IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * * *

SIAOSI VANISI, Appellant, vs. WILLIAM GITTERE, WARDEN, and AARON FORD, ATTORNEY GENERAL FOR THE STATE OF NEVADA. Respondents.	Supreme Court No. 78209 District Court No. 98CR0516 Volume 35 of 38

Electronically Filed
Sep 26 2019 04:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX

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

RENE L. VALLADARES
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EXHIBIT

EXHIBITS

EXHIBITS

EXHIBITS

3 Transcript of Proceedings, Trial Volume 5, *State of Nevada v. Vanisi,* Second Judicial District Court of Nevada, Case No. CR98-0516
January 15, 1999.......................................AA00524 – AA0550

7-8 Transcript of Proceedings, Trial Volume 5, *State of Nevada v. Vanisi,* Second Judicial District Court of Nevada, Case No. CR98-0516
September 24, 1999.................................AA01434 – AA01545

8 Transcript of Proceedings – Trial Volume 6, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
September 27, 1999.................................AA01546 – AA01690

8-9 Transcript of Proceedings – Trial Volume 7, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
September 28, 1999.................................AA01691 – AA01706

9 Transcript of Proceedings – Trial Volume 8, *State of Nevada v. Vanisi,* Second Judicial District Court of Nevada, Case No. CR98-0516
September 30, 1999.................................AA01707 – AA01753

9-10 Transcript of Proceedings – Trial Volume 9, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
October 1, 1999.......................................AA01754 – AA01984

10-11 Transcript of Proceedings – Trial Volume 10, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
October 4, 1999.......................................AA01985 – AA02267

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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circumstance could be applied to every murder, there was insufficient evidence to support the circumstance, and the instruction was improper. We conclude that this argument lacks merit. Contrary to Vanisi's assertion, the mutilation aggravating circumstance narrows the class of those eligible for the death penalty. It could not fairly be applied to every defendant who is eligible for the death penalty (all defendants convicted of first-degree murder). *Arave v. Creech*, 507 U.S. 463, 474 (1993) (explaining that an aggravating circumstance is constitutionally infirm "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty"). In particular, not all first-degree murders involve mutilation. By identifying the subclass of first-degree murderers who mutilate the victim's body as more deserving of death, the Legislature has "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Id.* at 476 (explaining that not all defendants eligible for the death penalty in Idaho (all first-degree murderers) are "cold-blooded" and that by identifying "the subclass of defendants who kill without feeling or sympathy as more deserving of death," Idaho "has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed"). Therefore, Vanisi failed to demonstrate that counsel was ineffective for failing to make a constitutional challenge to the validity of the aggravating circumstance.

We further reject his arguments that the aggravating circumstance was not supported by sufficient evidence or that the instruction was improper. This court has concluded that "Vanisi's assault went beyond the act of killing itself and resulted in mutilation of the victim's body." *Vanisi v. State*, 117 Nev. 330, 343, 22 P.3d 1164, 1173 (2001). Vanisi struck the victim at least 20 times about the head and stomped on his head after he had been felled. *Id.* at 342, 22 P.3d at 1172-73. The given instruction was largely consistent with instructions that have been approved. *Id.* at 343, 22 P.3d at 1173. Although it contained language that defined mutilation as "depraved physical abuse beyond the act of killing itself," that language was not prejudicial because there was compelling evidence of mutilation. *Id.* Therefore, Vanisi failed to demonstrate that postconviction counsel failed to raise a meritorious claim based on trial counsel's failure to object to the circumstance or instruction.

Jury instructions

Vanisi argues that postconviction counsel were ineffective for failing to assert that trial and appellate counsel were ineffective for failing to challenge several jury instructions.

First, Vanisi argues that postconviction counsel were ineffective for not arguing that appellate counsel was ineffective for neglecting to challenge the malice and anti-sympathy instructions. He asserts that the instructions prevented the jury from considering evidence related to his character and background and the malice instruction given during the guilt phase is impermissibly vague. Because we have repeatedly upheld these instructions, *see Byford v. State*, 116 Nev. 215, 232, 994 P.2d 700, 712 (2000) (upholding malice instruction where the jury is properly instructed on the presumption of innocence); *Sherman v. State*, 114 Nev. 998, 1011, 965 P.2d 903, 912 (1998) (upholding anti-sympathy instruction where trial court also instructs the jury to consider mitigating facts); *Leonard v. State*, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998) (upholding definition of malice referring to "heart fatally bent on mischief"), postconviction counsel's omission of this appellate-counsel claim does not fall below an objective standard of reasonableness.

Second, Vanisi argues that postconviction counsel were ineffective for neglecting to argue that trial and appellate counsel were ineffective for failing to assert that the district court should have instructed the jury that the aggravating circumstances had to outweigh the mitigating circumstances beyond a reasonable doubt. We disagree. The weighing of aggravating and mitigating circumstances is not a factual determination and thus it is not subject to the proof beyond a reasonable doubt standard. *Nunnery v. State*, 127 Nev. 749, 775-76, 263 P.3d 235, 253 (2011); *accord Kansas v. Carr*, ___ U.S. ___, 136 S. Ct. 633, 642 (2016) (concluding that the weighing of aggravating and mitigating circumstances is not subject to the beyond a reasonable doubt standard). Therefore, the district court did not err in denying this claim of ineffective assistance of postconviction counsel.

Appellate counsel's failure to challenge victim impact evidence

Vanisi asserts that postconviction counsel were ineffective for not arguing that appellate counsel was ineffective for failing to assert that the State introduced improper victim impact evidence during the penalty hearing. We conclude that the district court did not err in denying this claim. Most of the testimony by the challenged witnesses, whether those witnesses were related to the victim or not, was permissible. *See Sherman*, 114 Nev. at 1014, 965 P.2d at 914 (recognizing that evidence of the instant murder's impact "on the victim's family is relevant to show the damage done by the murder"); *Wesley v. State*, 112 Nev. 503, 519, 916 P.2d

793, 804 (1996) (recognizing that "this court has held that individuals outside the victim's family can present victim impact evidence"). The victim's wife briefly exceeded the bounds of permissible victim impact testimony by addressing whether Vanisi felt remorse and that he should be kept away from the community forever. *See Bosse v. Oklahoma*, ___ U.S. ___, 137 S. Ct. 1 (2016) (providing that admission of family members' opinions as to sentencing in capital case violates the Eighth Amendment); *Kaczmarek v. State*, 120 Nev. 314, 338, 91 P.3d 16, 33 (2004) (similar). However, the brief statement came in the midst of an extensive penalty hearing. Further, she did not advocate a specific sentence as several of the sentences Vanisi faced would have kept him out of the community forever. *See* 1995 Nev. Stat., ch. 168, § 1, at 257 (providing that murder in the first degree is punishable by death, life imprisonment without the possibility of parole, and life imprisonment with the possibility of parole). Considering the brevity of the improper testimony as compared to the entirety of the trial, the nature of the crimes, and the compelling evidence supporting the aggravating circumstances, Vanisi cannot demonstrate any error affected the outcome of the penalty hearing. *See Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) (providing erroneous admission of evidence harmless unless it had substantial and injurious effect on verdict). Therefore, he cannot demonstrate that postconviction counsel neglected to raise a meritorious claim.

Stun belt

Vanisi argues that postconviction counsel were ineffective for not arguing that trial and appellate counsel were ineffective for failing to challenge the use of the stun belt. We conclude that Vanisi did not demonstrate that trial counsel were deficient in failing to demand a hearing because *Hymon v. State*, 121 Nev. 200, 111 P.3d 1092 (2005), and the decisions upon which it relies concerning the court's scrutiny of the use of stun belts, *see Gonzalez v. Pliler*, 341 F.3d 897 (9th Cir. 2003); *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002); *People v. Mar*, 52 P.3d 95 (Cal. 2002), had not been decided until after Vanisi's trial. *See Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008) ("[C]ounsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel even where the theory upon which the court's later decision is based is available, although the court had not yet decided the issue." (internal quotation marks omitted)). Moreover, as he does not identify what information he could not communicate to counsel, Vanisi fails to demonstrate that he was prejudiced.[6] *See Hymon*, 121 Nev. at 208, 111 P.3d at 1098 ("'The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial – including those movements necessary for effective communication with counsel.'" (quoting *Durham*, 287 F.3d at 1305)). Therefore, the district court did not err in denying this claim of ineffective assistance of postconviction counsel.

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[6]Citing to a statement obtained from former jurors, Vanisi also asserted that the belt affected their perception of him because some jurors saw the restraints and believed he was dangerous and some noted his flat affect as a result. However, in evaluating prejudice, courts use an objective measure and do not consider the deliberative process of the sitting jury. *See* NRS 50.065(2) (providing that the court may not consider testimony or statements of juror concerning the effect of any evidence on a juror's mental processes).

Prosecutorial misconduct

Vanisi contends that postconviction counsel were ineffective for neglecting to argue that trial and appellate counsel failed to address prosecutorial misconduct. To show prejudice based on counsel's failure to object, Vanisi must demonstrate that it is reasonably probable that, but for trial and appellate counsel's error, the result of trial or direct appeal would have been different. *Strickland*, 466 U.S. at 694.

First, Vanisi contends that the prosecutor repeatedly aligned himself with the jury throughout his argument during the guilt phase of trial by using "we," "us," and "our" throughout his argument. However, Vanisi fails to specifically identify any single instance of the prosecutor's use of this language which he contends amounts to the State aligning itself with the jury, *see Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal."). Further, a review of the argument reveals that the prosecutor uses the language, such as the collective "we," to describe the prosecution as a whole or uses the terminology as a rhetorical device, which is permissible. *See Snow v. State*, 101 Nev. 439, 447-48, 705 P.2d 632, 638-39 (1985) (recognizing that prosecutor's use of "we" not improper when merely a rhetorical device). Moreover, the prosecutor did not persistently use "we," but many times used language that differentiated the State from the jury. As Vanisi failed to demonstrate that the arguments were improper, he failed to demonstrate that postconviction counsel omitted a meritorious challenge to trial or appellate counsels' performance. *See*

Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (stating counsel is not ineffective for failing to make futile objections).

Second, Vanisi argues that the prosecution improperly pointed out the absence of a mitigating circumstance. As it is misconduct for the prosecutor to point out the lack of evidence of mitigating circumstances, *see State v. DePew*, 528 N.E.2d 542, 557 (Ohio 1988) (providing that the State may not comment on mitigating factors not raised by defendant); *see also Turner v. Calderon*, 281 F.3d 851, 869 (9th Cir. 2002) (providing that a prosecutor may not argue that the lack of mitigating circumstances be treated as an aggravating circumstance), this comment was improper. Nevertheless, Vanisi cannot demonstrate that counsel were ineffective for not challenging the comment. Given the brevity of the comment, it did not "so infect[ ] the proceedings with unfairness as to make the results a denial of due process." *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002). Therefore, trial counsel's decision not to object and appellate counsel's decision not to challenge the comment were not objectively unreasonable. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103; *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir. 1994) (observing that decision whether to object to prosecutorial misconduct is a strategic one and "must take into account the possibility that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds"). As the trial- and appellate-counsel claims lack merit, postconviction counsel did not provide ineffective assistance by omitting them.

Third, Vanisi argues that the prosecution improperly asserted that justice requires the imposition of the death penalty. We disagree.

The prosecutor did not assert that the jury had a duty to return a verdict of death in violation of *Evans v. State*, 117 Nev. 609, 633, 28 P.3d 498, 515 (2001). Instead, the prosecutor argued that in a case like this, the defendant deserved the harshest sentence, which is permissible. *See Williams v. State*, 113 Nev. 1008, 1022, 945 P.2d 438, 446 (1997) (observing that "the prosecutor is permitted to argue that the only appropriate penalty is death"), *amended on other grounds by Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Therefore, postconviction counsel did not omit a meritorious trial- or appellate-counsel claim.

Voir Dire

Vanisi asserts that postconviction counsel were ineffective for failing to assert that trial counsel were ineffective during voir dire and appellate counsel were ineffective for not challenging district court rulings during voir dire. We conclude that, as Vanisi fails to show that any of the seated jurors were not impartial, *see Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (stating that "[i]f the impaneled jury is impartial, the defendant cannot prove prejudice" resulting from the district court's limitation of voir dire), he fails to demonstrate that he was prejudiced by trial counsel's performance or appellate counsel's failure to raise any jury-selection issue on appeal. In particular, Vanisi identifies only one sitting juror who he claims was disposed to find him guilty or impose the death penalty. However, the record belies that claim. Although the juror acknowledged that it would be difficult to serve as a juror as she had relatives in law enforcement, she stated that she could try and put these feelings aside and render judgment based solely on the evidence. She could also set aside what she learned about the case in the news and base her decision solely on the evidence at trial. Although she admitted that she may give a police officer's testimony more weight, she believed that the longer she considered her role as juror, the "more impartial" she became. When questioned about the death penalty, she stated that she believed death to be an appropriate penalty for the murder of a police officer, but, she would not close her mind to further evidence or instructions of law. As Vanisi failed to demonstrate that postconviction counsel neglected to raise meritorious claims, the district court did not err in denying this claim.

Venue

Vanisi argues postconviction counsel were ineffective for failing to claim that trial counsel were ineffective for not renewing their motion to change venue and appellate counsel was ineffective for not arguing the error on appeal. We conclude that Vanisi fails to demonstrate deficiency or prejudice as there was no basis for a change of venue. Some potential jurors noted that they had a passing familiarity with the facts of the case through media reports. However, the trial record did not indicate that the media had become so saturated with news of Vanisi's case as to overcome the presumption of impartiality. Notably, no seated juror indicated that the publicity would prevent them from acting impartially. Therefore, any effort to change the venue would not have met with success. *See Sonner v. State*, 112 Nev. 1328, 1336, 930 P.2d 707, 712 (1996) (providing that a defendant seeking to change venue must not only present evidence of inflammatory pretrial publicity but must demonstrate actual bias on the part of the jury empaneled), *modified on rehearing on other grounds by* 114 Nev. 321, 955 P.2d 673 (1998). Accordingly, Vanisi failed to demonstrate that postconviction counsel omitted a meritorious claim.

Probable cause determination

Vanisi argues that postconviction counsel were ineffective for neglecting to claim that trial and appellate counsel failed to argue that the lack of a probable cause determination regarding the aggravating circumstances rendered his sentence unconstitutional. The Nevada Constitution does not mandate that aggravating circumstances be charged in an indictment or information and subjected to a pretrial probable cause determination.[7] Therefore, it naturally follows that they need not be subjected to a pretrial probable cause determination. Accordingly, Vanisi failed to demonstrate that trial and appellate counsel acted deficiently and that postconviction counsel neglected to raise a meritorious claim.

Photographs

Vanisi contends that postconviction counsel were ineffective for not arguing that trial and appellate counsel failed to argue that the trial court erred in admitting gruesome photographs. We conclude that this claim lacks merit. Although the autopsy photographs are gruesome, trial and appellate counsel would not have been able to demonstrate that the district court abused its broad discretion in admitting them because

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[7]In federal prosecutions, the government is required to charge aggravating circumstances in the indictment based on the Fifth Amendment's grand jury clause, *see United States v. Cotton*, 535 U.S. 625, 627 (2002), however, this clause does not apply to the states, *see Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

the evidence was relevant and not unfairly prejudicial. *See Byford*, 116 Nev. at 231, 994 P.2d at 711; *see also Libby v. State*, 109 Nev. 905, 910, 859 P.2d 1050, 1054 (1993) (providing that even gruesome photographs may be admitted "as long as their probative value is not substantially outweighed by their prejudicial effect"), *vacated on other grounds*, 516 U.S. 1037 (1996). The photographs assisted the medical examiner in testifying about Sergeant Sullivan's cause of death and the manner in which he received the injuries. Further, they were necessary to prove the mutilation aggravating circumstance. Because there were no grounds upon which to challenge the admission of the photographs, trial and appellate counsel were not deficient. Consequently, the district court did not err by denying this claim of ineffective assistance of postconviction counsel.

Cumulative error

Vanisi argues that the district court erred in denying his claim that the cumulative effect of errors by trial, appellate, and postconviction counsel rendered his conviction invalid. Vanisi has cited no authority that requires this court to consider the cumulative effect of defaulted claims of ineffective assistance of trial and appellate counsel. As we have found only one error related to postconviction counsel, there is nothing to cumulate.

Fundamental miscarriage of justice

Vanisi argues that he can avoid the procedural bars because he is actually innocent. When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. *Berry v. State*, 131 Nev., Adv. Op. 96, 363 P.3d 1148, 1154 (2015); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). When claiming a fundamental miscarriage based on actual innocence, the petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. In this context, "actual innocence means factual innocence, not mere legal insufficiency." *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal quotation marks and alteration omitted). This requires the petitioner to present new evidence of his innocence. *See House v. Bell*, 547 U.S. 518, 537 (2006) ("[A] gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthiness eyewitness accounts, or critical physical evidence—that was not presented at trial.'" (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)); *Schlup*, 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.").

Actual innocence of first-degree murder

Vanisi contends that he is actually innocent of first-degree murder as newly discovered psychological evidence demonstrates that he could not have deliberately committed the murder but instead was suffering from delusional thinking.

We conclude that Vanisi failed to make a colorable showing of actual innocence. The evidence submitted with the petition suggests that Vanisi's mental health deteriorated several years before the crime. He engaged in delusional and bizarre behavior. Professionals opined that Vanisi appeared to have had a psychotic break, developed schizoaffective disorder, and was suffering from a state of chronic mental illness at the time of the killing. They did not believe him to have been "fully sane" at the time of the crime. However, the evidence produced at trial supports a conclusion that the murder was premeditated. Vanisi repeatedly told people that he planned to kill a police officer. He purchased an ax, and during that purchase, told those who were with him that he planned to use it to kill a police officer. Vanisi later attacked the victim, a UNR police officer, after he completed a traffic stop. These actions do not indicate that Vanisi's psychological issues rendered him unable to know the nature and quality of his acts or that he did not have the capacity to determine right from wrong. *Clark v. State*, 95 Nev. 24, 27-28, 588 P.2d 1027, 1029 (1979). Therefore, the district court did not err in dismissing his petition as procedurally barred.

Actual innocence of the death penalty

Vanisi argues that the district court erred in denying his claim that he is actually innocent of the death penalty. He asserts that the mutilation aggravating circumstance was improperly applied to his case. Additionally, he asserts that had prior counsel presented mitigation evidence, he would not have been sentenced to death.

We conclude that Vanisi did not demonstrate a fundamental miscarriage of justice. For Vanisi to succeed on his argument that he is actually innocent of the death penalty, all of the aggravating circumstances found by the jury must be deemed invalid—as long as one aggravating circumstance remains, he is death eligible. *See Lisle v. State*, 131 Nev., Adv. Op. 39, 351 P.3d 725, 731-33 (2015); *see also* NRS 200.030(4)(a). Even if this court were to agree with Vanisi's arguments, only one of the three aggravating circumstances would be invalidated. Because there would be two remaining aggravating circumstances, the actual-innocence claim fails. As the remainder of the claim relates to the mitigation evidence, it is not an appropriate basis for an actual innocence claim. *See Lisle,* 131 Nev., Adv. Op. 39, 351 P.3d at 733-34.

Having considered Vanisi's contentions and concluding that some relief is warranted, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, C.J.
Cherry

Douglas, J.
Douglas

Gibbons, J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

SUPREME COURT
OF
NEVADA

(O) 1947A

cc: Hon. Connie J. Steinheimer, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,
Appellant,
vs.
RENEE BAKER, WARDEN; AND THE STATE OF NEVADA,
Respondents.

Supreme Court No. 65774
District Court Case No. CR980516

FILED
JAN 05 2018
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

REMITTITUR

TO: Jacqueline Bryant, Washoe District Court Clerk
Pursuant to the rules of this court, enclosed are the following:

Certified Copy of Opinion/Order
Receipt for Remittitur
Enclosed Original Exhibits: 146 & 154.

DATE: December 26, 2017

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

cc (without enclosures):
Hon. Connie J. Steinheimer, District Judge
Attorney General/Carson City \ Adam Paul Laxalt, Attorney General
Federal Public Defender/Las Vegas \ Rene L. Valladares
Federal Public Defender/Las Vegas \ Randolph M. Fiedler
Federal Public Defender/Las Vegas \ Heather Fraley, Asst. Federal Public Defender
Washoe County District Attorney \ Terrence P. McCarthy, Deputy District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on DEC 27 2017

District Court Clerk

RECEIVED
DEC 29 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

17-44447

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI, Appellant, vs. RENEE BAKER, WARDEN; AND THE STATE OF NEVADA, Respondents.	**Supreme Court No. 65774** District Court Case No. CR980516

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

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

JUDGMENT

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

"ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 28th day of September, 2017.

JUDGMENT

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

"Rehearing Denied."

Judgment, as quoted above, entered this 29th day of November, 2017.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this December 26, 2017.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk

CODE #1260
CHRISTOPHER J. HICKS
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P.O. Box 11130
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IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

SIAOSI VANISI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_________________________/

Case No. CR98-0516

Dept. No. 4

APPLICATION FOR ORDER TO PRODUCE PRISONER

COMES NOW, Respondent herein (OR the State of Nevada), by and through CHRISTOPHER J. HICKS, District Attorney of Washoe County, by JENNIFER P. NOBLE, Appellate Deputy, and alleges as follows:

1. That the above Petitioner, SIAOSI VANISI #63376, is presently incarcerated at the Ely State Prison, Ely, Nevada.

2. That the above SIAOSI VANISI is scheduled for a post-conviction hearing before the Second Judicial District Court beginning on October 1, 2018, at 10:00 a.m. and that is anticipated to last for four weeks.

/ / /

WHEREFORE, Applicant prays that an Order be made ordering the appearance of the said SIAOSI VANISI before the Second Judicial District Court, and from time to time thereafter at such times and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper in the premises, and directing the execution of said Order by the Warden of the Ely State Prison, Ely, Nevada.

AFFIRMATION

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

DATED: March 20, 2018.

CHRISTOPHER J. HICKS
District Attorney

By /s/JENNIFER P. NOBLE
JENNIFER P. NOBLE
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on March 20, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Randolph Fiedler, Assistant Federal Public Defender

/s/Margaret Ford
MARGARET FORD

F I L E D
Electronically
CR98-0516
2018-03-20 01:14:51 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6586252 : cvera

CODE 1250

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SIAOSI VANISI

Plaintiff,

vs.

Case No. CR98-0516

THE STATE OF NEVADA,

Dept. No. 4

Defendant.

/

APPLICATION FOR SETTING

TYPE OF ACTION: POST-CONVICTION

MATTER TO BE HEARD: EVIDENTIARY HEARING

Date of Application : 3/20/18 Made by: DEFENDANT/RESPONDENT

Plaintiff or Defendant

COUNSEL FOR PLAINTIFF: Randolph Fiedler, Assistant Federal Public Defender

COUNSEL FOR DEFENDANT: Jennifer P. Noble, Appellate Deputy

Instructions: Check the appropriate box. Indicate who id requesting the jury. Estimated No. Of Jurors:

☐ Jury Demanded by (Name): __________

☑ No Jury Demanded by (Name): __________

Estimated Duration of Trial: 4 WEEKS

Attorney(s) for Plaintiff	Attorney(s) for Defendant
Randolph Fiedler	Jennifer P. Noble
via e-mail	via e-mail

Motion - No.	Setting at	on the	day of	20
Evidentiary Hrg	10:00 am	1st	October	2018

Trial - No.	Setting at	on the	day of	20

JUD 500 (Rev 3/03)

CODE #3340
CHRISTOPHER J. HICKS
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P.O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

SIAOSI VANISI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

______________________________/

Case No. CR98-0516

Dept. No. 4

ORDER TO PRODUCE PRISONER

IT APPEARING to the satisfaction of the above-entitled Court that it is necessary that the Petitioner above named, SIAOSI VANISI #63376, presently incarcerated in the Ely State Prison, Ely, Nevada, be brought before the Second Judicial District Court for a post-conviction hearing in the above-entitled action.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Ely State Prison, Ely, Nevada, bring the said SIAOSI VANISI before the Second Judicial District Court on October 1, 2018, at 10:00 a.m., for a post-conviction hearing in the above-entitled action that is anticipated to last for four weeks, and from time to time thereafter

/ / /

at such time and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper in the premises.

DATED this 22 day of March, 2018.

Connie J. Steinheimer
DISTRICT JUDGE

2175

RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
Nevada Bar No. 12577
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Attorneys for Petitioner

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

SIAOSI VANISI, Petitioner, v. TIMOTHY FILSON, Warden, et al., Respondents.	Case No. CR98-P0516 Dept. No. IV (Death Penalty Habeas Corpus Case) **MOTION FOR RECONSIDERATION**

Petitioner Siaosi Vanisi hereby moves this Court for reconsideration of its March 23, 2018, Order to Produce Prisoner. This Motion is based upon the attached memorandum of points and authorities and the entire file in this matter.

DATED this 2nd day of April, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

POINTS AND AUTHORITIES

On March 20, 2018, the State filed an Application for Order to Produce Prisoner to secure Vanisi's attendance at the evidentiary hearing set for October 1, 2018, in this Court. Before undersigned counsel were able to timely respond to the Motion within the ten day period provided by Second Judicial District Rule 12.2, on March 22, 2018, this Court signed the State's proposed Order. The Order was entered and transmitted to undersigned counsel on March 23, 2018.

Vanisi has informed undersigned counsel that he wishes to waive his appearance at the October 1, 2018, evidentiary hearing. Undersigned counsel will obtain a signed Waiver of Appearance from Vanisi and file it with the Court within thirty days.[1] Undersigned counsel filed similar Waivers of Appearance by Vanisi on two prior occasions, for evidentiary hearings set in this Court for February 23, 2012, and December 5-6, 2013. See Exhibits 1 & 2. This Court permitted Vanisi to waive his appearance both times. See Exhibits 3 & 4.

Undersigned counsel therefore respectfully move the Court to rescind its Order to Produce Prisoner or, in the alternative, hold it in abeyance until undersigned counsel have obtained and filed a signed Waiver of Appearance from Vanisi.

DATED this 2nd day of April, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

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[1] Undersigned counsel has a visit with Vanisi scheduled for April 9, 2018.

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding MOTION FOR RECONSIDERATION filed in the District Court Case No. CR98-P0516 does not contain the social security number of any person.

DATED this 2nd day of April, 2018.

/s/ Randolph M. Fielder
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 2nd day of April, 2018, a true and correct copy of the foregoing MOTION FOR RECONSIDERATION 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:

Jennifer P. Noble
Appellate Deputy
Nevada Bar No. 9446
P.O. Box 11130
Reno, NV 89520-0027

Joseph R. Plater
Appellate Deputy
Nevada Bar No. 2771
P.O. Box 11130
Reno, NV 89520-0027

/s/ Sara Jelinek
An employee of the Federal Public Defenders Office

Exhibit List

Exhibit 1	Vanisi v. McDaniel, et al., Case No. CR98-P0516, Petitioner's Waiver of Appearance, January 24, 2012
Exhibit 2	Vanisi v. McDaniel, et al., Case No. CR98-P0516, Waiver of Petitioner's Presence, November 15, 2013
Exhibit 3	Vanisi v. McDaniel, et al., Case No. CR98-P0516, Order on Petitioner's Presence, February 7, 2012
Exhibit 4	Vanisi v. McDaniel, et al., Case No. CR98-P0516, Order, February 7, 2014

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Jacqueline Bryant
Clerk of the Court
Transaction # 6608259 : cvera

EXHIBIT 1

EXHIBIT 1

4270

RENE L. VALLADARES
Federal Public Defender
State Bar No. 11479
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Assistant Federal Public Defender
Nevada Bar No. 11027C
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Attorneys for Petitioner

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

SIAOSI VANISI, Petitioner, vs. E.K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. CR98-P0516 Dept. No.: IV (Death Penalty Habeas Corpus Case)

PETITIONER'S WAIVER OF APPEARANCE

Petitioner SIAOSI VANISI, through counsel, submits the attached declaration waiving petitioner's personal presence at the post-conviction hearing to be conducted before this Court on February 23, 2012.[1] The undersigned does hereby affirm that this document does not contain the social security number of any person.

RENE L. VALLADARES
Federal Public Defender

Tiffani D. Hurst
TIFFANI D. HURST
Assistant Federal Public Defender
Attorney for Petitioner

1 A proposed Order has been sent to the court for approval, VIA U.S. Mail.

DECLARATION

I, SIAOSI VANISI, declare as follows:

1. I am the petitioner in the case entitled Siaosi Vanisi v. E.K. McDaniel, et al., Washoe County Second Judicial Court Case No. CR98-P0516. I have personal knowledge of all facts stated in this declaration and know them to be true and correct. Those facts which are based on information and belief are also believed to be true and correct by myself.

2. I am currently housed in Ely State Prison in Ely, Nevada, on death row and have been housed there since my conviction in 1999.

3. Based upon the overcrowded condition of the prison, if I were to attend a post-conviction hearing in Washoe County in 2012 (or after), the cell that I currently occupy would be given to another inmate and upon my return to Ely State Prison, and I would not be returned to my prior cell but would be housed in a section which is constantly locked down. I would be housed in that section until another inmate on death row either leaves his cell to go to court or commits an offense which the prison determines requires the punishment of being locked down. I could be housed in the locked down section for an indeterminate period, from months up to years.

4. Accordingly I request this Court waive my personal presence at the hearing and conduct the hearing in my absence. I wish to retain, however, my right to be present at any evidentiary hearings which this Court may order in the future, as the importance of being present for testimony outweighs any concerns regarding my housing. In other words, by waiving my right to attend the February 23, 2012 hearing, I do not wish to waive my right to be present at later hearings.

5. The Federal Public Defender's Office is my counsel in this case. I have discussed my case at length with my counsel, and I believe that my counsel can adequately represent my interests at the post-conviction hearing without my presence, and I authorize counsel to do so.

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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 at Ely, Nevada, on January 27, 2012.

Siaosi Vanisi

SIAOSI VANISI

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 1st day of February, 2012, a true and correct copy of the foregoing **PETITIONER'S WAIVER OF APPEARANCE** 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:

Richard A. Gammick
Washoe County District Attorney
dgammick@da.washoecounty.us

Terrence McCarthy
Washoe County District Attorney
tmccarth@da.washoecounty.us

Katrina Manzi
An Employee of the Federal Public Defender

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Jacqueline Bryant
Clerk of the Court
Transaction # 6608259 : cvera

EXHIBIT 2

EXHIBIT 2

RENE L. VALLADARES
Federal Public Defender
State Bar No. 11479
TIFFANI D. HURST
Assistant Federal Public Defender
State Bar No. 11027C
GARY TAYLOR
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(702) 388-6577
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Attorneys for Petitioner

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

SIAOSI VANISI, Petitioner, vs. E. K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. CR98-0516 Dept. No.: IV (Death Penalty Habeas Corpus Case)

WAIVER OF PETITIONER'S PRESENCE AT EVIDENTIARY HEARING

Petitioner Siaosi Vanisi herein waives his personal appearance at the evidentiary hearing previously scheduled in the above-entitled and numbered cause. Specifically, Mr. Vanisi would inform the Court as follows:

1. Mr. Vanisi is aware and understands that the Court scheduled a limited evidentiary hearing in this cause wherein the Court would hear testimony from his state habeas attorneys, Scott W. Edwards and Thomas Qualls, and that Mr. Vanisi would have an opportunity to testify. The hearing is currently scheduled for December 5-6, 2013.

2. Mr. Vanisi is aware and understands that he has the right to be present at the limited evidentiary hearing to hear the testimony and arguments before the Court, and to give testimony.

3. Mr. Vanisi discussed the limited evidentiary hearing, including the

testimony of his state habeas attorneys, with undersigned counsel. Mr. Vanisi further discussed with undersigned counsel his right to be present at any hearing in this cause.

4. Mr. Vanisi informed undersigned counsel and, through his signature below, informs the Court and opposing counsel that he does not wish to be present at the limited evidentiary hearing currently scheduled for December 5-6, 2013. Mr. Vanisi specifically waives his right to be present at the limited evidentiary hearing. Mr. Vanisi does not believe that his absence will affect the fairness of the hearing. See Kentucky v. Stincer, 482 U.S. 730, 745 (1987); see also State v. Sargent, 122 Nev. 210, 217, 128 P.3d 1052, 1054-5 (2006).

WHEREFORE, Mr. Vanisi asks that this Waiver of Petitioner's Presence at Evidentiary Hearing be accepted and that the hearing proceed in his absence.

DATED this 13 th day of November, 2013.

Siaosi Vanisi
SIAOSI VANISI

RENE L. VALLADARES
Federal Public Defender

Tiffani D Hurst
TIFFANI D. HURST
Assistant Federal Public Defender
Attorney for Petitioner

Gary Taylor
GARY TAYLOR
Assistant Federal Public Defender
Attorney 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 15th day of November, 2013, a true and correct copy of the foregoing WAIVER OF PETITIONER'S PRESENCE AT EVIDENTIARY HEARING 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:

Richard A. Gammick
Washoe County District Attorney
dgammick@da.washoecounty.us

Terrence McCarthy
Washoe County District Attorney
tmccarth@da.washoecounty.us

Katrina Manzi
An Employee of the Federal Public Defender

EXHIBIT 3

EXHIBIT 3

FILED
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02-07-2012:09:00:00 AM
Joey Orduna Hastings
Clerk of the Court
Transaction # 2747631

3105/4270

RENE L. VALLADARES
Federal Public Defender
State Bar No. 11479
TIFFANI D. HURST
Assistant Federal Public Defender
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Illinois Bar No. 6278909
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Attorneys for Petitioner

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

SIAOSI VANISI, Petitioner, vs. E.K. McDANIEL, Warden, and CATHERINE CORTEZ MASTO, Attorney General of the State of Nevada, Respondents.	Case No. CR98-P0516 Dept. No.: IV **ORDER** (Death Penalty Habeas Corpus Case)

ORDER ON PETITIONER'S WAIVER OF APPEARANCE

This Court finds that Petitioner SIAOSI VANISI, by and through counsel, voluntarily and knowingly waived his appearance at his post-conviction hearing scheduled for February 23, 2012. This Court hereby rescinds and withdraws the Order to Produce Prisoner, signed January 20, 2012, to transport Mr. Vanisi to attend his post-conviction hearing on or before February 23, 2012. As Mr. Vanisi is currently incarcerated in the Ely State Prison, it is hereby ordered that the Warden of the Nevada State Prison, Carson City, Nevada and the Warden of Ely State Prison in Ely, Nevada shall NOT bring Siaosi Vanisi before this Court on February 23, 2012.

DATED: February 6, 2012

Connie J. Steinheimer
District Judge Connie Steinheimer

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Jacqueline Bryant
Clerk of the Court
Transaction # 6608259 : cvera

EXHIBIT 4

EXHIBIT 4

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2014-02-07 02:42:40 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4296213

CODE 3370

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

SIAOSI VANISI,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

______________________________/

Case No. CR98-0516

Dept. No. 4

ORDER

On February 23, 2012, Oral Arguments on the Motion to Dismiss Petition for Writ of Habeas Corpus (Post Conviction) were presented to the Court. At such hearing, the Court determined that it was necessary for the Petitioner to present testimony and evidence to the Court in order to overcome the procedural time-bar requirements outlined in the Motion to Dismiss. On December 5, 2013, and December 6, 2013, an evidentiary hearing was held wherein the Petitioner waived his appearance and was represented by Deputies Federal Public Defender, Gary Taylor, Esq., and Tiffani Hurst, Esq., and the State of Nevada was represented by Chief Deputy District Attorney Terrence McCarthy, Esq. At the conclusion of the evidentiary hearing, the Court took the matter under advisement.

The Court having reviewed the file in its entirety, and having considered the testimony and evidence presented at the evidentiary hearing is prepared to render its decision.

Therefore, with good cause appearing,

IT IS HEREBY ORDERED that counsel for the Petitioner and counsel for the State appear telephonically before the Court on March 4, 2014 at 11:00 a.m. in order for the Court to render its decision on the record.

Dated this 7 day of February, 2014.

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 7th day of February, 2014, I filed the attached document 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:

_____**Personal delivery to the following: [NONE]**

X **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

Terrence McCarthy, Esq.
Chief Deputy District Attorney

Gary Taylor, Esq.
Tiffani Hurst, Esq.
Deputies Federal Public Defender

_____**Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

_____ **Placing a true copy thereof in a sealed envelope for service via:**

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

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

_____ Inter-Office Mail **[NONE]**

DATED this 7th day of Febuary, 2014.

[signature]

CODE No. 2300
CHRISTOPHER J. HICKS
#7747
P. O. Box 11130
Reno, Nevada 89520-0027
(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.

TIMOTHY FILSON, WARDEN,

Respondent.

______________________________/

Case No. CR98-0516

Dept. No. 4

STATE'S OPPOSITION TO MOTION FOR RECONSIDERATION AND OBJECTION TO PETITIONER'S WAIVER OF ATTENDANCE AT EVIDENTIARY HEARING

COMES NOW, the State of Nevada, by and through Jennifer P. Noble, Deputy District Attorney, and opposes this "Motion for Reconsideration." This Opposition is based on the pleadings and papers on file with this Court, and the following points and authorities.

POINTS AND AUTHORITIES

This Court has ordered that Vanisi be transported from the Ely State Prison for the evidentiary hearing, set to begin October 1, 2018. Through counsel, Vanisi has asked this Court to reconsider that order, indicating that he wishes to waive his right to appear for the entirety of the hearing. The State opposes the Motion for Reconsideration, and

/ / /

asserts that a mere written waiver completed at the prison is insufficient to protect the record.

In his 2012 declaration attached to the motion, Vanisi asserts that he does not want to attend the evidentiary hearing because he will lose his housing and privileges at the Ely State Prison. While that may have been true in 2012, the State has been informed by prison officials that this is simply not the case now. *See* Declaration of Housing Coordinator Donald Southworth, attached as Exhibit 1 hereto. To the contrary, if Vanisi were to attend the entirety of the evidentiary hearing, which is scheduled for most of the month of October, he would be displaced for less than one month upon his return, and retain the same privileges he enjoys now. Exhibit 1.

Alternatively, the State suggests that Vanisi could simply make one court appearance whereat he is orally canvassed in open court about the waiver. If the Court is satisfied as to the validity of his waiver, Vanisi could return to the prison. If the Court chooses to modify its Order to Produce in this way, Vanisi would not have to move from his prison unit at all, and would only be away from the Ely State Prison for a few days. Exhibit 1.

In capital cases, a petitioner is entitled to the appointment of counsel in the first post-conviction proceeding, NRS 34.820(1)(a), and to the effective assistance of that counsel, *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997) (providing that a post-conviction "petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel"). Because the Nevada Supreme Court has found that first post-conviction counsel were ineffective for failing to challenge trial counsel's performance on the issue of mitigation, Vanisi is entitled to effective assistance of counsel in the upcoming October hearing. The proceedings are estimated to take four weeks, with approximately 30 witnesses to be called by Vanisi's current counsel.

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Vanisi may wish to be present to assist in informing his attorneys as to issues arising during direct and cross examination of his witnesses and the State's witnesses. To be sure, Vanisi has evinced a desire for a high level of input and involvement in earlier proceedings. Transcripts filed by Vanisi's counsel in support of his most recent appeal include transcripts of various *in-camera* hearings, to which the State did not previously have access. In those hearings, the Court attempts to clarify issues regarding representation by counsel with Vanisi. Having reviewed those transcripts, the State submits that Vanisi's colloquies with the Court reveal that Vanisi is intelligent. They also reveal that he is at times evasive when questioned by the Court about issues related to his rights, and waiver of those rights. *See* Transcript of June 23, 1999 Pre-trial Motions Hearing, *In-Camera* pp. 4-19 (Vanisi asserts a conflict with trial counsel and claims counsel has deprived him of information he needs to make decisions). [1]

Allowing Vanisi to waive his right to appear at this hearing merely by signing a declaration invites further challenges to the effectiveness of current post-conviction counsel. Specifically, the State is concerned with Vanisi later claiming that he did not understand the written waiver of appearance, asserting that his waiver was involuntary, or claiming that counsel did not advise him of information he needed to make an informed waiver. At minimum, requiring Vanisi to be orally canvassed in open court about his desire to waive presence at these proceedings is necessary to ensure his waiver is valid.

Based on the foregoing, the State respectfully requests that the Motion for Reconsideration be denied, and suggests that if this Court modifies its order at all, it

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[1] Because these proceedings were sealed by the Court, but filed in connection with Vanisi's last appeal, the State has had the opportunity to review them. The transcripts are not attached hereto as the State believes this Court has not unsealed them. The State can provide the copies filed by Vanisi's counsel in connection with his last appeal, if the Court so orders.

would be to allow for an in-court canvass of Vanisi in order to ensure he is making an informed decision, and truly desires to waive his appearance at the upcoming hearing.

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: April 11, 2018.

CHRISTOPHER J. HICKS
District Attorney

By /s/ JENNIFER P. NOBLE
JENNIFER P. NOBLE
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on April 11, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Randolph Fiedler, Assistant Federal Public Defender

/s/ Margaret Ford
MARGARET FORD

<u>INDEX OF EXHIBITS</u>

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2018-04-11 11:30:05 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6623388 : yviloria

EXHIBIT 1

EXHIBIT 1

I, DONALD SOUTHWORTH, declare as follows:

1. I am a Correctional Caseworker Specialist II currently assigned as the Housing Coordinator at Ely State Prison.

2. I have reviewed the January 24, 2012 declaration of SIAOSI VANISI, inmate #63376, regarding VANISI's concerns about the effect of transportation to Washoe County on his prison housing situation.

3. In particular, I have reviewed paragraph 3 of VANISI's declaration, which indicates that if he were to be transported to attend a post-conviction hearing in Washoe County, he would "not be returned to my prior cell but would be housed in a section which is constantly locked down. I could be housed in the locked down section for an indeterminate period, from months up to years."

4. Currently, there are approximately 65 death row inmates housed in Unit 1 at Ely State Prison, which is a Maximum Security Unit that houses condemned men. Unit 1 is divided into two sections, 1A and 1B.

5. Unit 1A houses inmates whose disciplinary records merit additional privilege such as group tier time, group outdoor time and access to exercise equipment. Unit 1A has a maximum capacity of 48 inmates. Section 1B holds the remainder of the inmates, many of whom have reduced privileges. In both 1A and 1B, inmates have their own units and do not share units.

6. Based on his recent disciplinary record, VANISI is currently housed in section 1A.

7. If VANISI is required to make a one day court appearance, it is very unlikely that he would be displaced from his current unit upon his return. For example, if VANISI appears on October 1, 2018, he could be transported to Washoe County for the court appearance and transported back to Ely State Prison less than a week later.

8. Alternatively, if VANISI is transported to Washoe County for the October 2018 evidentiary hearing, and stayed in Washoe County for the month of October, an available cell in Unit 1A may not be immediately available upon his return. If a cell in Unit 1A is not available upon VANISI's return to the prison, he will be temporarily housed in 1B. Based on the prison's current population and other factors, I estimate VANISI's wait for a unit in 1A will be less than one month.

9. If VANISI is temporarily housed in 1B, he will still retain "cross-over privileges," meaning that privileges available to section 1A inmates will still be accessible to him.

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 at Ely, Nevada, on April 6th, 2018.

DONALD SOUTHWORTH

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Jacqueline Bryant
Clerk of the Court
Transaction # 6631256 : pmsewell

3790

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Attorneys for Petitioner

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

SIAOSI VANISI,

Petitioner,

v.

TIMOTHY FILSON, Warden, et al.,

Respondents.

Case No. CR98-P0516
Dept. No. IV

REPLY TO OPPOSITION TO MOTION FOR RECONSIDERATION AND OBJECTION TO PETITIONER'S WAIVER OF ATTENDANCE AT EVIDENTIARY HEARING

(Death Penalty Habeas Corpus Case)

Petitioner Siaosi Vanisi hereby replies to the State's Opposition to Motion for Reconsideration and Objection to Petitioner's Waiver of Attendance at Evidentiary

/ / /

Hearing. This Reply is based upon the attached memorandum of points and authorities and the entire file in this matter.

DATED this 16th day of April, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

I. ARGUMENT

A. The State Has Not Demonstrated That a Written Waiver Is Inadequate

The State presently argues that "a mere written waiver completed at the prison is insufficient to protect the record." In so arguing, the State ignores the fact that this Court in this case has twice previously accepted written Waivers of Appearance by Vanisi, without objection from the State. See Mot. Exs. 1, 2. This Court has previously relied on such written waivers and found Vanisi's written waivers of presence to be appropriate. See Mot. Ex. 3. In that this Court has previously been confronted with the exact same factual scenario as presently presented, and at that time the State twice failed to lodge the instant objection, Vanisi pleads that the State is estopped from making the argument that a written waiver is presently insufficient.

The State further presents no law to support its argument that a written waiver of in-person attendance is insufficient, indeed it does not even attempt to. The State cites to Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997), but Crump merely holds that where a habeas petitioner is statutorily provided counsel, that petitioner then enjoys the right to the effective assistance of appointed counsel. Id. at 303, 253. Neither Crump, nor any other Nevada case, holds that a written waiver of presence for purposes of a habeas petitioner's evidentiary hearing is insufficient, or that any cause of action therefore lies.

The State also describes this as a "mere written waiver"–the waiver in question comprehensively sets forth the rights Mr. Vanisi possesses and stipulates that he gives them up after consulting with his attorney. It is signed under penalty of perjury and accompanied by undersigned counsel's representation as an officer of the court that Vanisi was properly advised of the rights he is waiving. See Ex. 1 (Waiver of Appearance signed April 9, 2018).

The State's concern seems to be motivated out of a desire to "protect the record." See Opp. at 2. The State claims that nothing would stop Vanisi from, one day, "claiming that he did not understand the written waiver of appearance, asserting that his waiver was involuntary, or claiming that counsel did not advise of information he needed to make an informed waiver." Id. at 3. However, the State does not explain how an in-court colloquy is any greater guarantee against these speculative concerns. Following an in-court colloquy by this Court, Vanisi could–speculatively–make the exact same claims that the waiver was not knowingly, voluntarily, or intelligently made. Thus, the State fails to plead how an in-person waiver of rights is any more effective at stopping speculative challenges than a written waiver signed after thorough consultation with undersigned counsel.

Undersigned counsel therefore respectfully moves the Court to rescind its Order to Produce Prisoner.

B. The State Has Not Explained How It Would Ensure Vanisi's Mental Well-Being and Continued Medication Regimen If Compelled to Appear in Court

As this Court is aware from the Petition and exhibits filed during these state habeas proceedings, Vanisi suffers from a schizo-affective disorder and his symptoms of psychosis are managed only by a stringent and regular medication regimen. Vanisi has offered uncontroverted proof that a structured environment is beneficial to his mental health. Removal from his cell and daily routine, and transportation to an unfamiliar facility, would pose a substantial disruption to Vanisi and deleterious effects on his mental health are virtually guaranteed. These factors are completely unaddressed by the State.

During Vanisi's pretrial incarceration in the Washoe County Jail, his mental health symptoms caused him to be so disruptive to jail operations that the jail requested he be moved to a different facility. The State's pleadings are silent as to the measures that the Washoe County Jail intends, and is realistically able, to implement to ensure the same does not happen again.

In its efforts to compel Vanisi to appear in this Court, the State obtained a declaration from Donald Southworth, the Housing Coordinator at Ely State Prison. Opp. Ex. 1. Southworth stated that Vanisi "could be transported to Washoe County for the court appearance and transported back to Ely State Prison less than a week later." Id. at ¶7. Southworth's declaration does not indicate how Ely State Prison or the Washoe County Jail would arrange for continued monitoring of Vanisi's medication regimen, which requires strict adherence to time and content of treatment, during transportation between Ely and Washoe County and during a multi-day stay at the Washoe County Jail.

Southworth's declaration also fails to address the conditions in which Mr. Vanisi would be confined while he is being held in Washoe County. Vanisi is fearful that if incarcerated in the Washoe County Jail, even for a short time, he would (due to his sentence and/or past disciplinary history and/or the nature of the crime for which he is incarcerated) be housed in solitary confinement—a setting which is universally acknowledged as having deleterious consequences to the mental health of inmates, with especially severe decompensation being seen by persons suffering from schizoid-type disorders. See, e.g. "Psychiatric Effects of Solitary Confinement," Wash. Univ. Journal of Law & Policy, Vol. 22 (Jan. 2006).

To the extent that the State's objection to a written waiver is motivated by a desire to "protect the record," Vanisi argues that his continued mental health, and the safety of himself and those around him, is more compelling than record niceties.

C. Alternative Proposals

Vanisi reiterates that the waiver previously submitted to the Court and attached as Exhibit 1 to the instant Reply is all that is legally required to waive his appearance for the October evidentiary hearing in this case. In an attempt to resolve this matter short of litigation, undersigned counsel contacted the Deputy District Attorney assigned to this case and offered to draft a new written waiver including any language the State felt necessary to "protect the record" in this matter. The State declined that offer.

By way of further compromise, Vanisi does not object to a two-way audio-visual conference in which the Court could colloquy Vanisi as to his desire to waive his appearance. The undersigned would travel to Ely State Prison to be with Vanisi during this tele-colloquy and answer any confidential questions occasioned by the colloquy. Vanisi could also arrange for an attorney to be present in Reno on behalf of the defense should this colloquy occasion a formal hearing.

Should this Court nonetheless consider that the above proposals are insufficient to "protect the record," Vanisi asks that the Court set an evidentiary hearing at which the State presents evidence as to the protocols that will be employed to ensure that: (1) Vanisi's medication regimen is followed, especially as to time of dosage, during his transport from Ely to Washoe County and for the duration of his incarceration in Washoe County; (2) Vanisi is not unduly restrained during his transport from Ely to Washoe County; and (3) Vanisi, while in Washoe County, is housed in a setting which offers relative freedom of movement and opportunities for socialization consistent with his current housing in Ely State Prison. Each of these measures is aimed at preserving Vanisi's current mental status, and has not been answered by the State's Opposition.

D. Conclusion

Vanisi's ultimate concern is not to be removed from his present medical and housing situation–one to which he is well-adjusted and has had no recent disciplinary issues–for the mere purpose of "preserving the record." Transport even as short as one week would occasion disruptions to his treatment regimen and the structured environment which has aided in his maintaining relatively stable levels of mental health for several years. Undersigned counsel has negotiated in good faith to satisfy the State's concerns with the record, and will stipulate to any waiver requirement which does not entail a disruption of Vanisi's housing or medical regimen.

DATED this 16th day of April, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

<u>/s/ Randolph M. Fiedler</u>
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding REPLY TO OPPOSITION TO MOTION FOR RECONSIDERATION AND OBJECTION TO PETITIONER'S WAIVER OF ATTENDANCE AT EVIDENTIARY HEARING filed in the District Court Case No. CR98-P0516 does not contain the social security number of any person.

DATED this 16th day of April, 2018.

/s/ Randolph M. Fielder

RANDOLPH M. FIEDLER
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of April, 2018, a true and correct copy of the foregoing REPLY TO OPPOSITION TO MOTION FOR RECONSIDERATION AND OBJECTION TO PETITIONER'S WAIVER OF ATTENDANCE AT EVIDENTIARY HEARING 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:

Jennifer P. Noble
Appellate Deputy
Nevada Bar No. 9446
P.O. Box 11130
Reno, NV 89520-0027

Joseph R. Plater
Appellate Deputy
Nevada Bar No. 2771
P.O. Box 11130
Reno, NV 89520-0027

/s/ Sara Jelinek
An employee of the Federal Public Defenders Office

Exhibit List

Exhibit 1 Waiver of Appearance signed April 9, 2018

EXHIBIT 1

F I L E D
Electronically
CR98-0516
2018-04-16 02:28:47 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6631256 : pmsewell

EXHIBIT 1

4270

RENE L. VALLADARES
Federal Public Defender
Nevada Bar No. 11479
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
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(702) 388-6577
(702) 388-5819 (Fax)

Attorneys for Petitioner

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

SIAOSI VANISI, Petitioner, v. TIMOTHY FILSON, Warden, et. al., Respondents.	Case No. CR98-P0516 Dept. No. IV (Death Penalty Habeas Corpus Case) **PETITIONER'S WAIVER OF APPEARANCE**

Petitioner SIAOSI VANISI, through counsel, submits the attached declaration waiving his personal presence at the post-conviction hearing to be conducted before this Court beginning on October 1, 2018, at 10:00 a.m.

DATED this 16th day of April, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender

DECLARATION

I, SIAOSI VANISI, declare as follows:

1. I am the petitioner in the case entitled Siaosi Vanisi v. Timothy Filson, et al., Washoe County Second Judicial District Court Case No. CR98-P0516. I have personal knowledge of all facts stated in this declaration and know them to be true and correct. These facts are based on information and belief and also believed to be true and correct by myself.

2. I am currently housed in Ely State Prison in Ely, Nevada, on death row and have been housed here since my conviction in 1999.

3. Based upon the overcrowded condition of the prison, if I were to attend a post-conviction hearing in Washoe County in October, 2018, the cell that I currently occupy would be given to another inmate; upon my return to Ely State Prison, I would not be returned to my prior cell, but would be housed in a section that is constantly locked down. I would be housed there until another inmate on death row either leaves his cell to go to court or commits an offense which the prison determines requires the punishment of being locked down. I could be housed in the locked down section for an indeterminate period, from months up to years.

4. Accordingly, I request this Court waive my personal presence at the hearing and conduct the hearing in my absence.

5. The Federal Public Defender's Office is my counsel in this case. I have discussed my case at length with my counsel, and I believe that counsel can adequately represent my interests at the post-conviction hearing without my presence, and I expressly authorize counsel to do so.

6. I am aware and understand that I have the right to be present at this evidentiary hearing to hear testimony and arguments before the Court, and to give testimony. I have discussed these rights with my counsel. Through my signature below, I inform the Court and opposing counsel that I wish to waive my right to be present at this hearing. I do not believe my absence will affect the fairness of this proceeding.

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 at Ely, Nevada, on April 9, 2018.

Siaosi Vanisi
SIAOSI VANISI

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding PETITIONER'S WAIVER OF APPEARANCE filed in the District Court Case No. CR98-P0516 does not contain the social security number of any person.

DATED this 16th day of April, 2018.

/s/ Randolph M. Fiedler
RANDOLPH M. FIEDLER
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of April, 2018, a true and correct copy of the foregoing WAIVER OF PETITIONER'S APPEARANCE 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:

Jennifer P. Noble
Appellate Deputy
Nevada Bar No. 9446
P.O. Box 11130
Reno, NV 89520-0027

Joseph R. Plater
Appellate Deputy
Nevada Bar No. 2771
P.O. Box 11130
Reno, NV 89520-0027

/s/ Sara Jelinek
An employee of the Federal Public Defender's Office

4185
JUDITH ANN SCHONLAU
CCR #18
75 COURT STREET
RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

THE STATE OF NEVADA, Plaintiff,	)	
vs.	)	CASE NO. CR98-0516 DEPARTMENT NO. 4
SIAOSI VANISI, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

CONFERENCE CALL

THURSDAY, MAY 10, 2018, 1:45 P.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
Computer-aided Transcription

A P P E A R A N C E S

FOR THE PLAINTIFF: OFFICE OF THE DISTRICT ATTORNEY
BY: JENNIFER NOBLE, ESQ.
DEPUTY DISTRICT ATTORNEY
1 S. SIERRA STREET
RENO, NEVADA

FOR THE DEFENDANT: FEDERAL PUBLIC DEFENDER
BY: RANDOLPH FIEDLER, ESQ.
ASSISTANT FEDERAL PUBLIC DEFENDER
411 E. BONNEVILLE AVENUE #250
LAS VEGAS, NEVADA 89101, NEVADA

RENO, NEVADA; THURSDAY, MAY 10, 2018; 1:45 P.M.

-oOo-

THE COURT: Good afternoon, counsel.

MS. NOBLE: Good afternoon, Your Honor.

MR. FIEDLER: Good afternoon, Your Honor.

THE COURT: Thank you. The record should reflect that we are on a conference call with the Court Clerk present and the Court Reporter present. Your appearances have been noted. Mr. Vanisi is not present at this hearing. The purpose of our discussion today is to discuss your Motion for Reconsideration regarding the production of Mr. Vanisi for the hearings.

Given the nature of your request, I thought we could place this on the record but without Mr. Vanisi, at least preliminarily. Does anyone object to that procedure?

MS. NOBLE: State does not.

MR. FIEDLER: The defense does not either, Your Honor.

THE COURT: Now as I read the State's concerns, it appears to me that, Mr. Fiedler, you believe that you could-- You did get a new, in your Motion for Reconsideration, you did get a new Waiver and that you would be willing to get additional Waivers if the State feels it is necessary; is that correct?

MR. FIEDLER: That's correct, Your Honor.

THE COURT: So, Ms. Noble, have you been able to see the new Petitioner's Waiver of Appearance and Declaration by Mr. Vanisi that was signed? I guess you were attaching the 2012 one, but you didn't get a new one that looks like that, right, Mr. Fiedler?

MR. FIEDLER: No, Your Honor. The Declaration was attached with the Reply, Exhibit 1 to the Reply. It is dated April 9, 2018.

THE COURT: Okay. Ms. Noble, did you get to see that April 9, 2018 one?

MS. NOBLE: I have, Your Honor.

THE COURT: Are you comfortable with the language that is in that Waiver?

MS. NOBLE: Well, you know, the language is fine if the Court is going to not require Mr. Vanisi to come to anything. The State's concern is pretty much the same as what I indicated earlier, and that is, you know, Mr. Vanisi has, frankly, when I looked through some of the in-camera hearings that were supplied to the Nevada Supreme Court, he has a tendency to not agree with his counsel and to indicate that his counsel is doing something against his wishes. Because he's entitled to effective assistance of counsel in a Post

Conviction proceeding, the State just wants to make sure that he is absolutely on board with the Waiver and the way counsel are proceeding with respect to this Post Conviction Petition and the remaining claims.

THE COURT: So what would you need to feel more comfortable with the voluntariness of this Waiver?

MS. NOBLE: Well, Your Honor, short of having, as the State suggested, having him transported one time, that would make us the most comfortable. If the Court doesn't think that is necessary, we'll certainly respect that decision. We think, for the record, that would be the best way to proceed.

THE COURT: Mr. Fiedler.

MR. FIEDLER: If I could just make a couple points about that, Your Honor. First, although I appreciate Ms. Noble's concern for the effectiveness of our performance, one thing that is important to remember is this is not a case where Mr. Vanisi has a statutory right to counsel as would be the case for his first state Post Conviction proceeding. Admittedly, we are appointed pursuant to Federal statute. Neither Nevada law nor Federal law contemplates effectiveness of or our ineffectiveness of our performance would serve as good cause to justify additional rounds of Post Conviction proceedings. Although I understand where the State is coming from, there is not really a legal basis to be concerned about that kind of a challenge.

MS. NOBLE: I think, if I may, this is Jenny Noble, my response to that is with respect to the remaining claim of ineffective assistance with respect to the mitigation strategy. He has not yet had effective assistance on Post Conviction for that claim, so I think it is a little bit muddy there. The State would just like to proceed in this way. It is more cautious.

I would also indicate the State did take some pains to investigate the concerns raised in the original Motion to Reconsider the transport such as Mr. Vanisi losing privileges or housing permanently. As the Affidavit attached to our Opposition indicates, they informed the State those wouldn't be of concern. In Mr. Fiedler's Reply, there are more concerns raised, but the State didn't really have an opportunity to respond to those.

THE COURT: Okay. So this is what I am thinking: I would prefer Mr. Vanisi to be present and waive in front of me so that I can weigh whether or not he totally understands what he's giving up in terms of not to be here. The fact you have it set for the whole month of October makes it even more important for me to be sure Mr. Vanisi does not want to be here. I totally understand, Mr. Fiedler, the concerns you put into your Motion for Reconsideration and based on Mr. Vanisi's concerns. And I totally understand, but I want him to tell me on the record in person.

Now with that said, we also have pending the Motion for Discovery and Subpoenas, the issue with regard to the Subpoenas, and I would like to resolve that, but I would like to give you both an opportunity to be heard on those issues. So what I would like to do, that is really a request to issue the Subpoenas is where we are at, what I would like to do is set that for a hearing, and we could transport Mr. Vanisi for that hearing, and then, if he waives at that hearing his further attendance, great, we'll have that record. And if he changes his mind, he will still go back to the prison, but he will come back in October. He's housed in Ely, correct?

MR. FIEDLER: That is correct, Your Honor. Might I ask, would the Court be willing to consider our alternative proposal Mr. Vanisi appear telephonically, video-auto technology magic?

THE COURT: We don't have a lot of that magic here. Our equipment is very, very archaic. What we sometimes are able to do is get a Skype connection, but there is no guarantees on that. And he would still be in custody, so you would have to have somebody physically present with him to attest nobody is making him waive his rights, because I can't see. I wouldn't be able to see the environment he's being held in. So it would would be better if he were transported.

I was hoping to have the subpoena hearing on May 30th at 2:00 p.m. Do you think we could get him transported by then, Ms. Noble?

MS. NOBLE: We could. We'll just put in the request today.

THE COURT: So, Mr. Fiedler, I would prefer to do it that way and get him here. If he waives, great. It will be a short hearing. They probably will not even have to house him here overnight.

MR. FIEDLER: Your Honor, I guess my only request would but if we could figure how to make the Skype work on our end and work that out with the Court and the Court's technology people. Is that something that the Court might be willing to consider?

THE COURT: I don't see any reason why we can't just transport him for a short hearing.

MR. FIEDLER: Well, Your Honor, our concern is the mental health situation of Mr. Vanisi. He's been in a stable environment. The doctors finally have figured out the medication regime he needs to keep his mental health issues in check, and we are very concerned about the disruption to his routine by transporting him.

MS. NOBLE: Your Honor, this is Jenny Noble, I would just say in response, the State would have been able to look at that perhaps more carefully if there had been Affidavits or something from physicians. If we are talking a one to three day round trip in terms of mental health medications, I have never seen, historically, the Washoe County Jail not administering medication if Mr. Vanisi needs them. And I am certainly sympathetic to these concerns, however, the need for an in-person canvass at a hearing, you know, he frankly has a right to be at unless he waives is important for the integrity of the record in this case.

THE COURT: I am going to agree with you. I want him here. Mr. Fiedler, usually what happens with a prisoner like Mr. Vanisi is the prison will transport him to court and then take him to Carson City for the night if they have to then take him back to Ely. He isn't even always housed at the Washoe County Jail. So he will be able to be getting his medication, and it will be a quick turn around for him. I am anticipating that he waives any other further appearances.

We may want to go beyond just the hearing in case we would have some more administrative hearings that we have to set along the way. So let's set the hearing for the discovery, the request to issue subpoenas for May 30th at 2:00 p.m., and I will not waive his attendance at that, but I will let you make a record with regard to his future waivers at that hearing.

MR. FIEDLER: Okay. Your Honor, if I could just request, I know the request to transport Mr. Vanisi is going to be time sensitive. I would really like to be able to see Mr. Vanisi before. I guess I would like to be the person to tell him he's going to be transported. I don't know if the State would be willing to either agree to wait to file the Order until late next week or work it out with the prison they don't say something to him until I have had a chance to visit him next week.

MS. NOBLE: Mr. Fiedler, it is not -- I am understanding your concern. I understand what you're saying. Unfortunately, because we don't have a turn around time, he's coming from Ely, we want to make sure everything goes smoothly for Mr. Vanisi, we need to get the transport request in as soon as possible.

THE COURT: Can you go see him this weekend?

MR. FIEDLER: No, Your Honor. I don't know if the prison has special exceptions. Generally our visiting days are Monday and Tuesday. Because it is important, I can get make arrangements to get up there on Monday, so, really, I am just asking for a couple of business days.

THE COURT: Oh, that is fine. Ms. Noble, would you put in the request Monday about 4:00 o'clock?

MS. NOBLE: Your Honor, I can make sure that it goes in then. My concern is I don't have, frankly, a lot of experience transporting prisoners from Ely. I want to make sure he's here for the 30th. If the Court so instructs, we'll put it in Monday. Hopefully, it is enough time.

THE COURT: It would be. We have gotten them on fairly short notice. That is still two and a half weeks.

MS. NOBLE: Okay, Judge. I would suggest this: What if we got the Order today and send it to the prison Monday?

THE COURT: Why do you need a new order since I already entered one order to be produced? Was it date specific or ordered to produce at all hearings?

MS NOBLE: Thank you, Your Honor. That is a good question. I think it is all hearings having to do with the Post Conviction Petition. I need to look at it again.

THE COURT: You can talk to the prison to see if they need a new Order, but get the Order to he me right away if you need a new Order.

MR. FIEDLER: Your Honor, I have the Court's Order right in front of me. Just in the interest of everyone being careful, the Order says: Bring Siaosi Vanisi before the Second Judicial Court October 1, 2018, 10:00 a.m. The language that follows that says: At such time and place as may be ordered and directed by the Court for such proceedings thereafter may be necessary. Implying the Court's Order only applies to October 1st and every day after that.

THE COURT: Get me a new Order, Ms. Noble.

MS. NOBLE: Yes, Your Honor.

THE COURT: Okay. All right. Thank you, counsel. I appreciate you being available today so we could get some of these things handled. We will deal with the Motion for Permission to issue Subpoenas and Mr. Vanisi's Waiver at the May 30th hearing.

MS. NOBLE: Thank you, Your Honor.

MR. FIEDLER: Yes, thank you, Your Honor.

THE COURT: Is there anything else, counsel, you need from the Court at this time?

MR. FIEDLER: No, Your Honor.

MS. NOBLE: No. Thank you, Your Honor.

THE COURT: Thank you. We are in recess.

(Whereupon, the proceedings were concluded.)

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STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 4 of the above-entitled court on Thursday, May 10, 2018, at the hour of 9:00 a.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. SIAOSI VANISI, Case Number CR9809516.

That the foregoing transcript, consisting of pages numbered 1-13 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 11th day of May, 2018.

/s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18

F I L E D
Electronically
CR98-0516
2018-05-11 10:06:39 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6675049 : rrodrigu

CODE #1260
CHRISTOPHER J. HICKS
#7747
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

SIAOSI VANISI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

_________________________/

Case No. CR98-0516

Dept. No. 4

APPLICATION FOR ORDER TO PRODUCE PRISONER

COMES NOW, Respondent herein (OR the State of Nevada), by and through CHRISTOPHER J. HICKS, District Attorney of Washoe County, by JENNIFER P. NOBLE, Chief Appellate Deputy, and alleges as follows:

1. That the above Petitioner, SIAOSI VANISI #63376, is presently incarcerated at the Ely State Prison, Ely, Nevada.

2. That the above SIAOSI VANISI is scheduled for a hearing on May 30, 2018, at 2:00 p.m. before the Second Judicial District Court regarding his motion to waive his appearance for his post-conviction evidentiary hearing set to begin October 1, 2018, as well as VANISI's motion for order to conduct discovery in the above-entitled action.

WHEREFORE, Applicant prays that an Order be made ordering the appearance of the said SIAOSI VANISI before the Second Judicial District Court, and from time to time thereafter at such times and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper in the premises, and directing the execution of said Order by the Warden of the Ely State Prison, Ely, Nevada.

AFFIRMATION

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

DATED: May 11, 2018.

CHRISTOPHER J. HICKS
District Attorney

By /s/JENNIFER P. NOBLE
JENNIFER P. NOBLE
Chief Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on May 11, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Randolph M. Fiedler, Assistant Federal Public Defender

/s/Margaret Ford
MARGARET FORD

F I L E D
Electronically
CR98-0516
2018-05-14 10:42:53 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6677335

CODE #3340
CHRISTOPHER J. HICKS
#7747
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

SIAOSI VANISI,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

______________________________/

Case No. CR98-0516

Dept. No. 4

ORDER TO PRODUCE PRISONER

IT APPEARING to the satisfaction of the above-entitled Court that it is necessary that the Petitioner above named, SIAOSI VANISI #63376, presently incarcerated in the Ely State Prison, Ely, Nevada, be brought before the Second Judicial District Court for a hearing regarding VANISI's desire to waive his appearance for his post-conviction evidentiary hearing set to begin October 1, 2018, as well as VANISI's motion for order to conduct discovery in the above-entitled action.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Warden of the Ely State Prison, Ely, Nevada, bring the said SIAOSI VANISI before the Second Judicial District

/ / /

Court on May 30, 2018, at 2:00 p.m. for a hearing in the above-entitled action, and from time to time thereafter at such time and places as may be ordered and directed by the Court for such proceedings as thereafter may be necessary and proper in the premises.

DATED this 14 day of May, 2018.

Connie J. Steinheimer

DISTRICT JUDGE

F I L E D
Electronically
CR98-0516
2018-05-17 09:14:37 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6684156

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

DATE, JUDGE OFFICERS OF COURT PRESENT	**APPEARANCES-HEARING**	**CONT'D TO**
5/10/18 HONORABLE CONNIE STEINHEIMER DEPT. NO.4 M. Stone (Clerk) J. Schonlau (Reporter)	**CONFERENCE CALL RE: MOTON FOR RECONSIDERATION OF THE ORDER TO PRODUCE** Assistant Federal Public Defender Randolph Fiedler represented the Petitioner. Chief Deputy District Attorney Jennifer Noble represented the State. Court noted that the Petitioner was not transported to Court for this hearing due to the nature of the instant motion. Court noted that a new waiver of appearance from the Petitioner has been received. State's counsel had no objection to the language contained in that waiver, but is concerned about the waiver in itself as the Petitioner has a history of not agreeing his attorneys. State's counsel requested that the Petitioner be transported on one occasion for the sole of formally waiving his appearance in person and on the record. Petitioner's counsel objected to the State's request. State's counsel replied. **COURT ENTERED ORDER** granting the Motion to Reconsider the Order to Produce the Petitioner for the 4-week evidentiary hearing set October 1, 2018. The Petitioner shall be produced on May 30, 2018 at 2:00 p.m. to formally waive his appearance on the record for the October 1, 2018 evidentiary hearing. Petitioner's counsel requested the Petitioner's appearance at the May 30, 2018 hearing be telephonic. **COURT ENTERED ORDER** denying such request. Court noted the submission of the Motion for Discovery. **COURT ORDERED** oral arguments on the Motion for Discovery set. Court recessed.	**5/30/18** **2:00 p.m.** **Waiver of Appearance/ Motion for Discovery** **10/1/18** **10:00 a.m.** **Evidentiary Hearing** **(4 weeks)**

4185
JUDITH ANN SCHONLAU
CCR #18
75 COURT STREET
RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

THE STATE OF NEVADA, Plaintiff,	)	
vs.	)	CASE NO. CR98-0516 DEPARTMENT NO. 4
SIAOSI VANISI, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENTS

WEDNESDAY, MAY 30, 2018, 2:00 P.M.

Reno, Nevada

Reported By: JUDITH ANN SCHONLAU, CCR #18
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A P P E A R A N C E S

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RENO, NEVADA; WEDNESDAY, MAY 30, 2018; 2:00 P.M.

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THE COURT: Thank you. Please be seated. This is the time set for the State of Nevada versus Siaosi Vanisi. Actually, this is Mr. Vanisi's Petition, and we are hearing it in CR98-0516, although it is a new case in some respects because it is a civil matter that is pending. Go ahead and make your appearances for the record.

MR. FIEDLER: Randolph Fiedler and Joanne Diamond, Federal Public Defenders representing Mr. Vanisi.

THE COURT: Who is present.

MR. FIEDLER: He's presented.

MS. NOBLE: Jenny Noble and Joseph Plater on behalf of the State, Your Honor.

THE COURT: Thank you. We have two matters that are scheduled today, one being Mr. Vanisi's waiver of appearance in future hearings, especially the hearing with regard to the evidentiary presentation of evidence, and the other is the motion for discovery. Do you want to deal with the waiver first?

MR. FIEDLER: Yes, Your Honor. It would be easier.

THE COURT: Go ahead, counsel, and tell me why you want to waive and what you want to do. Have you talked to

Mr. Vanisi some more?

MR. FIEDLER: Yes, I have spoken with Mr. Vanisi since we last appeared. In fact, I saw him yesterday, and he indicated that he is still interested in waiving his appearance for the October hearing. I advised him, if he appeared at that hearing, he obviously would have the ability to jot notes down and communicate with us and offer questions and also have the opportunity to observe the witnesses as they testified in this case.

I advised him by waiving his right to be present at the hearing, he also would be waiving those rights to view those witnesses and communicate with counsel as the hearing progressed. He indicated he's still interested in waiving his appearance in the October hearing and all future hearings, Your Honor.

THE COURT: I am going to canvass Mr. Vanisi. Before I do, Ms. Noble, what areas beyond what he indicated he talked to Mr. Vanisi about would you like the Court to inquire?

MR. NOBLE: Your Honor, the State would like to make sure Mr. Vanisi understands the subject matter, the scope of the October hearing. We'd also would like make sure Mr. Vanisi is in agreement with the fact the Federal Public Defender is pursuing this claim on his behalf, and that he understands in the future by this waiver he would waive the right to assert any claims based on ineffective assistance for not having him here. In other words, any claims stemming from the fact he was not able to be present in court and interact with his attorneys or listen to the presentation of witness testimony in real time.

THE COURT: And that is based on the pleadings that were filed in the appeal, correct?

MS. NOBLE: That's correct, Your Honor. In the appeal there were hearings, in camera hearings that occurred during the trial phase. In those hearings, the State didn't have access to them previously. In reviewing those, the State concluded Mr. Vanisi historically has at times challenged counsel's strategy, at times wanted to represent himself, so we want to make sure Mr. Vanisi is on board with the procedure, how things are going, to make sure at some point we get some finality to this criminal conviction and no further claims are asserted with respect to not being present during the hearing.

THE COURT: Okay. Mr. Vanisi, if you will stand, please. Counsel stand with him, please.

So, Mr. Vanisi, were you able to understand what your attorney told me a few minutes ago?

HE DEFENDANT: Yeah. I am just waiving my appearance for the October 1st meeting.

THE COURT: You know that is not a meeting, it is a hearing, and it's going to go a whole month.

THE DEFENDANT: It is a hearing, yeah.

THE COURT: Do you realize it is going to go on for a month?

THE DEFENDANT: Yeah.

THE COURT: So in that hearing, that is when your attorneys are going to try to talk to me about what your lawyers didn't put on. They are going to bring witnesses in to testify on your behalf.

THE DEFENDANT: Yeah.

THE COURT: Now you understand, if you are not there, you can talk to them afterward, they may be able to talk to you somehow through the phone system, but you will not be able to hear the witnesses as they testify. Do you understand that?

THE DEFENDANT: Yeah. Yes, Your Honor.

THE COURT: You won't be able to communicate with your lawyers and tell them, give them ideas of how to ask questions or which questions to ask.

THE DEFENDANT: Yeah, I am aware.

THE COURT: And so you are waiving your right to be here for that?

THE DEFENDANT: Yeah.

THE COURT: Why is that?

MR. FIEDLER: If I could have the Court's indulgence for a moment. Okay, Your Honor.

THE DEFENDANT: I just don't want to leave Ely. I want to be-- I don't want to come back. I want to stay at Ely. I don't want to be present for the October 1st hearing.

THE COURT: Do you think you could add anything to the hearing? Could you help your lawyers if you were here?

THE DEFENDANT: No. I have confidence in them. They will do a good job.

THE COURT: You don't think there is anything you could do to make it better if you were here?

THE DEFENDANT: No.

THE COURT: Do you understand that when you tell me that you waive this and I accept that waiver, you can't later file an appeal and claim that they didn't do a good enough job because you weren't able to talk to them?

THE DEFENDANT: Yeah.

THE COURT: Do you realize you are giving that up?

THE DEFENDANT: Yeah.

THE COURT: Do you have any -- In your own words what do you think is going to happen in those hearings?

THE DEFENDANT: Well, from -- they are going to put witnesses to testify about my mental health issues and childhood abuse and to present a case where, if the jury would have heard that I was mentally abused or mental health issues, that they would consider that as a mitigating evidence.

THE COURT: And not have given you the death penalty. You understand that is the goal?

THE DEFENDANT: Yeah. Yeah.

THE COURT: Do you want them to represent you, the Federal Public Defender's Office?

THE DEFENDANT: Yeah.

THE COURT: You know they are the ones representing you right?

THE DEFENDANT: Right.

THE COURT: And you want them to continue to represent you?

THE DEFENDANT: Yeah.

THE COURT: These lawyers who are with you today may be the lawyers that continue to represent you, but it is possible you could end up with different lawyers. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Have they talked to you about their office could, I am not saying it would happen, it is a possibility the Public Defender could -- Federal Public

Defender could assign different lawyers to represent you?

THE DEFENDANT: Yeah.

THE COURT: Would your waiver be in effect no matter who the lawyers are from the Federal Public Defender?

THE DEFENDANT: Yeah.

THE COURT: Do you have any questions for me?

THE DEFENDANT: No.

THE COURT: Are you entering this decision freely and voluntarily?

THE DEFENDANT: Yeah.

THE COURT: Has anyone forced you to do this?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you in any way to waive your appearance?

THE DEFENDANT: No.

THE COURT: And you want me to let you do this?

THE DEFENDANT: Yeah.

THE COURT: Anything further by way of canvass for counsel?

MS. NOBLE: I don't think so, Your Honor. Thank you.

THE COURT: Okay. Then, counsel, do you still wish me to consider your waiver?

MR. FIEDLER: Yes, Your Honor.

THE COURT: All right then. Based upon Mr. Vanisi's response to my questions, the fact that I do believe that he understands what is happening here and is freely and voluntarily waiving his right to be present, I am going to grant his waiver.

Now, Mr. Vanisi, there could be some hearings between now and October that we have to have with your lawyers. Do you want to come back for those like you did today?

THE DEFENDANT: No, I don't.

THE COURT: Even if we have to have a hearing on something that comes up before the October hearing, you want to waive your right to be here?

THE DEFENDANT: Yeah.

THE COURT: You want this waiver to apply to your whole case?

THE DEFENDANT: Yeah.

THE COURT: If you decide you don't want it to apply anymore, how are you going to let me know?

THE DEFENDANT: I will talk to my attorney.

THE COURT: You make sure you do that, and they will tell me.

THE DEFENDANT: Yeah.

THE COURT: Then I am going to accept your waiver.

Do you want to go now or do you want to stay for the rest of the hearing?

THE DEFENDANT: I'll stay.

MR. FIEDLER: If I could make a record on one point. When I visited Mr. Vanisi yesterday, I spoke to his counselor at NNCC. She indicated they could try to get him on the bus that leaves on Tuesday. I am reasonably sure nothing is going to come up and he'll be able to go back to Ely on Tuesday. I wanted to make the Court aware if for some reason he's at NNCC after Tuesday, we'll file something from the Court for an order to transport him back to Ely.

THE COURT: Yes, you could do that, but normally those orders don't come out of this court. If it has something to do with what the prison is doing at NNCC it has to go to the First Judicial District, because I don't have control over what the prison does except when they are here in Washoe County.

MR. FIEDLER: Understood, Your Honor.

THE COURT: The rest of the time they answer my orders to produce, but in terms of where he's housed, usually an order from this Court doesn't get you what you want if it is transportable.

MR. FIEDLER: Understood.

THE COURT: Everyone be seated, and we'll continue.

We have currently the motion to conduct discovery and the issue isn't particularly the conducting of discovery, it is what kind of discovery you want to conduct that the State has an objection to. So I'm not sure that you have narrowed, maybe you have all talked and narrowed it down a bit, maybe you can inform me where you're at with regard your agreement or disagreement.

MR. FIEDLER: Your Honor, we have not spoken with the State since we filed these motions. However, we are okay, if the Court feels that the motions or the request are overbroad, we are okay with the Court's position of narrowing the scope of discovery.

THE COURT: Okay. Ms. Noble.

MS. NOBLE: I just want to clarify. I know Mr. Fiedler answered specifically the question about the subpoenas duces tecum that are sought with respect to the discovery motions, which I wanted to just let the Court know as a threshold matter, it is my understanding there are several persons who reside in Tonga whom Mr. Fiedler and his co-counsel would like to depose. The State has agreed not to object to that, and we're not going to go to Tonga. It is my understanding the Federal Public Defender's Office will set up video conferencing so we can at least see the witnesses during those depositions. I believe one of the witnesses testified during the penalty phase of the initial trial. We have no objection to that. So I did want to let you know we have been working quite well together to find areas where we agree.

THE COURT: Okay.

MS. NOBLE: Prior to filing the amended motion for discovery, additionally, Mr. Fiedler and I did discuss, he provided me with a courtesy copy, discussed the State's concerns about the subpoenas duces tecum as they are currently drafted. I would be happy, when the Court finds it is appropriate at this hearing, to talk about the State's concerns and why we believe we have standing to raise those concerns.

THE COURT: Okay. Yes.

MR. FIEDLER: If I could add, with regard to the discussion of the depositions, Ms. Noble can correct me if I am wrong, the witnesses are both in Tonga and Hawaii. Then there was one witness we were bringing to the attention of this Court to ask for leave to depose who is in San Bruno.

THE COURT: Who do you plan on taking that you want to take a deposition of in Tonga?

MR. FIEDLER: I have to apologize. I didn't bring the list with me. They are family members of Mr. Vanisi, all of whom either suffer from health conditions that make us concerned about transporting them, or because of their immigration status we are under the impression it would be extremely difficult to bring them in for live testimony.

THE COURT: Okay. And how many?

MR. FIEDLER: I believe the number was about eight.

THE COURT: And you are going to bear the expense of the video taped depositions?

MR. FIEDLER: Yes.

THE COURT: As well as connecting the District Attorneys to the depositions?

MR. FIEDLER: Yes, Your Honor.

THE COURT: So they can observe and participate via teleconferencing?

MR. FIEDLER: Correct, Your Honor.

THE COURT: So you think Skype from Tonga?

MR. FIEDLER: So this is another situation where the technological aspect is above my pay grade, but I am informed from people in Tonga and also the technology people in our office this is possible and that it shouldn't pose any logistical difficulties.

THE COURT: You are going to video tape it as well as do it via Skype?

MR. FIEDLER: Correct, Your Honor.

THE COURT: And you are stipulating to those individual depositions?

MS. NOBLE: We are with respect to certain witness. I have the names if the Court would like. I am going to have to spell most of these.

THE COURT: That's fine.

MS. NOBLE: Doctor Mapa, M-A-P-A, Puloka, P-U-L-O-K-A. I believe he's in Tonga.

MR. FIEDLER: Yes, Your Honor.

MS. NOBLE: L-I-M-U. H-A-V-E-A in Tonga

The third is S-I-O-E-L-I, T-U-I-T-A. The fourth is T-O-T-O-A, P-O-H-A-H-A-U. T-U-F-U-I, T-A-F-U-N-A. Sioasi, S-I-O-A-S-I. M-A-F-I-L-E-O. Those are the witnesses that the State has no objection to as well as the witness that is in California.

Additionally, I would just say the only witness we have discussed the State has objection to with respect to the deposition is Bishop Tonga. Bishop Tonga testified during the penalty phase in the original trial. That is why we would object, because I haven't been able to discern from the defense what new information they plan on providing.

MR. FIEDLER: Yes, Your Honor, Bishop Tonga did in fact testify before this Court, however, his testimony was pretty limited. The declaration which we provided with the Amended Petition from our investigator Herbert Dusant, Exhibit 99, provides substantially more information than his original time. Specifically, he provided testimony about Mr. Vanisi's father, some of his behaviors which are relevant to the performance of trial counsel, because trial counsel's obligation is to prepare a life history.

Additionally, Bishop Tonga provided additional information about the circumstances related to Mr. Vanisi's in essence failed mission. On that basis, Your Honor, his testimony is relevant, so we would like to depose him instead of presenting him as live testimony. He's quite old. Transporting him from San Bruno raises some concern about the health implications.

THE COURT: He is the other witness in San Bruno?

MR. FIEDLER: Bishop Tonga is the witness in San Bruno.

THE COURT: He is the witness in California?

MR. FIEDLER: Correct.

THE COURT: You said you had Exhibit 99 to the amended motion?

MR. FIEDLER: I am sorry, not the amended motion, the Petition originally filed with this Court.

THE COURT: I didn't see that many exhibits in your discovery motion. Okay.

MR. FIEDLER: If the Court would like me to narrow it.

THE COURT: Right. I am looking at Exhibit 99. The material in Paragraph 8 is almost entirely material not presented during the trial.

THE COURT: Okay. Have you been able to read Paragraph 8?

MS. NOBLE: Your Honor, I was able to just take a look at it. I know there are arguably some matters that fall outside the scope of the original testimony.

THE COURT: Okay. We'll go ahead and allow that deposition.

MS. NOBLE: Yes, Your Honor.

THE COURT: Okay. So let's talk about some of the subpoenas duces tecum and your request. They do appear to be overly broad, and I would appreciate some assistance from both counsel in how we can fashion the subpoenas in a manner that will allow you to receive the information that you are entitled to without undue burden to the persons or agencies that you are subpoenaing the data from. So, counsel, you have said you think you could narrow it. Do you want to make a suggestion on how you could narrow it?

MR. FIEDLER: Yes. Would the Court like to start with letter A and work our way down?

THE COURT: Start with the Washoe County District Attorneys Office.

MR. FIEDLER: So the State's opposition notes that the documents regarding mental illness and brain damage might potentially be mitigation. I think at the very least, we can agree that is material that should be disclosed. As the State is concerned about work product, for example the State's point is well taken. We can concede we don't have a right to the the State's work product. However, we request, I guess request narrowing language that indicates work product is outside the scope of the discovery order. However, we request a court order the State to keep a privilege log. That way, you know, there is some place to ensure that we can have it, you know, know what is being asserted and why.

THE COURT: Yes, counsel.

MS. NOBLE: Thank you, Your Honor. If I may, I think respectfully first we may be skimming over the issue of good cause under Chapter 34. Under Chapter 34.780(2), good cause is required to support these requests. It appears in reviewing the motion and the reply, that their position is they don't have to show good cause. In other words, they don't have to plead any sort of nexus between the requested information and what is the purpose of this hearing which is narrowed substantially by the Supreme Court's 2017 Order. That hearing is supposed to be, pursuant to the Court Order, the question is whether trial counsel could have discovered and presented the evidence as well as whether there was a reasonable probability of a different outcome at the penalty hearing had this additional mitigation evidence been presented.

Now with respect to each one of the proposed subpoenas duces tecum, it is simply not pled. So before we even get to the State's position of narrowing these discovery requests, there first has to be an articulation of some sort of good cause. It simply hasn't been pled or argued, and there is some instructive authority with respect to good cause when we're talking about Chapter 34. Good cause is something rarely defined, but in the context of another Chapter 34 rule, in Hathaway versus State, it is a substantial reason that affords a legal excuse. So it suggests in this case what we are looking for in each one of these requests is a substantial reason to believe these requested documents are going to go to the question of, one, whether or not counsel was objectively unreasonable during the penalty phase on the subject of mitigation; and, number two, that it would have resulted in prejudice. So there has to be some sort of nexus. As drafted, even if we narrow them, I am not persuaded this is much more than a fishing expedition asking for all the personnel reports of Sgt. Sullivan, things of that nature. It just does not seem to be connected to the good cause requirement. So I would ask the Court inquire about what good cause the Public Defender believes with respect to each one of these requests.

MR. FIEDLER: Your Honor, we would politely disagree with the State's position on good cause. We agree we have to make a showing of good cause, however we cited to the Federal analog for the discovery statute, and we suggest that is good persuasive authority how this Court should proceed in finding or not finding good cause. What the Federal courts have done, they defined good cause, on page 4 of the amended motion: Where specific allegations before the Court show reason to believe the Petitioner may, if the facts are fully developed, be able to demonstrate he's entitled to relief. Which I note is pretty similar to the standard the State of Nevada employs in determining whether or not a hearing is required. So the way we read the good cause requirement and the way we think the Court should read the good cause requirement, is merely require the claim be sufficiently pled so that the Court is assured if the facts are fully developed, Mr. Vanisi would be entitled to relief. We have clearly met that standard here. The Nevada Supreme Court found the claim was meritorious enough to warrant an evidentiary hearing.

To address the State's concern this is a fishing expedition, the Rules of Civil Procedure control over discovery. And the control they impose on the scope of discovery needs to be reasonably calculated to lead to admissible evidence. That is all this Court needs to worry about in terms of narrowing the scope of discovery in this case.

THE COURT: Okay.

MS. NOBLE: Your Honor, to be admissible, the evidence has to be relevant. The good cause requirement doesn't have to be good cause for the Petitioner or for this hearing. It has to be good cause for the discovery request. When we are asking for NDOC records pertaining to dates and times that are way away from the 1999 sentencing phase, that is not relevant to these proceedings. What is relevant is what counsel knew or should have known or should have known in 1999 not in 2010, not in some date in the future. As these are worded temporally and subject matter wise, they are burdensome on everyone.

I will give the example the request for the pharmaceutical company. They are asking for all records about Fen-Fen. This hearing is in October. Wyeth Pharmaceutical is not going to hand over all that stuff or anything close to that. And so the State is interested in making sure these proceedings go, they are not confused by a bunch of information not relevant to this narrow question for the

Court. There has to be a connection between the requested information and the claim they are seeking to prove. Speculating they might find something isn't enough. And what it appears to be to the State respectfully is an effort really to discover a basis for additional claims not to be tailored to the specific idea there was more mitigating material that was out there that defense counsel should have had during trial.

THE COURT: Counsel.

MR. FIEDLER: If I understand the position correctly, it seems to me the State argues we need to prove this evidence, the discovery we are requesting both is going to be admissible and needs to be relevant. That is simply not what the Rules of Civil Procedure contemplate in discussing discovery. It only needs to reasonably seem like it might lead to relevant evidence.

THE COURT: What is really happening here is if you plead a case of negligence, you can't do discovery on a person's wealth, because you haven't pled anything that would lead to discoverable information. So I am very familiar with the Rules of Civil Procedure. And so that is really what we are talking about here. You have a hearing on a very narrow scope. There were what, twenty-two claims of error at the Supreme Court or some very large number of which the Supreme

Court said one very narrow area you are entitled to a hearing on, not on any of the other claims.

Now your discovery requests really do appear to be looking at those claims that you lost already at the Supreme Court or claims perhaps that you haven't developed yet, that you look to develop in the Federal system. You can ask for the discovery in the Federal court when you are at that stage. For this stage, the narrow claim that we are going to hear in October is what we have to do the discovery for. This is the end of May. We have hearings set for the entire month of October. There is plenty of discovery already that you know you are going to be doing. So let's see what else is necessary to address the issues that we are going to address in October, then if there is more discovery that can be done later in this case when there are other claims pending, that will be fine. But I am only interested in allowing you to do the discovery that is necessary to put on the case in October. So that case is about the mitigation, what counsel could have or should have discovered. So why would it be important to bring in records from the prison from 2010?

MR. FIEDLER: I am happy to go through each of the requests and explain why we feel that evidence will lead, discovery will lead to admissible evidence.

THE COURT: We can start with the Washoe County

District Attorney's Office. You have asked for all documents in their file. All records related to the case including related to the post conviction and Supreme Court appeal case. That is what you asked for.

MR. FIEDLER: Yes, Your Honor. Obviously we are at a little bit of a disadvantage. We don't fully know what is in the file, which we can't know until we have discovery. But the request is aimed at getting more evidence about Mr. Vanisi's status that trial counsel could or should have known about, get this information from the District Attorney's Office.

THE COURT: What is it you think the District Attorney's office would have? I am not saying specific evidence. What is it they would have in their file that you think would be related to mitigation?

MR. FIEDLER: Take one example, any documents or evidence that indicates observations of Mr. Vanisi, or anything related to the investigation that might show or be relevant to Mr. Vanisi, in essence his behavior leading up to the offense or after. All that evidence is going to help with determining Mr. Vanisi's mental health status. It might show he was being obsessive. It might show that he was rambling while he was talking nonstop. That kind of evidence, Your Honor.

THE COURT: Why would that be in the District Attorney's file instead of the Public Defender's file? They were the ones that heard Mr. Vanisi. They are the ones that were in all the closed in camera hearings they were present for. The District Attorney wasn't. So what is it that the District Attorney could possibly have that his counsel didn't have?

MR. FIEDLER: That is part of what we are trying to learn. If there were records, for example, the District Attorney has that trial counsel did not have.

THE COURT: Are you talking about medical records?

MR. FIEDLER: Medical records or law enforcement records. Records that for example the State may have turned over if trial counsel had simply asked for them.

THE COURT: Well do you know what trial counsel asked for?

MR. FIEDLER: We have the records. We can reconstruct what he asked for. We can reconstruct what they have or at least what they turned over to us being indicative of what they had.

THE COURT: "They," the Public Defender?

MR. FIEDLER: Yeah, the paper file they had.

THE COURT: Didn't they do a 250 memo they have given you?

MR. FIEDLER: Yes, Your Honor.

THE COURT: That would tell you what they asked for from the State.

MR. FIEDLER: It wouldn't tell us what the State has that they didn't have. That is what we are trying to learn.

THE COURT: Okay. Counsel.

MS. NOBLE: Thank you, Your Honor. I haven't heard any allegation during the trial in reviewing the transcripts or from the Federal Public Defender's Office or from the Washoe County Public Defender's Office that there was information required to be turned over either under Brady or under our statute that wasn't turned over at the trial. I would ask the Court perhaps inquire when and how long counsel went through the Public Defender's paper file. We have 19 boxes of transcripts and all kinds of other things. But in terms of talking about law enforcement records, so all the police reports? Have they looked through the police reports? Do they have any reason to think they are missing police reports? It seems we are searching for something that might be helpful, but we don't know what we are looking for. And I don't think that is supported under chapter 34 . Again, the Rules of Civil Procedure can be applied by this Court. You can apply them to the extent you deem appropriate and do not have to apply them where you think they are inappropriate.

And with respect requesting all our records or all police reports in our file, anything having to do with infractions with Mr. Vanisi, I would suggest the good place to start if counsel wants information about that is the trial transcript. I mean it is a long trial. There were six thousand pages approximately in the appendices for the appeal with respect to the last hearing. So I am just wondering what Mr. Fiedler believes we have that is included in those six thousand pages. I haven't heard articulated we kept anything from anyone.

THE COURT: Counsel, have you looked through the exhibits that were filed in the case?

MR. FIEDLER: Yes, Your Honor. I looked through the exhibits. I would admit I haven't gone through the paper file, but I did review everything in the Nevada Supreme Court appendix which was most of what was presented to this Court related to the hearing.

THE COURT: Okay. I'm not positive that every exhibit that was marked during the trial was given to the Supreme Court because of the way it works. I don't think -- Do they get everything or only what is designated?

MS. NOBLE: They only get what is designated. I was suggesting the Public Defender's file. Mr. Bosler is very good at granting access to anyone who wants to come look at it if they are defending a post conviction claim.

THE COURT: So you have that file or you looked through it?

MR. FIEDLER: I believe we have the file, but the request is not about -- I realize indirectly it is about what trial counsel had, but what we are trying to learn is what the State has that trial counsel should have had. Obviously, we can recreate the record with the file trial counsel had. That doesn't help us with what is missing from it that the State has.

THE COURT: Well, we are talking about twenty years ago, close to twenty years ago. And it is extremely onerous to subpoena from the State if we narrowed this to what would be reasonable, it would be any medical records that you have that were not turned over to the defense. That is really what you want. But that is putting the burden on the State to go through everything and confirm that it was provided through discovery rather than have you do anything. And so I am a little uncomfortable with that.

MR. FIEDLER: In the alternative, the State could give us every medical record they have and we could go through and figure out which documents were turned over and which once were not.

THE COURT: Just going through that file for every medical record seems to be pretty onerous when you don't really have any basis.

MR. FIEDLER: Well the basis of that, if there are records in there that trial counsel doesn't have, that is indicative trial counsel could have requested them. That is indicative counsel was deficient.

THE COURT: But the problem is you don't know whether trial counsel asked for them. Just whether they are there or not is not going to prove whether they asked for them or whether or not he had them and didn't keep them. You have a little problem here because of so many years.

MR. FIEDLER: Yeah, I understand perhaps in the future there would be a problem with how much weight to give that evidence, but our position is that evidence would be admissible, it would be relevant, so it is discoverable.

THE COURT: Well, it might be, might be relevant if you didn't have it. But it may not be if it doesn't go to mitigation and it goes to aggravation. That is not going to help you and is not relevant to what you are going to be presenting, and in fact would support their argument that counsel wasn't deficient in its presentation. There is no guarantee what might exist is mitigation. You haven't given me any indication of that.

MR. FIEDLER: I understand the Court's concerns. I would just submit it on the argument we already offered.

THE COURT: Okay. Well, I want you to have everything you need. I don't want you not to have what you need, but I also don't want to allow for an overly burdensome either giving you things that are unnecessary for you to look at so that you are prepared in October for what you need to be prepared for, or forcing the State to go through things that are not necessary. I am trying to remember the trial. I am trying to remember all the issues in the trial as I look at mitigation, and there certainly were-- are records from the Washoe County Sheriff's Office Detention Bureau that might be relevant to what you're looking at, but I am guaranteeing it may not be all mitigation. What is mitigation in one hand is aggravation in the other. And so I am aware of behaviors of Mr. Vanisi while he was in custody that may be documented somewhere. It was in hearings that I heard about it. That you might argue because it was compulsive behavior that was mitigating. However, it was extremely aggravating also. And in the tenor of what was going on during the course of the trial would not have been reasonable for counsel to have presented. It would have only aggravated the penalty phase more. So there is some information there, and I don't know if you have it.

MR. FIEDLER: That is what we are trying to find out, Your Honor. I understand there is a risk those materials might not be as helpful as we might want it to be, but part of what we think the point of discovery is is for us to get these materials so we can review them, make a decision what we think are in Mr. Vanisi's best interest.

THE COURT: Did you have something else, Ms. Noble?

MS. NOBLE: Just the observation, I may be wrong, but I haven't heard Mr. Fiedler say they have gone through the file at the Washoe County Public Defender's Office. I mean if we are talking about making sure that they have information necessary to support this claim of ineffectiveness with respect to the sentencing phase, mitigation materials, that would seem to be the first place to start. So if we are talking about good cause, I would question how they can demonstrate good cause without being able to represent to this Court they saw those materials and gone through them.

THE COURT: And the document I was just talking about in the Court record is document AA, trial record exhibit. It is the Washoe County Sheriff's Office memorandum regarding defendant's behavior in the Washoe County Jail. So there is an exhibit if you haven't gone through the trial exhibits you might miss.

MR. FIEDLER: Just to clarify, I did go through the trial transcript. I reviewed I believe --

THE COURT: I am talking about the exhibits. If it was marked alpha, those were not during the trial. Those were pretrial. As you look at your exhibits, if they are numerical, they were marked for trial. If alpha, they were for hearings that were pretrial or perhaps during the course of the trial but were never intended to be presented in front of the jury. So when we have a double "A" that means we had gone all the way through the alphabet and started back. So that is how it is.

MR. FIEDLER: Thank you, Your Honor. If I could make one more point in response to Ms. Noble's point. I think there is a fundamental disagreement about what is required to show good cause. Our position is good cause merely is we pled a claim sufficiently the claims would warrant relief. Ms. Noble's position is we have to show good cause for every single discovery request which would supplant the discovery, rules on discovery.

THE COURT: That is not what she's saying. What I am hearing is you have to make a showing what you are requesting relates to your cause of action. Your cause of action is not post conviction relief in the broad sense. Your cause of action is a hearing that was ordered by the Supreme Court in a very narrow window, and that is what I am hearing her argue. If your discovery goes to something other than the

Supreme Court ordered the hearing to be about, to show some good cause why you should get it, and so I agree with her. We have a very narrow hearing here. We do not have all those issues you raised at the Supreme Court. We do not have all the issues that were raised in the original Petition or successive Petition. We have one issue, mitigation, and was counsel -- could they have discovered it if they had done something different, and, if they had discovered it, would they have put it on and would it have made a difference. And that is where we are at here. So I am thinking in terms of the Washoe County District Attorneys Office. I have no problem with the subpoena that requires them to turn over to you any mitigation evidence with regard to his mental health. That is what you say you are looking at and if they have something, they should turn it over. So that is granted as that relates to that.

The Reno Police Department request is for information regarding Mr. Vanisi, and all of his aliases or combination of names and combination of birth dates. And you are asking for all sealed and unsealed official and unofficial records, investigative materials, microfilm, logbooks. I think that is clearly overly broad. I'm not sure about the evidence vault. Why are you asking to look in the evidence vault?

MR. FIEDLER: If I could have the Court's indulgence for just a few minutes. So my notes indicate that we had requested to go to the evidence vault just to review the evidence which is standard procedure for our office when we get a new case. We were told we needed a court order. If the Court's asking what evidence we are looking for, we just feel we have an obligation to review the evidence in the evidence vault to make sure there is nothing that would lead to a claim. As to how that evidence would relate to this specific claim that is in front of the court, again, it is a lot of the same things I was saying earlier, a lot of this stuff we feel when turned over to an expert could be evidence of Mr. Vanisi's mental health.

THE COURT: I am going to deny the request for the Reno Police Department. It is too broad, and I do think it is what you normally do when you get a new case and you go to file a Petition, but we are not there right now and that is not the status of the State's case. You will get it if you file a Petition in the Federal court if you move from that point, but it is not relevant to the hearing we have coming up in October.

So we have the custodian of records of the State of Nevada Department of Corrections.

MR. FIEDLER: Your Honor, we would submit that on the pleadings.

THE COURT: Okay. Counsel, do you have anything you wanted to say?

MS. NOBLE: Your Honor, with respect to the NDOC request, I would just ask that it be limited to subject matter and temporal limitation be placed that would be designed to limit it to information Mr. Bosler and the defense team would have had, should have had during the time of trial and the penalty phase.

THE COURT: So we have a period of time when the defendant was housed at the Nevada Department of Corrections between the two cases while he was -- Before he was convicted, he was housed at the prison for security reasons. So that period of time, his classification and inmate files, if they exited in that period of time, and I don't know what he does or did would be relevant to the mitigation claims, and Mr. Bosler should have been able to find that if didn't have it. The same with any grievances that he filed during that period of time. Now that period of time was probably January 1999 to October 1999, in that window. The first set of jury questionnaires were filed January 4, 1999, so that must have been the date of that first trial. The next trial they started in September of '99. So I think it would be limited to the 1999. Was there any indication he was held by the prison before January of 1999?

MR. FIEDLER: I don't have any, Your Honor.

THE COURT: Counsel, would you ask your client if he was held in the prison before the first trial or just between the two? Can you remember?

THE DEFENDANT: I was held -- I was held before my first trial in July of 1998, I was in NHP in 1998.

THE COURT: So I will allow you to subpoena the records from June 1998 through September 1999.

MR. FIEDLER: Thank you.

THE COURT: That is the records from the Nevada Department of Corrections.

Then you have a Washoe County Sheriff's Office request. Does that relate to his housing?

MR. FIEDLER: Well, certainly I need records from his housing situation. That would be part of that request. It is the same category, we are looking for mental health evidence.

THE COURT: Okay. In reviewing your attachments to the subpoena, it does look like you're looking for the case file notes, lab reports, lab notes, all evidence that might have been found as well as other requests. I think that all goes to some future Habeas proceeding, not the one we are here on. I will allow to you subpoena from the Washoe County Sheriff's Office Detention Bureau records of his confinement from 1999-- 1998, I am sorry. That should give you plenty of information.

MR. FIEDLER: Thank you, Your Honor.

THE COURT: Then you have subpoena to the Ambassador Tupounina. This seems to go to a claim that was actually rejected by the Supreme Court.

MR. FIEDLER: If I could address that, Your Honor. It is true the Nevada Supreme Court rejected the claim based on the Vienna Convention. However, it is the case, we believe it is, if trial counsel reached out to the Consulate, they would have provided investigative assistance. So their failure to reach out to the Consulate would be another example of deficient performance, Your Honor, related to the Vienna Convention, and goes to the claim before this Court in October.

THE COURT: The testimony in the hearing on the previous -- at the previous time on the Habeas ineffective assistance was Mr. Specchio testified he did reach out, so there is no evidence he did not reach out. And the claim was resolved by the Supreme Court not just on the issue of the Vienna Convention but on a supporting of my factual finding that Mr. Specchio did in fact reach out and the Vienna Convention allowed the trial could go forward and the penalty could stand even though no involvement from the Tongan embassy took place.

MR. FIEDLER: Could I have the Court's indulgence?

THE COURT: Okay. You should know better than me, but I don't know. I might remember it wrong.

MR. FIEDLER: I will just object for the record. I read the Nevada Supreme Court rule differently.

THE COURT: It may be I am reading what they meant based on what I thought. Ms. Noble, do you have anything to add?

MS. NOBLE: No, Your Honor. We covered that in the brief. The Supreme Court said because Mr. Vanisi came here at six years old, information about his mental health issues that would have been in Tonga wouldn't have been of value.

MR. FIEDLER: I am sorry, if I could respond to that Your Honor. Under ABA guidelines, counsel has an obligation to prepare a social history which includes multiple generations of investigation. So that would have included investigation in Tonga. I would submit trial counsel had an obligation to investigate Mr. Vanisi's background in Tonga.

THE COURT: You are investigating his background in Tonga. You are doing that. You have people who are going to be -- you subpoenaed or have arranged to testify through a deposition. We also had a physician that testified, knew information about his background and was interviewed by counsel. The question here today is whether or not asking the

Consulate for their information of a contact, it seems to be only looking toward refuting what Mr. Specchio said in his sworn testimony which was not refuted and has not been refuted so far. So I don't think it goes to any mitigation. I am not saying you can't put on what he did in Tonga. I am just saying that request doesn't go to it.

We have the request from the University of Nevada Police Department regarding Sgt. Sullivan's records.

MR. FIEDLER: Yes, Your Honor. This is another one we would submit on the pleadings.

THE COURT: Having reviewed the request, although it may go to a claim in the future, it doesn't go to what we are dealing with here, therefore, I am going to deny your request for discovery in the matter before us today.

We have the custodian of records for the Church of Jesus Christ of Latter Day Saints.

MR. FIEDLER: Yes, Your Honor. In attempt to help us move things along, we are going to submit requests G through O on the pleadings. I am obviously happy to answer any questions the Court has about them.

THE COURT: So if you want to get tangled with the church, I could let you make this subpoena, but I doubt they are going to just let you subpoena all this without a fight.

MR. FIEDLER: Understood, Your Honor. I would just add these were very important moments, and so they are important moments in the social history.

THE COURT: Right. But you know about them.

MR. FIEDLER: Yes, Your Honor.

THE COURT: So there is really nothing in the church's records that are going to help you if it is approximately 1998 his committance to the temple.

MR. FIEDLER: I am confused what we are talking about. I am sorry, Your Honor.

THE COURT: The records you requested in this subpoena are very, very detailed from the Church of Latter Day Saints. It goes into a lot of their church records, not just with regard to Mr. Vanisi, but some of their records that they hold. If you know about these events and you have people who are going to testify to these events, the only thing that you might need is if somebody says this didn't happen, that he didn't go on a mission or he didn't, he wasn't active in the church at a certain period of time. Only then would this became relevant to you refuting that or counsel refuting it with mitigation evidence.

MR. FIEDLER: Also the records might help us have a fuller picture. Although we are preparing witnesses to testify about this, they are all people who, you know, can only testify about what they learned. We think the records we are asking for are a more direct source to that information.

THE COURT: You can come back and ask me for more after you deposed the people in Tonga if you think you need more information with regard to his education in Tonga from '70 to '76. If you need to subpoena that from the church, you can come back and make a presentation to me, not just that, but those things. Let's get the percipient witnesses first.

With regard to Ed Lynn. You have his reports, don't you?

MR. FIEDLER: Yes. It is my understanding there was underlying data. We were trying to track down that. We could not track it down without a subpoena, so were requesting that subpoena now.

THE COURT: You mean the raw data he used before he testified?

MR. FIEDLER: Yes, Your Honor.

THE COURT: We have a psychiatric report.

MR. FIEDLER: Yes. We want to turn that raw data over to our expert to review so their assessment can be more thorough and accurate.

THE COURT: What makes you think he has that raw data after this many years? I don't think they are required to hold it.

MR. FIEDLER: We are not sure, but if we issue a subpoena, they come back with we don't have it, that is the situation. If they do have it, it would be very helpful.

MS. NOBLE: Your Honor, the State doesn't understand how that would relate to the claim, this raw data. Is the accusation now Mr. Bosler and the defense team should not have relied on those experts or there was something wrong with their data? Because I haven't seen that with respect to the previous Petition, and I think that falls outside the scope of the narrow nature of the evidentiary hearing.

THE COURT: It goes to your, what I am hearing, I may -- I don't mean to put words in your mouth -- it probably goes to something you may do later.

MR. FIEDLER: Well, I think it goes to something we plan on doing through this hearing which is turning that raw data over to our expert who will opine about Mr. Vanisi with more data available to them.

THE COURT: So you have alleged that the defense should not have used Dr. Rich, and that that was error on their part. It was below the standard of care to call Dr. Rich as a witness?

MR. FIEDLER: No. The claim as it relates to this data is that it is all tied up to this trial counsel's failure to present mental health evidence. All we are trying to do here is ensure our experts who will testify about what expert testimony would have been available back then, to make sure they have all the data available that would have been available at the time.

THE COURT: If your expert tells me after they look at Phillip Rich's report that they need to know something, then maybe I would let you ask Dr. Rich that question. But I don't see that now. Plus, I didn't realize that your claim, I guess I didn't realize that your claim included litigating whether or not the doctors were adequately presented. I thought it was more about mitigation they should have found in terms of the social history and his social background not mitigation with regard to the doctors he called being ineffective. But I haven't read your brief on that. Did you brief that?

MR. FIEDLER: Yes, we briefed this. This is a mental health evidence mitigation evidence claim. My understanding of the claim it includes expert testimony.

THE COURT: So you briefed it at the Supreme Court that counsel was ineffective for failing to call an appropriate mental health expert in mitigation?

MR. FIEDLER: Yes, but tied to the ineffective investigation. Because if the claim is if counsel had conducted an adequate investigation and turned that Information over to an expert, an expert would have been able to offer testimony about Mr. Vanisi's mental state.

THE COURT: Well, if you have an expert that will tell me Dr. Rich's testimony and report is not sufficient for him to say whatever he thinks Dr. Rich did wrong in his presentation, then maybe I will let you look into it.

MR. FIEDLER: Understood.

THE COURT: For now, I am going to deny that request.

MR. FIEDLER: Just to keep the record clear, we are talking about Dr. Lynn, correct?

THE COURT: I thought we are talking about Dr. Rich. Sorry. Doctor Lynn. We have Dr. Lynn's report, don't we? I am sorry, I was talking about Dr. Rich. You are talking about Dr. Lynn. Do you have his report?

MR. FIEDLER:. I believe we have his report. It is really the raw data that we are asking for.

THE COURT: I am going to deny that request.

Pfizer, that goes to the issue of drugs that would be used; is that correct?

MR. FIEDLER: It goes to the correlation between Mr. Vanisi's Fen-Fen and mental health issues.

THE COURT: You want to subpoena from Pfizer all the information they had on Fen-Fen prior to 1999?

MR. FIEDLER: Yes, Your Honor, so we can piece together what effect this drug had on Mr. Vanisi's health.

THE COURT: Counsel.

MS. NOBLE: Your Honor, I'm just not sure how they are going to establish when Mr. Vanisi, was on Fen-Fen, because Mr. Vanisi is not to go be testifying at this hearing and didn't testify at trial, so it would seem that it would be kind of, to subpoena the pharmaceutical company would result in delay and the information ultimately not be admissible.

MR. FIEDLER: There are a number of witnesses who knew Mr. Vanisi in the years leading up to the events in this case who indicated in their declaration and we expect them to testify Mr. Vanisi was using and probably abusing the diet drug Fen-Fen. As to relevance, we expect testimony to establish that that is relevant.

As to the concern of delay, the Civil Rules have a procedure in place for quashing motions. If Pfizer decides to do that, we'll litigate that. But we don't feel that is going to delay the hearing in this case.

THE COURT: It is going to delay my life.

MR. FIEDLER: Understood, Your Honor.

THE COURT: Because I have to have a hearing with them, and we have to set it and we only have a few months, actually July, August and September. We have 90 days. So the probability of being able to get a resolution will be very difficult, but we will try. Which witness testified to which drug?

MR. FIEDLER: If I could have a moment, Your Honor. So I believe, unfortunately, I don't have the exhibit numbers handy. I believe that testimony came from the Williams brothers, so Terry and Tim. Possibly Robert Kirtz.

THE COURT: I am looking at the exhibit log to find the name.

MR. FIEDLER: I can give you the exhibit number of the witnesses. Unfortunately, I don't have their declaration with me. Robert Kirtz' declaration Exhibit 106.

THE COURT: Exhibit 106 doesn't have anything to do with anything you mentioned that I can find.

MR. FIEDLER: I apologize. I would be happy to file something with the Court. I know it is in the record somewhere. Unfortunately, I didn't bring those materials to court with me today.

THE COURT: You think you have a declaration from somebody who says a specific kind of drug he was taking?

MR. FIEDLER: Multiple witnesses. I know it is at least two. Maybe it is three or four.

THE COURT: Okay. Why don't you supplement for me. I am concerned about the scope of the requested subpoena to Pfizer. It seems very broad and no time frame. We need to have a time frame. It will need to be within three years of the trial and up to the time of the trial, and only the drugs that you have evidence that he was using. So if we are talking about 1998 abuse, we are talking about three years prior to that up to 1999 so we put it in the frame of what they knew. I don't think there were any of those Fen-Fen cases yet. So it isn't post.

MR. FIEDLER: We would still be filing a supplemental. My co-counsel managed to find the exhibit numbers. We can go through them now if the Court would prefer.

THE COURT: What is it?

MR. FIEDLER: Exhibit 97 paragraph 25. 98, paragraph 6. Exhibit 111, paragraph 20. Exhibit 123, paragraph 19. To repeat, Exhibit 97 paragraph 27. Exhibit 104, paragraph 42. Exhibit 123, paragraph 19. Exhibit 105, paragraph 22.

THE COURT: Okay. You just gave me more. 97.

MR. FIEDLER: 97 paragraph 25 and 27. We will combine them now.

THE COURT: I see. Okay.

MR. FIEDLER: In Exhibit 98 paragraph 6.

THE COURT: Okay.

MR. FIEDLER: Exhibit 104, paragraph 42. Exhibit 111 paragraph 20. Exhibit 123 paragraph 19, and Exhibit 105 paragraph 22.

THE COURT: Okay. In Exhibit 97 it is specifically Fen-Fen. No other drugs you are asking for information on?

MR. FIEDLER: To be clear, all of these are going to be Fen-Fen. Fen-Fen is the drug.

THE COURT: So your subpoena you requested Redux as well as Fen-Fen. Pondimin. Collectively known as the drug. I don't think the witnesses know the collectively known as. You can retrieve the information on Fen-Fen in the window of time I have given you, 1997 through 1999. If they can do this, great. If not, we'll deal with that.

MR. FIEDLER: Thank you, Your Honor.

MS. NOBLE: Your Honor, if I may, the State's concern with the Fen-Fen subpoenas isn't just whether or not they are going to receive them, it is going to become a reason or excuse to try to delay the October hearing. That is our principal concern.

THE COURT: I understand that. I am not going to delay it for this. I think it is a fishing expedition. I don't think it is relevant. I think the information is available at many more sources than the Pfizer Corporation. If the Public Defender were serious about wanting to have expert testimony or information about the drug, it is available in any other source in areas much easier to get than a subpoena like what you prepared for Pfizer. If you come back and say they are fighting over it, you need a continuance of your hearing, I am going to say you should have found the information some place else because it is available.

MR. FIEDLER: Understood, Your Honor.

THE COURT: With regard to the Boy Scouts. Obviously not to present time, your subpoena asked for information 1970 to present. That would be to 1999.

San Mateo Protective Services, you have information from them already don't you?

MR. FIEDLER: Court's indulgence. We requested records. We received a denial. Our understanding is we need an order from a court to get those records.

THE COURT: Because you are asking for brothers, mother, sisters other people, right?

MR. FIEDLER: Yes, Your Honor. That is my understanding.

THE COURT: You can ask for the record with regard to Mr. Vanisi but not the other family members.

MR. FIEDLER: Thank you, Your Honor.

THE COURT: I think you have them for Mr. Vanisi, but perhaps not. Same with Alameda County. You can ask for the records they have on Mr. Vanisi but not his family members. If you could make a showing somehow, I don't know if those people have mental health issues that your showing familial mental health issues, if you make some sort of showing on that and someone denies that and you want records to prove it up, you might be able to convince me to subpoena them, but for now, I think they are not necessary.

Then you have a subpoena to the Alameda County Juvenile Division. It is requesting individuals with cases and you have some of case numbers. Who do they relate to?

MR. FIEDLER: These relate to the children of Tufui Tafuna who is Mr. Vanesi's brother.

THE COURT: Brother?

MR. FIEDLER: Yes.

THE COURT: Okay. I am going to deny that request. You want to subpoena records from United States Citizenship and Immigration Service?

MR. FIEDLER: I do, Your Honor.

THE COURT: On Mr. Vanisi?

MR. FIEDLER: Yes, Your Honor.

THE COURT: What do you think they have that the lawyers should have discovered that they didn't discover?

MR. FIEDLER: Well, I know we requested his file on immigration status, how he came into the country. It would be relevant as far a the social history.

THE COURT: You don't have that information?

MR. FIEDLER: Well what we want is-- They released some portion of the record but withheld a portion of it and indicated we needed a court order.

THE COURT: What did they withhold?

MR. FIEDLER: They did not disclose, so we don't know, Your Honor.

THE COURT: You are not getting a court order if you issue a subpoena. That is not the kind of Court order they want. You want me to order they give something up, and I have no idea what it is I am supposed to order them to give up.

MR. FIEDLER: Could we brief this specific issue?

THE COURT: Yes.

MR. FIEDLER: Okay. Thank you.

THE COURT: I can't order them to give something up if I don't know what it is.

The Nevada Board of Continuing Legal Education. You are requesting information on their compliance or noncompliance with court cases?

MR. FIEDLER: Their CLE compliance, Your Honor.

THE COURT: As of 1998?

MR. FIEDLER: Yes, Your Honor.

THE COURT: I am going to be surprised if they have Mr. Gregory's or Mr. Bosler's or Mr. Specchio's. But if you tailor it to the period of time that they were representing

Mr. Vanisi back in '98, I guess that is the way you do that.

MR. FIEDLER: Well, could we go even a little farther before they were representing Mr. Vanisi? Part of what we want to show is their awareness of the standard they were to be complying with in representing somebody in a death penalty case.

THE COURT: Yes. If they have records, we'll do 1995 through '99. That may or may not get you what you want, because they could have taken classes that would have helped in that regard before '95. Okay. That is your discovery requests, right?

MR. FIEDLER: Yes, Your Honor.

THE COURT: Okay. Now did I miss a request to subpoena records from James Butcher?

MR. FIEDLER: Yes, Your Honor, but his status is essentially the same as Dr. Lynn's. I will be honest, I just assumed your ruling to Dr. Lynn would apply to it.

THE COURT: It will apply to both. Okay. So one of the things I wanted to say was this case should take precedence over everything on the court calendar. This came from the Supreme Court December 27th of '17 in their decision. The remittitur issued sometime after that, but not drastically after that, but the beginning of '18. We were prepared to hear this case pretty much any time. You all requested one month and you requested October. That is what you have. It will be tried in October, and it will be done in one month. So if these subpoenas don't get what you think you want, you are going to have to make a record of what happened. That, in itself, may be part of the record that you are making here about the availability and ability to get information, but whatever it is, we are going to move forward with the hearing in October.

So I am going to want counsel to get together and talk about the offered witnesses, which witnesses, how we are going to present them, on which days and what times. If you have witnesses coming from out of town, we are going to need to coordinate all of that. And I don't know if the State intends to call any witnesses at the conclusion of the Petitioner's case, so you are going to have to let me know how that goes.

MR. PLATER: Probably only a couple, Judge.

MS. NOBLE: There is one witness out of state. We are going through the process of the California court right now to ensure she's subpoenaed.

THE COURT: Okay. So you all must discuss it and talk about the order of witnesses and where they are and how they are going to get here. That being said, I think it is appropriate to have another status hearing so that I know what the witness order is going to be and we can find out what has happened with your subpoenas and make sure we make whatever record needs to be made with regard to moving forward with the hearing.

Counsel, what do your calendars look like for September 5th?

MS. NOBLE: That works for the State, Your Honor.

MR. FIEDLER: Works for the defense, Your Honor.

THE COURT: Okay. So we will have that hearing September 5th.

THE CLERK: September 5th at 10:00 a.m.

THE COURT: Mr. Vanisi, you waived your appearance so you won't be coming. Is that still okay with you?

THE DEFENDANT: Yeah.

THE COURT: So I won't see you again unless you tell your lawyers you changed your mind.

THE DEFENDANT: Yeah.

THE COURT: If you tell your lawyers you changed your mind and they don't, nobody brings you to court, you write a letter. You can always write a letter. But I don't want a letter from you unless your attorneys aren't doing what you want them to do, okay?

THE DEFENDANT: All right.

THE COURT: Otherwise, you communicate only with your lawyers about this, all right?

THE DEFENDANT: Right.

THE COURT: Okay. All right, counsel, we'll see you back in September. Thank you. Court's in recess.

(Whereupon, the proceedings were concluded.)

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STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, Judith Ann Schonlau, Official Reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, DO HEREBY CERTIFY:

That as such reporter I was present in Department No. 4 of the above-entitled court on Wednesday, May 30, 2018, at the hour of 2:00 p.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. SIAOSI VANISI, Case Number CR98-0516.

That the foregoing transcript, consisting of pages numbered 1-56 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 30th day of May, 2018.

/s/ Judith Ann Schonlau
JUDITH ANN SCHONLAU CSR #18

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

DATE, JUDGE OFFICERS OF COURT PRESENT	**PAGE ONE** **APPEARANCES-HEARING**	**CONT'D TO**
5/30/18 HONORABLE CONNIE STEINHEIMER DEPT. NO.4 M. Stone (Clerk) J. Schonlau (Reporter)	**ORAL ARGUMENTS ON MOTION FOR DISCOVERY AND ISSUANCE OF SUBPOENAS/WAIVER OF PETITIONER'S APPEARANCE AT EVIDENTIARY HEARING AND ALL OTHER HEARINGS** Petitioner, Siaosi Vanisi, present with counsel, Assistants Federal Public Defender Randolph Fiedler and Joanne Diamond. Chief Deputy District Attorney Jennifer Noble and Deputy District Attorney Joseph Plater. 2:08 p.m. Court convened. Counsel Fiedler advised the Court that the Petitioner still wishes to waive his appearance at all future hearings in this matter, including the evidentiary hearing in October. Counsel Fiedler further advised the Court that the Petitioner has been advised of his right to be present, personally hear the testimony being presented at the evidentiary hearing and assist counsel with examination of the witnesses. Court canvassed Petitioner, fully advised him of his rights. Court accepted the Petitioner's waiver of appearance after finding the Petitioner's waiver was voluntary, and that he fully understood his rights to be present at all hearings. **COURT ENTERED ORDER** waiving the Petitioner's appearance at all future hearings in this matter, including the evidentiary hearing in October. Counsel Fiedler advised the Court that the Defendant is scheduled to be transported from Carson City to Ely on Tuesday, June 5, 2018. Should that not occur, counsel Fiedler requested leave to ask this Court for assistance in getting the Petitioner transported to Ely. Court advised counsel that the Nevada Department of Corrections is not located within this Court's jurisdiction and if relief is needed, it will need to be requested in the First Judicial District Court. Counsel Noble advised the Court that the State stipulates to the following video depositions being taken with the State being present via teleconference at the Federal Public Defender's expense: Dr. Mapa Pulka, Limu Havea, Sioeli Tuita, Totoa Pohahau, Tufui Tafuna, and Sioasi Mafileo, as well the witnesses in the State of California. Counsel Fiedler and Noble presented argument regarding the deposition of Bishop Tonga. **COURT ENTERED ORDER** allowing for the deposition of Bishop Tonga to be taken. Counsel Fiedler and Noble presented arguments on narrowing the scope of the requested subpoenas duces tecum. **COURT ENTERED THE FOLLOWING ORDERS:** the Petitioner may subpoena any mitigating evidence of the Petitioner's mental health contained in the Washoe County	

DATE, JUDGE OFFICERS OF COURT PRESENT	PAGE TWO APPEARANCES-HEARING	CONT'D TO
5/30/18 J. Schonlau (Reporter)	**ORAL ARGUMENTS ON MOTION FOR DISCOVERY AND ISSUANCE OF SUBPOENAS/WAIVER OF PETITIONER'S APPEARANCE AT EVIDENTIARY HEARING AND ALL OTHER HEARINGS** District Attorney's file; the Petitioner may subpoena records from the Nevada Department of Corrections only from the period of time between 1998 and 1999, when the Petitioner was housed there pre-trial; the Petitioner may subpoena records from the Washoe County Sheriff's Department for the period of time he was in jail in 1998; the Petitioner may subpoena records from Wyeth-Ayerst Laboratories as to the drug Phen Phen from 1997 up to 1999 and the Court will not delay the evidentiary hearing if the records are not received timely; the Petitioner may subpoena records from the National Council – Boy Scouts of America from the time period of 1970 through 1999; the Petitioner may subpoena records from the National Council – San Mateo County Children's Protective Services only as to the Petitioner; the Petitioner may subpoena records from the National Council – Alameda County Children's Protective Services only as to the Petitioner; and the Petitioner may subpoena records from Nevada Board of Continuing Legal Education as to the Petitioner's trial counsel from the period of time of 1995 through 1999. **COURT FURTHER ENTERED THE FOLLOWING ORDERS:** Denying the request to subpoena records from the Reno Police Department as the request is too broad and not relevant to the limited scope of the evidentiary hearing; denying the request to subpoena records from the Consul General of Tonga as the Washoe County Public Defender's Office did reach out the Consul General of Tonga pre-trial and the Supreme Court has already ruled on the issue; denying request to subpoena records from the University of Nevada-Reno Police Services as those records are not relevant for the limited scope of the evidentiary hearing; denying the request to subpoena records from the Church of Jesus Christ of Latter Day Saints with leave to renew if becomes relevant after depositions are taken; denying request to subpoena records of Edward Lynn, M.D., with leave to renew if new expert needs the Doctor's raw data; denying request to subpoena records of James Butcher of the University of Minnesota, with leave to renew if new expert needs his raw data; and denying request to subpoena records from the National Council – Alameda County Juvenile Court – South County	

CASE NO. CR98-0516 **<u>TITLE: THE STATE OF NEVADA VS. SIAOSI VANISI</u>**
(POST-CONVICTION)

DATE, JUDGE OFFICERS OF COURT PRESENT	**PAGE THREE** **APPEARANCES-HEARING**	**CONT'D TO**
5/30/18 J. Schonlau (Reporter)	**<u>ORAL ARGUMENTS ON MOTION FOR DISCOVERY AND ISSUANCE OF SUBPOENAS/WAIVER OF PETITIONER'S APPEARANCE AT EVIDENTIARY HEARING AND ALL OTHER HEARINGS</u>** Division. **COURT FURTHER ORDERED** counsel to further brief with more specificity the request to subpoena records from U.S. Department of Homeland Security, U.S. Citizenship and Immigration. Court advised counsel that this case must take precedence over all other cases and the evidentiary hearing in October will not be continued. Further, counsel must meet and confer regarding the schedule of witness for the hearing. Status hearing set in order to review the outcome of the above subpoenas as well as to review the schedule of witnesses. 3:37 p.m. Court recessed.	**9/5/18** **10:00 a.m.** **Status Hearing** **10/1/18** **10:00 a.m.** **Evidentiary Hearing** **(4 weeks)**

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Attorneys for Petitioner

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

SIAOSI VANISI,

Petitioner,

v.

TIMOTHY FILSON, Warden, et al.,

Respondents.

Case No. CR98-0516
Dept. No. IV

MOTION TO DISQUALIFY THE WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

Death Penalty Habeas Corpus Case

POINTS AND AUTHORITIES

I. Vanisi moves to disqualify the Washoe County District Attorney's Office for ethical violations that have recently come to light.

Undersigned counsel have recently learned that members of the Washoe County District Attorney's Office (WCDAO) conducted interviews of Vanisi's trial defense team during which confidential, privileged disclosures were elicited. Vanisi moves to disqualify the WCDAO from further participation in this case based on its violation of the Nevada Rules of Professional Conduct. In the alternative, Vanisi requests an evidentiary hearing to determine the nature and extent of the WCDAO's ethical violations, remedies to repair the harm to Vanisi, and measures to protect him from further harm.

A. The WCDAO had improper communications with Vanisi's former defense team.

1. Improper contact with trial counsel Jeremy Bosler.

Mr. Bosler was one of the three attorneys with the Washoe County Public Defender's Office (WCPDO) assigned to represent Vanisi at trial. On May 31, 2018, current counsel for Vanisi, Randolph Fiedler, met with Mr. Bosler. Mr. Bosler revealed that, three weeks earlier, he was interviewed by representative(s) of the WCDAO about Vanisi's case. During the interview with the WCDAO representative(s), Mr. Bosler revealed confidential and privileged information relating to the WCPDO's representation of Vanisi.

2. Improper contact with defense investigator Crystal Calderon-Bright.

Ms. Calderon-Bright worked on Vanisi's case when she was an investigator at the WCPDO. On June 11, 2018, Ms. Calderon-Bright spoke with Mr. Fiedler and undersigned counsel's investigator, Herbert Duzant, via telephone. Ms. Calderon-Bright revealed that, in early May of 2018, John Gurriere, an investigator with the WCDAO, began leaving messages for her to contact him. Ms. Calderon-Bright did not know if it was appropriate for the WCDAO to be calling her and telephoned Jeremy Bosler to seek advice about whether she should speak with Mr. Gurriere. Mr. Bosler advised her to speak with Mr. Gurriere. Mr. Bosler left her with the impression that the WCDAO was representing her and Mr. Bosler's interests at the upcoming evidentiary hearing on Vanisi's Petition. Ms. Calderon-Bright subsequently telephoned Mr. Gurriere and arranged an interview. During the interview with Mr. Gurriere, Ms. Calderon-Bright revealed confidential and privileged information relating to the WCPDO's representation of Vanisi.

3. Improper contact with defense investigator Evo Novack.

Mr. Novack worked on Vanisi's case when he was an investigator at the WCPDO. On June 15, 2018, Mr. Novack spoke with Mr. Duzant via telephone. Mr. Novack revealed that, about three weeks earlier, he was contacted by a representative of the WCDAO and asked to submit to an interview about Mr. Vanisi's case. Mr. Novack was interviewed by a female Deputy District Attorney (DDA). During the interview with the DDA, Mr. Novack revealed confidential and privileged information relating to the WCPDO's representation of Vanisi. At the interview, the DDA showed Mr. Novack portions of the WCPDO's file on Vanisi's case. She informed Mr. Novack she had in her possession over three-thousand pages of the WCPDO's file on Vanisi.

4. These improper contacts violated Vanisi's rights to the protection of his confidential and privileged information.

Information relating to the WCPDO's representation of Vanisi is protected by three separate, but related, doctrines: the attorney-client privilege, the work-product doctrine, and trial counsel's ongoing duty of confidentiality. *See* American Bar Association (ABA) Model Rules of Professional Conduct, Comment [3] to Rule 1.6 ("The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics"). Comment [3] to Rule 1.6 explains the attorney-client privilege and work-product doctrine "apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client;" the duty of confidentiality applies in all other situations. *Id.*

Undersigned counsel received no warning that the WCDAO was going to contact members of Vanisi's trial defense team and induce them to disclose confidential and privileged information. Undersigned counsel only learned of these improper inducements during subsequent conversations with the individual trial team members. From those conversations, undersigned counsel learned that the WCDAO sought and obtained information that Mr. Bosler and his agents were not ethically and legally permitted to disclose because it was protected by the attorney-client and work-product privileges and the ethical duty of confidentiality. Vanisi did not give his informed consent to these disclosures. And this Court has not made, and the WCDAO has not requested, a finding that Vanisi has waived any privileges—and the limited extent of any waiver—related to information within the scope of the October evidentiary hearing.

Undersigned counsel are bringing this Motion to Disqualify pursuant to their own duty under the Nevada Rules of Professional Conduct to protect Vanisi's privileged and confidential information. *See* Nev. Rules of Prof'l Conduct R. 1.6(c) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.").

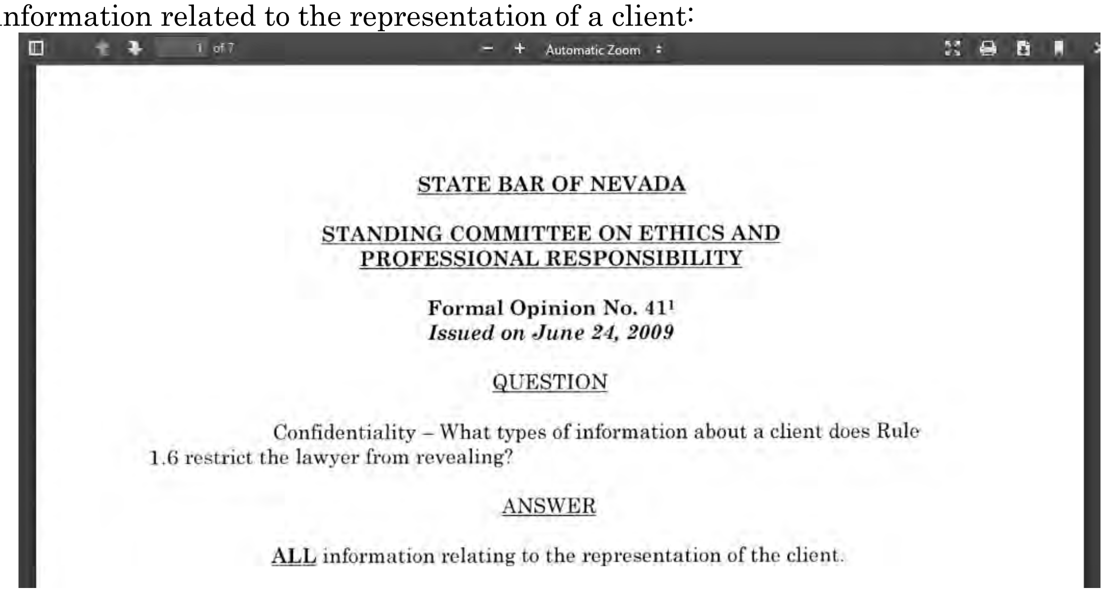
B. The legal standard requires this Court to resolve any doubt in favor of disqualification.

To prevail on a motion to disqualify opposing counsel for an alleged ethical violation, the moving party must establish (1) "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur" and (2) "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Cronin v. Eighth Judicial Dist. Court, In & For Cty. of Clark*, 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989), *disapproved of on other grounds by Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 123 Nev. 44, 152 P.3d 737 (2007) (internal quotation marks omitted). A district court "has wide latitude in determining whether to disqualify counsel from participating in a given case." *Cronin*, 105 Nev. at 640, 781 P.2d at 1153. "[A]ny doubt should be resolved in favor of disqualification." *Id.*

II. The WCDAO acted unethically by inducing Vanisi's former counsel and his agents to violate the duty of confidentiality.

An attorney's duty of confidentiality to current and former clients "is at the heart of the lawyer-client relationship." Ex. 1 (State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 41) at 1. In Nevada, this duty is embodied in Rule 1.6 of the Nevada Rules of Professional Conduct, which provides, with very limited exceptions: "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent [or] the disclosure is implicitly authorized in order to carry out the representation . . . ." Nev. Rules of Prof'l Conduct R. 1.6(a); *see also* Nev. Rules of Prof'l Conduct R. 1.9(c)(2) ("A lawyer who has formerly represented a client in a matter shall not . . . . [r]eveal information relating to the representation except as these Rules would permit or require with respect to a client.").

The State Bar of Nevada Standing Committee on Ethics and Professional Responsibility has made clear Rule 1.6(a) prohibits an attorney from revealing *any* information related to the representation of a client:



STATE BAR OF NEVADA

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 41[1]
Issued on June 24, 2009

QUESTION

Confidentiality – What types of information about a client does Rule 1.6 restrict the lawyer from revealing?

ANSWER

ALL information relating to the representation of the client.

Ex. 1 at 1. The State Bar Standing Committee expressly found "[t]he information protected by the lawyer's ethical confidentiality duty under Rule 1.6 is much broader than privileged information protected by the attorney-client privilege under NRS 49.185." Ex. 1 at 2. Indeed, Rule 1.6(a) applies "[e]ven though the information is not protected by the attorney-client privilege." Ex. 1 at 3-4; *see also* ABA Rule 1.6, cmt. 3 (confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

The WCDAO will inevitably try to defend its actions on the basis that Vanisi's ineffective assistance of trial counsel claim operated to waive the protection of Rule 1.6(a). *See* Nev. Rules of Prof'l Conduct R. 1.6(b)(5) (permitting lawyer to reveal information relating to the representation to the extent the lawyer reasonably believes it necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client"). The WCDAO would be wrong.

The ABA Standing Committee on Ethics and Professional Responsibility addressed the exact situation at bar—where "a prosecutor . . . defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing"—in Formal Opinion 10-456, *Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim*. Ex. 2 at 1. The ABA Standing Committee acknowledged a "lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel." *Id.*

But found it "highly unlikely a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable." *Id.* Thus, for purposes of the Rule 1.6(b)(5) exception, "it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting." Ex. 2 at 5.

The ABA Standing Committee noted, even when called as a witness in a formal judicial proceeding, "the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the . . . former client." Ex. 2 at 2. "Outside judicial proceedings, the confidentiality duty is even more stringent." *Id.* Critically, "[e]ven if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information . . . thereby eliminating the former client's opportunity to object and obtain a judicial ruling." *Id.* Moreover, "[b]ecause the extent of trial counsel's disclosures to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding." Ex. 2 at 5.

A. The WCDAO knew it was unethical to induce Vanisi's former defense team to violate the duty of confidentiality.

The WCDAO had no right to attempt to induce Vanisi's former counsel and his agents to violate their continuing duty of confidentiality and "engage in conduct that is prejudicial to the administration of justice." Nev. Rules of Prof'l Conduct R.

8.4(d). In doing so, the WCDAO committed professional misconduct. *See* Nev. Rules of Prof'l Conduct R. 8.4(a) (professional misconduct for lawyer to "[v]iolate or attempt to violate the Rules of Professional Conduct, *knowingly assist or induce another to do so*, or do so through the acts of another") (emphasis added). There is no question the WCDAO knowingly violated the Rules of Professional Conduct. As an initial matter, "[i]t is well known . . . that the rules of ethics governing lawyers prohibit a lawyer from revealing confidential client information without the consent of the client." Ex. 1 at 1. Moreover, the lead prosecutor in Vanisi's case, DDA Jennifer Noble, had specific knowledge that contacting Vanisi's trial defense team was unethical.

On December 22, 2016, attorneys from the Non-Capital Habeas Unit of the Federal Public Defender filed a Response to Motion to Dismiss, or Alternatively, to Disqualify the Federal Public Defender, in *Sheppard v. Gentry*, Second Judicial District Court Case No. CR03-0502B. Ex. 3. Although not assigned to the *Sheppard* case, DDA Noble represented the WCDAO at a conference call on the Motion when the assigned prosecutor was on vacation. *See* Ex. 4 (Transcript of Conference Call Re: Motions) at 3. DDA Noble represented to the court that she had looked at the pleadings in preparation for the conference call. *See id.* at 3.

Exhibit A to the Response was a declaration by Bruce A. Green, Director of the Louis Stein Center for Law and Ethics at Fordham University School of Law. *See* Exhibit A to Ex. 3 at ¶1. Professor Green's declaration was explicit that it would be unethical for a prosecutor to induce a defense lawyer to violate the duty of confidentiality:

> 26. Contrary to the implication of the District Attorney's motion, the prosecutors have no right to attempt to induce Ms. Sheppard's former counsel to violate their confidentiality duties. In general, lawyers act unethically when they intentionally elicit confidential information from someone who has a fiduciary duty to maintain confidentiality as well as a corresponding obligation under the state judiciary's rules of professional conduct.

Ex. 3 at ¶26. The court in *Sheppard* ultimately agreed that the representations contained in the Federal Public Defender's Response and Professor Green's declaration "constitute[d] a correct statement of law." Ex. 5 (Order denying Motion to Dismiss, or Alternatively to Disqualify the Federal Public Defender) at 3 (internal quotation marks omitted); *see also* Ex. 4 at 8 ("I think [Sheppard's counsel] articulates the rule clearly, the ethical obligations of counsel").

During the conference call, DDA Noble admitted it was the practice of the WCDAO in post-conviction cases to attempt to induce the petitioner's prior counsel to reveal confidential information:

> MS. NOBLE: Normally we are able to talk to counsel ahead of time. You know, some attorneys want to talk to us, some don't when there's been certain types of claims.
>
> . . .
>
> So normally we're able to chat with people ahead of time and get an idea of what their representation was like, in general, with respect to the petitioner.

Ex. 4 at 7. Even if DDA Noble was unaware prior to her appearance in the *Sheppard* case that the WCDAO's practice was unethical, she was certainly aware from that point onwards. Thus there can be no dispute that she knowingly violated the Rules of Professional Conduct when, eighteen months later, she and her agents sought privileged and confidential information from Vanisi's trial defense team.

III. The WCDAO subverted Vanisi's legal right to this Court's protection of his privileged information.

The actions of the WCDAO violated Vanisi's rights against improper disclosure of his confidential information, which is both protected by the attorney-client and work-product privileges, and subject to judicial oversight. *See* NRCP 26(b). The WCDAO also acted contrary to the mandates of NRS 34.780(2), which allows discovery only through tools recognized by the Nevada Rules of Civil Procedure. Outside of the discovery process, in the absence of judicial oversight, undersigned counsel were denied any recourse to seek this Court's protection of Vanisi's privileged information.

A. The WCDAO violated Vanisi's attorney-client and work-product privileges.

The attorney-client privilege is "one of the oldest recognized privileges in the law," intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (internal quotation marks omitted). It was not in trial counsel's province to waive the attorney-client privilege: the privilege belongs to Vanisi. *See* NRS 49.095 (client holds privilege "to refuse to disclose, and to prevent any other person from disclosing, confidential communications . . . [b]etween the client or the client's representative and the client's lawyer or the representative of the client's lawyer.").

Not only did trial counsel and his agents have no right to disclose privileged information to the WCDAO, they had an affirmative obligation to protect it. *See* Ex. 2 at 2 n.8 ("The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client.").

"Although the attorney-client privilege has been termed merely a rule of evidence and not a constitutional right, government interference with the attorney-client relationship may implicate Sixth Amendment rights." *Manley v. State*, 115 Nev. 114, 121, 979 P.2d 703, 707 (1999) (citations omitted). "Governmental intrusion violates the Sixth Amendment [ ] when it substantially prejudices the defendant," such as when a prosecutor inquires into a defendant's "confidential relationship with his attorneys." *Manley*, 115 Nev. at 122, 979 P.2d at 707 (internal quotation marks omitted).

The work-product privilege in NRCP 26(b)(3) protects against "disclosure of the mental impressions, conclusions, opinions, or legal theories" of Vanisi's attorneys and their representatives. "The work-product doctrine protects more than just communications between a client and attorney, and is thus broader than the attorney-client privilege." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. __, 399 P.3d 334, 347 (2017) (citing *Hickman v. Taylor*, 329 U.S. 495, 508 (1947)). "Both the attorney and client have the power to invoke the work-product privilege." *Id.*

"[T]he purpose of the work product privilege is to protect the integrity of the adversary process." *Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983); *see*

Admiral Ins. Co. v. U.S. Dist. Ct., Dist. Of Az., 881 F.2d 1486, 1494 (9th Cir. 1989) ("The conditional protections afforded by the work-product rule prevent exploitation of a party's efforts in preparing for litigation."). The integrity of the current post-conviction proceeding is called into question by Novack's report that the WCDAO is in possession of three-thousand pages of the WCPDO's case file on Vanisi. *See* Nev. Rules of Prof'l Conduct R. 3.8 (e)(1) (prohibiting prosecutors from subpoenaing a lawyer at a criminal proceeding to present evidence about a former client if the information is protected by privilege).

While courts may find a limited privilege-waiver exists when the holder of the privilege pleads a claim that requires drawing upon the privileged communication, this waiver is not unlimited. *See Wardleigh v. District Court*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995). Courts have a duty to balance the necessity of discovery with privilege protections and "must impose a waiver no broader than needed to ensure the fairness of the proceedings before it." *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003); *see United States v. Amlani*, 169 F.3d 1189, 1196 (9th Cir. 1999) (holding "only those documents or portions of documents relating to the" claim asserted by the client should be disclosed).

It is imperative courts fulfill these supervisory duties because if improper disclosure takes place, "the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by later appeal." *Wardleigh*, 111 Nev at 350-51, 891 P.2d at 1183-84. The actions of the WCDAO prevented this Court from fulfilling its supervisory duty and rendered meaningless the protections afforded to Vanisi.

B. The WCDAO failed to follow proper discovery procedures.

Since 1985, discovery in habeas proceedings has been statutorily restricted to the methods of discovery available under the Nevada Rules of Civil Procedure. NRS 34.780(2) ("After the writ has been granted and a date set for a hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure, if and to the extent that, the judge or justice for good cause shown grants leave to do so."). Vanisi complied with this requirement by filing a Motion for Order to Conduct Discovery, on which this Court held a hearing and granted certain of his requests. The WCDAO has filed no discovery motion.

In order to obtain unfettered access to Vanisi's trial defense team and improperly seek out protected information, the WCDAO intentionally failed to follow proper discovery procedures as dictated by Nevada Rule of Civil Procedure 26(a). *See* NRCP 26(a) (permitting a party to obtain discovery "by one or more of the following additional methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things . . . physical and mental examinations; and requests for admission").

The WCDAO had a duty to request a specific order from the Court confining the limits of discovery into Vanisi's protected information, so as to permit the Court to fulfill its supervisory duty and closely monitor compliance. *Bittaker*, 331 F.3d at 728 ("If a district court exercises its discretion to allow such discovery" in a habeas proceeding, "it must ensure compliance with the fairness principle. To that end, it must enter appropriate orders clearly delineating the contours of the limited waiver before the commencement of discovery, and strictly police those limits thereafter.").

The WCDAO's deliberate failure to do so demonstrates bad faith and constitutes conduct prejudicial to the administration of justice. *See* Nev. Rules of Prof'l Conduct R. 8.4(d).

IV. This Court should disqualify the WCDAO.

Vanisi has been irreparably harmed by the WCDAO's unauthorized interviews of his former defense team because of the actual and potential disclosure of confidential information related to the representation, and attorney-client and work-product disclosures that occurred during those interviews. *See Schlatter v. Eighth Judicial Dist. Court In & For Clark Cty.*, 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977) (recognizing disclosure of material is irretrievable once made and thus would effectively deprive petitioner of any remedy from an erroneous court order if petitioner was required to disclose the information and then contest the validity of the order); *see also Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986) (writ of mandamus may issue to prevent improper discovery where disclosure would cause irreparable injury); *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. 224, 228-29, 276 P.3d 246, 249 (2012). Because Vanisi will be irreparably harmed if the WCDAO remains on his case, this Court should disqualify the WCDAO and appoint a special prosecutor. The WCDAO should be ordered to disclose to Vanisi all privileged information learned from the trial defense team, to hand over the originals of any materials obtained from the trial defense team, and not to divulge to the special prosecutor anything learned from the trial defense team.

In the alternative, this Court should order an evidentiary hearing to determine the nature and extent of the WCDAO's ethical and statutory violations, remedies to repair the harm to Vanisi (if that is even possible), and measures to protect him from further harm. The conduct of the WCDAO and Vanisi's trial team raises serious concerns regarding fundamental fairness, the appearance of impropriety, the breakdown of the adversarial process, the trial team functioning as prosecution entities, the trial team's abandonment of their former client, and the trial team's self-interest. If these violations are left unexplored and unremedied, Vanisi's rights to due process, effective assistance of counsel, and a fair post-conviction hearing will be denied. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009) ("Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new [judicial proceeding] in which the protected material and its fruits are excluded from evidence.").

DATED this 29th day of June 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Joanne L. Diamond
JOANNE L. DIAMOND
Assistant Federal Public Defender

/s/ Scott Wisniewski
SCOTT WISNIEWSKI
Assistant Federal Public Defender

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding MOTION TO DISQUALIFY THE WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE filed in the District Court Case No. CR98-0516 does not contain the social security number of any person.

DATED this 29th day of June, 2018.

/s/ Joanne L. Diamond
JOANNE L. DIAMOND
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 29th day of June, 2018, a true and correct copy of the foregoing MOTION TO DISQUALIFY THE WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE 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:

Jennifer P. Noble
Appellate Deputy
Nevada Bar No. 9446
P.O. Box 11130
Reno, NV 89520-0027

Joseph R. Plater
Appellate Deputy
Nevada Bar No. 2771
P.O. Box 11130
Reno, NV 89520-0027

<u>/s/ Sara Jelinek</u>
An Employee of the Federal
Public Defenders Office

Exhibit	Document Description
1.	State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 41
2.	American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 10-456
3.	*Sheppard v. Gentry*, Case No. CR03-0502b, Response to Motion to Dismiss, or Alternatively to Disqualify the Federal Public Defender
4.	*Sheppard v. Gentry*, Case No. CR03-0502b, Transcript of Call Re: Motions
5.	*Sheppard v. Gentry*, Case No. CR03-0502b, Order denying Motion to Dismiss, or Alternatively to Disqualify the Federal Public Defender

EXHIBIT 1

EXHIBIT 1

STATE BAR OF NEVADA

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 41[1]
Issued on June 24, 2009

QUESTION

Confidentiality – What types of information about a client does Rule 1.6 restrict the lawyer from revealing?

ANSWER

ALL information relating to the representation of the client.

DISCUSSION

It is well known by both lawyers and clients that the rules of ethics governing lawyers prohibits a lawyer from revealing confidential client information without the consent of the client. This "confidentiality rule" is at the heart of the lawyer-client relationship[2] and has been embodied in the written rules of ethics since 1908.[3] The current Nevada rule is Rule 1.6 of the Nevada Rules of Professional Conduct. The general rule of confidentially is contained in Rule 1.6(a):

> *Rule 1.6. Confidentiality of Information.*
>
> *(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (c).*

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[1]This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[2]GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.2 (3d ed. 2005).

[3]1908 ABA Canons of Ethics, Canon 6; 1969 ABA Mode Code, DR 4-101; and 1983 ABA Model Rules of Professional Conduct, Rule 1.6.

Rule 1.6(a) imposes a duty on all lawyers not to reveal information relating to the representation of their clients to anyone unless there is an applicable exception.[4]

The information protected by the lawyer's ethical confidentiality duty under Rule 1.6 is much broader than privileged information protected by the attorney-client privilege under NRS 49.185.[5] Comment [3] to ABA Model Rule 1.6 provides:

> *The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.*[6]

Rule 1.6 prohibits a lawyer from <u>volunteering any</u> information <u>relating to representation of a client</u>; the attorney-client privilege prohibits a lawyer from being <u>compelled</u> to reveal <u>confidential communications</u> between a lawyer and a client.[7]

In contrast to predecessor Rule DR 4-101[8], the language of Rule 1.6(a) has three remarkable omissions from the historical rule of confidentiality.

The first is the omission of the qualifier "confidential" between "reveal" and

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[4] *McKay v. Bd. of Co. Comm'rs*, 103 Nev. 490, 746 P.2d 124 (1987); *Todd v. State*, 113 Nev. 18, 931 P.2d 721 (1977).

[5] *Eighth Judicial Dist. Court v. County of Clark*, 116 Nev. 1200, 14 P.3d 1266 (2000)(Agosti, Shearing, Leavitt dissent).

[6] Cited approvingly by *McKay v. Bd. of Co. Comm'rs*, 103 Nev. 490, 746 P.2d 124 (1987).

[7] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.2 (3d ed. 2005).

[8] This Rule was in effect in Nevada until 1986.

"information".[9] As a result, <u>all</u> information relating to the representation of the client is thereby made confidential.[10] Rule DR 4-101 protected the client from the lawyer's disclosure of "secrets", defined as: (1) information that the client "has requested to be held inviolate"; and (2) information that would be "embarrassing" or "likely to be detrimental" if revealed.[11]

The second remarkable aspect of Rule 1.6(a) is that the confidential information need <u>not</u> be information that is "adverse" to the client. Rule DR 4-101(B)(3) did not prohibit the disclosure of nonadverse client information.[12]

The final remarkable omission from Rule 1.6 is an exception for information already generally known or public. This element is contained in the Restatement's definition of "confidential client information", but omitted from Rule 1.6.[13]

Thus, the language of Rule 1.6(a) is so broad that it is – at least on its face – without limitation. Rule 1.6(a) requires that **<u>ALL</u>** information relating to the representation of a client is confidential and protected from disclosure. Even the mere identity of a client is protected by Rule 1.6.[14] The Rule applies:

1. Even if the client has not requested that the information be held in confidence or does not consider it confidential. Thus, it operates automatically;[15]

2. Even though the information is not protected by the attorney-client

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[9] *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995).

[10] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005).

[11] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005). In fact, the Washington State Bar revised Model Rule 1.6 so that its Rule 1.6 reads: "A lawyer shall not reveal <u>confidences or secrets</u> relating to representation of a client..." *In re Disciplinary Proceedings Against Schafer*, 66 P.3d 1036 (2003).

[12] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.6, n. 92 (1986).

[13] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2001).

[14] *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

[15] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005); *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

privilege;[16]

3. Regardless of when the lawyer learned of the information – even before or after the representation;[17]

4. Even if the information is not embarrassing or detrimental to client;[18]

5. Whatever the source of the information; *i.e.*, whether the lawyer acquired the information in a confidential communication from the client or from a third person or accidentally;[19]and

6. (In contrast to the attorney-client privilege) even if the information is already generally known – or even public information.[20]

By a literal reading of Rule 1.6, even a laudatory comment about a client or the client's achievement may violate the letter of the Rule. However, the Committee believes that the absolute wording of Rule 1.6 is not literally meant to make every disclosure of the most innocuous bit of client information an ethical violation; but rather it is intended to strongly caution the lawyer to give consideration to the rule of client confidentiality – and whether the informed consent of the client should be obtained – whenever the lawyer makes any verbal, written or electronic communication relating to the client.[21] For example, a lawyer advising his or her spouse that the lawyer will be traveling overnight to a distant city to defend the deposition of Client A in case A vs. B, is technically the revelation of "information relating to representation of a client" without client consent.[22] The Committee suggests that common sense should be a part of Rule 1.6 and the lawyer

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[16] *See Eighth Judicial Dist. Court v. County of Clark*, 116 Nev. 1200, 14 P.3d 1266 (2000)(Agosti, Shearing, Leavitt dissent)

[17] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.2, at 298 (1986).

[18] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.2, at 298 and §6.7.3, at 305 (1986); *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

[19] Comment [3] to ABA Model 1.6; Restatement 3rd, The Law Governing Lawyers, §59 Cmt b; *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

[20] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005); *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995); Ariz. Ethics Op. 2000-11 (2000).

[21] *See* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005).

[22] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.3, at 301 (1986).

should not be disciplined for a harmless disclosure.

The following are examples of common situations which raise issues under Rule 1.6(a) in the absence of client consent. They are offered – not as examples of Rule 1.6 violations *per se* – but as "food for thought" for all lawyers before communicating any information related to the representation of a client:

1. Phoning a client when the client is not at home and leaving a message about the representation on client's answering machine or discussing the matter with the roommate, or spouse of the client;[23]

2. Submitting a copy of the lawyer's client billing statements in support of an application for fees, such as a post-judgment motion or at the end of a probate;[24]

3. Submitting a client list (revealing the identity of the client) to a bank to support the lawyer's loan application;[25]

4. Listing some clients in a law firm brochure (revealing the identity of the clients);[26]

5. Processing a credit card payment (revealing the identity of the client) to the credit card company;[27]

6. Telling a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case;[28]

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[23] *People v. Hohertz*, 102 P.3d 1019 (Colo. 2004).

[24] There are generally two types of lawyer billing statements: (1) general "for services rendered" invoices that do not reveal the detail of the work performed; and (2) itemized statements that give a detailed description of all work performed by the lawyer on a date-by-date basis. For purposes of Rule 1.6, the difference does not matter. Even a general balance due invoice contains "information relating to representation of a client", including the fact that the client *is* a client, the client's address, the previous balance due to the lawyer, the amount of payments made by the client to the lawyer and the total billed to the client for the billing period.

[25] Ill. Ethics Op. 97-1 (1997).

[26] Iowa Ethics Op. 97-4 (1997).

[27] Utah Ethics Op. 97-06 (1997).

[28] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005).

7. A lawyer taking a client file or batch of discovery documents to the local photocopy shop for copying;[29]

8. A law firm employing an outside computer tech support person to trouble shoot the firm's computer system;[30]

9. The auditing of insurance defense attorney billing statements by an insurance company auditor;[31]

10. A request for attorney billing statements by a homeowner to the lawyer for the homeowner's association;

11. A request for attorney billing statements by a disgruntled shareholder of a corporation represented by the lawyer in litigation;

12. A request for attorney billing statements under the Open Records Act[32] to a public entity represented by outside counsel;[33] and

13. The law firm's listing of its "best" clients in Martindale-Hubbell.

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[29] ABA Formal Opinion 08-451 (2008).

[30] ABA Formal Opinion 08-451 (2008).

[31] D.C. Bar Ethics Op. 290 (1999); Amy S. Moats, *A Bermuda Triangle in Tripartite Relationship: Ethical Dilemas Raised by Insurers' Billing and Litigation Management Guidelines*, 105 W. Va. L. Rev. 525 n.58 (Winter 2003).

[32] Chapter 239 of NRS.

[33] Nevada's Open Records Act allows any person to inspect all public records which are not declared by law to be confidential. NRS 239.010. Where a request is made to a public body under the Nevada Open Records Act for inspection or copies of the billing statements of the public body's outside counsel, there is no question that mere invoices by the lawyer to the public body – without detailed descriptions of the work performed – contain "information relating to representation of a client". On the one hand, the lawyer may not allow an Open Records act inspection of the lawyer's billing statements. On the other hand, the public body is not governed by the Nevada Rules of Professional Responsibility. The public body must allow inspection of the lawyer's billing statements except to the extent that they are privileged under Nevada's attorney-client privilege statutes. NRS 49.035 – 49.115.

CONCLUSION

In view of the unrestricted language of Rule 1.6, all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent.

Ethics Opinion on Rule 1.6 Confidentiality 11-23-08.wpd
July 16, 2009

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EXHIBIT 2

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456 **July 14, 2010**

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent.[1] This question may arise, for example, because a prosecutor or other government lawyer defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,[2] a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer's failure to provide constitutionally effective representation, must establish both that the representation "fell below an objective standard of reasonableness" and that the defendant thereby was prejudiced, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[3] Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer's representation based on the defendant's failure to show prejudice. The Supreme Court recently expressed confidence "that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit."[4] Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,[5] and commentators have expressed concerns about the practice.[6]

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. *See* Rules 1.6 & 1.9(c). The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[7]

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
[2] 466 U.S. 668 (1984).
[3] *Id.* at 694.
[4] Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 1485 (2010).
[5] *See, e.g.*, Purkey v. United States, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009), *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client's ineffective assistance of counsel claim); State v. Binney, 683 S.E.2d 478 (S.C. 2009) (defendant's trial counsel met with law enforcement authorities and provided his case file to them in response to defendant's ineffective assistance of counsel claim).
[6] *See, e.g.*, Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14.
[7] Rule 1.6 cmt. 3. *See, e.g.*, Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when,

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.[8] Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make nonfrivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.[9] For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.[10] A client might agree that the former lawyer may testify in an adjudicative proceeding to the

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under threat of subpoena, it disclosed former client's statement to prosecutor without former client's consent; court stated that "[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally prohibited by the disciplinary rules," *id*. at 265 n.5).

[8] "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. *See, e.g.*, ABA Comm. on Eth. and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); *see also* Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Eth. Adv. Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

[9] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

[10] *Cf.* Clock v. United States, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's

extent the court requires but not agree that the former lawyer voluntarily may disclose the same client confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the "self-defense exception" of Rule 1.6(b)(5),[11] which provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." The self-defense exception grows out of agency law and rests on considerations of fairness.[12] Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer's self-defense.[13]

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.[14] For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception.[15] Although the scope of the exception has expanded over time,[16] the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.[17] Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences ...."[18]

When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not respond in order "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer

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explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id*. at *2.

[11] Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

[12] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b ("in the absence of the exception . . ., lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group").

[13] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

[14] Rule 1.6 cmt. 10 ("The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

[15] *See, e.g.*, First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer's interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof'l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

[16] Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: "A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct," but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

[17] Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, *see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. *See* Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 810-11 (1977).

[18] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

and the client," because the legal controversy is not between the client and the lawyer.[19] Nor is disclosure justified "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved," because the defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation "to respond to allegations in any proceeding concerning the lawyer's representation of the client." This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer's alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer's representation of the client to which the lawyer might wish to respond.[20]

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.[21] It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.[22] The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements … to the fullest extent practicable."[23] Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.[24] These limitations are equally applicable to Rule 1.6(b)(5).[25]

Permitting disclosure of client confidential information outside court-supervised proceedings

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[19] *See* Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant's claim that lawyer's prior advice was confusing; court stated, "[w]hile an arguable case might be made for disclosure under this exception, it ... is fraught with problems. The primary problem is that the 'controversy' is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no 'controversy' between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer."). *But see* Arizona State Bar Op. 93-02 (1993), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=652 (interpreting "controversy" to include a disagreement in the public media).

[20] *Cf.* State v. Madigan, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

[21] *See* Rule 1.6(b)(5) (allowing disclosure only "to the extent the lawyer reasonably believes necessary"); Rule 1.6 cmts. 10 & 14.

[22] *See* Rule 1.0(i) ("'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.")

[23] Rule 1.6 cmt. 14. Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. *See, e.g.*, ABA Comm. on Eth. and Prof'l Responsibility, Formal Op. 250 (1943), in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED 555, 556 (American Bar Foundation 1967) ("where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights").

[24] For example, in In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988), the district court "reject[ed] the suggestion made by some parties that 'selective' disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed," finding that this suggestion was "directly contrary to the reasonable necessity standard." *Accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 cmt. e ("The lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence."); *cf.* Dixon v. State Bar, 653 P.2d 321, 325 (Cal. 1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client's motion to enjoin lawyer from harassing her); Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) ("In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word 'necessary' in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.").

[25] Courts further recognize that disclosures may be made to defend against a non-client's accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. *Cf.* SEC v. Forma, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor's evidence against lawyer must "pass muster under Fed. R. Civ. P. 11").

undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.[26] Disclosure of such information might prejudice the defendant in the event of a retrial.[27] Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.[28] If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.[29]

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[26] *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

[27] Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, *see, e.g.*, Bittaker v. Woodford, 331 F.3d 715 (9th Cir.), *cert. denied*, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. *See, e.g.*, Fears v. Warden, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

[28] *See, e.g.*, Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

[29] *See* Rule 1.6 cmt. 14.

EXHIBIT 3

EXHIBIT 3

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Clerk of the Court
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Attorneys for Petitioner Melonie Sheppard

IN THE SECOND JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

MELONIE SHEPPARD, Petitioner, v. JO GENTRY, WARDEN, et al., Respondents.	Case No. CR03-0502B Dept. No. 1

RESPONSE TO MOTION TO DISMISS, OR ALTERNATIVELY, TO DISQUALIFY THE FEDERAL PUBLIC DEFENDER

Petitioner Melonie Sheppard, through undersigned counsel, C.B. Kirschner, Assistant Federal Public Defender, and Megan C. Hoffman, Assistant Federal Public Defender, files this Response to Motion to Dismiss, or Alternatively, to Disqualify the Federal Public Defender.

/ / /

/ / /

I. INTRODUCTION

In anticipation of the upcoming evidentiary hearing, counsel for Petitioner sent letters to prior counsel for Ms. Sheppard advising them that she was not waiving attorney-client privilege. The State filed a motion requesting leave to send a request for production of letters sent to attorneys Edwards and Calvert (filed 11/23/16). In the interest of transparency and judicial economy, counsel for Petitioner filed a response and included copies of the requested letters (filed 12/5/16). The State has now filed a motion alleging counsel for Petitioner engaged in misconduct, interfered with the State's access to witnesses, and formed an attorney-client relationship with Edwards and Calvert resulting in a conflict of interest. The State has requested this Court dismiss Ms. Sheppard's Petition for Writ of Habeas Corpus or disqualify the Federal Public Defender from representing Ms. Sheppard.

Counsel for Petitioner deny all allegations of misconduct and wrongdoing alleged by the State and file this Response to the State's motion. In support of this Response is a signed declaration by an expert in the field of ethics and professional responsibility, Professor Bruce A. Green, Director of the Louis Stein Center for Law and Ethics at Fordham University School of Law. *See* attached Exhibit A (declaration). Professor Green's qualifications include his previous work as an Assistant United States Attorney, law clerk to Justice Thurgood Marshall of the United States Supreme Court, and member of the ABA Standing Committee on Ethics and Professional Responsibility. For the complete list of Professor Green's extensive qualifications and publications, see his curriculum vitae, attached as Exhibit B. After reviewing the relevant materials, Professor Green concluded:

> [M]y opinion is that the FPD properly instructed Ms. Sheppard's former counsel regarding Ms. Sheppard's assertion of the attorney-client privilege and properly put former counsel on notice of their confidentiality obligations. There is no basis for any suggestion that the FPD provided erroneous information, improperly

> interfered with the prosecution's access to witnesses, or provided "legal advice" giving rise a lawyer-client relationship.

Exhibit A, ¶ 30.

II. THE POST-CONVICTION PETITION CURRENTLY BEFORE THE COURT DOES NOT RAISE ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AS TO ATTORNEYS EDWARDS OR CALVERT.

The current Petition at issue before the Court is the Second Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), which was filed with leave of the Court on September 27, 2016. The Petition raises the following three substantive claims:

> Ground One: Sheppard was denied due process of law under the 5th and 14th Amendments to the United States Constitution where newly discovered evidence proved Sheppard was convicted based upon materially false testimony and, but for the introduction of the false evidence, the outcome of Sheppard's trial probably would have been different.
>
> Ground Two: Sheppard was denied a fair trial and due process of law under the 5th and 14th Amendments to the United States Constitution when the jury was improperly instructed on felony murder.
>
> Ground Three: Sheppard was denied her right to due process of law and a fair trial under the 5th, 6th, and 14th Amendments to the United States Constitution where the State failed to disclose exculpatory and material evidence that witnesses were pressured to give false statements and testimony.

The Petition also alleges that any procedural bars can be overcome by demonstrating good cause and prejudice based on ineffective assistance of post-conviction counsel,[1] newly presented or discovered evidence, and/or actual

[1] Neither Edwards nor Calvert represented Sheppard at her previous post-conviction proceedings. Nor does Nevada recognize the ineffectiveness of post-

innocence. (*See* Petition at p. 10-11.) The current Petition includes no allegations of ineffectiveness against attorneys Edwards or Calvert either substantively or as cause to overcome any procedural bar.

The State's motion should be denied because the State has failed to proffer why attorneys Edwards or Calvert are necessary witnesses and for what purpose they would be called as witnesses at the upcoming evidentiary hearing. The State has failed to give an offer of proof as to what relevant information these witnesses have concerning the claims in the current Petition. Consequently, the State's motion lacks foundation and should be denied.

III. ATTORNEY-CLIENT PRIVILEGE STILL EXISTS BETWEEN ATTORNEYS EDWARDS AND CALVERT AND MS. SHEPPARD.

The Nevada Rules of Professional Conduct provide that attorneys owe a duty of confidentiality to current and former clients. *See* Rules of Prof.Conduct, Rule 1.6 (current clients) & Rule 1.9 (former clients). "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications… [b]etween the client or the client's representative and the client's lawyer or the representative of the client's lawyer." NRS 49.095. Counsel has rightfully asserted this privilege on behalf of Ms. Sheppard in the instant proceedings. *See* Exhibit A, ¶¶ 13 – 19.

In its motion, the State suggests Ms. Sheppard's waiver of attorney-client privilege at a separate legal proceeding seven years ago, where different issues had been raised, is still in effect. Notably, the State offers no legal support for its claim that a waiver of attorney-client privilege is unlimited in scope or duration. At issue during the hearing in 2009 were several ineffective assistance of counsel claims,

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conviction counsel as cause to overcome a procedural bar. *Brown v. McDaniel*, 331 P.3d 867 (Nev. 2014). However, Sheppard has a stayed federal petition alleging these same issues and the federal courts do recognize ineffective assistance of post-conviction counsel as cause. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

which have long been recognized to require a limited waiver of attorney-client privilege in order to resolve. *See Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888) ("When [petitioner] entered upon a line of defense which involved what transpired between herself and [her attorney], and respecting which she testified, she waived her right to object to his giving his own account of the matter.") Here, no such ineffectiveness claims are currently before the Court such that an implied waiver of privilege would be appropriate with respect to attorneys Edwards and Calvert.

Ms. Sheppard's waiver of privilege seven years ago at a separate proceeding on a different petition is not binding. While Nevada appears to be silent on the issue, the federal courts have interpreted waivers in habeas cases to be narrow and limited. *See Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (holding that the scope of a habeas petitioner's waiver of attorney-client privilege arising from an ineffective assistance of counsel claim raised in a habeas petition **extended only to litigation of that petition**) (emphasis added). *See also In re Lott*, 424 F.3d 446, 453-54 (6th Cir. 2005) (holding that waivers should be construed narrowly and no broader than is needed to resolve the claims); *United States v. Pinson*, 584 F.3d 972, 977-78 (10th Cir. 2009) ("When a habeas petitioner claims that he received ineffective assistance of counsel, he put communications between himself and his attorney directly in issue, and thus by implication waives the attorney client privilege **with respect to those communications**.") (emphasis added); *Lambright v. Ryan*, 698 F.3d 808, 818 (9th Cir. 2012) ("although that petitioner impliedly waives his attorney-client privilege, such waiver is narrow and **does not extend beyond the adjudication of the ineffectiveness claim** in the federal habeas proceeding.") (emphasis added).

IV. COUNSEL FOR PETITIONER PROPERLY ASSERTED THE ATTORNEY-CLIENT PRIVILEGE ON BEHALF OF MS. SHEPPARD.

Regarding the attorney-client privilege, the Nevada Supreme Court has recognized that an "attorney may claim the privilege on the client's behalf." *Manley v. State*, 115 Nev. 114, 121 n.1 (1999). In the present case, the letters counsel sent to attorneys Edwards and Calvert were an assertion of the attorney-client privilege between Ms. Sheppard and her prior attorneys. The letters read in part, "Please be advised that Ms. Sheppard is not waiving her attorney-client privilege – as it relates to you and your firm – with anyone other than the lawyers at the FPD." The State's claim, that this written assertion of attorney-client privilege is improper, is incorrect. *See* Exhibit A, ¶¶ 20 – 24.

The State claims "counsel has cautioned the witnesses that they should not speak to counsel for the State…." A plain reading of the very brief letters sent to attorneys Edwards and Calvert reveals that claim to be patently false. The State also claims counsel informed Edwards and Calvert "that they may suffer consequences from discussing their representation with anyone." Again, a plain reading of the letters reveals that claim to be patently false. Indeed, the State cites no language from the letters to support either of its false claims.

Next, the State's argument that "an implied attorney-client relationship" was created between counsel for Petitioner and attorneys Edwards and Calvert is absurd. The sole case cited by the State, *Todd v. State*, concerned an incarcerated criminal defendant asking to speak to an attorney about potentially filing a civil lawsuit for police brutality. 113 Nev. 18, 23 (1997). There can be no comparison between a client seeking out legal representation from an attorney and the current situation. Moreover, the State here fails to even identify what the "legal advice" was that was purportedly given to Edwards and Calvert that would have created such a relationship.

The only matter that counsel for Petitioner advised Edwards and Calvert on was that Ms. Sheppard was not waiving attorney-client privilege. Counsel provided no advice to Edwards or Calvert regarding what they should or should not do. Rather, they are guided by the Nevada Rules of Professional Conduct, the American Bar Association, and the duties of loyalty, confidentiality, competency, and zeal that they owe to their former client. *See My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, David M. Siegel, 23 J. Legal Prof. 85 (1999) ("Several ethical rules may affect a criminal trial lawyer whose former client brings a collateral proceeding challenging the effectiveness of his or her performance at trial. These include obligations to the client of loyalty, competent representation, confidentiality, and diligence or zeal."). Attorneys Edwards and Calvert remain free to discuss any matters not protected by the scope of attorney-client privilege and confidentiality with the State. Reminding Edwards and Calvert of their duty to Ms. Sheppard was not "legal advice." *See* Exhibit A, ¶¶ 28 – 29.

V. COUNSEL FOR PETITIONER VEHEMENTLY DENY ALL ALLEGATIONS OF WRONGDOING ALLEGED BY THE STATE.

Counsel for Petitioner did not engage in misconduct or interfere with the State's access to any witness. The State's claim that its ability to access witnesses was compromised is, again, unsubstantiated. First, the State has not offered any specific claims in support of its assertion, such as when the prosecutor attempted to interview the witnesses, what their responses were, and whether the scope of the interview would have breached attorney-client privilege or the rules requiring confidentiality. The State's mere assertion is not evidence of wrongdoing. Second, prosecutors are prohibited from subpoenaing a lawyer at a criminal proceeding to present evidence about a former client if the information is protected by privilege. *See* Rules of Prof.Conduct, Rule 3.8 (e)(1). Third, the State has not proffered why it would reasonably believe that Edwards or Calvert have information relevant to the claims raised in the Petition currently before the Court, where such claims do not include allegations of ineffective assistance of counsel.

The cases cited by the State in its motion are inapplicable. In those cases, the prosecutor and/or police actually told lay witnesses not to speak with defense counsel. For example, in *Davis v. State*, the witness testified the police and prosecutor specifically told him not to talk to the defense. 110 Nev. 1107, 1117-18 (1994). The State cited *United States v. White* for the proposition that both parties should have the same right and ability to interview witnesses. The complete sentence from that case reads:

> While it is true that witnesses to a crime are the property of neither the prosecution nor the defense and that both sides have an equal right and should have an equal opportunity to interview them, *Gregory v. United States*, 369 F.2d 185, 188 (1966), it is equally true that reversal on this ground **requires a clear showing that the government instructed the witness not to cooperate** with the defendant.

United States v. White, 454 F.2d 435, 438-39 (7th Cir. 1971) (emphasis added). Here, the State has not even made a prima facie showing of wrongdoing. Counsel for Petitioner merely informed prior counsel that Ms. Sheppard was not waiving attorney-client privilege and directed them to the Rules of Professional Conduct and an opinion by the American Bar Association. Attorneys Edwards and Calvert are guided by their own interpretation of those legal standards. Ironically, in another case cited by the State, the Ninth Circuit held a letter advising a witness of their right to decline an interview "constituted a correct statement of the law and was not improper." *United States v. Black*, 767 F.2d 1334, 1338 (9th Cir. 1985). *See also* Exhibit A, ¶¶ 25 – 27.

Finally, the State is interfering with counsel's attorney-client relationship with Ms. Sheppard by making unsubstantiated claims of unethical behavior and conflict of interest. Counsel owes a duty of zealous advocacy to Ms. Sheppard and will continue to act accordingly. The State's attempt to use the benign letters sent to Edwards and Calvert in an effort to deny Ms. Sheppard her right to post-conviction relief or to deny her counsel is unprofessional and unethical.

VI. CONCLUSION

Petitioner respectfully requests this Court deny the State's Motion to Dismiss as frivolous. There is no legal basis to dismiss the Post-Conviction Petition or disqualify the Federal Public Defender from representing Ms. Sheppard. The State's motion was filed in bad faith and the evidentiary hearing currently set for January 18-20, 2017, should proceed as scheduled.

DATED this 22nd day of December, 2016.

FEDERAL PUBLIC DEFENDER
DISTRICT OF NEVADA

By: */s/ CB Kirschner*
C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding Response to Motion to Dismiss, or Alternatively, to Disqualify the Federal Public Defender filed in the District Court Case No. CR03-0502B.

☒ Does not contain the social security number of any person.

- OR -

☐ Contains the social security number of a person as required by:

A: A specific state or federal law

B: For the administration of a public program or for an application for a federal or state grant.

DATED this 22nd day of December, 2016.

FEDERAL PUBLIC DEFENDER
DISTRICT OF NEVADA

By: */s/ CB Kirschner*
C.B. Kirschner
Assistant Federal Public Defender
Nevada State Bar No. 14023C
411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on December 22, 2016. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence McCarthy
P. O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Respondent

I further hereby certify pursuant to N.R.C.P. 5(b), that on this 22nd day of the month of December, 2016, I mailed a true and correct copy of the foregoing addressed to:

Daniel M. Roche
Nevada Attorney General's Office
Appellate Division
100 North Carson Street
Carson City, NV 89701

/s/ *Jineen DeAngelis*
Employee of the Federal Public Defender

EXHIBIT A

EXHIBIT A

DECLARATION OF BRUCE A. GREEN

I, Bruce A. Green, hereby declare as follows:

1. I hold the Louis Stein Chair at Fordham University School of Law, where I serve as Director of the Louis Stein Center for Law and Ethics.

2. This Declaration is submitted in the matter of *Melonie Sheppard v. Jo Gentry, Warden*, case number CR03-0502B. Counsel for petitioner Melonie Sheppard, a Nevada prisoner, has asked me to offer my opinion as to the ethical questions raised by the respondent Warden's motion to dismiss the petition or disqualify Ms. Sheppard's current counsel, the Office of the Federal Public Defender (FPD). I have not been, and will not be, compensated for my work, but render this opinion on a pro bono basis.

3. The FPD sent letters notifying Ms. Sheppard's trial and appellate counsel that with respect to an upcoming evidentiary hearing on Ms. Sheppard's petition for writ of habeas corpus, Ms. Sheppard is not waiving her attorney-client privilege. The letters directed prior counsel's attention to Rule 1.6 of the Nevada Rules of Professional Conduct (NRPC) and to an ABA ethics opinion interpreting the counterpart provision of the ABA Model Rules of Professional Conduct. On behalf of the Warden, the District Attorney asserts that the FPD gave "legal advice" to Ms. Sheppard's prior counsel, and that this "advice [was] incorrect" because Ms. Sheppard waived the attorney-client privilege by calling prior counsel as witnesses in a 2009 hearing. The District Attorney further asserts that, in providing this supposed "legal advice," the FPD improperly interfered with the Warden's "access to witnesses" and may have created an "implied attorney-client relationship" with Ms. Sheppard's prior counsel.

4. For the reasons discussed below, my opinions are that the District Attorney's characterizations of the FPD's correspondence are erroneous, and that the FPD's letters were ethically correct and proper in all respects, if not ethically compelled as a matter of competent representation.

Qualifications

5. My qualifications to provide expert opinions on questions of professional conduct in criminal advocacy are set forth more fully in my curriculum vitae.

6. Since 1987, I have been a member of the full-time faculty of Fordham University School of Law. I previously served as a law clerk to Judge James L. Oakes of the United States Court of Appeals for the Second Circuit, as a law clerk to Justice Thurgood Marshall of the Supreme Court of the United States, and as an Assistant United States Attorney for the Southern District of New York. I am admitted to practice law in New York, the United States District Courts for the Southern and Eastern Districts of New York, and the Supreme Court of the United States.

7. I have regularly taught courses in legal ethics at Fordham and elsewhere since 1987. For more than 25 years, I have taught a three-credit seminar on Ethics in Criminal Advocacy that focuses on the professional conduct of prosecutors and defense lawyers. I speak frequently at CLE programs regarding legal ethics, including ethics in criminal practice, and have written extensively on these subjects. Among other things, I am co-author of a casebook on legal ethics: Pearce, Capra, Green, Knake & Terry, *Professional Responsibility: A Contemporary Approach* (West Academic Publ., 2d ed. 2014).

8. I have engaged in various other professional work relating to legal ethics, including ethics in criminal practice. Nationally, I serve on the Multistate Professional Responsibility Examination drafting committee and the ABA Criminal Justice Standards Committee. Previously, I served on the ABA Standing Committee on Ethics and Professional Responsibility, chaired the ethics committees of both the ABA Litigation Section and the ABA Criminal Justice Section, served on the ABA Litigation Section's Task Force on Settlement Ethics, served as reporter to the ABA Commission on Multijurisdictional Practice and to the ABA Task Force on Attorney-Client Privilege, and chaired the Section on Professional Responsibility of the Association of American Law Schools. I am also a past Chair of the ABA Criminal Justice Section.

9. On the state and local level, I currently chair the New York City Bar's Committee on Professional Ethics. Additionally, I serve as a member and past Chair of the New York State Bar Association's Committee on Professional Ethics and as a member of the New York State Bar Association's Committee on Standards of Attorney Conduct. I previously served on the Departmental Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department (the court-appointed body that reviews and investigates ethics complaints against lawyers in New York).

10. I render opinions in this action in my individual capacity and do not speak on behalf of any of the entities with which I am, or have been, associated.

Relevant Facts

11. I have no first-hand knowledge of the relevant facts. For purpose of forming opinions, I have been provided, and have reviewed, the following: (1) the Warden's Motion to Dismiss, or Alternatively, to Disqualify the Federal Public Defender; (2) the letters which were addressed to Ms. Sheppard's trial and appellate counsel, Scott Edwards and John Calvert; and (3) the Second Supplemental Petition for Writ of Habeas Corpus, which is pending before this Court. I have been provided some additional factual background as set forth below in ¶ 12.

12. The relevant facts on which I rely are, in summary, as follows:

a. Petitioner, Melonie Sheppard, filed a Petition for Writ of Habeas Corpus (Post-Conviction). In that petition, Ms. Sheppard does not raise substantive claims of ineffective assistance of counsel against her trial or appellate attorneys.

b. An evidentiary hearing is currently scheduled on the petition for January 18-20, 2017.

c. Counsel for Petitioner sent letters to prior counsel informing them that Petitioner was not waiving attorney-client privilege and directing their attention to the Nevada Rules of Professional Conduct, the Model Rules of Professional Conduct, and an ABA Formal Opinion outlining counsel's continuing duty of loyalty and ethical obligations concerning issues of confidentiality and privilege in post-conviction proceedings.

d. The District Attorney has filed a motion to dismiss alleging counsel for Petitioner interfered with the state's right to interview witnesses and alleging that an attorney-client relationship may have been formed between current and former counsel based on the language contained in the letters.

Opinion

The Confidentiality Obligations of Ms. Sheppard's former counsel.

13. As a threshold matter, it is important to address the relevant confidentiality obligations of Ms. Sheppard's prior counsel. As discussed below, these are two-fold. First, prior to the hearing, the attorneys may not properly discuss confidential information with the prosecutors. Second, before testifying at the upcoming hearing, the attorneys must allow Ms. Sheppard an opportunity to make colorable objections based on the attorney-client privilege. The FPD's letters reflect correct understandings of these obligations.

14. Ms. Sheppard's trial and appellate attorneys' confidentiality duty *prior to* the upcoming evidentiary hearing is established by NRPC Rules 1.9(c)(2) and 1.6(a). Rule 1.9(c)(2) provides: ""A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . [r]eveal information relating to the representation except as these Rules would permit or require with respect to a client." Rule 1.9(a), in turn, establishes the confidentiality obligation to a current client. It provides: "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (d)." In other words, attorneys have essentially the same confidentiality duty to former clients as to current clients – namely, a duty not to reveal "information relating to the representation" absent client consent or an applicable exception.

15. As these rules make plain, the former counsel's confidentiality duty prior to the hearing does not turn on whether their information is privileged or the privilege has been waived. They may not voluntarily reveal to prosecutors *any* information relating to their representation of Ms. Sheppard, regardless of whether or not the information is privileged, unless Ms. Sheppard gives informed consent or an exception applies. The

confidentiality duty is broader than the privilege and expressly applies to *all* "information relating to the representation."

16. Among other things, consistent with the above-quoted Rules, the FPD's letters properly inform Ms. Sheppard's prior counsel that she does not consent to their extrajudicial disclosures to anyone other than the FPD.

17. No arguably applicable exception to Rule 1.6(a) authorizes the former attorneys to reveal information relating to their representation of Ms. Sheppard outside the hearing without her consent. One cannot plausibly argue that disclosure to prosecutors is authorized by Rule 1.6(b)(5) to establish a defense on behalf of the lawyers, since the habeas petition does not accuse them of misconduct. Moreover, even if there were an ineffective assistance of counsel claim, it is highly questionable whether the former counsel could disclose confidences to the prosecutors as a matter of self-defense. ABA Formal Opinion 10-456 (2010), to which the FPD's letters refer, concluded that the self-defense exception would not justify extrajudicial disclosure without court authorization in circumstances such as these. I am unaware of any Nevada authority contrary to the ABA's interpretation.

18. Ms. Sheppard's trial and appellate attorneys' confidentiality duty *during* the upcoming evidentiary hearing is established by the same two Rules – Rule 1.9 and Rule 1.6. Under Rule 1.6(b)(6), the attorneys may disclose confidential information "[t]o comply with . . . a court order." If subpoenaed to testify at the hearing, they will be required to provide testimony unless Ms. Sheppard makes an objection that is sustained based on attorney-client privilege or other grounds. The attorneys are obligated to allow Ms. Sheppard an opportunity to make any colorable objection. This is the subject of a recent ABA opinion, ABA Formal Opinion 473 (Feb. 17, 2016) ("Opinion 473"), which addresses the duties of an attorney or former attorney who is subpoenaed for information about a client. Opinion 473 recognizes that the subpoenaed attorney must consult with the former client and "[i]f after consultation, the client wishes to challenge the demand, the lawyer should, as appropriate and consistent with the client's instructions, challenge the demand on any reasonable ground." This is consistent with earlier authority as well.

19. The FPD's letters correctly apprehend the obligations of Ms. Sheppard's prior counsel insofar as they give notice that Ms. Sheppard has not waived the attorney-client privilege and is preserving the right to assert the privilege at the upcoming hearing, and insofar as they remind the attorneys of their confidentiality obligations under Rule 1.6 and relevant interpretive authority.

The Confidentiality Obligation of Ms. Sheppard's current counsel.

20. In general, the FPD, as Ms. Sheppard's current counsel, have a duty under Rule 1.1 to represent her competently. In particular, they have a duty under NRPC Rule 1.6(c) to protect the confidentiality of her information. Rule 1.6(c) provides that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a

client." The FPD acted consistently with these obligations in giving notice to Ms. Sheppard's prior counsel. As Opinion 473 specifically recognizes, a client may instruct her attorney to assert the attorney-client privilege when there is a reasonable basis to do so. The FPD's letters properly conveyed her instruction.

21. The District Attorney asserts that the FPD was "incorrect" in seeking to preserve a claim of attorney-client privilege because Ms. Sheppard previously waived the privilege by calling the attorneys as witnesses in the 2009 evidentiary hearing. To begin with, this assertion is largely beside the point. As discussed above in ¶ 15, Ms. Sheppard's former counsel may not voluntarily reveal information relating to the representation whether or not the information is privileged. Furthermore, as Opinion 473 establishes, the former counsel must follow Ms. Sheppard's instructions to assert the privilege if there is a colorable basis to do so, to enable her to obtain a judicial resolution. Therefore, the ethical propriety of asserting a privilege claim does not turn on whether one is certain that the claim will ultimately prevail.

22. Moreover, the District Attorney has not persuasively shown that Ms. Sheppard cannot assert a privilege claim. There is no suggestion that she has waived the privilege by filing the pending habeas petition, which does not contain a claim of ineffective assistance of counsel or otherwise put her communications with counsel in issue. The District Attorney claims that the attorneys' prior testimony waives any privilege claim in the upcoming proceeding but does not explain why the prior waiver entirely precludes any claim of privilege now. The subject matter of the upcoming hearing will differ from the subject matter of the 2009 hearing. Therefore, even assuming the prior waiver extends to future proceedings on the same subject matter, the Court may nevertheless conclude that the waiver does not extend to the entire subject matter of the upcoming hearing. If the District Attorney calls Ms. Sheppard's prior counsel as witnesses in the upcoming hearing, Ms. Sheppard is entitled to assert the attorney-client privilege with respect to the portions of their testimony that may still be privileged. There is nothing in the District Attorney's motion to suggest that Ms. Sheppard has waived the attorney-client privilege regarding absolutely any testimony that prior counsel might provide, and that any privilege claim will be frivolous.

23. In sum, there was nothing "incorrect" or misleading about notifying Ms. Sheppard's former attorneys that she did not waive the privilege. Moreover, nothing in the FPD's letters precluded the attorneys from forming their own judgment about whether a privilege claim will be viable.

24. Likewise, the FPD was entitled to put the former attorneys on notice of Rule 1.6 and of their position regarding its scope and application. There was nothing misleading, coercive or otherwise improper in doing so. On the contrary, reminding the former lawyers of their ethical obligations was consistent not only with the FPD's obligation to prevent unauthorized disclosures of their client's confidences but with the general obligation that all lawyers have to promote ethical practice.

The FPD did not improperly interfere with the District Attorney's access to witnesses.

25. The FPD's letters did not improperly "interfere[] with" the respondent's access to witnesses, as the District Attorney asserts. The letters gave the prior counsel "notice" that Ms. Sheppard was preserving, "not waiving," her privilege claim, and the letters "direct[ed] [prior counsel's] attention" to their ethical obligation under NRPC Rule 1.6. To the extent that this encouraged prior counsel to comply with their ethical and fiduciary duties of confidentiality rather than revealing confidential information to the prosecutors, one cannot plausibly argue that this was *improper* interference.

26. Contrary to the implication of the District Attorney's motion, the prosecutors have no right to attempt to induce Ms. Sheppard's former counsel to violate their confidentiality duties. In general, lawyers act unethically when they intentionally elicit confidential information from someone who has a fiduciary duty to maintain confidentiality as well as a corresponding obligation under the state judiciary's rules of professional conduct. It did not interfere with the prosecutors' *legitimate* access to witnesses to remind Ms. Sheppard's former attorneys to adhere to their confidentiality obligations. At the same time, nothing in the letters interfered with the prosecutors' ability to speak with the attorneys about matters that are not subject to Rules 1.6 and 1.9; nor did the letters interfere with prosecutors' ability to call the attorneys as witnesses at the upcoming hearing and to elicit information that the Court does not rule to be privileged.

27. The judicial decisions cited by the District Attorney, such as *Davis v. State*, 110 Nev. 1107, 881 P.2d 657 (1994), do not support the District Attorney's claim that the FPD acted improperly. The relevant case law establishes that a prosecutor may not improperly interfere with the defense's effort to interview prospective witnesses by instructing them not to talk to the defense attorney about matters that the witnesses have a right to discuss and the defense attorney may ethically attempt to elicit. Nothing in the case law addresses whether it is ethically proper, if not obligatory, for a defense lawyer to notify the defendant's prior counsel of their confidentiality obligations, which impose legal and ethical limits on their ability to provide information to the prosecution and on the prosecution's access to their information.

The FPD did not provide "legal advice" or potentially establish a lawyer-client relationship with Ms. Sheppard's trial and appellate counsel.

28. Finally, the District Attorney maintains that the FPD's letters provided "legal advice" to Ms. Sheppard's trial and appellate counsel and may thereby have established an implicit attorney-client relationship with them. The District Attorney's argument misconstrues the FPD's correspondence.

29. The FPD's letters to Ms. Sheppard's former counsel stated: "Please be advised that Ms. Sheppard is not waiving her attorney-client privilege . . .," and "direct[ed] [their] attention" to NRPC Rule 1.6 and to ABA Formal Opinion 10-456

(2010). The attorneys receiving the letters would not reasonably understand that the FPD was representing them and providing them legal advice for their own benefit. The recipients would reasonably have understood that, as the letters conveyed, the FPD "ha[d] been appointed to represent Melonie Sheppard," and, on her behalf, was giving them "notice" of Ms. Sheppard's instruction and legal position – namely, that "Ms. Sheppard is not waiving her attorney client privilege."

Conclusion

30. For the reasons discussed above, my opinion is that the FPD properly instructed Ms. Sheppard's former counsel regarding Ms. Sheppard's assertion of the attorney-client privilege and properly put former counsel on notice of their confidentiality obligations. There is no basis for any suggestion that the FPD provided erroneous information, improperly interfered with the prosecution's access to witnesses, or provided "legal advice" giving rise to a lawyer-client relationship.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed in New York, NY on the 21st day of December, 2016.

Bruce A. Green, Esq.

EXHIBIT B

EXHIBIT B

BRUCE A. GREEN
Louis Stein Chair
Fordham University School of Law
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New York, NY 10023
(212) 636-6851; (212) 636-6899 (FAX)
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Bar Admissions

New York State (since 1982)
U.S. District Courts for the Southern and Eastern Districts of New York
U.S. Supreme Court

Education

Columbia University School of Law: J.D. 1981
Honors: James Kent Scholar; Harlan Fiske Stone Scholar
Associate Editor, *Columbia Law Review*

Princeton University: A.B. 1978, *summa cum laude*

Current Legal Employment

Fordham University School of Law:
Louis Stein Professor of Law, since 1997
Professor, 1996-97; Associate Professor, 1987-96
Director, Louis Stein Center for Law and Ethics, since 1997
Director, Stein Center for Ethics and Public Interest Law, 1992-97
Responsible for teaching courses in the areas of legal ethics, criminal law and criminal procedure, and for overseeing the Stein Scholars Program

Prior Full-time Legal Employment

New York University School of Law: Visiting Professor: January-May 2007

Office of the United States Attorney for the Southern District of New York:
October 1983 to August 1987, Assistant United States Attorney
Deputy Chief Appellate Attorney, 1986-87; Chief Appellate Attorney, 1987

U.S. Supreme Court: Law clerk to Justice Thurgood Marshall, 1982-83

U.S. Court of Appeals for the Second Circuit: Law clerk to Judge James L. Oakes, 1981-82

Other Legal Positions

Departmental Disciplinary Committee, App. Div., 1st Department: Member, 1997-2002

New York City Conflicts of Interest Board: Member, Nov. 1995 to March 2005

Handschu Authority: Civilian member, July 1994 to Nov. 1995

Office of Investigations Officer (U.S. v. I.B.T.): Special Counsel (part-time), 1991

Office of Independent Counsel Lawrence Walsh, Associate Counsel (part-time), 1988-91

N.Y.S. Commission on Government Integrity: Consultant and special investigator, 1988-90

Columbia University School of Law: Adjunct Professor (part-time), 1990

Office of the United States Attorney for the Southern District of New York: Special Assistant United States Attorney (part-time), September 1987 to June 1988

Fordham University School of Law: Adjunct Assoc. Professor (part-time), 1985-87

Professional Service

American Bar Association:

- Commission on the American Jury Project: member, 2006-2008
- Commission on Multijurisdictional Practice: reporter, 2000-2002
- Coordinating Group on Bioethics and the Law: member, 1997-2003
- Criminal Justice Section:
  - Chair: 2010-2011
  - Chair-elect: 2009-2010
  - Council: member, 2011 to present
  - Criminal Justice Standards Committee: member, 2013 to present
  - First Vice Chair: 2008-2009
  - Ethics, Gideon and Professionalism Committee: co-chair, 2006-09
- Death Penalty Representation Project: member, 2006-09, 2014-present
- Section of Individual Rights and Responsibilities:
  - Chair, Committee on Privacy and Information Protection, 2014
- Section of Litigation:
  - Task Force on Sound Advice, 2012-13
  - Task Force on Implicit Bias: member, 2011-12
  - Task Force on the Litigation Research Fund: Chair, 2007-2011
  - Division VII (Task Forces): Co-Director, 2007-2008
  - Council member, 2004-07
  - Committee on Law Faculty Involvement: co-chair, 1998-2001, 2003-2004

American Bar Association (continued):

Section of Litigation (continued):

Civil Justice Institute: member, 2001-03
Task Force on Ethical Guidelines for Settlement Negotiations: member, 2000-02
Ethics 2000 Task Force: member, 1999-2000
Committee on Ethics and Professionalism: co-chair, 1995-1998
Task Force on the Independent Counsel Act: reporter, 1997-1999
Rep. to Sec./Div. Committee on Professionalism and Ethics, 1996-2003
Committee on Amicus Curiae Briefs: chair, 1991-1995

Standing Committee on Ethics and Professional Responsibility: member, 2008-2011
Standing Committee on Professionalism: reporter, 2000-2001
Steering Committee for the Symposium on the Multijurisdictional Practice of Law: reporter, 1999-2000
Task Force on the Attorney-Client Privilege: reporter, 2004-2010
Task Force on Law Schools and the Profession: consultant, 1991-1992

Association of American Law Schools: Chair, Section of Professional Responsibility, 1999

Association of the Bar of the City of New York:

Executive Committee: 2010-14
Working Group on the NYS Bar Exam: 2014
White Collar Crime Committee: 2013 to present
Council on Criminal Justice: member, 2009-13
Delegate to NYS Bar Association, 2003-07
Committee on Professional and Judicial Ethics: member, 1994-1997, 2003-2006, 2013-present
Nominating Committee: member, 2005
Ethics 2000 Committee: member, 1999-2001
Jt. Committee on the Legal Referral Service: chair, 1993-96; member, 1996-2000
Committee on International Access to Justice: member,1999-2000
Committee on Disaster Plan: member, 1996-1997
Marden Lecture Committee: member, 1991-1994
Criminal Law Committee: member, 1991-1994
Task Force on Lawyer Training: member, 1992-1994
Corrections Committee: member, 1988-1991

Criminal Law Bulletin: Contributing editor, 1988-1998

Evan B. Donaldson Adoption Institute: Ethics Advisory Committee: member, 1998-2001

Federal Bar Council:

Second Circuit Courts Committee: member, 1994-1997; chair, Subcommittee on Criminal Law and Ethics

Federal Bar Council News: member of the Editorial Board, 1995-2005

Inn of Court: master, 2000-2002

International Association of Legal Ethics: Director, 2010-13; Chair, Conference Planning Advisory Committee, 2014-16

Legal Ethics: Member of Advisory Board, 2008 to present

National Conference of Bar Examiners: Member of MPRE Drafting Committee, 2001 to present

New York County Lawyers' Association:

Director, 2004-2007, 2008-2012, 2013-present

Delegate to NYS Bar Association, 2009-2011

Member of Justice Center advisory board**,** 2003 to present

Member of the Ethics Institute board of advisors**,** 2008 to present

New York State Bar Association:

House of Delegates member, 2003-2007, 2009-2015

Committee on Professional Ethics: Chair, 1998-2001; member, 1991 to present

Committee on Standards of Attorney Conduct (formerly Special Committee to Review the Code of Professional Responsibility): member, 1997 to present

Task Force on Attorney Client Privilege, 2006-2008

Task Force on "Pay to Play" Concerns, member, 1998-2000

New York State Continuing Legal Education Board: Member, 2008-2011

New York State Task Force on Attorney Professionalism and Conduct: Member, 1996-1998

Awards

Powell Pierpont Award, given by the N.Y.C. Conflicts of Interest Board "for outstanding service to the New York City Conflicts of Interest Board," May 23, 2006

New York State Bar Association Criminal Justice Section Award for "outstanding contribution in the field of criminal law education," Jan. 23, 2003

Sanford D. Levy Award, given by New York State Bar Association Committee on Professional and Judicial Ethics, 1990

PUBLICATIONS

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A Prosecutor's Communications With Represented Defendants: What Are the Limits?, 24 Crim. L. Bull. 283 (1988)

The Ethical Prosecutor and the Adversary System, 24 Crim. L. Bull. 126 (1988)

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Note, A Functional Analysis of the Effective Assistance of Counsel, 80 Colum. L. Rev. 1053 (1980)

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"The Ethics of Global Litigation," Litigation, vol. 41, no. 4, Summer 2015, p. 9

“The Litigator’s Monopoly,” Litigation, vol. 40, no. 4, Summer 2014, p. 10

“Experiential Learning: Practice Makes Perfect,” NYLJ, Apr. 21, 2014

“Two Wrongs Make it Worse in Cops’ Retrial,” Nat’l L.J., Sept. 13, 2013

“The Ethics-Procedure Dichotomy,” Litigation, vol. 39, no. 3, Summer 2013, p. 11

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“Prosecutors for Sale,” Nat'l L.J., Oct. 1, 2012, p. 43

“Balancing Conscience and Confidentiality for Attorney Whistleblowers,” Corporate Counsel, June 6, 2012 (with Jordan Thomas), available at: http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202557377777

“The Perils of Sloppy Engagement Agreements,” Litigation, vol. 38, no. 1, Fall 2011, p. 7

“The Perils of New Technology,” Litigation, vol. 37, no. 4, Summer 2011, p. 6

“Criminal Justice: There’s Always More to Learn,” Criminal Justice, Summer 2011, p. 1

“What Use Are Legal Academics?,” Criminal Justice, Spring 2011, p. 1

“Criminal Justice–What’s Ahead? Roadblocks and New Directions,” Criminal Justice, Winter 2011, p. 1

“Thinking About White-Collar Crime and Punishment,” Criminal Justice, Fall 2010, p. 1

“Question of the Week – Unauthorized Practice of Law,” BNA’s Corporate Counsel Weekly 372 (Dec. 9, 2009) [reprinted in BNA, “Legal Ethics for In-House Corporate Counsel,” B-2601 (2010)]

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“Prosecutors’ Professional Independence: Reflections on *Garcetti v. Ceballos*,” Criminal Justice, Summer 2010, p. 4

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"Interviewing Corporate Client Officers and Employees: Ethical Considerations," ABA Section of Litigation, Committee on Corporate Counsel Newsletter, vol. 19, no. 1, p. 1 (Fall 2004) [reprinted in ABA Section of Litigation, Professional Liability Litigation [Newsletter], vol. 3, no. 1, p. 1 (Winter 2005)]

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