

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.

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Volume 36 of 38

APPELLANT'S APPENDIX

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

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27	114. Declaration of Heidi Bailey-Aloi April 7, 2011.....	AA05727 – AA05730
27	115. Declaration of Herbert Duzant’s Interview of Tony Tafuna April 18, 2011.....	AA05731- AA05735
27	116. Declaration of Terry Williams April 10, 2011.....	AA05736 – AA05741
27	117. Declaration of Tim Williams April 10, 2011.....	AA05742 – AA05745
27	118. Declaration of Mele Maveni Vakapuna April 5, 2011.....	AA05746 – AA05748
27	119. Declaration of Priscilla Endemann April 6, 2011.....	AA05749 – AA05752
27	120. Declaration of Mapa Puloka January 24, 2011.....	AA05753 – AA05757
27	121. Declaration of Limu Havea January 24, 2011.....	AA05758 – AA05767
27	122. Declaration of Sione Pohahau January 22, 2011.....	AA05768 – AA05770
27	123. Declaration of Tavake Peaua January 21, 2011.....	AA05771 – AA05776
27	124. Declaration of Totoa Pohahau January 23, 2011.....	AA05777 – AA05799
27-28	125. Declaration of Vuki Mafileo February 11, 2011	AA05800 – AA05814

28	127. Declaration of Crystal Calderon April 18, 2011.....	AA05815 – AA05820
28	128. Declaration of Laura Lui April 7, 2011.....	AA05821 – AA05824
28	129. Declaration of Le’o Kinkini-Tongi April 5, 2011.....	AA05825 – AA05828
28	130. Declaration of Sela Vanisi-DeBruce April 7, 2011.....	AA05829 – AA05844
28	131. Declaration of Vainga Kinikini April 12, 2011.....	AA05845 – AA05848
28	132. Declaration of David Hales April 10, 2011.....	AA05849 – AA05852
28	136. Correspondence to Stephen Gregory from Edward J. Lynn, M.D. July 8, 1999.....	AA05853 – AA05855
28	137. Memorandum to Vanisi File from MRS April 27, 1998.....	AA05856 – AA05858
28	143. Memorandum to Vanisi File From Mike Specchio July 31, 1998.....	AA05859 – AA05861
28	144. Correspondence to Michael R. Specchio from Michael Pescetta October 9, 1998.....	AA05862 – AA05863
28	145. Correspondence to Michael Pescetta from Michael R. Specchio October 9, 1998.....	AA05864 – AA05866

28	146. 3 DVD's containing video footage of Siaosi Vanisi in custody on various dates (MANUALLY FILED).....	AA05867
28	147. Various Memorandum to and from Michael R. Specchio 1998-1999	AA05868 – AA05937
28	148. Memorandum to Vanisi file Crystal-Laura from MRS April 20, 1998.....	AA05938 – AA05940
28	149. Declaration of Steven Kelly April 6, 2011	AA05941 – AA05943
28	150. Declaration of Scott Thomas April 6, 2011	AA05944 – AA05946
28	151. Declaration of Josh Iveson April 6, 2011	AA05947 – AA05949
28	152. Declaration of Luisa Finau April 7, 2011	AA05950 – AA05955
28	153. Declaration of Leanna Morris April 7, 2011	AA05956 – AA05960
28	155. Declaration of Maile (Miles) Kinikini April 7, 2011	AA05961 – AA05966
28	156. Declaration of Nancy Chiladez April 11, 2011	AA05967 – AA05969
28-29	159. Transcript of Proceedings, Trial Volume 1, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 11, 1999.....	AA05970 – AA06222

29-31	160. Transcript of Proceedings, Trial Volume 2, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 12, 1999.....	AA06223 – AA06498
31	163. Neuropsychological and Psychological Evaluation of Siasosi Vanisi, Dr. Jonathan Mack April 18, 2011.....	AA06499 – AA06569
31-32	164. Independent Medical Examination in the Field of Psychiatry, Dr. Siale ‘Alo Foliaki April 18, 2011.....	AA06570 – AA06694
32	172. Motion for Change of Venue, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 July 15, 1998	AA06695 – AA06700
32	173. Declaration of Herbert Duzant’s Interview with Tongan Solicitor General, ‘Aminiasi Kefu April 17, 2011	AA06701 – AA06704
32	175. Order Denying Rehearing, Appeal from Denial of Post-Conviction Petition, <i>Vanisi vs. State of Nevada</i> , Nevada Supreme Court, Case No. 50607 June 22, 2010	AA06705 – AA06706
32	178. Declaration of Thomas Qualls April 15, 2011.....	AA06707 – AA06708
32	179. Declaration of Walter Fey April 18, 2011.....	AA06709 – AA06711
32	180. Declaration of Stephen Gregory April 17, 2011.....	AA06712 – AA06714
32	181. Declaration of Jeremy Bosler April 17, 2011.....	AA06715 – AA06718

- 32 183. San Bruno Police Department Criminal
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- 32 184. Manhattan Beach Police Department Police
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- 32 185. Manhattan Beach Police Department
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- 32 186. Notice of Intent to Seek Death Penalty,
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- 32 187. Judgment, *State of Nevada v. Vanisi*,
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- 32 190. Correspondence to The Honorable Connie
Steinheimer from Richard W. Lewis, Ph.D.
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- 32 195. Declaration of Herbert Duzant’s Interview of
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- 32 196. Declaration of Herbert Duzant’s Interview of
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- 32 197. Declaration of Herbert Duzant’s Interview of
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32	198. Declaration of Herbert Duzant’s Interview of Juror Robert Buck April 18, 2011.....	AA06753 – AA06755
12	Remittitur, <i>Vanisi v. State of Nevada, et al.</i> , Nevada Supreme Court, Case No. 35249 November 27, 2001.....	AA02527 – AA02528
15	Remittitur, <i>Vanisi v. State of Nevada, et al.</i> , Nevada Supreme Court, Case No. 50607 July 19, 2010	AA03031 – AA03032
35	Remittitur, <i>Vanisi v. State of Nevada, et al.</i> , Nevada Supreme Court, Case No. 65774 January 5, 2018.....	AA07319 – AA07320
12	Reply in Support of Motion to Withdraw as Counsel of Record, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 December 27, 2002	AA02572 – AA02575
39	Reply to Opposition to Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 15, 2018.....	AA08232 – AA08244
36	Reply to Opposition to Motion to Disqualify the Washoe County District Attorney’s Office, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 July 27, 2018	AA07615 – AA07639

EXHIBITS

36	1. Response to Motion for a Protective Order, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court
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	of Nevada, Case No. CR98-0516 March 9, 2005.....	AA07640 – AA07652
36	2. Letter from Scott W. Edwards to Steve Gregory re Vanisi post-conviction petition. March 19, 2002.....	AA07653 – AA07654
36	3. Supplemental Response to Motion for a Protective Order, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 March 16, 2005.....	AA07655 – AA07659
36	4. Appellant’s Appendix, Volume 1, Table of Contents, <i>Vanisi v. State of Nevada</i> , Nevada Supreme Court, Case No. 50607 August 22, 2008.....	AA07660 – AA07664
36	5. Facsimile from Scott W. Edwards to Jeremy Bosler April 5, 2002.....	AA07665 – AA07666
35	Reply to Opposition to Motion for Reconsideration and Objection to Petitioner’s Waiver of Attendance at Evidentiary Hearing, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 April 16, 2018.....	AA07356 – AA07365

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35	1. Petitioner’s Waiver of Appearance (and attached Declaration of Siaosi Vanisi), April 9, 2018.....	AA07366 – AA07371
13	Reply to Response to Motion for Stay of Post-Conviction Habeas Corpus Proceedings and for Transfer of Petitioner to Lakes Crossing for Psychological Evaluation and treatment (Hearing Requested), <i>State of Nevada v.</i> <i>Vanisi</i> , Second Judicial District Court of Nevada,	

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36 Reply to State’s Response to Petitioner’s Suggestion
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36 1. Declaration of Randolph M. Fiedler
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36 Request from Defendant, *State of Nevada v.*
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32 Response to Opposition to Motion to Dismiss
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36 Response to Vanisi’s Suggestion of Incompetency
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35 State’s Opposition to Motion for Reconsideration
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1. Declaration of Donald Southworth, *Vanisi v. State of Nevada, et al.*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 36 State’s Sur-Reply to Vanisi’s Motion to Disqualify the Washoe County District Attorney’s Office, *Vanisi v. State of Nevada, et al.*, Second Judicial District Court of Nevada, Case No. CR98-0516
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EXHIBIT

- 36 1. Transcript of Proceedings – Status Hearing, *Vanisi v. State of Nevada*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 36 Suggestion of Incompetency and Motion for Evaluation, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 37 Transcript of Proceedings – Competency for Petitioner to Waive Evidentiary Hearing, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
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- 37-38 Transcript of Proceedings – Report on Psychiatric Evaluation, *State of Nevada v. Vanisi*, Second Judicial District Court of Nevada, Case No. CR98-0516
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13	Transcript of Proceedings – Conference Call – In Chambers, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 February 5, 2003	AA02583 – AA02587
35	Transcript of Proceedings – Conference Call, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 May 10, 2018	AA07372 – AA07384
34	Transcript of Proceedings – Decision (Telephonic), <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 March 4, 2014.....	AA07089 – AA07096
12	Transcript of Proceedings – In Chambers Hearing & Hearing Setting Execution Date, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District of Nevada, Case No. CR98-0516 January 18, 2002.....	AA02541 – AA02552
13	Transcript of Proceedings – In Chambers Hearing, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District of Nevada, Case No. CR98-0516 January 19, 2005.....	AA02645 – AA02654
13	Transcript of Proceedings – In Chambers Hearing, <i>Vanisi v. State of Nevada, et al.</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 24, 2005.....	AA02655 – AA02679
35	Transcript of Proceedings – Oral Arguments, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 May 30, 2018	AA07391 – AA07446

38	Transcript of Proceedings – Oral Arguments, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 25, 2019.....	AA08136 – AA08156
32-33	Transcript of Proceedings - Petition for Post-Conviction (Day One), <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 December 5, 2013	AA06848 – AA06966

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33	199. Letter from Aminiask Kefu November 15, 2011.....	AA06967 – AA06969
33	201. Billing Records-Thomas Qualls, Esq. Various Dates.....	AA06970 – AA06992
33	214. Memorandum to File from MP March 22, 2002.....	AA06993 – AA07002
33	Transcript of Proceedings - Petition for Post-Conviction (Day Two), <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 December 6, 2013	AA07003 – AA07083

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Admitted December 6, 2013

33	200. Declaration of Scott Edwards, Esq. November 8, 2013.....	AA07084 – AA07086
33	224. Letter to Scott Edwards, Esq. from Michael Pescetta, Esq. January 30, 2003.....	AA07087 – AA07088

12-13	Transcript of Proceedings – Post-Conviction, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 28, 2003.....	AA02576 – AA02582
13	Transcript of Proceedings – Post-Conviction, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 November 22, 2004.....	AA02614 – AA02644
1	Transcript of Proceedings – Pre-Trial Motions, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 November 24, 1998.....	AA00001 – AA00127
13	Transcript of Proceedings – Report on Psychiatric Evaluation, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 27, 2005.....	AA02680 – AA02716
37-38	Transcript of Proceedings – Report on Psychiatric Evaluation, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 24, 2018.....	AA07925 – AA08033
13-14	Transcript of Proceedings – Report on Psychiatric Evaluation <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 February 18, 2005	AA02717 – AA02817
38	Transcript of Proceedings – Report on Psychiatric Evaluation, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 25, 2018.....	AA08034 – AA08080

36-37	Transcript of Proceedings – Status Conference, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 5, 2018.....	AA07725 – AA07781
3-5	Transcript of Proceedings – Trial Volume 1, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 20, 1999.....	AA00622 – AA00864
5-6	Transcript of Proceedings – Trial Volume 2, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 21, 1999.....	AA00865 – AA01112
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6-7	Transcript of Proceedings – Trial Volume 3, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 22, 1999.....	AA01113 – AA01299
2-3	Transcript of Proceedings – Trial Volume 4, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 14, 1999.....	AA00296 – AA00523
7	Transcript of Proceedings – Trial Volume 4, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 23, 1999.....	AA01300 – AA01433

3	Transcript of Proceedings, Trial Volume 5, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 January 15, 1999.....	AA00524 – AA0550
7-8	Transcript of Proceedings, Trial Volume 5, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 24, 1999.....	AA01434 – AA01545
8	Transcript of Proceedings – Trial Volume 6, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 27, 1999.....	AA01546 – AA01690
8-9	Transcript of Proceedings – Trial Volume 7, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 28, 1999.....	AA01691 – AA01706
9	Transcript of Proceedings – Trial Volume 8, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 September 30, 1999.....	AA01707 – AA01753
9-10	Transcript of Proceedings – Trial Volume 9, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 1, 1999.....	AA01754 – AA01984
10-11	Transcript of Proceedings – Trial Volume 10, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 4, 1999.....	AA01985 – AA02267

11-12	Transcript of Proceedings – Trial Volume 11, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 5, 1999.....	AA02268 – AA02412
12	Transcript of Proceedings – Trial Volume 12, <i>State of Nevada v. Vanisi</i> , Second Judicial District Court of Nevada, Case No. CR98-0516 October 6, 1999.....	AA2414 – AA02522

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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Litigation, *Best Evidence Seminar* 41 (Apr. 19, 1991)

“Use of an Attorney’s Statements Against His or Her Client,” in ABA Section of Litigation, *Best Evidence Seminar* 35 (Mar. 9-10, 1990)

Participation in Professional and Academic Programs (since January 2000)

Co-chair and co-moderator, “Ethical Issues in Pro Bono Representation,” PLI, Dec. 15, 2016

Panelist, “Managing Your Client’s Image in the Court of Public Opinion,” NYCLA, Nov. 16, 2016

Panelist, “Wearing Two Hats as a Neutral and an Attorney: How to deal with inconsistent mandates in the ethical codes for lawyers and neutrals,” NYSBA Dispute Resolution Section Fall Meeting, NY Law School, Oct. 28, 2016

Co-panelist, “Ethical considerations when representing clients with, or defending actions brought by individuals with, mental disabilities and impairments,” Disability Law Forum, N.Y. City Bar, Oct. 13, 2016

Panelist, “Ethical Considerations for Corporate Investigations: Views from All Sides,” N.Y. City Bar, Sept. 21, 2016

Moderator & organizer, “Discussion Group: Re-imagining the Ideal Role of Prosecutors,” 2016 Annual Conference, Southeastern Association of Law Schools, Amelia Island, Florida, August 6, 2016

Discussant, “The Future of Legal Ethics Scholarship: Are We in the End Days or Just Getting Started?,” 2016 Annual Conference, Southeastern Association of Law Schools, Amelia Island, Florida, August 5, 2016

Organizer, The Ethics and Regulation of Lawyers Worldwide: Comparative and Interdisciplinary Perspectives, Seventh biannual International Legal Ethics Conference, International Association of Legal Ethics, New York, July 14-16, 2016

Co-presenter, “Rethinking Prosecutors’ Conflicts of Interest,” CrimFest, Cardozo Law School, July 12, 2016

Presenter, “The Price of Judicial Economy in the US, Workshop on “Too Few Judges? Regulating the Number of Judges in Society,” International Institute for the Sociology of Law, Oñati, Spain, July 1, 2016

Panelist, “Corruption Scandals, the Panama Papers, and the Transnational Lawyer in Latin America: Strengthening the Profession through Better Ethics Standards,” NY City Bar, June 6, 2016

Moderator, “The Decision-Making Conundrum When Representing a Child or Mentally Impaired Adult,” ABA National Conference on Professional Responsibility, Philadelphia, PA, June 3, 2016

Panelist, “Litigators’ Ethics: An Interactive Discussion of Problems of Confidentiality and Disclosure,” 2016 Second Circuit Judicial Conference, Saratoga, NY, May 25, 2016

Moderator, “Ethics Gumbo: First You Make a Roux,” ABA National Legal Malpractice Conference, New Orleans, Louisiana, April 28, 2016

Panelist, “Surveillance and the Attorney-Client Relationship: Recent International Developments,” Seventh International Professional Responsibility Conference, Association for Professional Responsibility Lawyers, Paris, France, April 13, 2016

Presenter, “Ethics in Class Actions: 2015-16 Update,” Institute for Law & Economic Policy, 22nd Annual Symposium, April 8, 2016, Miami Beach, Florida

Moderator, “Brandeis and Lawyering (II),” Conference on Louis D. Brandeis: An Interdisciplinary Perspective, Touro Law Center, Mar. 31, 2016

Speaker, Georgetown Journal of Legal Ethics Symposium on “Remaining Ethical Lawyers in a Changing Profession,” Georgetown Univ. Law Center, Mar. 18, 2016

Panelist, “Current Issues in Corporate Representation,” Cardozo Law School, Feb. 9, 2016

Panelist, “Watch Out Below! Avoiding Ethical Pitfalls in Class Action Litigation,” NYSBA Antitrust Law Section, Annual Meeting, NY, NY, Jan. 28, 2016

Moderator, “Ethics in Criminal Practice, The Hardest Questions Today: A Conversation in Honor of Monroe Freedman,” AALS Annual Conference, NY, NY, Jan. 7, 2016

Co-chair and co-moderator, “Ethical Issues in Pro Bono Representation,” PLI, Dec. 11, 2015

Panelist, “Social Responsibility of Corporations,” CJS Global White Collar Crime Institute, ABA Criminal Justice Section & KoGuan Law School, Shanghai, China, Nov. 20, 2015

Presenter & Facilitator, Professional Responsibility and Ethics in the Global Legal Market, Moscow State University Law School, Moscow, Russia, Oct. 28-31, 2015

Panelist, “What Line? Reining in Prosecutorial Excesses: The Ethics and Strategy of Negotiations,” NACDL’s 11th Annual White Collar Crime Seminar, Fordham Law School, Oct. 22, 2015

Panelist, “Ethical Considerations for Corporate Investigations: Views from All Sides,” N.Y. City Bar, Sept. 11, 2015

Discussant, “Keeping the Conversation Going on Intractable Problems in the Criminal Justice System,” 2015 Annual Conference, Southeastern Association of Law Schools, Boca Raton, Florida, August 1, 2015

Commentator, “Defense Attorneys,” CrimFest 2015, Cardozo Law School, July 20, 2015

Presenter, “Rethinking Prosecutors’ Conflicts of Interest,” 2015 Legal Ethics Schmooze, Stanford Law School, June 25, 2015

Moderator, “Attorney Privilege and Work Product,” New York State-Federal Judicial Counsel & the Second Circuit Judicial Counsel, Brooklyn, NY, June 18, 2015

Moderator, “Ethics and Corporate Social Responsibility,” Corporate Social Responsibility Leadership Course, Fordham Law School, June 11, 2015

Organizer, moderator and presenter, “Criminal Justice Ethics Schmooze,” Fordham Law School June 8-9, 2015

Moderator, “Ineffective Assistance of Counsel and Forensic Evidence,” 6th Annual Prescription for Criminal Justice Forensics, ABA Criminal Justice Section & Louis Stein Center for Law and Ethics, Fordham Law School, June 5, 2015

Panelist, “Ethics and Professionalism: Best Practices for Attorneys,” N.Y. City Bar, May 18, 2015

Panelist, “Ethical Issues in FCPA Compliance & Investigations,” Practical Advice from the Front Lines,” Fordham Law School, May 12, 2015

Panelist, “Negotiation Ethics: Pitfalls and Rules,” NYSBA Committee on Women in the Law, NYC, May 5, 2015

Speaker, Conference on “Reconsidering Access to Justice,” Texas A&M Law School, May 1, 2015

Co-interviewee, “The Power of the Prosecutor,” Talks on Law, recorded April 22, 2015, available at: <http://www.talksonlaw.com/talks/26>

Moderator, Panel discussion: Thurgood Marshall’s Legacy, NYCLA, April 15, 2015

Moderator, “Hot Topics: Ethical Issues in Public Interest Lawyering,” Fordham Law School, March 31, 2015

Speaker, “Lawyers as Lovers: Are We Romanticizing the Lawyer-Client Relationship?,” Conference on Billy Joel & the Law, Touro Law School, March 22, 2015

Moderator, “Ethical Issues in Insurance Law: 2015 Update,” NYCLA, March 18, 2015

Panelist, “Developments in Ethics for Antitrust Lawyers,” ABA teleseminar, Feb. 24, 2015

Presenter, “Prosecutorial Accountability in the Information Age” (work-in-progress), faculty workshop, Notre Dame Law School, Feb. 21, 2015

Panelist, “The Ethics of Conflicts of Interest,” Clifford Law Offices Continuing Legal Education Program, Chicago, IL, Feb. 20, 2015

Panelist, “Current Ethical Issues in Corporate Representation,” Cardozo Law School, Feb. 11, 2015

Panelist, “The Ethical Minefields of Witnesses: A Refresher,” ABA Webinar, Dec. 19, 2014

Co-chair and co-moderator, “Ethical Issues in Pro Bono Representation,” PLI, Dec. 16, 2014

Panelist, “Ethical Considerations for Corporate Investigations: Views from All Sides,” N.Y. City Bar, Sept. 30, 2014

Panelist, “Taz, Morality & Ethics,” The Taslitz Galaxy: A Gathering of Scholars at Howard, Howard University School of Law, Sept. 19, 2014

Panelist, “Supreme Court Update and Other Notable Developments in Criminal Law,” Southeastern White Collar Crime Institute, ABA Criminal Justice Section, Braselton, Georgia, Sept. 12, 2014

Co-presenter, “Regulation of U.S. Prosecutors in the Information Age,” International Legal Ethics Conference VI, London, England, July 11, 2014

Presenter, “Reforming the regulation of the prosecutors: A slightly comparative perspective,” Conference of the International Working Group for Comparative Studies of the Legal Professions, Frauenchiemsee, Germany, July 7, 2014

Panelist, “International Ethics,” Ninth Annual Fordham Law School Conference on International Arbitration and Mediation,” June 12, 2014

Panelist, “Fifth Annual Prescription for Criminal Justice Forensics,” ABA Criminal Justice Section, NY, NY, June 6, 2014

Panelist, “Ethics of Working With Witnesses,” Professional Education Broadcast Network, May 16, 2014

Panelist, “Plenary: Twenty Years After the MacCrate Report: Revisiting the Continuum,” NCBE Annual Admissions Conference, Seattle, WA, May 3, 2014

Moderator, “Conflicts: The Basics and Recent Developments,” Ethics for In-House Counsel: New Developments & Future Challenges, Fordham Law School, March 20, 2014

Panelist, “Race and Access to Justice,” Georgetown Univ. Law Center, Washington, D.C., March 18, 2014

Co-speaker, “Professional Ethics for Public Interest Lawyers,” Brennan Center for Social Justice, NY, NY, Feb. 28, 2014

Panelist, “Attorney Client Privilege and Selective Waiver in Bank Regulation,” Cardozo Law School, Feb. 24, 2014

Panelist, “Who Are They to Judge? Ethical and Professionalism Issues Facing the Bench,” 11th Annual Legal Ethics & Professionalism Symposium, Univ. of Georgia Law School, Feb. 21, 2014

Panelist, “Bridge the Gap” C.L.E. Orientation Program, Committee on Character & Fitness (Supreme Court, Appellate Division, First Judicial Department), NYCLA, Feb. 19, 2014

Moderator, “Ethical Choices in Dealing with Crime Victims: What is a Prosecutor, Defender and Judge to Do?,” 2014 ABA Midyear Meeting, Chicago, IL, Feb. 7, 2014

Panelist, “Stop, Frisk & Judicial Independence: An Ethics CLE,” NY Chapters of the Puerto Rican Bar, Federal Bar and National Bar Associations, U.S. Courthouse, NY, NY, Jan. 8, 2014

Commentator, “The Lost Lawyer and the Lawyer-Statesman Ideal: A Generation Later – the Shifting Sands of Professional Identity,” AALS Annual Meeting, NY, NY, Jan. 4, 2014

Co-presenter, Workshop on Prosecutorial Ethics, Hitotsubashi Univ., Tokyo, Japan, Dec. 18, 2013

Co-presenter, Workshop on Prosecutorial Ethics, Japan Federation of Bar Associations, Tokyo, Japan, Dec. 17, 2013

Presenter, “Comparing the Honesty and Candor Obligations of U.S. Prosecutors and Defense Lawyers,” Chukyo Univ., Nagoya, Japan, Dec. 16, 2013

Moderator, panel on “Unbundled Legal Services,” “Until Civil Gideon: Expanding Access to Civil Justice,” Fordham Law School, Nov. 1, 2013

Moderator, “Ripped from the Headlines,” 9th Annual White Collar Seminar, NACDL, Washington, D.C., Oct. 24, 2013

Panelist, Federal Criminal Practice Institute, New York County Lawyers’ Association, Oct. 19,

2013

Panelist, “Ethical Considerations for Corporate Investigations: Views from All Sides,” Association of the Bar of the City of New York, Sept. 25, 2013

Moderator, “Criminal Discovery Under *Brady v. Maryland*: Current Developments, Association of the Bar of the City of New York, Sept. 19, 2013

Moderator, “Navigating the Ethical Challenges in Counseling Unaccompanied Minors,” DCS Legal Access Project Managers’ Meeting, Vera Institute of Justice, July 31, 2013

Presenter, Ethics Workshop, Annual Capital Defense Training Program, New York City Bar, July 15, 2013

Panelist, “Culpability and White Collar Crime,” 2013 AALS Midyear Meeting, San Diego, CA, June 10, 2013

Panelist, “The Ethics of Sub-Prime Lending,” conference on The Mortgage Crisis—Five Years Later, Coalition for Debtor Education, Fordham Law School, June 3, 2013

Moderator, “Prosecutors’ Ethical and Professional Decision Making – Is it Unique?,” 39th ABA National Conference on Professional Responsibility, San Antonio, TX, May 30, 2013

Co-presenter, “Hot Topics in Legal Ethics,” Fordham Law School, May 20, 2013

Panelist, “Criminal Law and Ethics,” NYCLA, April 23, 2013

Panelist, “Religion and the Practice of Law,” 2013 Conference on Religious Legal Theory, Touro Law Center, April 11, 2013

Commentator, Conference on “The Ethical Infrastructure and Culture of Law Firms,” Hofstra Law School, April 5, 2013

Presenter, “The Gideon Effect: Rights, Justice and Lawyers Fifth Years After *Gideon v. Wainwright*,” Yale Law Journal Symposium, Yale Law School, March 9, 2013

Panelist, “Complying with Brady and Strategies for Defense Counsel,” 27th Annual National Institute on White Collar Crime, Las Vegas, Nevada, March 8, 2013

Panelist, “Ethics in White Collar Cases,” 27th Annual National Institute on White Collar Crime, Las Vegas, Nevada, March 7, 2013

Presenter, “Imagining Plea Bargaining Without Competent Counsel: Justice Scalia’s Pursuit of Less Perfect Justice,” conference on Plea Bargaining After *Lafler* and *Frye*, Duquesne Univ. School of Law, March 1, 2013

Moderator, “The Business and Ethics of Managing a 21st Century Law Firm: New, Smart and Ethical Business Models,” Fordham Law School, Feb. 26, 2013

Panelist, “Representing Financial Institutions and their Employees in SEC Enforcement Actions,” ABA Section of Business Law, White Collar Crime Committee, NY, NY, Feb. 13, 2012

Speaker, “New Developments in Attorney-Client Privilege,” AALS 2013 Annual Meeting, New Orleans, LA, Jan. 5, 2013

Chair and moderator, “Ethical Issues in Pro Bono Representation 2012,” PLI, Dec. 18, 2012

Panelist, “Ethical Issues for the Modern Day Prosecutor,” Kings County District Attorney’s Office, Nov. 20, 2012

Panelist, “Navigating Ethical Waters: Obstruction of Justice, Destruction of Evidence and False Statements,” 8th Annual White-Collar Seminar, NACDL, Fordham Law School, NY, NY, Nov. 15, 2012

Lecture, “Lawyers’ Professional Independence: Overrated or Undervalued?,” Miller-Becker Center for Professional Responsibility Distinguished Lecture Series, Akron Law School, Nov. 9, 2012

Speaker, “Federal Criminal Discovery Reform: A Legislative Approach,” symposium on Defining and Enforcing the Federal Prosecutor’s Duty to Disclose Exculpatory Information, the 13th Annual Georgia Symposium on Ethics and Professionalism, Mercer Law School, Oct. 5, 2012

Moderator, “Ethical Issues for Criminal Practitioners,” National Law Journal/Legal Times & Fordham Law School, recorded webinar broadcast on Oct. 2, 2012

Panelist, “Ethical Considerations for Corporate Investigations: Updates 2012,” Association of the Bar of the City of New York, Sept. 12, 2012

Speaker, “Lawyers’ Professional Independence: Is it undervalued or overrated?,” International Legal Ethics Conference V, Banff, Alberta, July 13, 2012

Panelist, “Law Without Walls,” International Legal Ethics Conference V, Banff, Alberta, July 13, 2012

Presenter, “Ethical Practice in the Criminal Justice System: Finding Common Ground,” National Institute for Teaching Ethics & Professionalism, Seattle, WA, June 22-24, 2012

Panelist, “Parallel Proceedings: Emerging Issues & Best Practices,” Association of the Bar of the

City of New York, June 13, 2012

Presenter, “Rehabilitating Lawyers: Perceptions of Deviance and Its Cures in the Lawyer Disciplinary Process,” 2012 International Conference on Law & Society, Honolulu, HA, June 5, 2012

Panelist, “So You Think You’re Up-to-Date on Attorney Client Privilege & Confidentiality,” 38th ABA National Conference on Professional Responsibility, Boston, MA, June 1, 2012

Panelist, “Conflicts in the Face of Corporate Representations and Government Investigative Techniques,” 1st Annual White Collar Crime Institute, Association of the Bar of the City of New York, May 14, 2012

Panelist, “Conflicts and Choice of Law Updates,” Professional Responsibility and Legal Ethics: Exploring the Similarities and the Differences Across Legal Systems, Association of Professional Responsibility Lawyers International Conference, Istanbul, Turkey, May 4, 2012

Co-speaker, “Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process,” The Law: Business or Profession? - The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century, Fordham Law School, April 24, 2012

Speaker, “The Flood of U.S. Lawyers: Natural Fluctuation or Professional Climate Change?,” Too Many Lawyers? - Facts, Reasons, Consequences, and Solutions, International Institute for the Sociology of Law, Oñati, Spain, April 20, 2012

Presenter, “Prosecutors and Professional Regulation,” faculty workshop, Fordham Law School, March 22, 2012

Speaker, “Ethics,” Counseling Clients in the Entertainment Industry 2012, PLI, March 12, 2012

Panelist, “Ethics for Government Lawyers 2012,” PLI, March 9, 2012

Speaker, “Ethics for Government Lawyers,” U.S. Environmental Protection Agency, Region 2, Office of Regional Counsel, March 8, 2012

Moderator, “Top Ten Reasons You’ll Wish You had Become a Trust & Estates Lawyer: Ethical Pitfalls and Blunders in White Collar Practice,” 26th National Institute on White Collar Crime, ABA, Miami, Florida, March 1, 2012

Panelist, “Developments in Ethics for Antitrust Lawyers,” live webinar and teleconference, ABA Section of Antitrust Law, Feb. 16, 2012

Panelist, “Prosecutorial Accountability in the Post-*Connick v. Thompson* Era: Reforms and Solutions,” ABA Death Penalty Representation Project et al., New Orleans, Louisiana, Feb. 4,

2012

Speaker, "Ethical Issues in Federal Practice," Current Developments in Federal Civil Practice 2012, PLI, Feb. 1, 2012

Panelist, "Technology in Your Practice - Trends, Tools and Ethics Rules," NYSBA Annual Meeting, Jan. 26, 2012

Panelist, "Rules of Professional Conduct and the Government Lawyer," NYSBA Annual Meeting, Jan. 24, 2012

Panelist, "Ethical Considerations in Setting Attorney Fees," NYSBA Annual Meeting, Jan. 24, 2012

Speaker, "Government Lawyering," 2012 Annual Meeting, AALS, Washington, D.C., Jan. 5, 2012

Chair and moderator, "Ethical Issues in Pro Bono Representation 2010," PLI, Dec. 21, 2010

Panelist, "Ethical Issues with Group Representation," LEAP conference on Civil Justice as bedrock value in Difficult Times, Nov. 29, 2011

Panelist, "The Watergate CLE," U.S. District Court - EDNY, Nov. 15, 2011

Panelist, "Future Ethics: Who Will Regulate Lawyers in 2020?," New York Law School, Nov. 14, 2011

Panelist, "Community Prosecution & Community Defense," Wake Forest Univ. School of Law, Nov. 4, 2011

Panelist, "Multi-jurisdictional rules of ethics and professional conduct: Coping with conflicting legal rules and privileges in a global business environment," German-American Lawyers' Association, NY, Oct. 25, 2011

Panelist, "What to Do? Has the Potential Client (Who Will Not Disclose) Intentionally Misrepresented?," Working Group on Legal Opinions Fall 2011 Seminar, NY, Oct. 25, 2011

Panelist, "Sentencing Advocacy," 2011 Federal Criminal Practice Institute, NYCLA, Oct. 15, 2011

Moderator, "Representing Clients With Diminished Capacity," Association of the Bar of the City of New York, Oct. 13, 2011

Moderator, "The ABCs of Defense in an E-electronic Age: Ethics and Strategies," 7th Annual White Collar Seminar, NACDL, Fordham Law School, Sept. 22, 2011

Panelist, “Ethical Considerations for Corporate Investigations: Updates 2011,” Association of the Bar of the City of New York, Sept. 15, 2011

Panelist, “Alternative Litigation Financing: A New Way to Help Pay for Lawsuits and Stay Out of Trouble While Doing It,” NYCLA, Sept. 14, 2011

Panelist, “The Ethical and Practical Challenges of Representing a Controversial Client,” Federal Bar Council & Stein Center, E.D.N.Y. federal courthouse, June 29, 2011

Panelist, “What is Good Lawyering?,” Conference on Padilla and the Future of the Defense Function, NACDL, Cardozo Law School, June 20, 2011

Luncheon speaker, “Staying Ahead of the Curve: What Every Criminal Defense Lawyer Needs to Know,” NYSBA, Albany, NY, June 17, 2011

Panelist, “Tackling Ethical Issues Arising in Criminal Cases,” NYCLA, June 16, 2011

Panelist, “Third Party Funding of International Arbitration Claims: The Newest ‘New New Thing,’” NYSBA Dispute Resolution Section & Fordham Law School ADR and Conflict Resolution Program, June 15, 2011

Panelist, “How the Rules of Professional Conduct Apply to Government Lawyers,” Seventeenth Annual Seminar on Ethics in New York City Government, NYC COIB & Center for New York City Law, New York Law School, May 17, 2011

Panelist, “Hypothetically Speaking II: Issues in the Attorney-Client Relationship under the Rules of Professional Conduct,” Association of the Bar of the City of New York, May 16, 2011

Moderator, “Ethics Update: Perspectives from the Federal and State Judiciary,” N.Y.S. Federal Judicial Council - Advisory Group, E.D.N.Y. federal courthouse, May 11, 2011

Moderator, “Ethics Update: Perspectives from the Federal and State Judiciary,” N.Y.S. Federal Judicial Council - Advisory Group, S.D.N.Y. federal courthouse, May 10, 2011

Panelist, “An Overview of Attorney Error: Malpractice, Breach of Ethical Rules and Ineffective Assistance of Counsel,” Mental Hygiene Legal Service, May 3, 2011 (videotape)

Panelist, “The Top Five Ethical Violations and Resulting Claims for Legal Malpractice,” Spring 2011 National Legal Malpractice Conference, ABA Standing Committee on Lawyers’ Professional Liability, Boston, MA, April 28, 2011

Panelist, “Anatomy of a Trial: Young Lawyer Trial Skills Training,” ABA Section of Litigation & Criminal Justice Section Annual CLE Conference,” Miami, Florida, April 14, 2011

Panelist, “Ethics,” IP Enforcement and Litigation 2011: Civil and Criminal Update, PLI, March 30, 2011

Panelist, “Ethical Implications of Legal Aid and Pro Se Assistance,” Legal Aid Society, March 18, 2011

Speaker, “Criminal Defense Ethics,” 25th Annual Metropolitan New York Trainer, NYS Defenders Ass’n, March 12, 2011

Moderator, “Criminal Defense?: The Ethical and Legal Line Between Zealous Advocacy and Obstruction of Justice,” 25th National Institute on White Collar Crime, ABA Criminal Justice Section, Mar. 3, 2011, San Diego, CA

Panelist, “2011 Ethical Issues,” 2011 Winter Bench & Bar Conference, Federal Bar Council, Los Cabos, Mexico, Feb. 21, 2011

Keynote Speaker, “Ted Schneyer’s Impact on Legal Ethics Scholarship,” The Ted Schneyer Ethics Symposium: Lawyer Regulation for the 21st Century, Univ. Of Arizona, James E. Rogers College of Law, Jan. 28, 2011

Panelist, “Ethical Pitfalls for Business Lawyers,” Business Law Section, NYSBA Annual Meeting, Jan. 26, 2011

Co-speaker, “Legal Ethics & Professionalism,” Nineteenth Annual London MCLE Fair, CLE Europe Limited, Jan. 15, 2011

Chair and moderator, “Ethical Issues in Pro Bono Representation 2010,” PLI, Dec. 21, 2010

Moderator, “Ethical and Privilege Issues for Pharmaceutical Whistleblowers Counsel,” Institutional Investor Educational Foundation, New York, NY, Dec. 9, 2010

Moderator, program on ethics and professionalism in criminal prosecution and defense, Multnomah County Courthouse, Portland, OR, Dec. 3, 2010

Panelist, “Ethics and the Construction Lawyer,” NYCLA, Nov. 30, 2010

Speaker, “Ethical Practices for the Modern Prosecutor,” Brooklyn District Attorney’s Office. Oct. 26, 2010

Speaker, “Prosecutive Ethics,” annual conference, National Association of Former United States Attorneys, Oct. 9, 2010

Moderator, “A Prosecutor’s Brady/Discovery Obligations For Production of Documents,” ABA Criminal Justice Section White Collar Crime Mid-Atlantic Regional Committee, Widener Law School, Wilmington, DE, Oct. 7, 2010

Panelist, “”Ethics and Litigation for Today’s Trial Counsel,” 2nd Annual Litigation Summit, Oct. 6, 2010

Panelist, “Ethical Considerations for Corporate Investigations: Updates 2010,” Association of the Bar of the City of New York, September 15, 2010

Panelist, “Hot Ethics Issues for Young Trial Lawyers (and the Young at Heart),” ABA ANNUAL Meeting 2010, San Francisco, CA, August 7, 2010

Speaker, “Criminal; Defense Ethics,” New York State Defenders Association 43rd Annual Meeting & Conference, Saratoga Springs, NY, July 27, 2010

Panelist, “Lawyers in Context: Ethical Decision Making in Practice,” International Legal Ethics Conference IV, Stanford Law School, July 17, 2010

Moderator, “Prosecutors and their Disclosure Duties: A Regulatory Conundrum,” 36rd National Conference on Professional Responsibility, ABA, June 3, 2010

Panelist, “Hypothetically Speaking: Considering Issues for the Practitioner under the New Rules of Professional Conduct,” Association of the Bar of the City of New York, May 17, 2010

Panelist, “Bloomberg Corporate Internal Investigations: Ethical Considerations Seminar 2010,” Bloomberg, NY, March 11, 2010

Panelist, “Protecting the Attorney-Client Privilege and Attorney Work Product,” 24th Annual National Institute on White Collar Crime, Miami, Florida, Feb. 25, 2010

Panelist, “Half a Century of Advice,” Committee on Professional Ethics, NYSBA Annual Meeting, Jan. 29, 2010

Chair, Ethical Issues in Pro Bono Representation 2009, PLI, NY, Dec.22, 2009

Panelist, “Ethics and the Role of Counsel at a Troubled Institution,” Banking Law Update 2009: Shaping the Future of the Financial Services System, PLI, NY, Dec. 9, 2009

Moderator, “Ethics: ‘Getting it Right and Wrong,’” Criminal Law, Procedure & Evidence Seminar, Brooklyn Law School, Dec. 5, 2009

Panelist, Decoding the New Rules of Professional Conduct: The Changes That Matter, Federal Bar Council, Dec. 3, 2009

Moderator and discussion leader, “New Perspectives on Brady and Other Disclosure Obligations: What Really Works?,” Cardozo Law School, Nov. 15-16, 2009

Panelist, “Town Hall Meeting: Brady Practices in State and Federal Jurisdictions,” ABA Criminal Justice Section, Washington, D.C., Nov. 5, 2009

Co-speaker, “How to Avoid Lateral Hire Conflicts under Rule 1.10,” PLI teleconference, Nov. 3, 2009

Panelist, “Attorney-Client Privilege Issues Confronting General Counsel,” N.Y.S. Judicial Institute on Professionalism in the Law, Oct. 30, 2009

Panelist, “Ethics and Professionalism: The Basics and Beyond,” Accredited Provider Conference, NYS Continuing Legal Education Board, Oct. 29, 2009

Co-speaker, “The Civil Government Litigator: A View from the Jury Box,” 2009 Hofstra Legal Ethics Conference, Power, Politics & Public Service: The Legal Ethics of Lawyers in Government, Oct. 20, 2009

Panelist, “Shyster, Sharks and Savors: Are Legal Ethics Immoral,” NYCLA, Oct. 14, 2009

Panelist, “Professionalism for Criminal Law Practitioners,” Multnomah County Bar Association, Portland, OR, Oct. 9, 2009

Panelist, “Choppy Waters – The Ethics of Privilege and Disclosure,” 5th Annual Defending the White Collar Crime Case – In and Out of Court, NACDL & the Stein Center for Law and Ethics, Oct. 1, 2009

Presenter and panelist, “Ethics for Breakfast: The New Rules of Professional Conduct and the Revised Power of Attorney Statute – Are You Ready?,” Sixth Annual Trusts & Estates Conference, Calvary Hospital, Sept. 22, 2009

Panelist, “Ethical Considerations for Corporate Investigations: Updates 2009,” Association of the Bar of the City of New York, September 17, 2009

Panelist, “Avoiding Ethical Minefields When Preparing and Examining Witnesses,” ABA Annual Meeting, Chicago, IL, July 30, 2009

Panelist, “Roundtable on Ethical Issues in Class Action Litigation,” Class Action Litigation 2009: Prosecution and Defense Strategies, PLI, July 10, 2009

Panelist, “Standards for Prosecuting Corporate Fraud by Federal & State Agencies: The Impact of the Revised Justice Department Charging Guidelines,” Association of the Bar of the City of New York, June 23, 2009

Panelist, “Ethics in the Wake of the New Rules of Professional Conduct, NYSBA, June 9, 2009

Panelist, “Making Pro Bono *Work*: Sustaining Corporate Pro Bono in an Economic Downturn, ACC-GNY, June 2, 2009

Panelist, “The Year in Review in Confidentiality and Attorney-Client Privilege,” 35th ABA National Conference on Professional Responsibility, Chicago, IL. May 28, 2009

Speaker, “Ethics in Criminal Discovery: What Does/Should *Brady* Mean?,” West LegalEdcenter (teleconference), May 14, 2009

Luncheon Speaker, “Hot Topics in Ethics and Professionalism,” ABA Section of Litigation Committee on Ethics and Professionalism, ABA Section of Litigation Annual Conference, Atlanta, GA, April 30, 2009

Panelist, “Corporate Counsel’s Guide to the New Disciplinary Rules,” NYCLA, April 22, 2009

Speaker, “Legal Ethics for Customs and International Trade Practitioners,” Customs and International Trade Bar Association, April 21, 2009

Panelist, Ethics panel, “Future Perspectives on Affordable Housing and Economic Development in New York City, Stimulus & Beyond, Association of the Bar of the City of New York, March 27, 2009

Speaker, “New Professional Responsibilities and Ethics Rules,” Office of the N.Y.S. Attorney General, March 20, 2009

Panelist, “The False Defense: How Far Can a Criminal Lawyer Go?,” Lawline.com (on-line CLE), recorded on March 17, 2009

Panelist, “Choices, Choices: Legal Ethics and Choice of Law,” Association of Professional Responsibility Lawyers Midyear Meeting, Boston, Mass., Feb. 13, 2009

Speaker, Ethics CLE, “Pro Bono Opportunities Day 2009,” Association of the Bar of the City of New York, Feb. 10, 2009

Moderator, “Pretexting in Investigations: Is it Ethical?,” NYSBA Annual Meeting 2009, Jan. 28, 2009

Commentator, Access to Justice Symposium, ABA Section of Litigation, Atlanta, Georgia, Dec. 4, 2008

Speaker, “The Role of Ethics Rules in Reducing the Risk of Wrongful Convictions,” Lewis & Clark Law School, Nov. 6, 2008

Speaker, “When Good Ethics Go Bad,” The Copyright Society of the U.S.A., NY, NY, Sept. 12, 2008

Panelist, “Ethical Considerations for Corporate Investigations: Updates 2008,” Association of the Bar of the City of New York, September 10, 2008

Moderator, “Attorney Client Privilege of Corporations: Vital Component of Due Process or Obsolete Vestige of Corporate Power and Influence?,” APRL Annual Meeting, NY, NY, Aug. 9, 2008

Panelist, “Issues in Judicial Ethics,” New Appellate Judges Seminar, NYU School of Law, July 16, 2008

Panelist, “Handling Fee Disputes in the U.S. and France,” NYCLA, May 21, 2008

Panelist, “You Be the Legal Ethicist: Drawing Lines in Areas of Ethical Ambiguity,” New York American Inn of Court, May 19, 2008

Speaker, prosecutorial ethics, meeting of the NJ County Prosecutors Association, Silver Lake, NJ, May 14, 2008

Moderator, “Attorney-Client Confidentiality in the Corporate Setting: Europe and the United States,” APRL’s Fifth International Meeting, Amsterdam, NE, May 7, 2008

Panelist, “Seeking Justice: Making Sense of the Special Responsibility of the Prosecutor,” New York City Bar Bi-Annual Justice Retreat, A Summit on the Prosecution Function, April 12, 2008

Moderator, “Transparency Outside the Courtroom,” symposium on Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?, NYU Annual Survey of American Law, March 11, 2008

Moderator, “Ethical Responsibilities for Lawyers Negotiating and Settling Claims,” Claims Management, Torts and Litigation of Claims - Current Developments and the International Context, Union Internationale des Avocats, Vail, CO, Feb. 29, 2008

Panelist, “Significant Rule Changes that will Change the Face of the Profession,” NYSBA Annual Meeting, Jan. 30, 2008

Speaker, “Ethics Within and Beyond the Rules: Examples from Criminal Advocacy,” Duke Law Leadership Experience, Duke Law School, Jan. 18, 2008

Panelist, “The City and the World,” AALS 2008 Annual Meeting, NY, NY, Jan. 5, 2007

Panelist, “Technology and Ethical Issues for Lawyers,” ABA-CLE Teleconference, Dec. 12, 2007

Speaker, “Criminal Defense Lawyering at the Edge: A Look Back,” 2007 Legal Ethics Conference, Lawyering at the Edge: Unpopular Clients, Difficult Cases, Zealous Advocates, Hofstra Univ. School of Law, Oct. 15, 2007

Panelist, "Ethics for Corporate Counsel – The Changing Face of the Attorney-Client Privilege," Second Corporate Counsel Institute, NYSBA, Oct. 12, 2007

Moderator, "Corporate Representation after DOJ's McNulty Memo: The Implications of DOJ Policy for White Collar Defenders, Internal Investigators, Civil Litigators and Everyday Business Advisors," ABA-CLE Teleconference, Oct. 3, 2007

Panelist, "Ethical Considerations for Corporate Investigations: Update 2007," Association of the Bar of the City of New York, September 18, 2007

Panelist, "Issues in Judicial Ethics," Appellate Judges Seminar – New Judges Series, NYU Univ. School of Law, July 12, 2007

Panelist, Professional Ethics Workshop, Securities Indus. and Financial Markets Assn., June 12, 2007

Panelist, "Legal Industry Outsourcing," The American Lawyer, Corporate Counsel & Law Firm Inc., New York, NY, May 23, 2007

Speaker, "Ethical Limits on Informal Discovery," program on Winning Cases in Federal Court – Day 2, New York County Lawyers' Ass'n, May 22, 2007

Panelist, "After Hewlett Packard: Methods & Ethics of Conducting Corporate Investigations," Association of the Bar of the City of New York, May 17, 2007

Trainer, "Ethical Issues in Legal Services Practice," Legal Services of New York, May 7, 2007

Speaker, "Inquiring, Prying, Snooping and Spying -- The Use and Misuse of Private Investigators," American Academy of Matrimonial Lawyers, New York Chapter, May 4, 2007, NY, NY

Panelist, "Technology and Ethical Issues," Technology in the Practice & Workplace Committee Midwinter Meeting, ABA Section of Labor & Employment Law, NYU School of Law, April 27, 2007

Co-presenter, "The Private Bar and the Public Interest: Structuring Deliberation within Professional Associations," 13th Annual Clifford Symposium on Tort Law and Social Policy, DePaul Univ. College of Law, April 19, 2007

Panelist, "When the Ends Justify the Means: Use of Disassembling in Investigations in Aid of Civil and Criminal Litigation," NYCLA Inn of Court, March 22, 2007

Speaker, "Prosecutorial Ethics," Goldstock Criminal Law Lunch Seminar, N.Y.U. School of Law, March 8, 2007

Panelist, “Ethics and Mediation – Where There’s Smoke, There’s Fire!,” Goliath vs. Goliath - Organizing the Construction Case for Mediation, ABA Section of Dispute Resolution, Feb. 23, 2007

Moderator, The Executive Branch’s Legal Response to the Post 9-11 World: Unconstitutional Overreach or Necessary Precaution?, Fordham Law School, Feb. 22, 2007

Panelist, “The Prosecution and Defense of American White Collars - An Ethical Quagmire,” Federal Bar Council Inn of Court, Jan. 25, 2006

Moderator, “Legal Ethics CLE in the Law School Setting: Can It Be Practical, Academic, and Interesting at the Same Time?,” AALS 2007 Annual Meeting, Washington, D.C., Jan. 4, 2007

Co-panelist, Ethics in Criminal Practice, “2006 Legislative Program, Part I,” Office of the NYS Attorney General, Dec. 7, 2006

Panelist, “Ethics and Professionalism,” N.Y. State Bar Ass’n, Dec. 7, 2006

Speaker and moderator, “Ethics for Government Lawyers,” Wisconsin Department of Justice, Office of the Attorney General, Madison, WI, Dec. 5, 2006

Co-panelist, “Ethical Issues Raised by Internal & Governmental Investigations,” Mealey’s Corporate Liability & Compliance Conference,” Miami, Fla., Nov. 14, 2006

Panelist, “The Seventh Annual ‘Ethics for Corporate Counsel’ Program: Corporations in Crisis,” N.Y. State Bar Ass’n, Oct. 13, 2006

Panelist, “NYCLA Retreat: Ethics,” N.Y. County Lawyers’ Association, Oct. 9, 2006

Response, “When Conscience Clashes with State Law & Policy: Distinctions between the Roles of Lawyers and Judges,” Inst. on Religion, Law and Lawyer’s Work, Fordham Law School, Sept. 22, 2006

Panelist, “Ethical Considerations for Corporate Investigations: Update 2006,” Association of the Bar of the City of New York, Sept. 12, 2006

Panelist, “Assault on the Attorney-Client Privilege: What Every Lawyer Needs to Know,” Fall 2006 National Legal Malpractice Conference, ABA Standing Committee on Lawyers’ Professional Liability, Chicago, IL, Sept. 8, 2006

Panelist, “Avoiding Inadvertent Production of Privileged Documents,” ABA TeleConference and Audio Webcast, August 8, 2006

Speaker, “Choice of Ethics Rules in Arbitration,” Transatlantic Perspectives on ADR, St. John’s Univ. School of Law & Chartered Institute of Arbitrators, London, England, July 27, 2006

Panelist, “Privileges in Regulatory & Criminal Investigations: Legal & Ethical Issues,” Association of the Bar of the City of New York, June 27, 2006

Panelist, “Common Conflicts of Interest in Transactional Law Settings,” ABA TeleConference and Audio Webcast, June 27, 2006

Panelist, “Emerging Issues: Money and Government,” Twelfth Citywide Seminar on Ethics in New York City Government, N.Y.C. Conflicts of Interest Board/New York Law School, May 23, 2006

Panelist, “Preparing or Coaching the Witness: Where is the Ethical Line?,” New York County Lawyers’ Association, May 16, 2006

Keynote speaker, “The Conversation Between Law and Medicine,” Student Physician Awareness Day, New York Medical College, Mt. Kisco, NY, April 27, 2006

Panelist, “Common Conflicts of Interest in Transactional Law Settings,” Spring 2006 National Legal Malpractice Conference, NY, NY, April 6, 2006

Trainer, “Ethical Issues in Legal Services Practice,” Legal Services for New York City, March 30, 2006

Co-speaker, “Ethics and Public Interest Law: Discussion of Current Issues (2006),” N.Y. Lawyers for the Public Interest, March 30, 2006

Panelist, “Ethical Considerations of an In-House Lawyer,” Annual Seminar of the Securities Industry Association Compliance and Legal Division, Hollywood, Florida, March 20, 2006

Moderator, “Ethical Issues in Private Funds Practice,” 7th Annual International Conference on Private Investment Funds, International Bar Ass’n & ABA Section of Business Law, London, England, Feb. 27, 2006

Panelist, “Ethics in Commercial Mortgage Practice,” Commercial Real Estate Financing 2006, PLI, Feb. 17, 2006

Panelist, “Government Requests for Corporate Waivers of the Attorney-Client Privilege,” NYSBA Annual Meeting, Jan. 25, 2006

Facilitator, “Conference on Representing Children in Families: Children’s Advocacy and Justice Ten Years After Fordham,” William S. Boyd School of Law, Las Vegas, NV, Jan. 12-14, 2006

Commentator, “Professional Responsibility and the Religious Traditions,” AALS Annual Meeting, Washington, D.C., Jan. 4, 2006

Panelist, “Checking the Pulse of the Attorney-Client Privilege,” ABA Connection

teleconference, Dec. 21, 2005

Moderator, “Litigation Ethics: Problems of Conflicts, Confidentiality and Candor,” Federal Bar Council 2005 Fall Bench & Bar Retreat, Nov. 6, 2005

Panelist, “Le secret Professionnel des Avocats en France et aux USA” [Attorney-Client Privilege in France and the U.S.], La Barreau de Lille & New York County Lawyers’ Association, Lille, France, Oct. 28, 2005

Panelist, “Le Plaider coupable” [The Guilty Plea], La Barreau de Lille & New York County Lawyers’ Association, Lille, France, Oct. 27, 2005

Panelist, “Corporate Crimes: Investigating and Prosecuting the Entity and its Employee,” New York Council of Defense Lawyers Retreat, Oct. 15, 2005

Panelist, “Zealous Advocacy: Ethics for the Criminal Defense Attorney,” Fordham Univ. School of Law, Oct. 11, 2005

Panelist, “Ethical Considerations for Corporate Investigations,” Association of the Bar of the City of New York, September 14, 2005

Moderator, “The Attorney-Client Privilege from Cradle to Grave: An Examination of the Role, Implications, and Viability of the Attorney-Client Privilege,” ABA Annual Meeting, Chicago, IL, Aug. 7, 2005

Moderator, “Ethical Issues in Pro Bono,” Association of the Bar of the City of New York, June 28, 2005

Panelist, “Ethical Dilemmas for Financial Services Attorneys,” SIA Compliance & Legal Division, June 21, 2005

Panelist, “Civility & Zealous Advocacy – Building Blocks to Success: The American College of Trial Lawyers Codes of Pre-Trial & Trial Conduct,” Association of the Bar of the City of New York, June 20, 2005

Presenter, Symposium: “Should There Be an Effort to Develop Uniform Statewide Attorney Disciplinary Rules?,” NYCLA, May 13, 2005

Panelist, “The Efficacy of Unbundling Legal Services,” Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar, New York State Judicial Institute, May 9, 2005

Panelist, “You’re Fired! Conflicts of Interest and Disqualification of Counsel,” Federal Bar Council, April 26, 2005

Speaker, "Ethical Issues in Legal Services Practice," Legal Services of New York, March 15, 2005

Panelist, "Rising to the Challenge: How Should a Civil Practitioner Deal with Liars, Cheaters, Suicide Threateners, and Other Difficult Clients?," Fordham Univ. School of Law, March 14, 2005

Panelist, "Ethical Considerations in Commercial Mortgage Practice," Commercial Real Estate Financing 2005, PLI, Feb. 18, 2005

Speaker, "United States Regulation of Multijurisdictional Practice," Conference on Liabilities of Lawyers in Crossborder Transactions and Disputes, Center for International Legal Studies, Kitzbuhel, Austria, Jan. 25, 2005

Panelist, "New Developments in Ethical Considerations for the Business Attorney," in MCLE Marathon 2004, PLI, Dec. 16, 2004

Panelist, "Waivers That Work - Managing Conflicts Effectively," NYLJ & Stein Center, Dec. 6, 2004

Moderator, "Practical Problems in Litigation Ethics," Trial Evidence in the Courts: Problems and Solutions, ALI-ABA, Dec. 2, 2004

Panelist, "'Acceptable Lies?' - The Ethics of Negotiation, and Legal Duties of Disclosure," NYLJ & Stein Center, Dec. 1, 2004

Moderator, "Ethical and Professional Issues in Litigation," Marilyn Stein Bellet Conference on Law and Ethics, Hilton Head, SC, Nov. 13, 2004

Panelist, "Ethical Considerations for Corporate Investigations: Updates 2004," Association of the Bar of the City of New York, Sept. 14, 2004

Moderator, "Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13," ABA Annual Meeting, Atlanta, GA, Aug. 7, 2004

Panelist, "Representing Clients with Diminished Capacity," NYSBA Legal Assistance Partnership Conference, Albany, NY, June 15, 2004

Panelist, "Avoiding Potholes: Discovery and Ethics on the Highway to Trial," ABA Section of Litigation Annual Meeting, Phoenix, AZ, May 6, 2004

Panelist, "Confronting Possible Client Fraud: Is 'Don't Ask, Don't Tell' an Ethically Acceptable Approach?," Brooklyn Bar Ass'n, Apr. 14, 2004

Panelist, "Ethical Issues in Pro Bono," Association of the Bar of the City of New York, Feb. 25,

2004

Panelist, "Ethical Considerations in Commercial Mortgage Practice," Commercial Real Estate Financing 2004, PLI, Feb. 24, 2004

Panelist, "Should New York Adopt the Model Rules of Professional Conduct?," NYSBA 2004 Annual Meeting, Jan. 28, 2004

Panelist, "Ethical Challenges in Employment Law," ABCNY, Jan. 16, 2004

Moderator, "Ethics in Action: The Role of Intergenerational Differences in Setting a Lawyer's Moral Compass," Northeast NALP, Jan. 15, 2004

Panelist, "The Attorney-Client Privilege and the Potential Abuse of Public and Private Power," AALS Annual Meeting, Atlanta, Ga., Jan. 5, 2004

Panelist, "Conflict of Interest Issues in Corporate Representation," PLI, Dec. 19, 2003

Panelist, "New Developments in Ethical Considerations for the Business Attorney," PLI, Dec. 18, 2003

Panelist, "Should Criminal Defense Lawyers Be Constrained by the Truth?: The Limits of Zealous Advocacy," Fordham Univ. School of Law, Nov. 25, 2003

Speaker, "Government Attorney Conduct from the Ethics Committees' Perspective," 2003 Ethics for Government Attorneys, Office of the NYS Attorney General, Nov. 14, 2003

Panelist, "Ethical Dilemmas Faced During the Defense of a Criminal Case," co-sponsored by the Legal Aid Society and the Stein Center, Fordham Univ. School of Law, Nov. 13, 2003

Panelist, "Ethics for Corporate Counsel," N.Y.S. Bar Ass'n Corporate Counsel Section, Oct. 27, 2003

Panelist, "Thorny Ethical Issues in Litigation," Federal Bar Council 2003 Fall Bench & Bar Retreat, CT, Oct. 18, 2003

Panelist, "Legal Ethics vs. Personal Morality: How to Resolve the Unresolvable," co-sponsored by the Legal Aid Society and the Stein Center, Fordham Univ. School of Law, Sept. 29, 2003

Commentator, conference on "Judging Judges' Ethics," Hofstra University School of Law, Sept. 14-15, 2003

Panelist, "Ethical Considerations for Corporate Investigation: Updates 2003," ABCNY, September 11, 2003

Panelist, panel on Ethics for program on "Real Estate Titles and Transfers, N.Y. State Bar Ass'n,

June 19, 2003

Moderator, "Conflicts of Interest in Criminal Practice," ABA National Conference on Professional Responsibility, Chicago, IL, May 29, 2003

Co-panelist, "Ethical Considerations of Asset Protection," Estate Planners Day, Estate Planning Council of NYC, May 9, 2003

Panelist, "Plenary Session: Coming Soon to a State Rules Committee Near You: How Will Ethics 2000 Affect Lawyer Liability?," ABA National Legal Malpractice Conference, New Orleans, Apr. 24, 2003

Moderator, "Ethics for Litigators," Assoc. of the Bar of the City of New York, Apr. 14, 2003

Moderator, "Top Ten Reasons Why You Should Read the 2002 Model Rules of Professional Conduct," ABA Section of Litigation Annual Meeting, Houston, TX, April 12, 2003

Panelist, "Collaborations Between Lawyers and Social Workers: Avoiding Ethical Minefields," Fordham Univ. School of Law, April 7, 2003

Moderator, "Effect of Present Wartime Legislation on Practicing Attorneys: A Discussion of Future Implications," conference on American Democracy in Times of War, Benjamin N. Cardozo School of Law, March 24, 2003

Speaker, "Criminal Neglect: Non-diligent Criminal Defenders, Under-funded Public Defense Systems, and the Disciplinary Non-response," What Do Clients Want? Emory Conference on Ethics and Professionalism, Emory Univ. School of Law, March 14, 2003

Speaker, "Ethical Issues and the Practice of Public Interest Law," Brennan Center for Justice, March 6, 2003

Panelist, "The Ethics of Helping Clients Who Cannot Help Themselves," Fordham Univ. School of Law, March 3, 2003

Speaker, "Criminal Neglect: Non-Diligent Criminal Defenders, Under-funded Public Defender Systems, and the Disciplinary Non-response," Association for Practical and Professional Ethics annual meeting, Charlotte, N.C., Feb. 28, 2003

Panelist, "Benchmarks of Ethics Center Excellence: Funding Strength," Ethics Center Colloquium: Strategic Planning for Ethics Centers, Association for Practical and Professional Ethics, Charlotte, N.C., Feb. 27, 2003

Panelist, "Ethical Considerations in Commercial Mortgage Practice," Commercial Real Estate Financing 2003, PLI, Feb. 25, 2003

Moderator, panel on “Integrity in the Practice of Law,” Conference on Integrity in the Law, Fordham Univ. School of Law, Feb. 7, 2003

Co-presenter, Asset Protection – Ethical Considerations, UJA Federation of NY, Feb. 4, 2003

Trainer, “Disciplinary Procedures and Overview of Issues Relevant to MELS’ Practice,” Legal Services for New York City, Feb. 3, 2003

Panelist, “New Developments in Ethical Considerations for the Business Attorney,” PLI, December 19, 2002

Panelist, “Ethical Issues in Representing a Corporation Under Investigation,” Fordham Univ. School of Law, November 19, 2002

Luncheon speaker, “Ethical Issues for Government Lawyers in Dealing with Witnesses,” Professional Responsibility Officers’ Conference, U.S. Department of Justice, Washington, D.C., November 13, 2002

Panelist, “Talking to the Media: Practical & Ethical Considerations Lawyers Need to Know about the Big, Bad World of TV & Radio,” Association of the Bar of the City of New York, November 12, 2002

Moderator, “Moral Philosophy and the Practice of Justice,” Federal Bar Council, Kerhonkson, NY, October 26, 2002

Panelist, “Representing the Corporation in Crisis,” New York State Bar Association, Business Law Section Fall Meeting, St. Thomas, October 11, 2002

Panelist, “Seminars for Judges: Should Judges Attend Seminars Funded by Private Organizations, and if so, How Should Such Programs Be Funded?,” Association of the Bar of the City of New York, October 9, 2002

Speaker, ABA National Legal Malpractice Conference, Chicago, IL, Sept. 13, 2002

Panelist, “Keeping to the Straight and Narrow: Ethical Issues for Civil Litigators,” N.Y. State Bar Ass’n, June 7, 2002

Panelist, “Teaching Professional Responsibility: ‘Woodshedding’ or Coaching the Witness and Impeaching the Honest Witness,” plenary session of AALS Conference on Evidence, Alexandria, Va., June 1, 2002

Moderator, “Law Practice at the Crossroads: How Far Should We Go in Changing Rules Governing Cross-Border Practice and Bar Admission?,” N.J. State Bar Ass’n annual meeting, May 22, 2002

Panelist, “The New York Lawyer Practicing Delaware Law” (program on “The Delaware-New

York Nexus 2002”), N.Y. County Lawyers’ Ass’n, May 3, 2002

Speaker, “Prosecutorial Ethics as Usual,” conference on ABA Model Rules of Professional Conduct, University of Illinois School of Law, April 5, 2002

Moderator, “Ethical Issues for the Lawyer in Dealing with Mentally Ill Clients,” Association of the Bar of the City of New York, March 23, 2002

Moderator, “Legal Issues Arising from Acts of Terrorism and Anti-Terrorist Efforts,” U.S. Judicial Conference for the District of New Jersey, March 20, 2002

Co-panelist, “Ethical Issues in Transactional Practice,” Fordham Law School, March 6, 2002

Trainer, “Selected Topics in Legal Ethics,” Legal Services for New York City, March 5, 2002

Speaker, “Ethical Considerations,” program on “Commercial Real Estate Finance,” PLI, February 26, 2002

Panelist, “Legal Ethics in the Practice of Criminal Law,” Association of the Bar of the City of New York, February 21, 2002

Panelist, “Ethics Issues in Multijurisdictional Practice,” ABA Connection, February 20, 2002 and February 21, 2002 (teleconference)

Panelist, “Dialogue Regarding the Issue: Justice Monitors Attorney/Client Communications,” Joint program of APRL and ABA Center for Professional Responsibility, ABA Midyear Meeting, Philadelphia, Jan. 31, 2002

Panelist, “Preparing and Presenting Experts: Practical and Ethical Issues,” N.Y.S. Bar Ass’n annual meeting, Antitrust Law Section, Jan. 24, 2002

Speaker, “Ethical Issues and the Practice of Public Interest Law,” Brennan Center for Justice at NYU School of Law, Dec. 11, 2001

Panelist, New Developments in Ethical Considerations for the Business Lawyer, MCLE Marathon 2001, PLI, Dec. 7, 2001

Speaker, “Ethics and Professionalism,” program titled “Update 2001,” N.Y.S. Bar Ass’n, Nov. 2, 2001

Panelist, “Ethics and Discovery,” Federal Bar Council, Oct. 14, 2001

Co-presenter, “Ethics for Transactional Lawyers,” Fordham Law School, Oct. 10, 2001

Speaker, 2001 Legal Ethics Conference: “Legal Ethics: What Needs Fixing?,” Hofstra

University School of Law, Sept. 10, 2001

Panelist, "Ethics and Criminal Procedure," Israeli Ministry of Justice (in conjunction with the Stein Center), Jerusalem, Israel, July 5, 2001

Panelist, ethics issues in real estate practice, "Real Estate Titles and Transfers," N.Y.S. Bar Ass'n, June 14, 2001

Co-chair and speaker, "Ethics and Professionalism," N.Y.S. Bar Ass'n, June 13, 2001

Panelist, "Ethical Issues in Welfare Advocacy," The Legal Aid Society, June 11, 2001
Panelist, "Ethics in Government," State of New York Office of the Attorney General, June 9, 2001

Panelist, "What Every New Attorney Must Know About Ethics, Part II," PLI, May 29, 2001

Panelist, "Training the Advocate," ABA Section of Litigation Annual Meeting, Phoenix, AZ, May 10, 2001

Presenter, ethics issues in commercial real estate finance, program on "Commercial Real Estate Finance," PLI, May 4, 2001

Panelist, program on Ethics in Litigation, New York County Lawyers' Assn., April 30, 2001

Presenter, Clifford Symposium on Tort Law and Social Policy ("Smoke Signals: The Changing Landscape of the Practice, Financing and Ethics of Civil Litigation in the Wake of the Tobacco Wars"), April 5-6, 2001, DePaul College of Law

Moderator, Ethical Issues in Settlement Negotiations, Walter F. George School of Law, Mercer University, March 9-10, 2001

Presenter, CLE program on ethics in criminal defense representation, Brooklyn Defender Services, Jan. 30, 2001

Panelist, Symposium on Unlawful Practice of Law: Toward a Definition of the "Practice of Law," NYSBA annual meeting, Jan. 25, 2001

Panelist, CLE program on legal ethics, PLI, Nov. 21, 2000

Panelist, CLE program on ethics in transactional representation, Fordham Univ. School of Law, Nov. 8, 2000

Panelist, CLE program on ethics in criminal advocacy, Fordham Univ. School of Law, Nov. 1, 2000

Panelist, CLE program on ethics in real estate transactions, Chicago Title, Oct. 30, 2000

Panelist, CLE program on witness preparation, Federal Bar Council, Oct. 25, 2000

Panelist, symposium on professionalism sponsored by S. Carolina Univ. School of Law, Savannah, Ga., Oct. 21, 2000

Panelist, CLE program on ethical issues for legal services lawyers, LSNY, Oct. 11, 2000

Presenter, symposium on ethics issues for law professors, S. Tex. College of Law, Oct. 6, 2000

Presenter, faculty workshop, ethics issues for law professors, Fordham Univ. School of Law, Sept. 28, 2000

Panelist, "Ethical Considerations in Asset Protection – Views from the Bench and Bar," ABA annual meeting, July 10, 2000

Panelist, "Lawyer vs. Client: Avoiding Ethical Pitfalls When the Attorney-Client Relationship Becomes Rocky," ABA annual meeting, July 9, 2000

Panelist, program on corporate internal investigations and cooperation, titled "I'm from the Government and I'm Here to Help You," ACCA, June 27, 2000

Panelist, program titled "Ethical Considerations for Criminal Practitioners," NYCLA, June 27, 2000

Speaker, "The Blurring Line Between Law & Business – Maintaining Ethical Standards," NYLJ General Counsel Conference, June 16, 2000

Panelist, panel on Ethics and the Newsgathering Process, for PLI program on "Newsgathering & Libel Litigation 2000," June 15, 2000

Member of planning committee, Partnerships Across Borders: A Global Forum on Access to Justice, ABCNY, Apr. 6-8, 2000.

Speaker, Symposium on "Prosecutorial Misconduct: Discretion, Remedies, and Ethics," Georgetown Law School, Mar. 30, 2000

Speaker, CLE program on legal ethics, Appellate Division, First Department, Mar. 27, 2000

Speaker, Symposium on "Legal Ethics for Government Lawyers: Straight Talk for Tough Times," Widener Univ. School of Law (Harrisburg), March 23, 2000

Organizer and participant, Symposium on the Multijurisdictional Practice of Law, Mar. 10-11, 2000

Speaker, CLE program on current topics in legal ethics, Fordham Law School, March 7, 2000

Panelist, "The Ethics, Tactics and the Law of Witness Preparation," Federal Bar Council annual winter meeting, Feb. 29, 2000

Panelist, "Lawyers Under Investigation: Are Prosecutors and Defense Lawyers Simply 'Doing Their Jobs'?", Federal Bar Council annual winter meeting, Feb. 28, 2000

Speaker, "The Future of the Legal Profession: A Symposium on Multidisciplinary Practice," Minnesota Law School, Feb. 26, 2000

Moderator, workshop program for deans and bar leaders, ABA Mid-Year Meeting, Feb. 11, 2000

Organizer and speaker, CLE program on ethics in litigation, Fordham Law School, Feb. 8, 2000

Invited guest, meeting of the Subcommittee on Attorney Conduct Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Feb. 4, 2000

Organizer and introducer, program on "Ethics in Criminal Advocacy," AALS Annual Conference, Jan. 6, 2000

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EXHIBIT 4

EXHIBIT 4

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SUNSHINE LITIGATION
151 Country Estates Circle
Reno, Nevada 89512

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
BEFORE THE HONORABLE JANET J. BERRY, DISTRICT JUDGE

-oOo-

MELONIE LYNN SHEPPARD,	:	
	:	
Petitioner,	:	
	:	
vs	:	Case No. CR03-0502B
	:	
JO GENTRY, Warden,	:	Dept. No. 1
	:	
Respondent.	:	
	:	

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TRANSCRIPT OF PROCEEDINGS

CONFERENCE CALL RE: MOTIONS

THURSDAY, DECEMBER 29TH, 2016

Reno, Nevada

Reported By: ERIN T. FERRETTO, RPR, CCR #281

A P P E A R A N C E S

FOR THE PETITIONER:
(By Telephone)

MEGAN C. HOFFMAN
Federal Public Defender
411 E. Bonneville Avenue
Suite 250
Las Vegas, Nevada

FOR THE RESPONDENT:
(By Telephone)

JENNIFER P. NOBLE
Deputy District Attorney
One South Sierra Street
Reno, Nevada

1 -o0o-

2 RENO, NEVADA, THURSDAY, DECEMBER 29TH, 2016, 1:30 P.M.

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5
6 THE COURT: Hello. This is Judge Berry.

7 MS. NOBLE: Hi, Judge. This is Jennifer Noble.

8 MS. HOFFMAN: Hi, Judge.

9 THE COURT: Hello, Ms. Noble. Are you taking over
10 this case or is this Mr. McCarthy's case?

11 MS. NOBLE: This is Mr. McCarthy's case, your
12 Honor. I'm here this week. Mr. McCarthy is out of the
13 country, and when I spoke to Tiffany she said that we
14 needed somebody to be on this conference call so I looked
15 at the recent motion, but this is Mr. McCarthy's case.

16 THE COURT: Okay. Well, I did receive
17 counsel's -- Ms. Hoffman's response to -- I must admit,
18 Mr. McCarthy's motion was, in the Court's view, somewhat
19 bizarre.

20 Do you know what his thought process on this was?

21 MS. NOBLE: No, I certainly don't, Judge, and this
22 was my concern when I talked to Tiffany ahead of time
23 because I don't have a way to reach him. I think the
24 pleadings, you know, speak for themselves in terms of
25 what -- I really can't expand upon anything other than

1 what, you know, the pleadings say.

2 THE COURT: Okay. Well, just so -- I've got my
3 court reporter present, because apparently on --
4 apparently on -- it looks like, was it December 9th
5 Mr. -- that was the date of the filing -- for whatever
6 reason, it appears that Mr. McCarthy filed a
7 three-page -- it says, "Motion to Dismiss or,
8 Alternatively, to Disqualify the Public -- Federal Public
9 Defender."

10 MS. NOBLE: Yes.

11 THE COURT: And previous to that he wanted -- he
12 had a request for production and Ms. Hoffman, in an
13 effort of transparency, gave him a copy of letters that
14 were sent to prior counsel just alerting them that her
15 client, Ms. Sheppard, was not waiving the attorney/client
16 privilege, and that's what appears to be --

17 Ms. Hoffman, have you had any discussions with
18 Mr. McCarthy about his thought process?

19 MS. HOFFMAN: I have not, your Honor. We were
20 taken off guard by the motion and, like you have
21 accurately described, we just filed with the Court and
22 with Mr. McCarthy the draft of the two letters that he
23 had requested, and that's all I have had in terms of
24 interaction with the DA's Office.

25 MS. NOBLE: Your Honor, unfortunately -- this

1 Jenny Noble -- I'm at a disadvantage here. And when I
2 spoke to Tiffany beforehand, I was concerned about
3 precisely the type of situation that I am in now, where I
4 haven't been able to consult with Mr. McCarthy and I'm
5 having to sort of design his intent. I didn't know we
6 were going to have essentially a hearing on the motion.

7 THE COURT: Well, here's my concern is I've got a
8 two- or three-day hearing coming up on this and I don't
9 want the District Attorney's Office to make any mistake
10 about it, we're going on this hearing, and so I don't
11 want Mr. McCarthy to come back from his three-week
12 vacation and say, "Oh, look, I have this motion before
13 the court and I'm not going to be ready to go because I
14 thought the court was going to disqualify the public
15 defender." I'm not.

16 Candidly, I'm offended by this motion. I find --
17 I'm astounded by it. Not you, Ms. Noble, I know you were
18 kind of left with it, but I want your office and
19 Mr. McCarthy and, most importantly, Mr. Hicks to know
20 this is going forward. And I fear, in looking at this,
21 that Mr. McCarthy may think, you know -- I just don't
22 even know where he comes up with this idea.

23 MS. NOBLE: Well, again, Judge, I understand what
24 the Court is saying. I certainly will convey it to Mr.
25 McCarthy when he returns. I don't see any indication as

1 I look over the file that he was planning or taking for
2 granted the Court granting any motions. It appears that
3 witnesses have been subpoenaed and that the State will be
4 ready to go.

5 THE COURT: Okay. Well, that was my primary
6 concern, is I want -- I will draft an order but because
7 Mr. McCarthy's motion was -- was devoid of any persuasive
8 legal authority or rationale, I thought perhaps there's
9 something I'm missing. And, Ms. Noble, I appreciate you
10 covering for him, but his citations and authority are
11 just -- are macabre.

12 I mean, I have had motions from defense where
13 they're all upset because witnesses won't talk to them
14 and they claim that the State is withholding the
15 witnesses and -- this is the weirdest thing I've ever
16 seen in my experience.

17 But is this something new in the prosecutor's
18 office, to file these kind of motions?

19 MS. NOBLE: I have not seen one before, but I will
20 tell you I also, to be candid, haven't seen -- and I
21 understand the Court's position, I'm not trying to argue
22 the motion, but in looking -- just as somebody outside
23 the case, looking at the letters that were sent to the
24 witnesses, I mean, in our view and Mr. McCarthy's view --
25 and I understand what the Court is saying in terms of not

1 being persuaded by the authorities he cites -- it does
2 look like it intends to chill the desire of any defense
3 attorney to talk to us about this case. So that's how I
4 view it and I understand the Court's position.

5 THE COURT: But, Ms. Noble, I've never presided
6 over a post-conviction hearing where criminal defense
7 attorney has been called that the criminal defense
8 attorney will not speak unless there's a waiver, at any
9 hearing ever.

10 MS. NOBLE: Well, I'm just -- again, I'm trying to
11 trying to sort of guess --

12 THE COURT: Yeah, divine what Mr. McCarthy was
13 thinking.

14 MS. NOBLE: Normally we are able to talk to
15 counsel ahead of time. You know, some attorneys want to
16 talk to us, some don't when there's been certain types of
17 claims. And I understand one thing that's been disputed
18 is whether or not the remaining claims implicate
19 *Strickland* or ineffective assistance. So normally we're
20 able to chat with people ahead of time and get an idea of
21 what their representation was like, in general, with
22 respect to the petitioner. I think the concern is that,
23 you know, we're not able to necessarily in this case.

24 THE COURT: Yes, but that doesn't -- that cannot,
25 as a matter of law, form the basis to dismiss a petition.

1 That's the most macabre thing I've ever seen, and all --
2 I mean, the way I read the letters is all Ms. Hoffmann
3 was doing was saying, "I represent Ms. Sheppard. She is
4 my client, and on behalf of my client I am making you
5 aware that my client will not be waiving the
6 attorney/client privilege." And she -- I think she
7 articulates the rule clearly, the ethical obligations of
8 counsel, and all she was doing, it appeared to the Court,
9 to just be saying, "I am aggressively representing my
10 client and I just want you to know what her position is."

11 Now, if Mr. Calvert and Mr. Edwards say, "Well, I
12 don't care what her position is," and "I'm going to do
13 what I want to do," you know, then that's their deal but
14 at least they've been advised. It wasn't a threatening
15 letter, as Mr. McCarthy articulates. It wasn't --

16 MS. NOBLE: I understand, your Honor. And,
17 honestly, if I had had a better idea of what this
18 conference call was going to entail, because I did ask a
19 couple of times, I would have tried to reach out to Mr.
20 McCarthy in Spain some way or another, because I
21 understand now that the Court is, frankly, upset about
22 it. But I was just told, hey, if you could just be
23 familiar with the pleadings so, unfortunately, I can't
24 argue authorities, I can't further defend whatever he
25 filed. And I think, you know, certainly if the Court has

1 questions about it, Mr. McCarthy would be a better person
2 to answer those. I apologize that we can't do that for
3 you today.

4 THE COURT: And you know what, counsel, I'm not at
5 all upset with you and I understand maybe Ms. Clements --
6 I mean, I just figured if you read the response to
7 disqualify the federal public defender and dismiss the
8 post-conviction, I think you'd get a flavor of, you know,
9 the issues.

10 MS. NOBLE: Certainly. But, for example, I was
11 told there wasn't going to be a court reporter, it wasn't
12 that type of conference call. But it doesn't matter
13 because the bottom line is unfortunately I'm not terribly
14 helpful to the Court at this point, and I do apologize
15 for that.

16 THE COURT: No, don't apologize in the least,
17 Ms. Noble. Your work has always been excellent and I
18 want to thank you for being on the phone call. My
19 primary concern, as I said, is we have put this hearing
20 off. I know that Mr. McCarthy -- you know, he must
21 believe there was a legal basis to file this motion but,
22 as I said, in my entire experience, I've just never seen
23 anything like this.

24 MS. NOBLE: I can certainly advise him upon his
25 return of the Court's reaction and position with respect

1 to this. Like I said, there's every indication that the
2 State will be ready to go on the date of the hearing, and
3 I'll also tell him that he may want to be prepared to
4 address any questions about this motion that the Court
5 may still have.

6 THE COURT: Well, yes, I will definitely make
7 further record with Mr. McCarthy, but what I didn't want
8 to do is have this motion waiting for him to get back,
9 then have a hearing sometime -- I guess after he gets
10 back, you know, the middle of January or whatever, and
11 then we're supposed to be going on our evidentiary
12 hearing on January 17th.

13 MS. NOBLE: Yes.

14 THE COURT: So that's what -- you know, he -- so I
15 want it to be really clear that I am denying his motion
16 to dismiss, I am denying his motion to disqualify the
17 Federal Public Defender, and they have -- in her final
18 statement, Ms. Hoffmann has indicated that there is --
19 that this was a frivolous motion and that there's no
20 legal basis to dismiss the petition or disqualify the
21 Federal Public Defender, and that the State's motion was
22 filed in bad faith. And my concern was the concern that
23 this was filed to delay or preclude this hearing.

24 MS. NOBLE: I can certainly represent to you,
25 Judge Berry, that that was not the intent in filing it,

1 to delay it. There's every indication that the State is
2 ready to go, and only in briefing chatting with
3 Mr. McCarthy prior to his departure about the letters at
4 issue in this case, it is his belief that there was a
5 problem there. I understand the Court doesn't agree, but
6 in terms of making any kind of finding on frivolity, I
7 would ask you to at least let Mr. McCarthy address the
8 points and authorities a little bit further. I'm just,
9 unfortunately, not able to do that, I think, in a way
10 that would be appropriate right now.

11 THE COURT: I totally agree, and this is not a
12 matter that was submitted by you, and I don't know if the
13 Federal Public Defender's Office wants to refer this to
14 the State Bar or if they want to refer it to other
15 parties for consideration. I do think it would be
16 behoove Mr. McCarthy to read many of the ethical -- many
17 of the ethical cases that are cited here.

18 The state of Nevada does not have cases on point
19 as it relates to the waiver of attorney/client privilege,
20 and I suspect that Mr. McCarthy's world view is that once
21 it's waived, it's waived forever, but the weight of
22 authority elsewhere suggests otherwise.

23 And I'm dumbfounded by this, candidly. I just --
24 you know, you just don't file motions without really
25 thinking it through, or at least meeting and conferring

1 with opposing counsel and say, "Look, this is what my
2 concerns are," especially when he submits it within, you
3 know, a very short time of an evidentiary hearing of a
4 case that is very complex and very lengthy in nature.

5 So, Ms. Noble, I want to thank you again. I have
6 the utmost respect for your work, your work product. I
7 apologize that you have had to cover this but, most
8 importantly, I wanted to make it clear that I would be --
9 I wanted to give -- I wanted to give the State at
10 least -- because, as I say, it's a bizarre motion and I
11 thought there might be something I'm missing.

12 But I think Ms. Hoffman's response was extremely
13 powerful and clearly it took a substantial amount of time
14 and work on her behalf to educate all the parties as to
15 what our ethical obligations are and, as such, I wanted
16 to make sure, because we don't have time for the State to
17 say, "Well, no, this is the missing piece," but I'm not
18 hearing it other than that it's -- I know Mr. McCarthy's
19 method of practice and it is very common for the
20 attorneys who work together for years and years to just
21 call one another and say, "Hey, what happened? Do you
22 remember what happened here or there."

23 I know this case very, very well. I don't know if
24 counsel has watched the videos of Mikysha Belvin. I'm
25 sure they've been discovered to you. Mr. Sexton may or

1 may not be a witness, but certainly he was a key witness
2 in her post-conviction, so we have a lot of overlap and a
3 lot of convolution in this case and I just wanted to make
4 sure that everybody was ready to go because this case
5 needs to get heard to move it along within the process.
6 Okay?

7 MS. NOBLE: I understand, your Honor. I
8 appreciate the Court's comments and I will certainly
9 communicate to Mr. McCarthy the Court's position on both
10 the nature of the motion and the Court's expectation that
11 we'll be ready to go on the hearing date.

12 THE COURT: Ms. Hoffmann, do you have anything
13 else to add or any other issues we need to address other
14 than just getting out an order?

15 I know I got the impression prosecute conclusion
16 of your order that I don't know if you were seeking -- if
17 you want further hearing on this with Mr. McCarthy as it
18 relates to the allegation of bad faith and, you know, the
19 frivolity of the motion; do you want to have a formal
20 hearing to address those issues?

21 MS. HOFFMAN: Your Honor, I think at this time it
22 would be in Ms. Sheppard's interest to just move this
23 case forward. You know, as you mentioned, it has been
24 delayed several times. We were concerned and continue to
25 be concerned about what we do believe was a frivolous

1 motion, not cited by or supported by any authorities.

2 Further, we are unclear as to Mr. McCarthy's
3 intentions, whether in this Court's denial of the motion
4 whether he intends to appeal it, and so I do feel that we
5 have had made a sufficient record and if the Court finds
6 that we have, then it's something that we can protect and
7 raise in the Nevada Supreme Court should the State decide
8 to take it that far, which I hope they do not.

9 But I think, at this point, if the Court is
10 willing to deny it and find that we've made a sufficient
11 record that the motion should not stand, then I feel
12 comfortable in presenting it to the Nevada Supreme Court
13 if it does go further than this. But, at this point, I
14 would just rather go forward with the hearing for
15 Ms. Sheppard's sake to get this case moving again.

16 THE COURT: Okay. Well, then I will draft an
17 order denying the motion to disqualify the public
18 defender's office and the motion to dismiss. And, again,
19 motions are to be brought separately, I think
20 Mr. McCarthy should know that by now, but I'll do one
21 order for both.

22 And if he wants to take it up to the Supreme
23 Court, then I strongly urge him to speak to Mr. Hicks
24 before he makes that decision, but that's his choice.

25 MS. HOFFMAN: Thank you, Judge.

1 THE COURT: Thank you. Again, thank you,
2 Ms. Noble. I know it's never fun to have to cover a
3 hearing of a case that you're not involved in, so
4 Mr. McCarthy should thank you for your fine efforts.

5 MS. NOBLE: Certainly, your Honor. And I just
6 want to make clear, if I had understood the nature of
7 today's call a little bit better, I would have been a
8 little bit better prepared to respond. But, again, thank
9 you. And I would ask that we get a copy of the
10 transcript so that Mr. McCarthy can review it.

11 THE COURT: Okay. That's fine. You can call
12 Sunshine Court Reporting Services.

13 MS. NOBLE: Okay. Thank you very much.

14 MS. HOFFMAN: Your Honor, this is Megan. I just
15 had one more question. And I don't know if it's just
16 because of the holidays and because of this motion, if
17 that has kind of put a delay a bit in the scheduling but
18 prior when the hearing had been previously scheduled, we
19 had a very strict timeline set by your secretary about
20 dates in which to file exhibits and exhibit lists and
21 witness lists and so forth, and we have not gotten a new
22 one of those for the new set hearing. So I just wasn't
23 sure if we need to have a new status conference for that
24 or if that's something that is with Mr. McCarthy or is
25 that something that we should work with your secretary to

1 set?

2 THE COURT: I think -- so we've got a number of
3 exhibits -- we're supposed to start on what, Tuesday the
4 17th or the Wednesday the 18th?

5 MS. HOFFMAN: I believe it's Tuesday -- wait a
6 minute. I'm sorry, Wednesday the 18th we're going from
7 1:30 until the afternoon -- end of the day, we're off on
8 the 19th, and then we're set for whole day on the 20th.

9 THE COURT: Then, you know what, why don't I keep
10 you on the line -- but isn't it Maria --

11 MS. ZUCKER: It's Maria who does the exhibits, and
12 she will be back Monday, I believe -- Tuesday.

13 THE COURT: When will Mr. McCarthy be back?

14 MS. NOBLE: I believe he'll be back the week of
15 the 9th, Monday the 9th.

16 THE COURT: Okay. Well, why don't we do this.
17 Ms. Hoffman, why don't you reach out to -- are there any
18 other motions or any other matters that need to be filed
19 with the court before the hearing?

20 MS. HOFFMAN: Not that I'm aware of, your Honor,
21 on our behalf other than just coordinating with
22 Mr. McCarthy whether we're going to have a joint exhibit
23 and witness list or whether we're going to have not a
24 joint list.

25 THE COURT: Okay. Well, usually my court clerk

1 Maria will get a date with both of you to mark the
2 exhibits and get everything set up.

3 MS. ZUCKER: She can probably do it in the morning
4 if it doesn't start until 1:30.

5 THE COURT: If it doesn't start -- but I think
6 we're in trial. Or why are we --

7 MS. ZUCKER: Or maybe the day before if she's up
8 from Vegas.

9 THE COURT: We're not in trial -- we're not in
10 trial.

11 Yeah. So you could probably -- are you coming
12 from Las Vegas, Ms. Hoffman?

13 MS. HOFFMAN: Yes, we are, your Honor.

14 THE COURT: Okay. Well, probably you could set up
15 a time to mark those on Wednesday morning the 18th with
16 Maria. How many exhibits, do you have an inkling?

17 MS. HOFFMAN: I know that we have our list
18 drafted. I don't know how many Mr. McCarthy is going to
19 have. I don't think -- well, the problem is it has a lot
20 of jury transcripts and evidentiary transcripts and so
21 forth.

22 THE COURT: And what about the videos?

23 MS. HOFFMAN: And videos, yes. Are you referring,
24 your Honor, to videos of testimony in the court or videos
25 of the statements?

1 THE COURT: No. I just recall in one of the many
2 post-convictions I've done in this case, for either
3 Ms. Belvin or Ms. Sheppard, there were the videos of the
4 detectives interviewing Ms. Belvin and there was the
5 testimony of Mr. Sexton --

6 MS. HOFFMAN: Correct.

7 THE COURT: -- and I don't know if there were
8 jail, other stuff --

9 MS. HOFFMAN: Your Honor, we did have the
10 opportunity to view the DA's file last week. We flew up
11 from Las Vegas and were able to view the file, and so we
12 have all the tapes and/or transcripts of the tapes, that
13 the transcripts are available to submit those in lieu of
14 the tapes, or both. And so just looking at it right now,
15 I'm not able to locate it and my paralegal is also out
16 this week, but I will get with Maria and give her an
17 estimate, and Mr. McCarthy, of the number of exhibits we
18 plan on submitting.

19 THE COURT: Okay. And then you can set up a --
20 set up a time and place to mark exhibits and then, if
21 necessary --

22 Could you go get my book? Maybe I'll see them on
23 the 17th, if I have to take up any other stuff.

24 Just one minute, I'm getting my calendar.

25 MS. HOFFMAN: Okay.

1 MS. ZUCKER: Just for the 17th.

2 THE COURT: She was asking about marking exhibits
3 but Maria would have to set up that with them; right,
4 Tiffany?

5 MS. CLEMENTS: Yes. And if we're not in court,
6 she can do it.

7 THE COURT: I think I've Streeter Imports, I
8 have -- is that still on, pre-trial conference?

9 MS. CLEMENTS: Uh-huh.

10 THE COURT: And then order to show cause.

11 MS. ZUCKER: That should go off.

12 THE COURT: Is this going off?

13 MS. CLEMENTS: Monroe, that is the one with JC and
14 Michael --

15 THE COURT: That's at 9:30, 10:30, okay.

16 So -- and then we don't have any crims -- oh, on
17 the 17th but we have Summit Canyon pre-trial.

18 MS. ZUCKER: That's being continued, isn't it?

19 Yeah, that one is going to be continued.

20 THE COURT: That one is continued?

21 MS. ZUCKER: I think so, versus Hussein?

22 THE COURT: Versus Hussein. So if the trial is
23 continued, then I would think this is continued, that's
24 my point. But then I also have a 1:30 on a petition for
25 judicial review; is that going?

1 MS. CLEMENTS: Yes.

2 THE COURT: So what we could do is why don't I
3 see -- why don't we do sort of a status conference on
4 Tuesday the -- January 17th at 3:30. Okay?

5 MS. HOFFMAN: Okay.

6 MS. NOBLE: Okay.

7 THE COURT: That way, if there are other issues
8 and evidentiary issues, videos, things like that, because
9 this involved so many co-defendants, we -- and so much
10 cross-pollinated evidence, I think it's really important
11 to take a look at what's in the record and how we make
12 the record. Okay?

13 MS. HOFFMAN: Okay.

14 THE COURT: Okay. We'll see you at 3:30. And,
15 Ms. Noble, don't let Mr. McCarthy dupe you into taking
16 over this case because it's a barn burner.

17 MS. NOBLE: I'll be with my kids in Disneyland.

18 THE COURT: Oh, great. Well, good for you. Good
19 for you.

20 MS. NOBLE: But I will put that on his schedule
21 1/17 at 3:30 and I'll let him know about the substance of
22 this call.

23 THE COURT: Okay.

24 MS. NOBLE: Okay?

25 THE COURT: All right. Thank you very much.

1 Anything else, Ms. Hoffman?

2 MS. HOFFMAN: I think that's it, Judge.

3 THE COURT: Okay. Thank you very much.

4 Stand in recess.

5 (At 2:54 p.m., proceedings adjourned.)

6 * * *

1 STATE OF NEVADA)
2 COUNTY OF WASHOE) ss.
3

4 I, ERIN T. FERRETTO, an Official Reporter
5 of the Second Judicial District Court of the State of
6 Nevada, in and for the County of Washoe, DO HEREBY
7 CERTIFY:

8 That I was present in Department No. 1 of
9 the above-entitled Court on THURSDAY, DECEMBER 29TH,
10 2016, and took verbatim stenotype notes of the
11 proceedings had upon the matter captioned within, and
12 thereafter transcribed them into typewriting as herein
13 appears;

14 That the foregoing transcript is a full,
15 true and correct transcription of my stenotype notes of
16 said proceedings.

17 DATED: This 5th day of January, 2017.
18
19

20 /s/ Erin T. Ferretto

21 _____
ERIN T. FERRETTO, CCR #281
22
23
24
25

FILED
Electronically
CR98-0516
2018-06-29 03:41:30 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6755571 : wvloria

EXHIBIT 5

EXHIBIT 5

1 CODE 3370

2
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5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 MELONIE LYNN SHEPPARD,

10 Petitioner,

11 vs.

Case No. CR03-0502B

Dept. No. 1

12
13 STATE OF NEVADA,

14 Respondent.
15 _____/

16 ORDER

17 On December 9, 2016, Respondent, the STATE OF NEVADA (hereinafter the "State"), by
18 and through TERRENCE MCCARTHY, Esq., filed a *Motion to Dismiss, Or Alternatively, To*
19 *Disqualify the Federal Public Defender* (hereinafter "*Motion to Dismiss*").¹ On December 22, 2016,
20 Petitioner MELONIE LYNN SHEPPARD, by and through counsel, C.B. KIRSCHNER and
21 MEGAN C. HOFFMAN, Assistant Federal Public Defenders, filed a *Response to Motion to Dismiss,*
22 *Or Alternatively, to Disqualify the Federal Public Defender* (hereinafter "*Response*"). An
23 evidentiary hearing on Sheppard's post-conviction *Petition for Writ of Habeas Corpus* is scheduled
24 to commence on Wednesday, January 18, 2017.²
25 _____

26
27 ¹ The State submitted the matter for the Court's consideration on December 9, 2016, before Petitioner had an opportunity
to file an opposition or otherwise respond. See WDCR 12. Accordingly, the Court will consider Petitioner's timely filed
Response.

28 ² The Court conducted a telephonic status conference on Thursday, December 29, 2016, and informed the parties the
evidentiary hearing would proceed as scheduled for January 18-20, 2017. Additionally, the Court set a status hearing for
January 17, 2017, at 3:30 p.m. in Department One.

1 The State's *Motion to Dismiss* alleges Sheppard's counsel engaged in misconduct, interfered
2 with the State's access to witnesses, and formed an attorney-client relationship with Sheppard's prior
3 counsel. The State moves this Court to dismiss Sheppard's petition as a "sanction" for the conduct of
4 counsel, or alternatively, to disqualify the Federal Public Defender (hereinafter "FPD") from
5 representing Sheppard. Counsel for Sheppard deny all allegations of misconduct and wrongdoing
6 alleged by the State. (*Response* at 2: 13-14.)

7 The State's *Motion to Dismiss* is premised on letters sent by the FPD to Sheppard's trial and
8 appellate counsel, John Calvert and Scott Edwards.³ The FPD sent letters to Sheppard's prior
9 counsel informing them Sheppard is not waiving her attorney-client privilege with respect to the
10 upcoming evidentiary hearing. The letters direct prior counsels' attention to Rule 1.6 of the Nevada
11 Rules of Professional Conduct and to an ABA ethics opinion.

12 The State asserts the letters "clearly give[] legal advice" to Edwards and Calvert, and "just as
13 clearly cautions them that they may be engaging in unethical conduct if they discuss this case with
14 lawyers for the State." (*Motion to Dismiss* at 1: 26, 2: 1-2.) The State asserts this alleged "legal
15 advice" is "incorrect" because Sheppard waived the attorney-client privilege by calling Edwards and
16 Calvert as witnesses in a 2009 hearing. The State further asserts the FPD improperly interfered with
17 the State's access to witnesses and may have created an "implied attorney-client relationship" with
18 Sheppard's prior counsel.

19 The FPD aver the attorney-client privilege still exists between Sheppard and that counsel for
20 Petitioner properly asserted the attorney-client privilege on behalf of Sheppard. The FPD maintains
21 counsel did not engage in misconduct or interfere with the State's access to any witnesses and argues
22 the State's claim that its ability to access witnesses was compromised is unsubstantiated.

23 //

24 //

25

26

27

28 ³ On November 23, 2016, the State filed a motion requesting leave to send a request for production of the letters sent to Edwards and Calvert. On December 5, 2016, counsel for Sheppard filed a response and included copies of the requested letters. The letters are attached hereto at **Exhibit 1**.

1 A signed declaration by Professor Bruce A. Green, Director of the Louis Stein Center for
2 Law and Ethics at Fordham University School of Law is attached in support of Sheppard's *Response*
3 to the State's *Motion to Dismiss*. Professor Green concludes:

4 [M]y opinion is that the FPD properly instructed Ms. Sheppard's former
5 counsel regarding Ms. Sheppard's assertion of the attorney-client privilege and
6 properly put former counsel on notice of their confidentiality obligations.
7 There is no basis for any suggestion that the FPD provided erroneous
8 information, improperly interfered with the prosecution's access to witnesses,
9 or provided "legal advice" giving rise to a lawyer-client relationship.

10 *See Declaration of Bruce A. Green*⁴

11 The Court has reviewed the pleadings and the record in its entirety. The Court finds there is
12 no legal basis to dismiss Sheppard's post-conviction *Petition for Writ of Habeas Corpus* or
13 disqualify the Federal Public Defender from representing Sheppard. The Court finds the FPD did not
14 provide "legal advice" as the letters merely inform prior counsel Sheppard is not waiving the
15 attorney-client privilege and directs them to various Rules of Professional Conduct and an opinion
16 by the American Bar Association. The FPD's letters "constitute[] a correct statement of law" and are
17 "not improper." *See U.S. v. Black*, 767 F.2d 1334, 1338, 19 Fed. R. Evid. Serv. 128 (1985) (holding
18 that a letter advising witnesses of their right to decline requests for an interview "constituted a
19 correct statement of the law and was not improper").

20 Accordingly, and good cause appearing, the State's *Motion to Dismiss, Or Alternatively, To*
21 *Disqualify the Federal Public Defender* is hereby **DENIED**. The evidentiary hearing currently set
22 for **January 18-20, 2017**, shall proceed as scheduled.

23 IT IS SO ORDERED.

24 DATED: This 5th day of January, 2017.

25 
26 DISTRICT JUDGE

27
28 ⁴ Attached hereto at Exhibit 2.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 5 day of January, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed the individuals listed herein and/or electronically filed the foregoing document with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

VIA ECF

Chris Hicks
Terrence McCarthy
Megan Hoffman
CB Kirschner
Div. of Parole & Probation

VIA MAIL

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

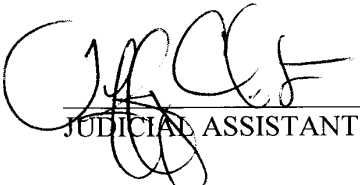

JUDICIAL ASSISTANT

EXHIBIT “1”

EXHIBIT “1”

Rene L. Valladares
Federal Public Defender
District of Nevada

Lori C. Teicher
First Assistant

Megan C. Hoffman
Assistant Federal Public Defender



**FEDERAL PUBLIC
DEFENDER**

— District of Nevada —

411 E. Bonneville Ave.
Suite #250
Las Vegas, NV 89101
Tel: 702-388-6577

October 11, 2016

John Calvert, Esq.
435 Court Street
Reno, NV 89501

Re: Melonie Sheppard, 2JDC Case No. CR03-0502B

Dear Mr. Calvert,

The Office of the Federal Public Defender, District of Nevada (FPD) has been appointed to represent Melonie Sheppard in her federal post-conviction proceedings. USDC Case No. 3:14-cv-00059-MMD-VPC. In connection with those proceedings, we have filed a new petition for a writ of habeas corpus in the Second Judicial District Court in Reno. Judge Berry has scheduled an evidentiary hearing in January 2017 on several claims in the petition, including actual innocence and *Brady* allegations.

It is our understanding that you may be called as a witness by the state's attorneys. As a result, we are mailing this letter to all of Ms. Sheppard's prior attorneys in anticipation of the hearing to address the matter of privilege. 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.

In connection with this notice, we direct your attention to Nevada Rule of Professional Conduct (NRPC) 1.6, and to ABA Formal Opinion 10-456 July 14, 2010¹, both of which address the confidentiality of information in a post-conviction setting. The ABA notes that Model Rule 1.6(b)(5) (which is identical to NRPC 1.6(b)(5)) “applies not only to matters communicated in confidence by the client but also to all

¹
http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf

information relating to the representation.” Formal Opinion at 1 *quoting* Rule 1.6. cmt. 3.

The ABA Opinion also notes that “It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.” *Id.* at 4. “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.” ABA Opinion at 5.²

Thank you very much for your assistance and understanding. Please do not hesitate to contact me if you should wish to discuss this matter further.

Sincerely,

MEGAN C. HOFFMAN
Assistant Federal Public Defender

² The hearing before Judge Berry is limited to *Brady* and actual innocence allegations made by Ms. Sheppard. Although the hearing is limited, even if there were allegations of ineffective assistance of prior counsel, such allegations do not, in and of themselves, amount to “informed consent” to an attorney’s voluntary disclosure of information—including non-privileged information—obtained outside of a judicial proceeding. ABA Formal Opinion 10-456, July 14, 2010 pg. 2.

Rene L. Valladares
Federal Public Defender
District of Nevada

Lori C. Teicher
First Assistant

Megan C. Hoffman
Assistant Federal Public Defender



**FEDERAL PUBLIC
DEFENDER**

— District of Nevada —

411 E. Bonneville Ave.
Suite #250
Las Vegas, NV 89101
Tel: 702-388-6577

October 11, 2016

Scott Edwards
561 Keystone Ave #322
Reno, NV 89503

Re: Melonie Sheppard, 2JDC Case No. CR03-0502B

Dear Mr. Edwards,

The Office of the Federal Public Defender, District of Nevada (FPD) has been appointed to represent Melonie Sheppard in her federal post-conviction proceedings. USDC Case No. 3:14-cv-00059-MMD-VPC. In connection with those proceedings, we have filed a new petition for a writ of habeas corpus in the Second Judicial District Court in Reno. Judge Berry has scheduled an evidentiary hearing in January 2017 on several claims in the petition, including actual innocence and *Brady* allegations.

It is our understanding that you may be called as a witness by the state's attorneys. As a result, we are mailing this letter to all of Ms. Sheppard's prior attorneys in anticipation of the hearing to address the matter of privilege. 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.

In connection with this notice, we direct your attention to Nevada Rule of Professional Conduct (NRPC) 1.6, and to ABA Formal Opinion 10-456 July 14, 2010¹, both of which address the confidentiality of information in a post-conviction setting. The ABA notes that Model Rule 1.6(b)(5) (which is identical to NRPC 1.6(b)(5)) “applies not only to matters communicated in confidence by the client but also to all

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The ABA Opinion also notes that “It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer’s belief must be objectively reasonable.” *Id.* at 4. “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.” ABA Opinion at 5.²

Thank you very much for your assistance and understanding. Please do not hesitate to contact me if you should wish to discuss this matter further.

Sincerely,

MEGAN C. HOFFMAN
Assistant Federal Public Defender

² The hearing before Judge Berry is limited to *Brady* and actual innocence allegations made by Ms. Sheppard. Although the hearing is limited, even if there were allegations of ineffective assistance of prior counsel, such allegations do not, in and of themselves, amount to “informed consent” to an attorney’s voluntary disclosure of information—including non-privileged information—obtained outside of a judicial proceeding. ABA Formal Opinion 10-456, July 14, 2010 pg. 2.

EXHIBIT “2”

EXHIBIT “2”

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.

1 CODE No. 2645
2 CHRISTOPHER J. HICKS
3 #7747
4 P. O. Box 11130
5 Reno, Nevada 89520-0027
6 (775) 328-3200
7 Attorney for Respondent

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
9
10 IN AND FOR THE COUNTY OF WASHOE

11 * * *

12 SIAOSI VANISI,

13 Petitioner,

14 v.

Case No. CR98-0516

15 TIMOTHY FILSON, WARDEN,

Dept. No. 4

16 Respondent.
17 _____/

18 OPPOSITION TO MOTION TO DISQUALIFY THE WASHOE
19 COUNTY DISTRICT ATTORNEY'S OFFICE

20 COMES NOW, the State of Nevada, by and through Jennifer P. Noble, Chief
21 Appellate Deputy, and Joseph R. Plater, Appellate Deputy, and opposes this "Motion to
22 Disqualify the Washoe County District Attorney's Office." This Opposition is based on
23 the pleadings and papers on file with this Court, and the following points and
24 authorities.

25 POINTS AND AUTHORITIES

26 I. ARGUMENT

**A. The Washoe County District Attorney's Office Did Not
Act Unethically In Communicating With Former
Counsel and His Agents Regarding Vanisi's Allegations
of Ineffective Assistance of Counsel.**

///

1 1. The Nevada Bar's Standing Committee On Ethics and Professional
2 Responsibility Has Expressly Rejected ABA Formal Opinion 10-
3 456.

4 Vanisi alleges that the WCDA has violated the Nevada Rules of Professional
5 Conduct by contacting Washoe County Public Defender ("WCPD") Jeremy Bosler and
6 former investigators of the WCPD by "inducing" them to disclose "confidential and
7 privileged information." Vanisi bases this serious and frivolous allegation upon 1) ABA
8 Formal Opinion 10-456, which has never been adopted by Nevada and 2) the
9 declaration of some law professor who has no authority to dictate how Nevada attorneys
10 should comport themselves.

11 On July 2, 2018, the Nevada State Bar's Standing Committee (hereafter "the
12 Committee") on Ethics and Professional Responsibility issued Formal Opinion 55,
13 attached hereto as Exhibit 1. The Committee expressly rejected the ABA Opinion 10-
14 456. Exhibit 1, pp. 3-6. In so doing, the Committee noted that it joined numerous other
15 jurisdictions in finding that ABA Formal Opinion 10-456 is contrary to judicial economy
16 and maintaining fairness in the judicial process. *Id.*

17 Although Vanisi's counsel are eager to bring allegations of ethical violations, they
18 are apparently less eager to acknowledge authority contrary to their position, even when
19 invited to do so. Several days after the July 2, 2018 issuance of the Committee's formal
20 opinion rejecting their position, the undersigned contacted Vanisi's counsel to inquire as
21 to whether they planned to alert the Court to the Committee's Formal Opinion 55.
22 Exhibit 2. As of this filing, the State has received no response to its inquiry, and is not
23 aware of any supplemental filings by Vanisi's counsel.

24 2. Communication With Former Counsel Bosler and Former
25 Investigators Novak and Calderon-Bright Was Not Unethical
26 Because Vanisi Has Waived His Attorney Client Privilege As to
 Matters Alleged In His Petition.

 Consistent with its regular practice, the WCDA requested to interview Vanisi's
 former counsel Bosler and two investigators assigned to his case. This was not unethical

1 because even prior to the Committee's recent opinion, no Nevada authority prohibited
2 extrajudicial discussion of matters alleged related to the ineffectiveness claims in a
3 petition for writ of habeas corpus. Vanisi filed the instant petition for writ of habeas-
4 corpus on May 4, 2011, and numerous exhibits on May 5, 2011. In so doing, Vanisi
5 waived his right to attorney-client privilege with respect to matters relevant to the
6 ineffective assistance of counsel claims.

7 Upon filing the petition, the former client declares, under penalty of perjury, that
8 the allegations of ineffective assistance are true to the best of his or her knowledge. NRS
9 34.735 (23). There is no question that the petitioner knows he or she is waiving the
10 privilege, because NRS 34.735 (6) also specifically advises petitioners that if they allege
11 ineffective assistance of counsel, "that claim will operate to waive the attorney-client
12 privilege for the proceeding in which you claim your counsel was ineffective."

13 It is well-established in Nevada that where a habeas petitioner raises a claim of
14 ineffective assistance of counsel, he waives the attorney-client privilege as to
15 communications with his allegedly ineffective lawyer relating to the claims. NRS
16 34.735; *Molina v. State*, 120 Nev. 185, 87 P.3d 533 (2004). The same rule has long
17 existed in the federal courts, that where a habeas petitioner raises a claim of ineffective
18 assistance of counsel, he waives the attorney-client privilege as to all communications
19 with his allegedly ineffective lawyer. *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir.
20 2003). Nevada Rule of Professional Conduct 1.6(b)(5) provides that a lawyer may reveal
21 information relating to the representation of a client to the extent the lawyer reasonably
22 believes necessary to respond to allegations in any proceeding concerning the lawyer's
23 representation of the client. The plain language of NRPC 1.6(b)(5) also allows for an
24 attorney to communicate regarding allegations of ineffective assistance of counsel.

25 This is not a game, but gamesmanship is afoot. Vanisi ambushed and brutally
26 murdered an innocent police officer with a hatchet. Now he seeks to escape the

1 consequences of his actions by attacking the quality of his legal representation. The
2 WCDA is responsible for defending the lawful conviction and sentence in this case. It is
3 no wonder, then, that the controlling legal authorities clearly allow the WCDA to
4 interview Vanisi's former counsel and legal team in order to prepare for the defense of
5 Vanisi's attack on his conviction and sentence.

6 3. Vanisi's Claims of Confidentiality Are Disingenuous As Vanisi
7 Himself Attached Nearly Two Hundred Pages of Privileged,
8 Confidential, Sensitive Information To His Exhibits In Support of
9 Petition For Habeas Corpus.

10 Vanisi's serious allegations of ethical violations ring particularly hollow in light of
11 the approximately two hundred pages of confidential internal memoranda, emails, and
12 declarations he attached to his petition as exhibits. See Petitioner's Exhibits In Support
13 of Petition for Writ of Habeas Corpus filed May 5, 2011. These exhibits included the
14 declarations of former attorneys Bosler and Stephen Gregory about mitigation strategy.
15 They also included Washoe County Public Defender Michael Specchio's memorandum
16 completed pursuant to SCR 250. Vanisi also included additional internal file
17 documents, emails and memoranda from the WCPD's office. See Exhibits 33, 127, 137,
18 143, 144, 145, 147, 148, 180, and 181 to Exhibits in Support of Petition for Writ of
19 Habeas Corpus.

20 Vanisi also filed Specchio's SCR 250 Memorandum. This highly sensitive,
21 confidential document was over one hundred pages of privileged, and at times damning,
22 information about Vanisi, including Vanisi's request that the defense team pursue a
23 fraudulent and dishonest defense. *Id.*, Exhibit 33. It included Specchio's analysis and
24 observation regarding trial strategy, mitigation strategy, Vanisi's admissions of guilt,
25 Vanisi's desire to blame the crime on a relative, and Vanisi's lack of remorse. *Id.*

26 Additionally, Calderon-Bright's declaration regarded defense team
communications about mitigation experts, potential travel to Tonga, conversations with

1 Bosler, conversations with Specchio, Specchio's decisions regarding interviews of family
2 members and mitigation witnesses, and her opinions about the performance of counsel.
3 *Id.*, Exhibit 127. Exhibit 137 was an internal memorandum from Specchio, which
4 indicated Dr. Lynn's findings that Vanisi was not insane and spoke of the murder
5 nonchalantly. It also indicated that Vanisi admitted to lying in wait for Sergeant
6 Sullivan because he hated cops and wanted to use the sergeant's gun to rob a
7 convenience store. *Id.*, Exhibit 137.

8 Another letter from Specchio to the federal public defender indicated that Vanisi
9 had admitted to malingering. *Id.*, Exhibit 145. Additional internal documents filed by
10 Vanisi indicated that he admitted to having the hatchet in his right and left hand during
11 the murder, summaries of interviews of potential mitigation witnesses, correspondence
12 between Specchio and mitigation expert Scharlette Holdman, indications by the Tongan
13 community that they did not want to support Vanisi, efforts by Specchio to contact
14 cultural experts, Specchio's conversations with Vanisi, memos from Specchio to
15 Calderon, memos from Calderon to Novak, and a memo from Specchio to Gregory,
16 Bosler, and deputy public defender Maizie Pusich. *Id.*, Exhibit 147.

17 Vanisi also filed a detailed memo from Specchio to Crystal Calderon regarding
18 mitigation witnesses and mitigation strategy. *Id.*, Exhibit 148. Former counsel Stephen
19 Gregory's declaration included details about mitigation strategy, ethical problems with
20 the defense Vanisi wanted to pursue, and budgetary constraints of the WCPD. *Id.*,
21 Exhibit 180. Bosler's declaration regarded his efforts to gather mitigation information
22 and mitigation strategy. *Id.*, Exhibit 181. Vanisi does not explain why filing confidential
23 and privileged documents discussing nearly every imaginable aspect of trial and
24 sentencing strategy does not operate to waive his attorney/client privilege.

25 / / /

26 / / /

1 II. CONCLUSION

2 Vanisi alleges that the WCDA communicated with his former attorney and his
3 agents about privileged matters, and that the WCDA committed serious ethical
4 violations. Yet the established law in Nevada is that Vanisi waived privilege with respect
5 to the allegations in the petition when he filed it. Moreover, the numerous exhibits he
6 filed in open court regard every confidential, privileged topic imaginable. The issuance
7 of the Committee's formal opinion should put Vanisi's arguments to rest. It would
8 appear that advancing similar arguments in the future could draw a valid NRCP 11
9 challenge. This Court should deny the Motion to Disqualify.

10 AFFIRMATION PURSUANT TO NRS 239B.030

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

13 DATED: July 9, 2018.

14
15 CHRISTOPHER J. HICKS
16 District Attorney

17 By /s/ JENNIFER P. NOBLE
18 JENNIFER P. NOBLE
19 Chief Appellate Deputy

20 By /s/ JOSEPH R. PLATER
21 JOSEPH R. PLATER
22 Appellate Deputy

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on July 9, 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

Joanne L. Diamond, Assistant Federal Public Defender

Scott Wisniewski, Assistant Federal Public Defender

/s/ Margaret Ford
MARGARET FORD

INDEX OF EXHIBITS

Exhibit 1, State Bar of Nevada, Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 55, 7 pages

Exhibit 2, E-mail from Jennifer Noble to Randolph Fiedler, Joanne Diamond, and Scott Wisniewski, 1 page

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Clerk of the Court
Transaction # 6767048 : csulezic

EXHIBIT 1

EXHIBIT 1

AA07595

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 55

QUESTION PRESENTED

May a criminal defense lawyer whose former client alleges that the lawyer provided constitutionally ineffective assistance of counsel disclose confidential information to the State in the course of any proceeding on the defendant's claim, for the purpose of establishing whether the lawyer's representation was competent?

ANSWER

Yes, a criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client may disclose confidential information relating to representation of the client to the extent the lawyer reasonably believes necessary to defend against the allegations. Any disclosure must be narrowly tailored to the issues raised by the former client.

DISCUSSION

Rule 1.6 of the Nevada Rules of Professional Conduct (NRPC) generally restricts the disclosure of information related to the representation of a client. The fundamental requirement of confidentiality is set forth in subsection (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 (d).

This Committee has previously opined that, "[i]n 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." State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 41, June 24, 2009.

The duty of confidentiality continues after the lawyer-client relationship has terminated. Rule 1.9 sets forth a lawyer's duties to former clients, and subsection (c)(2) further provides that "[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 mirrors the unrestricted language of Rule 1.6, extending the duty of confidentiality broadly to "information relating to representation."

The principle of lawyer-client confidentiality is further reflected in the statutory privilege set forth in NRS 49.095:

NRS 49.095 General rule of privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
2. Between the client's lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

However, the information protected under Rule 1.6 extends beyond the information protected by the attorney-client privilege under NRS 49.095. *McKay v. Board of County Comm'rs*, 103 Nev. 490, 494, 746 P.2d 124, 126-27 (1987) (citing Comment [3] to ABA Model Rule 1.6). The lawyer's ethical duty to preserve a client's confidentiality is thus broader than the evidentiary privilege.

Nevertheless, the ethical duty and the statutory privilege both make an exception when the competency of the lawyer's representation faces a subsequent legal challenge by the client. Subsection (b)(5) of Rule 1.6 permits limited disclosure of otherwise confidential client information under the so-called "self-defense" exception:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . [t]o 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.

Similarly, the statutory lawyer-client privilege does not extend "to a communication relevant to an issue of breach of duty by the lawyer to his or her client." NRS 49.115(3); *see also Tower Homes, Ltd. Liab. Co. v. Heaton*, 132 Nev. __, 377 P.3d 118, 123 (Nev. 2016).

A criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client would fall within the scope of the ethical and statutory "self-defense" exceptions to confidentiality. The third clause of Rule 1.6(b)(5) – permitting disclosure to the extent reasonably necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client" – specifically applies. Furthermore, in filing a petition for postconviction relief, a defendant is required to comply with NRS 34.735, which specifies in pertinent part: "If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective." Under such circumstances, a criminal defense lawyer may disclose confidential information relating to representation of the former client to the extent the lawyer reasonably believes necessary to respond to the allegations of ineffective assistance.

To prevail on an ineffective assistance claim, a defendant must prove that he was denied "reasonably effective assistance" of counsel to his detriment by satisfying the two-prong test

established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that his counsel's representation fell below an objective standard of reasonableness. Second, the defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, there would have been a different outcome; for instance, that the defendant would not have pleaded guilty or not have been found guilty at trial. The burden falls upon the defendant to make the requisite showing:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690.

The reasonableness of the representation may turn upon what both the lawyer and the defendant did or did not do, or did or did not communicate to one another, in the course of representation. This may require an inquiry as to what extent the lawyer considered and discussed with the defendant matters that might reasonably be expected to have a material impact on the case, such as the nature of the charges, potential defense strategies, evidentiary issues, what options might be in the defendant's best interest, the consequences of pleading guilty, and whether the defendant had any basis to appeal a conviction. "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). The lawyer's actions and decision-making process at every stage of the proceedings may be reviewed, including whether he conducted a reasonable and independent investigation of the case. "Ineffective-assistance claims often depend on evidence outside the trial record." *Id.* at 13.

The defendant's conduct throughout the lawyer-client relationship may also demand scrutiny, including whether he or she was forthcoming with all relevant information and whether he or she followed the advice of counsel:

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . [an] inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691. Consequently, a meaningful evaluation of defense counsel's performance cannot be conducted without the lawyer's disclosure to some extent of confidential information relating to representation of the client, which is expressly permitted under the third clause of Rule 1.6(b)(5) and NRS 49.115(3).

The Committee notes that the American Bar Association Standing Committee on Ethics and Professional Responsibility has taken a conflicting position in ABA Formal Opinion 10-456 (July 14, 2010) (ABA Opinion). The ABA Opinion held that the ABA's Model Rule of

Professional Conduct 1.6 precludes communication between former defense counsel and prosecutors in a postconviction proceeding involving an ineffective assistance claim, unless under direct judicial supervision at an evidentiary hearing. The confidentiality mandate in subsection (a) and the self-defense exception in subsection (b)(5) of the ABA Model Rule 1.6 are identical to the language of NRPC 1.6.

The ABA Opinion maintains that the third clause of subsection (b)(5) – permitting disclosure “to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer’s representation of the client” – is subject to severe constraints. ABA Opinion, at 3. “[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.” *Id.* (quoting *Restatement (Third) of the Law Governing Lawyers* §64 cmt. c (2000)). Based primarily on concerns that extrajudicial disclosure in a postconviction proceeding involving an ineffective assistance claim might prejudice the defendant in the event of a retrial, the ABA Opinion concluded that “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 Committee reaches a different conclusion.

First, nothing in the express language of Rule 1.6(b)(5) can be inferred to prohibit extrajudicial disclosures to the State in the context of a postconviction ineffective assistance claim. The ABA Opinion even appears to conflict with the ABA’s own Comment [10] to Model Rule 1.6, which states that when there is an allegation involving the lawyer’s conduct or representation of a former client, “Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding” to respond. While the ABA Opinion contends that Comment [10] should be construed narrowly, even a narrow construction cannot justify barring any extrajudicial disclosure when a criminal client has placed his former defense counsel’s performance squarely at issue. Significantly, the self-defense exception is tempered in that it only permits disclosure to the extent reasonably necessary to respond to the allegations. Furthermore, subsection (b)(5) is permissive (“[a] lawyer *may* reveal information”) and accords the lawyer the professional discretion to refuse to assist the State against the former client’s ineffective assistance claim.

Second, the position taken by the ABA Opinion could undermine both the truth-finding function of the judicial process and the principle of fairness that sustains our legal system. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (characterizing “the very nature of a trial as a search for truth.”); *Abbott v. Abbott*, 560 U.S. 1, 20 (2010) (noting that nations “rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.”). The self-defense exception to confidentiality promotes these objectives of truth and fairness. A convicted defendant alleging ineffective assistance of counsel contends his lawyer’s handling of his case was deficient and affected the outcome. The lawyer should be given a fair opportunity to protect his professional reputation by demonstrating that he provided reasonably effective representation under the circumstances. The State has a responsibility to ensure the integrity of the conviction.¹

¹ “The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose

The lawyer's extrajudicial disclosure of confidential information relating to the representation may be a necessary predicate to ascertaining the truth and maintaining fairness in the process.

Third, extrajudicial disclosure when warranted promotes judicial economy. Petitions for postconviction relief clog our courts. A claim of ineffective assistance of counsel is frequently asserted by defendants in these petitions. The limited resources of the legal system should be conserved by permitting the State to communicate with former defense counsel in the course of investigating the merits of the claim, without the necessity of judicial supervision.

Concerns such as these may explain why other jurisdictions have rejected the ABA Opinion. In *State v. Montgomery*, 997 N.E.2d 579 (Ohio Ct. App. 2013), the Ohio Court of Appeals held:

[W]e differ with the ABA's opinion that an attorney who is the subject of an ineffective assistance of counsel claim who may have a reasonable need to disclose relevant client information should do so only with prior judicial approval in the proceeding in which the claim is joined. . . . the very narrow scope of the information allowed to be disclosed suggests that the rule can be enforced without prior judicial intervention.

Id. at 590. See also *United States v. Straker*, 258 F. Supp. 3d 151, 157 (D.D.C. 2017) “[C]ourts in this District have regularly permitted the government to communicate with former counsel without the need for supervision by the court or current counsel.”); *Courtade v. United States*, 243 F. Supp. 3d 699, n.5 (E.D. Va. 2017) (declining to “prohibit *ex parte* communications between the government and former counsel in this situation, given the obvious need to fully develop and clarify the record in collateral proceedings.”); *Office of Lawyer Regulation v. Thompson (In re Thompson)*, 847 N.W.2d 793, 800 (Wis. 2014) (“Wisconsin's confidentiality rule does not limit permitted disclosures to a ‘court-supervised’ setting.”); *Melo v. United States*, 825 F. Supp. 2d 457, n. 2 (S.D.N.Y. 2011).

Several state bar entities have also issued formal opinions rejecting the ABA Opinion. The District of Columbia Bar in Ethics Opinion 364 (Jan. 2013) concluded:

[The Rule] permits a defense lawyer whose conduct has been placed in issue by a former client's ineffective assistance of counsel claim to make, without judicial approval or supervision, such disclosures of information protected by Rule 1.6 as are reasonably necessary to respond to the client's specific allegations about the lawyer's performance.

See also North Carolina State Bar, 2011 Formal Ethics Op. 16 (Jan. 27, 2012) (The Rule “affords the lawyer discretion to determine what information is reasonably necessary to disclose, and there is no requirement that the lawyer exercise that discretion only in a ‘court-supervised

interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935), cited in *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

setting.”); Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Op. 2013-F-156 (June 14, 2013) (“Exceptions to the confidentiality rules permit, but do not require, the former defense lawyer to make limited voluntary disclosures of information to the prosecution outside the in-court supervised proceeding.”).²

The argument against the ABA’s position is perhaps best articulated in *United States v. Ball*, 2017 U.S. Dist. LEXIS 120459 (E.D. Mich. 2017):

[T]his Court is not persuaded that Formal Opinion 10-456 champions the correct policy. In advising that prosecutors and former defense counsel should not be permitted to communicate without court supervision, the ethics opinion fails to strike the appropriate balance between protecting confidentiality interests and ensuring "fair proceedings" by allowing the prosecution to fully develop its case.

United States v. Ball, 2017 U.S. Dist. LEXIS 120459 at *6.

This Committee joins other jurisdictions in rejecting ABA Formal Opinion 10-456. A criminal defense lawyer confronted with a former client’s allegations of ineffective assistance of counsel should be able to disclose relevant confidential information relating to the representation. Judicial intervention is not a prerequisite for disclosing client information under such circumstances. However, disclosure is permitted only to the extent reasonably necessary to respond to the allegations and must be narrowly tailored to the issues raised by the former client.

CONCLUSION

A criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client may disclose confidential information relating to representation of the client to the extent the lawyer reasonably believes necessary to defend against the allegations. Any disclosure must be narrowly tailored to the issues raised by the former client.

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 person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

² The Bar Association of San Francisco Ethics Committee in Ethics Opinion 2014-1 (Jan. 2014) also cited the ABA Opinion in considering the ability of an attorney to respond to a negative online review by a former client alleging incompetence. Although California’s rule on confidentiality, Rule of Professional Conduct 3-100, is not based on the ABA Model Rule and contains no self-defense exception, and that committee concluded that case law on the self-defense exception for California’s statutory lawyer-client privilege, California Evidence Code § 958, limited disclosure to formal or imminent legal proceedings, the committee nonetheless noted that, “[e]ven in those circumstances where disclosure of otherwise confidential information is permitted, *the disclosure must be narrowly tailored to the issues raised by the former client.*” [Emphasis added].

AUTHORITIES

NRS 34.735
NRS 49.095
NRS 49.115
NRPC 1.6
NRPC 1.9
Abbott v. Abbott, 560 U.S. 1 (2010)
Berger v. United States, 295 U.S. 78 (1935)
Courtade v. United States, 243 F. Supp. 3d 699 (E.D. Va. 2017)
Martinez v. Ryan, 566 U.S. 1 (2012)
McKay v. Board of County Comm'rs, 103 Nev. 490, 746 P.2d 124 (1987)
Melo v. United States, 825 F. Supp. 2d 457 (S.D.N.Y. 2011)
Nix v. Whiteside, 475 U.S. 157 (1986)
Office of Lawyer Regulation v. Thompson (In re Thompson), 847 N.W.2d 793 (Wis. 2014)
State v. Montgomery, 997 N.E.2d 579 (Ohio Ct. App. 2013)
Strickland v. Washington, 466 U.S. 668 (1984)
Tower Homes, Ltd. Liab. Co. v. Heaton, 132 Nev. ___, 377 P.3d 118 (2016)
United States v. Ball, 2017 U.S. Dist. LEXIS 120459 (E.D. Mich. 2017)
United States v. Straker, 258 F. Supp. 3d 151 (D.D.C. 2017)
Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987)
American Bar Association Model Rule 1.6
American Bar Association, Formal Op. 10-456 (July 14, 2010)
District of Columbia Bar Ethics Op. 364 (Jan. 2013)
State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 41, June 24, 2009
North Carolina State Bar, 2011 Formal Ethics Op. 16 (Jan. 27, 2012)
Bar Association of San Francisco Ethics Committee Op. 2014-1 (Jan. 2014)
Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Op. 2013-F-156 (June 14, 2013)

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2018-07-09 04:10:56 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6767048 : csulezic

EXHIBIT 2

EXHIBIT 2

AA07603

Ford, Margaret "Margy"

From: Noble, Jennifer
Sent: Friday, July 06, 2018 9:56 AM
To: Joanne Diamond; Randolph Fiedler; Scott Wisniewski
Cc: Plater, Joseph; Cate, Marilee
Subject: Motion to Disqualify and Nevada Ethics Opinion regarding ABA Formal Opinion 55--
Siaosi Vanisi
Attachments: Nevada-Ethics-Opinion-re-ABA-Formal-Opinion-55.pdf

Good Morning Randy, Joanne, and Scott:

As you are undoubtedly aware, the State Bar of Nevada Standing Committee on Professional Responsibility issued the attached opinion this week. It joins a number of jurisdictions in explicitly rejecting ABA Formal Opinion 55. Please advise today as to whether you plan to alert the Court of this relevant authority. I believe it is your ethical obligation to do so given the allegations in your Motion to Disqualify.

Thank you,
Jenny Noble

Jennifer P. Noble
Chief Appellate Deputy
Washoe County District Attorney
(775) 337-5757

CR98-0516
STATE VS SIAOSI VANISI (D4) 2 Pages
District Court 07/24/2018 10:38 AM
Washoe County
3870

Code 3870

FILED

2018 JUL 24 AM 10:37

JUDICIAL DISTRICT COURT
CLERK
BY *[Signature]*
CLERK

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

THE STATE OF NEVADA,

Plaintiff(s),

Case No. CR98-0516

vs.

Dept. No. 4

SIAOSI VANISI

Defendant(s).

REQUEST FROM DEFENDANT

AA07605

Friday, 7-20-18

10:22 AM

Hello, Judge, how are you doing? I am doing good.

I am writing you to see if I can waive my evidentiary Hearing.

I am unsure of what more to write, meaning if I should explain my reason for such a wish, because, all the law requires is that I make this waiver knowingly, voluntarily and intelligently.

I suppose that there will be a Hearing and I can give my explanation to the Court then if it wishes to hear additional information.

Well, Judge, I end my letter here with
God Bless,

Jess Vain

1 CODE No. 2465
2 CHRISTOPHER J. HICKS
3 #7747
4 P. O. Box 11130
5 Reno, Nevada 89520-0027
6 (775) 328-3200
7 Attorney for Respondent

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE

12 * * *

13 SIAOSI VANISI,

14 Petitioner,

Case No. CR98-0516

15 v.

16 THE STATE OF NEVADA,

Dept. No. 4

17 Respondent.
18 _____/

19 MOTION TO SET HEARING REGARDING VANISI'S REQUEST
20 TO WAIVE EVIDENTIARY HEARING

21 COMES NOW, the State of Nevada, by and through Jennifer P. Noble, Chief
22 Appellate Deputy, and files its Motion to Set Hearing Regarding Vanisi's Request to
23 Waive Evidentiary Hearing. This Motion is based on the following points and
24 authorities.

25 **POINTS AND AUTHORITIES**

26 On May 30, 2018, this Court canvassed Vanisi in open court regarding his desire
to waive his appearance during the evidentiary hearing scheduled to commence October
1, 2018. At that time, Vanisi indicated his wish to waive his personal appearance during
the hearing. Vanisi also indicated to the Court that the October 2018 evidentiary

1 hearing pursued by the Federal Public Defender's Office was consistent with his wishes
2 and with his consent.

3 On July 24, 2018, the Court filed a letter from Vanisi that suggests Vanisi would
4 change his mind. The letter states:

5 I am writing you to see if I can waive my evidentiary hearing. I am unsure
6 of what to write, meaning if I should explain my reason for such a wish,
7 because, all the law requires is that I make this waiver knowingly,
8 voluntarily, and intelligently. I suppose that there will be a Hearing and I
can give my explanation to the Court then if it wishes to hear additional
information.

9 It appears that there may be a disagreement between the Federal Public
10 Defender's Office and their client as to whether or not the evidentiary hearing and
11 petition should be pursued. The tension between the Federal Public Defender's
12 obligation to honor their capital clients' wishes, and the conflicts that can arise when
13 they pursue courses of actions contrary to those wishes, was recently the subject of the
14 Nevada Supreme Court's inquiry during oral argument on May 8, 2018 in *Nevada Dep't*
15 *of Corr. vs. District Court (Dozier, Scott)*.¹

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25 _____
26 ¹ Available at [https://nvcourts.gov/Supreme/Arguments/Recordings/NEVADA_DEP_T_OF_CORR__VS__DIST__COURT_\(DOZIER_\(SCOTT\)\)/](https://nvcourts.gov/Supreme/Arguments/Recordings/NEVADA_DEP_T_OF_CORR__VS__DIST__COURT_(DOZIER_(SCOTT))/)
(recording at 59:40-1:07).

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CONCLUSION

Based on the foregoing, the State respectfully requests that the Court schedule an evidentiary hearing to examine Vanisi on the intent of his letter to the Court, and order that Vanisi be transported for purposes of that 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: July 25, 2018.

CHRISTOPHER J. HICKS
District Attorney

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

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on July 25, 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

Joanne Diamond, Assistant Federal Public Defender

Scott Wisniewski, Assistant Federal Public Defender

/s/ Margaret Ford
MARGARET FORD

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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

**SUGGESTION OF INCOMPETENCY
AND MOTION FOR EVALUATION**

(Death Penalty Habeas Corpus Case)

Counsel for Mr. Vanisi requests that this Court appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist to examine Mr. Vanisi to

1 evaluate whether he is competent to proceed. *See* NRS 178.415. This motion is made
2 because undersigned counsel has a good faith doubt about Mr. Vanisi's competence.
3

4 DATED this 25th day of July, 2018.

5 Respectfully submitted,
6 RENE L. VALLADARES
Federal Public Defender

7 /s/ *Randolph M. Fiedler*
8 RANDOLPH M. FIEDLER
Assistant Federal Public Defender
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AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

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

DATED this 25th day of July, 2018.

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

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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 25th day of July, 2018, a true and correct copy of the foregoing SUGGESTION OF INCOMPETENCY AND MOTION FOR EVALUATION was filed in open court with the Second Judicial District Court. Service of the foregoing document was made by hand:

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/s/ Sara Jelinek
An Employee of the Federal Public
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

SIAOSI VANISI,

Petitioner,

v.

TIMOTHY FILSON, WARDEN, et. al.,

Respondents.

Case No. CR98-P0516

Dept. No. IV

**REPLY TO OPPOSITION TO MOTION
TO DISQUALIFY THE WASHOE
COUNTY DISTRICT ATTORNEY'S
OFFICE**

(Death Penalty Habeas Corpus Case)

1 **I. INTRODUCTION**

2 The relationship between the Washoe County Public Defender, the Washoe
3 County District Attorney, and first state post-conviction counsel is a story of
4 misplaced alliances. Further review of the record in this case has revealed that
5 nothing more fully shows these misplaced alliances than the circumstances
6 surrounding a document signed by Mr. Vanisi in early 2002 and the Rule 250
7 memorandum.¹

8 In January of 2002, in open court, Mr. Vanisi filed a petition for post-conviction
9 relief and a motion for appointment of counsel.² The purpose of this hearing was not
10 for Mr. Vanisi to file these pleadings, but for the Court to set an execution date
11 pursuant to the State's request—a request that the State filed without waiting to see
12 if Mr. Vanisi would be filing a post-conviction petition, a request filed seven days after
13 issuance of remittitur from Mr. Vanisi's direct appeal.³ Indeed, the State did not wait
14 for the appointment of post-conviction counsel to which Mr. Vanisi was entitled. *See*
15 NRS 34.820.

16 Because post-conviction counsel was not yet appointed, members of the
17 Washoe County Public Defender's office, John Reese Petty and Jeremy Bosler,

18
19 ¹ Pursuant to undersigned counsel's duty of candor to the tribunal, attached
20 please find a purported Waiver and Release executed by Mr. Vanisi in March of 2002.
21 *See* Ex. 3. This document was only discovered by undersigned counsel in preparing
22 the instant Reply. For the reasons discussed below, the "Waiver and Release"
23 warrants additional consideration of Defendant's previous Motion to Disqualify on
24 additional grounds to those previously presented.

25 ² *See* Pet. for Writ of Habeas Corpus (Post-Conviction) (Jan. 18, 2002); Mot. for
26 Appointment of Post-Conviction Counsel (Jan. 18, 2002).

27 ³ *See* Appl. for Setting (Dec. 11, 2001); *see also* Remittitur (Dec. 4, 2001).

1 represented Mr. Vanisi at this hearing.⁴ They filed Mr. Vanisi's pleadings.⁵ They also
2 noted that the petition likely alleged "among other things, ineffective assistance of
3 counsel of the Public Defender's office. That put [sic] us into conflict with Mr. Vanisi.
4 If for some reason his petition, his pro per petition isn't quite clear, then that post
5 conviction counsel could supplement the petition."⁶

6 In March of 2002, this Court appointed Marc Picker and Scott Edwards to
7 represent Mr. Vanisi during his post-conviction proceedings.⁷ In the same order, this
8 Court required the Washoe County Public Defender's office to turn over its file to the
9 newly appointed counsel.⁸ The order was unambiguous: "IT IS FURTHER
10 ORDERED that the Washoe County Public Defender provide a complete copy of their
11 file with regard to the above named Petitioner to Marc Picker, Esq., pursuant to the
12 death penalty statutes."⁹

13 Problems with this order arose immediately. Within eight days, post-conviction
14 counsel wrote to trial counsel, attempting to verify that trial counsel had received a
15 copy of the order and asking for an indication of when the file would be turned over.¹⁰
16 Post-conviction counsel received no response.¹¹ Roughly two weeks later, post-

18 ⁴ See Hr'g Tr. (Jan. 18, 2002).

19 ⁵ *Id.* at 8-9.

20 ⁶ *Id.* at 10.

21 ⁷ Order (Mar. 11, 2002).

22 ⁸ *Id.*

23 ⁹ *Id.*

¹⁰ Ex. 2.

¹¹ Hr'g Tr. 2 (July 1, 2002).

1 conviction counsel faxed trial counsel a copy of the Order and a request for notification
2 when the file was ready.¹²

3 By late April, the Washoe County District Attorney's office became involved in
4 post-conviction counsel's quest to get the file from the public defender's office.
5 Apparently post-conviction counsel believed they needed the State's blessing for a
6 waiver of attorney-client privilege, to be signed by Mr. Vanisi.¹³ Mr. Picker's fax cover
7 sheet reads: "Terry—Look this over and let me know today whether this covers
8 everything you need to be said. Marc."¹⁴ The attached waiver reads:

9 I, Siao Si Vanisi, do hereby expressly waive the
10 attorney-client privilege between myself and all members
11 of the Washoe County Public Defenders Office—past or
12 present—as it relates to that office's representation of me
13 on criminal charges in the case underlying my current
14 Petition for Writ of Habeas Corpus pending the Second
15 Judicial District Court.

16 This waiver expressly allows my previous trial and
17 appellate counsel to discuss my case with the district
18 attorney's office.

19 I also recognize and intend that this waiver allows
20 the public defenders [sic] office to release all papers, tapes,
21 work product, memos, investigative reports, notes and
22 documents to my current attorneys.

23 *Id.* Handwritten on this document was the following notation: "This is fine. Terry."

At some point, Mr. Vanisi signed this waiver.¹⁵ By May, post-conviction counsel

12 Ex. 5.

13 Ex. 1.

14 *Id.*

15 *See* Ex. 3. Though the waiver indicates it was signed in March of 2002, it is not dated. *Id.* Additionally, Mr. Picker faxed an unsigned copy to Mr. McCarthy for approval on April 23, 2002, implying that the waiver could not have been signed until, at earliest, after April 23, 2002.

1 received much of the file.¹⁶ However, by June, post-conviction counsel began to believe
2 that trial counsel had failed to provide the entire file because the Rule 250
3 memorandum was missing.¹⁷

4 In July, post-conviction counsel and the Washoe County District Attorney's
5 Office appeared before this Court, so that post-conviction counsel could describe their
6 difficulty in getting the file from the Washoe County Public Defender's office:

7 The problem that we have had when we first talked
8 to Mr. Petty, because that's who we had been dealing with
9 at first, he told us he had no control over the file, we should
contact Mr. Gregory. Mr. Gregory then told us, after some
delay, we should be talking to Mr. Bosler because Mr.
Bosler is in charge of the file.

10

11 So to go back, Mr. Petty told us to talk to Mr.
Gregory about the file because he didn't have control of it.
12 Mr. Gregory told to us talk to Mr. Bosler because Mr.
Gregory didn't have control of the file. Mr. Bosler then
13 after some period of time told us no, you have to talk to
Mr. Specchio because he's in charge of the file. So we have
played this game for a period of a couple of months.

14 Hr'g Tr. 3 (July 1, 2002). Post-conviction counsel then described how the Washoe
15 County District Attorney's Office came to be in possession of the Rule 250
16 memorandum:

17 What we did end up with is on Friday Mr. McCarthy,
18 through I'm not even sure how at this point, he ended up
with a copy of the memo. Now I'm not sure under the rule
that's proper, but somehow we now all got it. Because, but
19 Mr. McCarthy has a copy, and I know that my client's never
agreed to that, but he never waived it, but here we are, and
we received a copy through Mr. McCarthy.

20 *Id.* at 4. Mr. McCarthy explained how he came to be in possession of the Rule 250
21

22 ¹⁶ See Hr'g Tr. 2 (July 1, 2002).

23 ¹⁷ Ex. 1; see also Hr'g Tr. 2 (July 2, 2002).

1 memorandum:

2 I got my Rule 250 memo by calling up and politely
3 asking for it, and Steve Gregory took time out of his day
4 and found it and copied it. I don't know why it wasn't done
before. I didn't find it very difficult. It took me all of three
minutes to arrange it.

5 *Id.* at 7.¹⁸

6 During this hearing, post-conviction counsel also referenced his belief that the
7 Washoe County Public Defender's office was represented by the Washoe County
8 District Attorney's office during the post-conviction proceedings: "Now, if that's the
9 way this case is going to be run, and I don't think, I know Mr. McCarthy has nothing
10 to do with that, *but it is unfortunately his client* so he gets stuck with them." *Id.* at 5
11 (emphasis added).¹⁹

12 At best, the confusion over who represented whom, who controlled which files,
13 and who, ultimately, had the authority to dictate what a waiver looks like, resulted
14 in Mr. Vanisi signing a waiver without informed consent and the State receiving the
15 Rule 250 memorandum. At worst, the Washoe County District Attorney's office
16 insinuated itself into the interactions between the Washoe County Public Defender's
17 office and post-conviction counsel, and in doing so received privileged
18 communications, both then and now.

19
20 ¹⁸ In this regard, the State is wrong to imply that present counsel waived
21 confidentiality by filing the Rule 250 memorandum as part of the present
proceedings, as, the State already had a copy. *Compare* Hr'g Tr. 7 (July 1, 2002) *with*
Opp'n at 4.

22 ¹⁹ Mr. McCarthy clarified: "Well, first off, the public defender is not my client .
23 . . . I represent the State and the warden, not the public defender's office, which
usually is something I have to explain to a young public defender." Hr'g Tr. 7 (July 1,
2002).

1 In either case, this Court must grant an evidentiary hearing to determine
2 whether Mr. Vanisi's waiver of privilege was given with informed consent and
3 whether the Washoe County District Attorney's office received privileged
4 information. And, if the evidence shows that it incorrectly received such information,
5 this Court must disqualify it from representing the State in this matter.

6 **II. ARGUMENT**

7 No known common law privilege is older than that of attorney-client. *See*
8 *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (citing 8 J. Wigmore, Evidence §
9 2290 (McNaughton rev. 1961). This rule "is founded upon the necessity, in the
10 interest and administration of justice, of the aid of persons having knowledge of the
11 law and skilled in its practice, which assistance can only be safely and readily availed
12 of when free from the consequences or the apprehension of disclosure." *Hunt v.*
13 *Blackburn*, 128 U.S. 464, 470 (1888); *see also Wynn Resorts, Ltd. v. Eighth Jud. Dist.*
14 *Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 341 (Nev. 2017) ("The purpose of the
15 attorney-client privilege is to encourage clients to make full disclosures to their
16 attorneys in order to promote the broader public interests of recognizing the
17 importance of fully informed advocacy in the administration of justice."). Nowhere is
18 this right more important than in the context of a criminal defendant facing the death
19 penalty. *See Manley v. State*, 115 Nev. 114, 121, 979 P.2d 703, 707-08 (1999)
20 (reversing death penalty conviction on basis that attorney-client privilege was
21 violated and error was prejudicial).

22 Here, the State has violated the attorney-client privilege by gaining access to
23 confidential materials. Based on this violation, this Court must either disqualify the

1 Washoe County District Attorney's office or grant a hearing to determine whether a
2 violation occurred and whether disqualification is necessary.

3 **A. This Court must disqualify the Washoe County District Attorney's office**
4 **from participation in this case because they improperly sought and**
5 **obtained confidential information.**

6 In addressing whether disqualification is necessary, this Court looks to
7 whether there is (1) "at least a reasonable possibility that some specifically
8 identifiable impropriety did in fact occur" and (2) "the likelihood of public suspicion
9 or obloquy outweighs the social interests which will be served by a lawyer's continued
10 participation in a particular case." *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200,
11 1205, 14 P.3d 1266, 1270 (2000) (quoting *Cronin v. Eighth Jud. Dist. Ct.*, 105 Nev.
12 635, 641, 781 P.2d 1150, 1153 (1989)).

13 Here, there can be no question of "a reasonable possibility" of "some specifically
14 identifiable impropriety" because, as discussed above, at minimum the Washoe
15 County District Attorney's office received the Rule 250 memorandum as early as July
16 2002, when post-conviction proceedings were already under way, and from trial
17 counsel. *See* Hr'g Tr. 7 (July 1, 2002) ("I got my Rule 250 memo by calling up and
18 politely asking for it, and Steve Gregory took time out of his day and found it and
19 copied it.").²⁰ But, as described above, and in Mr. Vanisi's Motion to Disqualify the

20 ²⁰ At this point in time, Mr. Vanisi had not filed any petition beyond his pro se
21 one. In that petition, Mr. Vanisi raised two claims, handwritten in all caps:

22 (A) GROUND ONE: DENIED RIGHTS UNDER
23 FOURTH, FIFTH, SIXTH AND FOURTEENTH
AMENDMENTS AS I DID NOT RECEIVE DUE
PROCESS OF LAW OR EFFECTIVE

1 Washoe County District Attorney's Office, prosecutors in this case have received
2 significant information from the Washoe County Public Defender's office, which they
3 are not entitled to. *See* § I above; *see also* Mot. to Disqualify Washoe County District
4 Attorney's Office (June 29, 2018) [hereinafter Mot. to Disq.], at 2-3.

5 The reasonable possibility of a specific impropriety is further supported by the
6 apparent confusion over whether the Washoe County Public Defender's office is
7 represented by the Washoe County District Attorney's office in post-conviction
8 proceedings. Although Mr. McCarthy indicated in court that he did not represent the
9 Washoe County Public Defender, post-conviction counsel believed he did. *Compare*
10 Hr'g Tr. 7 (July 1, 2002) *with id.* at 5. That post-conviction counsel had this belief is
11 especially apparent in light of the fact that he believed that the waiver from Mr.

12 ASSISTANCE OF COUNSEL AT TRIAL.

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

16 (B) GROUND TWO: DENIED RIGHTS UNDER
17 FOURTH, FIFTH, SIXTH AND FOURTEENTH
18 AMENDMENTS AS I DID NOT RECEIVE DUE
19 PROCESS OF LAW OR EFFECTIVE
20 ASSISTANCE OF COUNSEL ON APPEAL.

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

22 Pet. for Writ of Habeas Corpus (Post-conviction), at 6, (Jan. 18, 2002). These claims,
written without the aid of counsel and offering only general allegations, cannot serve
as informed consent for a waiver of privilege. *See* NRPC 1.6(a) (requiring informed
consent); *see also* NRPC 1.0(e) (defining informed consent).

1 Vanisi needed to be approved by the Washoe County District Attorney's office. *See*
2 Ex. 1. Rather than correct this misapprehension, Mr. McCarthy helped post-
3 conviction counsel draft Mr. Vanisi's waiver. *Id.* The only reasonable inference is that
4 members of the Washoe County Public Defender's office believed they were
5 represented by the Washoe County District Attorney's office, and so indicated to post-
6 conviction counsel back in 2002. This inference partially explains why Ms. Calderon-
7 Bright, after talking to Mr. Bosler on the phone, came away with the impression that
8 the Washoe County District Attorney's office represented her. *See* Mot. to Disq. At 3.

9 Indeed, opposing counsel acknowledges that the Washoe County Public
10 Defender provided privileged information. *See* Opp'n to Mot. to Disqualify Washoe
11 County District Attorney's Office (July 9, 2018) [hereinafter Opp'n], at 2-3. Instead,
12 the State argues only that Mr. Vanisi waived his privilege. *See* Opp'n at 2-5. Such an
13 assertion misses the point.

14 **1. Mr. Vanisi has not waived confidentiality or privilege because of**
15 **the document dated March, 2002.**

16 Under the Nevada Rules of Professional Conduct, "A lawyer shall not reveal
17 the information relating to representation of a client unless the client gives informed
18 consent" NRPC 1.6(a). "Informed consent" denotes the agreement by a person to
19 a proposed course of conduct after the lawyer has communicated adequate
20 information and explanation about the material risks of and reasonably available
21 alternatives to the proposed course of conduct." NRPC 1.0(e). Here, Mr. Vanisi could
22 not give informed consent because of the apparent confusion about the relationship
23 between the Washoe County Public Defender and the Washoe County District

1 Attorney.

2 First: it was wholly inappropriate for the Washoe County District Attorney's
3 office to be involved in drafting the waiver. *See* Ex. 1. The district attorney's office
4 has no role in determining what prior counsel could disclose to successor counsel.
5 That the district attorney's office was involved necessarily implies one of two
6 possibilities. If the district attorney's office inserted itself into the process, they had
7 no right to, and post-conviction counsel erred by involving it. It follows that Mr.
8 Vanisi's consent is not informed because post-conviction counsel could not have
9 possibly informed Mr. Vanisi of a fact that post-conviction counsel himself was wrong
10 about. If, alternatively, it was the Washoe County Public Defender's office that
11 insisted on approval from the district attorney's office, the public defender's office had
12 no right to do so. And, post-conviction counsel's error in humoring their mistake,
13 again, prevents Mr. Vanisi's consent from being informed.

14 Second: post-conviction counsel erroneously believed that the Washoe County
15 District Attorney's Office represented the Washoe County Public Defender's Office.
16 *See* Hr'g Tr. at 5. Regardless of where this error stemmed from, post-conviction
17 counsel could not "communicate adequate information and explanation" to Mr. Vanisi
18 "about the material risk of and reasonably available alternatives to the proposed
19 course of action." NRPC 1.0(e).

20 Put simply, post-conviction counsel could not have communicated adequate
21 information to Mr. Vanisi if post-conviction counsel himself was mistaken about the
22 role of the district attorney in Mr. Vanisi's post-conviction proceedings.
23

1 **2. Mr. Vanisi has not waived confidentiality or privilege by filing his**
2 **habeas petition.**

3 The State, in its Opposition, repeatedly confuses “privilege” and
4 “confidentiality” in an attempt to conflate their meanings and draw this Court into
5 concluding that a statutory waiver of privilege operates to strip attorney-client
6 communications of their confidential nature. Such a position is completely
7 unsupported, as referenced by the fact that the State fails to cite to a single case in
8 support of such a position.

9 In Nevada (as in most other states), when a defendant raises an issue alleging
10 ineffective assistance of counsel, privilege – a creature of statute – is waived by a
11 corresponding statute. A lawyer’s ethical duty of confidentiality, however, exists
12 independently of any privilege or waiver thereof. By inducing Mr. Vanisi’s former
13 counsel and members of the trial team to violate Mr. Vanisi’s rights to confidentiality,
14 the Washoe County District Attorney’s Office acted unethically, and pursuant to
15 Nevada precedent, must be disqualified from further prosecution of this case.

16 **a. The State’s Reliance on Opinion No. 55 is Fundamentally**
17 **Misplaced**

18 Opinion No. 55 is a non-binding opinion issued by a group of lawyers whose
19 qualifications to opine on issues of criminal law or legal ethics are unknown. It has
20 neither been adopted by the Nevada Supreme Court, nor subjected to public
21 comment. Were it adequately researched or supported by the law of other
22 jurisdictions, such lapses may entitle it to some deference, but it falls into neither of
23 these categories. Opinion No. 55, as written, ignores and distorts vast amounts of
contrary precedent, and inflates the relevance of holdings in its favor. It summarily

1 repudiates ABA Formal Opinion 10-456 without adequately explaining its reasons
2 for doing so. Opinion No. 55 is, in short, an advocacy brief. It should not be followed
3 by this Court.

4 **(1) Undersigned Counsel Fully Complied With The
Nevada Rules Of Professional Conduct**

5 The State argues that Mr. Vanisi's counsel behaved unethically by failing to
6 "acknowledge authority contrary to their position, even when invited to do so." *Opp.*
7 at 2. Such argument, made without citation to any statute or ethical rule,
8 presumably relies on Nevada Rule of Professional Conduct 3.3(a)(2)'s requirement
9 that a lawyer "shall not knowingly . . . [f]ail to disclose to the tribunal legal
10 authority in the controlling jurisdiction known to the lawyer to be directly adverse
11 to the position of the client and not disclosed by opposing counsel."

12 NRPC 3.3(a)(2), firstly, only applies to "legal authority in the controlling
13 jurisdiction." Opinion No. 55 "is advisory only. It is not binding upon the courts,
14 the State Bar of Nevada, its Board of Governors, any person or tribunal charged
15 with regulatory responsibilities, or any member of the State Bar." *State's Exhibit 1*,
16 p. 6 (bold in original). NRPC 3.3(therefore does not apply in this situation.

17 Second, counsel's duty is only triggered where contrary authority is "not
18 disclosed by opposing counsel." NRPC 3.3(a)(2). The State eagerly pointed out
19 Opinion No. 55 in its own filing, thus obviating any need for Mr. Vanisi's counsel to
20 inform the Court.

21 Finally, NRPC 3.3 provides no timeline for disclosure. Here, the State
22 informed instant counsel of Opinion No. 55, by e-mail, one business day prior to
23

1 filing the instant Opposition. Opinion No. 55 itself was published by the Nevada
2 State Bar *after* Mr. Vanisi's original motion was filed. Given the short time span
3 between notification of adverse "authority" and the State's accusation, the State's
4 feigned complaint should be disregarded.

5 **(2) Opinion No. 55 Ignores The Majority Of Jurisdictions**
6 **Which Follow ABA Formal Opinion 10-456**

7 The State argues that Mr. Vanisi's motion to disqualify is based upon nothing
8 more than "ABA Formal Opinion 10-456, which has never been adopted by Nevada
9 and the declaration of some law professor who has no authority to dictate how
10 Nevada attorneys should comport themselves." Opp. At 2. The State's vitriol
11 notwithstanding, Mr. Vanisi's motion is supported by the majority of states asked to
12 pass on the propriety of the behavior in question.

13 In Arizona, as in Nevada, the filing of an ineffective assistance of counsel
14 claim operates as a waiver of privilege as to the specific areas of ineffective
15 assistance claimed. *Waitkus v. Mauet*, 157 Ariz. 339, 340, 757 P.2d 615, 616 (Ct.
16 App. Ariz. 1988). However, Arizona law is careful to clarify that this waiver of
17 attorney-client communication privilege does not constitute a waiver of work-
18 product protections. *Id.* Arizona, likewise, does not allow pre-hearing discovery of
19 this information, providing that "[a]t most, case law would permit the questioning of
20 the attorney at an evidentiary hearing to determine the validity of a defendant's
21 ineffective assistance claim." *Id.*

22 Similarly, the state of Georgia requires judicial oversight of a claimed waiver
23 of privilege. Following the majority position, Georgia limits waiver of attorney-

1 client privilege to the specific and narrow grounds on which ineffective assistance of
2 counsel is alleged. *Waldrip v. Head*, 272 Ga. 572, 579, 532 S.E.2d 380, 387 (Ga.
3 2000). Georgia, again following the majority position, requires a court-supervised
4 discovery process: “Initially, petitioner’s current counsel determines the documents
5 waived by the privilege. When the state disagrees, the parties should attempt to
6 resolve their dispute; if they are unable to reach an agreement, the state may move
7 for an in-camera inspection of the disputed parts of the files. At that point, the
8 habeas court needs to review the files and order the disclosure of the parts that are
9 relevant to the issues raised.” *Id.*

10 As noted, the majority of states, either through judicial opinion or ethical
11 guidance from a state bar committee, follow the reasoning and adopt the conclusion
12 of the ABA Committee in Formal Opinion 10-456. *See State v. Lewis*, 36 So.3d 72,
13 78 (Ct. Crim. App. Ala. 2008) (trial court must conduct an *in camera* inspection of
14 file to determine to what extent privilege has been waived and disclosure of trial file
15 mandated); *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (N.C. 2000)
16 (finding error where trial court ordered former counsel to engage in *ex parte*
17 interview with prosecuting attorney); *State v. Taylor*, 327 N.C. 147, 155, 393 S.E.2d
18 801, 801 (N.C. 1990) (requiring issuance of subpoena and judicial oversight of extent
19 to which ineffective assistance filing waives privileges); *Virginia State Bar Comm.*
20 *On Legal Ethics, Formal Op. 1859* (2012) (concluding that a lawyer should refrain
21 from revealing information learned during the representation of a former client
22 unless “under judicial supervision in a formal proceeding, after a full determination
23

1 of what information should be revealed, and without the danger of revealing more
2 information than would be permitted..."); *Utah State Bar Eth. Advisory Op.*
3 *Committee Op. 05-01*, ¶ 2 (April 28, 2005) ("Absent a court order requiring the
4 attorney's testimony, and notwithstanding a subpoena served on the attorney by the
5 prosecution, the attorney may not divulge any attorney-client information, either to
6 the prosecution or in open court.").

7 Similarly, numerous federal courts have found persuasive the reasoning
8 employed by Formal Opinion 10-456, and ordered cases to proceed consistent with
9 its recommendations. *See, e.g. United States v. Evans*, 113 F.3d 1457, 1468 (7th
10 Cir. 1997); *United States v. Stone*, 824 F.Supp.2d 176, 187 (D. Me. 2011); *Cross v.*
11 *United States*, 2016 WL 4766490, *2 (S.D.W.V. 2012) (explicitly adopting Formal
12 Opinion 10-456); *Nelson v. United States*, 2010 WL 3398791, *3 (W.D. Mo. 2010)
13 (directing trial counsel to submit affidavits, which will be reviewed by the court and
14 habeas counsel, prior to release to the prosecution). Tellingly, most commentators
15 to analyze the issue conclude that trial counsel's duties of loyalty to their former
16 clients require them to *not* cooperate with prosecution attempts to discover
17 information, even where such cooperation is permitted. *See Motivation Matters:*
18 *Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering*
19 *to Self-Interest in Response to Allegations of Ineffective Assistance in Death*
20 *Penalty Cases*, 42 Hofstra L. Rev. 473 (Eldred, T.) (Winter, 2013); *The Lawyer's*
21 *Prisoner's Dilemma: Duty and Self-Defense in Postconviction Ineffectiveness*
22 *Claims*, 79 Fordham L. Rev. 699 (Newmark, J.) (Nov. 2010) ("Courts that permit
23

1 defense counsel to provide substantial assistance to the prosecution ... do not base
2 these decisions on actual ethical considerations; rather, they subordinate these
3 considerations to address prosecutorial and judicial convenience.”).

4 To the extent that Mr. Vanisi “only” relies on an ABA ethical opinion, that
5 opinion is supported by numerous state courts, ethical advisory opinions, and
6 published works of scholarship.

7 **(3) Opinion No. 55 Incorrectly Cites To States Which Do**
8 **Not Support Its Position**

9 Opinion No. 55 cites as persuasive authority *United States v. Straker* for the
10 proposition that it is acceptable to allow *ex parte* communication between former
11 counsel and a prosecutor defending an ineffective assistance of counsel claim, but
12 declines to mention that the court explicitly based its ruling on the fact that District
13 of Columbia Rule 1.6 differs from, and is not based on Model Rule of Professional
14 Conduct 1.6. 258 F.Supp.3d 151, 156 (D.D.C. 2017).²¹

15 Opinion No. 55 further cites to *In Re Disciplinary Proceedings against*
16 *Thompson*, an opinion by the Wisconsin Supreme Court declining to impose
17 sanctions against an attorney for his sending a 6 page affidavit to the trial court,
18 detailing his case activities, where an ineffective assistance of counsel claim had
19 been raised against him. 353 Wis. 2d 556, 847 N.W.2d 793 (Wis. 2014).

20 Troublingly, Opinion No. 55 fails to mention that the Wisconsin Supreme Court

21 ²¹ The Standing Committee also cites to the District of Columbia Bar in Ethics
22 Opinion 364 (Jan. 2013) for the proposition that judicial supervision is not necessary
23 for a lawyer to reveal confidential information. *Op. No. 55* at 5. Again, the Standing
Committee neglects to mention that the Ethics Opinion cited explicitly notes that
“[t]he D.C. Rules differ from the ABA Model Rules.” *District of Columbia Bar*, Ethics
Opinion No. 364 (Jan. 2013).

1 noted that “[t]he fact that Attorney Thompson sought and obtained leave of court to
2 respond to the motions is critical to our ruling in this case.” *Id.* at 799.

3 The North Carolina State Bar, as cited in Opinion No. 55, issued its opinion
4 that North Carolina’s analogue to MRPC 1.6 does not require a lawyer to confine his
5 disclosures to a court setting. *North Carolina State Bar*, Formal Ethics Op. 2011-16
6 (Jan. 2012). In reaching this conclusion, however, the North Carolina State Bar
7 ignored contrary holdings by the North Carolina Supreme Court. As discussed,
8 below, the North Carolina Supreme Court in *State v. Taylor* required issuance of a
9 subpoena, and judicial oversight, of the extent to which an ineffective assistance
10 filing waived privileges held by a client. 327 N.C. 147, 393 S.E.2d 801. The North
11 Carolina Supreme Court then upheld *Taylor* in *State v. Buckner*, finding error
12 where a trial court ordered former counsel to engage in an *ex parte* interview with
13 the prosecuting attorney. 351 N.C. 401, 527 S.E.2d 307.

14 Opinion No. 55, in addition to failing to recognize the existence of authority
15 contrary to its position, appears to mischaracterize the rulings of other state courts
16 and state ethical committees in its decision.

17 **b. A Statutory Waiver Of Privilege Does Not Waive**
18 **Confidentiality, Nor Absolve An Attorney For Ethical**
Breaches

19 As explained in Mr. Vanisi’s Motion to Disqualify the Washoe County District
20 Attorney’s Office, “the [Washoe County Public Defender’s] representation of Vanisi
21 is protected by three separate, but related, doctrines: the attorney-client privilege,
22 the work product doctrine, and trial counsel’s ongoing duty of confidentiality.”

23 *Motion* at 4.

1 The privilege which prevents the disclosure of confidential attorney-client
2 communications is codified at NRS 49.095. Its waiver is codified at NRS 49.385.
3 However, Mr. Vanisi is not moving for disqualification of the Washoe County
4 District Attorney's Office on grounds of violation of privilege, his motion is based on
5 the Washoe County District Attorney's Office violating the Nevada Rules of
6 Professional Conduct, specifically NRPC 1.6 (duty of confidentiality) and 1.9 (duties
7 to former clients).

8 Even Opinion No. 55, despite its faults, recognizes that NRPC 1.6 is broader
9 in scope and effect than NRS 49.095. *Op. No. 55* at 2 ("However, the information
10 protected under Rule 1.6 extends beyond the information protected by the attorney-
11 client privilege under NRS 49.095. The lawyer's ethical duty to preserve a client's
12 confidentiality is thus broader than the evidentiary privilege.") (internal citations
13 omitted).

14 The fact that privilege is partially waived by statute, while superficially
15 similar to a lawyer's duty of confidentiality, is wholly distinct such that the
16 WCDAO's ethical lapses here cannot be excused.

17 **3. Mr. Vanisi's Mandatory Filings Do Not Permit The State To**
18 **Breach Its Ethical Duties**

19 The State argues that Mr. Vanisi waived privilege by filing a number of
20 internal documents related to his ineffective assistance of counsel claims. The
21 State, again, confuses privilege and confidentiality. By filing a petition for writ of
22 habeas corpus alleging ineffective assistance of counsel, Mr. Vanisi waived
23 privilege, but only to the extent necessary to litigate his claims under the

1 supervision of this Court. NRS 34.735. Due to the necessity of averring facts
2 which, if true, would entitle Mr. Vanisi to relief, Mr. Vanisi disclosed documentation
3 which supported his claims that trial counsel was ineffective in a number of areas.
4 *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).²²

5 This issue is wholly separate from the State's actions in going outside the
6 judicially-supervised discovery process and conducting an *ex parte* interview of trial
7 counsel and trial investigators. NRS 34.780 applies not simply to the petitioner, but
8 to both parties. NRS 34.780(2). Discovery by the State must be based on good
9 cause and can only be conducted with leave of the Court. Such judicial approval
10 typically would address questions of overbreadth and relevance, to ensure that only
11 properly-discoverable information is obtained. *See Opposition to Amended Motion*
12 *for Order to Conduct Discovery*, CR98-0516 (April 26, 2018).

13 Here, the State failed to comply with the statutory discovery process. They
14 engaged in extrajudicial interviews of trial counsel and trial investigators and
15 obtained document discovery without first seeking leave of the Court. As such,
16 disqualifying them from this case is appropriate.

17 **B. This Court must grant an evidentiary hearing on these issues.**

18 If the Court does not order disqualification, it should permit an evidentiary
19 hearing. As to the March, 2002 document, this Court should order a hearing to
20 determine if it was supported by informed consent. Additionally, this Court should

21
22 ²² Additionally, the document that the State cites as most strongly supporting
23 its position, the Rule 250 memorandum, was previously filed during the first state
post-conviction proceedings. *See* Ex. 4 at 1, line 27-28 (index of appendix for Case No.
50607); *see also* Hr'g Tr. 43 (May 2, 2005).

1 order a hearing to determine what information the Washoe County District
2 Attorney's Office received, which, in turn will allow this Court to determine if the
3 district attorney's office received confidential materials or information.

4 **III. CONCLUSION**

5 The Washoe County District Attorney's office, despite knowing that
6 extrajudicial inquiry into confidential information possessed by Mr. Vanisi's former
7 trial team was, at the very least, of openly-disputed provenance, nonetheless
8 engaged in secret interviews of former attorneys and non-attorney trial team
9 members, and acquired trial team documents from a presently-unknown source.
10 The filing of Opinion No. 55 does nothing to change their actions, which occurred
11 before the release of the opinion.

12 In the majority of jurisdictions to review these issues, the Washoe County
13 District Attorney Office's conduct would violate state ethical rules founded on
14 MRPC 1.6 and 1.9, and warrant disqualification. This Court should follow the
15 position taken by their sister jurisdictions that conducting extrajudicial
16 investigations into confidential and potentially-privileged matters without judicial
17 scrutiny is an ethical violation.

18 If the Court is, based purely on the briefings, disinclined to impose such a
19 sanction, however, it should at the very least hold a hearing where the WCDAO,
20 and the trial team, are called to testify as to the communications between them.
21 Only then, with a full understanding of the information obtained in derogation of
22 Vanisi's rights to confidentiality, can this Court make an informed decision as to
23 what remedy is appropriate.

Currently pending before this Court are three documents, which warrant special mention: (1) Request from Defendant (July 24, 2018); (2) State's Motion to Set Hearing Regarding Vanisi's Request to Waive Evidentiary Hearing (July 25, 2018); and (3) Suggestion of Incompetence and Motion for Evaluation (July 25, 2018). Given that the pleadings regarding disqualification go to whether opposing counsel may even have a position on the other issues, Mr. Vanisi requests that this Court render its ruling on the disqualification issue before addressing any other issues.

DATED this 27th day of July, 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

/s/ Scott Wisniewski
SCOTT WISNIEWSKI
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Attorney for Respondent

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

The undersigned does hereby affirm that the preceding REPLY TO
OPPOSITION TO MOTION TO DISQUALIFY THE WASHOE COUNTY DISTRICT
ATTORNEY'S OFFICE filed in the District Court Case No. CR98-P0516 does not
contain the social security number of any person.

DATED this 27th day of July, 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

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INDEX OF EXHIBITS

Exhibit	Document Description
1.	Response to Motion for a Protective Order, dated March 9, 2005
2.	Letter from Scott Edwards to Steve Gregory, dated March 19, 2002
3.	Supplemental Response to Motion for a Protective Order, dated March 16, 2005
4.	Appellant's Appendix to Appeal from Denial of Post Conviction Habeas Petition filed in the Nevada Supreme Court, dated August 4, 2008
5.	Facsimile from Jeremy Bosler to Scott Edwards, dated April 5, 2002

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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 27th day of July, 2018, a true and correct copy of the foregoing REPLY TO OPPOSITION TO MOTION TO DISQUALIFY THE WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE was filed in open court with the Second Judicial District Court. Service of the foregoing document was made by hand:

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

Joseph R. Plater
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/s/ Sara Jelinek
An Employee of the Federal Public
Defenders Office

FILED
Electronically
CR98-0516
2018-07-27 05:45:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6800811 : yvioria

EXHIBIT 1

EXHIBIT 1

AA07640

ORIGINAL

CODE #3880
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2005 MAR -9 11 2:40

BY *H. Williams* JR.

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

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

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

Dept. No. 4

Respondents.

RESPONSE TO MOTION FOR A PROTECTIVE ORDER

COMES NOW, the Respondent, by and through counsel, and responds to petitioner's motion for a protective order. This response is predicated on the accompanying Points and Authorities.

POINTS AND AUTHORITIES

Petitioner Vanisi has filed a motion for a "protective order" seeking various forms of relief. The State will attempt to respond to each request. First, to the suggestion that any order should allow Vanisi to assert the attorney work-product privilege, the State contends that the attorney is the holder of that privilege. See Lisle v. State, 113 Nev. 679, 696, 941 P.2d 459, 471 (1997); Fellows v. Superior Court, 108 Cal.App.3d (1980). Vanisi has no standing to assert the lawyer's privilege to keep his mental impressions, conclusions and legal theories to himself. Thus, the balance of this response deals only with the assertion that information covered by the attorney-client privilege that has already been disclosed, or that will be disclosed in the course of this litigation, should be kept secret.

1 As to the suggestion that any evidence adduced in this action should be kept secret from
2 the press and the public, the State has no interest except to suggest that fundamental fairness requires
3 that the local press should be given notice and the opportunity to be heard on this matter.

4 As to the suggestion that any evidence adduced in this action should not be available in
5 any subsequent trial, the State first suggests that the issue is not ripe. Just in case the court is inclined to
6 consider such a hypothetical issue, the State has a few comments. First, Vanisi is the plaintiff in this
7 lawsuit. He has absolute control over the very existence of the lawsuit and the nature of the claims to be
8 raised. If he wishes to withdraw his claim of ineffective assistance he is free to do so.

9 The State's primary position is simple. Vanisi has previously expressly, clearly and
10 unconditionally released the Washoe County Public Defender's Office from the attorney-client privilege.
11 Exhibit "A" consists of copies of facsimile transmissions between Marc Picker and your undersigned in
12 March 2002. The State is informed and believes that the signed original waiver was provided to the
13 Washoe County Public Defender. See Exhibit "B" (June 11, 2002 letter from Scott Edwards to Public
14 Defender Michael Specchio acknowledging having previously provided an express waiver). As of this
15 writing the State has not obtained that document, but will seek to supplement the record once that
16 document is provided by the Public Defender.

17 The petitioner relies on the proposition that one cannot be put in the position of choosing
18 between competing constitutional rights. There are several flaws with this proposition, not the least of
19 which is that it is wrong. Litigants must chose between constitutional rights every day. Every defendant
20 who chooses to testify must do so at the expense of the right to refuse to testify. When such a defendant
21 voluntarily elects to testify, in the hopes of avoiding conviction, his statements are admissible in a
22 subsequent re-trial to the same extent that the prior statements of any other witness is admissible.
23 Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707-08 (2000). Similarly, when Vanisi voluntarily
24 elected to make his past communications with his attorneys relevant, in the hopes of avoiding his
25 conviction, by bringing a lawsuit claiming that the lawyers failed in their duty, when he sought an
26 advantage by presenting information relating to his attorneys, he did so with the risk that such

1 information might later be used against him.

2 Another flaw in the proposition is found in the assumption that Vanisi is being forced to
3 chose between constitutional rights. There is no constitutional right to a post-conviction proceeding in
4 which one may inquire into the validity of a judgment of conviction, or the effectiveness of trial counsel
5 leading to that judgment, in a state court.¹ Pennsylvania v. Finley, 481 U.S. 551, 557, 107 S.Ct. 1990,
6 1994 (1987). The procedural vehicle exists purely as a matter of legislative grace. Furthermore, the
7 attorney-client privilege is not a constitutional right. See Murdoch v. Castro, 365 F.3d 699 (9th Cir.
8 2004); United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994)(the attorney-client privilege, while
9 “hallowed,” is not found in the Constitution). Thus, when a prisoner elects to bring a claim of
10 ineffective assistance of counsel in a state court, he thereby runs the risk of revealing what would
11 otherwise be privileged information.

12 Although the court need not decide, the State also contends that Bittaker v. Woodford,
13 331 F.3d 715 (9th Cir. 2003), upon which Vanisi relies, was wrongly decided. The court need not decide
14 if the Ninth Circuit was correct because that court quite clearly limited its ruling to actions arising in the
15 federal court system. 331 F.3d at 726. It did not attempt to create a rule concerning the extent of the
16 waiver of a privilege, existing by state law, that would create a rule of evidence applicable in state
17 courts. In addition, there are several flaws in the decision. Most notably is that the court decided that
18 the future suppression must be required simply because a contrary rule would give an advantage to the
19 government in that future action. 331 F.3d at 724. So far as the State is aware, the mere fact that a rule
20 of law might be beneficial to the prosecution is not a reason for rejecting that rule of law, at least not in
21 the law of this state.

22 The United States Supreme Court once recognized a limited testimonial privilege
23

24
25 ¹There may well be a constitutional right to seek habeas corpus relief in federal courts, but the
26 traditional writ inquires only to see if the petitioner is held pursuant to a judgment of conviction by a
court of competent jurisdiction. The modern post-conviction action in federal courts is a congressional
product and the modern post-conviction action in state courts is not mandated by any constitutional rule.

1 applicable to state courts. If a state court requires a criminal defendant to establish standing in order to
 2 pursue a motion to suppress based on an alleged unconstitutional seizure, then in that limited
 3 circumstance the defendant may do so while being assured that his testimony establishing standing will
 4 not be used as substantive proof of an element of the crime at trial. Simmons v. United States, 390 U.S.
 5 377, 88 S.Ct. 967 (1968). That court has never expanded on that case to hold that whenever a person has
 6 a strong motive to provide evidence, that person may do so with the assurance that the evidence will
 7 never be used against him in any court or in any manner. Such a rule of law would be absurd. The State
 8 notes that by the plain language of Bittaker v. Woodford, counsel for the government was prohibited
 9 from even telling the local prosecutor about the evidence adduced in the federal habeas action.
 10 Furthermore, by the plain language of that same case, the petitioner would be free to perjure himself in a
 11 subsequent trial, free of any concern that he might be impeached. No court, save the Ninth Circuit, has
 12 ever adopted such a rule of law. This court ought not to be the first. The rules of privilege and the rules
 13 of evidence are both established by the state legislature and this court ought not to adopt the ruling of a
 14 federal court, establishing a rule only for federal actions, that would serve to overrule the legitimate
 15 decisions of the legislature.


16 A litigant who makes choices is often confronted with competing considerations. A
 17 defendant who chooses to testify must do so knowing that he is subject to cross-examination and that
 18 cross-examination may yield information helpful to the prosecution. That does not mean that he must be
 19 relieved of the decision or that he may not be subjected to cross-examination. Similarly, when Vanisi
 20 chooses to call the performance of his attorneys into question, he might thereby make available to the
 21 State information that would otherwise remain secret. That does not mean that he must be relieved of
 22 the choice or that the information must remain secret. It means only that he has some tough decisions to
 23 make. The Nevada Supreme Court, construing state law, has followed just that approach and held that
 24 "where a party seeks an advantage in litigation by revealing part of a privileged communication, the
 25 party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter
 26 of that which was partially disclosed." Wardleigh v. Second Judicial District Court, 111 Nev. 345, 354,

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1 891 P.2d 1180, 1186 (1995). That is, held the Court, the privilege is intended as a shield, not a sword.
2 When a litigant elects to deploy his sword, to use the relationship between attorney and client to achieve
3 an advantage, he loses his ability to continue to claim the benefits of the shield. That is the law that
4 should govern this action. Accordingly, the motion for a protective order should be denied.

5 DATED: March 9, 2005.

6 RICHARD A. GAMMICK
7 District Attorney

8 By 
9 TERRENCE P. MCCARTHY
10 Appellate Deputy
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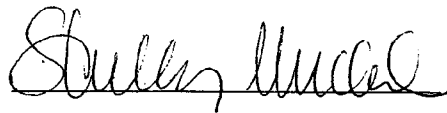
CERTIFICATE OF MAILING

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

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

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

DATED: March 9, 2005.



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EXHIBIT A

FROM: MARC-PICKER

Marc Picker, Esq., Ltd.

691 Sierra Rose Drive, Suite A
Post Office Box 3344
Reno, Nevada 89505
775/324-4533
Fax: 775/322-3014

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 328-3858

To: Terry McCarthy
Of: WCDA
From: Marc Picker, Esq., Ltd.
Client/Matter: Vanisi
Date: April 23, 2002

DOCUMENTS	NUMBER OF PAGES*
Draft Waiver/Release	1

COMMENTS: Terry - Look this over and let me know today whether this covers everything you need to be said. Marc

Original will NOT follow.

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

* NOT COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT.

2JDC05495
AA07648

8VAN1S12JDC05495

RELEASE AND WAIVER

I, Siaoisi Vanisi, do hereby expressly waive the attorney-client privilege between myself and all members of the Washoe County Public Defenders Office - past or present - as it relates to that office's representation of me on criminal charges in the case underlying my current Petition for Writ of Habeas Corpus pending in the Second Judicial District Court.

This waiver expressly allows my previous trial and appellate counsel to discuss my case with the district attorney's office.

I also recognize and intend that this waiver allows the public defenders office to release all papers, tapes, work product, memos, investigative reports, records, notes and documents to my current attorneys.

Dated this ____ day of March, 2002.

SIAOSI VANISI

Witnessed by

Marc Picker, Esq.

This is fine.
Toy

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EXHIBIT B



Washoe County District Attorney

RICHARD A. GAMMICK
DISTRICT ATTORNEY

TELECOPY TRANSMITTAL MEMORANDUM

FAX NO. (702) 328-3858

TEL. NO. (702) 328-3522

TO: *Marc Picker, Esq.*

FAX NO. *322-3014*

FROM: *Terry McClarthur*

SUBJECT: *Vanisi*

DATE: *April 24, 2002*

This telecopy transmittal consists of 2 pages, including this memorandum. Should you have any difficulties with transmission or receipt, please contact us at the above telephone number.

REMARKS: _____

Washoe County Court House, 75 Court Street, P.O. Box 11130, Reno, NV 89520
(702) 328-3200 Fax - Criminal 328-3844 • Civil 328-3415

2JDC05498

AA07651

SCOTT W. EDWARDS
ATTORNEY AT LAW

1030 Holcomb Avenue
Reno, NV 89502

Phone: (775) 786-4300
Fax: (775) 786-1361
NVlaw@aol.com

June 11, 2002

SENT VIA FAX 328-3596

Michael R. Specchio
Washoe County Public Defender
P.O. Box 30083
Reno, NV 89520

RE: Vanisi post-conviction petition

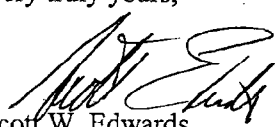
Dear Mr. Specchio:

As you may know, Marc Picker, Esq., and I have been appointed to represent Siasoi Vanisi in post-conviction proceedings in state court. Pursuant to our order of appointment, the Public Defender's office has been directed to provide us with the entire file in your possession. We have now received the two boxes of copies (and delivered a check for \$1,070). Our review of the file has not yielded the affidavit(s) required by counsel in your office pursuant to Supreme Court Rule 250, commonly referred to as the "250 memo". Kindly provide this to us forthwith. You have already been provided a release signed by Mr. Vanisi, waiving attorney-client privilege relative to the release of this information to us.

The absence of the Rule 250 memo has caused Mr. Picker and I to wonder what other items from your file have not been forwarded to us. Please provide us with an index relative to the items in your file so that we may compare our copies with the items in your file. Absent such an index we cannot certify that you have provided everything to us as required by Supreme Court Rule and Court Order.

Please let Mr. Picker or myself know when we can pick up the memoranda and index. If we do not hear from you shortly we will be compelled to seek another court order. Thank you in advance for your cooperation and assistance.

Very truly yours,


Scott W. Edwards
Attorney at Law

FILED
Electronically
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2018-07-27 05:45:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6800811 : yvioria

EXHIBIT 2

EXHIBIT 2

SVanisi1 SEDW1492

SCOTT W. EDWARDS
ATTORNEY AT LAW

1030 Holcomb Avenue
Reno, NV 89502

Phone: (775) 786-4300
Fax: (775) 786-1361
NVlaw@aol.com

March 19, 2002

Steve Gregory
Chief Deputy Public Defender
P.O. Box 30083
Reno, NV 89520

RE: Vanisi post-conviction petition

Dear John:

As you may know, Marc Picker, Esq., and I have been appointed to represent Siaosi Vanisi in post-conviction proceedings in state court. Pursuant to our order of appointment, the Public Defender's office has been directed to provide us with a copy of the entire file in your possession. I am just writing to follow up and make sure that you have received a copy of the order. Please contact me if you have not. Otherwise, kindly give me some guidance on when we might expect the copies. After we have a better grasp on the case, Marc and I would like to meet and discuss the case with you in depth.

Very truly yours,

Scott W. Edwards
Attorney at Law

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AA07654

FILED
Electronically
CR98-0516
2018-07-27 05:45:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6800811 : yvioria

EXHIBIT 3

EXHIBIT 3

ORIGINAL

CODE #4105
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775)328-3200
Attorney for Respondent

2005 MAR 16 PM 1:33

CLERK, JR.
K. Sullivan
CLERK

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

SIAOSI VANISI,

Petitioner,

v.

Case No. CR98P0516

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

Dept. No. 4

Respondents.

SUPPLEMENTAL RESPONSE TO MOTION FOR A PROTECTIVE ORDER

In responding to the petitioner's Motion for a Protective Order, the State represented that Vanisi had previously executed an unconditional waiver of the attorney-client privilege. That document is presented herewith as Exhibit "C."

DATED: March 16, 2005.

RICHARD A. GAMMICK
District Attorney

By *Terrence P. McCarthy*
TERRENCE P. MCCARTHY
Appellate Deputy

Evans 12JDC05484

CERTIFICATE OF MAILING

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

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

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

DATED: March 16, 2005.

Shelly Muddel

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EXHIBIT C

RELEASE AND WAIVER

I, Siaoosi Vanisi, do hereby expressly waive the attorney-client privilege between myself and all members of the Washoe County Public Defenders Office - past or present - as it relates to that office's representation of me on criminal charges in the case underlying my current Petition for Writ of Habeas Corpus pending in the Second Judicial District Court.

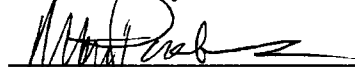
This waiver expressly allows my previous trial and appellate counsel to discuss my case with the district attorney's office.

I also recognize and intend that this waiver allows the public defenders office to release all papers, tapes, work product, memos, investigative reports, records, notes and documents to my current attorneys.

Dated this ____ day of March, 2002.


SIAOSI VANISI

Witnessed by


Marc Picker, Esq.

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Electronically
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Jacqueline Bryant
Clerk of the Court
Transaction # 6800811 : yvioria

EXHIBIT 4

EXHIBIT 4

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SIAOSI VANISI,

Case No. 50607

Appellant,

Death Penalty Case

vs.

THE STATE OF NEVADA,

Respondent.

APPELLANT'S APPENDIX

VOLUME I

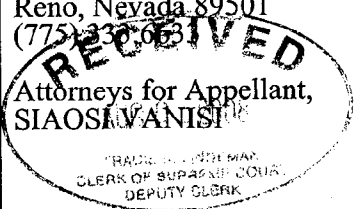
Appeal from Denial of Post-Conviction Habeas Petition, Second Judicial Dist. Ct.,
The Honorable Connie Steinheimer, Dept. 4, Dist. Ct. Case No. CR98P0516.

SCOTT W. EDWARDS, ESQ.
State Bar No. 3400
729 Evans Ave., Reno, Nevada 89512
(775) 786-4300
THOMAS L. QUALLS, ESQ.
Nevada State Bar No. 8623
216 East Liberty Street
Reno, Nevada 89501
(775) 338-0663

RICHARD GAMMICK, ESQ.
Washoe County District Attorney
TERRENCE McCARTHY
Appellate Deputy District Attorney
P.O. Box 30083
Reno, Nevada 89520

Attorneys for Appellant,
SIAOSI VANISI

Attorneys for Respondent,
STATE OF NEVADA



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EXHIBIT 5

EXHIBIT 5

TRANSMISSION VERIFICATION REPORT

TIME : 04/05/2002 14:32
 NAME : LAW OFFICES
 FAX : 7757861361
 TEL : 7757867118

DATE, TIME	04/05 14:31
FAX NO./NAME	3283596
DURATION	00:00:58
PAGE(S)	04
RESULT	OK
MODE	STANDARD ECM

1030 Holcomb Ave. Reno, NV 89502 FAX 775-786-1361,
 Phone 775-786-4300

**Law Office of
 Scott W. Edwards**

Fax

To: Jeremy Bosler, WCPD Office

From: Scott W. Edwards, ESQ 

Fax: 775-328-3596

Pages: 4 (including this one)

Phone:

Date: 04/05/02

Re: Vanisi

CC:

Urgent **XFor Review**

☐ **Please Comment**

XPlease Reply

☐ **Please Recycle**

● **Comments:** Jeremy,

Here is a copy of the order. Please prepare a copy of the entire file (including transcripts and pleadings) and notify when ready for pick-up. Thanks in advance.

AA07666

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SVanisi SEDW1680

1 CODE No. 3880
2 CHRISTOPHER J. HICKS
3 #7747
4 P. O. Box 11130
5 Reno, Nevada 89520-0027
6 (775) 328-3200
7 Attorney for Respondent

8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE

12 * * *

13 SIAOSI VANISI,

14 Petitioner,

Case No. CR98-0516

15 v.

16 THE STATE OF NEVADA,

Dept. No. 4

17 Respondent.
18 _____/

19 STATE'S RESPONSE TO VANISI'S "SUGGESTION OF
20 INCOMPETENCY AND MOTION FOR EVALUATION"

21 COMES NOW, the State of Nevada, by and through Jennifer P. Noble, Chief
22 Appellate Deputy, and Joseph R. Plater, Appellate Deputy, and responds to Vanisi's
23 Suggestion of Incompetency and Motion for Evaluation.

24 Since Vanisi was charged with the murder of Sergeant Sullivan and other crimes,
25 his competence and overall mental health have been repeatedly evaluated by mental
26 health professionals. In 2005, this Court found that Vanisi was competent to assist his
counsel with respect to his last round of post-conviction proceedings. See March 16,
2005 Order Finding Petitioner Competent to Proceed.

1 On May 30, 2018, this Court canvassed Vanisi on his professed desire to waive
2 his appearance with the upcoming 2018 evidentiary hearing. Vanisi appeared with his
3 attorneys from the Federal Public Defender (FPD) at that time. Because none of those
4 attorneys indicated to the Court that they did not believe that Vanisi was capable of
5 making a knowing, voluntary, and intelligent waiver, the State assumes that the FPD did
6 not have concerns about Vanisi's competence. Otherwise, the FPD surely would not
7 have allowed Vanisi to waive any rights.

8 Less than two months later, on July 20, 2018, Vanisi wrote a kite to the Court
9 asking to waive his evidentiary hearing, and indicating that "I suppose there will be a
10 hearing and I can give my explanation to the Court then if it wishes to hear additional
11 information." The kite was filed on July 24, 2018. Based on this communication from
12 Vanisi, on July 25, 2018, the State requested that he once again be brought before the
13 Court to verify 1) that Vanisi wishes not to appear at the October 1, 2018; and 2) that the
14 current litigation being pursued by the FPD is with Vanisi's full knowledge and consent.
15 That same day, the FPD filed its "Suggestion of Incompetence and Motion for
16 Evaluation." The Motion asks that Vanisi's competence once again be evaluated for
17 competency. By way of explanation, the FPD offered only that it "has a good faith doubt
18 about Mr. Vanisi's competence."

19 Moreover, it is not at all clear that Vanisi must be competent if he were to attend
20 the upcoming hearing, and he has made a valid waiver in any event. In its September
21 28, 2017 Order Affirming in Part, Reversing In Part and Remanding, the Nevada
22 Supreme Court indicated that the ruling in *Rohan ex rel. Gates*, 334 F. 3d 803 (9th Cir.
23 2013), "was not binding authority on the Nevada State District Court" and indicated that
24 "...this court has not addressed whether a capital defendant must be competent during
25 postconviction proceedings..." *Id.*, pp. 4-5. Here, Vanisi made a knowing, voluntary,

26 / / /

1 and intelligent waiver not to attend on May 30, 2018, and his counsel apparently had no
2 good faith basis to challenge competency at that time.

3 Before ordering even more competency evaluations, this Court should consider
4 inquiring as to whether the “good faith doubt” indicated by counsel has been
5 engendered by Vanisi’s July 20, 2018 letter seeking to waive the hearing. If that letter is
6 the only basis, the State suggests it is simply not enough. There well may be additional
7 events that have occurred since May 30, 2018 that support legitimate inquiry.
8 Alternatively, there may be no such events. Based on this Motion and other recent
9 motions, the State is growing increasingly concerned about strategic attempts to dilate
10 these proceedings. In this case where Vanisi’s competence has been evaluated and re-
11 evaluated, the FPD should be required to articulate to the Court specific reasons why it
12 believes Vanisi went from competent on May 30, 2018 to incompetent by July 25, 2018.

13 AFFIRMATION PURSUANT TO NRS 239B.030

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

16 DATED: July 30, 2018.

17
18 CHRISTOPHER J. HICKS
District Attorney

19
20 By /s/ JENNIFER P. NOBLE
JENNIFER P. NOBLE
Chief Appellate Deputy

21
22
23 By /s/ JOSEPH R. PLATER
JOSEPH R. PLATER
Appellate Deputy

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on July 30, 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

Joanne Diamond, Assistant Federal Public Defender

Scott Wisniewski, Assistant Federal Public Defender

/s/ Margaret Ford
MARGARET FORD

3790

RENE L. VALLADARES

Federal Public Defender

Nevada Bar No. 11479

RANDOLPH M. FIEDLER

Assistant Federal Public Defender

Nevada Bar No. 12577

randolph_fiedler@fd.org

JOANNE L. DIAMOND

Assistant Federal Public Defender

Nevada Bar No. 14139C

joanne_diamond@fd.org

SCOTT WISNIEWSKI

Assistant Federal Public Defender

Nevada Bar No. 14675C

411 E. Bonneville, Ste. 250

Las Vegas, Nevada 89101

(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

**REPLY TO STATE'S RESPONSE TO
PETITIONER'S SUGGESTION OF
INCOMPETENCE AND MOTION
FOR EVALUATION**

(Death Penalty Habeas Corpus Case)

1 **I. INTRODUCTION**

2 In August of 1998, before Mr. Vanisi's first trial, Michael Specchio requested a
3 copy of an evaluation done by the prison.¹ By way of explanation, Mr. Specchio stated:

4 [O]ne of the reasons that I'm asking for this copy of the
5 evaluation to me, we, the State and myself have received
6 various reports regarding some bizarre behavior on behalf
 of Mr. Vanisi. From talking gibberish to washing himself
 in his own urine to dancing naked. I mean, stuff that I do
 on Saturday night but stuff that's not the norm.

7 Hr'g Tr. 19, Aug. 4, 1998. Mr. Specchio indicated the Court should consider a
8 competency evaluation, but stopped short of requesting one: "I guess a guy can dance
9 naked and wash himself in his own urine and be competent as anybody else. I don't
10 know." *Id.*

11 This was not the first time that Mr. Vanisi's behavior convinced counsel to
12 raise concerns about his mental health. By May of 1999, Stephen Gregory was raising
13 Mr. Vanisi's bizarre behavior with the Court; by June, Mr. Gregory requested that
14 the Court order an evaluation so that a medical professional could prescribe
15 medications for Mr. Vanisi.² Mr. Gregory explained:

16 But we don't feel—although I was able to talk to him, and
17 I haven't had a substantive conversation with him since
18 March, and I can't keep him on the substantive issues,
 because we go off on to other issues that I don't care to put
 on the record at this point.

18

19 So we don't feel at this point, and I don't know quite
20 how to put this, that he is emotionally capable of handling
21 this hearing. So we're going to ask this Court to send him
 to Lake's Crossing for an evaluation and hopefully some
 sort of drug regimen that will allow us to continue.

22 ¹ Hr'g Tr. 16, Aug. 4, 1998.

23 ² Hr'g Tr. 3-4, May 12, 1999; Hr'g Tr. 1-2, June 1, 1999.

1 Hr'g Tr. 1-2, June 1, 1999. Mr. Gregory further offered: "I will indicate as an officer
2 of the court that he cannot control his emotions. I just went to speak to him in the
3 holding cell. He burst into tears. It's my opinion that he not putting an act on." *Id.* at
4 3.

5 During the prior post-conviction proceedings, Scott Edwards and Thomas
6 Qualls both indicated that Mr. Vanisi had partially undressed during an interview
7 with them, that he broke out into song, that he indicated he had not slept in eight
8 days, and that he was an independent sovereign, that he, while naked, made snow
9 angels in the yard, among other observations.³

10 Indeed, during the entire time that Mr. Vanisi has been imprisoned, medical
11 professionals have adjusted his medication regime in response to fluctuations and
12 flare-ups of his mental health issues. *See* Ex. 164 at 61-67 (Dr. Foliaki Report,
13 summarizing medication history). The history reflects that, during different periods,
14 doctors were prescribing anti-psychotics, mood stabilizers, and anti-depressants. *Id.*

15 There can be no question that Mr. Vanisi suffers from severe mental illness.
16 *See* Ex. 164 (Dr. Foliaki: "Mr. Vanisi suffers from a chronic and disabling mental
17 disorder known as Schizoaffective Disorder that greatly impairs his cognitive,
18 emotional and behavioural control and the evidence for this is unequivocal . . ."); Ex.
19 163 (Dr. Mack: "Mr. Vanisi's psychotic Disorder appeared to begin in his early
20 twenties, which is consistent with the typical course of schizophrenic illness. To

21
22 ³Edwards Aff. (Nov. 8, 2004); Qualls Aff. (Nov. 8, 2004); *see* Mot. for Stay of
23 Post-Conviction Habeas Corpus Proceedings and for Transfer of Petitioner to Lakes
Crossing for Psychological Evaluation and Treatment (Hearing Requested) (Nov. 9 ,
2004).

1 reiterate, Mr. Vanisi's presentation of extreme mental illness is not something, in my
2 opinion, that can be consistently malingered for a decade and a half. Mr. Vanisi
3 continues to persistently [be] hypomanic and to display some schizophrenic
4 symptoms despite copious psychotropic medication including IM Haldol, Seroquel,
5 Vistaril and Lithium.”).

6 And, it was in light of Mr. Vanisi's mental health issues, that undersigned
7 counsel requested that Mr. Vanisi remain at Ely State Prison, where his established
8 medication and structured routine had resulted in a relative period of stability.⁴ The
9 State opposed this request, and proffered a declaration indicating that Mr. Vanisi
10 would be returned to Ely within a week of transport to Carson City. *See* Donald
11 Southworth Decl. (Apr. 6, 2018).⁵

12 He was not. The Department of Corrections decided that Mr. Vanisi needed to
13 stay at Northern Nevada Correctional Center so that Mr. Vanisi could meet with a
14 psychologist or psychiatrist, and also see the forced medication panel. Mr. Vanisi was
15 not returned to Ely State Prison until the week of July 23, 2018.

16 On July 24, 2018, this Court received correspondence from Mr. Vanisi, who
17 was “writing [the Court] to see if I can waive my evidentiary hearing.” The next day
18

19 ⁴ *See* Reply to Opp'n to Mot. for Recons. and Objection to Pet'r's Waiver of
20 Attendance at Evidentiary Hr'g, at 4-7 (Apr. 16, 2018); *see also* Hr'g Tr. 8, May 10,
21 2018 (“Well, Your Honor, our concern is the mental health situation of Mr. Vanisi.
22 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.”).

23 ⁵ Filed as Ex. 1 to State's Opp'n to Mot. for Recons. and Objection to Pet'r's
Waiver of Attendance at Evidentiary Hr'g (Apr. 11, 2018).

1 the State filed a motion to set a hearing regarding Mr. Vanisi's request; undersigned
2 counsel filed a suggestion of incompetency and request for evaluation. The State then
3 filed a Response to "Suggestion of Incompetency and Motion for Evaluation,"
4 requesting that this Court inquire as to undersigned counsel's "good faith doubt."

5 This Reply follows.

6 **II. ARGUMENT**

7 **A. This Court should appoint two mental health professionals to**
8 **evaluate Mr. Vanisi because there are good faith reasons to doubt**
Mr. Vanisi's competence.

9 Under NRS 178.415, when a doubt about a defendant's competence arises, this
10 Court "shall appoint two psychiatrists, two psychologists, or one psychiatrist and one
11 psychologist to examine the defendant." Defendants do not need, only, to be
12 competent for trial; they must also be competent to waive their rights. *See Dusky v.*
13 *United States*, 362 U.S. 402 (1960) (to be competent for trial, "the test must be
14 whether he has sufficient present ability to consult with his lawyer with a reasonable
15 degree of rational understanding—and whether he has a rational as well as factual
16 understanding of the proceedings against him." (internal quotation marks removed));
17 *see also Godinez v. Moran*, 509 U.S. 389, 398-400 (1993) (finding same competence
18 standard applies to waiving constitutional rights).

19 In the context of abandoning litigation, the standard is whether a defendant
20 "has capacity to appreciate his position and make a rational choice with respect to
21 continuing or abandoning further litigation or on the other hand whether he is
22 suffering from a mental disease, disorder or defect which may substantially affect his
23 capacity" *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

1 As indicated in the attached declaration, undersigned counsel is concerned
2 that Mr. Vanisi does not have the present ability to consult with counsel, that Mr.
3 Vanisi lacks a reasonable degree of rational understanding of the proceedings against
4 him, and that Mr. Vanisi's mental illness is substantially affecting his capacity to
5 appreciate his position and make a rational choice about whether to continue with
6 the hearing in this case. *See* Ex. 1.⁶ Because undersigned counsel has a good-faith
7 doubt as to Mr. Vanisi's competence, counsel again requests that this Court appoint
8 two psychiatrists, two psychologists, or one psychiatrist and one psychologist to
9 examine Mr. Vanisi to evaluate whether he is competent to proceed.

10 In response to the Suggestion of Incompetence and Motion for Evaluation, the
11 State points out (1) that at the time of Mr. Vanisi's waiver of personal appearance,
12 counsel did not assert any concerns about Mr. Vanisi's competence, Resp. at 2; (2)
13 that Mr. Vanisi's competence is irrelevant to Mr. Vanisi's appearance because of his
14 prior valid waiver, Resp. at 2-3; and (3) that Mr. Vanisi's letter seeking to waive his
15

16
17 ⁶The attached declaration reflects counsel's dual obligation to "make known to
18 the evaluator the specific facts that have formed the basis of the motion" while also
19 observing counsel's obligation to "not divulge confidential communications or
20 communications protected by attorney-client privilege." *See* American Bar
21 Association, Criminal Justice Standards on Mental Health, Standard 7-4.3(d), (f)
22 (2016), available at [https://www.americanbar.org/content/dam/aba/publications/
23 criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf) (last
accessed Aug. 6, 2018).

21 If the Court believes that the proffer contained in the attached declaration is
22 not specific enough, counsel requests that the Court grant leave to file an ex parte
23 declaration or, alternatively that the Court hold an ex parte hearing, where counsel
can offer a more specific factual proffer.

1 hearing is an insufficient basis by itself to support the need for a competency
2 evaluation, Resp. at 3.

3 First, that counsel did not raise concerns about Mr. Vanisi's competence at the
4 time he waived his personal appearance is irrelevant. Competency is fluid; a person
5 who suffers from mental illness might be competent at one day and nonetheless be
6 incompetent later. This is especially so for someone, like Mr. Vanisi, who suffers from
7 bipolar symptoms.⁷ Moreover, competency is context-specific. *Compare Rees*, 384
8 U.S. at 314 (asking whether mental illness substantially affects ability to understand
9 position *and* make a rational choice with respect to continuing or abandoning further
10 litigation) *with Godinez*, 509 U.S. at 400-01 *and id.* at 401 n.12 (asking whether
11 defendant is able to understand proceedings *and* whether waiver is knowing and
12 voluntary). In this regard, even if Mr. Vanisi's mental status was the same at the
13 time of his waiver of appearance as it is now, Mr. Vanisi could still be competent as
14 to one and incompetent as to the other.

15 Second, Mr. Vanisi's competence is relevant. The State argues, "it is not at all
16 clear that Vanisi must be competent if he were to attend the upcoming hearing"
17 Resp. at 2. The State then goes on to note that "Vanisi made a knowing, voluntary,
18 and intelligent waiver" of his appearance. *Id.* at 2-3. The State's point is not clear. If
19 the State's argument is that Mr. Vanisi's competence is irrelevant because his
20 presence is not required, the argument is beside the point because Mr. Vanisi's

21
22 ⁷ See Ex. 163 at 67 (Dr. Mack); Ex. 164 at 6 (Dr. Foliaki); Ex. 190 (Oct. 10, 1998
23 Evaluation by Dr. Lewis, noting rule-out diagnosis of bipolar); Ex. 25 (Oct. 27, 1998
Evaluation by Dr. Rich); Ex. 59 (Jun. 9 & Jun. 15, 1999 Evaluation by Dr. Bittker);
Ex. 49 at 7 (Jan. 14, 2005 Evaluation by Dr. Bittker).

1 competence is relevant to determine whether he has the capacity to waive the hearing
2 ordered by the Nevada Supreme Court. If the State's argument is that the Nevada
3 Supreme Court has never upheld a right to competence during post-conviction
4 proceedings, then the argument, again, is beside the point because Mr. Vanisi's
5 competence is relevant in determining whether he has the capacity to waive his
6 hearing. If the State's argument is that Mr. Vanisi validly waived his personal
7 appearance, it is not clear how that is relevant to the instant question of whether Mr.
8 Vanisi is currently competent.

9 Third, and finally, the State "suggests" Mr. Vanisi's letter to the court "is
10 simply not enough" to warrant a competency evaluation. As indicated above, other
11 considerations support the need for a competency evaluation.⁸

12 **III. CONCLUSION**

13 Counsel for Mr. Vanisi respectfully requests that this Court appoint two
14 psychiatrists, two psychologists, or one psychiatrist and one psychologist to examine
15 Mr. Vanisi to evaluate whether he is competent to proceed. NRS 178.415.

16 DATED this 6th day of August, 2018.

17 Respectfully submitted,
18 RENE L. VALLADARES
Federal Public Defender

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

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22
23 ⁸ And, as noted above, n.6, undersigned counsel can provide more detail in ex parte proceedings.

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

The undersigned does hereby affirm that the preceding REPLY TO STATE’S RESPONSE TO PETITIONER’S SUGGESTION OF INCOMPETENCE AND MOTION FOR EVALUATION filed in the District Court Case No. CR98-P0516 does not contain the social security number of any person.

DATED this 6th day of August, 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

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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 6th day of August, 2018, a true and correct copy of the foregoing
REPLY TO STATE’S RESPONSE TO PETITIONER’S SUGGESTION OF INCOMPETENCE AND MOTION FOR EVALUATION 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 Noble
Appellate Deputy
Nevada Bar No. 9446
P.O. Box 11130
Reno, NV 89520-0027

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

/s/ Jeremy Kip
An employee of the
Federal Public
Defenders Office

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Index of Exhibits

Exhibit 1 Declaration of Randolph M. Fiedler, dated August 6, 2018

FILED
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CR98-0516
2018-08-06 01:41:46 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6814147 : pmsewell

EXHIBIT 1

EXHIBIT 1

AA07682

1 **DECLARATION OF RANDOLPH M. FIEDLER**

2 I, Randolph M. Fiedler, declare as follows:

3 1. I am an attorney at law, admitted to practice before this Court, and
4 employed as an Assistant Federal Public Defender. I am assigned to represent Siaoosi
5 Vanisi in this capital case.

6 2. I have been assigned to Mr. Vanisi's case since 2013. Over the last five
7 years, one of my responsibilities has been to visit with Mr. Vanisi and take legal calls
8 with him. I have observed dramatic fluctuations in Mr. Vanisi's mood and energy
9 levels. At times, Mr. Vanisi talks quickly, often repeats himself, and has difficulty
10 staying still, sometimes shaking. At other times I have observed Mr. Vanisi when his
11 speech is slurred, he has little to say, and moves or speaks slowly, if at all. During
12 the five years I have been representing Mr. Vanisi, I have alternately heard that he
13 sleeps sixteen hours a day or heard that he is engaging in extremely bizarre behavior.

14 3. My concerns about Mr. Vanisi's mental health have existed the entire
15 time that I have represented him.

16 4. More recently, however, my concerns about Mr. Vanisi's mental health
17 have grown. Over the last six months, and correlating with increased activity in his
18 case, Mr. Vanisi's behavior has fluctuated more than normal. At times his
19 communication has been slurred and slow; at other times, Mr. Vanisi's speech has
20 been extremely high energy. This indicates to me that there might be an issue with
21 Mr. Vanisi's current medication regime. And, when I visited Mr. Vanisi in Northern
22 Nevada Correctional Center, his caseworker indicated that he needed to spend extra
23 time there so Mr. Vanisi could meet with the forced medication panel.

5. Additionally, I have encountered difficulties in advising Mr. Vanisi. These difficulties stem from an apparent delusion about the reality of Mr. Vanisi's case, the nature of the charges in this case, and the seriousness of the penalty that Mr. Vanisi faces. Mr. Vanisi has beliefs about his case that are not tethered to reality. These delusions are preventing Mr. Vanisi from having a rational understanding of the proceedings against him. Because Mr. Vanisi lacks a rational understanding of the proceedings against him, his present ability to communicate with counsel is compromised.

6. Moreover, and, again, because of these delusions, Mr. Vanisi's mental illness is substantially affecting his capacity to appreciate his position. I believe he cannot make a rational choice about whether to continue or forego litigation in this case.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 6, 2018, in Las Vegas, Nevada.

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

1 CODE No. 1020
2 CHRISTOPHER J. HICKS
3 #7747
4 P. O. Box 11130
5 Reno, Nevada 89520-0027
6 (775) 328-3200
7 Attorney for Respondent

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
9
10 IN AND FOR THE COUNTY OF WASHOE

11 * * *

12 SIAOSI VANISI,

13 Petitioner,

Case No. CR98-0516

14 v.

15 THE STATE OF NEVADA,

Dept. No. 4

16 Respondent.
17 _____/

18 ADDENDUM TO MOTION TO SET HEARING REGARDING
19 VANISI'S REQUEST TO WAIVE EVIDENTIARY HEARING

20 COMES NOW, the State of Nevada, by and through Jennifer P. Noble, Chief
21 Appellate Deputy, and files this Addendum to its Motion to Set Hearing Regarding
22 Vanisi's Request to Waive Evidentiary Hearing.

23 On August 8, 2018, the State submitted its Motion to Set Hearing Regarding
24 Vanisi's Request to Waive Evidentiary Hearing. The basis for the State's motion was
25 Vanisi's letter filed with the Court on July 24, 2018. In that letter, Vanisi indicates that
26 he wants to waive the October 2018 hearing, and contemplates being brought before the
Court to explain his position.

///

1 On August 20, 2018, the State received a letter from Vanisi dated August 13,
2 2018. The letter reiterates Vanisi's desire to waive the hearing and states that "I'm
3 trying to waive my evidentiary hearing" and "I have made repeated attempts to go
4 through my attorney but they have rebuffed my request." Exhibit 1. Of course, the State
5 cannot respond to Vanisi, who is represented by counsel. However, based on the letters,
6 the State suggests that Vanisi should be transported to appear before the Court so that
7 the Court may inquire further as to his assertion regarding his desire to waive the
8 evidentiary hearing.

9 AFFIRMATION PURSUANT TO NRS 239B.030

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

12 DATED: August 20, 2018.

13
14 CHRISTOPHER J. HICKS
 District Attorney

15
16 By /s/ JENNIFER P. NOBLE
17 JENNIFER P. NOBLE
 Chief Appellate Deputy

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on August 20, 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

Joanne Diamond, Assistant Federal Public Defender

Scott Wisniewski, Assistant Federal Public Defender

/s/ Margaret Ford
MARGARET FORD

INDEX OF EXHIBITS

Exhibit 1, Letter from Siaso Vanisi to Jennifer Noble or Joe Plater dated
August 13, 2018, 1 page

FILED
Electronically
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2018-08-20 04:50:04 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6838866 : cvera

EXHIBIT 1

EXHIBIT 1

AA07689

Monday, 8-13-18

11:25 PM

To Jennifer Nobles or Joe Plater

How are you doing? I'm doing good.

As you know I'm trying to waive my evidentiary hearing and I would like to ~~waive~~ research this issue.

I have made repeated attempts to go through my attorney but they have rebuffed my request.

I was wondering if you can provide me with case law on this issue. I just want to know what to say to Judge Steendimer when she canvass me.

Thank you,

Jason Vania

2501
RENE L. VALLADARES
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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.

WILLIAM GITTERE, WARDEN, et. al.,

Respondents.

Case No. CR98-0516
Dept. No. IV

**NON-OPPOSITION TO PRESENCE
OF DEFENDANT**

(Death Penalty Habeas Corpus Case)

1 A hearing on all pending motions is scheduled in this Court on August 31,
2 2018, at 10:00 a.m. The State has indicated its position that Mr. Vanisi should be
3 present at this hearing. Undersigned counsel do not oppose Mr. Vanisi's presence.

4 DATED this 21st day of August, 2018.

5 Respectfully submitted,
6 RENE L. VALLADARES
Federal Public Defender

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

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

The undersigned does hereby affirm that the preceding NON-OPPOSITION
TO PRESENCE OF DEFENDANT filed in the District Court Case No. CR98-0516
does not contain the social security number of any person.

DATED this 21st day of August, 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

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CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 21st day of August, 2018, a true and correct copy of the foregoing NON-OPPOSITION TO PRESENCE OF DEFENDANT 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 Noble
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Joseph R. Platter
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

August 23, 2018

Scott Wisniewski
Assistant Federal Public Defender
District of Nevada
411 East Bonneville Avenue, Suite 250
Las Vegas, Nevada 89101

Re: Siaoosi Vanisi v. Timothy Filson, Warden

Dear Mr. Wisniewski:

I have been asked to render an opinion on the ethical duties of capital post-conviction counsel when there is a disagreement with the client over whether to pursue an arguably meritorious claim that trial counsel provided ineffective assistance under the Sixth Amendment to the United States Constitution. In answering this question, I have made the following assumptions, based on information provided:

- There is an arguably meritorious claim of ineffective assistance of counsel on the ground that trial counsel failed to properly investigate and pursue a mitigation strategy based on the client's mental health history and status.
- The client's primary objective in the habeas proceeding is to reverse the judgment of conviction and the capital sentence that was imposed.
- The Nevada Rules of Professional Ethics are the governing rules of ethics for the purposes of this question.

Short Answer

After reviewing the relevant authority and based on my experience,¹ it is my opinion that post-conviction counsel has an ethical responsibility to pursue an arguably meritorious claim that trial counsel was ineffective, notwithstanding the client's disagreement about this strategy, if post-conviction counsel determines, based on Nevada Rule of Professional Conduct 1.14, that the client suffers from diminished capacity because of mental impairment and, as a result, the client cannot act in his own interests to protect himself from the risk of execution. It is further my opinion, based on the materials provided to me,² that post-conviction counsel could reasonably believe Siaoosi Vanisi's capacity to make adequately considered decisions in connection with his representation is diminished by mental impairment.

¹ A copy of my current cv is enclosed.

² These include:

1. Reply to State's Response to Petitioner's Suggestion of Incompetence and Motion for Evaluation (8/6/18), with Ex. 1 [Declaration of Randolph M. Fiedler]
2. Declaration of Renee Peaua (4/7/2011)
3. Declaration of DeAnn Ogan (4/11/2011)
4. Confidential Report of Jonathan H. Mack, Psy.D. (4/18/2011) (pp. 66-70)
5. Request from Defendant Siaoosi Vanisi (7/20/2018)

Analysis

Counsel's ethical duty of competence under Nevada Rule of Professional Conduct 1.1 requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." While the rule does not specifically address the context of capital litigation, the most authoritative other source is the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) ("Guidelines"). These "set forth a national standard of practice for the defense of capital cases." Guideline 1.1(A), *reprinted at* 31 Hofstra L. Rev. 913, 919 (2003). They are "not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases." *Id.* at 920 (History of Guideline 1.1).

A bedrock obligation of post-conviction counsel under the Guidelines is to "seek to litigate *all issues*, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital representation." Guideline 10.15.1(C), *id.* at 1079 (emphasis added). The rationale for this obligation in the context of collateral litigation is straightforward: given strict procedural hurdles that are often difficult to overcome, post-conviction counsel should assume that any arguably meritorious claim not raised in the initial application for relief will later be waived or procedurally barred. Commentary to Guideline 10.15.1(C), *id.* at 1086-87.

Every lawyer in a criminal case is responsible for providing effective representation under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668 (1984). Competent representation in a capital post-conviction proceeding, under the Guidelines, thus requires that counsel litigate any arguably meritorious claim that trial counsel was ineffective. See also American Bar Association Standards for Criminal Justice: Defense Function (4th ed. 2015), Standard 4- 9.6 (a) ("If appellate or post-appellate counsel is satisfied after appropriate investigation and legal research that another defense counsel who served in an earlier phase of the case did not provide effective assistance, new counsel should not hesitate to seek relief for the client.").

The next inquiry is whether these duties change when the client does not want post-conviction counsel to pursue a claim that trial counsel was ineffective. The answer depends on the degree to which the client has the mental capacity to decide how the post-conviction litigation should proceed. In situations where there is evidence of the client's mental impairment, the relevant rule is Nevada Rule 1.14 ("Client with Diminished Capacity").³ Although "diminished capacity" is not defined in the rule, comments to Rule 1.14 of the Model Rules of Professional Conduct explain a number of factors should be considered and balanced in making this determination, such as:

[T]he client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive

³ See Model Rule of Professional Conduct 1.2, Comment 4 ("In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14."). Because Nevada has not adopted the Model Rule's comments as part of its ethics regime, citations to the Model Rule's comments are for guidance only.

fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.

Model Rule Professional Conduct 1.14, Comment 6. Additionally, “[i]n appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.” *Id.*

Notably, Rule 1.14 does not use the competency framework established by the Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960) and its progeny. Under the *Dusky* standard, a defendant is deemed competent to stand trial if he or she has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as [a] factual understanding of the proceedings against him.” *Id.* at 402. The *Dusky* test focuses solely on the defendant’s competency-related capacities and is a relatively easy bar to meet.

In contrast, the ethical rules recognize degrees of incapacity. J. C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 Wash. & Lee L. Rev. 147, 179 (2006).⁴ The distinction between the constitutional requirement of competence and the ethical category of diminished capacity was recognized in a 2005 ethics opinion from Virginia, the only state ethics opinion that, to my knowledge, has addressed the question. See Virginia Legal Ethics Opinion 1816 (2005). In this opinion, the Virginia State Bar’s Standing Committee on Legal Ethics examined how a lawyer should proceed when a client was found competent after examination and wanted to commit suicide through imposition of the death penalty, when the lawyer believed that the client was “not making an informed, rational and stable decision.” In applying Virginia Rule 1.14,⁵ the committee explained that “the determination of competency to stand trial is specific enough such that a client may have been determined competent for trial but nonetheless under impairment with regard to making decisions involving the matter.” *Id.* In other words, the fact that a forensic evaluation determined the client competent is not conclusive, by itself, to determine counsel’s ethical obligations when there is evidence of diminished capacity. *Id.*⁶

Applying this analysis, post-conviction counsel will need to determine whether the client satisfies Rule 1.14’s standard for diminished capacity. This should include, if feasible and

⁴ An earlier comment to Model Rule 1.14, since deleted in the most recent version, made this very point. See Rotunda & Dzienkowski, *A Student’s Guide*, § 1.14 at 656 (2012-13) (noting 1983 version of Comment 1 to Model Rule 1.14 stated “Furthermore, to an increasing extent the law recognizes intermediate degrees of competence”). The Supreme Court has also recognized that competence to stand trial may properly be more task-specific, at least when a competent defendant’s mental fitness for tasks other than being a defendant is at issue. *Indiana v. Edwards*, 554 U.S. 164 (2008) (state may constitutionally bar borderline-competent defendant who suffers severe mental illness from representing himself if he lacks fitness to conduct trial proceedings).

⁵ Virginia Rule of Professional Conduct 1.14 is identical to the Nevada rule in all relevant respects.

⁶ The most recent version of the American Bar Association’s Criminal Justice Standards on Mental Health clarifies that competence of a capital defendant at the time of sentencing requires task-specific abilities concerning decision making about the sentencing procedure itself. Standard 7-9.8(b) (Competence to proceed at capital sentencing) provides a defendant is competent to proceed at capital sentencing if he or she:

[H]as sufficient present ability to consult with defendant’s lawyer with a reasonable degree of rational understanding and, given the nature and complexity of the sentencing issues, has a rational as well as factual understanding of the proceedings, including the consequences of failing to present mitigation evidence and the possibility that a defendant’s attitude toward the death penalty and its alternatives will change over time.

practicable, an independent professional evaluation of the client's mental health. See American Law Institute, Restatement of the Law (Third), the Law Governing Lawyers (2000), §24 comment (d). The obligation to consider diminished capacity is also reflected in the American Bar Association's Criminal Justice Standards on Mental Health, which specifically address the procedure to be followed in capital cases when the defendant's ability to interact with post-conviction counsel is significantly impaired by mental disorder.⁷ Assuming a determination of diminished capacity is reached reasonably and in good faith, it is hard to imagine that review of that determination would be the basis for professional discipline. See Restatement of the Law (Third), the Law Governing Lawyers, *supra*, §24 comment (d).

While the Rules do not specify the evidentiary threshold for a lawyer's reasonable belief that a client's capacity is diminished, the considerations in the Comment to Model Rule 1.14 provide guidance.⁸ Counsel's Declaration (August 6, 2018) describes variability of the client's state of mind (¶¶ 2, 4), impaired ability to appreciate the consequences of his decision (¶¶ 5, 6), and impaired ability to articulate reasoning leading to his decision (¶¶ 2, 5). Mr. Vanisi's request (July 20, 2018) to waive the evidentiary hearing is a decision that appears to lack consistency with what, according to counsel, is his known long-term (at least five year) commitment to reverse the conviction and capital sentence imposed. Counsel's observations are supported by the declaration of Jonathan Mack, a licensed psychologist, who concluded in 2011 that as of 1998 Mr. Vanisi had chronic mental illness that was not accurately characterized as malingering. (Mack Report at 69). Dr. Mack further concluded (in 2011) that Mr. Vanisi will likely require chronic psychiatric medication in order to be compliant with the prison regimen and/or society in general in the long-term. *Id.* Counsel's current observations concerning his client's behavior and his medication (¶ 4) raise the possibility that current treatment of his mental illness may not enable him to make adequately considered decisions in connection with the representation.

If counsel finds the client suffers from diminished capacity, post-conviction counsel must then decide the proper course of action. Pursuant to Nevada Rule 1.14(a), counsel should endeavor to maintain, as far as possible, a normal client-lawyer relationship, which includes communicating with the client to ascertain his interests and how he wants them to be achieved. However, under Nevada Rule 1.14(b), "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical . . . harm unless action is taken and cannot act in the client's own interest, the lawyer may take reasonably necessary protective action." A client who has received a death sentence is, by definition, at risk of substantial physical harm, but that alone is insufficient for protective action. Rather, according to American Bar Association Formal Ethics Opinion 96-404 (1996), "Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client 'cannot adequately act in the client's own interest.'" (quoting Model

⁷ American Bar Association Criminal Justice Standards on Mental Health (4th ed., August 8, 2016), Standard 7-9.9 (Mental Disorder or Disability after Sentencing) provides:

If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to [rationally] understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings and order an evaluation of the prisoner.

⁸ *Supra* at 2-3.

Privileged and Confidential

Rule 1.14(b)). Thus, post-conviction counsel will need to determine, to the extent practicable, the measures needed to protect the client's interests.

Again, Virginia Legal Ethics Opinion 1816 is instructive: If the attorney has a reasonable basis to believe that the client is unable to "make a rational, stable decision," then:

Rule 1.14 permits this attorney to take such protective action as is necessary to protect his client. Such action may properly include, but is not limited to, seeking further evaluation of the client's mental state, seeking an appointment of a guardian, *and/or going forth with a defense in spite of the client's directive to the contrary*. The precise steps appropriate will depend on the attorney's conclusion regarding the degree of the client's impairment.

Virginia Legal Ethics Opinion 1816 (emphasis added).

If post-conviction counsel determines, after weighing these considerations, that the only course of conduct to protect the client's interests is to litigate trial counsel's failure to properly develop and present mitigation evidence, that conclusion would be authorized by Nevada's rules of professional conduct. Indeed, post-conviction counsel is arguably required to take such action. Recall that, as a matter of professional competence, post-conviction counsel must litigate all arguably meritorious claims that are permitted to be brought. See *supra*, pages 1-2. If counsel concludes, based on analysis of Rule 1.14, that the client is suffering from diminished capacity, and that the only way to protect the client's interests under the circumstances is to litigate the claim that trial counsel was ineffective for failing to properly prepare and offer mitigation, post-conviction counsel would arguably be in violation of the duty of competence by not bringing the claim.

Sincerely,



David M. Siegel
Professor of Law

Enclosure (cv)



1 CODE No. 3795
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7 Attorney for Respondent

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
9
10 IN AND FOR THE COUNTY OF WASHOE

11 * * *

12 SIAOSI VANISI,

13 Petitioner,

14 v.

Case No. CR98-0516

15 WILLIAM GITTERE, ACTING WARDEN,

Dept. No. 4

16 Respondent.
17 _____/

18 STATE'S SUR-REPLY TO VANISI'S MOTION TO DISQUALIFY THE WASHOE
19 COUNTY DISTRICT ATTORNEY'S OFFICE

20 COMES NOW, the State of Nevada, by and through Jennifer P. Noble, Chief
21 Appellate Deputy, and Joseph R. Plater, Appellate Deputy, and files this Sur-reply to
22 Vanisi's "Reply to Motion to Disqualify the Washoe County District Attorney's Office."
23 This Sur-reply is based on the pleadings and papers on file with this Court, and the
24 following points and authorities.

25 POINTS AND AUTHORITIES

26 **I. ARGUMENT**

A. Vanisi's New Argument Regarding a 15-Year-Old Hearing Does Not Support Disqualification.

1. *The July 1, 2002 Transcript Reveals Former Chief Deputy District Attorney McCarthy Acted At the Request of Post-Conviction Counsel.*

1 The position taken in the Federal Public Defender's (FPD) original Motion to
2 Disqualify was that the WCDA acted unethically by discussing matters of sentencing
3 mitigation strategy with former trial counsel and former investigators. No mention of
4 any 2002 hearing can be found in that Motion. The FPD apparently recognized that its
5 serious allegations of ethical misconduct were even less likely to gain traction in the
6 wake of the Nevada Bar's Standing Committee On Ethics and Professional
7 Responsibility's express rejection of the ABA standard, and abruptly switches gears in
8 its Reply. Without explanation for the delay, it pivots to a 15-year-old status hearing,
9 and selects small snippets from that hearing to suggest the State should now be
10 disqualified based on events that occurred in 2002.
11

12 For the Court's convenience, the State has attached the entire transcript of the
13 July 1, 2002 status hearing as Exhibit 1. Essentially, that transcript reveals that prior
14 post-conviction counsel Marc Picker and Scott Edwards had difficulty getting the SCR
15 250 Memorandum from the Washoe County Public Defender, and asked former Chief
16 Deputy District Attorney Terry McCarthy to intervene, because they were concerned
17 they did not have enough discovery to meet a looming deadline. McCarthy obliged, and
18 now, 15 years later, the FPD seeks to punish the WCDA for the professional courtesy
19 McCarthy extended to prior habeas counsel.
20

21 During the 2002 hearing, Picker described what he perceived to be ongoing
22 difficulties with the Washoe County Public Defender's (WCPD) Office in obtaining the
23 entire trial file on Vanisi: "...in looking through things and looking through the court
24 file, we determined that we had not received a Rule 250 memo, that being a memo of
25 counsel as to how the death penalty case had been run, decisions had been made."
26 Exhibit 1, 2:21-24. Picker indicated that he had written a letter to the WCPD requesting

1 the SCR 250 Memorandum, but received no response. *Id.*, 3:22-25; 1-2. Picker
2 explained:

3 What we did end up with is on Friday Mr. McCarthy, through I'm
4 not even sure how at this point, he ended up with a copy of the
5 memo. Now, I'm not sure under the rule that's proper, but
6 somehow we now all got it. Because, but Mr. McCarthy has a copy,
7 and I know my client's never agreed to that, but he never waived it,
8 but here we are, and we received a copy through Mr. McCarthy.

9 *Id.*, 4:3-9.

10 In the Reply, Vanisi's current counsel, the Federal Public Defender (FPD) omits
11 any reference to the section of the transcript wherein Picker explains that McCarthy
12 obtained the SCR 250 Memorandum at the behest of Picker's then co-counsel Scott
13 Edwards:

14 And I know that we have, Mr. Edwards and Mr. McCarthy talk frequently,
15 Mr. McCarthy has attempted to help. I know he spent all last week getting
16 us the Rule 250 memo, is my understanding. I believe Scott called him
17 last Monday or maybe the Friday before that.

18 *Id.*, 6:2-6.

19 Also absent from the FPD's recitation is McCarthy's representation, as an officer
20 of the Court, that after obtaining the SCR 250 Memorandum at the behest of Edwards,
21 he possessed it for an hour and delivered it to Picker and Edwards and had not read it:

22 MR. McCARTHY: Well, first off, the public defender is not my client. The
23 public defender's office has witnesses that may appear in this action. I
24 represent the State and the warden, not the public defender's office, which
25 usually is something I have to explain to a young public defender.

26 I got my Rule 250 memo by calling up and politely asking for it, and Steve
Gregory took time out of his day and found it and copied it. I don't know
why it wasn't done before. I didn't find it very difficult. It took me all of
three minutes to arrange it.

THE COURT: How long have you had it?

1 MR. McCARTHY: About an hour before I gave it to Mr. Edwards. I
2 haven't read it, by the way. To the suggestion that I shouldn't have it, I say
those that want to keep secrets shouldn't file the lawsuit.

3 We also ran an explicit, express waiver waiving the attorney-client
4 privilege, which would seem to cover any communications as to work
product. That privilege is owned by the public defender. They can waive it
5 or not waive it as they wish.

6 *Id.*, 7:6-25.

7 *2. The Doctrine of Waiver Applies, and the FPD Caused the SCR 250*
8 *Memorandum to Become Public Record.*

9 The FPD has represented Vanisi since 2011, and has waited until now to raise this
10 issue. To the extent that Vanisi might arguably have been able to object to McCarthy
11 obtaining SCR 250 Memorandum in 2002, Picker and Edwards did not object or seek
12 any remedy, thereby waiving it on behalf of Vanisi. If the FPD thought that the decision
13 to waive the issue was wrong, it has had many years to assert that via a claim of
14 ineffective assistance of first post-conviction counsel, and have not done so. The Nevada
15 Supreme Court has recognized that the doctrines of waiver and laches apply in the
16 context of a post-conviction petition, even in capital cases. *Pellegrini v. State*, 117 Nev.
17 860, 34 P.3d 519 (2001).

18 Such a claim would have been difficult to support, however, given the FPD's
19 subsequent decision to make the SCR 250 Memorandum a public document. The FPD
20 filed the SCR 250 Memorandum on May 5, 2011, thereby making it a matter of public
21 record. *See* Exhibit 33 to Petition for Writ of Habeas Corpus. Their current position
22 that the WCDA should be disqualified for possessing an exhibit the FPD filed is simply
23 frivolous. The request for an evidentiary hearing on this tired issue is equally frivolous
24 and an obvious dilatory tactic.

25
26 ///

1 B. This Court Should Decline the FPD's Invitation to Abandon Nevada Case Law,
2 Statutory Law, and the Nevada State Bar's Committee On Ethics and Professional
3 Responsibility's Advisory Opinion.

4 The Nevada Bar's Standing Committee On Ethics and Professional Responsibility
5 has expressly rejected ABA Formal Opinion 10-456. See Formal Opinion 55, issued July
6 2, 2018. In rendering its opinion, the Committee noted that it joined numerous other
7 jurisdictions in finding that ABA Formal Opinion 10-456 is contrary to judicial economy
8 and maintaining fairness in the judicial process. *Id.* Formal Opinion 55 is consistent
9 with Nevada statutes, case law, and the Nevada Rules of Professional Conduct.

10 NRS 34.735 (6) also specifically advises petitioners that if they allege ineffective
11 assistance of counsel, "that claim will operate to waive the attorney-client privilege for
12 the proceeding in which you claim your counsel was ineffective." Where a habeas
13 petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-
14 client privilege as to communications with his allegedly ineffective lawyer relating to the
15 claims. NRS 34.735; *Molina v. State*, 120 Nev. 185, 87 P.3d 533 (2004). Nevada Rule of
16 Professional Conduct 1.6(b)(5) provides that a lawyer may reveal information relating to
17 the representation of a client to the extent the lawyer reasonably believes necessary to
18 respond to allegations in any proceeding concerning the lawyer's representation of the
19 client. The plain language of NRPC 1.6(b)(5) also allows for an attorney to communicate
20 regarding allegations of ineffective assistance of counsel.
21

22 In urging this Court to rule contrary to Nevada authorities, the FPD simply
23 argues that the Nevada Bar's Standing Committee On Ethics and Professional
24 Responsibility's ability to conduct research and legal analysis is inferior to that of the
25 FPD:

26 / / /

1 Were it adequately researched or supported by law of other jurisdictions,
2 such lapses may entitle it to some deference, but it falls into neither of
3 these categories. Opinion No. 55, as written, ignores vast amounts of
4 contrary precedent, and inflates the relevance of holdings in its
5 favor...Opinion No. 55 is, in short, an advocacy brief. It should not be
6 followed by this Court.

7 Reply, pp. 12-13.

8 The Reply then spends several pages explaining why this Court should ignore
9 Nevada authorities in favor of authorities favorable to the FPD's position. Reply, 14-17.
10 Repeating a familiar pattern, the FPD urges this Court to disregard Opinion 55 because
11 it differs from the opinions that support the FPD's position. In what has now become a
12 familiar approach, the FPD suggests that, like the WCDA, the Ethics Committee has also
13 abandoned its ethical obligations, and is incapable of giving proper consideration to
14 contrary authority.

15 C. By Filing the Petition, Vanisi Waived Attorney-Client Privilege, And That
16 Waiver Included Confidential Communications Relevant to the Claims in
17 the Petition.

18 The FPD continues to argue that Vanisi did not waive attorney-client privilege or
19 confidentiality by filing a petition alleging ineffective assistance of counsel. The FPD
20 asserts that despite the petition's allegations against the trial team, Jeremy Bosler,
21 Crystal Calderon, and Evo Novak are still bound by a duty of confidentiality, without
22 exception or nuance. Yet the Nevada Supreme Court has explained:

23 While NRS 49.055 defines attorney-client communications as confidential
24 and NRS 49.095 provides that a client has a privilege of refusing to
25 disclose such confidential communications, a client may waive the
26 privilege. Supreme Court Rule 156(3)(b) provides that a waiver of the
privilege occurs when it becomes necessary for counsel "to respond to
allegations in any proceeding concerning the lawyer's representation of the
client." Additionally, the Legislature has instructed petitioners for writs of

///

1 post-conviction habeas corpus that, if a writ petition contains a claim of
2 ineffective assistance of counsel, the claim acts as a waiver of the attorney-
client privilege.

3 *Molina v. State*, 120 Nev. 185, 87 P.3d 533, 539 (2004).

4 The rule of *Molina, supra*, has been specifically applied to Vanisi's post-
5 conviction claims by the Nevada Supreme Court, which explained that "...in this case,
6 Vanisi expressly waived his attorney client privilege as it related to his representation at
7 trial." This is the law of the case. See *Vanisi v. State*, 126 Nev. 765, 367 P. 3d. 830
8 (2010).

9 Vanisi has alleged that the defense team was ineffective during the penalty phase,
10 and specifically, that the defense team's performance was inadequate regarding the
11 subject of mitigation. The WCDA requested to interview members of the trial team
12 regarding mitigation strategy. Contrary to the FPD's suggestion, these routine
13 interviews were not barred by NRS 34.780. Nothing in the statute bars informal
14 interviews or information gathering. Indeed, the FPD requested informal discovery in
15 this case from the undersigned. And this Court recognized back in 2002 that informal
16 discovery in these cases is sometimes the preferable way to gather information, urging
17 Picker and Specchio to meet about documents needed by post-conviction counsel and
18 advising that "if you have some doubts about the information you have and you can't
19 resolve it informally with Mr. Specchio personally, then you probably should do a
20 records deposition and go through the file." Exhibit 1, 8:12-16.

21 **II. CONCLUSION**

22 Vanisi's allegation that the WCDA committed ethical violations by interviewing
23 the trial team about mitigation strategy is unsupported by Nevada law. The FPD made
24 the SCR 250 Memorandum a matter of public record, and Vanisi has waived attorney
25

26 / / /

1 client privilege and the confidentiality of communications that are directly relevant to
2 the allegation of ineffective assistance of counsel.

3 AFFIRMATION PURSUANT TO NRS 239B.030

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

6 DATED: August 31, 2018.

7
8 CHRISTOPHER J. HICKS
District Attorney

9
10 By /s/ JENNIFER P. NOBLE
JENNIFER P. NOBLE
Chief Appellate Deputy

11
12
13 By /s/ JOSEPH R. PLATER
JOSEPH R. PLATER
Appellate Deputy
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on August 31, 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

Joanne L. Diamond, Assistant Federal Public Defender

Scott Wisniewski, Assistant Federal Public Defender

/s/ Margaret Ford
MARGARET FORD

INDEX OF EXHIBITS

Exhibit 1, Transcript - Status Hearing , July 1, 2002, 13 pages

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2018-08-31 04:18:55 PM
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Clerk of the Court
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EXHIBIT 1

EXHIBIT 1

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Washoe County 4185
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RONALD A. LONGTIN, JR.

BY

DEPUTY

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

SIAOSI VANISI,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

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Case No. CR98P0516

Dept. No. 4

STATUS HEARING

July 1, 2002

Reno, Nevada

FOR THE PETITIONER:

MARC P. PICKER
Attorney at Law
691 Sierra Rose Drive
Reno, Nevada

FOR THE RESPONDENT:

TERRENCE P. MCCARTHY
Deputy District Attorney
195 South Sierra Street
Reno, Nevada

Reported by: Lesley A. Clarkson, CCR #182

ORIGINAL

SIERRA NEVADA REPORTERS (775) 329-6560

AA07712

RENO, NEVADA, MONDAY, JULY 1, 2002, 1:30 P.M.

-oOo-

(The following proceedings held in the
Court's chambers.)

THE COURT: Let the record reflect that we are
convened in chambers on State versus Mr. Vanisi with counsel
for the State and counsel for Mr. Vanisi.

MR. PICKER: Your Honor, I asked for this session
kind of because I wanted to make a record and put some things
before you and into the record on the length of time things
have taken, because it may become an issue. I know that
Mr. Edwards and Mr. McCarthy spoke on Friday and to some
extent may be obviating our time crunch issue if necessary,
but I still think that just because of the nature of this case
probably more record is better than less.

THE COURT: Okay.

MR. PICKER: You will recall on March 11 you issued
your order appointing myself and Mr. Edwards to represent
Mr. Vanisi. At that time you ordered the Washoe County Public
Defender to provide a complete copy of their file with regard
to Mr. Vanisi to me pursuant to the death penalty statutes.
Thereafter, Mr. Edwards was in contact, we were each in
contact with the public defender's office, but on March 19,
pursuant to a number of phone calls, he sent a letter to Steve

SIERRA NEVADA REPORTERS (775) 329-6560

1 Gregory, a copy of which I have here, in which he said you
2 understand that we have been appointed, we would like to
3 arrange to get a copy of the file as soon as possible, that
4 was on March 19, and that we would then want to meet with
5 them.

6 On April 5 another copy of the order was faxed to
7 Jeremy Bosler, Mr. Gregory's co-counsel in this case, based on
8 a number of phone calls and based on the fact that we hadn't
9 heard anything about the records. And so I have a fax
10 transmission sheet that says the order was transmitted again
11 to them on April 5.

12 Thereafter, on the 22nd of May we delivered a check
13 to, for \$1,070 to the public defender's office after, upon
14 contacting your office, you ordered us to go ahead and do that
15 and then seek reimbursement. So my understanding of the order
16 had been that they were supposed to give us the file and then
17 keep a copy for themselves. Instead we got the copies and
18 they kept the originals. That doesn't, at the moment that
19 doesn't seem to be a problem, but I wanted to have that on
20 there as well.

21 At that point, in looking through things and looking
22 through the court file, we determined that we had not received
23 a Rule 250 memo, that being a memo of counsel as to the how
24 the death penalty case had been run, decisions had been made.

25 We then wrote a letter on June 11, a copy of which I

1 have here and I'd like to give to you to have in the record
2 today. I have a copy for Mr. McCarthy, too, because I don't
3 think he's gotten one of these, addressed to Mr. Specchio.

4 The problem that we have had when we first talked to
5 Mr. Petty, because that's who we had been dealing with at
6 first, he told us he had no control over the file, we should
7 contact Mr. Gregory. Mr. Gregory then told us, after some
8 delay, we should be talking to Mr. Bosler because Mr. Bosler
9 is in charge of the file.

10 THE COURT: Just a minute. We will mark the
11 exhibit.

12 MR. PICKER: Thank you.

13 THE CLERK: Exhibit Z-1 marked.

14 MR. PICKER: Thank you.

15 So to go back, Mr. Petty told us to talk to
16 Mr. Gregory about the file because he didn't have control of
17 it. Mr. Gregory told to us talk to Mr. Bosler because
18 Mr. Gregory didn't have control of the file. Mr. Bosler then
19 after some period of time told us no, you have to talk to Mr.
20 Specchio because he's in charge of the file. So we have
21 played this game for a period of a couple of months.

22 The letter on June 1 asked for two things. One, the
23 Rule 250 memo, and second, because we were now unsure we had
24 actually received the entire file, for them to give us an
25 index of everything they had. We received absolutely no

1 response. As of last Monday and Tuesday I contacted your
2 administrative assistant basically asking for help.

3 What we did end up with is on Friday Mr. McCarthy,
4 through I'm not even sure how at this point, he ended up with
5 a copy of the memo. Now, I'm not sure under the rule that's
6 proper, but somehow we now all got it. Because, but
7 Mr. McCarthy has a copy, and I know that my client's never
8 agreed to that, but he never waived it, but here we are, and
9 we received a copy through Mr. McCarthy.

10 I see references to things in here, I've only seen
11 this for about an hour, I just got it this morning from
12 Mr. Edwards, because we couldn't make contact on Friday, I see
13 a few things referenced in here that I don't recall seeing in
14 the two boxes of materials that I got from the PD's office. I
15 will tell you that the materials in the PD's office in some
16 places looked like somebody took two decks of cards and
17 shuffled them, and we are going to have to sort out what goes
18 with what.

19 So, my problem at this point is I'm going to try and
20 meet the October deadline, but I'm pretty sure we are not
21 going to meet that. At that point we are going to need more
22 time, and I'll know better in about a month how much more time
23 we are going to need, because we are still working on the
24 trial transcripts, as you can understand.

25 But quite honestly, Your Honor, we have gotten less

1 than no cooperation from the public defender's office. In
2 fact, it appears that the public defender's office has
3 attempted to put every roadblock in front of us that they
4 possibly can in this case.

5 Now, if that's the way this case is going to be run,
6 and I don't think, I know Mr. McCarthy has nothing to do with
7 that, but it is unfortunately his client so he gets stuck with
8 them. If that's the way the things are going to be run from
9 their side, we are going to be meeting frequently. We are
10 going to become very close on this issue, and I'm going to
11 come in here every time they do it again, and I'm going to
12 make a record about it.

13 And I may be in a position where, in order to make
14 sure that I get things, I'm going to have to ask for discovery
15 before I do the supplemental petition, because I'm going to
16 need to do a deposition of Mr. Specchio, get him under oath
17 and have him tell me every single peace of paper they have
18 got, because they won't respond to us, they won't cooperate.
19 And I just, I cannot run this case this way and do a job that
20 Your Honor expects of us. Because as we know that when you
21 appointed Mr. Edwards and I, specifically when you appointed
22 me as lead counsel, it was with the understanding that I was
23 going to meet a certain standard of competency here based on
24 what I have, on my experience in these kind of cases. Well,
25 based on my experience in these kind of cases, I have never

1 run into that kind of problem.

2 And I know that we have, Mr. Edwards and
3 Mr. McCarthy talk frequently, Mr. McCarthy has attempted to
4 help. I know he spent all last week getting us the Rule 250
5 memo, is my understanding. I believe Scott called him last
6 Monday or maybe the Friday before that.

7 I just want it on the record where we are at.

8 THE COURT: You think you have everything though,
9 now, right?

10 MR. PICKER: No. Quite honestly I see things
11 referred to in the Rule 250 memo that I don't recall ever
12 seeing in the materials that I paid a thousand bucks for.

13 THE COURT: Do you know how many pages you have?

14 MR. PICKER: No. We are busy trying to catalog
15 them, because as I said, they are a little bit mixed up, so we
16 have to try and put pages together to make sure we are matched
17 up. Then I can do an index and then I can figure out what I
18 have got.

19 THE COURT: Do you know how much they charged you
20 per page?

21 MR. PICKER: I don't have that offhand. I have the
22 bill. But I know they sent it to the most expensive place in
23 town, so -- you know, I'll live with that, and I guess so will
24 the State, because the state public defender will be paying it
25 back.

1 This is just, you know, I can't even go over at this
2 point -- Mr. McCarthy's offered me, as he always does, an open
3 file, come over, look at everything I've got. I can't even do
4 that yet because I don't know what I've got.

5 THE COURT: Okay. Mr. McCarthy.

6 MR. MCCARTHY: Well, first off, the public defender
7 is not my client. Public defender's office has witnesses that
8 may appear in this action. I represent the State and the
9 warden, not the public defender's office, which usually is
10 something I have to explain to a young public defender.

11 I got my Rule 250 memo by calling up and politely
12 asking for it, and Steve Gregory took time out of his day and
13 found it and copied it. I don't know why it wasn't done
14 before. I didn't find it very difficult. It took me all of
15 three minutes to arrange it.

16 THE COURT: How long have you had it?

17 MR. MCCARTHY: About an hour before I gave it to
18 Mr. Edwards. I haven't read it, by the way. To the
19 suggestion that I shouldn't have it, I say those that want to
20 keep secrets shouldn't file the lawsuit.

21 We also ran an explicit, an express waiver waiving
22 the attorney-client privilege, which would seem to cover any
23 communications as to work product. That privilege is owned by
24 the public defender. They can waive it or not waive it as
25 they wish.

1 My initial thought is when one is dissatisfied with
2 the resolution of things informally, the proper response is
3 not more informality but instead to get formal. It's do a
4 records deposition. I find it easier to make a polite phone
5 call, but -- anyway.

6 If and when the motion for more time is filed, I'll
7 respond to it. Mr. Picker's not asking for anything today, I
8 guess I don't oppose anything.

9 THE COURT: All right. Well, we will make the
10 letter that you have provided to the Court today part of the
11 record. It's been marked as Z, as in zebra, 1.

12 And I think I agree with Mr. McCarthy at this point.
13 If you have some doubts about the information you have and you
14 can't resolve it informally with Mr. Specchio personally, then
15 you probably should do a records deposition and go through the
16 file.

17 MR. PICKER: And you understand that my difficulty
18 in doing that is that the rule that the statute says I'm not
19 allowed to do any discovery until after the supplemental is
20 filed and then only upon leave of this Court. If that's what
21 I'm being given is leave to do a records deposition, if
22 necessary, that's fine.

23 MR. MCCARTHY: It doesn't say after the supplemental
24 production, it's says leave of the Court.

25 MR. PICKER: My memory was after the supplement.

1 MR. McCARTHY: Sometimes there is no supplement.

2 THE COURT: I'm not giving you authority to do it.

3 What I'm telling you is I would feel much more comfortable if
4 you would personally meet with Mr. Specchio and see if the two
5 of you can't resolve whatever concerns you have before we
6 start going down the deposition road. But if you can't, this
7 case is serious, it is important that you have all the
8 records.

9 This is the only, technically the only writ that is
10 available, and I do not want it to be, to fail because you
11 missed something or didn't have it available to you. So if
12 you speak with Mr. Specchio personally, I think any concerns
13 you may have can be alleviated by taking what you have and
14 going into his conference room and sitting down with what they
15 have. And it's a meticulous --

16 MR. PICKER: I don't mind doing it.

17 THE COURT: -- process.

18 MR. PICKER: Your Honor, and I would be willing to
19 do it. My problem has been in the last month that Mr. Edwards
20 and I have both made a number of phone calls to Mr. Gregory,
21 Mr. Bosler and Mr. Specchio, not one of which has been
22 returned. And that's why the letter of June 1 was written
23 that is now Exhibit Z-1. And as you can tell, we got no
24 response to the letter either. Thus, my dilemma and why we
25 came to you, why I came to you last week.

1 THE COURT: Well, at this point you need to have
2 your secretary probably go through the public defender file
3 and yours and make sure she has everything. Is that where you
4 are at?

5 MR. PICKER: Well, what I anticipate is that
6 Mr. Edwards this week will be able to finish the index, what
7 he got from the public defender's office. And quite honestly,
8 Mr. Edwards and I will both be sitting down with what the
9 public defender has and going page by page. I don't think I
10 can certify then to the Court otherwise unless I'm looking at
11 every piece of paper that I have got every piece of paper. As
12 you just very correctly stated, this is a pretty serious case,
13 a very serious case, and I'm not, while I trust my secretary
14 implicitly, I don't trust her do that kind of thing when
15 that's my job.

16 THE COURT: Well, if you have any problem, it's my
17 understanding that the public defender's office will make
18 their conference room available and the file available to you.
19 That's my understanding.

20 MR. PICKER: Right.

21 THE COURT: So if that does not happen, I certainly
22 would be more than glad to ask the public defender's office
23 why that can't happen, and if it appears they have some
24 legitimate issues or concerns, then I will give you leave at
25 that point, if you file a motion, to do the deposition. I

1 would of course want you to arrange the time for the
2 conference room in a way that works out with the public
3 defender as well as your schedule.

4 MR. PICKER: Certainly.

5 THE COURT: Anything else today?

6 MR. McCARTHY: Nothing for from me.

7 MR. PICKER: Nothing further. Thank you.

8 THE COURT: Then we will be off the record.

9 (1:50 p.m., proceedings concluded.)

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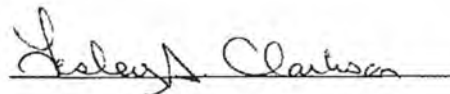
1 STATE OF NEVADA)
2 COUNTY OF WASHOE) ss
3
4

5 I, LESLEY A. CLARKSON, Official Reporter of the
6 Second Judicial District Court of the State of Nevada, in
7 and for the County of Washoe, DO HEREBY CERTIFY:

8 That I was present in Department No. 4 of the
9 within-entitled Court on Monday, July 1, 2002, and took
10 stenotype notes of the proceedings entitled herein and
11 thereafter transcribed them into typewriting as herein
12 appears;

13 That the foregoing transcript is a full, true and
14 correct transcription of my stenotype notes of said hearing.

15 Dated this 29th day of July, 2002.
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21 Lesley A. Clarkson, CCR #182
22
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24
25

1 4185

2 JUDITH ANN SCHONLAU

3 CCR #18

4 75 COURT STREET

5 RENO, NEVADA

6
7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR THE COUNTY OF WASHOE

9 BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

10 -o0o-

11 THE STATE OF NEVADA,)

12 Plaintiff,)

13 vs.)

14 SIAOSI VANISI,)

15 Defendant.)

CASE NO.CR98-0516

) DEPARTMENT NO. 4

16
17 TRANSCRIPT OF PROCEEDINGS

18 STATUS CONFERENCE

19 WEDNESDAY, SEPTEMBER 5, 2018, 10:00 A.M.

20 Reno, Nevada

21
22 Reported By: JUDITH ANN SCHONLAU, CCR #18
23 NEVADA-CALIFORNIA CERTIFIED; REGISTERED PROFESSIONAL REPORTER
24 Computer-aided Transcription

A P P E A R A N C E S

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1 RENO, NEVADA; WEDNESDAY, SEPTEMBER 5, 2018; 10:00 A.M.

2 -oOo-

3
4 THE COURT: Thank you. Please by seated. This is
5 the time set in CR98-0516 for numerous hearings. I ask
6 counsel to identify themselves for the record, please.

7 MS. NOBLE: Good morning. Jennifer Noble and Joseph
8 Plater on behalf of the State.

9 MR. FIEDLER: Randy Fiedler and Joanne Diamond on
10 behalf of Mr. Vanisi.

11 THE COURT: Thank you. We should acknowledge
12 Mr. Vanisi is also present. So we have lots of things to talk
13 about today. I know that the Federal Public Defender would
14 like to begin with the Motion to Recuse the State, however, I
15 do think it appropriate, just because it is on the top of my
16 mind, to deal with your Hearing Memorandum, because there
17 seemed to be a little bit of a disconnect there. I want to
18 make sure that we resolve that. The technical accommodations
19 the Federal Public Defender has noted are ones that I think
20 need to be addressed by the Public Defender. The way that we
21 handle the technical equipment in this district is you go to
22 the website. You download the application to the IT
23 Department. You fill out what you need. You make an
24 appointment with them, and then you work with them to figure

1 out how to use the equipment. What complicates that concept is
2 that the State also wishes to use IT equipment, but I think
3 from there Memorandum they want to use their own IT equipment
4 which is an E.L.M.O. or a cart kind of thing. Either setup
5 connects to the screens in the courtroom, and the State
6 frequently brings extra screens for the witness as well as the
7 Court. The Court doesn't have those extra screens right now.
8 But I only want one E.L.M.O. in the courtroom, so I prefer
9 everyone work together. So in combination with the Court's IT
10 Department and the State's IT Department, I'd ask that you
11 coordinate. Now, of course, if you cannot coordinate and there
12 is an issue, the IT Department through the Court will handle
13 whatever has to happen. So we'll have that available for you,
14 but you have to do it early. We are a month away now, so it is
15 not too early to do it.

16 The question about the exhibits. The Federal Public
17 Defender indicated that they understood the Court to be
18 directing the parties to combine their exhibits so the Court
19 would only be handling one set of exhibits. That is correct,
20 that is what the Court was talking about. The Court is not in
21 any way trying to limit what exhibits you provide or how many
22 exhibits you provide. So if you need 20 exhibit binders, that
23 is what you need. But they are in consecutive order and
24 marked with the clerk. The clerk will give you more direction

1 about how you fill out a Word document that you send to the
2 clerk before she marks the exhibits with you present so she
3 has a little information in advance.

4 The other thing that came up in the Federal Public
5 Defender's Memorandum is the issue with regard to the
6 depositions that were going to take place in Tonga and Hawaii.
7 It is true I did note that I want to get this done in October.
8 I, though, know first off the pleadings that were filed were
9 never submitted to me, so I never really ruled on that. I
10 wanted to make the record clear on that. We don't rule on
11 things before they are submitted. I was trying to give you a
12 heads up in the scheduling conference, but the Court has never
13 ruled that you could not do simultaneous video presentation to
14 the Court or do that kind of deposition. So you certainly
15 could set up that kind of deposition, do it remotely with the
16 court reporter. That happens frequently. You could video
17 tape it, and also have those witnesses appear in the courtroom
18 that way. Pursuant to the Nevada Supreme Court rules on
19 appearances, remote appearance, that is the way to get these
20 witnesses on. You do not have to not call them or not be able
21 to use them. Because I didn't rule on your motions because
22 they weren't submitted to me, I never had that discussion with
23 you in the administrative hearing that we had. But I am now,
24 based upon the Memorandum and your concerns about being able

1 to get that information before the Court. So, again, the
2 Court's IT department will assist you in doing that. We do
3 not have a jury, so it is possible for them to set up a screen
4 in front of me to connect through SKYPE or other software.
5 Certainly in Hawaii, it would be no problem, because there are
6 lots of Kinkos and court reporters I am sure in Hawaii that
7 would be able to do it. I think even in Tonga, the
8 Consulate's office could help in assisting in finding a way to
9 get a SKYPE connection through an attorney's office or
10 something like that where you have a good, fast Internet
11 service. But we can make that happen, but you are going --
12 When you say, Mr. Fiedler, you are going to have to make that
13 happen --

14 MR. FIEDLER: One of the logistical difficulties with
15 those witnesses, we would really like to have an attorney on
16 the ground with them. That is where the official passport
17 becomes an issue. We are working to get the official State's
18 passport for me so I can be there, but we are not 100 percent
19 confident that we can get it in time to have those depositions
20 or live testimony, whatever it may be, during the month of
21 October.

22 THE COURT: Well, I understand that you would really
23 like that. It is not necessary for Mr. Vanisi's
24 constitutional rights and for the hearing that was scheduled

1 at all of your request for October. The Court didn't pick
2 this date. You asked for it almost a year ago. We held it
3 for a year. Nothing else is scheduled. The fact that you
4 would prefer to have an attorney on site is not a requirement,
5 and I'm telling you there are ways to get this information
6 before the Court in a way that the Supreme Court has noted is
7 acceptable. And so I understand you would rather send
8 somebody there, rather talk to them in person. That sounds
9 great, but I'm frankly really surprised you were able to get
10 funding to go to Tonga. That is not a cheap place to go. And
11 it is great that you got it. I hope it works out. But if it
12 doesn't, there are other ways.

13 MR.FIEDLER: Understood. I want to represent we are
14 doing everything we can to make sure there is not a problem,
15 that we can get these witnesses, but if it turns out we cannot
16 get it together by the end of October, I understand. It is
17 what it is.

18 THE COURT: I guess you are going to have to
19 represent to the Court what you are doing to get it working. I
20 mean at this point, I wouldn't consider you acting in good
21 faith if you have not checked with at least three or four
22 sources in Tonga that have the ability to get simultaneous
23 video witness testimony. And if you have not checked with the
24 Court's IT operators by no later than two weeks before you're

1 in court, we are in trial. The reason I say that is you can't
2 just say, well, I looked at it and it didn't work. You're
3 going to have to really represent.

4 MR. FIEDLER: Understood, Your Honor, and when the
5 time comes, we'll be ready to make the record.

6 THE COURT: But it isn't, I want you to understand,
7 for me this is not about a record. It is about making
8 Mr. Vanisi, be sure Mr. Vanisi gets the hearing that has been
9 ordered he should have. I'm not worried about whether or not
10 there is a sufficient record. If you believe these witness are
11 necessary, I want to hear them, and I don't want to be told
12 October 28th, Judge, I tried everything, and then I say what
13 did you do? And you say, well, I got really busy and I didn't
14 do anything. At that point, you have not followed my rules.
15 You are in contempt, but you boxed me into a position that I
16 have no choice. I want to hear Mr. Vanisi's case and I want to
17 get it resolved honestly and completely, but to grant your
18 request. So I just want you to know I understand, I see it and
19 I am making every effort to give you options, September 5th,
20 on how to be sure these witnesses are before me in October.

21 MR. FIEDLER: Understood, Your Honor. Thank you.

22 THE COURT: Okay. At this point, we can proceed with
23 the request to disqualify the District Attorney's Office. If
24 you would you like to use the podium, we'll move it over for

1 you. Or, you are welcome to argue from there. Counsel.

2 MS. DIAMOND: Your Honor, I am happy from here.

3 THE COURT: Okay.

4 MS. DIAMOND: The briefing we submitted is quite
5 extensive briefing with the State's quite extensive. Most of
6 the argument is addressed on the pleadings, but I wanted to
7 summarize to the Court what we see to be the real crux of the
8 issue that we are dealing with.

9 The relationship between the Washoe County District
10 Attorney's Office and the Washoe County Public Defenders
11 Office in Mr. Vanisi's case is problematic. It really came to
12 our attention earlier this year when we became aware of the
13 efforts to contact members of Mr. Vanisi's former trial team
14 by the District Attorney's Office, but the critical time where
15 this really started was back in 2002. It is clear from the
16 situation surrounding the purported waiver by Mr. Vanisi that
17 something was problematic in the relationship between those
18 two agencies. As an initial matter, we have Mr. Picker who was
19 Mr. Vanisi's post conviction counsel at that time making a
20 comment on the record to Your Honor he believed the Public
21 Defenders Office were being represented by the District
22 Attorney's Office in this matter. I understand Mr. McCarthy,
23 as soon as he had an opportunity to address the Court, stated
24 clearly that was not the case and that his office represented

1 the State and not the Public Defender's Office. But that
2 caused some questions as to why Mr. Picker had that
3 understanding. And if the Court looks at the factual proffer
4 we made concerning that purported waiver by Mr. Vanisi, it
5 supports the inference Mr. Picker had that impression, because
6 potentially that is the impression the Public Defender's
7 Office had. This waiver was drafted in conjunction with the
8 District Attorney's Office, then current counsel for
9 Mr. Vanisi, post conviction lawyers Mr. Picker and Mr. Edwards
10 and members of the Public Defender's Office in order,
11 purportedly, for them to obtain the file from the Public
12 Defender's Office, which this Court had already ordered it be
13 handed over. As part of this waiver, it was not just that
14 that file goes from former trial counsel to post conviction
15 counsel, but included a blanket waiver that the District
16 Attorney's Office have access to the trial team, to the file,
17 to any information they wanted regarding Mr. Vanisi's
18 representation. At that time, Mr. Picker and Mr. Edwards
19 represented Mr. Vanisi, and their paramount interest was to
20 protect Mr. Vanisi's rights. The same for the members of the
21 Public Defender's Office. There was their former client.
22 Their paramount interest was protecting his right. For them
23 to think that it was necessary to get a waiver that involved
24 the District Attorney's Office, it wasn't in Mr. Vanisi's

1 interest. The inference from that was they believed they
2 needed the permission from the District Attorney's Office,
3 because the District Attorney's Office was representing the
4 Public Defender's Office and representing their interest in
5 the post conviction matter. That is why post conviction
6 counsel felt obligated to reach out to the District Attorney
7 when he was unable to get the Rule 250 Memo from the Public
8 Defender's Office. This is how you act when a party is
9 represented by counsel.

10 And the factual proffer we made regarding
11 conversations with Ms. Calderon this year and her
12 understanding from her conversation with Mr. Bosler that the
13 District Attorney's Office still represented the Public
14 Defender's Office in this matter is troubling. It is an
15 independent ethical conflict for the District Attorney's
16 Office if it is the case they represented a critical witness
17 in the proceedings, and the State of Nevada. Their interests
18 are not aligned. And the test for disqualification of the
19 office based on an attorney, based on an ethical violation
20 from the Cronin case that is cited in our pleadings, it is two
21 fold: The moving party must establish a reasonable
22 possibility that some specifically identifiable impropriety
23 did in fact occur, and the likelihood of public suspicion or
24 strong public criticism strongly outweighs the social interest