence?

A A garage that is directly within the residence, however, it's offset from the rest of the domicile.

Q What was your responsibilities relative to the scene of the interior of that apartment and the collection of evidence after Swat had done its thing?

A Just to document evidence, collect it, photograph it, and seize it.

Q Before you I have two photographs, Exhibits 6 and 7 into evidence.

Starting with the photograph to your left--That would be State's Exhibit 6--do you recognize what is in that photograph?

A Yes, sir, I do.

Q And where was that in the home?

A There is a hallway adjacent to the entrance of the residence. There is a washroom off that hallway, and this is immediately inside the washroom on top of the washer.

Q And what is the caliber, make and model of the handgun depicted in the photograph?

A It is a Glock .45 caliber semi-automatic

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pistol.

Q In your presence at some point with that weapon were you with Reno Police Officers and doing serial number comparisons of that weapon?

A Yes, sir, we did.

Q Did that weapon match the weapon that Detective Jim Duncan was looking for?

A Yes, sir, it did.

Q Photograph 7, to the right, is that a vehicle that you located and directed to be taken into custody?

A Yes, sir, I located the vehicle. It was loaded onto a tow truck, and I put it into evidence personally.

Q Where was that vehicle located at that time?

A It was roughly eight blocks north of the Riverside Drive address.

Q And you knew that to be a relative of the occupants of apartment 116?

A It was, sir.

Q It was the address where that vehicle was located?

A I didn't have that pertinent information. At that time we just knew the location of the vehicle.

Q Subsequent to that, though, you had been able to determine the location of the vehicle that was there was because of the relative that lived nearby?

A Nearby, yes.

MR. STANTON: No further questions of Detective Stephens.

THE COURT: Mr. Fey.

CROSS-EXAMINATION

BY MR. FEY:

Q With respect to the vehicle that you located, without saying what someone may have told you, was the location of that vehicle based upon what others may have told you, or was it based upon your own independent investigation, sir?

A Myself and Sgt. Townsend went to the location, and he basically pointed it out to me.

Q Sgt. Townsend had had previous contact with the residents at that location?

A Yeah, previous contact with family members. They had pointed it out to him.

Q When you saw State's Exhibit 6, was this the condition in which these items were found?

A I found them. Yes, they were.

Q Was the firearm that you just described up

like that, or was it covered?

A Let me set this for you. This is the washer and dryer, sitting like this. This is the front of it, so it's laying like this as you enter the doorway. So that is facing the front of the washer.

Q So that would be obvious when you walk in there? There was nothing covering the--

A Not when I walked in there, sir. That is exactly how it was.

MR. FEY: Thank you. No further questions.

THE COURT: All right. Mr. Stanton, any redirect?

MR. STANTON: No, Your Honor.

THE COURT: Thank you, detective. You are excused.

Is he free to go?

MR. STANTON: From the State's perspective, yes.

MR. FEY: No objection.

THE COURT: All right. Call your next witness.

MR. STANTON: The State would next call Sateki Taukiuvea.

THE COURT: Sir, if you will come up to my right, I will swear you in.

(The Court administered the oath to the prospective witness.)

THE COURT: All right. Please be seated.

SATEKI TAUKIUVEA,

produced as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STANTON:

Q Sir, could you state your full and complete name, and could you spell your last name for the court reporter.

A Sateki, S-a-t-e-k-i, last name Taukiuvea, T-a-u-k-i-u-v-e-a.

Q And do you have a name or nickname that you go by?

A Teki.

Q Teki?

A Yeah.

Q Okay. And, sir, were you interviewed by the Reno Police Department on Wednesday, January 19th, 1998?

A Yeah.

Q Okay. Was it Detectives Dreher and Depczynski?

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A Yes.
Q Do you recall that?
A Yes.
Q To your right at that table is a gentleman in the middle with the red jump suit. Do you know him?
A Yes.
Q What do you know him by? What name do you know him by?
A Pe.
Q Pardon me?
A Pe.
Q Do you know him by any other names?
A No.
Q Do you know what his formal name is?
A Well, yeah.
Q What is his formal name?
A Siaosi Vanisi.
Q Okay. And how do you know him?
A I just met him when he came down from LA.
Q When was that?
A I'm not sure.
Q Well, if I were to represent to you that you were interviewed by the police on Wednesday, January 19th, 1998, how many days prior to the police

talking to you had you first met the defendant?
A Probably about five days before or so.
Q Okay. And how is it that you knew him or came to be introduced to him?
A By a friend named Renee Peaua.
Q What is Renee's last name?
A Peaua.
Q How do you spell her last name?
A P-e-a-u-a.
Q Who is Renee Peaua to you?
A My girlfriend.
Q Are you married?
A No.
Q Where is Renee now?
A She is in Tonga.
Q In Tonga?
A Yeah.
Q What is she doing in Tonga?
A She is in school.
Q Where physically were you when you first met the defendant?
A At her house.
Q And where is that located?
A On Sterling Way.
Q Okay. And how did he first appear to you?

How was he-- What did he look like?

A He had his wig, that long hair, and he had a jacket and pants.

Q Okay. Now, when you talk about the wig, describe the wig for me in a little more detail.

A It was just straight. It was like straight hair.

Q Do you know the term dreadlocks?

A Yeah.

Q Were they dreadlocks?

A No.

Q Okay. And you said there was-- the hair was attached to what?

A Like a grungy looking thing.

Q Like a beanie?

A Yeah.

Q You pull it over your head?

A Yeah.

Q What about his shirt sleeves?

A Shirt sleeves in--

Q Yeah.

A They were cut off.

Q What color was his shirt?

A Black.

Q And do you remember what day it was that

you first saw him?

A No.

Q If I once again represent to you that you talked to the police on Wednesday, using that as a reference point, can you tell me what day it would have been when you first met him?

A Thursday.

Q Thursday the week before?

A Yeah.

Q Okay. Now, besides the wig and his shirt sleeves that were cut off, do you remember anything else about his appearance?

A No.

Q How about his beard?

A He had a beard.

Q Was it a full beard, or was it--

A It was full.

MR. STANTON: Can I have the booking photo, Your Honor?

THE COURT: (Handing.)

BY MR. STANTON:

Q Let me show you Exhibit 1. Did he look like that when you first saw him, the beard?

A Yeah, the beard did.

Q Okay. The hair was different because of

the wig?

A Yeah.

Q Now, did there come a time after you first saw him the next day that you saw him at Losa's house?

A Yeah.

Q What is Losa's name?

A Losa Louis.

Q Okay. And did you see her outside of court before you came in?

A Yes.

Q And where does she live?

A Rock Boulevard.

Q Do you know the address?

A 1098 Rock Boulevard, Apartment A.

Q And do you live there?

A No.

Q Where do you live?

A 230 Booth Street.

Q And when you saw him at Losa's house on North Rock Boulevard the next day, what was he wearing then?

A Same thing.

Q Same thing as you just described?

A Yeah.

Q Did he have any objects with him?

A No.

Q Do you remember telling the detectives that you saw him with a little axe?

A Yes.

Q Okay. Do you see the axe in the middle of that photograph-- what has been marked as State's Exhibit 3-C?

A Yes.

Q Did you see the defendant with that axe at Losa's house the next day?

A Yeah.

Q Where did he have it?

A He had it in his hand.

Q What was he doing with it?

A Holding it.

Q Where was he carrying it when he wasn't holding it?

A On his side.

Q Where on his side?

A Left side.

Q His pocket? In his hip? Where?

A Like in his pants.

Q Okay. In his pocket?

A Like between his pants and his-- between him and his pants, you know.

Q So right in here next to where you put a gun belt or-- a gun in a holster, inside?

A Yeah.

Q Did he say anything at that residence about what he was going to do with that hatchet?

A No.

Q You don't remember that?

A Yeah.

Q Okay. What did he tell you?

A He said he was going to kill somebody.

Q Okay. Who was he going to kill?

A I don't know. He didn't tell me.

Q He didn't tell you?

A (The witness shakes his head.)

Q If I were to show you your transcript of your interview with the police department, would that refresh your recollection?

A Yeah.

MR. STANTON: Counsel, referring to page 26, lines 39, carrying over to page 27, through lines 18.

BY MR. STANTON:

Q Sir, I want you to look at this transcript. This is you obviously. This is a police officer.

And I would like you to read, beginning at line 39 when this police officer asks you the question

right here, then I want you to read up until line 18, and see if that doesn't refresh your memory. Just read it to yourself.

A (Reading.)

Q Does that refresh your memory?

A Yeah.

Q So let me try this again. Did he tell you what he wanted to do with that hatchet?

A Yes.

Q What was it that he told you?

A He said he wanted to kill a cop.

Q And did he tell you why he wanted to kill a cop?

A No.

MR. STANTON: Counsel, page 27, lines 22 through 24.

BY MR. STANTON:

Q Okay. The question here at line 20, read this to yourself. That is the question by the police officer. Read your answer at lines 22 through 24.

A (Reading.)

Q Does that refresh your memory?

A Yeah.

Q What did he tell you about why he wanted to kill a cop?

A He said he could get his like radio and badge.

Q Okay. Did he tell you where he got the hatchet from?

A Yeah.

Q Where?

A Wal-Mart.

Q Did he tell you who was with him when he bought the hatchet at Wal-Mart?

A No.

Q You don't remember it was three girls?

A Yeah.

Q Okay. What were the three girls' names that were present with him when he bought the hatchet?

A I think it was-- I don't remember.

Q You don't remember?

A (The witness shakes his head.)

Q Makaleta, Ms. Reporter, M-a-k-a-l-e-t-a, Kavapalu, K-a-v-a-p-a-l-u, Nanina Kofu, N-a-n-i-n-a, K-o-f-u, and Mele Maveini, M-e-l-e, M-a-v-e-i-n-i.

Do you recall that?

A Yeah.

Q Is that the people that he told you that were present?

A Yes.

Q Now, on Monday-- Once again as a frame of reference, Teki, the interview with the police occurs on Wednesday. The Monday before that, were you at Losa's house at ten a.m. in the morning?

A Yes.

Q Who else was at Losa's house at ten a.m.?

A Me, Losa, Corina, Bill, Masi, Laki.

THE COURT: Laki?

THE WITNESS: Yeah. And that is all I can remember.

BY MR. STANTON:

Q Okay. And did Pe have the hatchet with him at that time?

A Yes.

Q Go ahead. Answer out loud.

A Yes.

Q Now, the night before, Sunday night, did you go to Bully's?

A Yes.

Q Was the defendant with you?

A Yes.

Q Did he carry anything with him?

A No.

MR. STANTON: Counsel, page 44--

Court's indulgence.

THE COURT: All right.

MR. STANTON: (Looking.)

BY MR. STANTON:

Q On Sunday evening when you went to Bully's to shoot pool, did the defendant have a hatchet with him?

A No.

Q Did you see the defendant on Monday any time after ten a.m. at Losa's house?

A I'm not sure.

Q Did you see him the next morning? That would be Tuesday morning.

A Tuesday?

Q Yes.

A Again I'm not sure.

MR. STANTON: Counsel, page 53, lines 7 through 22.

BY MR. STANTON:

Q If you could read from lines 7 through 22 to yourself.

A (Reading.)

Q Does that refresh your memory?

A Yes.

Q Did you see him Tuesday morning?

A Yes, I did.

Q Did you see him with a gun?
A With the gun?
Q Yes.
A No.
Q You didn't?
A I saw him later on that day, I did.
Q Okay. What time in the day on Tuesday did you see the gun?
A Probably about 10:30, 11.
Q Did you ask him, the defendant, how he got the gun?
A No.
Q Are you certain?
A I'm not sure.
Q Okay. Why don't you take a moment to think whether or not you asked the defendant how he got the gun.
A Yes, I did.
Q Okay. What did he tell you?
A He said that he got it from a cop.
Q Did you ask him specifically point blank or straight forward whether or not he had killed a police officer at the University of Nevada-Reno campus?
A No.

Q You don't remember asking him that?

A I don't remember.

MR. STANTON: Counsel, pages 55 and 56, starting on 55, line 29, through page 56, lines 1 through 7.

BY MR. STANTON:

Q This is page 55. Start right here, line 29, and read the rest of that page down to about half way down that page.

A (Reading.)

Q Does that refresh your memory?

A Yes.

Q Let me ask you a question again, Teki.

Did you ask him straight out whether or not he killed the police officer?

A Yes, I did.

Q What was his answer to your question?

A He said he did.

Q Did he tell you how he got to North Rock Boulevard to Losa's house?

A That is the same place.

Q Yeah, I know. How did he get to Losa's house? Did he tell you?

A Unh-unh.

Q Okay. Do you remember telling the police that he got-- that he got a ride by Mano (spelled

phonetically)?

A Yes.

Q Who is Mano?

A Renee's brother.

Q Okay. And do you remember telling the police that the defendant told you that he got over to the North Rock address with you on Tuesday morning by Mano?

A Yes.

Q When he arrived at that address, did you see him carrying anything?

A A plastic bag.

Q Let me show you State's Exhibit 4-A. Does that look like the plastic bag he was carrying?

A Yes.

Q State's Exhibit 2, do you know who the gentleman in the center of that photograph is?

A Yes, it's Pe.

Q Pe.

A (The witness nods his head.)

Q What was in the plastic bag on Tuesday morning that you saw the defendant carry?

A I don't know.

Q Do you remember what color the items were inside?

A No. I was asleep. I just woke up for a couple minutes, I glanced over, and just saw the plastic bag.

Q Would it surprise you if I told you that you told the police that it was something dark colored inside the bag?

A Yeah, I did tell them that.

Q Is that true?

A Yes.

Q So you don't know what was in it, but it was dark?

A Yes.

Q Now, the night before Sunday night into Monday morning did you have occasion to be driving a car with the defendant?

A Yes.

Q What did the defendant ask you that was unusual while you were driving?

A That he wanted to go kill a cop.

Q He wanted to go kill a cop?

A Uh-huh.

Q And when he told you that, did it surprise you?

A Yes.

Q Did you want to go kill a cop?

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A No.

Q Did you see a police officer as you were driving around?

A I don't remember.

Q You don't remember?

MR. STANTON: Counsel, page 110-- Strike that. 111-- 112.

BY MR. STANTON:

Q Could you read that page.

A (Reading.)

Q Do you remember now?

A Yes.

Q What is the answer?

A What was the question?

Q Did you see a police officer when you were driving around with the defendant?

A Yes, we did.

Q Where did you see the police officer? And I can leave this sheet of paper in front of you, if you--

A It was El Rancho Drive.

Q Okay. And what type of police officer did you see?

A Sparks.

Q And describe how you saw the police

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officer.

A He was just driving.

Q In a-- In what?

A In a police car.

Q Okay. And did you see the police officer that was driving?

A No. I just glanced at him.

Q You can't remember specifically what he looked like?

A Yeah.

Q Can you tell me whether he was white or not?

A He was.

Q Okay. What did the defendant say after he saw the police vehicle?

A To follow him.

Q Okay. And what did you say after he told you to do that?

A I said I didn't want to.

Q You didn't want to be a part of this?

A Yeah.

Q Now, the plan to go kill a police officer that night, was that before or after you got into the car?

A After.

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