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 32 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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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of September, 2019. Electronic Service of the foregoing Appellant's Appendix shall be made in accordance with the Master Service List as follows:

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Siaosi was talking rapidly and his words didn't make much sense. The things that Siaosi said gave me the impression that he was losing touch with reality".

18.1.3 *"Amongst Siaosi's various rambling, he talked like he was rich and had a lot of money. Siaosi told me and my siblings to tell him whatever we wanted and he could buy it for us. Siaosi also told us that he was going to college and he mentioned something about his wife. I thought that Siaosi may have been on drugs at the time of this visit, even though I didn't smell anything and I didn't see him using any substances. Siaosi's mannerisms and demeanor just looked like that of someone on drugs".*

18.1.4 *"Siaosi visited with us for about an hour on the evening that he brought the gifts, and then he said that he wanted to visit David Kinikini and others in the family who lived around Salt Lake City. Siaosi stayed in town for a few days but I have no idea where he stayed. I saw Siaosi a few times during the days that he was in town and he seemed like he was out of his right mind during each of our interactions".*

18.2 Mr. Vanisi was arrested at the house of Mr. David Kinikini, a cousin and childhood friend. His description of Mr. Vanisi at the time of his arrest is vital in attempting to understand whether Mr. Vanisi was mentally disordered at the time of the instant offense. Mr. David Kinikini reports the following in his sworn declaration:

18.2.1 *"In January 1998, when Siaosi first came to Salt Lake City the first stop he made was at the home of our cousin, Miles Kinikini. Miles then brought Siaosi to my house where Siaosi met up with my younger brother, Vainga Kinikini. I was in class at the time, but Vainga called me to let me know what was going on. Vainga didn't recognize Siaosi at first because he hadn't seen him for several years at that time. Vainga also told me to*

come home because Siaosi was acting really weird and he had a gun, which was totally not like him".

18.2.2 *"Siaosi looked messy when he came to Salt Lake in January 1998 . Siaosi's clothes looked worn out and dirty. His overall appearance was not groomed and he looked scruffy. Siaosi also looked like he had been up for days without getting any sleep. Siaosi also had a body odor that smelled like he hadn't bathed for days".*

18.2.3 *"I then took Siaosi and Jerry, my adopted son, to a local community center to play ball. This is when I made contact with the police. The police didn't want to arrest Siaosi at the community center, so they told me to get Siaosi back to my home and to get everyone else out so that they could make the arrest there. When I returned to the center, I told Jerry to walk to my sister Aileen's home".*

18.2.4 *"When Siaosi and I got back to my house, we were alone and Siaosi was acting very paranoid. Whenever the phone rang or I walked in or out of the room Siaosi became suspicious and wanted to know who I was talking to on the phone and where I was going. I knew that Siaosi was armed but he never displayed or pointed the weapon at me. I believe that Siaosi respected me because of my involvement in the church and because he knew that I was never involved with street activity like my brother Vainga and our cousin Miles who were both former members of the Tongan Crip Gangstas gang".*

18.2.5 *"After I got off the phone with the police, I told Siaosi that I was going to cook some food but I needed to throw away a bag of garbage. Siaosi became extremely suspicious at this point and began insisting that I stay in the house. When I persisted in telling Siaosi that I needed to put the garbage out, Siaosi became agitated. Siaosi's voice, facial expression and*

demeanor instantaneously changed. Siaosi looked and acted like he was a completely different person who did not know me. Siaosi looked like he was no longer there, and someone else took over his body. Siaosi then said in a deep and unfamiliar voice, "Put the garbage down" ,"...you ain't going nowhere." As Siaosi said these words to me he had an empty look in his eyes and he started reaching towards his waistband like he was going for a weapon".

18.2.6 "*I never knew Siaosi to abuse drugs or alcohol before his arrest. I saw no signs that Siaosi was abusing drugs or alcohol during his trip to Salt Lake in January 1998. I never observed Siaosi ingesting any drugs or alcohol, and he never had the scent of marijuana or liquor on his clothing or breath. It was approximately 8 to 10 hours between the time that Siaosi first came to town and his arrest".*

18.3 Mr. Vainga Kinikini is the younger brother of Mr. David Kinikini and was at home when Mr. Vanisi arrives with another cousin Mr. Miles Kinikini on the day of his arrest. This is how he describes Mr. Vanisi's presentation on that day:

18.3.1 *"When I saw Siaosi in January 1998, he looked so different that I did not recognize him when I first saw him. Siaosi was dressed strangely with sweat pants that were turned inside out and utility boots".*

18.3.2 *"Siaosi was very nervous and jumpy during the visit. Siaosi became anxious and looked disturbed every time the house phone rang. Siaosi's eyes were moving rapidly and he was frequently moving around and turning like he was paranoid and was looking behind his back. Siaosi rambled when he spoke and at times I could not understand what he was trying to say. Siaosi seemed like he was confused and lost".*

18.3.3 *"Siaosi spoke about not liking the police, but he never explained why. Siaosi spoke about outer space, and he also said that he was planning to build a laser beam gun".*

18.3.4 *"Siaosi was acting totally out of character and talking like he was some kind of a fake street thug. I had the sense that Siaosi was trying to impress me because he knew that I was a former gang member. Siaosi told me that he did a couple "Fahi Kesis," which was an outdated Tongan slang for gas station robbery. Fahi Kesi was an old word that was no longer being used on the streets anymore, even in 1998. Siaosi also told me that he had a "G ride," which is a street term for a stolen car, parked outside, but I never saw it. I never heard Siaosi talk in this manner and it sounded wrong coming out of his mouth because he was a church boy. I actually thought that he was making it all up because Siaosi was always known for being such a square. Siaosi was never affiliated with any gangs as far as I knew".*

18.3.5 *"At one point during the visit, Siaosi pointed a handgun at a picture of LDS church leaders as they were standing in front of an image of Jesus. As Siaosi was pointing the gun, he stated, "Fuck that white man" and then Siaosi began ranting about going back to his roots and re-establishing the order of Lamanite and Stripling warriors to fight the evil forces of the west who have oppressed the Polynesian people for centuries. Siaosi talked about wanting to unite his people to fight the Nyphites".*

19.0 MENTAL STATUS EXAMINATION

19.1 Mr. Vanisi and I greeted each other in the traditional Tongan custom of pressing cheeks. I observed that his gait was unexceptional as he worked his way across the large visiting room. His appearance was that of a moderately overweight Polynesian male of approximately six feet in height. He had a firm handshake, appropriate levels of eye contact, a pleasant demeanour with a warm and inviting smile. He expressed his joy in seeing me as he had not seen another Tongan for sometime. He also expressed his awe in relation to my travelling from the bottom of the world to come and see him. Throughout the lengthy interview containing many questions and requests for elaboration he remained calm and co-operative. I noted a transference process where Mr. Vanisi appeared to be trying hard to please me and I also noted my counter-transference as a pleasant feeling of a friendly encounter without any sense of concern for my safety. This was confirmed by the absence of any evidence of aggression or agitation at any point during the examination.

19.2 Mr. Vanisi and I developed an easy rapport. He had a clear sensorium, was fully oriented to time, person and place, was aware that I was a psychiatrist and that I had been asked by his attorney's to evaluate his current and past mental status and file a report on his clinical condition.

19.3 Mr. Vanisi and I spoke mainly in English but on occasion we spoke in our native language of Tongan. His speech was of a normal rate, rhythm and intonation, without any signs of pressured speech or flight of ideas consistent with previous manic states. He spoke with a verbal fluency that at first meeting him, the natural inclination was to consider him to be of above average intelligence. As the interview progressed however it became apparent that there was a shallowness and superficiality to his responses that indicated a weakness in higher cognitive executive functioning. There are many examples from the evaluation but the most

pertinent is his description of his marriage. The questions and answers were as follows:

Question	*"Was your wife happy in the marriage"*
Mr. Vanisi	*"Yes she was happy in the marriage"*
Question	*"What made her leave and move back to her parents".*
Mr. Vanisi	*"She left at that time – I went into a different career working in the industry. Jobs behind the camera. Unsteady work – she left because I was not providing for her and the children and I told her I didn't love her anymore".*
Question	*"Any regrets about the marriage"*
Mr. Vanisi	*"No"*
Question	*"Anything you could have done better".*
Mr. Vanisi	*"No I couldn't have done any better".*

At the point where Mr. Vanisi responds by saying that he had unsteady work and that he was not providing for his wife and children, it appears that he may be progressing towards a deeper analysis of the relationship breakdown. This is not the case however as it appears he is unable to identify the underlying issues like, frustration, hurt, betrayal, that lie beneath all relationship breakdowns (and are contained in his wife's letters to him). The theme of superficiality inherent in the above transcript repeats itself throughout the evaluation regardless of the issue being discussed.

19.4 Mr. Vanisi denied having ever experienced any hallucinatory experiences which he has consistently reported from the time of the instant offense.

19.5 The major themes present in Mr. Vanisi's dialogue were difficult to identify because he has a tendency to gloss over the important (but more difficult) life events and he appeared to enjoy talking for talking sake. His description of what was going through his mind during the instant offense is as follows:

"The thought to kill a policeman just evolved, and it kept coming into my head, I didn't know when, I didn't know how, it was in my mind all the time. It was like a premonition, it was like some compelling force driving me to do it. I don't know if it was evil or what but...". This is a psychotically driven distorted belief that Mr. Vanisi still believes up until the preset time.

19.6 Mr. Vanisi reports that Police Sgt. Sullivan was the one that approached him and it was he that initiated the assault on him and that is when he took out the hatchet and defended himself which is consistent with previous accounts that he has given of the murder. He then goes on to say:

"The thought told me to kill him. I was thinking what do I do next. My thought said to kill him. It was not a voice – it was a thought. It would be better to kill him rather than leave him in hospital for the rest of his life breathing out of a tube".

Following the murder Mr. Vanisi reports that he:

"...felt cleansed, cathartic, whatever force that was compelling me to kill the police officer was lifted".

Mr. Vanisi uses the word *cathartic* and uses the word correctly and is another example of his use of language in an accurate way denoting intelligence and understanding of emotional states but again I could not get him to expand on why he chose to use this word and what it represented for him. He is adamant however that the murder was inevitable.

19.7 Mr. Vanisi denied any current symptoms of paranoia but he did admit to feeling this way around the time of the instant offense. He denied any other delusional symptoms of psychosis namely ideas of his body or mind being controlled by an

external force, ideas of thought insertion/withdrawal, telepathy, persecution, special powers, grandiosity or Capgra's phenomena (people not being who they say they are). In effect he denied any of the delusional ideas consistent with active psychosis. The manner in which these questions were asked would have given a more insightful or manipulative person a sense that answering positively to these questions would have made him appear more mentally disturbed.

19.8 Mr. Vanisi's mood was euthymic and stable throughout the evaluation. He reported himself as feeling *"normal"* for the first time in his life. He reported that he *"loved being here"* that he was treated with respect and got on well with all the staff now that he had learnt to cooperate. His affect throughout the interview was pleasant, polite, stable but strangely incongruent at times in relation to the matters being discussed. For example his demeanour never changed and would not show sadness, guilt, regret when discussing the numerous disappointments he experiences, his failure as a Mormon, as a family member as a husband or the death of Police Sgt. Sullivan.

19.9 In relation to Mr. Vanisi's insight into whether he is mentally disordered he reports:

> *"I think I have a mental disorder, racing thoughts, bizarre behaviour, I have that type of disorder".*

It is evident however that his insight and judgement is dependent on how well his psychiatric symptoms are controlled and it is evident that when he is actively disturbed that his insight and judgement fluctuate markedly.

20.0 THE EFFECT OF CULTURAL FACTORS

20.0 There can be no doubt that culture plays an important part in understanding mental disorder of migrants whose cultural norms deviate significantly from the host culture. Discussion of the impact cultural factors play in the development of mental illness in Mr. Vanisi's case is undertaken here.

20.1 The largest epidemiological migrant study of Pacific people moving from their Islands of origin to a developed Western society was undertaken in New Zealand in 2006 [Oakley-Brown 2006]. The New Zealand Mental Health Survey of approximately 2,500 Pacific Island people showed that Pacific people born in New Zealand or who migrated there before the age of twelve had double the rates of mental disorder compared with those who migrate after the age of eighteen years of age (12 month prevalence of mental disorder of 31.4% versus 15.0%). This landmark study demonstrates that the migrant experience brings with it a set of stressors which dramatically increases the chances of Pacific people suffering from mental disorders in adulthood if they migrate away from their Islands of birth before the age of twelve. Mr. Vanisi migrates at age six to the United States of America, with a genetic predisposition towards suffering mental illness and having experienced significant attachment problems.

20.2 The other landmark result from the same study highlighted the poor use of mental health services by Pacific people with even the most serious mental health disorders. The New Zealand mental health survey showed that only 25.0% of Pacific Island people who had experienced a "serious" mental disorder had received treatment from mental health services compared with 58.0% of the total New Zealand population [Oakley-Brown 2006]. Mr. Vanisi was floridly unwell well over a year before the instant offense and all family and friends recognised this but nobody attempts to have Mr. Vanisi seen by mental health services.

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

20.4 The informal adoption of children that is a common practice in Tongan society is a healthy and protective factor for children in traditional societies where the family members live together in extended family groups. Over the last thirty years with increasing migration (particularly as overseas Tongan communities have become established) this cultural practice has become a source of significant attachment ruptures that are psychologically damaging for children. Mr. Vanisi has to address two major attachment upheavals – the loss of his adopted mother at age three, followed by another loss and readjustment at age six when reunited again. This is followed by the deaths of significant people in his life in mid-adolescence. The confusion that Mr. Vanisi must have experienced around these adoption arrangements appear to be poorly understood by the family. It sets up a morbid psychological fear of abandonment and belonging which are clearly evident in Mr. Vanisi's psychiatric autobiography.

20.5 The sexual abuse Mr. Vanisi experiences when he arrives in the United States of America is a universally damaging human experience for children. From a cultural perspective, Tongan people have a vested interest in maintaining the structural integrity of extended family units. This results in sexual abuse being swept "under the carpet". Strong cultural taboos create a framework that attempts to stop this type of activity from occurring but when it does occur the shame is so strong that often Tongan victims do not report it.

21.0 PSYCHOLOGICAL IMPACT OF KEY EVENTS

21.0 The major life events that have a negative psychological impact on Mr. Vanisi's adult mental status are discussed in this section. The critical events that have a negative psychological impact on Mr. Vanisi's developing mental status are as follows (1) attachment issues (2) parenting style (3) sexual abuse (4) identity formation (5) peer relationships (6) grief due to loss of significant others

21.1 Attachment theory, developed by John Bowlby [Bowlby, 1969; Bowlby, 1973; Bowlby, 1980), postulates a universal human need to form close affectional bonds. At its core is the reciprocity of early relationships, which is a precondition of normal psychological development probably in all human beings [Hofer, 1995]. According to Bowlby, no individual person is born with the capacity to regulate their own emotional reactions. In the presence of a caring mother an infant learns that emotional arousal will not lead to disorganization beyond their coping capabilities. Thus an attachment system is developed and referred to by Bowlby as an open bio-social homeostatic regulatory system. In Mr. Vanisi's case, by all accounts he develops a strong attachment to his adoptive mother Toeumu Tafuna and the first three years of his life go according to plan. His adoptive mother then leaves him at age three. What impact does this have on Mr. Vanisi's developing emotional state?

21.1.2 According to Mary Ainsworth (1969; 1985; Ainsworth, Blehar, Waters 1995), who developed the well-known laboratory based procedure for observing infant's internal working models in action. She describes four types of infant psychology; the secure infant, the anxious resistant infant, the anxious avoidant infant and the most severe form being the disorganized/disoriented infant. It is my contention that the infant Mr. Vanisi experienced a secure early childhood experience but at the departure of his adoptive mother at age three he went from being a secure

child to becoming disorganized and disoriented. The evidence for this assertion comes from the legal declarations that report:

"*...a very traumatic separation and Mr. Vanisi is reported to have remained very distressed and inconsolable for several months. He was very withdrawn and isolated himself during the years that he was separated from his adoptive mother Toeumu Tafuna and often refused to interact with his siblings and hid under his bed and cried for long periods".*

21.1.3 Bowlby proposed that internal working models of the self and others provide prototypes for all later relationships. Such models are relatively stable across the lifespan (Collins & Read, 1994). Early experiences of flexible access to feelings are regarded as formative by attachment theorists. The autonomous sense of self emerges fully from secure parent-infant relationships (Emde & Buchsbaum, 1990; Fonagy et al., 1995; Lieberman & Pawl, 1990). Most importantly the increased control of the secure child permits him to move toward the ownership of inner experience, and toward understanding self and others as intentional beings whose behavior is organized by mental states, thoughts, feelings, beliefs and desires (Fonagy et al., 1995a; Sroufe, 1990). There is strong evidence that Mr. Vanisi struggles from a young age to understand his emotional state and that of others in effect reflecting the research evidence above. He is described as weird and odd from a young age and has difficulties with identity formation. The odd and weird behavior, probably reflect his inability to understand his own thoughts and feelings and by default the thoughts and feelings of others. But of any more interest is the prediction from attachment theory that patterns of attachment are stable across the life span [George, Kaplan, & Main, 1996]. It is apparent that Mr. Vanisi's failure to achieve an autonomous sense of self in childhood as a result of

his insecure attachment led to his failure to reach an autonomous sense of self in adult life as predicted by attachment theory.

21.2 Parenting style has a major psychological impact on the developing mental status of children. A parenting style is a psychological construct representing standard strategies that parents use in their child rearing. There are many differing theories and opinions on the best ways to rear children, as well as differing levels of time and effort that parents are willing to invest.

Many parents create their own style from a combination of factors, and these may evolve over time as the children develop their own personalities and move through life's stages. Parenting style is affected by both the parents' and children's temperaments, and is largely based on the influence of one's own parents and culture. Most parents learn parenting practices from their own parents, some they accept, some they discard. The most important aspect of parenting is that it is relatively consistent so that the child can learn to predict what behaviors lead to what outcomes.

One of the best known theories of parenting style was developed by Diana Baumrind [Santrock 2007]. She proposed that parents fall into one of three categories: *authoritarian* (telling their children exactly what to do), *indulgent* (allowing their children to do whatever they wish), or *authoritative* (providing rules and guidance without being overbearing). The theory was later extended to include *negligent* parenting (disregarding the children, and focusing on other interests). The best type of parenting is authoritative, the worst type of parenting is negligent but in reality most parents alternate between the four types. The most difficult and confusing situation is where a child receives different types of parenting from primary care givers and this is what happens to Mr. Vanisi. The two most important women in his life are his adoptive mother who has a tendency to alternate between indulgent and authoritarian parenting and his biological mother that Mr. Vanisi feels rejected (neglected) him. The main male role model, his maternal uncle Mr. Maile Tafuna is an overbearing and completely

authoritarian parental type. As a result Mr. Vanisi tries hard to "be a good boy" but this type of family dynamic and competing parental styles is very confusing. When this confusing parenting style is added to his insecure attachment, his developing identity confusion is an understandable outcome.

21.3 The impact of sexual abuse is almost universally viewed as having major negative psychological impacts on the developing mental status of children. The actual psychological disturbance it causes however is difficult to specify. In a major review of forty-five studies undertaken in the area of sexual abuse the findings *"clearly demonstrated that sexually abused children had more symptoms than non-abused children, with abuse accounting for 15-45% of the variance. Fears, posttraumatic stress disorder, behavioral problems and poor self-esteem occurred most frequently among a long list of symptoms"* [Kendall-Tackett 1993]. Mr. Vanisi's psychological status is already fragile as a result of his insecure attachment. The sexual abuse he experiences is likely to add greatly to his confusion and even greater degree of psychological insecurity.

21.4 Identity formation or a strong sense of self is the critical state of adolescent psychosocial development. Erik Erikson, a developmental psychologist proposed eight life stages through which each person must develop [White 2005]. In each stage, they must understand and balance two conflicting forces, and so parents might choose a series of parenting styles that helps each child as appropriate at each stage. The first five of his eight stages occur in childhood: The early development state of developing trust goes awry when his adoptive mother leaves him aged three with the second and third stages of shame and doubt being difficult to negotiate with the major upheavals occurring with migration and return to his adoptive mother. The sexual abuse affects his self-esteem and a sense of inferiority grows. Using Erikson's stages of human development it is obvious that Mr. Vanisi childhood insults would definitely affect his ability to trust others, and lead to issues of inferiority (particularly the migration experience). The insecure attachment, abuse issues and conflicting parenting make it difficult to form a coherent sense of who he is and the evidence is overwhelming that he has

worsening identity problems. In effect he fails to achieve the psychosocial stages required in childhood and adolescence for him to negotiate the challenges of autonomous adult life.

21.5 In adolescence Mr. Vanisi is essentially a very confused young man. He is trying hard and actually has quite a caring and sensitive nature evidenced by his care for his elderly grandfather and the lack of premeditated harm he causes with others. His teenage peer relationships are not particularly healthy but he is unaware of the opinion of the teenagers around him who think he is slightly odd and weird at times. He then experiences the death of people who are close to him. He is not able to integrate the losses in a healthy way and further psychological damage is done. These numerous psychological insults over the course of his childhood and adolescence undermine his ability to develop the necessary psychological machinery required to manage the major stressors that are awaiting him in adult life.

22.0 IMPACT OF NEUROCOGNITIVE DEFICITS

22.0 The most recent set of neuropsychiatric testing undertaken in October 2010 by Dr. Jonathan H. Mack are the most important set of test results carried out on Mr. Vanisi since his incarceration. This section discusses the implications of his neurocognitive deficits in relation to his mental disorder and the instant offense. The table below is reproduced with the consent of Dr. Mack. The following table is the WISC-IV summary outlining the full extent of Mr. Vanisi's current cognitive functioning.

Wechsler Adult Intelligence Scale-IV		
Index	Composite Score	Percentile Rank
Verbal Comprehension	107	68
Perceptual Reasoning	73	4
Working Memory	80	9
Processing Speed	81	10
Full Scale	83	13
General Ability	89	23

22.1 Dr. Mack summarises Mr. Vanisi's neuropsychiatric profile as follows:

"Neuropsychological evaluation of Mr. Vanisi is reflective of a dementia due to significant, both absolute and relative, impairments in short-term memory at the 2nd to 3rd percentile ranks, marked and severe executive-frontal dysfunction with a very significant perseverative tendency, impaired complex sequencing, impaired concept formation, and impaired non-verbal abstract reasoning. In addition, Mr. Vanisi has language deficits with mildly impaired semantic fluency and mildly impaired auditory-verbal comprehension. His math computation is mildly impaired at the 5th percentile rank. His sentence comprehension is mildly impaired at the 6th percentile rank. Tactile-kinesthetic problem solving is markedly impaired. Sensory-perceptual functions are substantially impaired, right worse than left".

22.2 Dr. Mack reports the pattern of cognitive testing indicates that Mr. Vanisi has the cognitive profile of someone with dementia. Dementia is defined as a *"diminution in cognition in the setting of a stable level of consciousness. Dementia denotes a decrement of two or more intellectual functions, in contrast to focal or specific impairments such as amnestic disorder or aphasia. The persistent and stable nature of the impairment distinguishes dementia from the altered consciousness and fluctuating deficits of delirium. Dementia must also be distinguished from long standing mental-subnormality, as the former represents an acquired loss of or decline in prior intellectual and functional capacities".* [Kaplan and Saddock 2000]. The evidence indicates that Mr. Vanisi was not of subnormal intelligence in child-hood or adolescence (although it is possible that attenuated cognitive deficits were present before adulthood) so he does meet criteria for meeting a diagnosis of dementia. Dementia is a form of brain damage and there should be a medical explanation. It is an unusual cognitive profile for people aged sixty-five and under and would normally be explained by Traumatic Brain Injury, which is possible in Mr. Vanisi's case as he does have a history of being involved in numerous physical altercations that could have had an accumulated effect of brain injury.

22.3 The other important possibility that explains Mr. Vanisi's cognitive results is that his cognitive impairment could purely be a result of his Schizoaffective Disorder. Traditionally, significant cognitive impairment was thought to be evident only in elderly people with Schizophrenia whose cognitive state had already deteriorated. However, over the past 25 years, evidence has accrued to challenge this view. Palmer et al in 1997 gave a comprehensive battery of neuropsychiatric tests to 171 outpatients with Schizophrenia and compared them with 61 healthy controls. 83% of the Schizophrenic patients had abnormal cognitive testing and the main abnormalities were in memory function and executive functioning. A similar pattern of cognitive functioning is found with Mr. Vanisi. Goldberg et al in 1993 also had an interesting finding in that he achieved symptomatic improvement in a group of patients with Schizophrenia using the most effective pharmacological

agent, namely Clozapine but there was no accompanying improvement in neurocognitive functioning.

22.4 The importance of these findings is that it has an impact on the ability Mr. Vanisi has to hold information and process it to the extent that he can problem solve and find non-delusional and non-fantastical answers to challenging life situations, is greatly impaired. In effect the individual who has normal cognitive functioning but is suffering from Schizoaffective Disorder is in a much better position to deal with their illness compared to someone with the same diagnosis but cognitively less intact. This is another important piece of information that allows greater understanding of Mr. Vanisi's mental status.

23.0 CLINICAL JUDGEMENT OF COMPETENCY

23.0 A defendant is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him, or the court determines that he is unable to assist in his defense. See Dusky v. United States, 362 U.S. 402 (1960). The test for competency to stand trial is therefore whether the defendant *"has sufficient present ability 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".*

23.1 Previous psychiatric opinions have found Mr. Vanisi to be of sufficiently sound mind to meet the test of competency as defined by the Dusky standard. It is my contention that Mr. Vanisi has never been of sufficiently sound mind to meet this standard and this was particularly the case at the time of his initial trial. This contention is based on the following evidence:

- The true extent of Mr. Vanisi's mental disorder has never been properly established.
- Mr. Vanisi's Schizoaffective Disorder has a core delusional component that affects his rational appreciation of certain facts. He has always been of the belief (and still carries this belief) that he was compelled to kill a policeman. The compulsion is and always has been psychotically driven and despite adequate treatment (and resolution of many of the symptoms of psychosis – labile mood, disorganised thought processes, bizarre behaviour) his psychotically conceptualised notion of killing a police officer has never resolved.
- Therefore Mr. Vanisi has never been able to meet the first component of the Dusky standard and that is he has never been able to rationally consult with his lawyer because he labours under the psychotic belief that his actions were totally justifiable. A belief that he continues to hold. This means that he does not have *"sufficient present ability to consult with his*

lawyer with a reasonable degree of rational understanding" because what Mr. Vanisi considers as rational is in effect irrational.

23.2 The Rohan decision (see Rohan v. United States, 01-99016 (1993) sets a slightly different standard for federal post-conviction relief proceedings in capital cases compared with the Dusky standard. The Rohan decision states a person's statutory right to counsel in federal post-conviction relief proceedings and implies statutory right to competence for those proceedings, which encompasses the requirement that the petitioner or movant be able to rationally communicate with counsel. It is my contention that as a result of Mr. Vanisi's mental disorder (namely Schizoaffective Disorder) which is characterised by his ongoing psychotically driven belief that his actions were absolutely necessary and completely justifiable (in the context of his delusional thinking) that he cannot rationally communicate or advise his counsel.

24.3 It is my psychiatric opinion that as a result of Mr. Vanisi's Schizoaffective Disorder and the ongoing delusional ideas that he labours under that Mr. Vanisi has never reached standard of competency as outlined by the Dusky or Rohan decisions.

24.0 STATEMENT OF IMPARTIALITY

24.1 Conclusions reached in this report are based on information derived from the face to face interview conducted with Mr. Vanisi at Ely Penitentiary on the 28th of March 2010, the Expert Manuals, electronic copies of PDF files on CD and video interviews of Mr. Vanisi on CD and wider discussion with mental health colleagues and legal professionals.

24.2 I reiterated here that the psychiatric opinion offered deals with the matters defined as an independent and neutral psychiatric consultant. The presentation of the facts contained in this report was undertaken without embellishment and draw conclusions that I deem are credible given the information provided and the examination undertaken.

24.3 The above (see 19.2) was explained to Mr. Vanisi at the beginning of the evaluation at Ely State Prison March 28, 2011

25.0 CONCLUDING REMARKS

25.0 The credibility of the diagnostic conclusions made by Psychiatrists depend on evidence of genetic vulnerability to mental disorder, maternal insults, developmental insults, evidence of a clear deterioration in level of social, educational and occupational functioning and ultimately clear and indisputable signs and symptoms of mental disorder. Mr. Vanisi's psychiatric autobiography presented meets all of these criteria and therefore gives the conclusions drawn strong validity and robustness.

25.1 Mr. Vanisi suffers from a severe form of Schizoaffective Disorder the evidence for which in incontrovertible. The diagnosis was applicable well before the instant offence and if psychiatric treatment had been given then it is highly probable that the death of Police Sgt. Sullivan could possibly have been averted.

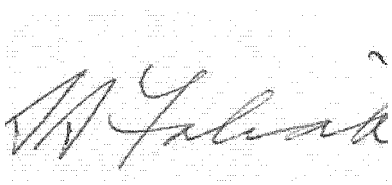
25.2 Mr. Vanisi was floridly psychotic at the time of the instant offence and was driven to murder Police Sgt. Sullivan as a result of a psychotically derived compulsion.

25.3 As a result of Mr. Vanisi's Schizoaffective Disorder and the ongoing delusional ideas that he labours under Mr. Vanisi has never reached the level of competency to consult with his lawyer with a reasonable degree of rational understanding or have a rational as well as factual understanding of the proceedings against him due to his ongoing fixed delusional beliefs that have never responded to treatment.

25.4 Mr. Vanisi has never been Malingering and this statement is based on the evidence against malingering clearly outweighing any evidence to the contrary.

If there are any questions or concerns regarding any matter in this comprehensive psychiatric evaluation then I would be more than pleased to be contacted or consulted further.

Yours sincerely



Dr. Siale Alo Foliaki

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APPENDIX A: CURRICULUM VITAE

PERSONAL DETAILS

NAME: DR SIALE 'ALOKIHAKAU FOLIAKI AGE 43 Years

AREAS OF EXPERTISE

- Pacific Mental Health
- Mental Health and Primary Care Integration
- Pacific Mental Health Research
- Service Development
- Mental Health Planning and Policy Development

EDUCATION:

1992	MBChB University of Otago
1995-1997	Royal Australian and New Zealand College of Psychiatrists Fellowship Training Scheme.
1998	Granted time out of training scheme to assist in setting up the first ethnic specific Tongan community owned primary care clinic in South Auckland with a small group of other Tongan doctors. Worked as GP for 2 years.
2001- 2002	Royal Australian and New Zealand College of Psychiatrists Training Scheme - Passed General Medical Examination and completed requirements for eligibility requirements to sit final Fellowship Examination
2004	Royal Australian and New Zealand College of Psychiatrists Training Scheme - Passed Written Examination
2005	Royal Australian and New Zealand College of Psychiatrists Training Scheme -

	Passed Oral Examination
2006	Royal Australian and New Zealand College of Psychiatrists Fellowship Awarded August 2006

WORK EXPERIENCE:

Current Positions:

(1) Consultant Psychiatrist
Pacific Mental Health Services
Counties-Manukau District Health Board (CMDHB) – 1993-Current

(2) Primary Care Liaison Psychiatrist – 1998-Current

(3) Clinical Supervisor
MediBank Health Solutions – Mental Health Telephone Support Service – 2009-Current

Professional Activities:

1997	Member of Tongan Health Society working party for establishment of a Tongan Primary Care Centre in South Auckland - worked as a general practitioner for first three years after opening.
1997	Member of the Mental Health Commissions Pacific Peoples Advisory Committee.
1997-1998	Pacific Project Manger for National Mental Health Workforce Coordinating Committee.
1997-1999	Chairman of the Mental Health Commission's Pacific Peoples Advisory Committee.
1999	Guest Lecturer Manukau Institute of Technologies Social Work, Nursing and Community Mental Health Support Worker Programmes on Pacific Mental Health.

1998	Member of Manukau Institute of Technologies Advisory Board to the Community Mental Health Certificate Course.
1999	Chairman of the Manukau Institute of Technologies Advisory Board to the Community Mental Health Certificate Course.
2000	Member of the Ministry of Health's Pacific Advisory Board
2001	Member of the Suicide Prevention Information New Zealand Advisory Board
1998-2003	Project Manager South Auckland Health- Set up first Clinical Pacific Island Mental Health Service in New Zealand.
2002-2003	Senior Lecturer Pacific Health Studies at the Department of Maori and Pacific Studies, Auckland School of Medicine, University of Auckland
2003	Established Maori and Pacific Organisation for the care of Intellectually Disabled Persons with Challenging Behaviours Waipareira Trust
2003	Board Member Pacific Information, Advocacy and Support Services
2005-2007	Chairman Pacific Information, Advocacy Support Services
2007 - Present	Primary Care Liaison Psychiatry – TaPasefika PHO, AuckPac PHO and Tongan Health Society PHO.
2008 - Present	Establish Youth Service – Vaka Toa CM DHB Child and Adolescent Mental Health Services.
2008- Present	Consultant Psychiatrist McKessons Health Line – Clinical Supervisor.
2009- Present	Chairman Vaka Tautua – Pacific Mental Health, Information, Advocacy Support Services and Elderly Support Services.

Research Activities

1999	New Zealand Mental Health and Wellbeing Pilot Study- in charge of Pacific component of the study. Completed in 2000

1999-2000	Co-investigator Research Assistant Psychiatric Hospitalisation: Reasons for Admission and Alternatives to Admission in South Auckland, New Zealand. Study Completed in 2000
1999-2004	Principal Investigator "Validation of commonly used mental health assessment tools amongst Tongans". Study Completed March 2004.
2003-2005	Pacific Research Consultant - Te Rau Hinengaro - The New Zealand Mental Health and Well Being Survey
2004-2005	Auckland Regional Pacific Disability Plan Project – Dec 03-Dec05 – completed – funded by Ministry of Health.
2005	Pathways into Mental Health Services for Pacific people – completed-funded by CM-DHB
2005	Assessment and Treatment of Depression in Pacific people in Primary Care – completed - funded by CM-DHB
2005	Research Proposals for Health Research Council 2005 Funding Round ➢ Exploration into variables to explain higher antipsychotic doses in Pacific peoples
2006	GP-Mental Health Clinics – Chronic Care Management Study - Depression ➢ Tongan Health Society – Onehunga – September 2006- present ➢ South Seas Health Care – Otara - January 2007 – present ➢ Mangere Doctors – Mangere - June 2007 – Present
2006	Lead Pacific Researcher Te Rau Hinengaro – The New Zealand Mental Health Survey.
2008	Qualitative Research Study of Older Pacific Informal Caregivers – Ministry of Health

2009 Pacific Post Natal Depression Study – Counties Manukau DHB

2009 Correlation between Mental Health and Physical Fitness Study Counties Manukau – Still in Design Phase

Academic Papers (Including Publications)

1. Foliaki, S.A., (1997) Migration and Mental Health- the Tongan Experience. *International Journal of Mental Health.* Vol 26. No.3. 36-55.
2. Abass M, Vanderpyle J, le Prou T, Foliaki SA. (2001) Psychiatric Hospitalisation: Reasons for Admission and Alternatives to Admission in South Auckland, New Zealand. *Australian and New Zealand Journal of Psychiatry.*
3. Foliaki S.A., Kokaua J., Tukuitonga C. and Schaaf D. (2006) 12-month and lifetime prevalences of mental disorders and treatment contact among Pacific people in the New Zealand Mental Health Epidemiology Survey. Awaiting publication *New Zealand and Australian Journal of Psychiatry.*

Published Reports

1. Blueprint for Mental Health Services in New Zealand- Chapter Seven. Services for Pacific People pp 68-72. Mental Health Commission Wellington November 1998.
2. Developing the Mental Health Workforce Report of the National Mental Health Workforce Development and Coordinating Committee- Chapter on Pacific People. July 1999.
3. Qualitative Study Of Elderly Pacific Informal Caregivers of A Young Person With An Illness Or Disability July 2009 for the National Health Committee, New Zealand

APPENDIX B: COMPLETE LIST OF INFORMATION SOURCES

Summary of Legal Declarations

School Records

NDOP Medical Kites by Vanisi

NDOP Medical Reports of Incident, Injury or Unusual Occurrence

NDOP Release of Liability for Refusal of Medical Treatment and Denial of Rights Form

Involuntary Use of Psychotropic Medication, Review Panels on forced medication

NDOP Lab Records

Ely State Prison ("ESP") al Observation and Referral

NDOP Continuing Medication Records

NDOP Progress Notes and Orders, Classifications and Treatment Plan Mental Health

Nevada Department of Prison ("NDOP") – Mental Status Examination Records and

NDOP Psychological Evaluations

Transfer Screening Reports

Client Photographs

Poem and drawings by client

Correspondence from Vanisi to Tibone Malone

Correspondence to Vanisi from wife DeAnn

WCSO Inmate Management Unit Memo

Washoe County Sheriff's Office Confidential Officer Safety Bulletin

Washoe County Jail Resident Classification Review

Washoe County Jail Resident Classification Review

Washoe County Sheriff's Office Detention Facility Booking Recap Sheet

Washoe Country Sheriff's Office Inmate Request Form and drawings by client

WCSO Classification Case Memorandum

WCSO Classification Case Memorandum

WCSO Inmate Visitor Report

WCSO Continuation Report

WCSO Offense Face Sheet

WCSO Incident Report

Inmate Visitor Report

WCSO Memo

WCSO Memo

WCSO Incident Report

WCSO Incident Report

Denied visits by Vanisi

WCSO Incident Reports – (kill cops or self/weapons)

WCSO Special Monitor Form Suicide Watch

Drawings/Writings by Vanisi

WCSO (Visit denied by Vanisi)

WCSO Inmate Request Form and Incident Report (Admin. Seg.)

WCSO Classification Mail Record

WCSO Incident Report (cell search)

Evidence List

Incident Report

Inter-disciplinary Progress Notes

CSI Report

(Physical Altercation)

WCSO Memo to Classification (Re: Safekeeping of Vanisi)

WCSO Inmate Visitor Report

WCSO Memo (Follow-up on physical altercation)

WCSO Inmate Request Form (Chair and Shoes)

WCSO Classification Memo (Handling of Vanisi)

Correspondence from Echo Rebideaux (wants interview)

Visitor Log

Washoe County Sheriff's Office ("WCSO") Inmate Visitor Report

WCSO Inmate Request Form (Segregation)

WCSO Inmate Request Form (Chair, Mail)

WCSO Memo (Inmate Handbook)

WCSO Incident Report (News interview)

WCSO Incident Report (Threat)

WCSO Inmate Request Forms (pencils, mail, threats report)

WCSO Memo (Tier time)

WCSO Incident Report (witness threat)

WCSO Incident Report (passing items)

WCSO Memo (Tier time)

WCSO Classification Memo (handling of Vanisi)

Correspondence from Vanisi to relative (God)

Correspondence to sister Sela? From Vanisi

WCSO Incident Report (Suicide threat)

WCSO Memo (Gang writing)

WCSO Statement (snitch-kill cop statement)

WCSO Memo (pencil restriction)

NDOP Medical Records

WCSO Memo (Vanisi housing)

WCSO Inmate Visitor Report

WCSO Inmate Request Forms (Statements by Vanisi to WCSO)

WCSO Classification Memos

WCSO Incident Report (Passing items)

WCSO Inmate Request forms (Commissary)

WCSO Inmate Request Form (Inmate complaint)

WCSO Memo and Incident Report (behavior)

WCSO Inmate Request Form (tier restriction)

WCSO Memo (Court date demeanor)

Richard W. Lewis, Ph.D., Letter to court re: court ordered exam

WCSO Inmate Management Unit Memo (Passing broken plastic)

Phillip A. Rich, M.D., Letter to court re: court ordered exam

WCSO Incident Report

WCSO Inmate Request Form (Classification Issues)

WCSO Classification Memo

WCSO Inmate Request Forms

Correspondence from Vanisi to wife 43 pages

WCSO Inmate Management Unit Memo

WCSO Memo (behavior observed)

WCSO Incident Report (video taped – no incidents)

WCSO Segregation memo – (unusual behavior observed)

WCSO Incident Report (missing chicken bones)

WCSO Housing Unit Log (Vanisi behavior)

WCSO Incident Reports (Strange behavior and refusal to follow orders)

WCSO Inmate Request Form

WCSO Incident Report (Violation of rights complaint)

WCSO Incident Request Form (mail privacy)

WCSO Incident Report (inmate altercation)

WCSO Incident Request Form (many grievances)

WCSO Incident Request Form (behavior getting worse)

WCSO Incident Request Form (co-inmate Vanisi agitators)

WCSO Incident Request Form (major outburst by Vanisi)

WCSO Incident Request Form (Vanisi disruption)

WCSO Incident Request Form (Vanisi outbursts)

NSP Intratransfer Screenings (Note 05/08/99 showing "Normal"even though he had many "Incidents"at this time.

WCSO Memorandum to Captain (breakdown/timeline of Vanisi events) and a Notice of Charges

Nevada State Prison ("NSP") (behavior report)

NSP Correspondence to Lt. Wise

NSP Notice of Charges and WCSO memo re: attempt escape

WCSO Memo re; housing arrangements

WCSO Custody Bulletin – Extreme Officer Safety Risk

WCSO Custody Bulletin and Incident (high profile status and pencil weapon)

WCSO Memo (observations)

WCSO Inmate Request Form (pencils, Mormon book)

WCSO Memo re: behavior and copy of Vanisi correspondence to wife, DeAnn

WCSO Incident Report

Reporters Transcript of testimony of Ole Thienhaus

Thomas A. Bittker, M.D., Letter to court re: court ordered exam

A.M. Amezaga, Jr., Ph.D., Letter to court re: court ordered exam

Memo Re client meetings by Ben Scroggins

Memo Re Witness interviews by Denise

Fen-phen Wikipedia article

Correspondence from Vanisi to wife 47+ pages

Correspondence from Vanisi to relative (God)

Legal Declarations

Declaration Of Heidi Bailey-Aloi

Declaration Of Edgar DeBruce

Declaration Of Priscilla Endemann

Declaration Of Michael Finau

Declaration Of David Hales

Declaration Of David Kinikini

Declaration Of Le'o Kinikini-Tongi

Declaration Of Vainga Kinikini

Declaration Of Robert Kurtz

Declaration Of Laura Lui

Declaration Of Olisi Lui

Declaration Of Siaosi Vuki Mafileo

Declaration Of Mele Maveni-Vakapuna

Declaration Of DeAnn Ogan

Declaration Of Sione Pahahau

Declaration Of Manamoui Peaua

Declaration Of Renee Peaua

Declaration Of Tavake Peaua

Declaration Of Lita Tafuna

Declaration Of Sitiveni Tafuna

Declaration Of Totoa Pohahau

Declaration Of Tony Tafuna

Declaration Of Toeumu Tafuna

Declaration Of Tufui Tafuna

Declaration Of Sioeli Tuita-Heleta

Declaration Of Sela Vanisi-DeBruce

Declaration Of Tevita Vimahi

Declaration Of Toa Vimahi

Declaration Of Terry Williams

Declaration Of Tim Williams

Exhibit 172

Exhibit 172

Swan is12JDC0352

FILED

'98 JUL 15 P3:15

BETTY L LEWIS
[redacted] Y. CLERK
BY [signature]
DEPUTY

CASE NO. CR98-0516

DEPT. NO. 4

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

~~THE STATE OF NEVADA~~,

Plaintiff,

vs.

SIAOSI VANISI, aka "PE", aka "GEORGE",

Defendant.
_____/

MOTION FOR CHANGE VENUE

COMES NOW SIAOSI VANISI, Defendant herein, by and through counsel, the Washoe County Public Defender's Office, and respectfully moves this Honorable Court for an Order changing venue of the within trial from Washoe County. This Motion is based upon the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States; Article 1 of the Nevada State Constitution and NRS 13.050(b).

POINTS AND AUTHORITIES

The Defendant is accused of committing the brutal murder of a police officer, while the officer was on duty. As this Court is aware, the "facts" and allegations of the crime have been published in both the print and electronic media.

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Public memorials have been held in honor of the officer in question which have been duly reported in the media. Each of Defendant's courtroom appearances has thus far been extensively covered by the local media. This coverage, and the expected coverage this case will command during the pretrial hearings to be held between now and January 1999 (the expected trial date), has, and will, place information before prospective jurors in Washoe County that is severely prejudicial to the Defendant.

Pursuant to NRS 13.050(b), the place of trial may be changed "[w]hen there is reason to believe that an impartial jury cannot be had therein." Where a defendant meets his burden to show that a fair and impartial trial cannot be held in the county, the defendant is entitled to a change of venue. Hale & Norcorss Gold & Silver Mining Co. v. Bajazette & Golden Era G. & S.M. Co., 1 Nev. 322 (1865). Where public pressure would intimidate a jury, venue should be changed. State v. Mallian, 3 Nev. 409 (1867). "The preeminent issue in a motion seeking a transfer of trial site is whether the ambiance of the place of the forum has been so thoroughly perverted that the constitutional imperative of a fair and impartial panel of jurors has been unattainable." Ford v. State, 102 Nev. 126, 129, 717 P.2d 27 (1986).

NRS 174.455(2) provides that removal shall not be granted "until after the voir dire examination has been conducted and it is apparent to the court that selection of a fair and impartial jury cannot be had in the county … ." It is

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respectfully submitted that the Court should determine, after examination of potential jurors, that the defendant herein cannot receive a fair trial and that the Court cannot seat a fair and impartial jury.

As a matter of constitutional law, it is well settled that an accused is entitled to a change of venue if he produces evidence of "inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, [since jury] 'prejudice is [then] presumed and there is no further duty to establish bias.'" Coleman v. Zant, 708 F.2d 541, 544 (11th Cir.1983)(quoting Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir.1980), cert.denied, 451 U.S. 913 (1981).

It is equally well settled that a change of venue is constitutionally required when it is demonstrated that jurors called for the case entertain an opinion on guilt or punishment and are unable to lay aside their opinions and render a verdict based on the evidence. Irvin v. Dowd, 366 U.S. 717, 723, 727 (1961). The Fourteenth Amendment's due process clause safeguards a defendant's Sixth Amendment right to be tried by a "panel of impartial, 'indifferent' jurors." Id. at 722. When prejudicial pretrial publicity precludes seating an impartial jury, due process requires the trial court to grant a defendant's motion for change of venue. Rideau v. Louisiana, 373 U.S. 723 (1963). Where pretrial publicity is extensive,

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voir dire cannot adequately protect an accused's right to a fair trial by an impartial jury.

In the context of a death penalty case, the notion that a defendant is entitled to a fair and impartial jury takes on additional importance because of Eighth Amendment considerations. In such cases, the jury not only decides the issue of guilt or innocence of the defendant, but if he is found guilty, must also decide whether he should live or die. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gardner v. Florida, 430 U.S. 349, 357-358 (1977).

Extensive publicity prior to trial "can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." Estes v. Texas, 381 U.S. 532, 536 (1965). Pretrial publicity of a criminal case (especially a death penalty case) can jeopardize a defendant's right to a jury trial, to a trial before a fair and impartial jury, and to effective assistance of counsel. Wherefore, the Defendant herein moves this Court for an Order granting the Motion for Change of Venue.

RESPECTFULLY submitted this 15th day of July, 1998.

MICHAEL R. SPECCHIO
WASHOE COUNTY PUBLIC DEFENDER

Counsel for Defendant

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SVan is 12JDC 3506

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document addressed to:

RICHARD A. GAMMICK
DISTRICT ATTORNEY

DATED this 15th day of July, 1998.

LISA LEE

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Exhibit 173

Exhibit 173

Declaration of Herbert Duzant's
Interview with Tongan Solicitor General, 'Aminiasi Kefu

I, Herbert Duzant, hereby declare as follows:

1. I am employed as an investigator with the Law Offices of the Federal Public Defender. I have been assigned to work on the federal habeas corpus petition of Siaosi Vanisi. As part of my responsibilities regarding Mr. Vanisi's case I traveled to his place of birth, the Kingdom of Tonga, to interview members of his family as well as government officials and representatives.

2. On January 18, 2011, attorney Ben Scroggins and I had the opportunity to meet with the Kingdom's Solicitor General, Mr. 'Aminiasi Kefu, at his office in Nukualofa, on the main island Tongatapu. During our meeting, Mr. Kefu said the Kingdom of Tonga is a signatory state of the Vienna Convention and his government has a full expectation to be contacted in the event that a Tongan national is arrested abroad on a death penalty case.

3. Mr. Kefu told us that he and his government were not aware of Mr. Vanisi's circumstances. Mr. Kefu did not know about Mr. Vanisi's conviction on the instant case, nor the fact that he is on death row in Nevada because it was never brought to the attention of the Tongan government.

4. When we told Mr. Kefu that Mr. Vanisi's previous attorneys attempted to contact the Tongan consulate in San Francisco, California, Mr. Kefu immediately informed us that this was the incorrect procedure. Mr. Kefu explained that the Tongan embassy in New York was the proper office to contact for the solicitation of assistance on the case of a Tongan foreign national in the United States. Mr. Kefu said their New York embassy deals with all of matters relating to Tonga's international relationship with the United States, whereas the San Francisco consulate office deals with matters concerning the local community. Mr. Kefu

experienced with handling such matters. Nevertheless, Mr. Kefu said he would conduct a full review of the San Francisco consulate's files to determine whether there is any evidence that they were contacted by Mr. Vanisi's trial or state post-conviction counsel.

5. Mr. Kefu assured us that he and his government would have accommodated Mr. Vanisi's previous attorneys with assistance had they traveled to the Kingdom of Tonga to conduct a social history investigation into Mr. Vanisi's background. Mr. Kefu said that his government would have provided Mr. Vanisi's previous counsel with interpreters, government escorts and vehicles, and they also would have given them full access to all records pertaining to Mr. Vanisi and his family. Mr. Kefu also indicated that he would have given Mr. Vanisi's previous counsel permission to use the resources of his office to use computers, make phone calls, make copies, use meeting space and anything else they may have required to complete their tasks. Mr. Kefu said his government would have done anything they could to assist the attorneys of the only Tongan national on death row in the United States. Mr. Kefu said that Mr. Vanisi's case would have been their top priority.

6. Mr. Kefu offered us government escorts and vehicles for the balance of our stay in Tonga, but we respectfully declined his offer because we had our own interpreter and means of transportation. Mr. Kefu provided us with the names and locations of agencies around the island which might have Mr. Vanisi's family records, as well as contact information for the various custodians of records. Mr. Kefu also provided us with his cards and told us to let him know if we encountered any problems in our requests and he'd make sure that we receive the full cooperation of all government agencies.

7. Mr. Kefu expressed doubts that many of Mr. Vanisi's family records still existed. Mr. Kefu said his government recently began computerizing documents and many older records have been lost in the preceding years to pro-democracy riots, in 2006, where fires were set to government buildings and cyclones. Mr. Kefu insisted that more of Mr. Vanisi's family records would have been available had his attorneys reached out to the Tongan government

in the late 1990's during the time of his trials and in the early 2000's during the initial portions of his post-conviction proceedings.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed in Clark County, Nevada, on April 17, 2011.

Herbert Duzant

Exhibit 175

Exhibit 175

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 50607

FILED

JUN 22 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

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 178

Exhibit 178

DECLARATION OF THOMAS QUALLS

I, Thomas Qualls, hereby declare as follows:

1. I am an attorney duly licensed to practice law in the State of Nevada. I was one of the attorneys appointed to represent Mr. Vanisi during his state post-conviction proceedings.

2. During my representation of Mr. Vanisi I became very concerned about his competency to proceed and moved for a stay of his state-post conviction proceedings in order to determine his competency. From that point forward I focused most of my efforts on litigating the competency issue.

3. To effectively have represented Mr. Vanisi it would have been necessary for me to conduct a complete investigation of all aspects of his case, especially the investigation I had pled trial counsel were ineffective for failing to pursue.

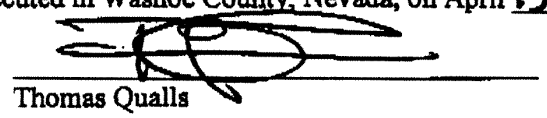
4. To conduct a full investigation of Mr. Vanisi's case I planned to and should have traveled to Tonga, with a cultural expert, to explore Mr. Vanisi's cultural and family background. Such was the litigation plan and we should have conducted a thorough investigation into Mr. Vanisi's life and provided competent experts with an in-depth social history as well as all medical, employment and educational records we could obtain.

5. Because I was focused on the competency litigation and believed that we would at least obtain a necessary stay of the proceedings, I had not yet sought or obtained funds to conduct the investigation which was part of the long-term litigation plan.

6. After the post-conviction judge denied the motion for a stay she gave us an extremely short period of time to file the amended/supplemental post-conviction petition, I believe it was less than a week. As a result, our planned investigation was cut short and the supplemental petition was left deficient of that information.

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

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Washoe County, Nevada, on April 15, 2011.



Thomas Qualls

Exhibit 179

Exhibit 179

DECLARATION OF WALTER FEY

I, Walter Fey, hereby declare as follows:

1. I am an attorney duly licensed to practice law in the State of Nevada. I was one of the attorneys appointed to represent Mr. Vanisi during his pre-trial proceedings and represented him through his preliminary hearing. At the time I was appointed I was a Deputy Public Defender with the Washoe County Public Defender's Office. I left the employ of the office, by mutual agreement, shortly after representing Mr. Vanisi.

2. During my tenure with the public defender's office I observed the implementation of the Early Case Resolution program in mid 1997, which was a joint effort between the public defender's office and the Washoe County District Attorney's office to attempt to resolve as many cases as possible within 72 hours of arrest. I was opposed to the program from the beginning because 72 hours did not provide enough time to investigate a case. Discovery was never available in that time and there was no way to have forensic testing in such a short time.

3. The entire point of the program was to save the county money by avoiding the costs of investigation and trials. Both public defender Michael Specchio and district attorney Richard Gammick were strong proponents of the program and publically praised the money that the program saved the county. Because of this, I felt pressure from my supervisors to have my clients plead, whenever possible, to the offers made through the Early Case Resolution program. I on the other hand felt like the program often put the county's budget ahead of the clients' legal interests and refused to advise clients to accept pleas unless I had sufficient information about the case to assess the fairness of the offer.

4. I was told on numerous occasions to plead more cases out and "get them off my desk." I have always believed that it is the client's decision whether to go to trial, and if my clients wanted to reject a plea offer, even against my advice, I would try the case. I was reprimanded on numerous occasions for taking too many cases to trial, and it eventually created a conflict between Michael Specchio and myself that we could not get over. Some time shortly after I worked on Mr. Vanisi's case it was agreed between the office and me that I would resign from the office of the Washoe County Public Defender and enter private practice.

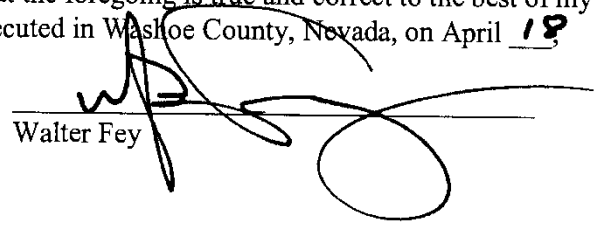
5. Based upon my understanding of the Early Case Resolution program, the overriding concern was to save Washoe County money, including prosecution and defense expenditures. Because the program necessarily depended upon the cooperation of the office of the District Attorney and the Public Defender, it created less of an adversarial relationship between the offices than might otherwise have been the case. While I understand that mutual respect between professional adversaries is to be desired, I believe this program often compromised principles of criminal defense in Washoe County and

often resulted in less zealous advocacy than might otherwise have been the case.

6. Although not included in the Early Case Resolution program, the more serious cases defended by the office were also subject to fiscal constraints and considerations. An office philosophy emerged to process cases and resolve them as cheaply and as quickly as possible.

7. It is my opinion that many clients represented by the Washoe County Public Defender's Office during the time I was a trial deputy did not receive the zealous advocacy they were entitled to under the Sixth Amendment. The efforts to plea cases with insufficient information and to spend as little time and money as possible directly influenced the quality of representation provided by the office.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Washoe County, Nevada, on April 18, 2011.



Walter Fey

Exhibit 180

Exhibit 180

DECLARATION OF STEPHEN GREGORY

I, Stephen Gregory, hereby declare as follows:

1. I am a retired attorney, but at the time of the trial I was duly licensed to practice law in the State of Nevada. I began representing Mr. Vanisi in the capital proceedings against him with Michael Specchio as lead counsel in approximately October of 1998.

2. We knew immediately that this was going to be an extremely difficult case given the evidence against Mr. Vanisi that the State had collected. We did the best job that we could to protect Mr. Vanisi's right to a fair trial by litigating over forty pretrial motions, many of which were granted.

3. After Mr. Vanisi's first trial resulted in a mistrial I became lead counsel on the case because Michael Specchio became ill. Jeremy Bosler was asked to secure the attendance of specific out-of-state witnesses for the mitigation portion of the case. Mr. Bosler was never given authority to expand the mitigation investigation of the case beyond the scope of the first trial.

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

5. I have recently learned that Mr. Specchio consulted with mitigation specialist Scharlette Holdman, about potential avenues of investigation. She recommended that the defense team travel to Tonga since Mr. Vanisi was born there. I was never given her recommendation or given any indication that funds were available to travel to Tonga, and therefore decided to focus our investigation on the many family members that we could interview here in the United States.

6. Had I known that there were several witnesses to Mr. Vanisi's childhood in Tonga who could substantiate our defense that Mr. Vanisi was psychotic when he committed this crime, I could have presented this evidence at trial to support the testimony of Mr. Vanisi's ex-wife that Mr. Vanisi had been suffering from a mental health disorder for some time prior to the crime.

7. Had I had the benefit of an expert report confirming what our office suspected - that Mr. Vanisi was psychotic during the offense, and while we were representing him, I could have utilized those reports both to support our defense, and to try to convince the trial judge that Mr. Vanisi was not competent to stand trial.

8. After a conflict arose between Mr. Vanisi and myself about how to proceed with Mr. Vanisi's defense we contacted Bar counsel for the Nevada State Bar and the NACDL Strike Force. Bar counsel and NACDL advised us that we were ethically obligated to withdraw from the representation due to the conflict, so we filed a motion to withdraw. At the hearing on the motion to withdraw the judge insisted that we tell her exactly what the conflict was. Therefore, I explained to the judge discussions we had with Mr. Vanisi. After our explanation the judge denied my motion and forced us to continue with representing Mr. Vanisi.

9. As a result of the conflict we could not ethically put on any meaningful defense regarding drug use or mental health issues for Mr. Vanisi during the trial phase of his case because we were concerned that it would contradict or discredit Mr. Vanisi's proposed testimony. The entire time that we represented Mr. Vanisi, he indicated that he wanted to testify on his own behalf. Based upon many conversations with Mr. Vanisi, we wanted to present a defense that Mr. Vanisi believed that he was provoked by certain behaviors that he found to be threatening. We were concerned, however, that if we put on this defense, it would contradict Mr. Vanisi's trial testimony. We were stuck between a rock and a hard place.

10. We did not believe that Mr. Vanisi could obtain a fair trial in Reno given the massive publicity about his case. We filed several pretrial motions which, if granted, would enable us to prove that a change of Venue was required. When the trial court denied these motions, we believe the court prevented us soliciting the necessary facts from the jury to establish the necessary elements to support a change of venue, which is why we did not renew our motion for a change of venue at the conclusion of the voir dire proceedings.

11. This was a very difficult case to try given the huge amount of negative publicity, the extreme mental health related difficulties occurring when we were interacting with Mr. Vanisi. Despite the vast number of obstacles, we tried very hard to do our best given our budgetary constraints and the multiple obstacles thrown in our path.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Washoe County, Nevada, on April 17, 2011.

Stephen Gregory

Exhibit 181

Exhibit 181

DECLARATION OF JEREMY BOSLER

I, Jeremy Bosler, hereby declare as follows:

1. I am an attorney duly licensed to practice law in the State of Nevada. I began representing Mr. Vanisi in the capital proceedings against him with Michael Specchio and Stephen Gregory in approximately October of 1998. I believe that Mr. Vanisi's case was the second capital case I tried and Mr. Specchio, who was the Washoe County Public Defender, wanted me to become qualified to try capital cases under Nevada Supreme Court Rule 250. My responsibilities were limited and I did not direct investigation or strategy in the case.

2. After Mr. Vanisi's trial resulted in a mistrial I was assigned to assist Stephen Gregory with the case because Michael Specchio became ill. My responsibilities involved the penalty phase investigation. I was primarily in charge of securing out-of-state witnesses for the mitigation part of the trial.

3. Mr. Vanisi had been displaying bizarre behaviors while incarcerated and during our visits. Unfortunately, both times Mr. Vanisi was examined for competency, he was found to be competent to stand trial. Mr. Vanisi's behavior was so problematic that we had Edward Lynn, M.D., a psychiatrist, evaluate Mr. Vanisi to determine whether there was any medication that could help to stabilize him. Unfortunately, despite our best efforts, we were unable to get Mr. Vanisi medicated until shortly prior to his second trial.

4. I interviewed numerous family members, high school teachers, high school classmates and Mr. Vanisi's LDS bishop from when he was growing up in San Bruno. I spent a significant amount of time filing motions to subpoena out of state witnesses and attending hearings in California courts to make sure we had a significant number of witnesses to testify in the penalty phase of Mr. Vanisi's trial.

5. I also learned from Mr. Vanisi's ex-wife that she had left him a year prior to the offense in part because she believed that his mental health was deteriorating in a way that was problematic for her and her children. I had information that Mr. Vanisi was a user of amphetamines and attempted to argue to the jury that Mr. Vanisi's crime was committed during a manic psychotic episode.

6. After these interviews, it became clear that Mr. Vanisi had a large number of witnesses available to testify about what a great person he had been in high school, and that the offense was a result of his deteriorating mental health.

7. I brought in eighteen witnesses to testify at trial, some of whom I subpoenaed from out of state. The majority of these witnesses attempted to humanize Mr. Vanisi by explaining to the jury what a great person he had been before mental illness struck.

8. It is current office policy to have a mitigation specialist in all capital cases investigate the client's background for the purpose of identifying whether there is any mitigating evidence such as childhood abuse or trauma, a history of mental health disorders, prenatal drug and alcohol abuse, and other factors that could offer a jury an explanation of how the client had arrived at the point in his life of committing the offenses. I am unaware of a strategic reason for not obtaining additional collateral reports and historical records from Tonga supporting our theory that Mr. Vanisi was mentally ill when he committed the offense.

9. It is current office policy to request medical, mental health, scholastic, criminal and other records, and provide them to both my investigator and mental health experts so that they can perform a complete evaluation of the client.

10. I have been made aware that Mr. Specchio had consulted with mitigation specialist Scharlette Holdman, but at the time of both trials, I was not made aware of the details of their discussions.

11. Psychiatric reports explaining that Mr. Vanisi suffers from schizoaffective disorder and was operating under a psychotic delusional system at the time of his crime would have been useful at Mr. Vanisi's trial to help support a theory of the defense.

12. I made the decision to call psychiatrist Ole Thienhaus, M.D. during the penalty phase of Mr. Vanisi's trial because he had provided a tentative diagnosis for Mr. Vanisi as having bipolar disorder with manic psychosis.

13. After a conflict arose between Mr. Vanisi and the defense team about how to proceed with Mr. Vanisi's defense we contacted Bar counsel for the Nevada State Bar and the NACDL Strike Force. Bar counsel and NACDL advised us that we were ethically obligated to withdraw from the representation due to the conflict, so we filed a motion to withdraw. At the hearing on the motion to withdraw the judge insisted that we tell her exactly what the conflict was. Therefore, Mr. Gregory and I explained to the judge discussions we had with Mr. Vanisi. After our explanation the judge denied my motion and forced me to continue with representing Mr. Vanisi.

14. As a result of the conflict we could not ethically put on any meaningful defense for Mr. Vanisi during the guilt phase of his trial because we were concerned that it would contradict or discredit Mr. Vanisi's proposed testimony. The entire time that we represented Mr. Vanisi, he indicated that he wanted to testify on his own behalf. Based upon many conversations with Mr. Vanisi, we wanted to present a defense that Mr. Vanisi believed that he was provoked by certain behaviors that he found to be threatening. We were concerned, however, that if we put on this defense or evidence of drug abuse an/or mental health issues, it would contradict or discredit Mr. Vanisi's

testimony.

15. We did not believe that Mr. Vanisi could obtain a fair trial in Reno given the massive publicity about his case. We filed several pretrial motions which, if granted, would enable us to prove that a change of Venue was required. When the trial court denied these motions, we were prevented from establishing the necessary elements to support a change of venue, which is why we did not renew our motion for a change of venue at the conclusion of the voir dire proceedings.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in Washoe County, Nevada, on April 17, 2011.

Jeremy Bosler

Exhibit 183

Exhibit 183

SAN BRUNO POLICE DEPARTMENT
CRIME REPORT
Person/Property

1 Victim's Name (Last, First, Middle / Firm Name, if Business)	2 Report Number
People of the State	89-0030f

3 Reporting Person's Name (Last, First, Middle)	4 Code Section	5 Crime Classification
Watson, Richard Sgt. #2	415.1 P.C.	Disturbing the Peace — Challenging

7 Reporting Person's Residence Address	8 Res. Phone	X	9 Location of Occurrence	10 Reporting Area / Beat
			1150 El Camino Real	4 - 1

11 Reporting Person's Business Address	12 Bus. Phone	X	13 Date and Time Occurred / Day of Week	14 Date and Time Reported
S.B.P.D.	877-8965		2/7/89 1715 Hrs Tue	2/7/89 1715

15 Victim: Nature of Injury, Minor, Serious, Location, Describe	16 Victim's Occupation, Race, Sex, Age/DOB	17 Victim's Condition

18 Treated? Yes ☐ No ☐	19 Location of Treatment / By Whom?	20 Victim's Residence Address / City	21 Res. Phone	X

22 Deceased Removed to:	23 Victim's Business Address (School, if Juvenile)	24 Bus. Phone	X

25 Witness No. 1 — Name (Last, First, Middle)	Date of Birth	26 Residence Address / City	27 Res. Phone	X	28 Bus. Phone	X
Rucker, Jason Off#22		San Bruno P.D.			877-8965	
Witness No. 2	Date of Birth					

29 Suspect No. 1 — Name (Last, First, Middle)	30 Race	31 Sex	32 Age	33 Date of Birth	34 Height	35 Weight	36 Hair	37 Eyes	38 Arrested?
TAFUNA, George	Ton	M	18	( )	5-11	210	Brn	Brn	Yes ☒ No ☐

39 Address / Clothing, and Other Identifying Marks or Characteristics	40 I.D. Number	41 Arrest Number
1880 Crestwood Drive San Bruno		

Suspect No. 2 — Name (Last, First, Middle)	Race	Sex	Age	Date of Birth	Height	Weight	Hair	Eyes	Arrested?
									Yes ☐ No ☐

Address / Clothing, and Other Identifying Marks or Characteristics	I.D. Number	Arrest Number

42 Describe Premises or Vehicle and Area Where Offense Occurred

43 Describe Briefly How Offense Committed / If Burglary: Point of Entry / Method of Entry / Manner of Search

44 Describe Weapon, Instrument, Trick, Device, or Force Used

45 Motive / Type of Property Taken or Other Reason for Offense

46 Trademark, Actions, or Conversation of Suspects

47 Vehicle Used | License No. /State, Year/ | ID No. | Year | Make | Model | Color | Other Identifying Characteristics

CONFIDENTIAL DOCUMENT
SAN BRUNO POLICE DEPT
DO NOT DUPLICATE
DEF CRT PD
DA VOMC OTHER
PROB

48 Narrative — (A) Identify additional suspect(s), (B) Reconstruct the crime, (C) Describe physical evidence, list property found, and give disposition, (D) Summarize other details relating to crime, (E) Time and location where Victim/Witness can be contacted by duty investigators, if no available phone numbers, (F) If unable to list only one article to item, describe and show value of property taken, listing all serial numbers and other marks of identification

49 Item		50 Serial No.	51 Value
	At 1651 Hrs, I along with other San Bruno Police Officers responded to the Tanforan Shopping Center on a report of a disturbance in the mall, possibly involving gang members. Upon our arrival, approximately 15 subjects were observed walking toward the U.A. Cinema exits. These subjects were detained and each was identified. This group claimed that a fight had taken place in the mall and that they had no involvement in the fight. Several members of this group stated that the particpants were still lingering near the middle of the mall.		
	After leaving this group, I along with other officers,		

52 Reporting Officer's/Employee's Signature, Serial No.	53 Accompanying Officer's Name & Serial No.	54 Approving Supervisor's Signature, Serial No.
Sgt. R. Watson #2		

55 Direct Additional Copies of this Report to:	56 Continuation Report Attached
DOB	Yes ☐ No ☐

57 Reviewed by Signature / Serial No.	58 Date	59 Cleared for Filing, Date	60 Assigned to Invest. Div., Date

FORM S204 SM 7/85

SAN BRUNO POLICE DEPARTMENT

CA-SBPD00001

AA06720

SAN BRUNO POLICE DEPARTMENT
CONTINUATION REPORT

Type of Report		Case No.
	415.1 P.C.	89-00301
Page No.	Last, First and Middle Name of Subject of Report	Alias/Nickname
2	TAFUNA, George	

walked to the center of the mall and observed a group of approximately 6 Tongan males lingering near the top of the escalators.

I approached the group and spoke with S-1 Tafuna. I asked S-1 Tafuna for some identification and without speaking he turned and began to walk away. I stopped Tafuna and again requested identification. Tafuna said he had no I.D. with him. I asked Tafuna his name and he refused to reply. He then turned and began to walk away again.

At this point officer Rucker, who was in plain clothes, arrived. We again attempted to detain Tafuna to determine if he was a participant in the earlier fight.

Tafuna then became belligerent and said "I don't have to tell you shit." "You think you're so bad?" "I could kick your ass - one on one." I then asked Tafuna, "Are you challenging me to fight?" Tafuna replied, "Yes. I'll fight you right here."

I then told Tafuna that he was under arrest. I then attempted to place handcuffs on Tafuna. Tafuna stated, "If you want to arrest me, you're going to have to work for it." Tafuna then proceeded to resist the attempts of officer Rucker and I in placing handcuffs on him. Tafuna repeatedly pulled his arms away and stiffened his body

Reporting Officer	Approved by	Date
Sgt. R. Watson #2		

SAN BRUNO POLICE DEPARTMENT

SAN BRUNO POLICE DEPARTMENT
CONTINUATION REPORT

Type of Report		Report Number
415 P.C.		89-00301
Page No	Last, First, Middle Name of Subject on Initial Report	Arrest Number
	TAFUNA, George	

making the handcuffing virtually impossible.

After approximately 30 seconds of struggling with the suspect, officer Wright #36 arrived and with his assistance we were able to subdue and handcuff Tafuna.

Tafuna was subsequently transported to the San Bruno Police Station and thereafter to the North County Jail where he was booked for 415.1 P.C. "Challenging to Fight."

I request the DDA consider an additional charge of 148 P.C. be filed against Tafuna.

Sgt. R. Watson #2

Yes ☐ No ☐

SAN BRUNO POLICE DEPARTMENT

Exhibit 184

Exhibit 184

MANHATTAN BEACH POLICE DEPARTMENT
242 P.C. CRIME REPORT
DR #95-6108

SOURCE:

ON 11-4-95 AT APPROXIMATELY 0156 HOURS, I WAS DETAILED TO THE SCHOONER BAR, 1122 22ND STREET RE: 2 MALES TRYING TO START A FIGHT WITH PEOPLE IN THE PARKING LOT. ONE SUBJECT WAS DESCRIBED AS A MALE HAWAIIAN, 28 YRS, 6-0, HEAVY BUILD, BEIGE SHIRT AND BEIGE PANTS. SUBJECT #2 WAS DESCRIBED AS A MALE WHITE, 25 YRS, 6-0, THIN BUILD, WEARING A WHITE SHIRT AND BLUE JEANS.

INVESTIGATION:

I ARRIVED APPROXIMATELY 2 MINUTES LATER AND OBSERVED THREE MALES STANDING IN THE MIDDLE OF 22ND STREET IN FRONT OF THE SCHOONER BAR. A WHITE FORD ESCORT WAS PULLING AWAY FROM THE GROUP AND DRIVING WESTBOUND ON 22ND STREET. ONE OF THE SUBJECTS IN THE GROUP OF THREE MEN TOLD ME TO STOP THE CAR BECAUSE THE SUBJECTS THAT WERE STARTING THE FIGHTS WERE IN THE VEHICLE. I CAUGHT UP TO THE VEHICLE AND STOPPED IT AT THE CORNER OF 22ND STREET AND SEPULVEDA BLVD. I CONTACTED THE DRIVER WHO INFORMED ME THAT HE DID NOT HAVE HIS CDL ON HIM BUT HE IDENTIFIED HIMSELF AS JOEL JOHNSON. I ASKED THE PASSENGER FOR IDENTIFICATION AND HE TOLD ME THAT HE DID NOT HAVE ANY ON HIS PERSON. I OBSERVED THAT BOTH SUBJECTS IN THE VEHICLE MATCHED THE DESCRIPTION OF THE SUSPECTS IN THE 415 CALL. I THEN TOLD THEM OF THE REASON FOR THE STOP AND THAT THEY WERE TO STAY IN THE VEHICLE WHILE I SPOKE TO THE R/P. DURING MY CONVERSATION WITH JOHNSON, I DETECTED THE STRONG ODOR OF AN ALCOHOLIC BEVERAGE ON HIS BREATH, BLOODSHOT EYES AND SLURRED SPEECH.

I THEN CONTACTED ONE OF THE VICTIMS WHO IDENTIFIED HIMSELF AS ROTTENBERG AND HE STATED THE FOLLOWING IN ESSENCE: HE WAS IN THE SCHOONER BAR WITH SOME FRIENDS WHEN HE OBSERVED THE TWO SUBJECTS I HAD DETAINED IN THE FORD ESCORT ENTER THE BAR. HE STATED THAT HE DID NOT KNOW THEM AND THERE WERE NO WORDS EXCHANGED BETWEEN THEM. APPROXIMATELY 5 MINUTES AFTER THEY HAD ENTERED THE BAR, THE HAWAIIAN SUBJECT WENT INTO THE RESTROOM. HE SAID THAT APPARENTLY SOMEONE TURNED THE RESTROOM LIGHTS OFF ON THE SUBJECT AND THAT APPARENTLY IT MADE HIM ANGRY. THE HAWAIIAN SUBJECT CAME OUT OF THE RESTROOM AND FOR NO REASON STRUCK HIS FRIEND MARK IN THE FACE WITH A CLOSED FIST. ROTTENBERG STATED THAT HE TOLD THE SUSPECT THAT

MARK HAD NOT TURNED THE LIGHTS OFF ON HIM. THE SUSPECT THEN TURNED AND PUNCHED A SECOND SUBJECT BY THE NAME OF TROY. AT THIS TIME, THE HAWAIIAN SUSPECT AND HIS FRIEND (JOHNSON) WERE ASKED TO LEAVE THE BAR BY THE MANAGEMENT. ROTTENBERG STATED THAT THEY LEFT THE BAR BUT CAME BACK APPROXIMATELY 20 MINUTES LATER. THEY WERE IN THE BAR A FEW MINUTES WHEN THEY ATTEMPTED TO START FIGHTS WITH SEVERAL PEOPLE IN THE BAR. HE STATED THAT THE ARGUMENTS WERE CARRIED OUT TO THE REAR PARKING LOT. ROTTENBERG ADDED THAT AT SOME POINT JOHNSON STRUCK HIS FRIEND MARK. THE HAWAIIAN SUSPECT THEN PUNCHED HIM WITH A CLOSED HIS ON THE LEFT SIDE OF HIS FACE AND TORE THE SWEATER THAT HE WAS WEARING OFF HIS BODY. ROTTENBERG STATED THAT THE HAWAIIAN SUSPECT THEN TOLD JOHNSON TO "GO GET THE CAR AND PICK ME UP AT THE CORNER." HE STATED THAT THE SUSPECT THEN CHALLENGED HIM TO FIGHT AGAIN BUT THAT HE REFUSED TO FIGHT THE MUCH LARGER MAN.

I OBSERVED A BRUISE ON ROTTENBERG'S LEFT CHEEK AREA. I THEN INFORMED HIM THAT IF HE WANTED TO PROSECUTE THIS WOULD HAVE TO BE A PRIVATE PERSON'S ARREST SITUATION AND I EXPLAINED THE PROCEDURE. HE INFORMED ME THAT HE WANTED TO MAKE THE ARREST.

I THEN CONTACTED HUH, A WITNESS WHO OBSERVED THE INCIDENT. HE STATED THE FOLLOWING IN ESSENCE: HE WAS AT THE BAR WHEN BOTH SUSPECTS CAME IN. HE STATED THAT THE HAWAIIAN SUSPECT APPARENTLY GOT MAD WHEN AN UNKNOWN PERSON TURNED THE LIGHTS OFF IN THE RESTROOM WHILE HE WAS USING IT. HE STATED THAT THE SUSPECT CAME OUT OF THE RESTROOM AND STRUCK "MARK" IN THE FACE WITH A CLOSED FIST. HUH STATED THAT THE HAWAIIAN SUBJECT AND HIS FRIEND (JOHNSON) WERE THEN ASKED TO LEAVE AND THEY COMPLIED. APPROXIMATELY 20 MINUTES LATER THEY RETURNED AND GOT IN AN ARGUMENT WITH SEVERAL SUBJECTS INCLUDING MARK AND ROTTENBERG. HUH STATED ALL OF THE SUBJECTS EXITED THE BAR AND WENT OUT TO THE REAR PARKING LOT. THERE, THE ARGUMENT CONTINUED AND THE SUBJECT IDENTIFIED AS JOHNSON STRUCK MARK WITH HIS FIST. HE STATED THAT HE ALSO OBSERVED THE HAWAIIAN SUSPECT STRIKE ROTTENBERG IN THE FACE AND THEN TORE THE SWEATER THAT ROTTENBERG WAS WEARING OFF HIS BODY HUH STATED THAT BEFORE BOTH SUSPECTS LEFT IN THE VEHICLE, THEY WERE MAKING MOVEMENTS AS IF THEY HAD A WEAPON UNDER THEIR SEATS. HE ASKED ME TO SEARCH THE VEHICLE FOR WEAPONS.

I THEN CONTACTED MARK, WHO WAS A VICTIM OF A 242 P.C. FROM BOTH SUSPECTS IN THE VEHICLE. HE TOLD ME THAT HE DID NOT WANT TO PROSECUTE FOR FEAR OF REPRISAL BY THE SUSPECTS. DUE TO THE TIME OF THE NIGHT I WAS NOT ABLE TO LOCATE ANY OTHER WITNESSES TO THE CRIME SINCE THE BAR HAD CLOSED AND ALL PATRONS HAD LEFT.

I THEN TOLD ROTTENBERG THAT I WAS GOING TO GET THE "HAWAIIAN" SUSPECT OUT OF THE VEHICLE AND THAT HE WAS TO TELL HIM THAT HE WAS UNDER ARREST. I WALKED OVER TO THE VEHICLE WITH OFFICER COCHRAN WHO HAD ARRIVED ON SCENE AND I ASKED THE SUBJECT TO STEP OUT OF THE VEHICLE. HE SAID "IM NOT COMING OUT, I HAD NOTHING TO DO WITH THIS." I THEN TOLD HIM THAT HE WAS GOING TO BE PLACED UNDER CITIZENS ARREST FOR BATTERY AND I AGAIN ASKED HIM TO EXIT THE VEHICLE. HE TOLD ME THAT HE WAS NOT. I ASKED HIM REPEATEDLY TO EXIT THE VEHICLE AND HE REFUSED. I THEN TOLD HIM THAT IF HE DID NOT COMPLY I WAS GOING TO USE PEPPER SPRAY ON HIM. HE DID NOT ANSWER. I ASKED HIM TO EXIT THE VEHICLE AND HE AGAIN REFUSED. HE SAT IN THE VEHICLE WITH HIS ARMS CROSSED ON HIS CHEST AND LOOKING FORWARD, NOT MAKING EYE CONTACT WITH ME. I TOLD THE SUBJECT AGAIN TO EXIT THE VEHICLE AND HE REFUSED SAYING THAT HE WAS NOT COMING OUT OF THE CAR. AT THIS TIME I TOLD THE SUBJECT THAT HE WAS UNDER ARREST AND I ORDERED HIM TO EXIT THE VEHICLE. HE REFUSED. I REPEATED THE ORDER AGAIN AND HE AGAIN REFUSED. I THEN TOLD HIM AGAIN THAT I WAS GOING TO PEPPER SPRAY HIM AND USE FORCE TO GET HIM OUT OF THE VEHICLE. HE DID NOT REPLY. I THEN ATTEMPTED TO PULL THE SUBJECT OUT BY THE ARM AND HE TENSED UP AND DID NOT COMPLY. I TRIED THIS SEVERAL TIMES BUT HE DID NOT COMPLY WITH MY COMMANDS TO EXIT THE VEHICLE. AT THIS TIME I SPRAYED THE SUBJECT IN THE FACE WITH THE PEPPER SPRAY AND I AGAIN ORDERED HIM TO EXIT. HE DID NOT COMPLY. I SPRAYED THE SUBJECT AGAIN AND AGAIN ORDERED HIM TO EXIT THE VEHICLE AND HE FAILED TO COMPLY. I THEN USED THE SHORT END OF MY ISSUED PR-24 BATON TO JAB THE SUSPECT IN THE RIGHT RIB AREA. I STRUCK HIM ONCE AND ORDERED HIM TO EXIT BUT HE DID NOT COMPLY. I STRUCK THE SUBJECT IN THE RIB AREA AGAIN AND ORDERED HIM TO EXIT THE VEHICLE BUT HE AGAIN FAILED TO COMPLY. I AGAIN ATTEMPTED TO PULL HIM OUT OF THE VEHICLE BUT HE DID NOT COMPLY AND RESISTED MY FORCE. I STRUCK THE SUBJECT TWICE MORE IN THE RIB AREA WITH THE SHORT END OF THE BATON AND HE DID NOT COMPLY AND EXIT THE VEHICLE. AT THIS TIME OFFICERS COCHRAN, ZINS, KLATT AND MYSELF GOT IN A POSITION AFTER OFFICER COCHRAN CUT THE SUSPECT'S SEAT BELT WHERE WE WERE ABLE TO

PULL THE SUSPECT OUT OF THE VEHICLE. HE WAS NOT COMBATIVE BUT HE DID RESIST WHILE HE WAS BEING HANDCUFFED. WE WERE ABLE TO GET HIM HANDCUFFED AND UNDER CONTROL. AT NO TIME WHILE HE WAS BEING PULLED OUT OF THE VEHICLE OR HANDCUFFED WAS THE SUSPECT STRUCK OR INJURED BY ANY OF THE OFFICERS ON THE SCENE. THE SUSPECT, LATER IDENTIFIED AS VANISI WAS TRANSPORTED TO THE MBPD JAIL BY OFFICERS ZINS AND KLATT.

THE DRIVER OF THE VEHICLE (JOHNSON) WAS PLACED UNDER ARREST BY OFFICERS ROSENBERGER AND HAGEMAN FOR 23152(A) V C. AND TRANSPORTED TO THE MBPD JAIL FOR BOOKING. FOR DETAILS OF THEIR ARREST SEE BOOKING #85370.

ADDITIONAL:

AT THE MBPD STATION, VANISI MADE A COMMENT IN FRONT OF OFFICERS ZINS, COCHRAN AND LT. LEAF. HE MADE STATEMENTS THAT IT WAS A TRADITION FOR HIM TO GET PEPPER SPRAYED IN MANHATTAN BEACH BEFORE GETTING ARRESTED. AND HE NO LONGER WANTS TO CONTINUE WITH THE TRADITION.

Exhibit 185

Exhibit 185

Manhattan Beach Police Department
Crime Report

Source:

On 08-23-97 at 2343 hours Officer Rosenberger #241 and I (Officer Combs #263) were detailed to 116 Manhattan Beach Blvd. (Shellbacks Tavern) in regards to a fight at that location. Upon our arrival we contacted the victim. Perrin Vanisi and a witness. Mark Tucker.

Observations:

Officer Rosenberger and I saw blood on V-1(Vanisi) face and a one inch cut above his right eye. V-1 appeared to be slightly disoriented.

Statements:

V-1(Vanisi) told me. he is a doorman at Shellbacks Tavern. On 08-23-97 at 2340 hours V-1 was escorting S-1(see page 1&2 for description) who was very drunk out the front door of Shellbacks Tavern. S-1 was swinging his arms at V-1 and attempting to hit him as he was being escorted out of the front door. While V-1 was at the front door S-2(see page 1&2 for description), who was S-1's friend. swung his right fist at V-1. striking V-1 above his right eye. Both S-1 and S-2 fled the scene.

W-1(Tucker) told me. he is also a doorman at Shellbacks Tavern. W-1 said S-2 is a regular customer at Shellbacks Tavern, and believes his name is Matt Carnes.

Injuries:

V-1(Vanisi) sustained a minor cut approximately one inch in length above his right eye. He was treated and released by Manhattan Beach Fire Department Paramedics.

Additional:

V-1(Vanisi) does not wish prosecution of S-2 who hit him. V-1 wanted a report of this incident.

MANHATTAN BEACH POLICE DEPARTMENT

4 OF:	CRIME REPORT	INCIDENT REPORT	CAD 1944	PAGE 1	OF 1
242 P.C	ARREST/BOOKING REPORT	SUPPLEMENTAL REPORT	DATE 8-24-97	TIME 0200	

PROPERTY CODE: S - Stolen R - Recovered L - Lost F - Found E - Embezzled D - Damaged B - Evidence
(Use all applicable codes, for example, if property is both stolen & recovered, Code as S/R)

C	ITEM	ARTICLE NAME	QTY.	SERIAL NO	BRAND/MAKE	MODEL NAME/NO.	MISC. DESCRIPTION	CODE	VALUE

OBSERVATIONS:

ON 8-23-97 @ APPROX 2335 HRS I WAS INPUTTING @ VEH FROM THE UPPER NORTH PIER LOT. WHILE I WAS COMPLETING THE PAPERWORK, I OBSD ACROSS THE STREET @ SHELLBACK'S THREE SUSTS WALKING OUT THE DOOR FACING M.B.B.

I NOTED THAT THE SUST (LATER THE VICT) WAS PUSHED FROM BEHIND AS HE EXITED THE DOOR AS THE VICT. TURNED HE WAS PUNCHED IN THE FACE BY A MWA, BLONDE WAVY HAIR, 6-6 BLU CLOTHING. I APPROACHED BOTH VICT & SUSP WHO WERE NOW FIGHTING

WHEN I ORDERED THE TWO TO STOP FIGHTING THEY COMPLIED. THE SUSP. THEN RAN SOUTH ON OCEAN, ACROSS THE SOUTH PARKING LOT & OVER THE HILL DOWN TO THE STRAND. I TOLD THE SUSP. TO STOP BUT HE DID NOT COMPLY WITH MY ORDER

I THEN RETURNED TO THE VICT. WHO NEEDED TO BE TREATED BY THE M.B.F.D. I CAN I/D THE SUSP

OFFICER(S) REPORTING	SERIAL NO.	SUPERVISOR APPROVED	SERIAL NO.	DATE	CASE
O'BRIEN, N	202	Sgt. Smith	205	8-24-97	☐ ACTIVE ☐ INACTIVE ☐ CLOSED

☐ CHECK HERE FOR COPY TO REPORTING OFFICER

DATE REPRODUCED / CLERK / DR.#

ADDITIONAL PROPERTY • NARRATIVE

WCPD01392

AA06730

Exhibit 186

Exhibit 186

SVanisi2JDC03456

FILED

'98 FEB 26 A9:03

JUDI BAILEY, CLERK

BY [signature] DEPUTY

Case No. CR98-0516

Dept. No. 4

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

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

SIAOSI VANISI,
also known as
"PE",
also known as
"GEORGE",

Defendant.

_____/

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and DAVID L. STANTON, Chief Deputy District Attorney, and hereby gives Notice to the Court, counsel, and the defendant, SIAOSI VANISI, also known as "PE", also known as "GEORGE", of the following:

YOU ARE HEREBY NOTIFIED that the State of Nevada by and through the Office of the Washoe County District Attorney intends to seek the death penalty as punishment against SIAOSI VANISI,

///

///

9

also known as "PE", also known as "GEORGE", upon his conviction for Murder of the First Degree as set forth in Count I.

YOU ARE HEREBY FURTHER NOTIFIED that the State intends to produce and present evidence concerning aggravating circumstances relevant to the offense, defendant, victim and/or other matters relevant to conviction and sentence to allow a jury or panel of three judges to set the penalty for the conviction of Murder of the First Degree at death. NRS 200.030, NRS 200.033, NRS 175.552; NRS 175.556, Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991).

In addition to seeking the death penalty against defendant SIAOSI VANISI, also known as "PE", also known as "GEORGE", based upon the aggravating nature of the offense itself, the State intends to present the following aggravating circumstances as it relates to Count I, NRS 200.033(4a)(7)(8)(11).

The evidence which the State intends to present in support of one or more of the following statutory aggravating circumstances pursuant to NRS 200.033 as allowed by NRS 175.552 as it relates to Count I, Murder of the First Degree of Sergeant GEORGE SULLIVAN includes:

1. Evidence that the murder of Sergeant GEORGE SULLIVAN was committed by the defendant, SIAOSI VANISI, also known as "PE", also known as "GEORGE", in the commission of or attempting to commit the crime of Robbery With the Use of a Deadly Weapon. NRS 200.033(4)(a).

2. Evidence that the murder of Sergeant GEORGE SULLIVAN was committed by the defendant, SIAOSI VANISI, also known as "PE", also known as "GEORGE", upon a peace officer or who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer. NRS 200.033(7); NRS 289.350.

3. Evidence that the murder of Sergeant GEORGE SULLIVAN was committed by the defendant, SIAOSI VANISI, also known as "PE", also known as "GEORGE", involved torture or the mutilation of the victim. NRS 200.033(8); Jones v. State, 113 Nev., Advance Opinion 48 (1997).

4. Evidence that the murder of Sergeant GEORGE SULLIVAN was committed by the defendant, SIAOSI VANISI, also known as "PE", also known as "GEORGE", upon a person because of the actual or perceived race, color or national origin of that person. NRS 200.030(11).

The State also intends to present evidence against the defendant at the penalty hearing pursuant to NRS 175.552, in addition to the aggravating circumstances outlined above, to include all relevant character evidence as well as the circumstances of the particular offenses. NRS 175.552; Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991); Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990); Biondi v. State, 101 Nev. 252, 699 P.2d 1062 (1985); and Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983).

//

The State will rebut any defense allegations claiming mitigating circumstance(s) as listed in NRS 200.035.

If the defendant intends to present any evidence in support of mitigating circumstances, as allowed by NRS 200.035, the State should have prior notice pursuant to the Discovery Order in this case. In any case, the State will address and rebut any alleged mitigating circumstance(s), the nature of which may not be known until the presentation of those mitigating circumstance(s) by the defense. At that time, the State will be prepared to and will disclose to the defendant and his counsel in a timely fashion any additional evidence to contradict any claim of mitigating circumstance(s).

The State asserts that the documented aggravating circumstances are not outweighed by any mitigating circumstance(s) and, thus, the death penalty is just and appropriate.

Moreover, if additional evidence of aggravating circumstances as set forth in NRS 200.033 becomes apparent prior to the commencement of the penalty hearing, notice will be provided to counsel and the defendant as required by NRS 200.033 and NRS 175.552.

Thus, based on the foregoing and upon the conviction of the defendant, SIAOSI VANISI, also known as "PE", also known as "GEORGE", for the charge of Murder in the First Degree as set forth in Count I, it is submitted that all relevant evidence concerning this Notice is to be presented to the jury or the

three judge panel to allow death verdicts to be returned against the defendant, SIAOSI VANISI, also known as "PE", also known as "GEORGE", in compliance with the law.

Dated this 25TH day of FEBRUARY, 1998.

Richard A. Gammick

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

DAVID L. STANTON
Chief Deputy District Attorney

02255165

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I personally served a true copy of the foregoing document, by delivering said document to:

Mike Specchio
Washoe County Public Defender
One South Sierra
Reno, Nevada

Walter Fey
Deputy Public Defender
One South Sierra
Reno, Nevada

DATED this 26th day of February, 1998.

Sarah H. Johnson

Exhibit 187

Exhibit 187

Code 1850

FILED

NOV 22.1999

AMY HARVEY, CLERK

By: DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

Vs.

SIAOSI VANISI, also known as "GEORGE, also known as "PE",

Defendant.

Reporter: E. Nelson

Case No. CR98-0516

Department No. 4

JUDGMENT

No sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That SIAOSI VANISI, also known as "GEORGE, also known as "PE", is guilty of the crimes of Murder of the First Degree, a violation of NRS 200.010 and NRS 200.030, a felony, as charged in Count I; Robbery with The Use Of A Deadly Weapon, a violation of NRS 200.380 and NRS 193.165, a felony, as charged in Count II; Robbery With The Use Of A Firearm, a violation of NRS 200.030 and NRS 193.165, a felony, as charged in Count III and IV; and Grand Larceny, a violation of NRS 205.220, a felony, as charged in Count V of the Information and that he be punished by Death for Count I; by imprisonment in the Nevada Department of Prisons for the maximum term of one hundred eighty (180) months with the minimum parole eligibility of seventy-two (72)

months, with a consecutive like term for the use of a deadly weapon, for Count II, to be served consecutively to sentence in Count I; by imprisonment in the Nevada Department of Prisons for the maximum term of one hundred eighty (180) months with the minimum parole eligibility of seventy-two (72) months, with a consecutive like term for the use of a firearm, for Count III, to be served consecutively to sentences in Counts I and II; by imprisonment in the Nevada Department of Prisons for the maximum term of one hundred eighty (180) months with the minimum parole eligibility of seventy-two (72) months, with a consecutive like term for the use of a firearm, for Count IV, to be served consecutively to sentences in Counts I, II and III; and by imprisonment in the Nevada Department of Prisons for the maximum term of one hundred twenty (120) months with the minimum parole eligibility of forty-eight (48) months, for Count V, to be served consecutively to sentences in Counts I, II, III and IV. Defendant shall receive credit for six hundred sixty seven (667) days time served. Defendant is further punished by payment of a fine in the amount of Ten Thousand Dollars ($10,000.00); and by submission to a DNA Analysis Test for the purpose of determining genetic markers. Defendant shall reimburse the Washoe County Public Defender attorney's fees in the amount of Seven Hundred Fifty Dollars ($750.00). Defendant is further ordered to pay a Twenty-Five Dollar ($25.00) administrative assessment fee and a Two Hundred Fifty Dollar ($250.00) DNA analysis fee to the Clerk of the Second Judicial District Court.

Dated this 22nd day of November, 1999.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file in my office.
DATE: 1-18-02
ATTEST: [illegible] Second Judicial District Court and for the County of Washoe, State of Nevada
By: [illegible]

Exhibit 190

Exhibit 190

Richard W. Lewis, Ph.D.
955 South Virginia Street, Suite 104
Reno, Nevada 89502
(702) 322-8899

10/10/98

Honorable Connie Steinheimer
Second Judicial District Court
Washoe County
Reno, Nevada

Re: Saiosi Vanisi
CR98-0516

Reason For Referral: Mr. Vanisi was referred by the Honorable Connie J. Steinheimer to determine if the defendant is mentally competent to understand the nature of the charges against him and to assist his counsel in his defense.

Procedure: Mr. Vanisi was interviewed at the Washoe County Detention Facility on today's date.

Conclusions: Mr. Vanisi is of sufficient mentality to understand the nature of the charges against him and can aid and assist his counsel in his defense.

Findings: Mr. Vanisi had no difficulty interacting with the examiner in a thoughtful and intelligent manner. He appeared from the results of the mental status examination to be a very intelligent man. He has an above average grasp of the English language and can think abstractly with no difficulty. He claimed to have some speaking knowledge of six languages. His obvious intelligence and proficiency with English suggests he has the capacity to do so.

He was born without any birth complications, developed normally and completed high school. He denied any chemical dependency problems. He has no history of any major head injuries or brain damage. He has never experienced any hallucination. He reported that he has always had significant mood swings although he has never made a suicide attempt. He has been bothered by some suicidal ideation. He reportedly has been put on Depakote since the 1st of October. He

believes the medication has impacted his emotions and allowed him to think more clearly. He thinks he has been suffering from a bipolar disorder and as he looks back on his life can see significant shifts in his affect from depression to feeling extremely high. His ability to perform in school and on the job has been influenced by which stage of his mood swing he was currently experiencing. He has achieved some success in employment and has worked on various film sets. As he presented today, his affect was normal.

Although a bipolar disorder should be ruled out, as he presented today he can clearly understand the nature of the charges against him and more than assist his counsel in his defense.

Sincerely,

R.W. Lewis Ph.D.

Richard W. Lewis, Ph.D.

Exhibit 195

Exhibit 195

Declaration of Herbert Duzant's
Interview with Richard Tower

I, Herbert Duzant, hereby declare as follows:

1. I am employed as an investigator with the Law Offices of the Federal Public Defender. I have been assigned to work on the federal habeas corpus petition of Siaosi Vanisi. As part of my responsibilities, I have interviewed several of the jurors who were present during trial and deliberated the guilt and penalty phase verdicts in Mr. Vanisi's case.

2. On April 15, 2011, my colleague, Michele Blackwill, and I spoke with juror Richard Tower at his place of employment, SpecTir, located at 9390 Gateway Drive, Reno NV 89511. Mr. Tower provided us with the following information:

3. Mr. Tower told us that he did not know why he was chosen to sit on Mr. Vanisi's jury. Mr. Tower's answers during the voir dire process were honest, but he believes that it was clear that he would not be beneficial for the defense. Mr. Tower was also exposed to a great deal of media coverage of Mr. Vanisi's case because Tower worked from the Reno Gazette-Journal during the time of the trial.

4. Mr. Tower vaguely recalls seeing Mr. Vanisi in shackles or a stun belt during the proceedings.

5. Mr. Tower said Siaosi showed no emotions and seemed very detached from the proceedings throughout the trial. Mr. Tower took this as a sign of no remorse, and he had no idea whether Mr. Vanisi was medicated at the time.

6. Mr. Tower recalled seeing elevated levels of security in the courtroom during the trial. Tower said there were bailiffs all around the courtroom, and two always stood behind him throughout the proceedings. Mr. Tower served on others juries and never saw this level of security at a trial. Mr. Tower believed that the court was using their best judgement and precaution in the circumstances.

7. Mr. Tower recalls that the courtroom was filled with several law enforcement officials each day from various county and state agencies.

8. Mr. Tower knew one of his fellow male jurors, but he did not recall the man's name. Tower worked with this male juror for about 6 months when he first moved to Reno in 1991and was working on the assembly line at innovative gaming.

9. Mr. Tower made it very clear that no additional mitigation would have had any impact on his opinion in the deliberations had the defense found and used it at trial. Mr. Tower believes in "an eye for an eye" and if a person kills another individual mental health

issues are not important. Tower believes that mental health issues are too often used as a cop-out and a failure of defendants to take responsibility for their actions. Tower said there is nothing that could have been said which might have allowed him to consider the possibility of a life sentence in Mr. Vanisi's case. Mr. Tower said he believes that some people are just "evil" and should be eliminated from society.

10. Mr. Tower was bothered that Mr. Vanisi is still alive and he lamented that our state and this country doesn't have the stomach to follow the laws and kill those sentenced to death. Mr. Tower believes that the death penalty is just a waste of time and should be abolished if it cannot be done in a more immediate fashion.

11. Mr. Tower believes that executions should be carried out on everyone under a sentence of death, even in cases where defendants were wrongfully convicted. Mr. Tower believes that if an innocent person puts him or herself in a position to be arrested for a homicide it's probably a sign that they're no good and should go. Mr. Tower said mistakes sometimes happen with executions but that should not stop or slow down the process.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed in Clark County, Nevada, on April 18, 2011.

Herbert Duzant

Witnessed and agreed to by,
Michele Blackwill

Exhibit 196

Exhibit 196

Declaration of Herbert Duzant's
Interview with Nettie Horner

I, Herbert Duzant, hereby declare as follows:

1. I am employed as an investigator with the Law Offices of the Federal Public Defender. I have been assigned to work on the federal habeas corpus petition of Siaosi Vanisi. As part of my responsibilities, I have interviewed several of the jurors who were present during trial and deliberated the guilt and penalty phase verdicts in Mr. Vanisi's case.

2. On April 15, 2011, my colleague, Michele Blackwill, and I spoke with juror Nettie Horner at her place of residence, 6751 Peppermint Court, Reno NV 89506. Mrs. Horner provided us with the following information:

3. Mrs. Horner said she felt like the entire jury had become victims of Mr. Vanisi because he took three weeks of their lives away from them to participate in his trial.

4. Mrs. Horner was convinced of Mr. Vanisi's guilt and callousness when she saw him, seemingly, counting the blood spots on the door of officer Sullivan's vehicle when it was up on the overhead screen in the courtroom.

5. Mrs. Horner recalled that Mr. Vanisi had a flat and emotionless affect throughout the trial proceedings and she took this to be a sign of no remorse on is part. Mr. Vansisi also did not interact much with his attorneys. Mrs. Horner had no idea whether Mr. Vanisi was being medicated during the trial.

6. The only time that Mr. Vanisi showed any signs of emotions was when his wife took the stand. Mrs. Horner saw Mr. Vanisi smile and wink at his wife and Horner could tell that he was still in love with his wife. After his wife stepped down from the witness stand, Mr. Vanisi went back to having a blank look on his face.

7. Mrs. Horner said that she saw Mr. Vanisi in restraints throughout the proceedings, and she described observing his hands in a cable-like confinement device. Mrs. Horner believes that the restraints were necessary because Mr. Vanisi was a security risk.

8. Mrs. Horner could tell that Judge Connie Steinheimer was emotionally effected by the crime scene photographs during the trial. When the prosecutors were about the show images of the slain officer, Mrs. Horner recalled hearing Judge Steinheiner tell the jury she was sorry for not looking at the photos but this was her second time. The judge then turn her chair around and looked away as the photos were displayed. Mrs. Horner could tell that Judge Steinheimer was bothered by the crime scene photos. Mrs. Horner wad also aware that this was Mr. Vanisi's second trial.

9. Mrs. Horner said the penalty phase deliberations lasted 15 minutes but the jury extended the time by one hour because they wanted to have a meal and they didn't think it would look good if they returned a verdict too fast.

10. Mrs. Horner said that she believes in "an eye for an eye", and there was nothing that the defense could have said to allow her to consider a sentence of life without parole. Even if he had substantial mental health issues, it would have been of no consequence to Mrs. Horner. Mrs. Horner said "there are some things that can't be fixed" and that Mr. Vanisi was a waste of human flesh that had to go.

11. Mrs. Horner did not believe that life without a possibility of parole was real, and she believed there was a chance that Vanisi might get out of prison one day if the jury did not return a verdict for death.

12. Mrs. Horner recalled that Mr. Vanisi abused the diet drug, Fen-Phen, in the months leading up to the incident but she never believed that it had anything on his mental state. Mrs. Horner explained that she'd an herbalist and had personal knowledge that Fen-phen grows wildly all over Nevada, in the form of a herb. Mrs. Horner then blamed additives in the national food supply for causing a variety of mental illnesses throughout the society. Thus, with the pervasiveness of the food additive driven mental illnesses in the country, Mrs. Horner believes anyone could use mental illness as a cop-out to their crimes.

13. Mrs. Horner is outraged that Mr. Vanisi is still alive and she said almost a dozen times throughout our conversation that "he should be gone!" Mrs. Horner also stated that she wanted to be present in the room whenever Mr. Vanisi might be executed.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed in Clark County, Nevada, on April 18, 2011.

Herbert Duzant

Witnessed and agreed to by,
Michele Blackwill

Exhibit 197

Exhibit 197

Declaration of Herbert Duzant's
Interview with Bonnie James

I, Herbert Duzant, hereby declare as follows:

1. I am employed as an investigator with the Law Offices of the Federal Public Defender. I have been assigned to work on the federal habeas corpus petition of Siaosi Vanisi. As part of my responsibilities, I have interviewed several of the jurors who were present during trial and deliberated the guilt and penalty phase verdicts in Mr. Vanisi's case.

2. On April 16, 2011, my colleague, Michele Blackwill, and I spoke with juror Bonnie James at her place of residence, 155 Rosetta Stone Drive, Sparks NV 89441. Ms. James provided us with the following information:

3. Ms. James recalled that Mr. Vanisi had a blank and emotionless expression on his face throughout the trial proceedings no matter what evidence was being shown or which witness was testifying. James also recalled that the Tongans in the audience were the same way throughout the trial as well. James was left wondering if it was a Tongan cultural thing to not display any emotional expressions.

4. Ms. James saw Mr. Vanisi in shackles at the beginning of the trial, and she later saw him wearing a stun belt. Ms. James believed that the shackles and stun belt were necessary because Mr. Vanisi was a dangerous person.

5. Ms. James attended UNR from 1991 to 1992 and she was familiar with the area where the crime took place. Ms. James said she usually did not use the parking lot in the vicinity where the incident occurred unless she was going to one of the campus offices that were located on that side of the campus.

6. Ms. James' father was a Los Angeles police officer, but he was retired by the time of the trial. Ms. James was raised around her father's police friends and their families in Los Angeles and in Reno. Ms. James knew and grew up around many police officers in the Reno area.

7. Ms. James said that there was nothing that the defense could have told her that would have allowed her to consider life imprisonment without the possibility of parole. Ms. James believes that whatever problems Mr. Vanisi may have had could not have been serious because she remembers observing the large amount of family members in attendance at the trial. Ms. James is convinced that Mr. Vanisi's family would have took him in for treatment if he was in need of psychiatric help, especially since they had been in the country for over twenty years and must have known the American system.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed in Clark County, Nevada, on April 18, 2011.

Herbert Duzant

Michele Blackwill

Witnessed and agreed to by,
Michele Blackwill

Exhibit 198

Exhibit 198

Declaration of Herbert Duzant's
Interview with Robert Buck

I, Herbert Duzant, hereby declare as follows:

1. I am employed as an investigator with the Law Offices of the Federal Public Defender. I have been assigned to work on the federal habeas corpus petition of Siaosi Vanisi. As part of my responsibilities, I have interviewed several of the jurors who were present during trial and deliberated the guilt and penalty phase verdicts in Mr. Vanisi's case.

2. On April 16, 2011, my colleague, Michele Blackwill, and I spoke with juror Robert Buck at his place of residence, 489 W. Patrician Drive, Reno NV 89506. Mr. Buck provided us with the following information:

3. Mr. Buck told us that he attended UNR from 1979 to 1985 on a Tennis scholarship. Mr. Buck was familiar with the campus, as well as the area where the crime was committed.

4. Mr. Buck recalled attending class with a UNR police officer around 1980 but he didn't recall his name. Mr. Buck said it's possible that Mr. Sullivan could have been his classmate, but he truly has no idea because he remembers nothing of the person and it was so long ago. Mr. Buck has no memory of ever meeting officer Sullivan.

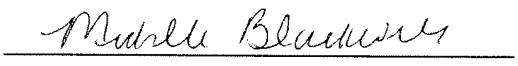
5. Mr. Buck was surprised that he was selected for the jury because, at the time, he was working as an investigator with the Nevada state nursing license board. Mr. Buck explained that he's worked closely with police officers and detectives in the capacity of his job where criminal charges were connected to disciplinary issues of the nurses that he investigated.

6. Mr. Buck believed that Mr. Vanisi's attorneys could have done more to help him during the penalty phase of the trial. Mr. Buck believes that more information should have been developed and presented around Mr. Vanisi's drug abuse of meth. Mr. Buck has experience working around meth addicts who are in withdrawal and their behavior parallels Mr. Vanisi's actions during the crime and aggressiveness in the months following his arrest. Mr. Buck believes that the substance abuse evidence could have made for a persuasive life argument, but he could only consider the evidence and information that he was provided with.

7. Mr. Buck also believes that Mr. Vanisi's brain damage and mental illness diagnosis could have played a relevant role in the deliberations had the jury been informed about them.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and that this declaration was executed in Clark County, Nevada, on April 18, 2011.

Herbert Duzant



Witnessed and agreed to by,
Michele Blackwill

CODE #1130
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775) 328-3200
Attorney for Respondent

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

Dept. No. 4

E.K. McDANIEL, WARDEN and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Respondent, by and through counsel, to answer the petition as follows:

1. Respondent admits part 1 in which Vanisi claims to be imprisoned. Beyond part one, despite the hundreds of numbered paragraphs, the petition is a narrative that consistently mixes factual allegation with legal conclusions. Accordingly, respondent denies each and every other material allegation of fact.

2. Respondent is informed and does believe that all relevant pleadings and transcripts necessary to resolve the petition are currently available.

3. Respondent is informed and believes that petitioner Vanisi has applied for relief via: petitions for extraordinary relief, a direct appeal, a petition for certiorari, a prior petition for

writ of habeas corpus, and an appeal from the denial of the prior petition for writ of habeas corpus.

AFFIRMATION PURSUANT TO NRS 239B.030

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

DATED: July 15, 2011.

RICHARD A. GAMMICK
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on July 15, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

C. Benjamin Scroggins, Assistant Federal Public Defender
Tiffani D. Hurst, Assistant Federal Public Defender
Counsel for Siaosi Vanisi

/s/ SHELLY MUCKEL
SHELLY MUCKEL

CODE #2300
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775)328-3200
Attorney for Respondent

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

Dept. No. 4

E.K. McDANIEL, WARDEN and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.
_____/

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the State of Nevada, by and through counsel, and moves this honorable court to dismiss the petition for writ of habeas corpus. This motion is based upon the petition, the records of this court and of the Supreme Court, and the following Points and Authorities.

POINTS AND AUTHORITIES

The petition for writ of habeas corpus is undoubtedly untimely, abusive and successive. *See* NRS 34.726; 34.810. Those bars can sometimes be overcome, but the instant efforts are insufficient.

Vanisi first contends that he is constitutionally entitled to "cumulative consideration" of all of his claims. That is most decidedly incorrect. First, the Constitution of the United States

does not require states to allow post-conviction relief at all. Indeed, as the Supreme Court has put it "it is clear that the state need not provide any appeal at all." *Ross v. Moffitt*, 417 U.S. 600, 611, 94 S.Ct. 2437, 2444 (1974). The extent to which a state allows for collateral attacks is a matter of state law and our state law does not provide for "cumulative consideration" of all claims. Quite the contrary, all procedural bars are mandatory. *State v. District Court (Riker)*, 121 Nev. 225, 112 P.3d 1070 (2005).[1]

Vanisi also contends that his prior post-conviction lawyers were ineffective in their efforts to show that trial counsel were ineffective. However, each such claim is presented in a generic fashion. The claim is oft repeated that counsel was ineffective in "failing to investigate, develop and present" information. That is, counsel attacks the result, not the process. Those claims are but bare or naked claims and are insufficient to warrant any inquiry. *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), the Court ruled that the prisoner must identify the specific decisions of counsel, and the court must inquire into an "objective standard" governing the decision. A failure to achieve something is not a decision, let alone a decision that may be evaluated objectively. Hence, the various generic claims of ineffective post-conviction counsel are insufficient.

Vanisi also contends that he is entitled to a new petition because this court, in the first go-round, failed to afford him a full and fair opportunity to plead his supplemental petition. He claims that once this court determined that Vanisi was competent and had been competent, the court gave only a week for counsel to prepare a supplemental petition. That is untrue. Counsel had years in which to prepare the petition and could have consulted with their client for all of those years, and prepared a supplement. Indeed, counsel indicated that they could

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[1]The failure of counsel to cite this controlling authority is all the more inexplicable because Vanisi's current counsel is the same agency that represented Riker and led to the publication of the controlling authority.

meet the obligation to file the supplement on very short notice. To the extent that Vanisi claims that this court was wrong the first time, and that Vanisi was really incompetent, that claim was rejected in the last appeal.

Vanisi also claims that he is actually innocent and thus the court must hear whatever claims he wishes to present, no matter how long he sat on his rights. One such claim of innocence is a challenge to aggravating circumstances but that challenge has already been rejected by the Supreme Court in the last appeal. Thus, it is legally incorrect.

Another claim of innocence is based on the notion that Vanisi has new evidence that he was unable to form the intent to kill. The existence of new evidence showing an inability to form criminal intent is announced at page 22 of the petition. Fascinating until you get to the point where the evidence is revealed, at page 97, and it concedes the intent to kill.

A claim of actual innocence to overcome procedural bars "requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995). The new evidence must be such that "it is more likely than not that *no* reasonable jury would have convicted him in light of the new evidence." 513 U.S. at 327, 115 S.Ct. at 867. Here, after the big build-up, we are finally directed to the new psychological opinion that Vanisi's mental illness led to the "formation of the psychotically driven notion that the killing of a police officer will miraculously restore his life to an even keel." That is not a defense. That is an indictment. The petitioner's witness has opined that Vanisi intentionally killed a cop in order to feel better. As a motive to feel better is not a defense, we now know, after the wealth of information alleged in the petition, the Vanisi is indeed guilty of a premeditated murder and that his motive was to feel better.

An intentional killing driven by a psychotic delusion is a defense only to the extent that the delusion, if true, would justify a murder. *See Finger v. State*, 117 Nev. 548, 577, 27 P.3d 66,

85 (2001). A belief that one will feel better after killing a cop, even if true, would not justify the killing. Therefore, the belief is not a defense and the opinion of the witness is not exculpatory but is instead, quite damning.

An evaluation of prejudice must be based on the notion that jurors follow their instructions.

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

Strickland v. Washington, 466 U.S. 668, 694-95, 104 S.Ct. 2052, 2068 (1984).

As no instruction to the jury would have called for an acquittal if the jury learned that the motive for the murder was to restore Vanisi's life to an even keel, the 60 pages of nonsense building up to the opinion, and the opinion itself, is not the type of evidence that will support a claim of actual innocence. Accordingly, that justification for the procedural bars must be rejected.

The petition also has another attention-getting caption, in which the petitioner asserts that the delay was caused by a failure to reveal evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The *Brady* decision involves the duty to reveal evidence that would be likely to change the outcome of the trial. Eventually, Vanisi reveals that the so-called *Brady* material is the protocol used by the department of corrections to carry out the execution ordered by the court. That is unrelated to guilt or innocence and is unrelated to the trial and,

therefore, unrelated to *Brady v. Maryland*.

The State would also mention that the Nevada Supreme Court has previously ruled that the manner in which the sentence to be carried out cannot be addressed in a post-conviction habeas corpus action. *McConnell v. State*, 125 Nev. ___, 212 P.3d 307, 310-311 (2009). If the protocol is not even relevant, at trial or even now, the State suggests that it does not amount to evidence that would change the outcome of anything.

The 570 numbered paragraphs in the 234 page petition are full of sound and fury, but ultimately signify nothing. The petition is untimely, abusive and successive and there is nothing in the pleading that comes close to allegations that, if proven, would allow the court to ignore the mandatory procedural bars. Thus, the petition must be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

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

DATED: July 15, 2011.

RICHARD A. GAMMICK
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on July 15, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

SIAOSI VANISI, Petitioner, v. RENEE BAKER, Warden, et al, Respondents.	Case No.: CR98-P0516 Dept. No.: IV **OPPOSITION TO MOTION TO DISMISS** **(Death Penalty - Habeas Corpus Case)** Dept.: D4 Date of Hearing: Time of Hearing:

Petitioner, SIAOSI VANISI, by and through undersigned counsel, hereby opposes the State's motion to dismiss his petition for writ of habeas corpus. This opposition is made and based on the following memorandum of points and authorities, and the entire file herein.

DATED this 30th day of September, 2011.

RENE L. VALLADARES
Federal Public Defender

/s/ Tiffani D. Hurst
TIFFANI D. HURST
Assistant Federal Public Defender
C. BENJAMIN SCROGGINS
Assistant Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

On May 4, 2011, Mr. Vanisi filed a petition for writ of habeas corpus in the Second Judicial District Court. On July 15, 2011, the State filed a motion to dismiss Mr. Vanisi's petition. Mr. Vanisi hereby submits the following opposition requesting that this Court deny the State's motion, or in the alternative, that this Court hold the State's motion in abeyance pending Mr. Vanisi's opportunity to obtain discovery and an evidentiary hearing to demonstrate that he can overcome all of the procedural bars asserted by the State.

II. Argument

The State argues that Mr. Vanisi's petition is time barred under NRS 34.726 and procedurally barred and successive under NRS 34.810 because: (1) Mr. Vanisi's claim that initial state post-conviction counsel was ineffective is "generic;" (2) initial state post-conviction counsel's problematic time constraints were not the fault of the district court; (3) Mr. Vanisi's claims that he is incompetent and is actually innocent of the death penalty are barred by the doctrine of law of the case; (4) Mr. Vanisi's claim that he could not form the intent to kill is prohibited by Finger v. State; and (5) Mr. Vansi's lethal injection claim is not cognizable in state court. The State's arguments regarding post-conviction counsel are contrary to clearly established state and federal law. Because Mr. Vanisi's claim that prior post-conviction counsel was ineffective was timely raised, this claim provides good cause to either re-raise his remaining claims or to raise those claims for the first time, even where the procedural default rules

constitutionally apply.[12] Further, Mr. Vanisi has demonstrated that he can also show good cause and prejudice to excuse any procedural defaults based upon: (1) his actual innocence; (2) the State's suppression of evidence; (3) an intervening change in law; and (4) a cumulative consideration of his claims. Under the current procedural posture of a motion to dismiss, Mr. Vanisi's allegations of good cause must be taken as true. This Court, therefore, cannot conclude as a matter of law that Mr. Vanisi's claims are procedurally barred without authorizing discovery and ordering an evidentiary hearing to give Mr. Vanisi an opportunity to demonstrate that he has good cause and prejudice to overcome procedural bars, and to address the merits of Mr. Vanisi's timely raised claims.

A. The legal standard applicable to reviewing a motion to dismiss requires this Court to accept Mr. Vanisi's allegations as true or, where a factual inquiry is needed, to grant discovery and an evidentiary hearing.

This Court is required to liberally construe Mr. Vanisi's petition and accept all the factual allegations of the petition as true. Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994); Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984) ("[f]or purposes of the motion, the allegations of the non-moving party must be accepted as true while the allegations of the moving party which have been denied are assumed to be false."). This Court can dismiss Mr. Vanisi's petition only if "it appears beyond a doubt

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[1]As explained below, Mr. Vanisi also alleged in his petition that the procedural default bars raised by the State cannot be constitutionally applied to him.

[2]References and cites to "Petition" refer to Petitioner Siaosi Vanisi's Petition for a Writ of Habeas Corpus (Post-Conviction) filed with this Court on May 4, 2011. References and cites to "Pet. Ex." refer to the numbered exhibits attached to the May 4, 2011 Petition for a Writ of Habeas Corpus. References and cites to "Ex." refer to numbered exhibits filed with the instant Opposition to Motion to Dismiss.

that the [petitioner] could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief." Vacation Village, 110 Nev. at 484, 872 P.2d at 746 (citations omitted).

This Court is obligated to grant an evidentiary hearing "when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). This standard merely requires "something more than a naked allegation" to merit an evidentiary hearing. Id. at 1230; see also Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 226 (1984). A claim is "belied by the record" only if it is affirmatively repelled by the record as opposed to a claim that is subject to a factual dispute. See Mann, 118 Nev. at 354, 46 P.3d at 1230. Where resolution of a question of procedural default requires a factual inquiry, the petitioner is entitled to an adequate hearing on the issue, both under state law, see Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997), and under federal due process principles.

The State's motion does not discuss or acknowledge the standards applicable to reviewing a motion to dismiss, but it is clear that under those standards Mr. Vanisi's petition cannot properly be dismissed. The allegations in Mr. Vanisi's petition, taken as true, establish Mr. Vanisi's right to relief. As shown below, the petition also alleges that the default rules asserted by the State are either inapplicable to Mr. Vanisi's case, excused by showings of cause, or cannot constitutionally be applied to his case.

B. Clearly established state and federal law supports Mr. Vanisi's claim that initial post-conviction counsel was deficient in alleging the ineffective assistance of trial and appellate counsel, and that Mr. Vanisi was prejudiced by this deficiency.

Initial post-conviction counsel failed to conduct any extra-record

investigation, thereby failing to identify extra-record areas where trial counsel was deficient, and how that deficiency prejudiced Mr. Vanisi. Additionally, initial post-conviction counsel failed to allege several areas apparent from the record where trial and appellate counsel were ineffective.

It is axiomatic that a reasonable investigation must take place before counsel can make a strategic choice regarding which issues to include in a habeas petition. See Silva v. Woodford, 279 F.3d 825, 846-47 (9th Cir. 2002); Correll v. Ryan, 539 F.3d 938, 949 (9th Cir. 2008) (An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.). Initial post-conviction counsel's failure to investigate and raise the issues contained in the instant petition, therefore, cannot be characterized as a strategic choice. Counsel did not know about the issues and therefore could not have made a strategic choice to omit them. See, e.g., Poindexter v. Mitchell, 454 F.3d 564, 578-79 (6th Cir. 2006) ("The record reflects that . . . counsel failed to conduct virtually any investigation, let alone sufficient investigation to make any strategic choices possible.").

1. Initial post-conviction counsel was deficient in failing to conduct an extra record investigation into trial counsel's ineffectiveness.

Post-conviction counsel is required to do more than simply read the transcript and raise record-based allegations without any pretense of conducting an extra-record investigation. The Nevada Indigent Defense Standards of Performance (ADKT No. 411) for post-conviction counsel require counsel to "secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition." Ex. 102 at 21, Standard 3-9(f). This rule recognizes the importance of investigating, developing and presenting extra-record evidence in post-conviction proceedings where there is an allegation that trial counsel or direct appellate counsel was ineffective in order to satisfy the

prejudice prong under Strickland v. Washington, 466 U.S. 668, 699-700 (1984). See Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Wilson v. State, 105 Nev. 110, 114-15, 771 P.2d 583, 585-86 (1989); In re Marquez, 822 P.2d 435, 446 (Cal. 1992) ("To determine whether prejudice has been established, we compare the actual trial with the hypothetical trial that would have taken place had counsel competently investigated and presented . . . defense. "); see also Ford v. Warden, 111 Nev. 872, 881, 901 P.2d 123, 128 (1995) (claim that client's mental state prevented counsel from adequately litigating habeas proceedings rejected because counsel did not raise any claims "not ascertainable from records . . . reviewed").

The Nevada Supreme Court has acknowledged that the State of Nevada faces a crisis in indigent defense. See Ex. 103. As result of this crisis, the supreme court adopted ADKT No. 411, noting that "the paramount obligation of criminal defense counsel is to provide zealous and competent representation at all stages of criminal proceedings, adhere to ethical norms, and abide by the rules of the court." Ex. 102.

The prevailing norms for Mr. Vanisi's initial post-conviction counsel are reflected in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, (Rev. Ed. 2003):

> C. Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.
>
> . . . .
>
> E. Post-Conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the

obligations to:

1. maintain close contact with the client regarding litigation developments; and

2. continually monitor the client's mental, physical and emotional conditions for effects on the client's legal position; and

3. keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and

4. continue an aggressive investigation of all aspects of the case.

Id., Guideline 10.15.1 (Emphasis added). Part of conducting an aggressive post-conviction investigation of a capital case includes counsel's obligation to determine whether trial counsel complied with prevailing norms. The following pre-trial investigative norms prevailed at the time of Mr. Vanisi's trial:

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

. . .

Commentary: Guilt/Innocence

In this regard, the elements of an appropriate investigation include the following:

1. Charging documents:

. . . .

b. the defenses ordinary and affirmative, that may be

available to the substantive charge and to the applicability of the death penalty;

. . . .

2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses including, but not limited to:

(1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;

. . . .

(3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s) and the degree of culpability for the offense, including:

(a) members of the client's immediate and extended family
(b) neighbors, friends and acquaintances who knew the client or his family
(c) former teachers, clergy, employers, co-workers, social service providers, and doctors
(d) correctional, probation or parole officers;

(4) members of the victim's family.

b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

. . . .

Commentary: Penalty

Counsel needs to explore:

(1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug

use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

(2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

. . . .

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.

Id., Guideline 10.7. Had initial post-conviction counsel conducted an effective investigation into whether trial counsel had complied with the above referenced professional norms, they would have learned of trial counsel's deficiency, and the need to conduct an extra-record investigation to determine whether Mr. Vanisi was prejudiced by this deficiency.

These professional norms are also reflected in clearly established federal

law. Capital defense attorneys have an obligation to conduct a thorough investigation of evidence of mental impairment, Bean v. Calderon, 163 F.3d 1073, 1080 (9th Cir. 1998), including providing mental health experts with the information needed to develop an accurate profile of the defendant's mental health, Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir. 2002). Trial counsel must "investigate and present mitigating evidence of mental [impairments]." Robinson, 595 F.3d at 1109 (citing Lambright v. Schriro, 490 F.3d 1103, 1117 (9th Cir. 2007) (quoting Summerlin, 427 F.3d at 630)).

"In preparing for the penalty phase of a capital trial, defense counsel has a duty to 'conduct a thorough investigation of the defendant's background' in order to discover all relevant mitigating evidence." Robinson, 595 F.3d at 1108 (citing Correll v. Ryan, 539 F.3d, 938, 942 (2008) (quoting Williams v. Taylor, 529 U.S. 362, 396 (2000) (O'Conner, J., concurring) (counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances")). This investigation should "include inquiries into social background and evidence of family abuse." Robinson, 595 F.3d at 1109 (citing Summerlin v. Schriro, 427 F.3d 623, 630 (2005) (citing Boyde v. Brown, 404 F.3d 1159, 1179 (9th Cir. 2005))); see also Wiggins v. Smith, 539 U.S. 510, 538 (2003) (counsel was deficient because available evidence of severe physical and sexual abuse "might well have influenced the jury's appraisal" of the defendant's moral culpability).

Contrary to the dictates of precedent and prevailing norms, initial post-conviction counsel treated Mr. Vanisi's post-conviction proceedings as nothing more than another review of the record created at trial. Initial post-conviction counsel's interviews with Mr. Vanisi caused him to file a motion to have Mr. Vanisi declared incompetent. Counsel was so focused on litigating the competency

issue, however, he completely failed to conduct the requisite extra-record investigation. Initial post-conviction counsel admits:

> To conduct a full investigation of Mr. Vanisi's case I planned to and should have traveled to Tonga, with a cultural expert, to explore Mr. Vanisi's cultural and family background. Such was the litigation plan and we should have conducted a thorough investigation into Mr. Vanisi's life and provided competent experts with an in-depth social history as well as all medical, employment and educational records we could obtain.

Pet. Ex. 178. Failing to conduct an extra-record investigation is antithetical to competent counsel's duty in a post-conviction proceeding, which is to go beyond the record to establish constitutional violations that the record does not show or that were not adequately litigated by trial or appellate counsel. This is especially true in Mr. Vanisi's case where trial counsel failed to investigate, develop and present any evidence regarding Mr. Vanisi's brain damage, social history and mental health issues.

2. Mr. Vanisi was prejudiced by initial post-conviction counsel's deficient investigation.

The failure of initial post-conviction counsel to conduct an effective investigation prejudiced Mr. Vanisi. In its motion to dismiss, the State mis-classifies the wealth of detailed evidence of prejudice contained in Mr. Vanisi's petition as "generic." Clearly established state and federal law, however, indicates that the evidence contained in Mr. Vanisi's petition consists of the exact type of evidence that could have altered the outcome of Mr. Vanisi's trial.

Instead of presenting the jury with evidence about the fact that Mr. Vanisi was brain damaged and psychotic during the offense, trial counsel focused their investigation on and presented testimony that: (1) ten years prior to the crime Mr. Vansi was an admirable student and a helpful individual; and (2) during his sister's wedding, which occurred several months prior to the crime, his family

members found his clothing and behavior to be different. The only witness who testified about Mr. Vanisi having a long-term mental illness, Mr. Vanisi's ex-wife, was discredited because her information was uncorroborated during the trial.

Had initial post-conviction counsel interviewed trial counsel, Messrs, Bosler and Gregory, they would have learned that:

> Had [trial counsel] known that there were several witnesses to Mr. Vanisi's childhood in Tonga who could substantiate [their] defense that Mr. Vanisi was psychotic when he committed this crime, [they] could have presented this evidence at trial to support the testimony of Mr. Vanisi's ex-wife that Mr. Vanisi had been suffering from a mental health disorder for some time prior to the crime.
>
> Had [trial counsel] had the benefit of an expert report confirming what [their] office suspected - that Mr. Vanisi was psychotic during the offense, and while [they] were representing him, [they] could have utilized those reports both to support [their] defense, and to try to convince the trial judge that Mr. Vanisi was not competent to stand trial.

Pet. Ex. 180 ¶ 5-6; see also Ex. 181 ¶ 10-11. Mr. Bosler, who is currently the Washoe County Public Defender reports that:

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

Pet. Ex. 181 ¶¶ 8-9. This was not done in Mr. Vanisi's case. Mr. Bosler confirms, and Mr. Gregory notes, that:

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

> efforts, we were unable to get Mr. Vanisi medication until shortly prior to his second trial.

Pet. Exs. 180 ¶ 4; 181 ¶ 3. Mr. Bosler reports that he is "unaware of a strategic reason for not obtaining additional collateral reports and historical records from Tonga supporting [their] theory that Mr. Vanisi was mentally ill when he committed the offense." Pet. Ex. 181 ¶ 8. Had prior counsel performed effectively in Mr. Vanisi's case, the jury and the post-conviction court would have learned that Mr. Vanisi had suffered from brain damage and mental health impairments for most of his life which gradually increased in severity until it culminated into full blown psychosis and led to the instant offense.

To perform effectively, counsel must conduct sufficient preparation to be able to present and explain the significance of available mitigating evidence. Allen v. Woodford, 395 F.3d 979, 1000 (9th Cir. 2005). The Supreme Court recently reversed a state court ruling that the defendant was not prejudiced by trial counsel's deficiency on the grounds that the "failure to conduct a thorough – or even cursory – investigation is unreasonable." Porter v. McCullum, 130 S.Ct. 447, 454 (2009). The Court ruled that the state court "did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." Id. The Supreme Court found it unreasonable to completely discount the effect that evidence of brain damage might have had on the jury or sentencing judge. Id. As in Porter, "there exists too much mitigating evidence that was not presented to now be ignored." Id. at 455.

Even a minimal investigation would have revealed the evidence contained in Claims One and Two of Mr. Vanisi's petition. There was a wealth of information available about Mr. Vanisi's descent into madness which culminated in the instant offense. This information, detailed extensively in Mr. Vanisi's

petition,[3] was provided by family members and friends, all of whom indicate that they would have provided the information to prior counsel had they been asked.

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

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

Pet. Ex. 164 ¶ 11.0. Dr. Foliaki also reports that the "risk factors for the development of adult psychopathology are as follows: (1) attachment problems, (2) abuse – which can be passive (neglect) or active (sexual or physical abuse), (3) bullying, (4) pathological parenting, (5) exposure to drugs and alcohol, and (6) peer relationship problems. Pet. Ex. 164 ¶ 12.0. As explained in detail in Claim Two, Mr. Vanisi experienced all of these stressors as well as issues of identity and grief due to loss of significant others. 164 ¶ 21.0. Individuals like Mr. Vanisi who suffer from Schizoaffective Disorder become much more disabled when they have his cognitive profile. 164 ¶ 2.7.2. Due to the inadequate investigation of state post-conviction counsel, the following mitigating facts that trial counsel ineffectively failed to uncover and present to the jury were never presented to this Court or the Nevada Supreme Court.

a. Mr. Vanisi suffered from cognitive deficiencies consistent with severe brain damage and an untreated psychotic disorder at the time of the

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[3]This section contains a very condensed summary of the more detailed and comprehensive information contained in Claims One and Two of Mr. Vanisi's petition, which also includes source citations for each fact presented.

offense.

There was readily available evidence that Mr. Vanisi first began evidencing mental health deficits when he was a child, and that these deficits significantly increased in severity during the ten year period that he was away from home as a young adult. This wealth of information should have been presented to competent mental health experts, such as neurosychologist Jonathan Mack and psychiatrist Siale Foliaki, who have, after interviews, testing and reviewing Mr. Vanisi's social history, diagnosed Mr. Vanisi as suffering from, among other things, brain damage and Schizo-Affective Disorder. As long as Mr. Vanisi was being taken care of by family members in a controlled environment, he was able to remain within socially acceptable boundaries despite his mental illness. Once Mr. Vanisi left that controlled environment, however, he began a slow descent into the madness that culminated with the offense.

Mr. Vanisi first began exhibiting recognizably strange behavior after being molested by his older brother Sitiveni. Pet. Ex. 155. Vanisi shared a bedroom with Sitiveni when he arrived in the United States from Tonga in 1976 at age six until Sitiveni left home in 1981. Pet. Exs. 155 ¶ 3; 101 ¶ 34. Vanisi's cousin Miles reports:

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

Pet. Ex. 155 ¶ 5. Mr. Vanisi confided in his ex-wife in 1995 that he had been sexually molested by Sitiveni [Steven]. Pet. Ex. 104 ¶ 9. Mr. Vanisi began engaging in bizarre and inappropriate sexual conduct in front of his peers, such as masturbating openly in front of his cousins, at about the age of 13. Pet. Ex. 155 ¶ 7.

The incest that Mr. Vanisi endured would have brought him great feelings of shame and guilt, as Tongans equate incest with murder and any family where incest occurs is considered to be cursed. Pet. Ex. 108 ¶ 27. Furthermore, the psychological impact of Mr. Vanisi's molestation would have been magnified by the fact that he was raised in a very strict and devout Church of Jesus Christ of Latter Day Saints family. Pet. Exs. 108 ¶ 23; 130 ¶ 50. Mr. Vanisi became extremely religious himself by the time he reached high school and often spoke about the Bible and encouraged his family members to "do the right thing." Pet. Exs. 153 ¶ 17; 112. ¶ 11; 112 ¶ 8.

Despite his professed religiosity, Mr. Vanisi was already displaying bizarre behavior during his time in high school. No one in his family addressed Mr. Vanisi's mental health issues because of the huge stigma attached to mental illness in the Tongan culture. Pet. Ex. 124 ¶ 28. When Mr. Vanisi behaved strangely, people ignored him or told him to be quiet. Pet. Ex. 124 ¶ 28. While engaging in normal conversation, Mr. Vanisi would suddenly begin yelling and shouting strange things. Pet. Ex. 124 ¶ 5. It was as if a "switch" went "off and on in his head." Pet. Ex. 124 ¶ 5. One minute he would talk and laugh with friends, and the next minute he would abruptly walk away, sit by himself and stare off into the distance. Pet. Ex. 124 ¶ 12; 122 ¶ 3. People would have to touch him to bring him back to reality. Pet. Ex. 124 ¶ 16; 122 ¶ 5. Mr. Vanisi also displayed a severe blinking and eye squinting problem whereby he would uncontrollably blink and squint without stopping. Pet. Ex. 124 ¶ 6. Mr. Vanisi often mumbled, spoke and laughed to himself while walking to school, during classes, during sports practice, at movie theaters and at home. Pet. Exs. 124 ¶ 7; 122 ¶ 4.

At times Mr. Vanisi would suddenly begin doing the "Sipitau," an ancient Tongan warrior dance, without reason, while walking to school, in school

hallways, in classrooms, and during football practice. Pet. Ex. 124 ¶ 14. At football practice, while the coach instructed the team, Vanisi would speak over him and give his own instructions. Pet. Ex. 124 ¶ 10.

Mr. Vanisi suffered severe mood swings. Pet. Ex. 155 ¶ 12. Mr. Vanisi would laugh and joke one moment, and then furiously yell the next. Pet. Ex. 155 ¶ 12. Mr. Vanisi also spoke rapidly, and frequently changed topics without explanation, which made conversation difficult. Pet. Ex. 112 ¶ 5. Mr. Vanisi complained that he was unable to control his mumbling, laughing, talking to himself, blinking, squinting, shouting and blurting out random thoughts, and he did not know why. Pet. Ex. 124 ¶ 15. Mr. Vanisi also began using cocaine and marijuana while in high school and it appeared that the cocaine actually calmed him down. Pet. Ex. 124 ¶ 20. When Mr. Vanisi used cocaine, he went from talking non-stop to being absolutely quiet. Pet. Ex. 124 ¶ 20.

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

Mr. Vanisi first left home when he was accepted to conduct an LDS mission. Mr. Vanisi's family were full of pride and there were many celebrations. Pet. Exs. 130 ¶ 75; 101 ¶ 28; 103 ¶ 34. The mission soon ended, however, when Mr. Vanisi revealed to the church elders that he had fornicated with a girl and she had become pregnant. 101 ¶ 29; 96 ¶ 45. Mr. Vanisi was expelled from his mission and sent home in disgrace. Pet. Exs. 130 ¶ 75; 112 ¶ 11; 108 ¶ 26; 101 ¶

30. To make matters worse, it turned out that the girl he impregnated was his first cousin, although he did not know it at the time. Pet. Exs. 130 ¶ 76; 108 ¶ 27; 96 ¶ 45. The head of Mr. Vanisi's family, his uncle Maile, declared him to be a disgrace to the family and announced that Mr. Vanisi was no longer a part of the family. Pet. Ex. 155 ¶ 14. Shortly after his failed mission, Mr. Vanisi visited his cousin Miles who describes that Mr. Vanisi "seemed like he was a little crazy during that visit. [Mr. Vanisi] was dressed weird and he spoke like he wasn't completely in touch with reality." Pet. Ex. 155 ¶ 14. Mr. Vanisi's speech issues were "ten times worse." Pet. Ex. 112 ¶ 12. He frequently changed topics, "spoke off subject" and spoke as if "he was carrying on a conversation with himself." Pet. Ex. 112 ¶ 12.

Mr. Vanisi also began "lashing out" and "speaking disrespectfully" to the Tongan head of the family, Maile. Pet. Ex. 101 ¶ 30. Mr. Vanisi moved to Los Angeles, ostensibly to attend college, but mostly to escape his shame. Pet. Exs. 108 ¶ 27; 130 ¶ 77. It was at this time that Mr. Vanisi became obsessed with the idea of becoming a movie star. Pet. Ex. 111 ¶ 12. Mr. Vanisi also began to deny and reject his Tongan heritage, which Dr. Foliaki attributes to Mr. Vanisi's uncertainty about his identity, which eventually led to Mr. Vanisi's adopting various different personalities. Pet. Ex. 164 ¶ 3.2.8.

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

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

Mr. Vanisi's mental health deteriorated steadily once he began living on his own and away from his family. Pet. Ex. 164 ¶ 3.3.1. Between 1990 and 1991, while living in Los Angeles, Mr. Vanisi was often incoherent, and frequently made himself laugh during "strange and inappropriate times." Pet. Ex. 114 ¶ 7.

In 1992 Mr. Vanisi moved to Mesa, Arizona where he lived with his cousin Michael and a third roommate. Pet. Ex. 97 ¶ 11. He changed his name from George Tafuna (the name given to him by his aunt when he began school) to Perrin Vanacey, after a bottle of Lea and Perrins steak sauce. Pet. Exs. 97 ¶ 15; 114 ¶ 3; 107 ¶ 4; 111 ¶¶ 13, 16; 106 ¶ 3; 123 ¶ 9. Mr. Vanisi began to randomly manifest various personalities, with their own accents and mannerisms. Pet. Ex. 153 ¶ 3. Mr. Vanisi had various photo identification cards with different names for each personality. Pet. Ex. 153 ¶ 4. Mr. Vanisi let his short and neat hair grow long and disorderly, and he would wear his hair differently according to the personality that he was displaying. Pet. Ex. 153 ¶ 5. Mr. Vanisi also began wearing wigs and pantyhose. Pet. Ex. 153 ¶ 5. Mr. Vanisi slept very little during this time. Pet. Ex. 153 ¶ 11; 116 ¶ 22. Mr. Vanisi would show up at his friend Terry's house at 2 or 3 a.m., knock loudly on the door, and then speak with him about insignificant things as if it were the middle of the afternoon. Pet. Ex. 116 ¶ 22.

Mr. Vanisi impregnated a woman who was the daughter of a police officer during his time in Arizona. Pet. Exs. 97 ¶ 15; 153 ¶ 17. After the police officer

threatened Mr. Vanisi, Mr. Vanisi fearfully left Arizona and moved to Manhattan Beach, California, in 1993. Pet. Ex. 153 ¶ 17. Mr. Vanisi met his ex-wife DeAnn during a trip to Lake Havasu. Pet. Ex. 104 ¶ 2. When first they met, Mr. Vanisi told her that he had approached her because Sam Beckett from the television series "Quantum Leap" had entered his body and made him approach her. Pet. Ex. 104 ¶ 4. Mr. Vanisi told DeAnn that his name was Giacomo. Pet. Ex. 104 ¶ 7. It was not until two weeks later that DeAnn learned that most people in Los Angeles knew Mr. Vanisi as "Perrin." Pet. Ex. 104 ¶ 7.

DeAnn became pregnant with their first son two months later, and her parents expelled her from their home. Pet. Exs. 104 ¶ 5; 105 ¶ 11. Mr. Vanisi took her in. Pet. Ex. 104 ¶ 5. Mr. Vanisi married DeAnn in 1994, two months after the birth of their first son. Pet. Ex. 104 ¶ 14. Because DeAnn was Caucasian, only one of Mr. Vanisi's family members attended their wedding. Pet. Ex. 104 ¶ 14. Mr. Vanisi changed their last name to Vanacey because of the anger that he felt for his father abandoning his family, and he insisted that this last name be used on their children's birth certificates. Pet. Ex. 104 ¶ 15.

At times during this period Mr. Vanisi would have a serious face as he said strange things that would make people laugh, after which Mr. Vanisi would look puzzled. Pet. Ex. 114 ¶ 12. Mr. Vanisi frequently talked to himself in front of others, oblivious to their presence. Pet. Ex. 114 ¶ 13. Although Mr. Vanisi often spoke about becoming rich, he could not keep a job, and did not study or take any courses to acquire skills. Pet. Ex. 132 ¶ 6. Mr. Vanisi began wearing "weird and inappropriate outfits" in public. Pet. Ex. 114 ¶ 14. He enjoyed dressing up like a super-hero in electric blue waist tights and a cape. Pet. Ex. 114 ¶ 14. Mr. Vanisi also would dress in native Tongan clothing like the "Lava Lava" wraps and straw Hawaiian Hula type skirts, and do war dances. Pet. Ex. 117 ¶ 19. Mr. Vanisi was

expelled by certain neighborhood establishments because he scared the customers and staff. Pet. Ex. 97 ¶ 22.

Mr. Vanisi also would wear women's clothing. Pet. Ex. 116 ¶ 9. He wore loose dresses, skirts with wigs, high heels and make-up. Pet. Ex. 116 ¶ 9. Mr. Vanisi would wear this and other outfits to bars, restaurants, supermarkets and stores. Pet. Ex. 116 ¶ 9. Mr. Vanisi was hyperactive, suffered from racing thoughts, constantly spoke without ceasing, and would answer himself before anyone could respond to his questions. Pet. Ex. 100 ¶ 7. Mr. Vanisi's conversations were always incoherent as he would frequently change subjects and make random comments completely unrelated to the topic. Pet. Exs. 100 ¶ 7; 98 ¶ 3.

In 1994 Mr. Vanisi decided to "recommit his life" to the LDS Church. Pet. Exs. 104 ¶ 17; 132 ¶ 11. Mr. Vanisi scheduled a meeting with an LDS Bishop where he confessed "every bad thing that he had ever done in his entire life." Pet. Ex. 104 ¶ 17. After the meeting, Mr. Vanisi was excommunicated. Pet. Ex. 104 ¶ 17. Although Mr. Vanisi was allowed to be present during his sons' blessing ceremonies, he was not allowed to "lay hands on them" during either ceremony. Pet. Ex. 104 ¶ 17. Mr. Vanisi's cousin David had to perform this ceremony on Mr. Vanisi's behalf. Pet. Exs. 104 ¶ 17; 112 ¶ 24. After Mr. Vanisi's failed mission, which resulted in his family forcing him to go to Los Angeles, his excommunication and inability to "lay hands" on his sons was psychologically devastating. Pet. Ex. 104 ¶ 18. Dr. Foliaki notes that collateral reports support that Mr. Vanisi's mental status, indicative of a Schizophrenic-like illness, deteriorated markedly during this time period. Pet. Ex. 164 ¶ 3.3.5.

At this time Mr. Vanisi had about five or six personalities. Pet. Exs. 104 ¶ 21; 123 ¶ 10; 106 ¶ 21; 116 ¶ 6. The main personalities were Gia Como, Sonny

Brown, Perrin Vanacey and Rocky. Pet. Exs. 97 ¶ 17; 105 ¶ 17; 123 ¶ 10; 116 ¶ 6. Mr. Vanisi would re-introduce himself and behave as if it were the first time that he had met his friends when he changed personalities. Pet. Ex. 116 ¶ 7. Mr. Vanisi used hats and wigs to transform into his various personalities. Pet. Exs. 104 ¶ 20; 116 ¶ 8. Strangers were often disturbed by Mr. Vanisi's appearance. Pet. Ex. 105 ¶ 16.

Mr. Vanisi had an imaginary friend named Lester. Pet. Exs. 104 ¶ 22; 107 ¶ 7; 105 ¶ 33. Mr. Vanisi explained that Lester was a more powerful being than Jesus and the devil because Lester controlled the universe while the other two only controlled earth. Pet. Ex. 105 ¶ 33.

In the middle of a conversation with his friend Tim during this time, Mr. Vanisi's voice, facial expression and demeanor changed and he stated "Timmy, I will protect you," in a "weird deep voice with a strange look on his face." Pet. Ex. 117 ¶ 13. The statement was completely out of place, and shortly afterwards Mr. Vanisi "snapped back into his normal self and continued carrying on the conversation like nothing had happened." Pet. Ex. 117 ¶ 13. On another occasion, Tim caught Mr. Vanisi sitting in a corner in his livingroom with a spotlight shined on him while he sobbed and cried for his mother. Pet. Exs. 117 ¶ 17; 105 ¶ 12. As Mr. Vanisi cried, he stated "Stop. . . , No daddy," as if he were being abused. Pet. Ex. 105 ¶ 12. On other occasions, Mr. Vanisi would stand silently in the dark posing like he was a statue for long periods of time. Pet. Ex. 116 ¶ 11.

Mr. Vanisi's home had piles of garbage including plastic bottles and fast food wrappers "laying all over the floor in every room." Pet. Exs. 113 ¶ 3; 123 ¶ 17; 107 ¶ 5. Mr. Vanisi spoke about building a laser beam and using his collection of plastic bottles for a star-ship. Pet. Exs. 104 ¶ 23; 105 ¶ 33. Mr. Vanisi stated that he was going to use the hundreds of bottles to "help with reentry into the

atmosphere and landing the spacecraft." Pet. Ex. 105 ¶ 13. Mr. Vanisi reported, in a serious manner, that the bottles would serve as protective cushioning and insulation. Pet. Ex. 105 ¶ 13. Mr. Vanisi also stopped bathing daily, wore dirty clothes and gained a lot of weight. Pet. Exs. 104 ¶ 28; 107 ¶ 4; 112 ¶ 23; 113 ¶ 2; 105 ¶ 31; 123 ¶ 14.

Between 1996 and 1997, Mr. Vanisi began to completely lose control, Pet. Ex. 105 ¶ 30. He began to isolate himself and did not show his family attention or affection. Pet. Ex. 105 ¶ 30. He began speaking in tongues and frequently rambled about biblical topics and the teachings of the prophet Joseph Smith in nonsensical ways. Pet. Exs. 105 ¶ 32; 123 ¶ 20. Then he would suddenly stick out his tongue and perform the Tongan warrior dance. Pet. Ex. 105 ¶ 32.

He would talk to himself for hours in mirrors, using his rambling, one-sided, incoherent form of speech. Pet. Ex. 104 ¶ 24. Mr. Vanisi began to talk about taking his star-ship into outer space. Pet. Exs. 104 ¶ 23; 117 ¶ 16. He often said that he was from another planet, and would say "I'm here . . . but I'm really not here." Pet. Ex. 116 ¶ 19. Mr. Vanisi said that he was building a spaceship so that he could return home to his galaxy. Pet. Ex. 116 ¶ 19. Mr. Vanisi spoke about having invisible alien friends who no one could see except for him. Pet. Ex. 116 ¶ 20.These friends were going to accompany him back to his galaxy, where they would go on a mission to see whose god was the greatest. Pet. Exs. 116 ¶ 20;123 ¶ 20.

Mr. Vanisi drew strange patterns of symbols on his walls and sexually explicit drawings. Pet. Exs. 113 ¶ 4; 123 ¶ 18; 104 ¶ 25; 107 ¶ 6; 116 ¶ 18. Mr. Vanisi's wife DeAnn finally left Mr. Vanisi when she became very uncomfortable about how Mr. Vanisi's behavior was negatively affecting their children. Pet. Ex. 104 ¶ 26. After DeAnn left, Mr. Vanisi's cousin Michael and friend Greg moved

into Mr. Vanisi's apartment. Pet. Ex. 123 ¶ 21. Mr. Vanisi's behavior worsened. Pet. Exs. 97 ¶ 23; 117 ¶ 11. Mr. Vanisi began to complain about losing his sense of time. Pet. Ex. 97 ¶ 24. Before his wife left, Mr. Vanisi had begun taking a diet drug called Fen-Phen in order to lose weight. Pet. Exs. 97 ¶ 24; 104 ¶ 41; 117 ¶ 24; 112 ¶ 36; 105 ¶ 22.

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

Mr. Vanisi began working for his neighbor, an elderly woman who paid him to drive her to work. Pet. Ex. 97 ¶ 36. Eventually, she began paying Mr. Vanisi to have sex with her for two hundred dollars a session. Pet. Ex. 97 ¶ 36. Although Mr. Vanisi found her obesity to be very unattractive, he used the money to support his drug habit. Pet. Exs. 97 ¶ 35; 106 ¶ 26; 116 ¶ 26. Mr. Vanisi was smoking methamphetamine during this time. Pet. Ex. 116 ¶ 25. During one of these sessions, the woman had a heart-attack and died. Pet. Exs. 97 ¶ 35; 116 ¶ 26. After his neighbor died, Mr. Vanisi expressed his paranoid belief that the police were going to falsely arrest him despite that his neighbor's death was attributed to natural causes. Pet. Exs. 97 ¶ 34; 123 ¶ 22; 116 ¶ 26.

In November 1995, Mr. Vanisi engaged in a brawl at a bar during which he

fought with several men after they laughed at him because someone had turned the lights out while he was using the bathroom. Pet. Exs. 97 ¶ 34; 184. After Mr. Vanisi and his friend left the bar, Mr. Vanisi was stopped by the police because two of the individuals that he had fought had been off duty police officers. Pet. Ex. 97 ¶ 35. When Mr. Vanisi refused to exit his car, the police broke his car window and began spraying him with mace, which had no effect. 105 ¶ 37. The police then cut off his seat-belt and dragged him out of the car after beating him with night sticks. Pet. Ex. 97 ¶ 35; 105 ¶ 37; 116 ¶ 24; 184. Mr. Vanisi, who did not fight back, "was a bloody mess, with cuts and bruises all over his head, face and torso." Pet. Exs. 97 ¶ 35; 105 ¶ 37; 116 ¶ 24.

Mr. Vanisi's cousin, Tavake, suggested that Mr. Vanisi stay with him in Reno so that he could reconnect with family and "mentally reset" himself. Pet. Ex. 97 ¶ 39; 123 ¶ 24. Within two weeks of being in Reno, Mr. Vanisi killed an officer with a hatchet.

A neuropsycholgist, Dr. Mack, reports that:

> An in-depth review of the history of Siaosi Vanisi reveals an individual who was in a state of chronic mental illness at the time of the homicide of Sergeant George Sullivan on 1/14/1998. The history makes it clear that Mr. Vanisi had early onset ADHD and a number of psychosocial losses and traumas in childhood. The history also makes it clear that in his mid-20's Mr. Vanisi had a psychotic break and developed a schizophrenic disorder that is best characterized as a Schizoaffective Disorder due to both a chronic schizophrenic presentation that is separate and apart from his mood disorder, but concomitant ~~with~~ a Bipolar One Disorder that is primarily hypomanic/manic, with much less frequent and remote bouts of depression.

Pet. Ex. 163 at 67(emphasis added). Dr. Mack further reports that:

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

Pet. Ex. 163 at 67.

Mr. Vanisi's jury never heard this evidence, evidence that would have been easily presented had trial counsel sought it out in a reasonably competent manner. Nor did the jury hear the evidence of the history of mental illness in Mr. Vanisi's immediate and extended family or the effects of Tongan cultural norms on Mr. Vanisi's psyche. The jury also never heard the psychological effects of Mr. Vanisi's attachment disorder. Post-conviction counsel were ineffective for failing to investigate and present this readily available evidence which would demonstrate prejudice by Mr. Vanisi's trial counsel's deficient investigation. See Pet. Claim One at 69-89.

Trial counsel were ineffective in failing to retain and properly prepare a competent neuropsychologist, such as Jonathan Mack, Psy.D., to conduct neurological testing and to testify about how Mr. Vanisi's neuropsychological and psychotic disorders affected him on the day of the offense. Dr. Mack has diagnosed Mr. Vanisi as suffering from: Schizoaffective Disorder; Attention Deficit Hyperactivity Disorder (ADHD), Combined Type; Dementia Due to Multiple Etiologies; Amphetamine Abuse and Dependence, Remotely; and a History of Alcohol Abuse. Pet. Ex. 163 at 69.

Dr. Mack reports that "[n]europsychological. . . markers of brain damage are very significant in the case of Mr. Vanisi." Pet. Ex. 163 at 68. Mr. Vanisi has major cognitive deficits that have increased the severity of his Schizoaffective Disorder. Pet. Ex. 164 ¶ 2.7.3-4. Mr. Vanisi suffers from impaired frontal executive functioning, which was caused by a combination of factors such as Dementia, Attention Deficit Hyperactivity Disorder, multiple head traumas and possibly traumatic brain injury. Pet. Ex. 163. Mr. Vanisi's "severe executive-frontal dysfunction [includes] a very significant perseverative tendency, impaired

complex sequencing, impaired concept formation, and impaired non-verbal abstract reasoning." Pet. Ex. 163 at 68. This cluster of cognitive deficits causes Mr. Vanisi to think and reason in an impaired and irrational manner, to fixate on his irrational ideas and to have difficulty preventing himself from acting on those ideas, behaviors which he has displayed throughout his life.

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

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

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

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

> 1.1 Mr. Vanisi suffers from a chronic and disabling mental disorder known as a Schizoaffective Disorder that greatly impairs his cognitive, emotional and behavioural control and the evidence for this is unequivocal as will be demonstrated in great detail in [this] report.
>
> 1.2 Mr. Vanisi as part of his Schizoaffective Disorder, compounded by substance misuse was suffering from a severe, psychotically driven disturbance of mind with marked delusional ideas at the time of the instant offense – the murder of Police Sgt. George Sullivan on the 13th of January 1998.
>
> 1.3 Previous mental health professionals did not have access to sufficiently robust information regarding Mr. Vanisi's genetic predisposition to mental illness, his major childhood developmental insults, evidence of pre-offence mental instability, the necessary neuropsychiatric battery of tests and important neurological investigations (CT Scan, MRI, EEG's) to make an accurate diagnostic assessment. The psychiatric and psychological opinions therefore failed to diagnose and hence convey to the sentencing court the true extent, depth and breadth of Mr. Vanisi's disordered mental status.
>
> 1.4 Mr. Vanisi is not and has never been Malingering in the true clinical sense of the term. The evidence is very strong and is based primarily on the most recent Neuropsychiatric Psychometric Testing and Psychiatric Evaluation. The evidence also strongly challenges the issue of Mr. Vanisi's perceived legal competency.
>
> 1.5 Mr. Vanisi without medication would return to a florid state of psychosis and lability of mood very rapidly. It would be completely unethical to stop his medications to test this hypothesis and demonstrate the seriousness of his ongoing Schizoaffective Mental Disorder but a large body of evidence will be presented to support this conclusion.

Pet. Ex. 164. Schizoaffective Disorder is:

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

Pet. Ex. 164 ¶ 2.7.1.

The jury and post-conviction judge were not informed that Mr. Vanisi was the product of his tortured past where, through no fault of his own, his mental state

deteriorated to the point of madness. They did not learn of his history of hearing voices, talking to people who did not exist, severe personality shifts and overtly bizarre behavior. They did not hear about his brain damage and ongoing mental health disorders, which Mr. Vanisi first evidenced as a child. They were not provided his history of being beaten by the police for his mental health provoked passive resistance to their authority. This social history would have offered jurors an explanation for his irrational fixation on the police and his uncontrollable impulse to defend himself from mis-perceived police threats. The evidence presented at Mr. Vanisi's trial, "adds up to a mitigation case that [bore] no relation to the few naked pleas for mercy actually put before the jury." See Rompilla, 545 U.S. at 393.

Where capital counsel "fails to interview necessary witnesses and track down critical documents, and ended up presenting a false portrait to the sentencing [jury] that incorrectly showed [the defendant] as having a much nicer childhood than he had in fact," counsel's investigation and presentation of mitigating evidence is "woefully inadequate." Jones, 583 F.3d at 644. Trial counsel in the instant case failed to present any evidence about Mr. Vanisi's mental health issues first manifesting when he was a child and his brain damage. Evidence of a mental disorder is a "classic" form of mitigation. See, e.g., Detrick v. Ryan, 619 F.3d 1038, 1056 (9th Cir. 2010). Further, the leading case on the necessity of allowing the jury to consider all forms of mitigation dealt in part with consideration of evidence of a personality disorder. Eddings v. Oklahoma, 455 U.S. 104, 113 (1982), accord, e.g., Sears v. Upton, 130 S. Ct. 3259, 3264 (2010). The influences that produce these disorders and their symptoms are part of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 at 535; see generally Welch S. White, "Effective Assistance of

Counsel in Capital Cases: The Evolving Standard of Care," 1993 U. Ill. L. Rev. 323, 361; Gary Goodpaster, "The Trial for Life: Effective Assitance of Counsel in Death Penalty Cases," 58 N.Y.U. L. Rev. 299, 323-24 (1983).

The evidence presented during the penalty phase of Mr. Vanisi's trial was similar to that presented during the penalty phase in Porter v. McCullum, 130 S.Ct. 447, 449 (2009) (extensive mitigation evidence was never presented to the jury, "which left the jury knowing hardly anything about him other than the facts of his crimes"). In Porter, the Supreme Court reversed because the new evidence presented during post-conviction "described Mr. Porter's abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." Id. The Supreme Court ruled that trial counsel's performance was deficient because he failed to obtain any "school, medical or military service records or interview any members of Porter's family." Id. at 453. Trial counsel also ignored pertinent avenues of investigation of which he should have been aware, thus failing to "uncover and present any evidence about Porter's mental health or mental impairment, his family background, or his military service." Id. Similarly, in Mr. Vanisi's case, counsel failed to obtain historical records, ask members of Mr. Vanisi's family about his mental health history, and present the jury with the readily available evidence that Mr. Vanisi's mental health issues have plagued him since childhood.

The failure to present evidence about background and character during the penalty phase of a capital trial is prejudicial because:

> of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 472 U.S. 302, 319 (1989), quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Conner, J. concurring). Where the failure to uncover mitigating information results in the jury being presented with "a completely inaccurate picture of [the defendant's] life," the defendant suffers prejudice. Jones, 583 F.3d at 646. Further, it would be clearly erroneous for a court to find that there is no prejudice due to a "lack of causal connection between the crimes and the new allegations of abuse," where, as in Mr. Vanisi's case, the experts report that the "circumstances surrounding [the victim's] death are a direct consequence of [the defendant's] abused and unfortunate past." See, e.g., Id. It should be noted, however, that the Supreme Court has explicitly held that a capital defendant need not show any causal connection between the unpresented mitigation and the crime. See Tennard v. Dretke, 542 U.S. 274, 287 (2004). The missing evidence need only be "of such a character that it might serve as a basis for a sentence of less than death." Id. (quoting Skipper v. South Carolina, 476 U.S. 1, 5 (1986)). In his petition, Mr. Vanisi has pled with detail the evidence that initial post-conviction counsel was ineffective for failing to present.

3. Initial Post-conviction counsel were ineffective for failing to raise record based claims.

a. Post-conviction counsel was ineffective for failing to investigate and present a claim that trial counsel was deficient during voir dire proceedings.

Initial post-conviction counsel was ineffective for failing to investigate and present a claim that trial counsel was ineffective during voir dire proceedings, and direct appeal counsel ineffectively failed to litigate the defective voir dire proceedings. Specifically, trial counsel was ineffective for failing to life qualify the jury, move to excuse biased jurors for cause, and failing to effectively exercise their peremptory challenges. Trial counsel performed defectively during voir dire

in the following areas:

Trial counsel failed to life-qualify the venire in accordance with Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). It is "well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." Ross v. Oklahoma, 487 U.S. 81, 85 (1988); Uttecht v. Brown, 551 U.S. 1, 22 (2007) ("Capital defendants have the right to be sentenced by an impartial jury."). Voir dire "plays a critical function in assuring the criminal defendant that his Sixth [and Fourteenth] Amendment right[s] to an impartial jury will be honored." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). If trial counsel fails to adequately voir dire prospective jurors, "the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." Id. Thus, "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan v. Illinois, 504 U.S. 719, 729 (1992); accord Dennis v. United States, 339 U.S. 162, 171-72 (1950). This is "particularly true in capital cases," where the Supreme Court has "not hesitated . . . to find that certain inquiries must be made" by the trial judge or trial counsel "to effectuate constitutional protections." Id. at 730. These "inquiries" not only protect a defendant's right to intelligently exercise his "for cause" and peremptory challenges, see Rosales-Lopez v. United States, 451 U.S. at 188 (a "lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges"); McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984) ("Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges."), they also ensure the defendant's culpability or death-worthiness is not

"entrust[ed]... to a tribunal 'organized to convict'" or "organized to return a verdict of death." Witherspoon, 391 U.S. at 521.

Accordingly, because "conventional wisdom is that most trials are won or lost in jury selection," John H. Blume et al., "Probing 'Life Qualification' Through Expanded Voir Dire," 29 Hofstra L. Rev. 1209, 1209 , & n.1 (2001), capital trial attorneys are obligated to "conduct a voir dire that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, whether because they will automatically vote for death in certain circumstances or because they are unwilling to consider mitigating evidence." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.10.2, commentary (2003) (emphasis added). As a result,"voir dire in American trials," particularly death penalty cases, "tends to be extensive and probing, operating as a predicate for the exercise of peremptories[.]" Swain v. Alabama, 380 U.S. 202, 218-19 (1965) (overruled on other grounds by Batson v. Kentucky, 476 U.S. 79 (1986)); Wainwright v. Witt, 469 U.S. 412, 423 (1985) ("it is the adversary seeking [a juror's] exclusion... [who] must demonstrate, through questioning, that the potential juror lacks impartiality.") (emphasis added). Moreover, trial counsel is obligated to conduct a more searching inquiry of a prospective juror when "the quantum of evidence already known to counsel" regarding the prospective juror "would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. at 527.[4]

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[4]Although Wiggins, and cases from this and other Circuits, pertain to trial counsel's duty to investigate mitigating evidence for the penalty phase, this principle is equally applicable to the voir dire context. If trial counsel learns of evidence, which calls into question a prospective juror's willingness or ability to consider a capital defendant's mitigating evidence or sentences less than death, trial counsel is obligated to probe further to determine whether in fact the prospective juror's beliefs "prevent" or "substantially impair" their ability to consider the capital defendant's mitigation or a sentence less than death. E.g.,

Trial counsel ineffectively failed to ask several individuals who were ultimately seated on Mr. Vanisi's jury any individual questions on issues pertaining to Mr. Vanisi's death case because the trial court erroneously prevented questioning regarding specific mitigating circumstances.

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

> MR. STANTON: Once again, counsel's questions about–you are posing about alcohol, about the ones that aren't statutory mitigating evidence is violating the rule that you cannot tell a jury what mitigating evidence is.
>
> . . .
>
> THE COURT: ...Curtail your inquiry into the permissible inquiry, which is whether or not they will look at other evidence in determining penalty.
>
> MR. BOSLER: So don't talk about specific mitigators?
>
> THE COURT: No.

09/21/99 TT 337-38.

The trial court's erroneous ruling tied the hands of trial counsel and forced them to ineffectively fail to fully question the jury.

The trial court's erroneous foreclosure of necessary questioning during voir dire prevented Mr. Vanisi's counsel to definitively ascertain, through more probing questions, whether these jurors could in fact fairly consider the evidence in Mr. Vanisi's case, and consider a sentence of less than death. See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.10.2 (2003) (emphasis added); ABA Guidelines for the

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Gray v. Mississippi, 481 U.S. 648, 658 (1987) (juror is to be excused if his beliefs would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.") (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.7.2 (B) (1989). In short, more questioning would have "l[e]d to an inference" that at bare minimum, juror Shaylene Grate, could "not act with entire impartiality" under the circumstances of Mr. Vanisi's case. United States v. Gonzalez, 214 F.3d 1109, 1112 (9th Cir.2000) (a juror is properly excused when his state of mind "leads to an inference that [he] will not act with entire impartiality") (quoting United States v. Torres, 128 F.3d 38, 43 (2d Cir.1997)).

Trial counsel performed objectively unreasonably, and their deficient performance prejudiced Mr. Vanisi because a biased juror's presence on his jury violated his clearly established right to an impartial jury; trial counsel's actions require automatic reversal. E.g., Smith v. Phillips, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (juror bias, whether presumed or proven, requires automatic reversal); Leonard v. United States, 378 U.S. 544 (1964) (per curiam); Fields v. Brown, 431 F.3d 1186, 1192 (9th Cir. 2005) ("A defendant is denied the right to an impartial jury if only one juror is biased or prejudiced."); Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.1998) (en banc).

b. Mutilation

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

Dictionary 1039 (7th Ed. 1999).

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

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

Pet. Ex. 12 at Instruction 10. On its face, the instruction applies to every murder, in that a defendant will necessarily have to "destroy" or "alter an essential part" of a victim's body in order to accomplish the homicide. Where jurors can fairly conclude that mutilation applies to every defendant eligible to the death penalty, the aggravating circumstance is constitutionally infirm. See e.g., Godfrey v. Georgia, 446 U.S. 420, 428-430 (1980).

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

In defining torture, the Nevada Supreme Court has required evidence of a specific intent to inflict pain for revenge, extortion, persuasion or for any sadistic

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

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

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

c. Initial post-conviction counsel was ineffective for failing to investigate and present a claim that prior counsel deficiently failed to object to jury instructions.

Initial post-conviction counsel was ineffective for failing to investigate, develop and present a claim that trial counsel deficiently failed to object to, and direct appeal counsel deficiently failed to brief, improper jury instructions. Specifically, trial counsel failed to object to, and direct appeal counsel failed to brief the first degree murder instructions, the mutilation instructions, the anti-sympathy instruction and the malice instruction. Additionally, Mr. Vanisi's jury was not instructed that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt.

(i) Premeditation and Deliberation

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

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

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

Pet. Ex. 11 at Instruction No. 24.

This has become known as the Kazalyn instruction. See Byford v. State, 116 Nev. 215, 233, 994 P.2d 700, 712 (2000); Kazalyn v. State, 108 Nev. 67, 825 P.2d

578 (1992). In addition to the Kazalyn instruction, Mr. Vanisi's jury was instructed:

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

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

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

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

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

In 2007, a unanimous panel of the United States Court of Appeals for the

Ninth Circuit decided Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007). In this non-capital case, the court held that the Kazalyn instruction violated the federal constitutional guarantees of due process of law by removing the deliberation element of first-degree murder from the jury's consideration of guilt. The Ninth Circuit held:

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

The court also held:

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

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

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

Polk, 503 F.3d at 910-11. The court concluded:

> Instead of acknowledging the violations of Polk's due process right, the Nevada Supreme Court concluded that giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law. Rather, the question of whether there is a reasonable likelihood that the jury

> applied an instruction in an unconstitutional manner is a "federal constitutional question." The state court failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and Winship, and thus ignored the law the Supreme Court clearly established in those decisions-that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution.

Id. at 911.

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

(ii) Mutilation

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

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

Pet. Ex. 12 at Instruction No. 10.

The aggravating circumstance of "mutilation" is vague on its face and in its

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[5]Although the Nevada Supreme Court has rejected Polk as applied to cases that become final before Byford was decided, Nika v. State, 124 Nev. 1272, 1279-1289, 198 P.3d 839, 851 (2008), that decision cannot affect Mr. Vanisi's case, because his case became final after Byford was decided. Id. at 1287, 198 P.3d at 850 ("Byford applies to convictions that were not yet final at the time of the change.") Byford was decided on February 28, 2000; Mr. Vanisi's case was not decided by the Nevada Supreme Court until May 17, 2001.

application in this case. Further the use of the word "depravity" in the mutilation instruction rendered it unconstitutionally vague. As the Nevada Supreme Court recognized, the depravity portion of the instruction was based upon a former version of the statute which referred to the "depravity of mind" as well as torture and mutilation. See Vanisi v. State, 117 Nev. 330, 342-43, 22 P.3d 1164, 1172-73 (2001). In 1995, the state legislature amended the statute to delete "depravity of mind." Id. The "depravity of mind" aggravating circumstance has been held by the Ninth Circuit to be unconstitutionally vague. Valerio v. Crawford, 306 F.3d 742, 750-51 (9th Cir. 2002).

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

(iii) Sympathy

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

The flaw in this instruction is that it did not preclude the jury's consideration of "mere sympathy"– that is, the sort of sympathy that would be totally divorced from the evidence adduced during the sentencing phase – but rather precluded consideration of all sympathy, including any sympathy warranted by the evidence. Because the jury in this case was told not to consider any

sympathy – rather than "mere" sympathy – it is reasonably likely that the jury at Mr. Vanisi's trial understood that when making a moral judgment about his culpability, it was forbidden to take into account any evidence that evoked a sympathetic response.

The giving of the unconstitutional "anti-sympathy" instruction rendered Mr. Vanisi's sentence fundamentally unfair and unconstitutional. The State cannot demonstrate beyond a reasonable doubt that this constitutional error was harmless. See Morgan v. Illinois, 504 U.S. 719 (1992) (jury must always be able to consider a sentence other than death).

(iv) Malice

The malice instruction given during the guilt phase of Mr. Vanisi's trial is unconstitutional because the description of the predicate facts upon which the inference is based – the "heart fatally bent on mischief" and "an abandoned and malignant heart" – are impermissibly vague and over-broad. Mr. Vanisi acknowledges that the Nevada Supreme Court has rejected these arguments, see, e.g., Cordoza v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000), but without adequately addressing the federal questions presented by this instruction. In People v. Phillips, 414 P.2d 353 (Cal. 1966), overruled on other grounds by People v. Flood, 957 P.2d 869 (Cal. 1998), the California Supreme Court found it "unnecessary and undesirable" to instruct the jury on implied malice using the "obscure metaphor" of the "abandoned and malignant heart" and ordered the use of a more direct and comprehensible instruction that retains substantially the language of the current instruction. Id. at 363-64; 1 California Jury Instructions, Criminal, CALJIC 8.11 (2004).[6] The Nevada Supreme Court, in Leonard v. State,

[6]Since Nevada's statute defining implied malice was taken from California's, it should be construed the same way. See, e.g., City of Las Vegas Downtown Redevelopment Agency v. Crockett, 117 Nev. 816, 824-25, 34 P.3d 553, 558-59 (2001).

114 Nev. 1196, 1208, 969 P.2d 288, 295 (1998), conceded that these terms are "not common in today's general parlance," but did not explain how these terms would allow a reasonable lay juror to identify "an abandoned or malignant heart," with acts done "in contradistinction to accident or mischance." Id. at 1208, 969 P.2d at 296. The use of these concededly "archaic," Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988), and "cryptic," Phillips, 414 P.2d at 363, terms could only have caused unnecessary prejudice. The language used in the instruction is unconstitutionally vague and, because it invites the jury to consider the defendant's general "badness" as a basis for finding this element, is over-broad as well.[7]

(v) Burden of Proof on Outweighing Element of Death-Eligibility

Mr. Vanisi's jury was not instructed on the burden of proof required for finding that the aggravating circumstances outweigh the mitigating circumstances. Under Nevada law, eligibility for the death penalty requires two factual findings: (1) the existence of one or more statutory aggravating circumstances, and (2) that the aggravating circumstances are not outweighed by mitigation. See NRS 175.554(3). While the Nevada Supreme Court held in McConnell v. State, 125 Nev. __, 212 P.3d 307, 314-15 (2009) that "[n]othing in the plain language of [the statute] requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty," and "[s]imilarly, this court has imposed no such requirement," Id. at 314-15, this is contrary both to the Nevada Supreme

[7]A reasonable juror – the standard by which the constitutionality of an instruction is judged, see, e.g., Boyde v. California, 494 U.S. 370, 382 (1990) (effect of language of instruction on reasonable juror) – would also have understood the "abandoned and malignant heart" and "heart fatally bent on mischief" language to require an objective, rather than subjective, standard in determining whether the defendant acted with conscious disregard of life, thereby entirely obliterating the line which separates murder from involuntary manslaughter in violation of the Constitution.

Court's earlier holdings, see Johnson v. State, 118 Nev. 787, 802-03, 59 P.3d 450, 460 (2002), and the United States Supreme Court's interpretations of federal constitutional requirements, which mandate application of the reasonable doubt standard to all death eligibility factors. See, e.g., Apprendi v. New Jersey, 530 U.S. 466, 483 (2000); United States v. Booker, 543 U.S. 220, 244 (2005). The failure to require the jury to find the outweighing element of capital eligibility beyond a reasonable doubt is prejudicial per se, because that failure undermines any and all of the jury findings. Sullivan v. Louisiana, 508 U.S. 275, 279-83 (1993).

d. Post-conviction counsel was ineffective for failing to investigate and present a claim that prosecutorial misconduct should have prompted objections and been briefed on direct appeal.

Initial post-conviction counsel was ineffective in failing to investigate and raise a claim that trial counsel was ineffective for failing to object to, and direct appeal counsel was ineffective for failing to brief, severe and pervasive prosecutorial misconduct. See Claim Fourteen. Trial counsel was ineffective for failing to object when the prosecutor: (1) improperly aligned himself with the jury; (2) improperly commented on the absence of mitigating factors; and (3) improperly argued that justice required the jury to sentence Mr. Vanisi to death . Direct appeal counsel was ineffective for failing to brief these claims. These allegations, however, when considered singly and cumulatively, demonstrate that the State's pervasive misconduct prejudiced Mr. Vanisi and deprived him of his right to a fair trial. See Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993).

Throughout his entire closing argument, the prosecutor constantly used the words "we," "us," and "our" in a manner that suggested that the jury was aligned with the State in deliberating Mr. Vanisi's guilt. The prosecution repeatedly spoke to the jury as if the State were part of the deliberative process with them. It is improper for the prosecution to align itself with the jury as if they were

deliberating together. See Schoels v. State, 114 Nev. 981, 987, 966 P.2d 735, 739 (1998). Trial counsel were ineffective for failing to object to this line of argument, and direct appeal counsel was ineffective for failing to raise this claim.

During closing argument in the penalty phase of Mr. Vanisi's trial the State characterized the defense mitigation evidence by saying:

> [W]e have a series of family witnesses that have said he was raised in a loving, caring environment. He wasn't abused. That's also offered as mitigating evidence that someone was abused. Was it in this case? No.

10/06/99 TT 1827. It was improper for the State to highlight the absence of a potential mitigating factor. Turner v. Calderon, 281 F.3d 851, 869 (9th Cir. 2002). The State's only purpose could be to undermine Mr. Vanisi's mitigation presentation by highlighting evidence that was not presented. Trial counsel were ineffective for failing to object to the State's improper reference. Mr. Vanisi was prejudiced in that his mitigation presentation was improperly minimized in the eyes of the jury.

Twice during closing arguments in the penalty phase of Mr. Vanisi's trial the State argued that justice required that the jury impose a death sentence. The last sentence of the prosecution's rebuttal closing argument was "[j]ustice in this case demands death." 10/06/99 TT 1843. Earlier, in the State's opening statement, trial counsel objected to the State making the same argument, but was overruled. 10/01/99 TT 1125-26. These arguments were improper and the trial court erred by failing to sustain trial counsel's objection. The argument left the impression with the jury that the authority of the State of Nevada required them to reach a death verdict. Mr. Vanisi was prejudiced by this argument. It is violative of a capital defendant's Fifth and Fourteenth Amendment due process rights for a prosecutor to argue to a jury that it is required to impose a sentence of death. See, e.g. Flanagan v. State, 104 Nev. 105, 109, 754 P.2d 836, 838 (1988), vacated and remanded on other grounds by Flanagan v. Nevada, 503 U.S. 931 (1992).

Mr. Vanisi had a right to fundamental fairness, a reliable determination of punishment and an individualized determination of an appropriate sentence guided by clear, objective and evenly applied standards.[8] It is most important that the sentencing phase of the trial not be influenced by passion, prejudice, or any other arbitrary factor. Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126 (1985); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585; Leonard v. State, 114 Nev. 1196, 1212, 969 P.2d 288, 298 (1988).

The law-of-the case doctrine does not bar reconsideration of this claim because "subsequent proceedings [have] produce[d] substantially new or different evidence." Hsu v. County of Clark, 123 Nev. 625, 631, 173 P.3d 724, 729 (Nev. 2007) (recognizing exceptions to law of the case doctrine adopted by courts in other states and federal system); see also Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (Nev. 2006) (holding "the doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine such action is warranted."). Initial post-conviction counsel's ineffectiveness for failing to investigate and develop the facts necessary to support this claim both excuses any procedural default and renders the law-of-the case doctrine inapplicable.

d. Stun-belt

Throughout Mr. Vanisi's trial he was required to wear a stun belt restraining device. Mr. Vanisi alleges that this requirement deprived him of his Sixth Amendment and due process rights to confer with counsel, be present at trial and participate in his defense. Mr. Vanisi further alleges that requiring him to wear a stun belt deprived him of due process and unduly prejudiced him in that it negatively affected his demeanor in front of the jury.

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[8] See, e.g., Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).

The decision to use a stun belt must be subjected to close judicial scrutiny. See, e.g. Gonzalez v.Pliler, 341 F.3d 897, 901 (9th Cir. 2003); U.S. v. Durham, 287 F.3d 1297, 1304 (11th Cir. 2002). It has been recognized by federal courts that the use of a stun belt on a defendant during trial interferes with the defendant's Sixth Amendment and due process rights to confer with his counsel, to be present during trial and to follow the proceedings and actively participate in his defense. See, e.g., Pliler, 341 F.3d 897, 900 (2003). The Nevada Supreme Court has also recognized the negative Sixth Amendment and due process implications of the use of stun belts during criminal proceedings. See Hymon v. State, 121 Nev. 200, 111 P.3d 1092 (2005). Before a court may constitutionally allow the use of a stun belt, it must find on the record that there are compelling state interests that justify the derogation of the defendant's constitutional rights and that less restrictive means are not available. See, Pliler, 341 F.3d at 901; See also, Hymon, 121 Nev. at 209, 111 P.3d at 1099. This was not done in this case.

C. Mr. Vanisi's ineffective assistance of post-conviction counsel claim is timely raised.

The State does not dispute that Mr. Vanisi's claim that initial post-conviction counsel was ineffective was timely raised within one year from the conclusion of state post-conviction proceedings. Controlling authority, which the State ignores, holds that Mr. Vanisi can overcome the procedural bars raised by the State by demonstrating that initial post-conviction counsel was ineffective. See, e.g., Crump v. Warden, 113 Nev. 293, 304-05, 934 P.2d 247, 253-54 (1997). In his petition and herein, Mr. Vanisi has spent a considerable amount of time specifically explaining why initial post-conviction counsel was ineffective by failing to raise the constitutional claims that are contained in his petition. The State fails to dispute the majority of these allegations, which must be taken as true for the purposes of a motion to dismiss. To the extent that the State has raised any evidence resulting in a factual dispute, under the current procedural posture, this

Court is required to grant an evidentiary hearing to resolve those disputes.

The State, however, does not dispute that as a death row petitioner, Mr. Vanisi had a right to the effective assistance of counsel in his first post-conviction proceeding, so he may raise claims of ineffective assistance of post-conviction counsel in a successive petition.[9] As explained in Crump, if Mr. Vanisi "can prove that [post-conviction counsel] committed an error which rises to the level of ineffective assistance, then [he] will have established 'cause' and 'prejudice' under NRS 34.810(1)(b)(3) to overcome procedural default. See Coleman, 501 U.S. at 753-54, 111 S. Ct. at 2566-67." Crump, 113 Nev. at 304-05, 934 P.2d at 254. Accordingly, by showing that post-conviction counsel was ineffective, Mr. Vanisi can impute to the State the failure to raise the claims in the instant petition earlier, and he can overcome all of the procedural default bars. See id.

The Nevada Supreme Court has squarely recognized that the right to the effective assistance of post-conviction counsel extends to the appeal from denial of a first post-conviction petition, thus it defies reason for petitioners to have to raise claims alleging the ineffective assistance of their counsel during the pendency of an appeal in which further instances of ineffectiveness could occur. See, e.g., Middleton v. Warden, 120 Nev. 664, 668-69, 98 P.3d 694, 697-98 (2004).

Appointed post-conviction counsel's mere presence during district court and appellate proceedings, therefore, prevented Mr. Vanisi from filing another petition during that time. See, e.g., Manning v. Foster, 224 F.3d 1129, 1135 (9th Cir. 2000). Mr. Vanisi would not have had a factual basis for raising allegations of

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[9]Post-conviction counsel was appointed under NRS 34.820(1) which "provides for the mandatory appointment of counsel for the first post-conviction petition challenging the validity of conviction or sentence where the petitioner has been sentenced to death." Pelligrini v. State, 117 Nev. 860, 888 n.125, 34 P.3d 519 538 n.125 (2001). Mr. Vanisi was therefore entitled to the effective assistance of counsel in that proceeding. See, e.g., Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247 (1997).

ineffective assistance of post-conviction counsel before the conclusion of state post-conviction counsel's appellate representation. Cf., e.g., Nika v. State, 120 Nev. 600, 606-07, 97 P.3d 1140, 144-45 (2004) (counsel not in a position to raise ineffective assistance of trial counsel before conclusion of direct appeal).

As the Nevada Supreme Court acknowledged in Nika v. State, 120 Nev. 600, 606-07, 97 P.3d 1140, 1145 (2004), no bar can be imposed based on supposed defaults arising before a decision is issued from the post-conviction appeal because: (1) Mr. Vanisi did not have access to the opinion on post-conviction appeal; (2) he had no opportunity to conduct an investigation into counsel's ineffectiveness; (3) his post-conviction counsel still owed him a duty of loyalty; and (4) litigating such a claim would require waiver of the attorney-client privilege. Most fundamentally, post-conviction counsel could not rise or litigate, or advise Mr. Vanisi as to how to raise or litigate, issues of his own ineffective assistance. Doing so would give rise to an actual conflict of interest between the lawyer's personal interests and the client's, see NRPC 1.7(a)(2); and courts have recognized that a lawyer cannot properly be expected to litigate his or her own ineffectiveness, and thus that an otherwise-applicable default cannot bar review when the default arose during a proceeding in which such a conflict existed. See, e.g., State v. Bennett, 146 P.3d 63, 67 (Ariz. 2006); Keats v. State, 115 P.3d 1110, 1117 (Wyo. 2005); Fernandez v. Cook, 783 P.2d 547, 549-50 (Utah 1989).[10]

1. Nrs 34.726 Does Not Bar Consideration of Mr. Vanisi's Claims Because Any Delay Was Not "The Fault of the Petitioner."

Assuming arguendo that the filing deadline of one year from finality on

[10]The dispositions of the Nevada Supreme Court on this point reach the same result, but are unpublished. To the extent that this Court should decline to apply this rule to Mr. Vanisi's case, it would give rise to a violation of the state and federal constitutional right to equal protection of the laws, based on a factually-demonstrable inconsistent treatment of similarly-situated litigants.

direct appeal under NRS 34.726(1),[11] is applicable, a procedural bar based on that section cannot be imposed because the delay in filing was not "the fault of the petitioner,"[12] but was attributable to counsel from whom Mr. Vanisi had a right to effective assistance.

The Nevada Supreme Court has recognized that NRS 34.726 "is not a statute of limitations" which means that Mr. Vanisi must be "given an opportunity to show either that no default occurred or that there was good cause." Glauner v. State, 107 Nev. 482, 485 n.3, 813 P.2d 1001, 1003 n.3 (1991), superseded by statute on other grounds as stated in Gonzales v. State, 118 Nev. 590, 593 n.5, 53 P.3d 901, 902 n.5 (2002). The crux of the issue then is whether the filing of Mr. Vanisi's successive petition containing his allegation of ineffective assistance of post-conviction counsel in less than a year from the conclusion of his state post-conviction proceedings places Mr. Vanisi at "fault."

The use of the term "the fault of the petitioner" shows that the legislative intent of NRS 34.726(1)(a) is that the petitioner himself must act or fail to act to

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[11] Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur.

NRS 34.726(1).

[12] For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(a) That the delay is not the fault of the petitioner; and

(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

NRS 34.726(1).

cause the delay.[13] In Pellegrini v. State, 117 Nev. 860, 36 P.3d 519 (2001), the Nevada Supreme Court adopted a subjective standard arising from the legislature's use of the term "fault" by holding that counsel's failure to act cannot be considered the petitioner's fault under NRS 34.726:

> For example, in Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995), we concluded that good cause excused the procedural bar at Nev. Rev. Stat. § 34.726(1) for untimely filing of a second petition where the first petition had been timely filed, but not pursued by counsel, and any delay in filing the second petition was not the petitioner's fault.

Pellegrini, 117 Nev. at 869-70, 34 P.3d at 526 n.10 (emphasis supplied); see also Bennett, 111 Nev. 1099, 1103, 901 P.2d 676, 679 (1995) (delay in filing supplemental petition occurred "only after counsel was appointed"). When the legal issue is properly framed, it is clear from the information presented below that

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[13]The legislature's explicit adoption of a definition of "cause" in Nevada Revised Statute section 34.726(1), which is different from the judicially adopted definition of "cause" in Nevada Revised Statute section 34.810, indicates the legislative intent to adopt the different, explicit definition prescribed by this section. E.g., Utter v. Casey, 81 Nev. 268, 274, 401 P.2d 684 (1965). Contrary to the implicit assumption of the State's motion the explicit standard of cause stated in NRS 34.726(1)(a) is different from the "external impediment" cases the State cites.

To be at fault, a party must have acted in a manner that goes beyond negligence because "[f]ault contemplates more than mere negligence, and includes intentional acts." Slade v. Farmers Ins. Exchange, 5 P.3d 280, 285 (Colo. 2000); see, e.g., NRS 104.1201(16) ("[f]ault means wrongful act, omission or breach"); NRS 104A.2103(1)(f) ("[f]ault means wrongful act, omission, breach or default"); NRS 128.105(2) (fault of parent or parents can be established by proving abandonment, neglect, parental unfitness, failure of parental adjustment, risk of serious physical, mental or emotional injury to child, or token efforts by the parents(s)); In re Termination of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126, 133 (2000) (adopting a best interests/parental fault standard in termination of parental rights cases; best interests of child necessarily include considerations of parental fault and/or conduct and both best interests of the child and parental fault must be proven by clear and convincing evidence); Hill v. State, 955 S.W.2d 96 (Tex. Crim. App. 1997) ("[t]he word "fault" implies wrongdoing; "[f]ault" is defined as "a weakness in character, failing imperfection, impairment, . . . misdemeanor . . . mistake . . . responsibility for something wrong") (citation omitted); State v. Jackson, 94 Ariz. 117, 122, 382 P.2d 229, 232 (Ariz. 1963) ("[f]ault implies misconduct not lack of judgment" (citation omitted)); Harrison v. Heckler, 746 F.2d 480, 482 (9th Cir. 1984) (the determination of whether a Social Security recipient is "at fault" for having received an overpayment "is highly subjective, highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation").

Mr. Vanisi's was not at "fault" for filing his successive petition alleging the ineffective assistance of post-conviction within less than a year from the conclusion of initial post-conviction proceedings. See, e.g., Bennett, 111 Nev. at 1103, 901 P.2d at 679.

Accordingly, the Nevada Supreme Court has determined that in order for a petitioner to avoid being at "fault," the filing of the successive petition be done "without unreasonable delay." Pet. Ex. 162 at 52-53. The fact that Mr. Vanisi's instant petition was filed less than one year from the conclusion of state court proceedings is presumptively reasonable.

2. Filing a successive petition within one year of the conclusion of initial state post-conviction proceedings alleging the ineffective assistance of counsel is presumptively reasonable.

Mr. Vanisi could not file a claim that initial post-conviction counsel was ineffective until after he had fully investigated and uncovered facts supporting that claim. The Order Denying Rehearing of the Order of Affirmance was filed on June 22, 2010, less than one year prior to the filing of the instant petition in state court on May 4, 2011. Additionally, current counsel was not appointed until August 5, 2010.

Once appointed, current counsel investigated, developed and filed an amended federal petition on April 18, 2011 which included a claim that state post-conviction counsel was ineffective, and the instant state petition was filed less than a month later. Current counsel, therefore, investigated, developed and filed a state court petition less than one-year of the Order Denying Rehearing and within eight months of being appointed.

The facts underlying Mr. Vanisi's claim that initial post-conviction counsel was ineffective could not be uncovered until a complete investigation was conducted to demonstrate not only the deficiencies in trial and post-conviction counsel's representation, but also how those deficiencies prejudiced Mr. Vanisi.

See, e.g., Hasan v. Galaza, 254 F.3d 1150, 1154-55 (9th Cir. 2001) (despite that defendant had some facts to suspect that counsel conducted an ineffective investigation, the clock did not begin to run until he had the necessary facts to demonstrate that he was prejudiced). "[T]o have the factual predicate for a habeas petition based on ineffective assistance of counsel, a petitioner must have discovered (or with the exercise of due diligence could have discovered) facts suggesting both unreasonable performance and resulting prejudice." Id.

It was not until current counsel was appointed that Mr. Vanisi was in a position to exercise due diligence in uncovering the factual predicate necessary to show not only that prior counsel was ineffective, but also that Mr. Vanisi was prejudiced by prior counsel's constitutionally deficient investigation. See Hasan, 254 F.3d at 1154-55 (citing Strickland v. Washington, 466 U.S. 668 687-91 (1984)); Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001).

> By looking only at the time [the defendant] discovered that his counsel's performance was deficient (the first prong of an ineffective assistance of counsel claim under Strickland), the district court failed to consider at what point [the defendant] discovered (or could have discovered) that he was prejudiced as a result (the essential second prong of any such claim)."

Id. (emphasis added). Thus, as part of its reasonableness analysis, this Court should rely upon the date that current counsel was appointed, August 13, 2010, as the date to begin any default calculation.

Current counsel's investigation included: (1) locating mental health experts; (2) collecting the historical documents necessary for the experts to produce a competent report regarding Mr. Vanisi's mental health issues; (3) travel throughout the United States and Tonga to interview family members and friends, and obtain historical documents to develop a social history; and (4) reviewing a voluminous trial and appellate record. During this time period, current counsel also had to investigate, develop and file two other capital habeas petitions, two other state court petitions, and file multiple motions and briefs for numerous other

clients.

As explained above, an effective extra-record investigation requires post-conviction counsel to investigate and obtain historical documents and collateral interviews. ADKT No. 411 standards for post-conviction counsel require counsel to "secure the services of investigators or experts where necessary to develop claims to be raised in the post-conviction petition." Ex. 102 at 22, Standard 3-9(f). This rule recognizes the importance of investigating, developing and presenting extra-record evidence in post-conviction proceedings where there is an allegation that prior counsel was ineffective in order to satisfy the prejudice prong under Strickland, 466 U.S. at 699-700. See Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Wilson v. State, 105 Nev. 110, 114-15, 771 P.2d 583, 585-86(1989); In re Marquez, 822 P.2d 435, 446 (1992); see also Ford v. Warden, 111 Nev. 877, 881, 901 P.2d 123, 128 (1995). In order for Mr. Vanisi to show that the shortcomings of initial post-conviction counsel were prejudicial, he had to conduct the full investigation that should have occurred prior to trial, and prior to filing a supplemental petition in the first state post-conviction proceedings.

3. Mr. Vanisi vindicated his claim to the effective assistance of initial post-conviction counsel within a reasonable time under NRS 34.800.

Mr. Vanisi's showing of cause and prejudice to overcome NRS 34.726 also necessarily establishes cause and prejudice to overcome the bars under NRS 34.800. See, e.g., Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997). Mr. Vanisi has a right to file a successive petition to vindicate his claim that initial post-conviction counsel was ineffective. While state law may purport to recognize that Mr. Vanisi's ability to allege ineffective assistance of post-conviction counsel is not limitless, see State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005), the instant petition is his one and only opportunity to raise his allegation that initial post-conviction counsel

was ineffective. As previously explained, Mr. Vanisi filed his successive petition without unreasonable delay. By showing that initial post-conviction counsel was ineffective, the fault for the failure to comply with the state procedural default rules for his remaining claims is imputed to the State. See id.

4. Initial post-conviction counsel's deficient and prejudicial investigation provides good cause for Mr. Vanisi's failure to raise the remaining meritorious claims in his petition.

As it is clear that Mr. Vanisi's allegations of ineffective assistance of post-conviction counsel are properly before this Court, the only remaining issue is whether initial post-conviction counsel's constitutionally deficient investigation provides good cause and prejudice for Mr. Vanisi's failure to raise the meritorious claims contained in his petition. Under the legal analysis previously presented on what constitutes good cause and prejudice, it is clear that initial post-conviction counsel's constitutionally defective investigation provides the good cause and prejudice to excuse Mr. Vanisi's failure to previously raise the meritorious claims contained in his instant petition.

As explained above, a reasonable investigation must take place before counsel can make a strategic choice regarding which issues to include in a habeas petition. See Silva v. Woodford, 279 F.3d 825, 846-47 (9th Cir. 2002); see also pp. 4-11 above. By failing to conduct any of the tasks necessary to provide adequate representation in Mr. Vanisi's post-conviction proceedings, not only did counsel's representation violate his Sixth Amendment right to the effective assistance of counsel, it also fell below state and federal due process standards.[14]

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[14]In cases arising before the federal constitutional right to effective assistance of counsel was established, the Nevada Supreme Court held that counsel's deficient investigation could violate the due process "farce or sham" test:

> [W]hile Nevada law will recognize the ineffectiveness of counsel only when the proceedings have been reduced to a farce or pretense, Warden v. Lischko, 90 Nev. 221, 223,

If not for prior counsel's failure to adequately investigate, develop and present the evidence contained in the instant petition during trial and on appeal, the results of Mr. Vanisi's trial and appeals would have been different. There is a reasonable probability that the jury would have convicted of second-degree murder, or refused to impose the death penalty. There is also a reasonable probability that the post-conviction court and the Nevada Supreme Court would have recognized that trial counsel was ineffective and granted Mr. Vanisi a new trial or penalty hearing. Accordingly, Mr. Vanisi was prejudiced by post-conviction counsel's ineffectiveness in failing to develop the facts necessary to support a claim of ineffective assistance of trial and direct appeal counsel.

The State's motion to dismiss does not defend the conduct of initial post-conviction counsel in failing to investigate and present the evidence contained in the instant petition. Mr. Vanisi, therefore, has raised sufficient factual allegations

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> 523 P.2d 6, 7 (1974), it is still recognized that a primary requirement is that counsel '. . . conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf both at the pleading stage . . . and at trial . . . .' In re Saunders, 2 Cal.3d 1033, 99 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970). If counsel's failure to undertake these careful investigations and inquiries results in omitting a crucial defense from the case, the defendant has not had that assistance to which he is entitled. In re Saunders, supra; People v. Stanworth, 11 Cal.3d 588, 114 Cal.Rptr. 250, 522 P.2d 1058 (1974).

Jackson v. Warden, 91 Nev. 430, 432-433, 537 P.2d 473 (1975) (remanding for hearing where petition alleged counsel advised guilty plea without conducting any investigation); accord Mazzan v. State, 100 Nev. 74, 79-80, 675 P.2d 409 (1984) (counsel's representation fell below "farce or sham" standard, where counsel did not obtain or present any mitigating evidence but berated jury for guilty verdict); Bean v. State, 96 Nev. 80, 92-93, 465 P.2d 133 (1970) (pre-Strickland "farce or sham" test of counsel's effectiveness based on due process). Under this more ~~lenient~~ standard, counsel's defective investigation and failure to inquire into extra-record issues violated Mr. Mr. Vanisi's basic right to due process of law under the state and federal constitutions, as well as his right to effective assistance of counsel under Crump. It is clear that Mr. Mr. Vanisi can demonstrate cause to and prejudice excuse procedural default of his other meritorious claims due to the ineffective assistance of initial post-conviction counsel.

regarding post-conviction counsel's ineffectiveness to survive a motion to dismiss, and to conduct discovery and obtain an evidentiary hearing to show (1) that counsel was deficient, and (2) that Mr. Vanisi was prejudiced as a result.

5. Under the circumstances of Mr. Vanisi's case, an evidentiary hearing on the issue of "fault" is required.

In the procedural posture of a motion to dismiss, "if it is permissible to infer from the evidence that" Mr. Vanisi did not have previous notice of the factual bases for his allegations of ineffective assistance of post-conviction counsel, then "such an inference must be made." Allen v. Title Ins. and Trust Co., 87 Nev. 261, 269, 485 P.2d 677, 682 (1971). The Nevada Supreme Court has recognized that "the time of discovery may be decided as a matter of law only where uncontroverted evidence proves that the plaintiff discovered or should have discovered" the claim. Siragusa v. Brown, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1999) (citation omitted). "To hold otherwise would transmute the statute from one of limitation into one of abolition . . . . Such a result is not consonant with the legislative purpose of the statute." Id. at 1392 (quotations and citation omitted). Accordingly, this Court cannot conclude from the pleadings that Mr. Vanisi was not diligent as a matter of law in order to justify summary dismissal of his petition because it is "permissible to infer from the evidence" that he was diligent in raising his allegations of ineffective assistance of post-conviction counsel.

Should this Court determine that there is a factual dispute on the question of reasonableness, then it must provide Mr. Vanisi with discovery and an evidentiary hearing where he will have the opportunity to provide the discovery dates for each piece of evidence that required investigation which will reflect that he promptly raised those allegations in the instant petition after discovering them. Controlling state and federal law dictate that Mr. Vanisi has the right to an evidentiary hearing to prove that he filed his successive petition without unreasonable delay, e.g.,

Crump v. Warden, 113 Nev. 293, 305, 934 P.2d 247, 254 (1997). The law also provides for Mr. Vanisi to obtain discovery in order to demonstrate cause and prejudice. See, e.g., O'Lane v. Spinney, 110 Nev. 496, 501-02 & n.4, 874 P.2d 754, 757 & n.4 (1994) (remanding for discovery and evidentiary hearing on equitable tolling), see fn. 6, supra (citing cases remanded for hearing on statutory tolling).

D. Mr. Vanisi can overcome the procedural bars because he is actually innocent.

Mr. Vanisi has alleged that he is actually innocent of first-degree murder because he was incapable of forming the requisite intent, and that he is actually innocent of the death penalty. Mr. Vanisi can demonstrate a fundamental miscarriage of justice to overcome procedural default rules because he is "ineligible for the death penalty" and there is "a reasonable 'probability' that the verdict would have been different." Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).

1. Mr. Vanisi is actually innocent of the death penalty.

The State does not directly address Mr. Vanisi's claim that he is actually innocent of the death penalty. First, Mr. Vanisi has demonstrated in Claim Seven of the instant petition that an aggravator found by the jury in this case is unconstitutional both on its face and as applied to him, and as there exists a wealth of mitigating evidence, Mr. Vanisi is actually innocent of the death penalty. Sawyer v. Whitley, the case defining actual innocence of the death penalty, does not hold that actual innocence of the death penalty means "there are zero aggravating circumstances," rather, it holds that to be found actually innocent of the death penalty, a petitioner must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law." 505 U.S. 333, 336 (1992). One cannot analyze a defendant's death eligibility in Nevada without first

considering the effect of the mitigating evidence, and considering the invalid aggravator found by the jury in Mr. Vanisi's case against the mountain of mitigating evidence contained in the instant petition, Mr. Vanisi has shown by clear and convincing evidence that he would not have been found death eligible if not for the constitutional errors that occurred at his trial. In any event, the state has not correctly cited the state law standard, which holds that Mr. Vanisi is actually innocent of the death penalty if he can simply show a "reasonable probability that absent the aggravator the jury would not have imposed death . . . ." Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). Thus, under any standard, Mr. Vanisi can overcome the procedural default bars because he is actually innocent of the death penalty.

Mr. Vanisi can overcome all of the procedural default bars alleged by the state if he can demonstrate that a "fundamental miscarriage of justice" would result from the court's failure to consider the claims of constitutional error. Such "standard can be met where the petitioner makes a colorable showing he is actually innocent" of the crime or sentence. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); see also Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 449 (2002); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); cf. Sawyer v. Whitley, 505 U.S. 333, 339 n.6 (1992); Murray v. Carrier, 477 U.S. 478, 496 (1986). In House v. Bell, 547 U.S. 518 (2006), the Supreme Court made it clear that, where a habeas petitioner argues that actual innocence forgives a procedural default, the habeas court must consider not only the trial evidence but the new evidence as well. Id. at 536-38 (citing Schlup v. Delo, supra, at 324-32); see also Haberstroh v. State, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003).

The test for actual innocence of the death penalty under Sawyer focuses on

what makes a petitioner eligible for the death penalty, Sawyer, 505 U.S. at 347,[15] which, in Nevada, requires an assessment of the mitigation evidence. As a weighing state, Nevada requires that in order for the sentencer to determine whether a defendant is eligible for the death penalty they must perform two tasks: (1) the sentencer must find at least one aggravating circumstance beyond a reasonable doubt; and (2) the sentencer must consider all of the mitigation, and determine whether the mitigation is sufficient to outweigh the aggravation. Deutscher v. Whitley, 991 F.2d 605, 606-07 (9th Cir. 1993) (withdrawn and superseded on other grounds by 16 F.3d 981 (9th Cir. 1994)); Rippo v. State, 122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006) ("The primary focus of our analysis, therefore, is on the effect of the invalid aggravators on the jury's eligibility decision, i.e. whether we can conclude beyond a reasonable doubt that the jurors would have found that the mitigating circumstances did not outweigh the aggravating circumstances even if they had considered only the three valid aggravating circumstances rather than six."); Johnson v. State, 118 Nev. 787, 802-03, 59 P.3d 450, 460 (2002) (finding that aggravating factors not outweighed by mitigation is element of death-eligibility under Nevada law); NRS 200.030(4)(a) (2007). Thus, death eligibility in Nevada is inextricably bound to both the aggravating and mitigating evidence, and whether the sentencer believes the one outweighs the other. Under the Sawyer standard, if Mr. Vanisi can show by clear and convincing evidence that, but for his trial counsel's ineffectiveness under the

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[15]In Sawyer the Court was analyzing a claim of actual innocence of the death penalty under the Louisiana death penalty statute. At the time Sawyer was decided that statute read: "'A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.'" Id. at 342 n.9 (quoting La. Code Crim. Proc. Ann. art. 905.3 (1984)). Death eligibility under that statute required only the finding of an aggravating circumstance. In sharp contrast to Louisiana, Nevada is a 'weighing state,' thus, death eligibility is not just a question whether any aggravating circumstances exist, but also a question of whether the mitigating circumstances outweigh the aggravating circumstances.

Sixth Amendment, a plethora of mitigating evidence would have been presented, and no reasonable juror– weighing that evidence against the single aggravator– would have found Mr. Vanisi eligible for the death penalty. Thus, in analyzing claims of "actual innocence" of the death penalty under the Nevada statute, courts are required to consider all of the mitigation evidence, including newly presented mitigation evidence, to determine whether the petitioner remains eligible for the death penalty. Deutscher, 991 F.2d at 607 ("In short, Sawyer [infra] requires the consideration of mitigating evidence in those states like Nevada that require balancing of mitigating factors against aggravating factors."). The mitigating evidence contained in the instant petition which trial counsel were constitutionally ineffective for failing to present constitutes clear and convincing evidence sufficient to demonstrate actual innocence of the death penalty under Sawyer.

Under Nevada law, which is most relevant to the instant proceedings, Mr. Vanisi need only show a "reasonable probability that absent the aggravator the jury would not have imposed death . . . ." Leslie v. Warden, 118 Nev. 773, 776, 59 P.3d 440, 445 (2002). Under this standard, even certain mitigating evidence that was insufficient to outweigh the aggravators under the eligibility determination would nonetheless be relevant to the decision of whether to impose the death penalty. Thus, when reweighing under Leslie, it is critical for the court to consider all of the mitigating evidence that the petitioner contends should have been presented at that trial. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002); see also State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003) (newly discovered evidence not presented based on trial counsel's ineffectiveness); State v. Bennett, 119 Nev. 589, 605, 81 P.3d 1, 11 (2003) (Evidence relevant to mitigation was suppressed by State: "Considering this undisclosed mitigating evidence with the invalid aggravating evidence, we conclude that the district court correctly vacated Bennett's death sentence and ordered a new penalty hearing.") If, after reweighing

the aggravating factors and the new mitigating evidence, the Court finds a reasonable probability that absent the error, the jury would not have imposed death, the defendant has established the fundamental miscarriage of justice that overcomes the procedural bars.

Weighing the valid aggravating circumstances in Mr. Vanisi's case against the mountain of mitigating evidence presented in the instant petition, Mr. Vanisi has demonstrated under both the Sawyer standard and the Leslie standard that he is actually innocent of the death penalty. During the trial, the only evidence the jury had to weigh against the aggravator was the testimony of Mr. Vanisi's wife, family and friends that Mr. Vanisi was once a very nice, respectful person. The jury heard nothing about the fact that as a result of his traumatic life, Mr. Vanisi suffers from cognitive deficits, ADHD, and Schizoaffective disorder that seriously diminish his moral culpability. The jury did not hear that Mr. Vanisi was regularly beaten and emotionally abused by his uncle throughout his childhood. The jury was not informed that Mr. Vanisi was sexually abused by his older brother from the time he was six years old. No evidence was presented of the discrimination Tongans were subjected to in San Bruno while Mr. Vanisi was growing up. It was not explained to the jury that the personal failures in Mr. Vanisi's life, such as impregnating his first cousin, being banished from his religious mission and finally excommunicated by his church, affected Mr. Vanisi more than the average person due to the strong Tongan sense of honor and family shame. The effects of multiple childhood abandonments by caregivers were not laid out for the jury's consideration. Mr. Vanisi's steady and emotionally painful descent into madness, leading to full blown psychosis, mania and psychotic delusions was not explained to the jury. It is more likely than not that if the jury had heard this evidence and weighed it against the valid aggravating circumstances, they would not have found Mr. Vanisi eligible for the death penalty, or at the very least would not have

imposed the death penalty. As a result, Mr. Vanisi can demonstrate a fundamental miscarriage of justice under Leslie to receive a merits review of this claim; and he can thereby overcome the procedural bars.

2. Mr. Vanisi is actually innocent of first-degree murder.

Mr. Vanisi has presented an overwhelming amount of newly discovered factual evidence that he did not willfully commit the crime, but that in fact he was suffering from delusional thinking caused by his severe and untreated Schizoaffective Disorder at the time of the offense.

It is clearly established federal law that once a petitioner has presented a gateway claim of actual innocence, procedural bars do not apply. House v. Bell, 547 U.S. 518, 555 (2006); see also State v. Bennett, 119 Nev. 589, 597, 81 P.3d 1, 6 (2003) (reviewing issues presented in "untimely and successive" habeas petition where petitioner alleged actual innocence of death penalty due to invalid aggravating factor). Mr. Vanisi can demonstrate good cause and prejudice to raise his claim of actual innocence because he has presented new reliable evidence of his innocence that erodes the outcome of his trial. Schlup v. Delo, 513 U.S. 298, 316 (1995); Pelligrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

"In an effort to 'balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case,'" the United States Supreme Court has set forth a specific procedure for determining whether a petitioner has made a showing of actual innocence. See House, 547 U.S. at 536 (quoting Schlup, 513 U.S. at 324). To establish a gateway actual innocence claim, Mr. Vanisi must demonstrate "that more likely than not any reasonable juror would have a reasonable doubt" of his guilt. House, 547 U.S. at 538. Mr. Vanisi has established a gateway claim.

The authority of Finger v. State, 117 Nev.548, 27 P.3d 66 (2001), finding the legislature's abolition of the plea of not guilty by reason of insanity

unconstitutional, was not available to Mr. Vanisi at the time of the trial. As a result, his constitutional right to present relevant evidence during the guilt/innocence phase regarding his mental health and intoxication during the alleged crime to the jury was denied. While it is arguable whether Mr. Vanisi's psychotic delusions that the police intentionally harassed and physically attacked him, which led him to believe he was acting in self-defense at the time of the crime, would rise to the level of "not guilty by reason of insanity," it is clear that he suffered from severe psychotic delusions at the time of the offense caused by his Schizoaffective Disorder.

The state is required to prove each element of first-degree murder beyond a reasonable doubt. Such being the case, mental health evidence of Mr. Vanisi's severe psychosis may have created reasonable doubt in the mind's of the jury that Mr. Vanisi was capable of deliberating prior to the offense. "Evidence that does not rise to the level of legal insanity may, of course, be considered in evaluating whether a killing is first or second-degree murder or manslaughter or some other argument regarding diminished capacity." Finger, 117 Nev. at 577, 27 P.3d at 85. The denial of Mr. Vanisi's right to present relevant evidence as to his mental state during the guilt phase of the trial was constitutional error, and the state cannot prove that it was harmless beyond a reasonable doubt.

E. Mr. Vanisi can overcome procedural bars for his lethal injection claim because the prosecution suppressed evidence and there has been an intervening change in the law.

Mr. Vanisi has provided extensive facts and argument in his petition sufficient to provide cause and prejudice to excuse any procedural default of Claim Eleven that death by lethal injection constitutes cruel and unusual punishment because (1) the State suppressed its lethal injection protocol, and (2) there has been an intervening change in law since the filing of Mr. Vanisi's first state post-conviction petition. In Claim Eleven of his petition, Mr. Vanisi also has

briefed in detail the merits of this argument, the fact that it is ripe for review, and why the current forum is appropriate for its consideration. Mr. Vanisi, therefore, does not re-present those arguments, but incorporates them herein by reference.

Mr. Vanisi acknowledges that the Nevada Supreme Court has held that an attack on the method of execution is not cognizable in post-conviction proceedings. McConnell v. State, 125 Nev. __, 212 P.3d 307, 310-11 (2009). The McConnell ruling, however, amounts to an unconstitutional suspension of the writ, Nev. Const. art. 1 § 1, based merely upon construction of a statute.

Additionally, Mr. Vanisi alleges this claim because it is not clear that he can litigate it in federal habeas proceedings without first raising it in the state courts. The representatives of the state in federal habeas corpus proceedings have not conceded that exhaustion of this claim in state court is unnecessary to obtaining federal review per 28 U.S.C. § 2254(b), and have continued to argue post-McConnell that federal courts cannot address claims that lethal injection is unconstitutional if it is not raised in state proceedings first. Motion at 5.

F. Mr. Vanisi can overcome any procedural default rules because he is entitled to a cumulative consideration of the constitutional issues which infect his conviction and death sentence.

The State argues that this Court should reject previously raised claims because "our state law does not provide for 'cumulative consideration' of all claims." Motion at 2. This position is not legally or logically supported. Constitutional errors that may be harmless in isolation may have the cumulative effect of rendering the petitioner's trial fundamentally unfair. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Parle v. Runnels, 505 F.3d 922, 927-28 (9th Cir. 2007). This Court must consider the cumulative effects of multiple errors in assessing whether any particular error may have been prejudicial in combination with other constitutional errors that infected the trial. Id. at 927; see Chambers v. Mississippi, 410 U.S. 284, 298, 302-03 (1973). Nothing in State v.

District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), cited by the State to support its position, even discusses cumulative error analysis. Indeed, the Nevada Supreme Court has long engaged in cumulative error analysis in habeas cases. See, e.g. Evans v. State, 117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001).

Mr. Vanisi can demonstrate good cause and prejudice under controlling state and federal law for re-raising several of his claims based on this Court's need to consider the cumulative effect of the constitutional errors in his case when determining whether those errors are harmless. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973) (holding cumulative effect of multiple trial-court errors can violate due process even when no single error rises to level of constitutional violation or would independently warrant reversal); see also Butler v. State, 120 Nev. 879, 900, 102 P. 3d 71, 85-86 (2004) (reversing death sentence based on cumulative errors at penalty, some of which were not even preserved for appellate review); Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."); Parle v. Runnels, 505 F. 3d 922, 927 (9th Cir. 2007) (holding when combined effect of individually harmless errors renders defense far less persuasive than it might otherwise have been, resulting conviction violates due process); Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir.1995) (finding ineffective assistance based on cumulative errors). Mr. Vanisi can demonstrate good cause and prejudice for re-raising claims because this Court cannot conduct an adequate harmless error analysis without considering the cumulative effect of all of the constitutional errors that occurred in his case. See Claim Twenty-Four.

G. Mr. Vanisi's claims are not barred by the law of the case doctrine.

The State complains that some of the claims contained in the instant petition were previously raised and are therefore barred by law of the case. Mr. Vanisi

acknowledged in his petition which claims had been raised, or partially raised, previously. If prior post-conviction counsel had conducted a reasonable investigation, they would have pleaded the factual allegations that are contained in Mr. Vanisi's instant petition which specifically show prejudice. In particular, prior post-conviction counsel failed to investigate and present evidence of prejudice from trial counsel's failure to conduct an adequate investigation into the existence of mitigation evidence. Because Mr. Vanisi has made specific claims regarding what trial counsel should have discovered and presented in mitigation, the evidence presented in the instant petition is substantially different than that which was presented in earlier proceedings. The law-of-the-case doctrine does not bar reconsideration of this claim because "subsequent proceedings [have] produce[d] substantially new or different evidence." See Hsu v. County of Clark, 123 Nev. 625, 631, 173 P. 3d 724, 729 (2007) (recognizing exceptions to law of case doctrine adopted by courts in other states and federal system); see also Bejarano v. State, 146 P. 3d 265 (Nev. 2006) (holding "the doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine such action is warranted."). Prior post-conviction counsel's ineffectiveness for failing to develop the facts necessary to support the claims raised, therefore, renders the law-of-the-case doctrine inapplicable.

Additionally, Mr. Vanisi can overcome the law of the case doctrine because he is entitled to a cumulative consideration of the constitutional issues which infect his conviction and death sentence. This Court cannot perform an appropriate harmless error review without considering the cumulative effect of the constitutional violations that Mr. Vanisi has previously raised. See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); see also Williams v. Taylor, 529 U.S. 362, 397-98 (2000) ("the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation

evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation" (citing Clemons v. Mississippi, 494 U.S. 738, 751-54 (1990)); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); Daniels v. Woodford, 428 F.3d 1181, 1214 (9th Cir. 2005) (considering "cumulative effect of multiple errors and not simply conducting a balkanized issue-by-issue harmless error review" when invalidating aggravating circumstance). Thus, this Court must consider all of the allegations of constitutional error when deciding whether Mr. Vanisi is entitled to relief.

H. The procedural bars raised by the State cannot be constitutionally applied to Mr. Vanisi.

The State seeks to bar consideration of Mr. Vanisi's constitutional claims by invoking default rules under Nevada Revised Statutes sections 34.726 and 34.810 that are not applied consistently and that do not provide adequate notice of when they will be applied or excused. Refusing to review Mr. Vanisi's constitutional claims on the basis of these default rules would violate the due process right to adequate notice and the equal protection right to consistent treatment of similarly situated litigants.

1. The application of Nevada default rules has been discretionary and inconsistent.

The Nevada Supreme Court has exercised complete discretion to address constitutional claims, when an adequate record is presented to resolve them, at any stage of the proceedings, despite the fact that the default rules contained in Nevada Revised Statutes sections 34.726 and 34.810 are mandatory.[16] This unobjective

[16]See, e.g., Bejarano v. State, 106 Nev. 840, 843, 801 P.2d 1388, 1390 (1990); Bejarano v. Warden, 112 Nev. 1466, 1471 n.2, 929 P.2d 922, 926 n.2 (1996); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123 (1995); Grondin v. State, 97 Nev. 454, 455-56, 634 P.2d 456, 457-58 (1981); Gunter v. State, 95 Nev. 886, 887, 620 P.2d 859 (1980); Krewson v. Warden, 96 Nev. 886, 887, 620 P.2d 859 (1980); Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868 (1968); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077 (1998); Lane v. State, 110 Nev. 1156, 1168, 881 P.2d 1358 (1994) ; Lord v. State, 107 Nev. 28, 38, 806 P.2d 548 (1991);

discretionary application of the mandatory rules is inadequate to preclude review of the merits of Mr. Vanisis' constitutional claims. E.g., Valerio v. Crawford, 306 F.3d 742, 774 (9th Cir. 2002) (en banc); Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir. 1996).

Although the Nevada Supreme Court asserted in Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), that application of the statutory default rules, some of which were adopted in the 1980s, are mandatory, id. at 886, 34 P.3d at 536, the examples cited below establish that the Nevada Supreme Court has always exercised, and continues to exercise, subjective discretion in applying them.[17]

The Nevada Supreme Court has failed to apply the one-year rule of Nevada Revised Statutes section 34.726 to bar its review of constitutional claims

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Powell v. State, 108 Nev. 700, 705-06, 838 P.2d 921 (1992); Stocks v. Warden, 86 Nev. 758, 760-761, 476 P.2d 469 (1978); Warden v. Lischko, 90 Nev. 221, 222, 523 P.2d 6 (1974); Farmer v. Director, No. 18052, Order Dismissing Appeal (March 31, 1988), Ex. 104; Farmer v. State, No. 22562, Order Dismissing Appeal (February 20, 1992), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002), Ex. 107; Hardison v. State No. 24195, Order of Remand (May 24, 1994), Ex. 109; Hill v. State No. 18253, Order Dismissing Appeal (June 29, 1987), Ex. 110; Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996); Application of Alexander, 80 Nev. 354, 395 P.2d 615 (1964); NRS 174.105(3)); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002), Ex. 112; Milligan v. State, No. 21504, Order Dismissing Appeal (June 17, 1991), Ex. 113; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987), Ex. 116; Nevius v. Sumner (Nevius I) Nos. 17059, 17060, Order Dismissing Appeal and Denying Petition (February 19, 1986), Ex. 117; Nevius v. Warden (Nevius II), No. 29027, Order Dismissing Appeal (October 9, 1996), Ex. 118; Nevius v. Warden (Nevius III), Order Denying Rehearing (July 17, 1998), Ex.119; Rogers v. Warden, No. 22858, Order Dismissing Appeal (May 28, 1993), Ex. 124; Stevens v. State, No. 24138, Order of Remand (July 8, 1994), cf. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247 (1997)), Ex. 128; Williams v. State, No. 20732, Order Dismissing Appeal (July 18, 1990), Ex. 130; Williams v. State, No. 29084, Order Dismissing Appeal (August 29, 1997), Ex. 131; Ybarra v. Director, No. 19705, Order Dismissing Appeal (June 29, 1989), Ex. 132.

[17]See also Ybarra v. Warden, No. 43981, Order Affirming in Part, Reversing in Part, and Remanding (November 28, 2005), Ex. 133, and Ybarra v. Warden, No. 43981, Order Denying Rehearing (February 2, 2006), Ex. 134 (both reiterating that application of the statutory default rules is mandatory despite alleged inconsistencies in application).

contained in successive capital habeas petitions.[18] The Nevada Supreme Court also routinely disregards the procedural bar arising from failure to raise claims in earlier proceedings.[19] The Nevada Supreme Court has failed to apply the rebuttable presumption of Nevada Revised Statute section 34.800(2) to capital habeas petitioners.[20]

The Nevada Supreme Court has issued inconsistent rulings on whether

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[18]See, e.g., Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998) ; Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995) (amended petition filed December 30, 1993); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997) (successive petition filed August 28, 1995), Ex. 106; Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996) (successive petition filed August 23, 1996), Ex. 118; Nevius v. Warden, Order Denying Rehearing (July 17, 1998) (successive petition filed February 7, 1997), Ex. 119; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999) (successive petition filed August 26, 1998), Ex. 123; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997) (successive petition filed July 27, 1996), Ex. 126; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (addressing all three-judge panel claims on merits; successive petition filed May 1, 2000), Ex. 112.

[19]See Valerio v. Crawford, 306 F.3d 742, 778 (9th Cir. 2002); see also Bejarano v. Warden, 112 Nev. 1466, 1471 n.2, 929 P.2d 922, 926 n.2 (1996); Bennett v. State, 111 Nev. 1099, 1103, 901 P.2d 676 (1995); Ford v. Warden, 111 Nev. 872, 886-87, 901 P.2d 123, 131 (1995); Hill v. Warden, 114 Nev. 169, 178-179, 953 P.2d 1077, 1084 (1998); Farmer v. State No. 22562, Order Dismissing Appeal (February 20, 1992), Ex. 105; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 5-6 (November 14, 2002), Ex. 107; Hardison v. State No. 24195, Order of Remand (May 24, 1994), Ex. 109; Neuschafer v. Warden No. 18371, Order Dismissing Appeal (August 19, 1987), Ex. 116; Ybarra v. Director No. 19705, Order Dismissing Appeal (June 29, 1989), Ex. 132.

[20]See, e.g., Bejarano v. Warden, 112 Nev. 1466, 1471 n.2, 929 P.2d 922 (1996); Ford v. Warden, 111 Nev. 872, 886-887, 901 P.2d 123, 131 (1995); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998); Farmer v. State, No. 29120, Order Dismissing Appeal (November 20, 1997), Ex. 106; Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002), Ex. 112; Milligan v. Warden, No. 37845, Order of Affirmance (July 24, 2002), Ex. 114; Nevius v. Warden, No. 29027, Order Dismissing Appeal (October 9, 1996), Ex. 118; Nevius v. Warden, Order Denying Rehearing (July 17, 1998), Ex. 119; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 2 (December 18, 2002), Ex. 121; Riley v. State, No. 33750, Order Dismissing Appeal (November 19, 1999), Ex. 123; Sechrest v. State, No. 29170, Order Dismissing Appeal (November 20, 1997), Ex. 126; Williams v. State, No. 29084, Order Dismissing Appeal (August 29, 1997) , Ex. 131.

technical defects in a petition may be cured by amendment.[21] The Nevada Supreme Court has entertained the merits of constitutional claims that were improperly incorporated from the briefing in the trial court in violation of Nevada Rule of Appellate Procedure 28(e).[22] The Nevada Supreme Court has found certain constitutional claims procedurally defaulted before those claims could even be raised.[23]

The Nevada Supreme Court has reached diametrically opposite conclusions on whether an erroneous court ruling establishes "cause" to review the merits of a constitutional claim on post-conviction.[24] However, the Nevada Supreme Court continues to treat an erroneous court ruling as "cause" in unpublished dispositions without observing the limitation it established in Evans v. State, 117 Nev. 609,

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[21]In Wade v. State, the court rejected the petitioner's argument that an improperly verified petition could be cured by an amendment which would relate back to the filing date of the initial petition. Wade v. State, No. 37467, Order of Affirmance at 3 (October 11, 2001), Ex. 129. However, in Miles v. State, the court held that an improperly verified petition could be cured by an amendment which would relate back to the filing date of the initial petition. Miles v. State, 91 P.3d 588, 120 Nev. 383 (2004).

[22]In Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001), the court refused to address the merits of a claim due in part to the petitioner's improper incorporation of briefing from the trial court. Id. at 522 & n.86. However, in Thomas v. State, 120 Nev.37, 83 P.3d 818 (2004), the court entertained the merits of the petitioner's claims, which incorporated factual allegations from the habeas petition, due to the fact that the State's appendix included excerpts of the record below. Id. at 43 & n.3, 83 P.2d at 822 & n.3.

[23]In Thomas v. State, 120 Nev. 37, 83 P.3d 818, 827 (2004), the court held that claims alleging that the court performs constitutionally-inadequate appellate review must be raised on direct appeal before the court has actually performed appellate review of the defendant's conviction and sentence. Id. at 50, 83 P.3d at 827. The court also required "specific supporting facts" in order to prevail on such a claim even though such facts would not exist before appellate review occurs. See id.

[24]See, e.g., Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944 (1994); Harris v. Warden, 114 Nev. 956, 958-59, 964 P.2d 785, 786-87 (1998); see also Birges v. State, 107 Nev. 809, 820 P.2d 764 (1991); contra Evans v. State, 117 Nev. 609 28 P.3d 498, 521 (2001).

643, 28 P.3d 498, 521 (2001).[25] The fact that the definition of "cause" under Nevada Revised Statutes section 34.729 is treated differently in published versus unpublished dispositions further shows that this statutory provision is not a "rule" that is clearly and consistently followed.

The Nevada Supreme Court has reached inconsistent results on the issue of whether a procedural rule that does not exist at the time of a purported default may preclude the review of the merits of meritorious constitutional claims.[26] The Nevada Supreme Court has taken opposite positions on whether application of procedural default rules is waivable by the State.[27] The definition of cause is completely amorphous, because it is whatever the Nevada Supreme Court says it is on any particular occasion.[28]

In the past, the State has admitted that the Nevada Supreme Court disregards procedural default rules on grounds that cannot be reconciled with a

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[25]See, e.g., Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part, at 7 n.19 (November 14, 2002) (citing Lozada v. State), Ex. 107; O'Neill v. State, No. 39143, Order of Reversal and Remand, at 5 & n.13 (December 18, 2002) (citing Lozada v. State), Ex. 121.

[26]Compare Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (applying NRS 34.726 to preclude review of merits of successive habeas petition when one-year default rule announced for the first time in that case); Jones v. McDaniel, No. 39091, Order of Affirmance (December 19, 2002) (same), Ex. 112; with State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681-82 (2003) (refusing to retroactively apply rule that parties may not stipulate out of procedural default rules); Smith v. State, No. 20959, Order of Remand (September 14, 1990) (refusing to apply default rule that was not in existence at the time of the purported default), Ex. 127; Rider v. State, No. 20925, Order (April 30, 1990) (same), Ex. 122.

[27]State v. Haberstroh, 119 Nev. 173, 69 P.3d 676, 681-82 (2003); contra Doleman v. State, No. 33424, Order Dismissing Appeal (March 17, 2000), Ex. 103; see also Jones v. State, No. 24497, Order Dismissing Appeal (August 28, 1996), Ex. 111.

[28]See also Rogers v. Warden, No. 36137, Order of Affirmance, at 5-6 (May 13, 2003), Ex. 124; Feazell v. State, No. 37789, Order Affirming in Part and Vacating in Part (November 14, 2002), Ex. 107.

theory of consistent application of procedural default rules.[29]

Mandatory default bars that can be "graciously waived," or disregarded out of "frustration," are not "rules" that bind the actions of courts at all, but are the result of mere exercises of unfettered discretion; and such impediments cannot constitutionally bar review of meritorious claims. Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges.' Opinion on the Writ of Habeas Corpus, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)."). The Nevada Supreme Court's practices make review of the merits of constitutional claims a matter of "grace and favor," and they cannot constitutionally be applied to bar consideration of Mr. Vanisi's claims.

The Nevada Supreme Court can not apply any supposed default rules to bar consideration of Mr. Vanisi's claims when it has failed to apply those rules to similarly-situated petitioners, and thus has failed to provide notice of what default rules will be enforced, without violating the equal protection and due process clauses of the Fourteenth Amendment. Bush v. Gore, 531 U.S. 98, 104-09 (2000) (per curiam); Village of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000) (per curiam); Ford v. Georgia, 498 U.S. 411, 425 (1991).

2. Consideration of the petition cannot be barred by applying the successive petition doctrine since it is inconsistently applied and Mr. Vanisi has shown cause to overcome it.

The same arguments made above, which show that the bar of Nevada Revised Statutes section 34.726 cannot be applied, show that the successive petition bar cannot be applied. The ineffectiveness of counsel in the initial habeas proceedings preclude application of the successive petition bar based on that

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[29]Bennett v. State, No. 38934, Respondent's Answering Brief at 8 (November 26, 2002), Ex. 101; Nevius v. McDaniel, D. Nev., No. CV-N-96-785-HDM(RAM), Response to Nevius' Supplemental Memorandum at 3 (October 18, 1999), Ex. 120.

proceeding.

Further, the application of the successive petition bar in NRS 34.810 has been explicitly held inadequate to bar review of constitutional claims in later proceedings in capital cases. E.g., Valerio v. Crawford, 306 F. 3d 742, 776-778 (9th Cir. 2002) (en banc); cf. Pellegrini v. State, 117 Nev. 860, 869-874, 34 P.3d 519, 526-29 (2001). The fact that the state and federal courts have reached directly opposite conclusions as to the pattern of applying this rule indicates that it is not sufficiently clear to satisfy due process standards of notice and equal protection standards of consistent application, under the federal constitution. This Court must therefore address these constitutional issues and conclude that this rule cannot bar review of Mr. Vanisi's constitutional claims.

III. Conclusion

For the foregoing reasons, Mr. Vanisi respectfully requests that this Court deny the State's motion to dismiss his petition for writ of habeas corpus. In the alternative, Mr. Vanisi requests that this Court defer ruling on the motion pending discovery and an evidentiary hearing in order to show cause and prejudice to overcome the procedural default bars raised by the State.

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

DATED this 30th day of September, 2011.

RENE VALLADARES
Federal Public Defender

/s/ Tiffani D. Hurst
Tiffani D. Hurst
Assistant Federal Public Defender

C. BENJAMIN SCROGGINS
Assistant Federal Public Defender

Attorneys for Petitioner

CERTIFICATE OF SERVICE

In accordance with Rule 5(b)(2)(D) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 30th day of September, 2011, a true and correct copy of the foregoing **OPPOSITION TO MOTION TO DISMISS** was filed electronically with the Second Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

Dept. No. 4

E.K. McDANIEL, WARDEN and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.
_____/

RESPONSE TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

The opposition to the State's motion to dismiss adds nothing to the debate. Much of the opposition describes evidence of Vanisi's mental state years before the instant crime. That is relevant only as it is relevant to his mental state at the time of the crime, or of the trial, but Vanisi's mental state at relevant times has been thoroughly explored.

The balance of the opposition consists of asserts that prior post-conviction counsel failed to raise various issues. The proper question is whether there was some external impediment that prevented Siaosi Vanisi from raising the claims in his initial petition. *See* NRS 34.810. As there is no explanation in the petition, the claim that counsel was ineffective in failing to do what Vanisi could have done means nothing.

The petition also has a discussion of a Ninth Circuit case, *Polk v. Sandoval*, in which the 9th Circuit undertakes to discern Nevada law concerning the elements of first-degree murder. The Ninth circuit incorrectly interpreted state law. *Nika v. State*, 124 Nev. 1272, 1285-86, 198 P.3d 839, 848-49 (2008). The correct statement of state law is in *Nika* and the final arbiter of Nevada law has ruled on the subject and determined that the instructions to the jury in the instant case were supported by the law as it existed at the time of the trial.

The opposition also suggests that this court has the authority to ignore the Law Of the Case and to overrule the Supreme Court. The Supreme Court has ruled that the Supreme Court has the authority to overrule its own decisions but the Supreme Court has never ruled that the district court may assert appellate authority over the Supreme Court. *See Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006).

The claim of actual innocence to overcome the procedural bars is based solely on the existence of new mitigating evidence. The State notes that in a capital case, all evidence is potentially mitigating and so there will always be new mitigating evidence. That is why no court in the nation has adopted the theory that a claim of new mitigating evidence is a claim of actual innocence that will overcome a procedural bar. On the contrary, courts generally rule that the innocence exception applies only where the petitioner can show that there are zero aggravating circumstances. *See Sawyer v. Whitley*, 505 U.S. 332, 344-45, 112 S.Ct. 2514, 2521-22 (1992)(rejecting notion that existence of additional mitigating evidence makes one "innocent" of the death penalty). Although there are several stages of the jury's analysis, the existence of one or more aggravators is the last part that is susceptible of objective proof. Hence, in Nevada, eligibility is a function of the existence of aggravating circumstances alone. Thus, the claim of additional mitigating evidence is not a claim that will overcome the procedural bars.

As indicated earlier, the claim regarding lethal injection is not a claim that attacks the conviction, and so it must be brought in a separate civil action seeking injunctive relief. The

State has not asserted that the claim is not cognizable in state court, but it is not cognizable in a post-conviction habeas corpus action. *McConnell v. State*, 125 Nev. ___, 212 P.3d 307, 311 (2009).

The opposition to the motion to dismiss is voluminous, but ultimately adds nothing to the debate. The petition is untimely, abusive and successive and should be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

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

DATED: October 7, 2011.

RICHARD A. GAMMICK
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on October 7, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

C. Benjamin Scroggins, Assistant Federal Public Defender
Tiffani D. Hurst, Assistant Federal Public Defender
Counsel for Siaosi Vanisi

/s/ SHELLY MUCKEL
SHELLY MUCKEL

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

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

E.K. McDANIEL, WARDEN and CATHERINE CORTEZ MASTO, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Dept. No. 4

Respondents.
_____/

ORDER

Petitioner Vanisi has filed a second petition for writ of habeas corpus. The State moved to dismiss, asserting various procedural bars. The court finds that the claims of innocence are not sufficient to overcome the procedural bars. However, petitioner has also alleged that the failure to present all his claims in his first petition was due to the ineffective assistance of his first post-conviction lawyers in failing to properly investigate and plead the ineffective assistance of his trial lawyers. The State asserted that the claim of ineffective assistance of post-conviction counsel is pleaded in conclusory terms, and not with the specificity required by *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984).

On February 23, 2012, this court heard oral arguments. The court has determined that the issue of whether the petition was pleaded with sufficient particularity is close enough to

proceed to the next step of holding an evidentiary hearing to determine whether the ineffective assistance of post-conviction counsel can be established sufficiently to overcome the procedural bars. Accordingly, the court directs a further hearing in which the court may hear testimony on the subject of the ineffective assistance of post-conviction counsel with the goal of clarifying those claims.

Counsel shall contact the administrative assistant of this department within 10 days of this order to schedule a hearing relating to the motion to dismiss.

DATED this 20 day of March, 2012.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 21st day of March, 2012, I filed the attached Order with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

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Terrence McCarthy, Esq.
Deputy District Attorney

Tiffani Hurst, Esq.
Assistant Federal Public Defender

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_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 21st day of March, 2012.

Marie Stone

Code No. 4185

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

STATE OF NEVADA, Plaintiff,	)	Case No. CR98-0516
vs.	)	Dept. No. 4
SIAOSI VANISI, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

PETITION FOR POST CONVICTION

DAY ONE

THURSDAY, DECEMBER 5, 2013

RENO, NEVADA

Reported By: STEPHANI L. LODER, CCR No. 862

APPEARANCES:

For the Plaintiff:

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RENO, NEVADA, THURSDAY, DECEMBER 5, 2013, 1:40 P.M.

-oOo-

THE COURT: Thank you. Please be seated. Go ahead and make you appearances for the record.

MR. McCARTHY: Terry McCarthy for the State, Your Honor.

THE COURT: Thank you.

MS. HURST: Tiffani Hurst on behalf of the defendant.

MR. TAYLOR: Gary Taylor, Your Honor, from the FPD as well.

THE COURT. Okay. And you all have waived Mr. Vanisi's appearance?

MR. TAYLOR: Yes.

THE COURT: And nothing has changed in that?

MR. TAYLOR: No, ma'am.

THE COURT: All right. Are you ready to proceed?

MR. TAYLOR: Yes, ma'am.

MR. McCARTHY: We are.

THE COURT: Okay. Then let's go forward. Did you want to present any oral arguments before you begin your evidentiary presentation?

MR. TAYLOR: No, Your Honor.

THE COURT: Okay. Then you may proceed.

MR. TAYLOR: Judge, at this point, for the purposes of this hearing alone, which, as I understand is essentially a *Crump* or *Martinez* hearing, we would move to admit the exhibits at least through 200, which are attachments to our petition, understanding that should the Court allow us past this procedural issue, then Mr. McCarthy may want to present evidence on those issues at later date.

But for the purposes of this hearing, we'll assume the proof and all that kind of thing.

MR. McCARTHY: Gosh, Judge, I wasn't prepared for a wholesale offering like that. We did have an agreement there'll be lots of stuff that will be admissible, just not for the truth, but --

MR. TAYLOR: Well, we're just assuming it was there and available to counsel to find, and I'll be asking him questions along that line.

MR. McCARTHY: That's too broad for me to wholesale --

MR. TAYLOR: Okay.

THE COURT: Okay. You want to do it as you go.

MR. McCARTHY: Yeah.

MR. TAYLOR: Can we admit them just on -- what

basis would you agree to?

MR. McCARTHY: Oh, I'd think everything here is authentic.

THE COURT: When you want to -- let's say you want to admit Exhibit 42 that you have marked.

MR. TAYLOR: Sure.

THE COURT: When you're ready to admit, just say move to --

MR. TAYLOR: Just move it.

THE COURT: And if Mr. McCarthy wants more of a foundation or more of a showing, he can ask for it or not.

MR. McCARTHY: Thanks, Your Honor. And I notice the stuff I found on the table here begins with Exhibit 42.

THE COURT: That's what I show.

MR. TAYLOR: Can I explain, Your Honor?

THE COURT: Yes.

MR. TAYLOR: What these are, and after conferring with the court clerk, there are a number of exhibits to our petition that we wanted to use during this hearing, so they retain the same number that they had as an exhibit to the petition so that we don't mess up or confuse anybody.

THE COURT: Okay.

MR. TAYLOR: Past 199, which the exhibits had 199

exhibits, we just started then sequentially with anything new.

THE COURT: And you have marked exhibits today. It starts on Exhibit 42. It isn't sequential, but it's Exhibit 42, and then the last exhibit you have marked is Exhibit 222.

MR. TAYLOR: Yes, ma'am. What I was -- and I apologize if I wasn't clear.

The petition contained 199 exhibits. We used the same exhibit numbers for anything that was attached to the petition. For any new evidence or new exhibits, we just started at 200 and went forward.

THE COURT: All right. I understand.

MR. TAYLOR: I would ask the Court to take judicial notice of all previous proceedings and the record in this case.

THE COURT: The Court will.

MR. TAYLOR: Thank you. We'd call Thomas Qualls, Your Honor.

THE COURT: All right.

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THOMAS QUALLS,

called as a witness by the defense,

having been first duly sworn, was examined

and testified as follows:

DIRECT EXAMINATION

BY MR. TAYLOR:

Q State your name, please.

A Thomas Qualls.

Q And your occupation?

A I'm an attorney.

Q Okay. And how long have you been an attorney?

A About ten years, since 2003.

Q And do you know Siaosi Vanisi?

A I do.

Q And how do you know him?

A I represented him in a state post-conviction habeas proceedings.

Q Okay. Were you appointed by the Court?

A Yes, I was.

Q Did you have a role in the case prior to the formal appointment as an attorney in his case?

A I did. My memory is that Mr. Edwards moved to have me appointed as kind of an assistant, legal research,

paralegal stuff, and the judge granted that. So I was working on the case briefly before I became licensed, at which point Mr. Edwards moved to have me appointed as co-counsel.

Q Okay. And were you an attorney but not licensed in Nevada prior to your appointment or at the time you were appointed as paralegal?

A I wasn't a licensed attorney, no. I gradated from law school in '95, but I wasn't practicing law at that time.

Q Okay. Had you worked on other capital cases?

A I had.

Q And approximately how many? What was your experience?

A I'd say in one form or another, I had worked on approximately 10 to 12 death penalty cases prior to Vanisi.

Q Okay. Including habeas cases?

A Including habeas cases.

Q And obviously, since then, you have had quite a bit more experience as an attorney.

A Yes.

Q Do you remember when your appointment was?

A In this case?

Q Yes.

A I don't remember exactly. It was shortly after I was sworn in, which was October of -- either September or October of 2003, but I don't remember the -- sorry, I don't remember the date of the appointment.

MR. TAYLOR: Does he have the witness exhibits up there?

THE COURT: Yes. The binders are to your right there.

THE WITNESS: Both of these?

THE COURT: Yes.

BY MR. TAYLOR:

Q Would you, Mr. Qualls, take a look at Exhibit 203.

A Okay.

Q And looking at -- I'm sorry. I promise I'm much more organized.

213. I apologize. Do you recognize that exhibit?

A Yes, I do.

Q And would you explain what that exhibit is.

A It appears to be the order appointing me as co-counsel in this case. The file stamp is December 23rd, 2003.

Q And that was after you had passed the Nevada bar; is that correct?

A That's correct.

Q Now, if you would, turn to Exhibit 201.

MR. TAYLOR: Judge, we would offer 213.

MR. McCARTHY: It's part of the record. I have no objection.

THE COURT: Okay. Exhibit 213, I think it's probably cleaner if I just take judicial notice of Exhibit 213 rather than admit it.

MR. TAYLOR: That's fine. Thank you.

THE WITNESS: I apologize, what was the -- 201? Is that the one you wanted me to look at?

BY MR. TAYLOR:

Q I'm bouncing around here. 201. Do you recognize those exhibits?

A Yeah. Appears to be bills that I submitted for work on the case.

Q And that is related to this, Mr. Vanisi's representation or your representation of Mr. Vanisi?

A That is what it appears to be, yes.

Q And would those bills truly and accurately reflect the work that you did on behalf of Mr. Vanisi?

A Yes, it should. I mean, there may be things that

I did that weren't recorded or something, but that should be an accurate reflection.

MR. TAYLOR: Thank you. Judge, we'd offer Exhibit 201.

THE COURT: Objection?

MR. McCARTHY: No, Your Honor.

THE COURT: 201 is admitted.

(Exhibit No. 201 admitted.)

BY MR. TAYLOR:

Q Okay. If you would, how soon after your appointment did you meet with Mr. Vanisi?

A I would have to refer to something. I don't have any independent recollection of that.

Q Okay. Did you meet with him?

A Sure. I met with him on a number of occasions.

Q Do you have a recollection of how he appeared, any concerns you may have had from that meeting?

A Sure. In a couple of our meetings, Mr. Vanisi's behavior was consistent with some of the reports that we had before. He was erratic, manic. He did not track conversations well, if at all.

In short, it was very difficult to communicate with Mr. Vanisi.

Q Okay. Did you suspect a mental illness?

A Yes.

Q Is that relevant in your mind to the responsibilities you had pursuant to that Court order?

A Is it relevant?

Q Yes.

A Yes.

Q Can you explain to the Court how?

A Sure. There's a requirement that the client had to be able to assist counsel in order for you to be able to move forward just from a fundamental legal perspective.

Q Okay. And did you actually take some sort of action or file some pleading with regard to Mr. Vanisi's mental illness?

A Yes, we did. At the time, there was a case out of the Ninth Circuit called *Rohan*, and the essence of that was that if you're on an unopposed conviction habeas, if the client is not able to assist counsel, then the proceedings need to be stayed until he has that requisite level of competency.

And so we filed a motion on Mr. Vanisi's behalf based upon *Rohan* to, number one, stay the proceedings and, number two, have him evaluated pursuant to the standard in that case.

Q In your opinion, did Mr. Vanisi have a rational

and factual understanding of the proceedings in which he was engaged?

MR. McCARTHY: I suppose I should object.

THE COURT: Maybe.

MR. McCARTHY: I don't know if this witness is qualified to render an opinion.

THE COURT: I'm going to sustain the objection.

BY MR. TAYLOR:

Q Did you have a concern whether or not this witness had a rational and factual understanding of the proceedings to which he was engaged?

A Yes. As I testified, that was part of our concern and that was the reason for the *Rohan* proceedings.

Q In addition, did you have a concern that Mr. Vanisi was unable to rationally communicate with you?

A Well, I mean, I think I can answer that. We were concerned, and we also had difficulty with rational communication.

Q Can you describe the difficulties you encountered?

A Could I describe the difficulties? Was that your question?

Q Yes.

A I apologize. Yes. Again, when we asked him

questions, whether it be about his social history or the case or anything, when he tried to engage in dialogue with us, as I noted, he didn't track very well. He would spontaneously break out in song. He would get up and move around the room. He would take off part of his clothes. He would talk about wanting to be Dr. Pepper.

You know, I mean, he would sit down and maybe have two sentences with us and then move on to his next antic.

He was able to communicate what food and beverages he wanted, but beyond that, there was not a lot of rational communication.

Q And based on this concern, you filed your *Rohan* motion?

A Correct.

Q Okay. Now, you've mentioned that when you attempted to discuss his social history with him, that you encountered these issues. Can you first tell us what -- when you mean social history, to what are you referring?

A Well, I don't know that I have an independent recollection. I don't have an independent recollection of what exact questions we would have asked him. Part of the standard procedure in a death penalty case, and especially in a post, is to try to do a comprehensive -- compile some

sort of comprehensive social history so you know something about your client, number one, but it also gives you clues about who to talk to and where to find more information.

Q So it would form -- and I'm just clarifying, make sure I understand it. It would form a basis for your further investigation of the case?

A Sure. That's definitely one of the things it can do.

Q If you would, turn to Exhibit 214, and we're going to look at 214, 215, and 216 very quickly.

A (Witness complies.)

Okay.

Q Can you tell us generally what those exhibits are?

A They appear to be kind of rough draft, you know, maybe memos to a file regarding the case, regarding Vanisi and witnesses and, you know, basic facts about date of birth, where he grew up, those kinds of things.

Q Going back to -- let me ask you this first. Initially, before you were appointed to this case, was there another attorney appointed?

A Yes. I believe -- well, the record shows it was Marc Picker, and that's what my memory is. Marc Picker and Scott Edwards were on the case before I got involved.

Q And Mr. Edwards was co-counsel or second chair initially, and he was elevated to lead counsel?

A I believe that's true.

Q And then upon your passing the bar, you were named second chair.

A Correct.

Q And if you look at Exhibit 214, does it reflect who this memo is from? The first page of 214.

A First page? Oh, sure. It says from MP, which I assume is Marc Picker.

Q And if I represented to you this memo was found within the state post-conviction counsel's file, either yours or Mr. Edwards, do you have any reason to dispute that?

A No.

Q The content that is within this memo, does it generally fit what you were talking about regarding social history?

A Some of it does, yes.

Q Are there a number of blanks?

A What's that?

Q Are there a number of blanks, not only in 214, but 215, which was found at the same place? Does it appear to be the same printer or whatever?

A Yes, there's a number of blanks. As I said, it appears to be sort of a first draft or a rough of this information.

Q Okay. Social history information?

A Yes, there's some of that.

Q Do you know where y'all or Mr. Picker may have gotten these forms for doing this investigation?

A I don't know. Based upon the dates, that probably would have been before I got involved. I see 214 is dated March 22nd, 2002.

Q Okay.

A I don't know where Mr. Picker got this information.

Q Okay. But it does have some of the social history information that you were talking about was important to you.

A Yes.

Q 214, 215, and 216.

A Yes.

Q Okay. Then if you would, turn to -- I'm trying to make sure I keep these marked so we can...

217. This appears to be some sort of manual. Or the index to a manual.

A Yes.

Q Okay. If I represent to you that this was found within those same state post-conviction attorney files, do you have any reason to dispute that?

A No. This type of kind of form or checklist is familiar to me.

Q Okay. 218? Again, with the representation that it was in the files that you and Mr. Edwards maintained, do you have any reason to dispute that?

A No.

Q Does it appear to be something similar?

A Yes. It appears to be a bibliography of resources for defense counsel in death penalty cases.

Q Kind of a how-to type place to go, ideas.

A Yes, resources.

Q Okay. Let's turn to 219. 219, on the second page, actually has an e-mail that is written; is that correct?

A That's what it appears to be, yes.

Q Do you know who that e-mail was written to?

A From the face of the document, it says it's to someone named Scharlette.

Q Do you know Scharlette Holdman?

A I know the name, yes. She's a -- she was a mitigation specialist.

Q Works for the Center For Capital Assistance?
A I'll take your word for that.
Q Is it the same e-mail or the same name spelled -- kind of a unique spelling, is it not?
A Yes.
Q And if you look at the first page of the exhibit, is it spelled the same way as the e-mail on the second page?
A Yes.
Q Okay. Now, on the first page as well, it lists a place called the Habeas Corpus Resource Center. Are you familiar with that organization?
A Yes.
Q Their contact person is an attorney named Michael Laurence?
A That's what it says, yes.
Q Okay. The last page of that exhibit contains an e-mail as well?
A Yes.
Q Okay. And who is that e-mail from?
A Appears to be another e-mail from Marc Picker.
Q And who is it to?
A Says Michael. The two column is mdl@cris.com, which is -- appears to be consistent with being Michael at

the Habeas Corpus Resource Center that you referenced.

Q On the first page?

A Yes.

Q Okay. And the content of these e-mails, do you know what they are?

A They both appear to be requesting assistance with the death penalty habeas case. Doesn't appear to reference Vanisi specifically, but it's asking about a, quote, nasty death penalty state habeas.

Q Okay. And it was sent by Mr. Picker; is that correct?

A Correct.

Q Okay. We do know that it was after the 2002 version of Microsoft was released. Would you agree with that?

A That's what the copyright at the bottom of the page says.

Q Okay. Let's turn to Exhibit 220. And actually, I'll ask you to turn to the second page of that exhibit. That's another e-mail?

A That's what it appears to be, yes.

Q And who is that e-mail from?

A It says it's from Scharlette Holdman.

Q That's the mitigation guru we were talking about

a while ago?

A Yes.

Q Who is the e-mail to and who were copies sent to?

MR. McCARTHY: Your Honor, I haven't objected, but at this point, this witness has no knowledge of these things. He's just asking him: Does this look like what it looks like?

And so my objection is undue waste of time.

MR. TAYLOR: Your Honor, these came from this attorney's file. So he is deemed to have knowledge of them. It was in his files that we received.

MR. McCARTHY: He just testified that he -- all he said is this is what it looks like.

THE COURT: Right. I think you better -- on each document, you have to ask him if it came from his file.

MR. TAYLOR: Okay.

BY MR. TAYLOR:

Q Do you have any independent memory of this document?

A I'm sorry, I don't.

Q Would you have received copies of any information from Marc Picker after he was released or withdrew from this case?

A I believe I reviewed all of the files that were

in Mr. Edwards' office at the time, which would have included whatever Mr. Picker had.

Q And I would assume that you and Mr. Edwards shared information as well.

A Well, we were working on the case together, yeah.

Q Well, I mean, you did work together?

A Yes.

Q Okay. And do you dispute that these letters were located within your file?

A I'm sorry, I don't know how to answer that question.

If you tell me they were found in my file, I don't have any reason to disagree with that. But again, I can't tell you that I have an independent recollection of them.

Q Do you know who Roseann Schaye is?

A Yes. Roseann Schaye was another mitigation expert, and I believe that she was a mitigation expert that Mr. Edwards and I planned on using.

Q Okay. And was she recommended -- is it your understanding she was recommended by Ms. Holdman?

A That's my understanding from reading these e-mails, and I have some memory that Ms. Holdman wasn't available.

Q Okay.

MR. TAYLOR: For the purpose of this hearing only, Your Honor, I offer 214 through 220, inclusive.

THE COURT: Any objection?

MR. McCARTHY: No.

THE COURT: Exhibit 2 -- did you say no? Or were you groaning?

MR. McCARTHY: I'm groaning. I really don't -- I mean, I don't doubt that these were things obtained from somebody's file at some time, but --

MR. TAYLOR: Perhaps I can make a representation to the Court. I don't know if it will ease Mr. McCarthy's feelings.

MR. McCARTHY: Probably.

MR. TAYLOR: These matters were obtained by my office from post-conviction counsel's files. I believe the majority were from Mr. Qualls's file, but it may have been Mr. Edwards'. I don't want to misrepresent. I know it came from those files.

I also know that I can establish this either by bringing someone up from Las Vegas to testify to that or by subpoenaing Mr. Picker. If Counsel -- you know, I'm trying to get past the particular bar -- he doesn't necessarily want me to go there, but if we need to, to

establish that, I'm --

THE COURT: You're making an offer of proof that these were secured by your investigator --

MR. TAYLOR: They were secured by one of our paralegals or investigators. Could I confer one minute?

THE COURT: Yes.

(Discussion off the record between defense counsel.)

MR. TAYLOR: Your Honor, I would make this offer of proof. My co-counsel reviewed Mr. Qualls's files, and she pulled those documents from that file.

THE COURT: Okay. Any objection?

MR. McCARTHY: I don't doubt that for a minute. So no, I have no objection.

THE COURT: For purposes of today's hearing, 214 through 220 are admitted.

(Exhibit Nos. 214 through 220 admitted.)

MR. TAYLOR: We'll switch gears for a minute, Judge.

BY MR. TAYLOR:

Q Let's go back to just some general things, and then we'll start to key in on some other exhibits if that's okay, Mr. Qualls.

For the most part, have you had the opportunity