

**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 37 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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- 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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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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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
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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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Sara Jelenik  
An employee of the Federal  
Public Defender's Office

1 in the continued participation by that lawyer's office.

2 Here, the public perception of the Public Defender's  
3 Office who represents the indigent being represented in their  
4 own interest by the prosecutor's office who prosecutes the  
5 indigents in this County, that satisfies that test, Your  
6 Honor. And I understand right now we are dealing with  
7 inferences, and we don't have a solid factual basis for this,  
8 and that is why we requested an evidentiary hearing, because  
9 there was contact in 2002 and in 2018 potentially during that  
10 sixteen year period between members of Mr. Vanisi's trial team  
11 and the District Attorney's Office, and there is this shroud  
12 of apparent understanding at least by his post conviction  
13 counsel that the District Attorney's Office represented  
14 members of the Public Defender's Office. And without us  
15 hearing from those individuals and Your Honor being able to  
16 make an assessment what in fact took place, what the  
17 understanding was, whether there was a disqualifying conflict  
18 of interest is why we renew our request for an evidentiary  
19 hearing on that matter, Your Honor.

20 THE COURT: Okay. State.

21 MS. NOBLE: Thank you, Your Honor. I first want to  
22 begin by pointing this Court to the Order of Affirmance from  
23 2010 by the Nevada Supreme Court. And that was 04-20-2010, the  
24 last post conviction appeal. Vanisi had moved for a

1 protective order preventing disclosure of this type of  
2 information to the District Attorney's Office. The Nevada  
3 Supreme Court said, I am quoting: "Vanisi expressly waived  
4 his attorney-client privilege as it related to his  
5 representation at trial." That is on page 3 and 4 of that  
6 Order.

7 Part of the State's argument here is that is the law  
8 of the case. But even if it wasn't, we have our Nevada  
9 statute that tells us when a Petitioner alleges ineffective  
10 assistance of counsel, he's put on notice he's waiving  
11 attorney-client privilege. That's 34.735. Our case law  
12 underscores that consensus in Molina versus State. I know the  
13 Court's aware of that case. We also have Nevada Rule of  
14 Professional Conduct 1.6B5: A lawyer can reveal information  
15 in order to respond to allegations from a former client. We  
16 observed in our Opposition and in our Sur Reply that the  
17 Federal Public Defender's Office, these attorneys, filed many  
18 documents including it SCR 250 Memo which goes into every  
19 privilege and confidential manner under the sun and made it a  
20 matter of public record. When that happens, that is a waiver.

21 Now it is very interesting it was not until their  
22 Reply that counsel decided to unearth or bring a fifteen year  
23 old or sixteen year old hearing from 2002. It was a status  
24 hearing. We attached to our Sur Reply the entire transcript.

1 What that transcript makes very clear is that Mr. Edwards was  
2 having difficulty getting documentation that he needed to  
3 prepare for an upcoming hearing with the Court. He asked  
4 Mr. McCarthy for assistance. Mr. McCarthy obliged.  
5 Mr. McCarthy says on the record: "I gave it to Scott Edwards.  
6 It is about an hour. I haven't read it." That is what  
7 happened in 2002. But even so, the Federal Public Defenders  
8 themselves ended up filing that memorandum anyway. Now we are  
9 trying to split hairs in the motion practice between  
10 confidential communication and attorney-client privilege.  
11 Confidential communication and right to that is part of the  
12 attorney-client privilege. Molina makes very clear by filing  
13 this Petition, Mr. Vanisi has waived attorney-client  
14 privilege. It is that privilege that protects the  
15 confidential communication.

16 Now this fifteen year old or sixteen year old  
17 hearing only came up after we have our State Bar's Ethics and  
18 Professional Responsibility standing committee expressly  
19 reject the ABA opinion that was not binding in the State  
20 contrary to our statutes and contrary to our case law. That  
21 was nonetheless the subject of attack of unethical conduct on  
22 the part of my office. And we strenuously object to that. It  
23 is very improper, and at this point it has become a harassing  
24 litigation tactic that is a pattern by the Federal Public



1 Defenders. The Nevada opinion is not binding on this Court,  
2 true. But I would ask this Court to decline their invitation  
3 to reject well-established Nevada statutory law, to reject our  
4 case law and to reject to the Nevada Supreme Court's previous  
5 finding in its Order of Affirmance in 2010 and to instead  
6 adopt a standard that is not the law of Nevada. And to not  
7 find that my office, by contacting former counsel and persons  
8 who worked on the case, to talk to them about the subject of  
9 mitigation, the narrow scope of this hearing, that is not  
10 unethical. That is part of our job. There has been no law in  
11 Nevada or any court that says that we cannot do this.

12 And so with that, Your Honor, I will submit it. But  
13 I would say this appears, in the State's view, to be a  
14 dilatory tactic.

15 THE COURT: The only thing I would like you to  
16 address that you haven't is the allegation --

17 MS. NOBLE: Yes, Your Honor.

18 THE COURT: -- at some point the Public Defender  
19 believed that the District Attorney's Office was representing  
20 them. I know you made the comment about securing the document  
21 for Mr. Picker or Mr. Edwards and Mr. McCarthy's limited  
22 involvement there. But the argument as we heard today from  
23 the Federal Public Defender is that somehow there is a  
24 relationship between the Washoe County District Attorney's

1 Office and the Washoe County Public Defender's Office that  
2 implies that the people in the Public Defender's Office think  
3 they were "represented" by the County prosecutor's office.

4 MS. NOBLE: Thank you, Your Honor. The entire  
5 transcript expressly refutes that assertion. It is Mr. Picker  
6 who was not a member of the Federal Public Defender's Office  
7 who was frustrated with Mr. Specchio, what he felt was  
8 Mr. Specchio's failure to give him documents in a timely  
9 manner. It was Mr. Picker who makes that statement, because  
10 he's trying to connect Mr. McCarthy to this situation in which  
11 documents are not being turned over, and he wants more time  
12 for a hearing. So one lone attorney's statements who is not  
13 affiliated with the Washoe County Public Defender's Office  
14 that we represent that office is not enough to establish that.  
15 That is simply not the case. Mr. Bosler understands that. I  
16 don't know what conversation he had with Ms. Calderon, but I  
17 would be very interested to see during the trial, I am sorry,  
18 during the evidentiary hearing on the Petition whether that is  
19 accurate, because we have had several other representations  
20 made about stuff Ms. Calderon said that have proven to be  
21 inaccurate in our conversations with her. So we have never  
22 indicated we represent the Public Defender's Office.  
23 Mr. McCarthy expressly disavowed that on the record. That  
24 should be the end of the hunt. This is sixteen years old. If

1 it is such a concern, why has it not been raised before? And  
2 it doesn't affect these proceedings. Thank you.

3 THE COURT: Counsel.

4 MS. DIAMOND: Your Honor, to be candid with the  
5 Court, we are preparing for litigation and preparing to  
6 address the motion and our Reply to the Motion to Disqualify.  
7 When we looked more into this issue, we found the transcript,  
8 found the waiver, made the factual representation to the Court  
9 what we had discovered. That is why it is being brought to  
10 the Court's attention now. We started looking into this issue  
11 when we found out about the outreach efforts that took place  
12 in 2018. Initially, the State made some representations I  
13 would submit support the need for an evidentiary hearing on  
14 this matter. If Ms. Calderon indicated things to the State  
15 that undermines our position, that is information we would  
16 like to know about, and we would like the Court to know about  
17 what Ms. Calderon is representing, because it is something  
18 that was represented to us that we represented to you. This  
19 is a critical matter. It is relevant to these proceedings,  
20 because if the District Attorneys are laboring under a sixteen  
21 year conflict of interest, they simply cannot represent the  
22 State in this matter. They also represent members or former  
23 members of the Public Defenders Office. Again, Mr. Bosler  
24 understands he's not represented by the District Attorney's

1 Office, I don't see that in the record anywhere. If that is a  
2 representation Mr. Bosler made to opposing counsel, that is  
3 something that needs to be explored in an evidentiary hearing.  
4 Mr. Picker's motivation in pointing out or trying to link  
5 Mr. McCarthy to the Public Defender's Office, again we don't  
6 know that without hearing from Mr. Picker. It all sounds like  
7 factual disputes that need to be fleshed out in an evidentiary  
8 hearing.

9 Your Honor, there wasn't a change of tactic. It was  
10 adding additional support to a situation that seemed to be  
11 getting more serious as time went on, and we looked into it  
12 more. We do not agree that the recent opinion, the Ethics  
13 opinion that came out after this contact was made changes the  
14 impropriety we allege regarding the contact at the time that  
15 was made, because at the time that was made, an interpretation  
16 of the Nevada Rules of Ethics had been made in the Shepard  
17 case in this district. And the Court in this district said  
18 that was an accurate reflection of the law. So that is what  
19 we were basing our motion on, and that is what was described  
20 as a court in this district as an accurate representation of  
21 law at the time these representations and outreach was made to  
22 the trial team. None of this is made in bad faith. This is  
23 simply made to make sure this hearing goes toward protecting  
24 Mr. Vanisi's rights.

1           Your Honor, there are many factual disputes here,  
2 things we just don't know about. It is a serious allegation.  
3 We know it is a serious allegation and absolutely not made  
4 frivolously that the public interest in a District Attorney's  
5 Office representing a Public Defenders Office or that spectre  
6 being held out there hanging over this case is the very reason  
7 that the Nevada Supreme Court, which is not something that  
8 happens in many states, gives a method for disqualifying  
9 opposing counsel for an ethical violation. And that is  
10 something this Court should want to hear from. I understand  
11 most of the people we want to hear from are local to this  
12 area. We have the whole month of October. The Court could set  
13 a time this could be addressed before we move into the  
14 substantive hearing. So, Your Honor, this is a problem  
15 hanging over this case right now, and it needs factual dispute  
16 and representation from one side or the other that disputes  
17 each other. Those are factual disputes this Court should  
18 resolve by hearing from the witnesses concerned.

19           THE COURT: The Court has had an opportunity to  
20 review the oral motion to disqualify the Washoe County  
21 District Attorney's Office from the hearing that is scheduled  
22 in October. I understand from your argument and some of your  
23 pleadings that the Federal Public Defender on behalf of  
24 Mr. Vanisi is asking for something broader, asking for the

1 Washoe County District Attorney's Office to be recused from  
2 their representation of the State in all proceedings around  
3 Mr. Vanisi's. However, there are some problems with that. I  
4 don't think this is the appropriate timing or appropriate  
5 pleading to raise that issue. The matter has been returned  
6 from the Nevada Supreme Court for a limited purpose. We have  
7 that limited purpose set. The Nevada Supreme Court is going to  
8 have to rule on my ruling on that limited hearing that it was  
9 returned for before the case will be sufficient where you can  
10 start raising additional issues.

11 In addition, the Motion to Disqualify can just as  
12 easily be raised at the Nevada Supreme Court, or raised after  
13 the evidentiary hearing. So for purpose of setting a hearing  
14 prior to our evidentiary hearing that has been scheduled, I am  
15 going to deny that request.

16 I am going to at this time find also that the basis  
17 of that denial is there was no ethical violation on the part  
18 of the Washoe County District Attorney's Office and their  
19 communication with the trial team to investigate the  
20 ineffective assistance of counsel claim in the narrow area  
21 that we are talking about, mitigation, before the hearing that  
22 is scheduled in October. So I am specifically making a finding  
23 there was no ethical violation and no basis to disqualify.

24 Now embedded in your Reply and perhaps more argument

1 today is a request separate and apart from any activity on the  
2 part of the Washoe County District Attorney's Office as it  
3 prepared for this hearing or the hearing coming up in October  
4 to disqualify them because of a representation of the Public  
5 Defender's Office. At this time, I think that you have not  
6 supported that allegation and that motion sufficient to even  
7 get an evidentiary hearing. As you said, the witness are all  
8 local. There is no reason you can't do some investigation and  
9 be prepared for such an argument in the future. It isn't all  
10 about just throwing something at the wall and make some sort  
11 of allegation and think you're entitled to an evidentiary  
12 hearing and a delay of the hearing that this matter is  
13 required by the Supreme Court's return.

14 So that is not to say in the future you can't  
15 litigate the issue whether or not they represented, the Washoe  
16 County District Attorney, represented the Washoe County Public  
17 Defender back in 2002. I am not saying you can't raise that  
18 issue. I'm saying it is not timely now to raise it and not  
19 appropriate to be raised at this time based on the evidence  
20 that you have provided to me, the allegations. There is too  
21 much supposition, too much guesswork. There is lots more you  
22 could do to investigate that claim prior to it being raised  
23 that would be more appropriate.

24 I also think it is a claim that may well be raised

1 later if this matter continues and you to go a Federal court.  
2 You could certainly raise it in the Federal court again. I  
3 mean anything that happens in the future you can raise that.  
4 But you're going to have to flesh it out more completely  
5 before I would provide you a hearing on the issue of  
6 disqualification based on representation.

7 So I am going to ask the State prepare an order with  
8 regard to the disqualification for inappropriate contact. I do  
9 adopt the discussion of the Nevada Rules of Professional  
10 Contact committee as well as noting the statutory requirement  
11 and ability to investigate the ineffective assistance of  
12 counsel claim when it is raised pursuant to Chapter 34.  
13 Prepare such a decision for the Court and provide it to the  
14 Federal Public Defender before submitting it to me.

15 MS. NOBLE: Yes, Your Honor.

16 THE COURT: Thank you. Okay. Let's talk about notice  
17 of witnesses. We'll start there. I did see that the Federal  
18 Public Defender thinks we can get this done in two weeks  
19 rather than four; is that correct?

20 MR. FIEDLER: Yes, but that was when we were thinking  
21 we would be doing depositions. So I think, if we could leave  
22 that open until we have had a chance to address the logistics  
23 of getting the live testimony.

24 THE COURT: So you can make a decision what you want



1 to do?

2 MR. FIEDLER: Yes, please.

3 THE COURT: What I would like to do, we are  
4 currently set for every Monday, October 1st, October 8th,  
5 October 15th, October 22. Those weeks Monday and through the  
6 following week. We have a specific witness who has been  
7 scheduled to testify, Crystal Calderon, on October 4th at  
8 10:00 a.m. is that correct?

9 MS. NOBLE: Yes, Your Honor, that's correct.

10 THE COURT: So what I would ask is if you need to  
11 move things around or you think you need less than a full four  
12 weeks, I ask you not set anything else for the first week of  
13 October. That would be the week we would drop off if we drop  
14 a week off. Even though we have Crystal Calderon on the  
15 Thursday, I don't want anything else set.

16 MR. FIEDLER: One of the witnesses we intend to call  
17 also needs to be during that first week.

18 THE COURT: Okay.

19 MR. FIEDLER: We will try to have that witness on  
20 October 4th, but I would need to go back and look at that  
21 witness' specific calendar.

22 THE COURT: Who is that?

23 MR. FIEDLER: Pat Fager, Your Honor.

24 THE COURT: When did you think they would be

1       available?

2               MR. FIEDLER: Our recollection is the 2nd, 3rd and  
3       4th of October.

4               THE COURT: Were the days they were available?

5               MR. FIEDLER: The days they were available. The  
6       whole rest of the month is not available.

7               THE COURT: Okay. Hopefully, I don't know how long  
8       you think Crystal Calderon's testimony will take.

9               MS. NOBLE: Your Honor, from the State's  
10      perspective, it would take about half a day or less. But I'm  
11      not sure what Mr. Fiedler thinks.

12              MR. FIEDLER: We would expect something similar, but  
13      with that said, I still think we could probably squeeze Pat  
14      Fager in October 4th. Before I officially take that position,  
15      I would like to reviewing everything we were planning.

16              THE COURT: That would be my preference if you can  
17      do that. If you can't, we can't.

18              Okay. The next issue really here is whether or not  
19      we are going to do a competency evaluation on Mr. Vanisi and  
20      whether or not he can waive the hearing. He's already, while  
21      in my opinion there was no allegation he wasn't competent at  
22      the hearing where he waived his appearance at the hearing set  
23      in October, so we have that, his personal waiver, but we now  
24      have some communication directly to the Court, to the District

1 Attorney's Office and I am assuming to his counsel indicating  
2 that he wants to waive the hearing completely even though it  
3 was returned by the Supreme Court for that limited purpose to  
4 have that hearing. And part and parcel of that is the Federal  
5 Public Defender's Office's request for a competency  
6 evaluation. Mr. Fiedler, is this your motion?

7 MR. FIEDLER: Yes. Thank you, Your Honor. By design,  
8 Nevada law sets a low bar for when a competency evaluation is  
9 required. There are good policy reasons for this. I am not a  
10 mental health expert, and the law governing competency  
11 evaluations recognizes the fact I am not qualified to  
12 determine whether Mr. Vanisi is competent or not. So the  
13 Court's task here is to evaluate one question, that question  
14 is is there evidence, assuming it is true, that raises a  
15 reasonable doubt about Mr. Vanisi's competency. What that  
16 requires is for this Court to look at the available evidence  
17 supporting reasonable doubt, assume that evidence is true and  
18 then decide whether that is a sufficient amount of evidence to  
19 support there is a doubt about Mr. Vanisi's competency. What  
20 this Court does not do at this stage is weigh the  
21 contradicting evidence. That happens later when this Court,  
22 after having Mr. Vanisi evaluated, this Court weighs and  
23 determines for itself whether Mr. Vanisi's is competent to  
24 proceed. But we are not there yet. For now we are just at

1 the threshold question whether an evaluation is required.

2 The evidence supporting a reasonable doubt about  
3 Mr. Vanisi's competence is two fold: First we have two  
4 experts' reports included in the Petition filed in this case,  
5 Dr. Mack and Dr. Foliaki. Both concluded Mr. Vanisi suffers  
6 from schizoaffective disorder, a mental illness disorder that  
7 Dr. Mack categorized as extreme mental illness. Dr. Foliaki  
8 noted Mr. Vanisi's schizoaffective disorder greatly impairs  
9 his cognitive and emotional behavioral control. And  
10 Dr. Foliaki questioned whether Mr. Vanisi has ever been  
11 competent, whether he could rationally communicate with  
12 counsel at the time he wrote his report.

13 Second, we have my personal observations of  
14 Mr. Vanisi which I include in the Declaration filed with this  
15 Court. Mr. Vanisi's mental health has been an ongoing concern  
16 in our representation of him in this case. He has ups and  
17 downs. Historically these fluctuations occurred over a long  
18 period time. Recently, they have been occurring much faster,  
19 gotten to the point where lately when I speak with  
20 Mr. Vanisi's or meet with Mr. Vanisi, I don't know if I am  
21 going to be meeting high energy Mr. Vanisi or low energy  
22 Mr. Vanisi's. When he's low energy Mr. Vanisi, I encounter  
23 someone who has slurred speech, moves slowly. And when I have  
24 met with Mr. Vanisi's who has high energy, he talks so fast

1     that he can't get the words out, and he repeats himself  
2     multiple times. In between visits or phone calls he will  
3     switch from being high energy or low energy. Additionally,  
4     when I visited with Mr. Vanisi in May, the case worker, the  
5     NNCC case worker indicated Mr. Vanisi was going to go before  
6     the forced medication panel to determine whether he needed to  
7     continue with the medication. These reasons by themselves  
8     support reasonable doubt about Mr. Vanisi's competency. But  
9     additionally, as I indicated in my Declaration, Mr. Vanisi's  
10    delusions about this case made me question our ability to  
11    rationally communicate with each other.

12           More importantly, I believe Mr. Vanisi's mental  
13    condition substantially is affecting his capacity to  
14    appreciate his position and make a rational choice about  
15    whether to continue with the claim in this case. Specifically,  
16    Mr. Vanisi has delusional belief and certainty of obtaining  
17    guilt phase relief that is preventing him from appreciating  
18    the very real danger of execution that follows from him  
19    waiving this hearing. On that basis, Your Honor, we request  
20    you order Mr. Vanisi be evaluated for competency.

21           THE COURT: Just a minute, Mr. Vanisi. I will let  
22    you talk in a few minutes. The record should reflect  
23    Mr. Vanisi raised his hand to get my attention right after  
24    argument of counsel.

1 THE COURT: Ms. Noble or Mr. Picker.

2 MR. PLATER: Thank you.

3 THE COURT: Mr. Plater not Mr. Picker.

4 MR. PLATER: There is a conflict there, Judge.

5 THE COURT: It was just in my brain I guess.

6 MR. PLATER: Judge, what is the purpose of this  
7 request for a competency hearing? You didn't hear it, did  
8 you? So ask yourself is the request that he be evaluated to  
9 determine whether the waiver that we anticipate might be  
10 coming is proffered, or is it to delay the proceedings so that  
11 we can continue the Habeas proceeding at some future time when  
12 he becomes competent? We haven't determined what the basis of  
13 the request is. I would submit, Judge, that if we are talking  
14 about competency to go forward with a Habeas proceeding, he  
15 doesn't have to be competent. That is supported by the United  
16 States Supreme Court case of Ryan versus Gonzales. The cite  
17 to the case, Your Honor, is 133 Supreme Court 696, Ryan versus  
18 Gonzales decided in 2013. Justice Thomas of the majority  
19 essentially said a Habeas Petitioner -- granted it is a  
20 Federal Habeas Petitioner-- contesting a State conviction on a  
21 death penalty case does not have to be competent during the  
22 Habeas proceeding itself. The Court reasons while a Habeas  
23 Petitioner has a right to counsel under the Sixth Amendment,  
24 the right to counsel does not involve a right to competency,

1 because that is under the due process clause. They are two  
2 different things. And so what they were arguing is the right  
3 to have the effective assistance of Habeas counsel to be able  
4 to communicate to gather strategy and understand the  
5 proceedings. That is not implicated, because that falls under  
6 the Sixth Amendment. But competency falls under the due  
7 process clause.

8 We need to figure out what he wants this for. I  
9 would suggest that the Court canvass Mr. Vanisi and ask him  
10 what did you mean by the letters you have been sending to the  
11 Court. I find it strange and curious these representations  
12 that are given by counsel that suggest that Mr. Vanisi needs  
13 to be evaluated for competency, he refers -- I don't know what  
14 the Court has received. We have received a Declaration by  
15 Mr. Fiedler. I don't know if Mr. Fiedler filed anything else  
16 ex parte or under seal, or whether his Declaration is the only  
17 thing. But this is really curious, Judge. If you read his  
18 Declaration, you see that Mr. Fiedler asserts to this Court  
19 that he has had issues regarding Mr. Vanisi's competency for  
20 the last six months. And he made this Declaration I believe  
21 in August. So these concerns allegedly go all the way back to  
22 February. And yet on May 30th Mr. Vanisi, when you canvassed  
23 him, was competent at least as far as Mr. Fiedler represented  
24 to the Court, at least impliedly, right? I mean Mr. Fiedler at

1 the end of May when he says in his Declaration he has had  
2 concerns about Mr. Vanisi all during the scope of the last six  
3 months tells the Court essentially my client is competent and  
4 now apparently sometime between May and August he has  
5 developed some other belief that would challenge or question  
6 Mr. Vanisi's competency, and he doesn't tell us. It is just  
7 this broad range assertions that he has always been concerned.

8 But what the Court needs to ask itself is when did,  
9 according to Mr. Fiedler, because he's the basis of this  
10 request, essentially, when did Mr. Fiedler, on what particular  
11 day, did he have fear regarding Mr. Vanisi's competency.  
12 Because, again, he filed the motion for the hearing the very  
13 same day we filed a motion to have a hearing regarding whether  
14 he wanted to waive the hearing. I mean that is really  
15 coincidental, Judge. All of a sudden you say you have had  
16 concerns for the last six months, and when we want to know  
17 whether he really wants to waive the hearing on the very same  
18 day, I've got a question about his competency now, excuse me,  
19 I find that a little coincidental.

20 Now these other experts he relied on, these are  
21 people he knew about the entire time he's filed this Petition.  
22 I think those Affidavits were filed with the Petition. So if  
23 those doctors had concerns, apparently Mr. Fiedler wasn't so  
24 concerned at any time up until he filed the motion for



1       evidentiary hearing the same day we filed our motion, that  
2       Mr. Vanisi had any problems with his competency.

3               So what I would like to do at this point, Judge, is  
4       I think the Court should have a conversation with Mr. Vanisi,  
5       ask him what does he want to do. You can rely on your own  
6       observations and answers to your questions about Mr. Vanisi's  
7       competency as well, and whether he's competent to waive this  
8       hearing if that is indeed what he wants to do.

9               THE COURT:   Okay.   Thank you.

10              MR. FIEDLER:  If I could just make a couple of points  
11     in response.   First I would like to compliment Mr. Plater on  
12     his very stirring impression of me.  But I would like to be  
13     very clear right now that we are worried about Mr. Vanisi's  
14     competency as it relates to this waiver.  In that regard, it  
15     matters what Mr. Vanisi needs to be competent for.  If  
16     Mr. Vanisi is going to waive this hearing, he needs to be  
17     competent under the *Reys* versus *Payton* standard which requires  
18     that, excuse me, Your Honor, the defendant have capacity to  
19     appreciate his position to make a rational choice with respect  
20     to continuing or abandoning further litigation, or, on the  
21     other hand, whether he's suffering from mental disease  
22     disorder which may substantially affect his capacity.  *Reys v.*  
23     *Payton*, 384 U.S. 312.

24              So I want to be clear, this is not about delaying

1 the proceeding. We are moving forward preparing for this  
2 hearing, expecting it to go forward. However, we feel  
3 Mr. Vanisi, at least there is enough of a doubt as to  
4 Mr. Vanisi's competency, as to his ability to enter this  
5 waiver.

6 Mr. Plater made a lot of point regarding this  
7 Court's canvass of Mr. Vanisi on May 30th and the fact I did  
8 not raise any competency concerns at that time. Again, I would  
9 reiterate it matters what Mr. Vanisi's needs to be competent  
10 for. At that time, he was waiving his right to be present at  
11 a hearing where he would still have counsel present to  
12 represent his interests. But, additionally, competency is  
13 fluid. And this universe where we are dealing with a client  
14 who suffers from mental health issues, it is very difficult,  
15 and we have to make very difficult decisions about when and if  
16 to evaluate Mr. Vanisi for competency. On May 30th we did not  
17 feel we were there. But taking everything together with the  
18 fact Mr. Vanisi has indicated an interest in waiving this  
19 hearing, we feel that is enough to give us a question about  
20 Mr. Vanisi's competency.

21 THE COURT: Okay. I have a question for you,  
22 counsel.

23 MR. FIEDLER: Yes, Your Honor.

24 THE COURT: When I read what you have filed and when

1 I listened to what you argue, it seemed to me that you felt  
2 the competency issue really wasn't was Mr. Vanisi competent to  
3 make a decision to waive a hearing that, in your opinion,  
4 could result in him ultimately receiving, actually having the  
5 death penalty. Because if he waives his last chance at the  
6 Nevada Supreme Court, he waives that hearing, there is nothing  
7 pending at the Nevada Supreme Court left or at that point very  
8 little for him to contest, and he's one step closer to  
9 execution. And what you argued was that he has an unfound or  
10 unsupported delusion of his receiving some other benefit for  
11 relief from his conviction. Are you not putting your own  
12 belief system at odds with Mr. Vanisi's belief system and  
13 saying he must be incompetent because he doesn't agree with  
14 the way you are looking at the case?

15 MR. FIEDLER: Well, Your Honor, if it were only a  
16 disagreement, then we wouldn't be here today. But it is much  
17 more than a disagreement. One, we have this history of mental  
18 health problem that is documented. And, two, it is not just a  
19 disagreement about, you know, the best path forward. This is a  
20 delusional belief about the guilt phase, claims that he is  
21 making. It is difficult, if not impossible, for me to convey  
22 to Mr. Vanisi the seriousness of waiving the hearing in this  
23 case and what that means for his chances of getting penalty  
24 phase relief some day. So the short answer to your question

1 is this is much more than a disagreement.

2 THE COURT: All right. Mr. Vanisi, how are you  
3 doing today?

4 THE DEFENDANT: Doing good, Judge. How you doing?

5 THE COURT: I am fine. I have been noticing you  
6 have been taking some notes down.

7 THE DEFENDANT: Yeah.

8 THE COURT: You paid attention to what is happening  
9 in this day's hearing?

10 THE DEFENDANT: Yeah. Yes.

11 THE COURT: All right. You want to talk to me,  
12 right?

13 THE DEFENDANT: Yeah. Well are we talking about the  
14 competency evaluation?

15 THE COURT: Yes, we can talk about that first.

16 THE DEFENDANT: We can talk about that first. I  
17 want, you should shoot down my lawyers' request for competency  
18 evaluation. Every time I do something contrary to their  
19 wishes, they want me evaluated. I have been evaluated a  
20 couple of times before, before today. You remember those  
21 times, right?

22 THE COURT: Yes.

23 THE DEFENDANT: I think twice, two other times that  
24 I can remember. Because I said something contrary to what my

1 lawyers were thinking, they wanted a competency evaluation.

2 You granted those evaluations, correct?

3 THE COURT: Yes.

4 THE DEFENDANT: I passed those competency  
5 evaluations, right? Well today I am doing something contrary  
6 to their line of thinking, their belief system and they want  
7 me to be evaluated. Judge, the doctor i going to ask if I am  
8 oriented to time. I am oriented to time. They are going to  
9 ask if I am oriented to place. I am oriented to place. I know  
10 where I am. Am I oriented to date. I know this September 5.  
11 Am I oriented to -- can I assist my attorney. I can assist my  
12 attorney. We have disagreements. That is what a healthy  
13 client, attorney-client privilege is all about is having  
14 disagreements. And do I understand the proceedings against  
15 me. I understand the proceedings against me, and I understand  
16 that I have the death penalty hanging over my head, and I  
17 understand that. And so what my counselor has said, what he  
18 said earlier about low energy, high energy, Judge, I am human.  
19 Sometimes I have low energy and I've got to make a phone call.  
20 I am low energy, lack of food. I am exercising. I am carrying  
21 on with my life. My energy, sometimes I receive a good  
22 report, high energy. So he's fabricating about like me talking  
23 loud and repeating myself over and over. I don't repeat  
24 myself over and over. Depending how the conversation goes, I

1 might have to restate a few things again to them over and over  
2 again depending how the conversation goes. But they are  
3 making me out to look like I am mentally incompetent. That I  
4 have a history of mental incompetency. I don't have a history.  
5 I mean they want to present that as mitigating evidence I have  
6 a history of mental health problems. But you should shoot  
7 down their request for the reasons I stated today. I am  
8 oriented to place. I am oriented to time. I know I can  
9 assist my attorney. Especially on speaking, sometimes when I  
10 am speaking about lawyer stuff, legal stuff, it is hard for me  
11 to say the right word, because I am unfamiliar with the  
12 jargon, so I don't speak fluently. So that is why I have to  
13 sometimes pause, make sure I state the right things in order  
14 for them to understand. And I am aware of the proceedings  
15 against me.

16 So if I were to see a doctor again, I am quite sure  
17 they would find me competent. It would be a waste of  
18 resources, a waste of time on the Court's behalf if I were to  
19 see a doctor again. But if you want me to be evaluated, then I  
20 will cooperate with that.

21 That is all I have to say about the competency  
22 evaluation, Judge.

23 THE COURT: Okay. Well, what I think I understand  
24 is --

1 THE DEFENDANT: Oh, one more thing.

2 THE COURT: What?

3 THE DEFENDANT: Personal observations of me in  
4 court. I have been coming to your court, plus your  
5 observations of me would determine whether I am crazy. I am  
6 am not crazy. Competent or not competent. Your observation of  
7 me in court, I am responsive to you. When you tell me to sit  
8 down, I sit down. When you tell me not -- When we talk, you  
9 talk to me, I am responsive to your commands and your  
10 questioning. So your observations of me alone should  
11 determine that, you know, whether I should be evaluated or not  
12 evaluated.

13 THE COURT: Okay. It seems to me that most of this  
14 evaluation and competency issue is whether or not you are  
15 really competent to waive a very significant right that you  
16 have right now to have an evidentiary hearing on the  
17 ineffective assistance of counsel claim, whether they put on  
18 enough mitigation at your trial. That is really what the  
19 question is for me. So it is not, although the motion has been  
20 raised initially as a broad request for competency, I am more  
21 concerned with the issue of whether or not you can completely  
22 understand what a waiver of the hearing we have already got  
23 scheduled is and you have already been allowed to waive going  
24 to. So, really, it shouldn't have any impact on you,

1 personally, if you have that hearing, because you are not  
2 going to be there. So that is what is important to me. And I  
3 understand that you wrote a letter to the Court saying you  
4 wanted to waive that hearing.

5 THE DEFENDANT: Yes.

6 THE COURT: And so my question for myself is are you  
7 competent to make that decision. And that is not just about  
8 assisting your attorneys. It is about understanding what that  
9 waiver really means for your case.

10 Now what your lawyer has told me is that you don't  
11 understand that. Now you heard me ask him are you sure it is  
12 that he doesn't understand it or is it that you think he  
13 doesn't understand it or do you think he doesn't understand it  
14 because he disagrees with you, lawyer, your opinion. Do you  
15 want to tell me why you think it is so important to waive this  
16 hearing?

17 THE DEFENDANT: Well --

18 MR. FIEDLER: Your Honor, if I may.

19 MR. PLATER: Your Honor I object. Mr. Fiedler has  
20 now interrupted a canvass. I ask the Court to ask Mr. Fiedler  
21 to sit down. I can't see.

22 THE COURT: You can move back if you want.

23 MR. FIEDLER: I was just going to ask perhaps we  
24 could do this ex-parte.



1           THE DEFENDANT: I am fine. I am not going to say  
2 anything confidential.

3           THE COURT: Okay. I don't want you to tell me what  
4 your lawyers have said to you.

5           THE DEFENDANT: It is nothing to preclude the  
6 District Attorneys from hearing. There is no confidential.  
7 It is just a conversation we are having about the tactics I  
8 want to employ.

9           THE COURT: You want to tell me the reason is a  
10 tactical decision you have made about what is best for your  
11 case?

12          THE DEFENDANT: Yes. That's simply what it is.

13          THE COURT: Don't tell me the basis of that tactic.

14          THE DEFENDANT: No, I am not going to. Yeah, you  
15 know, they are just doing some things in my appeal I have  
16 asked them not to do. I have asked them to cease and desist  
17 from pursuing that. They haven't been listening to me on  
18 that. And they are wanting to go ahead and pursue this  
19 evidentiary hearing. I told them I don't want an evidentiary  
20 hearing, any guilt phase penalty claim issues, but they are  
21 doing it anyway against my wishes. I have been hijacked. I  
22 thought I was the captain of the ship making decisions on what  
23 I think and what I feel is best for my appeal. But they have  
24 a mind of their own that they want to force on me, want to put

1 on me to go with that evidentiary hearing. I don't want an  
2 evidentiary hearing. I don't want a competency evaluation,  
3 and I don't want that, Your Honor.

4 THE COURT: Okay.

5 THE DEFENDANT: I don't feel I should be evaluated  
6 again, because you can ask me the same things that the doctor  
7 would ask and you would get the same answer and you can make  
8 that determination on your own.

9 THE COURT: Thank you. You may be seated.

10 Either counsel can answer this question: When was  
11 the last time Mr. Vanisi received a competency evaluation?

12 MR. FIEDLER: It would have been in 2005 unless the  
13 Court wants to count the expert reports we provided with the  
14 current Petition which were filed in 2011.

15 THE COURT: No, I was thinking Lakes Crossing  
16 evaluation. Back in 2005?

17 MR. FIEDLER: I am reasonably confident it was 2005  
18 pursuant to prior counsel's Rohan motion.

19 THE COURT: Okay. Mr. Vanisi appears to be very  
20 competent. He's articulate as always, but also addressing the  
21 Court in realtime with real concerns, clearly appears to be  
22 competent to make his own decisions. And for whatever reason,  
23 he said the magic word that he wants to waive the hearing  
24 because he isn't believing the strategy, or he wants to take

1 his appeal another way.

2 A defendant has the right to manage his own case and  
3 that right is significant, and the courts have given  
4 defendant's a great deal of deference to individuals, and we  
5 see it throughout the self-representation litigation about  
6 when the court can determine whether or not a person is  
7 competent to waive counsel. The problem I have in this  
8 instance isn't that I feel there is very good evidence he's  
9 incompetent or that I think that the Federal Public Defender  
10 really made a good faith showing that this is something new or  
11 unique. The problem I have is if I accept his, Mr. Vanisi's,  
12 waiver of the hearing without a current evaluation, that an  
13 appellate court will tell me, Judge, you shouldn't have done  
14 it that way. You should have had a current evaluation. I see  
15 no need for a current evaluation unless we are relating it to  
16 Mr. Vanisi's request to waive his right to have this hearing  
17 that is scheduled in October. That is the only basis. I do  
18 not think there is a need for him to be competent to proceed  
19 with the hearing. He has counsel. I don't think there is any  
20 basis to ask for a competency hearing to proceed with the  
21 hearing. The only question is whether or not he can  
22 competently waive his right to have the hearing.

23 With that said, since Mr. Vanisi is serious he  
24 really wants me to waive his hearing, right, Mr. Vanisi's?

1           THE DEFENDANT:  Yes, Your Honor.

2           THE COURT:  And because I believe he has a right to  
3 waive that hearing if he is competent, I am not going to grant  
4 his request until a competency evaluation is conducted for the  
5 sole purpose of determining whether or not he's competent to  
6 waive his right to have a hearing.  And then if he's competent  
7 and he tells us he wants to waive it still, then that is his  
8 choice and I would be glad to have oral argument on that  
9 again, counsel, with him present if he would like to be heard  
10 again.  But what we have to be aware of is that I see this  
11 hearing as a significant hearing for his future, positive or  
12 negative.  It could go either way.  And he has told me that he  
13 believes strategically it is not in his best interest to do  
14 that.  That is his right and his call.  It is not counsel's  
15 call as long as he's competent.

16           Now if he's not competent, it is counsel's call and  
17 the appellate court.  So the request to waive the hearing  
18 Mr. Vanisi made is stayed pending the outcome of an  
19 evaluation.  And until I rule on that motion, the hearing is  
20 going forward.  So until we get the competency evaluation,  
21 everything is still going forward as currently scheduled.  What  
22 I am saying, I am only staying a ruling on Mr. Vanisi's  
23 request.  Mr. Vanisi, you said you would go get another  
24 evaluation.  I appreciate that.  I am going to need that,

1 because I need those doctors to tell me yes, Judge, your  
2 impression that Mr. Vanisi is competent to make this decision  
3 is true, and then I am going to let you make your decision.

4 THE DEFENDANT: Yeah.

5 THE COURT: Okay.

6 THE DEFENDANT: One more thing. Well there is  
7 another matter I want to take up before in court. I don't  
8 know if we are ready to take up that matter right now or  
9 should I wait?

10 THE COURT: Well, it kind of depends what the matter  
11 is, have you told your lawyer what you wanted to bring up?

12 MR. FIEDLER: If I may have the Court's indulgence.

13 MR. FIEDLER: I think this is an appropriate thing  
14 for the Court to hear.

15 THE COURT: Go ahead.

16 THE DEFENDANT: Well, in case I want to represent  
17 myself at the evidentiary hearing. I know I read a few case  
18 laws on Habeas Corpus proceedings. They said I don't have a  
19 right to represent myself, but it is up to the judge. They say  
20 it is up to the judge to make that discretion, and I have here  
21 a case here out of the Fifth Circuit that they allowed, they  
22 allowed the defendant to represent himself. 278 USC subsection  
23 6054. Under the ruling, they allowed him to represent  
24 himself. That is out of the Fifth Circuit. It is an

1 unpublished Opinion, but I read the case, but there has not  
2 been a case that allows Habeas Corpus to represent myself. It  
3 is up to you, Judge. I am kind of like hoping it would appeal  
4 to your kindness, graciousness to allow me to represent myself  
5 if the evidentiary hearing were to take place. That's all I  
6 have got to say about that.

7 THE COURT: Okay. We'll wait and see. Let's wait  
8 and see what happens. We have some other things we have to  
9 decide, make sure your competent. If you're competent, maybe  
10 you won't have a hearing. But then if you do have the hearing  
11 and I don't accept your waiver of the hearing for whatever  
12 reason, I don't know what that would be if you're competent,  
13 we'll broach the issue of you representing yourself, okay? We  
14 have to go through a couple of steps.

15 THE DEFENDANT: When do you think I would have this  
16 competency evaluation?

17 THE COURT: That is the next question. The clerk  
18 has notified me we are going to need the State to fashion the  
19 proposed order, because it is so different than our normal  
20 order which is for purposes of trial and the competency  
21 evaluation for purposes of competency to waive his right to  
22 have the hearing. Then the next question is one or two  
23 evaluations? Normally on a preliminary competency we use one  
24 evaluation. But if anybody thinks we need two evaluators, we

1 can order that. Do you have an opinion on that?

2 MR. FIEDLER: Perhaps unsurprisingly, Your Honor, we  
3 request it be two evaluations.

4 MS. NOBLE: State has no opposition to that, Your  
5 Honor.

6 THE COURT: The next question.

7 THE DEFENDANT: I have one more question.

8 THE COURT: Wait a second. I am talking now, right?  
9 The next question is can we get Lake's Crossing to where  
10 Mr. Vanisi's is to do it? I think that would be our order  
11 that they conduct the evaluation there, and I hope they can go  
12 to him. If they can't, they will transport him to them.

13 MS. NOBLE: Your Honor I would just suggest, if I  
14 may, if we are going to do it, if we can get it done quickly,  
15 it might be best while he's still up here in Washoe County. I  
16 will go immediately back to the office to start making  
17 inquiries.

18 THE COURT: We don't know about the Warden's  
19 transportation issues. We believe he's just up here on a day  
20 pass, but we don't know.

21 MR. FIEDLER: Your Honor, if I could make a  
22 representation. Mr. Vanisi is also indicating if the  
23 evidentiary hearing moves forward, he would like to be present  
24 for it.

1           THE COURT: He doesn't want to waive his appearance  
2 after all?

3           MR. FIEDLER: Correct.

4           THE COURT: If he's competent to make that decision,  
5 then that is great. Otherwise, it doesn't matter. He can  
6 change his mind obviously at any time. So we'll just notify  
7 the Warden he has to be at all appearances.

8           MR. FIEDLER: The reason I bring it up, I understand  
9 the Court has limited control whether Mr. Vanisi is  
10 transported. If he is essentially going to be here anyway for  
11 the hearing, perhaps he could just stay. It is easier.

12          THE COURT: I have no idea if that would work. I  
13 understand Mr. Vanisi the last time you thought you were going  
14 back to Ely right away and you didn't. So everyone made their  
15 best guess. But I have no control over what the Warden does in  
16 that regard about your transport and where you are housed. I  
17 can order that you remain in the Washoe County Jail pending  
18 hearings. So it is possible that if you come to Washoe County  
19 for the hearings, you could stay here so your attorneys can  
20 have access to you. It is possible the Warden would do that  
21 and the Sheriff would take you. I just don't know what is  
22 going to happen.

23          Now you wanted to say something else.

24          THE DEFENDANT: Yeah. I don't want to go to Washoe



1 County. I don't want to stay in Washoe County. I want to  
2 stay at NNCC. As far as since you have no control how they do  
3 transportation, I will take it up with the case worker. I  
4 spoke to her yesterday and indicated to her I might stay a  
5 little bit longer. She said that was all right. Speaking to  
6 you today, I can talk to her about staying at NNCC until the  
7 competency hearing.

8 THE COURT: I think that is really important so you  
9 can get that done quickly. If the hearing takes place, the  
10 hearing we are talking about the Supreme Court ordered in  
11 October, if that hearing takes place, that is when I have a  
12 feeling you may not stay at NNCC if you want to be present for  
13 that hearing. You may well be transferred to Washoe County  
14 and have to stay in Washoe County for the duration because the  
15 Warden usually does not transport people back and forth every  
16 day.

17 THE DEFENDANT: Okay.

18 THE COURT: So you can talk to your social worker  
19 about that.

20 THE DEFENDANT: Yeah. I feel, I feel, I feel the  
21 case worker will work with me as far as staying but leave it  
22 up, leave it up -- I prefer not to go to Washoe, leave it up  
23 to the corrections, NNCC, to decide. If they move me back to  
24 Ely, they will just move me to Ely, and I will just come back

1 if there is an evidentiary hearing. I will work it out with  
2 the case worker as far as my staying here.

3 THE COURT: Okay. You know the hearing is going to  
4 go on for two or three weeks?

5 THE DEFENDANT: Yeah.

6 THE COURT: For those two or three weeks, where do  
7 you think you would stay if you are here for the hearing?

8 THE DEFENDANT: Well I would like to stay at NNCC.  
9 If you have no control over it, I guess I will go to Washoe,  
10 is that what you're indicating.

11 THE COURT: That is what I think will happen. I  
12 don't know for sure, but your case worker will give some more  
13 insight into that. They will have a better idea, but rarely  
14 have I seen the Warden be willing to transport someone back  
15 and forth every day. I know Carson is not too far.

16 THE DEFENDANT: That's fine. I am fine.

17 THE COURT: When you make your decision whether or  
18 not you want to still waive appearing at your hearing, you  
19 will know all the facts.

20 THE DEFENDANT: Okay. Thank you.

21 THE COURT: So what we are going to do now is we  
22 have a couple of other things. We need to set a return date  
23 on the psyche evals. The clerk will give the dates for the  
24 return and hearing.

1           THE CLERK: September 24th at 10:00 a.m. which is a  
2 Monday. We are going to ask Lakes Crossing to have the  
3 reports to us by September 20th. Ms. Noble if you could put  
4 those dates in the order so that we have it.

5           MS. NOBLE: Certainly, Ms. Clerk.

6           THE COURT: The hearing will be on the 24th  
7 beginning at 10:00 a.m. Once we have the results, we'll  
8 decide where we are going to go with regard to the waiver of  
9 the hearing, waiver of the appearance, all of that by  
10 Mr. Vanisi. But counsel should be aware, if you disagree with  
11 the findings that you get the 20th, you notify the doctors  
12 immediately to be here on the 24th, because that will be the  
13 date for the hearing and your ability to traverse and  
14 cross-examine the doctors on their findings. We'll have the  
15 hearing at that date. Of course, if you have no objection to  
16 what their findings are or the basis to cross-examine, the  
17 hearing will be complete and we'll move directly into  
18 Mr. Vanisi's request.

19          MR. PLATER: Your Honor, I don't know if you have  
20 any appetite for this, however, I am a little confused what  
21 Mr. Vanisi wants. Does he want a hearing? Does he not? Does  
22 he want to represent himself or waive the hearing? We heard  
23 different things today. I know you want to evaluate his  
24 competency before you get to some of those ultimate findings.

1 I think if you would ask him to clarify exactly what he wants  
2 in terms of a hearing and representing himself.

3 THE COURT: What I heard him say wasn't in conflict.  
4 What I heard him say is he doesn't want to have a hearing, but  
5 if I don't grant his request to not have a hearing, he wants  
6 to represent himself. If I don't let him represent himself, at  
7 the very least he wants to be present for the hearing. Is  
8 that right, Mr. Vanisi?

9 THE DEFENDANT: That is correct, Your Honor.

10 THE COURT: That is what I thought he was saying.  
11 So it made sense to me.

12 MR. PLATER: If he is not competent he can't very  
13 well represent himself.

14 THE COURT: No. That is why we have to start with  
15 the competency issue and move forward. If he is not  
16 competent, he will go forward with counsel representing him  
17 because he's not competent to waive and he's not competent to  
18 represent himself. If he is competent, we have to deal with  
19 those other issues, whether it is a valid waiver, knowingly  
20 and intelligently giving up his right to have that hearing.

21 MR. PLATER: And, Your Honor the consequences of the  
22 waiver. We haven't canvassed him on that. I know you will  
23 get to that if necessary.

24 THE COURT: I will. And counsel will have a chance

1 to make sure I do it adequately, because I am sure both  
2 counsel are very concerned about that. Where I sit now, we  
3 have to know if he's competent and have to do the canvass on  
4 the waiver. If I deny his waiver, then he wants to represent  
5 himself, I have to do a canvass with regard to representing  
6 himself which Mr. Vanisi and I did twenty some years ago.  
7 That was the subject of appeals. It has gone a long way up and  
8 down the keyboard. So I better re-read what I wrote and  
9 decided then and think about Mr. Vanisi argument, what he may  
10 say to me in that canvass. If I deny his request to represent  
11 himself, he still will be able to be present.

12 So the only other thing, I think there was one other  
13 thing, that was about the Federal Public Defender has  
14 indicated they will accept rough draft transcripts instead of  
15 certified daily transcripts, and I understand you will accept  
16 it but I am not sure you can waive that requirement.

17 THE COURT REPORTER: May I say something? I won't  
18 do it without an order from the Supreme Court.

19 MR. FIEDLER: Okay. Understood, Your Honor.  
20 Understood, Your Honor. Thank you.

21 THE COURT: Was there something special about the  
22 rough draft that you somehow withheld?

23 MR. FIEDLER: Well, Your Honor, after we had the  
24 first couple of hearings, we received a bill for those

1 transcripts. That is sort of what started our concern about  
2 the certified daily copies. We have communicated with  
3 Sunshine Litigation that we didn't understand we were supposed  
4 to be paying for the transcripts. So our indication we are  
5 willing to take a rough daily transcript is just to lower the  
6 expense related to the transcript.

7 THE COURT: I see. Don't you have some request into  
8 the the Chief Judge to cover expenses, some of your expenses?

9 MR. FIEDLER: Yes, Your Honor, but we did not  
10 understand this was something Mr. Vanisi, the Federal Public  
11 Defender was responsible for. If the Court would like, we can  
12 amend that request to an amount for the transcripts.

13 THE COURT: The statute requires that the court  
14 reporter prepare an original plus one. The question is that  
15 plus one, where does it go? Does it go to the State? Does it  
16 go to the defense, and who pays for it. It might be plus two  
17 now maybe in death penalty. So we pay for the transcript and  
18 the court reporter has to prepare that. If there is an issue,  
19 we'll kind of do some research in the clerk's office with the  
20 Court Administrator about the transcripts. My experience is  
21 that because the Supreme Court requires daily certified  
22 transcript to be prepared and provided to counsel, that we  
23 have never had a problem with an indigent defendant's  
24 transcript being prepared and provided to them. I will check

1 on that and see. But I don't think you can waive it.

2 MR. FIEDLER: Understood, Your Honor.

3 THE COURT: Did you have an opinion, Ms. Noble?

4 MR. NOBLE: No. I do have one other housekeeping  
5 matter, that is why I am squirming in my seat.

6 THE COURT: Go ahead.

7 MS. NOBLE: We indicated, Your Honor, that in our  
8 pre-hearing memorandum I have some concerns about the late  
9 notice of witnesses by the Federal Public Defender. This  
10 Court was very clear in its Order notice of witnesses needed  
11 to be filed by June 11th. So before that date, we got 39  
12 witnesses noticed from the Federal Public Defenders Office,  
13 and it is my understanding three of those are expert  
14 witnesses, but we don't have any reports or other information  
15 regarding those folks. Particularly a neuropsychologist. I  
16 don't know if he examined Mr. Vanisi or is going to. I ask we  
17 be able to get a copy of that report. Further, I would note  
18 for the Court that we have gotten two supplemental notices of  
19 witnesses since then and one is as recently as August 30th.  
20 This hearing is rapidly approaching, and the continuing  
21 failure to comply with the Court's Order is going to prejudice  
22 the State in our ability to be prepared. I would just ask  
23 that, number one, any expert opinions or evaluations or  
24 reports be provided to the State timely, and that be a

1 standing order. And, two, that after the State, absent  
2 extraordinary circumstances and a demonstration as to why no  
3 further notice of witnesses or supplemental notice be accepted  
4 by the Federal Public Defender's Office, the State's following  
5 the rules and the Federal Public Defender should need to as  
6 well.

7 THE COURT: Counsel.

8 MR. FIEDLER: As to the supplemental notice of  
9 witnesses, Your Honor, as we move forward, we have been  
10 refining this claim, working out what witnesses we need to  
11 call. As we moved forward, we noticed additional witness we  
12 do need. We noticed them to the Court.

13 THE COURT: Really, is that the way you would  
14 respond in front of Judge Du? If you had a Pretrial order she  
15 told you you violated or were accused of violating the timing,  
16 would you stand up and say well, you know, we are just getting  
17 ready as we go. Or do you make a good faith representation to  
18 her that in fact you have done something special and unique  
19 and you had to disclose it late? Just because you are in  
20 State court doesn't mean my rulings and my orders mean  
21 something less than what you are used in Federal court. I  
22 practiced in Federal court. I know you don't just stand up  
23 and say we are getting ready for a hearing, Your Honor. You  
24 give at least a good reason. So that is not acceptable. Are



1     you ready for the hearing? Have you prepared? Are you ready  
2     to go? Do you know which witnesses you are going to call?

3             MR. FIEDLER: Yes, Your Honor.

4             THE COURT: Today are you ready? You are not going  
5     to have anymore; is that correct?

6             MR. FIEDLER: We'll not have anymore, Your Honor.

7             THE COURT: What about the expert reports?

8             MR. FIEDLER: The expert reports, there is a little  
9     bit of confusion. I though I e-mailed Ms. Noble and  
10    Mr. Plater, I may be mistaken about that, who the experts  
11    were. Two of the experts are going to be relying on the same  
12    report already filed with this Petition. I believe I e-mailed  
13    Ms. Noble and Mr. Plater last week indicating we will make the  
14    formal expert disclosures on September 10th or 21 days before  
15    the hearing begins.

16            THE COURT: Okay. My order did not give you an  
17    earlier time for the formal expert disclosures, so I can see  
18    why you might think you have until the 21 days before trial to  
19    disclose. You understand that rebuttal experts then, if you  
20    don't disclose until 21 days before, will be a significantly  
21    shorter period of time before the hearing for your  
22    preparation. But that is what you choose to do?

23            MR. FIEDLER: Understood, Your Honor.

24            THE COURT: All right. Anything else for today?

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

2 THE COURT: Anything else, counsel?

3 MR. FIEDLER: No, Your Honor.

4 THE COURT: I know it has been a hard day for you.

5 I hope that it doesn't discourage you from coming back. I  
6 promise I will check on the transcript issue for you and also  
7 encourage you to work out the IT issues so we are sure all  
8 that is ready to go. Now we have a hearing set for the 24th at  
9 10:00 a.m. That is for return of the psychiatric evaluations  
10 on competency and the time that you would have to traverse  
11 those findings. So be sure to have a doctor here if you want  
12 to traverse the findings. That is the day we have and the  
13 time. Once those findings, I make a ruling on that, the  
14 remainder of the time that we have which is the remainder of  
15 the day if necessary will deal with Mr. Vanisi's request if we  
16 can. Okay.

17 All right, Mr. Vanisi, we'll see you back on the  
18 24th.

19 THE DEFENDANT: Thank you, Your Honor.

20 THE COURT: Court is in recess.

21 (Whereupon, the proceedings were concluded.)

22 --o0o--

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24

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

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

7               That as such reporter I was present in Department  
8       No. 4 of the above-entitled court on Wednesday, September 5,  
9       2018 at the hour of 10:00 a.m. of said day and that I then and  
10       there took verbatim stenotype notes of the proceedings had in  
11       the matter of THE STATE OF NEVADA vs. SIAOSI VANISI, Case  
12       Number CR98-0516.

13              That the foregoing transcript, consisting of pages  
14       numbered 1-57 inclusive, is a full, true and correct  
15       transcription of my said stenotypy notes, so taken as  
16       aforesaid, and is a full, true and correct statement of the  
17       proceedings had and testimony given upon the trial of the  
18       above-entitled action to the best of my knowledge, skill and  
19       ability.

20       DATED:   At Reno, Nevada this 5th day of September, 2018.

21

22

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

1 **CODE**

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

8  
9 **SIAOSI VANISI,**

10 **Petitioner,**

11 **vs.**

12 **WILLIAM GITTERE, Warden, et. al.,**

13 **Respondents.**  
14 \_\_\_\_\_/

**Case No. CR98-0516**

**Dept. No. 4**

15 **ORDER FOR EXPEDITED PSYCHIATRIC EVALUATIONS**

16 Pursuant to the Nevada Supreme Court's Order issued September 28, 2017,  
17 this Court has scheduled an evidentiary hearing to determine whether or not  
18 Petitioner's trial counsel were ineffective during the penalty phase regarding the  
19 subject of mitigation. That evidentiary hearing is scheduled to begin on October 1,  
20 2018.

21 On September 5, 2018, Petitioner appeared with his counsel, the Federal  
22 Public Defender, for a status hearing in this matter. During the hearing, Petitioner  
23 expressed to the Court that he wishes to waive the upcoming evidentiary hearing  
24 altogether. Petitioner further indicated that the Federal Public Defender's pursuit of  
25 the scheduled evidentiary hearing is contrary to Petitioner's wishes. Petitioner  
26 articulated his position cogently, and appeared to understand the serious nature of his  
27 request to waive the scheduled evidentiary hearing. However, the Court finds that it is  
28

1 appropriate that Petitioner be evaluated and the Court to make findings regarding his  
2 competency prior to accepting Petitioner's waiver. Calambro v District Court, 114 Nev.  
3 961 (1998).

4 IT IS HEREBY ORDERED that the Petitioner be examined by two  
5 psychiatrists, two psychologists or one psychiatrist and one psychologist employed by  
6 Lake's Crossing Center, for the purpose of determining:

- 7 1. Whether Petitioner has the capacity to appreciate his position and make  
8 a rational choice with respect to waiving the scheduled evidentiary  
9 hearing; or
- 10 2. Whether Petitioner has such a mental disease, disorder, or defect that  
his capacity to make that decision might be substantially affected.

11 IT IS HEREBY FURTHER ORDERED that both examinations **be conducted at the**  
12 **Northern Nevada Correctional Center.**

13 IT IS HEREBY FURTHER ORDERED that the results of said examinations be  
14 made known to this Court, to the District Attorney of Washoe County and to the Federal  
15 Public Defender, **no later than September 20, 2018.**

16 IT IS FURTHER ORDERED that both **evaluators shall ensure they are available**  
17 **to appear in Department 4 on September 24, 2018 at 10:00 am** for a hearing  
18 regarding the evaluations, unless their appearance is waived by counsel.

19 Dated this 6 day of September, 2018.  
20  
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22   
23 DISTRICT JUDGE  
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**CERTIFICATE OF ELECTRONIC SERVICE AND/OR E-MAIL SERVICE**

I hereby certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 6<sup>th</sup> day of September, 2018, I electronically filed the attached Order with the Clerk of the Court by using the ECF system, which will send a notice of electronic filing to the following:

Jennifer Noble, Esq.  
Chief Deputy District Attorney

Randolph Fiedler, Esq.  
Assistant Federal Public Defender

I further certify that on the 6<sup>th</sup> day of September, 2018, I delivered via e-mail a copy of the Order addressed to:

Lake's Crossing Center  
Janet Ashby ([jashby@health.nv.gov](mailto:jashby@health.nv.gov))  
Nancy Patterson ([npatterson@health.nv.gov](mailto:npatterson@health.nv.gov))  
Tom Durante ([tdurante@health.nv.gov](mailto:tdurante@health.nv.gov))

  
\_\_\_\_\_  
Marci L. Stone

1 CODE No. 3060  
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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,**  
7 **IN AND FOR THE COUNTY OF WASHOE**

8 \* \* \*

9 **SIAOSI VANISI,**

10 **Petitioner,**

11 **v.**

**Case No. CR98-0516**

12 **WILLIAM GITTERE, Warden, et. al.,**

**Dept. No. 4**

13 **Respondent.**  
14 \_\_\_\_\_/

15 **ORDER DENYING MOTION TO DISQUALIFY**

16 The Court has read and considered 1) Petitioner's Motion to Disqualify the Washoe  
17 County District Attorney's Office and supporting exhibits, filed June 29, 2018; 2) the State's  
18 Opposition to Motion to Disqualify and supporting exhibits, filed July 9, 2018; 3) Petitioner's  
19 Reply to Opposition to Motion to Disqualify the Washoe County District Attorney's Office and  
20 supporting exhibits, filed July 27, 2018; and 4) the State's Sur-Reply to Motion to Disqualify the  
21 Washoe County District Attorney's Office, and supporting exhibit, filed August 31, 2018. The  
22 Court heard oral argument from the parties regarding the matter on September 5, 2018.  
23 Having considered the pleadings, the oral arguments, and relevant portions of the record, the  
24 Court denies the Motion.

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1 FINDINGS OF FACT AND CONCLUSIONS OF LAW

2 Through counsel, Petitioner alleges that the Washoe County District Attorney's Office  
3 (WCDA) should be disqualified from these proceedings. Petitioner argues that disqualification  
4 is proper because members of the WCDA had "improper contact" with members of the  
5 Petitioner's trial team in 2018. Petitioner also asserts that a 2002 transcript further supports  
6 disqualification based on an alleged conflict of interest, and urges this Court to either disqualify  
7 the WCDA or hold an evidentiary hearing to determine the nature and extent of the State's  
8 violations, and to determine the harm suffered by Petitioner.

9 1. The State's Contact With Former Counsel and Former Investigators Did Not  
10 Constitute an Ethical Violation.

11 In support of his argument that the State acted unethically by contacting former  
12 members of Petitioner's defense team, Petitioner relies upon American Bar Association (ABA)  
13 Model Rule of Professional Conduct 1.6, Nevada Rule of Professional Conduct Rule 1.6, and  
14 the ABA Standing Committee on Ethics and Professional Responsibility's Formal Opinion 10-  
15 456. He contends that the Washoe County Public Defender's Office (WCPD) and its former  
16 employees continue to be bound by a duty not to disclose confidential information to the  
17 WCDA. Petitioner also alleges that the WCDA failed to follow proper discovery procedures by  
18 informally interviewing former Washoe County Public Defender Jeremy Bosler, and former  
19 Washoe County Public Defender investigators Crystal Calderon-Bright and Evo Novak.

20 The WCDA does not dispute that in preparation for the evidentiary hearing scheduled to  
21 commence October 1, 2018, it interviewed Bosler, Calderon-Bright, and Novak, and obtained  
22 information that was previously subject to attorney client privilege and/or confidential in nature.  
23 However, the WCDA argues that Petitioner has waived his right to attorney-client privilege and  
24 confidentiality by filing the first and second petitions for writ of habeas corpus. The WCDA  
25 maintains that its conduct was consistent with Nevada statutes and case law, as well as a  
26 recent opinion issued by the Nevada State Bar's Standing Committee on Ethics and



1 Professional Responsibility. The WCDA also observes that through current counsel, Petitioner  
2 caused numerous documents previously subject to privilege and confidentiality to become a  
3 matter of public record, including a memorandum completed pursuant to SCR 250 and various  
4 documents, emails, and memoranda that were previously part of the WCPD's internal files.  
5 The Court is persuaded by the State's arguments.

6 Upon filing a petition, a petitioner alleging ineffective assistance of counsel declares,  
7 under penalty of perjury, that the allegations of ineffective assistance are true to the best of his  
8 or her knowledge. NRS 34.735 (23). NRS 34.735 (6) also specifically advises petitioners that  
9 if they allege ineffective assistance of counsel, "that claim will operate to waive the attorney-  
10 client privilege for the proceeding in which you claim your counsel was ineffective." Where a  
11 habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-  
12 client privilege as to communications with his allegedly ineffective lawyer relating to the claims.  
13 *Molina v. State*, 120 Nev. 185, 87 P.3d 533 (2004). The same rule has long existed in the  
14 federal courts, that where a habeas petitioner raises a claim of ineffective assistance of  
15 counsel, he waives the attorney-client privilege as to all communications with his allegedly  
16 ineffective lawyer. *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003).

17 The WCDA's position is also supported by Nevada Rule of Professional Conduct  
18 1.6(b)(5), which provides that a lawyer may reveal information relating to the representation of  
19 a client to the extent the lawyer reasonably believes necessary to respond to allegations in any  
20 proceeding concerning the lawyer's representation of the client. The plain language of NRPC  
21 1.6(b)(5) also allows for an attorney to communicate regarding allegations of ineffective  
22 assistance of counsel. Moreover, on July 2, 2018, the Nevada State Bar's Standing  
23 Committee (hereafter "the Committee") on Ethics and Professional Responsibility issued  
24 Formal Opinion 55, which expressly rejected the ABA Opinion 10-456. In so doing, the  
25 Committee noted that it joined numerous other jurisdictions in finding that ABA Formal Opinion  
26 10-456 is contrary to judicial economy and maintaining fairness in the judicial process. *Id.*

1 While the Court understands that Formal Opinion 55 is not binding upon this Court, the Court  
2 finds it to be persuasive authority. The Court declines Petitioner's invitation to reject Formal  
3 Opinion 55 in favor of the extra-jurisdictional authorities cited by Petitioner.

4 The WCDA does not dispute that it interviewed Mr. Bosler, Ms. Calderon-Bright, and Mr.  
5 Novak regarding matters relevant to mitigation strategy. Thus, the Court finds an evidentiary  
6 hearing is unnecessary. The Court finds that the WCDA's efforts to obtain information from the  
7 trial team regarding allegations in the petition do not constitute an ethical violation.

8 2. Petitioner Has Not Alleged Facts Supporting Disqualification.

9 Petitioner also alleges in his Reply that the WCDA should be disqualified from these  
10 proceedings because there is an indication that the WCDA previously represented the WCPD  
11 in connection with Petitioner's first petition for writ of habeas corpus. In support of this  
12 assertion, he cites the transcript of a July 1, 2002 status hearing, as well as a note written  
13 upon a drafted waiver of attorney-client privilege. The WCDA denies this assertion, and  
14 observes that the record does not support Petitioner's argument.

15 During the 2002 status hearing, Petitioner's former post-conviction counsel Marc Picker,  
16 who was not a member of the WCPD, explained to this Court that he was having difficulty  
17 obtaining the entire trial file during informal discovery. Mr. Picker then referred to the WCPD  
18 as the State's client. Former Deputy District Attorney Terry McCarthy promptly corrected Mr.  
19 Picker's assumption, reminding the Court and counsel that the WCDA did not represent the  
20 WCPD. Transcript of July 1, 2002 Status Hearing, 7:6-25.

21 This Court finds that Petitioner's assertion that the WCDA should be disqualified to be  
22 based upon supposition and guesswork. Petitioner has not alleged facts that would establish a  
23 specifically identifiable impropriety occurred, and the record and undisputed facts do not  
24 support a finding that the likelihood of public suspicion outweighs the interests that will be  
25 served by the WCDA's continued participation in Petitioner's post-conviction proceedings. See  
26 *Cronin v. Eighth Judicial Dist. Court, In and For County of Clark*, 105 Nev. 635, 641, 781 P.2d

1 1150 (1989). The Court does not hold, however, that the issue cannot be raised again in  
2 future proceedings, should Petitioner develop some additional factual basis supporting his  
3 position.

4 IT IS HEREBY ORDERED that the Motion to Disqualify the Washoe County District  
5 Attorney's Office is denied.

6 DATED this 14 day of September, 2018.

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8 Cornie J. Steinheimer  
9 DISTRICT JUDGE  
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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the  
STATE OF NEVADA, COUNTY OF WASHOE; that on the 17<sup>th</sup> day of  
September, 2018, I filed the attached document with  
the Clerk of the Court.

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

       Personal delivery to the following: [NONE]

☒ Electronically filed with the Clerk of the Court, using the eFlex system which  
constitutes effective service for all eFiled documents pursuant to the efile User  
Agreement:

Jennifer Noble, Esq.  
Chief Deputy District Attorney

Randolph Fiedler, Esq.  
Assistant Federal Public Defender

       Transmitted document to the Second Judicial District Court mailing system  
in a sealed envelope for postage and certified mailing with the United States Postal  
Service in Reno, Nevada: [NONE]

       Placed a true copy in a sealed envelope for service via:

       Reno/Carson Messenger Service – [NONE]

       Federal Express or other overnight delivery service – [NONE]

       Inter-Office Mail – [NONE]

DATED this 17<sup>th</sup> day of September, 2018.

M. J. [Signature]

Court Ordered Evaluation, State of Nevada v. Vanisi,  
Second Judicial District Court of Nevada, Case No.  
CR98-0516  
September 19, 2018.....

FILED  
UNDER SEAL

**AA07792 - AA07829 ARE UNDER SEAL**

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 COMPETENCY FOR PETITIONER TO WAIVE EVIDENTIARY HEARING

19 MONDAY, SEPTEMBER 24, 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

FOR THE PLAINTIFF: OFFICE OF THE DISTRICT ATTORNEY  
BY: JOSEPH R. PLATER, III, ESQ.

JENNIFER P. NOBLE, ESQ.

DEPUTY DISTRICT ATTORNEYS

1 S. SIERRA STREET

RENO, NEVADA 89520

FOR THE DEFENDANT: OFFICE OF THE PUBLIC DEFENDER  
BY: RANDOLPH FIEDLER, ESQ.

SCOTT WISNIEWSKI, ESQ.

ASSISTANT FEDERAL PUBLIC DEFENDERS

411 E. BONNEVILLE AVENUE, SUITE 250

LAS VEGAS, NEVADA 89101

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I N D E X

WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

STEVEN ZUCHOWSKI

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1           RENO, NEVADA; MONDAY, SEPTEMBER 24, 2018; 10:00 A.M.

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3           THE COURT: Thank you. Please be seated. We would  
4 like to have everyone make their appearance for the record  
5 starting with the State.

6           MS. NOBLE: Thank you. Jenny Noble on behalf of the  
7 State.

8           MR. PLATER: Joe Plater. Thank you, Your Honor

9           MR. FIEDLER: Randy Fiedler on behalf of Mr. Vanisi.

10          MR. WISNIEWSKI: Scott Wisniewski on behalf of  
11 Mr. Vanisi.

12          THE COURT: And Mr. Vanisi is present. Good  
13 morning.

14          THE DEFENDANT: Good morning.

15          THE COURT: Counsel, we have a lot of names that  
16 have access to the file that may be no longer representing  
17 Mr. Vanisi. We want to kind of clean that record up, so we  
18 are going to start there, just because I keep forgetting to  
19 ask you about it.

20                 We currently have Franny Forsman still on the record  
21 here. She's no longer the Public Defender, correct?

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

23          THE COURT: She's retired. Do you want me to have  
24 the clerk remove her?

1           MR. FIEDLER: Yes. I apologize we didn't already  
2       take care of this.

3           THE COURT: We have Gary Taylor.

4           MR. FIEDLER: We can also remove him from the case.

5           THE COURT: C. Benjamin Scroggins.

6           MR. FIEDLER: We can remove him, please.

7           THE COURT: We have Tiffani Hurst.

8           MR. FIEDLER: We can remove her too, please.

9           THE COURT: Rene Valladares.

10          MR. FIEDLER: If we could keep him on.

11          THE COURT: And Scott Wisniewski. And Joanne  
12       Diamond.

13          MR. FIEDLER: Correct.

14          THE COURT: They should stay?

15          MR. FIEDLER: Both of them should stay.

16          THE COURT: We will leave four Public Defender's for  
17       Mr. Vanisi on the record and the others will be removed.

18          MR. FIEDLER: Thank you, Your Honor.

19          THE COURT: You're welcome. Now we need to proceed  
20       with the hearing. I do have reports from Dr. Zuchowski and  
21       Dr. Moulton. Counsel, have you had an opportunity to review  
22       these reports?

23          MR. FIEDLER: Yes, Your Honor.

24          MS. NOBLE: The State has, Your Honor. Thank you.

1           THE COURT: Now does either the State or the defense  
2 wish to traverse those findings?

3           MR. FIEDLER: The defense would, Your Honor.

4           THE COURT: Okay. So you have witnesses here?

5           MR. FIEDLER: Yes, Your Honor.

6           THE COURT: Go ahead and call your first witness.

7           MR. FIEDLER: We'll call Dr. Zuchowski.

8           THE COURT: Okay. Thank you. Sir, please come  
9 forward and be sworn.

10          MR. FIEDLER: Your Honor, could we have the  
11 Exclusionary Rule?

12          THE COURT: Any objection?

13          MS. NOBLE: The State doesn't have an objection.  
14 Normally, with experts, we let them remain.

15          THE COURT: So I suspect they know of each other's  
16 reports already since they both work and have access to the  
17 records at Lake's Crossing, but if you would like to exclude  
18 Dr. Moulton from this examination, I will allow it.

19          MR. FIEDLER: We would, please.

20          THE COURT: Okay. We will ask Dr. Moulton to step  
21 outside. Thank you. You may inquire.

22          MR. FIEDLER: Your Honor, may I have permission to  
23 cross-examine Dr. Zuchowski?

24          THE COURT: You want to lead him?

1 MR. FIEDLER: Yes, Your Honor.

2 THE COURT: I don't know. What is the basis for  
3 that?

4 MR. FIEDLER: Just because we intend to challenge  
5 Dr. Zuchowski's findings, and so I thought I would start by  
6 asking permission to cross-examine. I can direct if the Court  
7 feels that is not appropriate.

8 MR. PLATER: Normally you would allow on direct  
9 examination cross-examination of a witness who is deemed to be  
10 aligned with a certain party or hostile for a certain party.  
11 I don't see there has been any indication of that at this  
12 point.

13 THE COURT: And I would, if it did appear the  
14 witness was biased against you, I would allow it, but at this  
15 point, I don't see that, so just proceed.

16 MR. FIEDLER: Thank you, Your Honor.

17 THE COURT: You're welcome.

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STEVEN ZUCHOWSKI

Called as a witness, having been first duly sworn,  
took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR FIEDLER:

Q Doctor Zuchowski, could you state and spell your  
name for the record?

A Steven with a "v". Z-U-C-H-O-W-S-K-I. Please  
apologize for my voice. I am losing it or lost it.

Q Would you mind briefly describing your professional  
background for the Court?

A Yes. I am adult psychiatrist. I graduated in 1999,  
then I did additional forensic psychiatry training. I  
graduated from that in 2001, spent some time on the faculty at  
Case Western Reserve University and moved to Reno to the  
University of Nevada in 2004. I am an associate professor at  
the University of Nevada Reno, and I do my clinical work at  
Lake's Crossing Center.

Q How long have you been doing clinical work at Lake's  
Crossing?

A Since 2004.

Q How long have you been an associate professor for  
the University of Nevada Reno?

1           A     About five years.

2           Q     Okay. When you received the-- Do you recall  
3 receiving a referral question in this case?

4           A     Say that again?

5           Q     Do you recall receiving a referral question in this  
6 case?

7           A     Yes.

8           Q     When you received the referral question, were you  
9 aware that you would be working with someone else on the  
10 evaluation?

11          A     Yes. Both Dr. Moulton and I were told at the same  
12 time we were going to be asked to do the evaluation.

13          Q     How did you approach, after receiving the referral  
14 question, how did you approach sort of how you were going to  
15 evaluate Mr. Vanisi?

16          A     Well, simply by looking at the referral question,  
17 the three questions as I sort of parsed them out to, and then  
18 reviewing whatever records we had available. And that is the  
19 old reports from the time around his trial to the more recent  
20 reports from 2011, I believe, and whatever other collateral  
21 information we had.

22          Q     In terms of the question, what did you understand  
23 that that question required you to evaluate?

24          A     Well, I guess I would simply quote the question and

1 say that you asked us -- Your Honor asked us to evaluate  
2 whether he understood and appreciated his position, and  
3 whether he was able to make a rational waiver of the  
4 evidentiary hearing. And, thirdly, whether his mental illness  
5 impacted that ability to make a rational waiver.

6 Q And after reviewing the records, what was the next  
7 step after that?

8 A Interview.

9 Q An interview. And did you, before coming into the  
10 interview, did you already have an idea of how you were going  
11 to structure it?

12 A Not really. My style is mostly conversation. In  
13 other words, I don't, in this kind of evaluation, we don't  
14 have a pre-ordained set of questions that we ask. Most of what  
15 we do is competence to stand trial, and we do have somewhat  
16 pre-ordained set of questions we ask in that. That is a  
17 little more structured of an interview. This was a lot more  
18 conversational and essentially, for lack of a better term  
19 chatting about these questions with Mr. Vanisi.

20 Q You said in the early part of your answer "this kind  
21 of evaluation." What did you mean by that?

22 A Well, these specific referral questions. So in other  
23 words, we didn't use the normal competency to stand trial type  
24 battery we would normally use, although we asked many of those

1 same questions along the way. For instance, if he understood  
2 his position. He was able to talk about his charge. His  
3 conviction. His sentence and so on.

4 Q So when you received this kind of referral question,  
5 you just mean a referral question that is different from like  
6 the competency to stand trial?

7 A Yes. Basically, a competency to waive a hearing.

8 Q Okay. Did you discuss with Dr. Moulton how you were  
9 going to approach the evaluation?

10 A We may have discussed it slightly. Not a whole lot.  
11 We did agree we weren't going to go through the battery of  
12 competency to stand trial questions. He has his own set of  
13 questions, and I have mine, and neither of us were going to  
14 ask those questions. Other than that, I don't think we really  
15 had any strategy. We were just going to have conversation with  
16 Mr. Vanisi.

17 Q Could you explain your decision not to do any  
18 standardized questions, or do your regular questions?

19 A Well, the regular questions, many of them are  
20 irrelevant. Things like -- things like what is the definition  
21 of probation. What is the job of the Public Defender. What is  
22 the job of the District Attorney. What is the job of a  
23 witness. Those we did, again, touch upon those in our  
24 conversation to some extent, but that wasn't the core of our



1       questioning.

2           Q       And other than agreeing that you were not going to  
3       use any of your standard questions, did you discuss anything  
4       else with Dr. Moulton beforehand?

5           A       Very little. I don't have specific recollection  
6       of -- We drove down together, and so I don't have specific  
7       recollection of any strategizing or figuring out how we would  
8       approach this other than we both sort of agreed we would sit  
9       down and let the conversation flow.

10          Q       Could you explain your decision to discuss the  
11       evaluation with Dr. Moulton?

12          A       Yeah. Well that was kind of the direction we  
13       received from our boss. We would go down together in a State  
14       car and both see Mr. Vanisi at the same time.

15          Q       And aside from your boss instructing you, were there  
16       any other reasons for the two of you to evaluate Mr. Vanisi  
17       together?

18          A       I mean there is an issue of sort of I guess I would  
19       say expediency being we were under somewhat of a time crunch  
20       and, also, for the convenience of Mr. Vanisi not to have to  
21       sit there two hours and answer very similar kinds of questions  
22       twice.

23          Q       When you said your boss, who is this?

24          A       Tom Durante.

1           Q     To go back a little bit, were there any clinical  
2 reasons to conduct the evaluation together?

3           A     Other than his comfort. In other words, we do this  
4 at Lake's Crossing where we have three evaluators. If we do  
5 them serially, by the time you get to the third, the person  
6 can become annoyed with answering the same questions over and  
7 over again. We sometimes try to combine examiners simply to  
8 prevent that person from becoming annoyed with all the  
9 questions.

10          Q     So when you arrived at the prison, could you  
11 describe what you saw when you walked into the interview room?

12          A     Well, he wasn't, Mr. Vanisi wasn't there. Do you  
13 want me to describe the room, itself?

14          Q     Yes, please.

15          A     It as an examining room, medical examining room. It  
16 had one of the medical examining tables, couple of desks,  
17 couple of chairs, a sink. Well lit. Very few people around.  
18 It was just fairly abandoned and isolated.

19          Q     Was anyone else in the room when you entered it?

20          A     Well, the correctional officer let us into the room.  
21 No, no one was in the room at the time.

22          Q     When they brought Mr. Vanisi in, would you describe  
23 Mr. Vanisi?

24          A     Yes. Mr. Vanisi came apparently willingly with two

1       correctional officers. He was wearing shorts, sandals,  
2       T-shirt. He had similar to how he looks right now with close  
3       shaved head, hair, his glasses. Minimal beard growth. Calm.  
4       Friendly.

5             Q       Was he restrained?

6             A       He was.

7             Q       What kind of restraints?

8             A       Well, unfortunately, I don't know the terms so much.  
9       At some point during the interview they added a set of  
10      restraints probably just to go according to policy. There was  
11      no reason in his behavior that suggested that. But I believe  
12      he came in with I think what they call belly chains. And I  
13      believe they added leg chains after a certain amount of time.  
14      In fact, it was Mr. Vanisi who said, "Hey, would you like to  
15      put those on me?" Because the officer was sitting holding  
16      them, kind of waiting for an opportunity to put them on. I  
17      assumed it was simply a matter of policy.

18            Q       Just to be clear, belly chains, you mean chains that  
19      go around the torso and then also handcuff the wrists to the  
20      torso chain?

21            A       I believe that is the kind he was wearing. I don't  
22      know for sure.

23            Q       After he came in, what did Mr. Vanisi do?

24            A       Well, he sat down initially on the examining table

1 propped back up so it was fairly up right, but it turned out  
2 that wasn't going to be very comfortable with a longer  
3 interview. His feet were not touching the ground, he would be  
4 dangling. So we moved him to a chair, just a regular chair,  
5 office-type chair which the correctional officers facilitated.  
6 Then he did indicate a few minutes into the interview he was  
7 chilly. One of the officers got him a jacket from outside and  
8 draped it over his shoulders.

9 Q How long before they brought leg chains to put on  
10 him?

11 A I would guess 15 or 20 minutes.

12 Q So do you recall if that was before or after he  
13 indicated he was cold?

14 A I think it was after he indicated he was cold.

15 Q Did he have a writing utensil?

16 A I don't recall seeing a writing utensil.

17 Q No paper?

18 A Not that I know of.

19 Q Then after Mr. Vanisi sat down, who else was in the  
20 room?

21 A There were two other correctional officers, one  
22 sitting next to Mr. Vanisi and one sitting in the doorway.

23 Q Did they stay during the evaluation?

24 A They did.

1           Q     Did anyone else come in or out during the  
2     evaluation?

3           A     There was a, who I presumed was a supervisor, who  
4     popped in briefly for maybe a minute or two and then left. I  
5     am assuming. I don't recall the rank, but I think he had  
6     extra stripes.

7           Q     Did that person interrupt the evaluation in anyway?

8           A     No, not really.

9           Q     Did the guards have weapons during the evaluation?

10          A     I don't think so. I didn't notice any.

11          Q     In terms of the interview, itself, did you and  
12     Dr. Moulton discuss whether one was going to sort of lead the  
13     interview or anything like that?

14          A     We didn't. We normally do if we do an interview  
15     together. In this case, we didn't discuss that. I believe I  
16     asked the first question. After introductions, we gave him the  
17     usual what we call our informed consent to say this is the  
18     purpose of the interview. Here is who is going to be  
19     receiving the reports. And then I believe at that point I  
20     jumped in and simply asked him why are you wanting to waive  
21     the Nevada evidentiary hearing.

22          Q     Did you sort of lead the discussion with Mr. Vanisi?

23          A     Well, I would say that I led the beginning of the  
24     discussion, so maybe the first 20 minutes. But Dr. Moulton was

1 a full participant. There were times when he led his desired  
2 line of questioning. Again, I almost hate to characterize it  
3 as a line of questioning. It was more of a conversation. If  
4 Dr. Moulton was curious about some response, he might engage  
5 Mr. Vanisi in a 15 minute dialog about it while I stayed  
6 silent. Kind of that is how it worked overall.

7 Q And you took notes on the conversation?

8 A Yes.

9 Q Those are the notes that you provided with the  
10 court?

11 A Yes.

12 Q Could you describe for us schizoaffective disorder?

13 A Yes. Schizoaffective disorder is somewhat like a  
14 combination of schizophrenia and bipolar disorder. So in  
15 other words, a person, untreated, a person would remain to  
16 appear to have a schizophrenic type illness essentially all  
17 the time with some waxing and waning. But they would continue  
18 to have psychotic beliefs and continue to have perhaps  
19 hallucinations. That is untreated. Then, according to the  
20 current definition, a large proportion of their illness, of  
21 their life history, is also interrupted by mood episodes. So  
22 they get mania. They get depression. Not everyone gets both.  
23 But if we call somebody schizoaffective bipolar type, they  
24 have a chronic psychotic condition that runs more or less

1 continually unless treated. And then they have a significant  
2 component of their illness that is characterized by mania or  
3 major depression. Or there is also something called mixed  
4 state which is sort of a combination of the two.

5 Q And could you describe some of the traits or could  
6 you describe mania?

7 A Yes. Mania is a hyper energized state for many  
8 people. For most people, a person may not need to sleep.  
9 That is different from insomnia where a person wants to sleep  
10 and can't. But this is a person that doesn't need to sleep.  
11 In this state, they are energized maybe after a half hour nap.  
12 They are often impulsive. They can be silly. They can be  
13 extra gregarious, so boundaries between them and other people  
14 may go down. In other words, they would hug somebody they  
15 wouldn't otherwise hug or shouldn't hug. Very talkative.  
16 Sometimes racing thoughts, racing speech, pressured speech  
17 which means it is very difficult to interrupt them. And most  
18 importantly is the tendency to engage in risky behavior. So a  
19 person might, with mania, might out of character for  
20 themselves, might drive recklessly, might use drugs, might  
21 have unprotected sex, might spend money they don't have.  
22 Start businesses, three different businesses a day. So they  
23 engage in risky behavior. That is financially risk, physical  
24 risk and so on.

1           Q     Did you evaluate Mr. Vanisi to determine whether he  
2 suffers from mania?

3           A     Well, while we saw him in those two hours, he was  
4 not suffering from mania. There was no evidence of that at  
5 all. However, reading the records, there was suggestion of  
6 repeated episodes that seem to reflect the history of mania.

7           Q     Now would waiving a substantive right that increases  
8 the chance of execution, would that qualify as risky behavior?

9           A     It certainly could qualify as risky behavior. Mania  
10 is a cluster of symptoms. If somebody is making a decision we  
11 consider risky, that wouldn't even raise the question of mania  
12 for us. They would have to have several of the other symptoms  
13 besides that.

14          Q     Is high self-esteem a symptom of mania?

15          A     Yes, it can be.

16          Q     Is grandiosity a symptom of mania?

17          A     Yes.

18          Q     Would overstating one's chance of success on appeal,  
19 a specific example, would that be an example of high  
20 self-esteem or grandiosity?

21          A     I mean it could be. I looked at it more as an  
22 optimistic attitude as opposed to grandiosity. Grandiosity  
23 tends to imply the person is out of touch with reality. They  
24 are delusionally grandiose. And what I mean by that, they



1 cross over into a complete fantasy land. They believe they  
2 are the Chairman of Microsoft, have billions of dollars at  
3 their disposal. Perhaps they are Jesus or God, other things  
4 that are clearly delusional. So I would say that I didn't  
5 actually, overall I didn't find Mr. Vanisi to appear to have  
6 an inflated self-esteem when I met with him. He actually  
7 seemed quite humble and quite easy to work with.

8 People that are grandiose from mania or even  
9 inflated self-esteem from mania, they don't take well to  
10 questions given to them. In other words, why do you think  
11 that? Don't you think you're being unrealistic? That kind of  
12 stuff triggers a person to become angry and lash out, who are  
13 you to question me. None of that with Mr. Vanisi.

14 Q Now you indicated that part of schizoaffective  
15 disorder was schizophrenia. Would you go into more detail?

16 A Yes. Schizophrenia is a chronic psychotic illness  
17 that affects about one percent of the population. It involves  
18 the potential for hallucinations which are the perceptual  
19 disturbances in any domain, visual, auditory, tactile and so  
20 on. Also the person could have delusions which are fixed false  
21 beliefs. They could be paranoid delusions which would be they  
22 are being harmed or being targeted for harm. They could be  
23 grandiose delusions as we already described. They could have  
24 delusions of reference which means somebody, according to how

1       their food is arranged on a tray, they receive a message from  
2       that that is important to them somehow in forming their life.  
3       They can have thought broadcasting which is the sense their  
4       thoughts are being heard by others. And also suffer from  
5       thought insertion, feeling like someone else has inserted  
6       foreign thoughts into their own mind.

7               There is also negative symptoms which include  
8       relative lack of emotional expression. Some degree of social  
9       isolation and social disconnectiveness between them and other  
10      people.

11           Q     Could you explain, before we were talking about  
12      grandiosity as relates to mania, and is that different from  
13      grandiose delusions as it relates to schizophrenia?

14           A     No. You can't necessarily tell the difference in the  
15      moment. In other words, you would have to look at the person  
16      longitudinally using old records. If you happen to have the  
17      person, repeated contact with the person, you could tell the  
18      difference. But the type of grandiose delusion could look  
19      exactly the same, whether it be part of schizophrenia or mania  
20      or schizoaffective disorder.

21           Q     And you reached a diagnosis in this case?

22           A     I did.

23           Q     What was the diagnosis?

24           A     It was schizoaffective bipolar type.

1           Q     Can you explain what "bipolar type" means?

2           A     It means that the person has suffered both with  
3 periods of mania as well as periods of depression.

4           Q     Can you talk a little bit about depression as part  
5 of the bipolar aspect just generally, please?

6           A     Yes. Depression is obviously a sad mood. A person is  
7 hoping things, whose interest in things, may become suicidal,  
8 may begin to wish they would die even if they are not frankly  
9 suicidal. Often can't sleep or sleeps too much. Often lose  
10 their appetite or on the opposite they would eat more. Their  
11 concentration is reduced. Often times energy is reduced. And  
12 in the course of life history of somebody with bipolar  
13 disorder, and I would include schizoaffective bipolar type  
14 depression is much more disabling for the average individual,  
15 and they spend more time in a depressed state than they do in  
16 a manic state statistically speaking.

17          Q     Would you say that is the case with Mr. Vanisi?

18          A     I don't know. My review of the records suggested  
19 that he-- that people tended to -- tended to document more  
20 when he was in a manic state, an apparent manic state and  
21 perhaps less of a tendency to document long passages when he  
22 was in a depressed state. There were periods where he clearly  
23 was depressed, experienced suicidal ideation. So I would say  
24 actually, based on the records alone, there seems to be more

1 evidence of mania than there is long periods of depression.

2 Q And to backtrack a little bit, you are a  
3 psychiatrist?

4 A That's correct.

5 Q Would you explain to us the difference between a  
6 psychiatrist and a psychologist?

7 A Yes. A psychiatrist goes to medical school, earns  
8 either an MD or OD degree, then goes on to specialized  
9 training in psychiatry which takes about four years for adult  
10 psychiatry, an additional two years for child psychiatry, and  
11 in my case, an additional one year for forensic psychiatry. We  
12 prescribe medication, order tests, everything the medical  
13 doctor does plus expertise in psychopharmacology and mental  
14 illness.

15 Q As part of this evaluation, did you receive  
16 Mr. Vanisi's medical reports?

17 A Yes, I did.

18 Q Did you review those records?

19 A I did.

20 Q Would you mind describing Mr. Vanisi's medication  
21 regimen?

22 A Actually, I wrote in my report. May I refer to my  
23 report or would you like it from memory?

24 Q Yes?

1           A     I can't remember if I included it in there. Well, it  
2     looks like I didn't. I will have to go from memory. I know  
3     he's received Haldol Decanoate which is a long acting  
4     intramuscular antipsychotic. It is given about once every four  
5     weeks. I believe his dose is 100 milligrams. As I recall, he  
6     was also on Abilify, 20 milligrams. He was also receiving  
7     insulin for his diabetes as well as a couple of oral  
8     hypoglycemic medicines, oral medicines for his diabetes. He's  
9     on -- Sorry, I can't remember the others.

10          Q     You will have to forgive me. I don't have a medical  
11     degree. Would you mind telling what Cogentin is?

12          A     Cogentin is something commonly prescribed to reduce  
13     the side effects of a medicine like Haldol. Haldol can cause  
14     muscle stiffness, muscle cramps, shaking almost like  
15     Parkinsons disease. It is often given to remedy those side  
16     effects.

17          Q     Is that the most likely reason Cogentin is being  
18     given to Mr. Vanisi?

19          A     Yes, by far.

20          Q     You indicated 100 milligrams of Haldol every four  
21     weeks. Is that a high dose, low dose, normal?

22          A     I consider that to be a relatively low dose. I have  
23     multiple patients on 200 to 400 milligrams per month of Haldol  
24     Decanoate. That seems to be what is required to keep them

1     stable and in remission. One hundred milligrams is the maximum  
2     starting dose. So in other words, the initial injection can  
3     be 100 milligrams or less. So often what we do would be give  
4     100 milligrams, and then in a week give another hundred  
5     milligrams, then stabilize the person on let's say 200  
6     milligrams a month.

7           Q     You mentioned Abilify. Could you describe again  
8     what that is for?

9           A     Abilify has multiple uses. It is what is considered  
10    a second generation antipsychotic. It also is approved for  
11    augmentation of antidepressants. So in other words, if  
12    someone has a partial response to an antidepressant, they can  
13    be prescribed Abilify to boot the effectiveness of the  
14    antidepressant. It is also considered a mood stabilizer.  
15    Somebody who has mania can benefit from Abilify or a medicine  
16    like it.

17          Q     Could you explain to us why a person would need both  
18    Abilify and Haldol?

19          A     Well, there is a variety of reasons why somebody  
20    might. One is that they had partial effectiveness to Haldol,  
21    then they were augmented with Abilify to get the full  
22    effectiveness in terms of controlling the psychotic thinking.

23                 There is also the possibility it was being used as  
24    an antidepressant. Its antidepressant qualities were being

1       tapped on.

2               Thirdly, it could be being used as a mood stabilizer  
3       to try to reduce any tendency towards mania or depression.  
4       This is somewhat of an off-label use, but there is this--  
5       there is papers written about using Abilify to help reduce  
6       people's sedation and flatness that sometimes comes with  
7       Haldol. Haldol is a very potent medicine. Sometimes it causes  
8       people to move slowly and to kind of look flat in terms of how  
9       much range of motion or expression they have. So there is the  
10      idea Abilify can sometimes reverse some of that for people  
11      because it has a different reaction.

12           Q       Would you mind telling us what Trazodone is?

13           A       Trazodone started off as an antidepressant and fell  
14      out of favor because antidepressant doses made people too  
15      sleepy. It fell into favor as a sleep aid that is non-habit  
16      forming, nonaddicting, and we use it in relatively low doses  
17      that are a subtherapeutic in terms of being an antidepressant  
18      dosage, but they are effective at helping people sleep.

19           Q       To backtrack a little bit, do you know why  
20      Mr. Vanisi, himself, would need both Haldol and Abilify?

21           A       I do not.

22           Q       Do you recall if Mr. Vanisi is receiving Trazodone?

23           A       I do recall it being in his records. I can't  
24      remember if it is in his current regimen or taking it

1 currently.

2 Q Would reviewing his medical records refresh your  
3 recollection?

4 A Yes.

5 MR. FIEDLER: May I approach?

6 THE COURT: We are looking at the medical records  
7 that were supplied by the prison?

8 MR. FIEDLER: I brought copies if that would help.  
9 I have two copies, though.

10 THE COURT: Okay. That is fine. The Court has the  
11 originals in evidence, so go ahead and share the copies and  
12 we'll get the originals up here as soon as we can.

13 MR. FIEDLER: If I could have the Court's indulgence.

14 THE COURT: You need to give a copy to the witness.

15 MR. FIEDLER: Oh, yes. Sorry.

16 BY MR. FIEDLER:

17 Q Unfortunately, I did not flag everyone's copies.  
18 These are not numbered by page, but in the physician's orders  
19 which is the number three maybe a quarter of an inch into the  
20 documents.

21 A Yes. I found the physician's orders 2017.

22 Q The first page of the physician's orders has a bunch  
23 of medications listed.

24 MR. PLATER: Can we hold on until we find it? We



1 don't know where he's at.

2 MR. FIEDLER: I thought he found it.

3 THE COURT: The witness found it but counsel hasn't.

4 MS. NOBLE: We are a little slower on the uptake,

5 Your Honor. Apologize.

6 THE WITNESS: Are you referring to the page that is  
7 dated at the top left 7-27-18? When you say first, they are  
8 in reverse order.

9 BY MR. FIEDLER:

10 Q I did say first. What I meant was a couple pages  
11 in. It says 5-2-18 at the top left corner?

12 A I have that page.

13 Q And under --

14 THE COURT: Wait a second.

15 MR. PLATER: We are still looking. Thank you,  
16 Judge.

17 MS. NOBLE: Mr. Fiedler, can you show me where it is?  
18 Thank you very much. Thank you very much, counsel. Thank you,  
19 Your Honor.

20 THE COURT: Go ahead.

21 BY MR. FIEDLER:

22 Q So the entry dated June 13, 2018, does that refresh  
23 your recollection?

24 A Yes, it does, although that is June. I don't know

1       that means he's currently taking that.

2               Q       Okay. Could you explain to us what -- Would you mind  
3       telling us what Tegretol is?

4               A       Yes, Tegretol is an antiseizure medication used for  
5       people with bipolar disorder as a mood stabilizer.

6               Q       Do you have any reason to believe Mr. Vanisi is no  
7       longer taking Tegretol?

8               A       Well, you could actually -- I think It is in the  
9       record somewhere where his more current medications are.

10              Q       Would reviewing the more recent records refresh your  
11       recollection?

12              A       It may take a while. What I use primarily are what  
13       is called the medication administration records which are kind  
14       of, it looks like a piece of graph paper and has a bunch of  
15       initials on it. Admittedly, the records were a bit haphazard  
16       in how they were organized, but I think I was able to locate  
17       it.

18              Q       For the record, this would be divider number 11?

19              A       They don't necessarily go in order, so it becomes a  
20       bit challenging to find the ones. I found July of 2018. That  
21       is just for his insulin. I did find July of 2018 for all of  
22       his other, it appears to be all of his psychotropic medicine.  
23       This looks like a graph paper dated in the upper right-hand  
24       corner 7-2018, upper left-hand corner the first drug

1       Aripiprazole which is Abilify. I don't believe I saw August or  
2       anything beyond that in these files.

3               MR. PLATER: Counsel, could you help us again?  
4       Sorry, Judge.

5               MR. FIEDLER: I apologize, Your Honor.

6               THE COURT: What might be helpful is if counsel for  
7       the State would take your set and give them to the doctor. He  
8       might be able to find them much quicker. Nobody can find where  
9       you're looking. Thank you, Mr. Plater.

10              MR. PLATER: Thank you. Thank you, Judge.

11              THE COURT: Mr. Fiedler, do you have the right page?

12              MR. FIEDLER: Yes.

13              THE COURT: Now everyone is on the same page. Go  
14       ahead.

15       BY MR. FIEDLER:

16              Q       Do these records indicate whether Mr. Vanisi is  
17       receiving Trazodone?

18              A       Yes. This record goes to the end of July 2018 and  
19       indicates that he took it each night except for three or four  
20       nights where it is indicated by "R" refused to take it.

21              Q       I apologize if I already asked you this, what is  
22       Trazodone for?

23              A       It is almost certainly prescribed for Mr. Vanisi for  
24       sleep. It has pretty much fallen out of favor as an

1     antidepressant. This dose of 100 milligrams, that is  
2     subtherapeutic for an antidepressant, but exactly what we use  
3     for sedation at nighttime.

4             Q     Why would Mr. Vanisi need to be sedated at  
5     nighttime?

6             A     Just to help him sleep.

7             Q     Does he need help to sleep related to his sort of  
8     schizoaffective disorder or his other mental health issues?

9             A     I don't know the answer to that. I didn't  
10    specifically ask him those questions related to his sleep. I  
11    can tell you we prescribe it to people with schizoaffective  
12    and without. People that just have transient insomnia or  
13    chronic insomnia. One reason we like it, it is not habit  
14    forming. A person can stop taking it whenever they want to.  
15    Often times in hospital settings we would write this order as  
16    as needed so the person didn't have to refuse but only get it  
17    when they asked for it. I understand in some settings it is  
18    more difficult for somebody to ask for an as needed medication  
19    in certain settings, so it is often as needed medication  
20    though.

21            Q     Can you tell us what Tegretol is?

22            A     Tegretol was initially approved as an antiseizure  
23    medication. But then it was discovered to also have some mood  
24    stabilizing properties, so we use for people who have bipolar

1 disorder or schizoaffective bipolar type.

2 Q Based on the records, do you recall if Mr. Vanisi is  
3 receiving Tegretol?

4 A I see he's receiving it twice a day through the  
5 month of July with a couple of unexplained little blanks. I  
6 don't know what that means when they don't have it at all.  
7 Usually, if it is refusal, they put a circle and the "R".  
8 There are a couple of little blanks. I don't know what they  
9 are. For the most part, he's taken it every day in the month  
10 of July.

11 Q Could you tell us which one of these words is  
12 Tegretol?

13 A Oh, Carbamazepine, the last one.

14 Q Could you explain what Vistaril is?

15 A Yes. Vistaril is an antihistamine not very  
16 different than Benadryl. We often use it as, again,  
17 nonaddicting medicine for anxiety. So it's a relatively mild  
18 anxiety medication. It basically takes the edge off anxiety.  
19 No risk for habit forming, no addiction risk.

20 Q Do the records indicate Mr. Vanisi is taking  
21 Vistaril?

22 A They do.

23 Q Could you indicate which of these is Vistaril?

24 A The second from the bottom. Hydroxyzine is the

1 generic name.

2 Q Is there anything you can tell us based on this  
3 combination of medication?

4 A Well, just commentary?

5 Q Yes, please?

6 A It is not an unusual combination. I have a number of  
7 patients on similar combinations of medication. We tend to  
8 treat the overall illness with a medicine like Haldol, and  
9 then we augment with other things as needed. So if somebody is  
10 having chronic problems sleeping, that could be for various  
11 reasons, thin mattress, noisy environment or whatever, we  
12 would add Trazodone. If they were having some depressive  
13 symptoms, we might add Abilify. Similarly with the others, if  
14 somebody is complaining of feeling anxious during the day, we  
15 might offer them something like Vistaril to help with their  
16 anxiety.

17 Q Now if someone did not suffer from schizoaffective  
18 disorder, took all these medications, what would be the likely  
19 result?

20 A That would be pretty speculative. I would never  
21 prescribe these to somebody who I didn't think suffered from  
22 schizoaffective disorder. I did, somewhere in the records,  
23 someone referred to that these were -- well, he had been  
24 treated previously with massive dosages of multiple

1 antipsychotics. I can't really say what a person without the  
2 disorder how they would react to this.

3 Q What about someone with a disorder who suddenly  
4 stopped all these medications?

5 A Well, statistically there is a high risk of relapse.  
6 The relapse would be about 20 percent per month. So in other  
7 words, when you look at a large population of people that stop  
8 their medication, there is about a 20 percent chance per month  
9 that they're going to have a relapse. So in other words, they  
10 don't necessarily instantly relapse, but within the first six  
11 or eight months within the first year it becomes fairly likely  
12 they are going to have a relapse of illness.

13 Q Now, I am sorry, did the medical records also  
14 indicate something about Mr. Vanisi's June Haldol dose?

15 A Yes. There was some confusion I gathered about  
16 whether he had received -- First of all he received his July  
17 dose, and then I don't think they resolved the confusion about  
18 June, whether he had received his June dose. So I saw a clear  
19 evidence that he was administered the dose of Haldol in May.  
20 Then I saw it in July, but I never saw any notation to  
21 indicate that he was given it in June of 2018.

22 Q If someone were to miss their monthly dosage of  
23 Haldol and they needed it, what would be the likely result?

24 A Well, what you end up with is a gradual lessening of

1 the blood level of the drug. So you're trying to maintain a  
2 certain level of drug in the person's blood. And that is  
3 dependent upon the monthly injection. And so if you imagine  
4 it as a relatively flat line for somebody who is taking it  
5 monthly, a month interruption would cause a downward deviation  
6 in the blood level, not necessarily down to zero, but somewhat  
7 of a deviation downwards. And so you might expect their  
8 therapeutic, their efficacy of the medicine would decrease in  
9 the aftermath.

10 Q What kind of difficulty would that person  
11 experience?

12 A Well, it could be -- it could be, if they are prone  
13 to hallucinations, they might start having hallucinations. If  
14 they are prone to delusions, they might start having those  
15 delusions re-emerge. If they are prone to mania, they might  
16 start to develop symptoms of early mania.

17 Q Would those -- Would you expect those difficulties  
18 to impair a defendant's ability to work with his attorney?

19 A They could. That --

20 MR. PLATER: Wait a minute. Hold on. I object.  
21 That goes to trial competency, assisting counsel. That is not  
22 relevant to what we are here for.

23 THE COURT: What is the relevance, counsel?

24 MR. FIEDLER: I am just trying to parse out what the



1 possible consequence of Mr. Vanisi missing his Haldol dosage  
2 and how the interaction with his attorneys might be impacted  
3 with regard to that, specifically with an eye towards his  
4 attorneys advising him about potential consequences or his  
5 ability to understand those potential consequences.

6 THE COURT: If your question goes to missing one  
7 month of the Haldol, if that would affect the way that he  
8 looks at what his lawyers say, I will allow that question.  
9 The way he perceives what the lawyers are saying to him, I  
10 will allow that question.

11 MR. FIEDLER: Thank you, Your Honor.

12 THE WITNESS: It is possible that it could. So a  
13 single missed dose could cause a deviation, a deviation in how  
14 he's doing, a change in his mental status such he would be  
15 more difficult to work with. That he would become more  
16 symptomatic.

17 Now generally speaking, if you simply make up for  
18 it, in other words I don't necessarily mean double up the  
19 dose, I mean just get back on tract, the person should  
20 re-stabilize and there should be no long term effect.

21 Q During the period of instability --

22 THE COURT: Are you okay, Mr. Vanisi?

23 THE DEFENDANT: Yeah. In June, I did take my shot in  
24 June.

1 THE COURT: Okay. We'll get to that. Thank you.

2 But you are all right? You are feeling all right?

3 THE DEFENDANT: Yeah.

4 THE COURT: Okay. Go ahead.

5 BY MR. FIEDLER:

6 Q I am sorry, I forget where I was. During the period  
7 of instability, would the defendant have trouble understanding  
8 the advice of counsel?

9 MR. PLATER: Your Honor, that question is now  
10 apparently irrelevant according to what Mr. Vanisi just told  
11 us.

12 THE COURT: No, it isn't testimony, counsel, but I  
13 take what he said literal. He said he took it, and the  
14 records are ambiguous. We have gotten into it. You have  
15 gotten enough in there to establish your argument, but I think  
16 beyond that it would be irrelevant.

17 MR. FIEDLER: Thank you, Your Honor.

18 MR. WISNIEWSKI: You're excellent, Your Honor.

19 THE COURT: Long time.

20 BY MR. FIEDLER:

21 Q In the records, you reviewed, were there indications  
22 of whether Mr. Vanisi has ever wished to end his course of  
23 forced medication?

24 A Yes. There were repeated references to that in the

1 months prior to July. I remember one entry in particular  
2 where Dr. Lee basically had to give Mr. Vanisi a bit of a pep  
3 talk, come on, let's keep this going, you are doing well,  
4 let's do it, and he did agree to take it. That may have been  
5 this May.

6 And then there was talk of that again at the end of  
7 July I believe where he indicated he would prefer not to take  
8 the injection in particular. He references pain at the  
9 injection site which is a fairly common complaint of people.  
10 Haldol Decanoate, the drug is suspended in a fairly thick oil,  
11 and it can be somewhat a painful injection at the time. I did  
12 see those references in the record.

13 Q Did the record indicate whether he was still under  
14 forced medication?

15 A As far as I know he is. Well, he mentioned it  
16 during the direct interview with him, one of the reasons he  
17 stayed at NNCC was to have a forced medication panel because  
18 that is where Dr. Lee was. Dr. Lee now has another title.

19 Q Could you speak generally as to why individuals  
20 might wish to stop taking their medication?

21 MR. PLATER: Objection Judge. We are getting --  
22 First of all, that is really broad?

23 THE COURT: I will sustain.

24 MR. FIEDLER: I will rephrase, Your Honor.

1 BY MR. FIEDLER:

2 Q Could you explain generally why individuals who are  
3 being forced medicated for mental health medication might wish  
4 to stop the medication?

5 MR. PLATER: I object. As of this point there is no  
6 indication he has stopped taking the medication.

7 THE COURT: I don't know what the relevance is of  
8 your question.

9 MR. FIEDLER: The question is not whether he stopped  
10 forced medication. The relevance is insofar as Mr. Vanisi's  
11 refusing to take medication, and that is related to his denial  
12 about his mental health status, that is relevant as to what is  
13 motivating his desire to waive this hearing.

14 THE COURT: First, we don't have any evidence he has  
15 not been taking his medicine, so he's on it. What is the  
16 relevance of what happens when people are on medication with  
17 this illness?

18 MR. FIEDLER: I am sorry, I misstated the question.  
19 I am trying to ask why would someone who is being forced  
20 medicated want to stop being forced medicated which the record  
21 indicated he has indicated before he wants to stop.

22 THE COURT: What is the relevance of that to today's  
23 hearing?

24 MR. FIEDLER: The relevance is it could be evidence

1 he's in denial about his mental health issues and he's in  
2 denial about his mental health issues could be motivating his  
3 waiver and also his denial of his mental health issues could,  
4 itself, be motivated by his mental health issues.

5 THE COURT: It is really speculative unless the  
6 doctor can answer. I am sorry, it seems very speculative  
7 unless you have some information that you know the answer to  
8 that somehow makes it relevant. I don't see it.

9 MR. FIEDLER: I will move on, Your Honor. Thank  
10 you.

11 THE COURT: Okay.

12 BY MR. FIEDLER:

13 Q Your report, in your report did you offer an opinion  
14 about the frequency of dosage for Haldol?

15 A Yes, I did.

16 Q Would you mind expressing that for us?

17 A Yes. I was careful not to make these treatment  
18 recommendations, but I did note that some of my patients  
19 require to receive their Haldol Decanoate injection on an  
20 every third week basis. If we notice a pattern of getting in  
21 that final week before their next injection, if they get a  
22 little disorganized in their thinking or a little more  
23 agitated or a little more oppositional, it could be a sign  
24 their body is metabolizing the medication more quickly than

1 average. Four weeks is really an average based upon giving it  
2 to thousands of people. Whereas an individual may have  
3 particularly efficient enzymes to break the medicine down, so  
4 they may break it down in three weeks or three and a half  
5 weeks as opposed to four weeks.

6 I would say it goes the other direction, too.  
7 Somebody could get by with five weeks if possible. Sometimes  
8 it is a very difficult determination to make. It is only when  
9 you see the person over the course of six or eight months do  
10 you realize. And sometimes family will report this that,  
11 yeah, I noticed in the three days before their next injection  
12 they become a little more restless, little more difficult to  
13 deal with. So it is possible that there would be some benefit  
14 in a slightly more frequent injection.

15 Q If he were in fact metabolizing the Haldol more  
16 frequently than the average, would that interfere in his  
17 ability to work with counsel or talk to counsel about his case  
18 and decide whether to make certain decisions?

19 MR. PLATER: I don't think that is relevant whether  
20 he can talk with his lawyers about how to proceed with the  
21 case. We are here to decide whether his decisions are  
22 rationally based on his mental health condition right now.

23 MR. FIEDLER: I will rephrase, Your Honor.

24 THE COURT: Okay. Thank you.

1 BY MR. FIEDLER:

2 Q If Mr. Vanisi were metabolizing his Haldol more  
3 quickly than the average person, would that interfere with his  
4 ability to make a rational choice?

5 MR. PLATER: Objection. We have no documentation or  
6 evidence how Mr. Vanisi metabolizes this medication.

7 THE COURT: It is speculative. We have an expert on  
8 the stand.

9 THE WITNESS: It is possible in the few days before  
10 the next injection, Mr. Vanisi could become more difficult to  
11 work with. I wouldn't necessarily say it becomes impossible to  
12 work, it usually in my experience with this sort of situation,  
13 we are sort of using a hypothetical, not really saying this is  
14 necessarily Mr. Vanisi's situation, my experience is it is  
15 relatively subtle. It is a family member who might say the  
16 person is more irritable in those three days or something like  
17 that, not that they are becoming psychotic necessarily in  
18 those three days.

19 Q Moving on, you spoke to Mr. Vanisi and he indicated  
20 to you his Federal Public Defenders simply want to get him off  
21 death row?

22 A Yes.

23 Q Did he indicate whether -- Did he indicate the  
24 status of his guilt phase claims?

1           A     He seemed to imply that they were, that his guilt  
2 phase claims and State appeals were finished. In other words,  
3 that they were not successful.

4           Q     Did he indicate anything about their status in  
5 Federal court?

6           A     He did not. He was looking forward to getting them  
7 heard in Federal Court.

8           Q     You also indicate in your report Mr. Vanisi stated  
9 he read a number of Federal court decisions?

10          A     Yes.

11          Q     Could you tell us a little more about that?

12          A     I didn't probe him for which decisions. One of his  
13 reasons for feeling optimistic is he had read decisions that  
14 reversed, that found reversible error in the guilt phase of  
15 somebody's trial, and that the person was granted a new trial  
16 by the Federal Court.

17          Q     Did he indicate how he was similarly situated to  
18 these other defendants?

19          A     Just that they were also convicted of murder and  
20 sentenced to death.

21          Q     Did you-- did he-- I am sorry. Did you talk at all  
22 about the procedural requirements of raising a successful  
23 claim in Federal court?

24          A     Since I don't understand your question, I don't



1 think we did discuss it.

2 Q Okay. Did he say anything about the Federal Statute  
3 of Limitations?

4 A He did not. He indicated that he was in a hurry to  
5 get his case to Federal court, but we did not talk about a  
6 Federal Statute of Limitations.

7 Q Did he talk about Federal procedural default?

8 A No.

9 Q Did he talk about the Federal statute that governs,  
10 requires deference to State court decisions? Did he mention  
11 that at all?

12 A No.

13 Q Did he mention-- He said something about his claims  
14 in State court. Could you elaborate a little bit more on that?

15 A Well, my understanding was from him that the current  
16 issue was a penalty phase issue. In other words, that the  
17 judge could order a new penalty phase based upon ineffective  
18 assistance of counsel, and that that was the remaining State  
19 appeal that was afforded to him.

20 Q So did he say anything about the fact his guilt  
21 phase claims have already been denied in State court?

22 A He didn't say those exact words. That was clearly  
23 implied with our conversation.

24 Q Did you discuss at all why he thought his chance in

1 Federal court might be better in Federal court than State  
2 court?

3 A We did. At that point, it seemed to be invading  
4 what he would rather not talk about. That was, for instance,  
5 the details of the offense. And he respectfully declined to  
6 discuss the details of the offense with us. We didn't  
7 pressure him on that. Does that answer your question? I'm  
8 sorry.

9 Q Yes. Thank you. Did Mr. Vanisi indicate his chances  
10 in Federal court were excellent?

11 A Yes, that's what he said.

12 Q But then he later downgraded that assessment to  
13 hopeful?

14 A Yes.

15 Q Did you ask him any questions about having his  
16 appeals denied in Federal court?

17 A Yes. I asked him if he thought that that was  
18 possible, and he said yes.

19 Q Did you talk at all about how the vast majority of  
20 Federal Habeas petitioners lose?

21 A Yes. I phrased it as the appeals process being an  
22 uphill battle, and I thought he was being overly optimistic  
23 about his chances. He sort of took that in. He didn't argue  
24 with me. And he was able to entertain the possibility that he

1 is wrong and that they might, the Federal appeals might not go  
2 any better than the State appeals have gone.

3 Q I would like to backtrack a little bit and talk  
4 about mania. Is one of the examples of manic behavior  
5 overactive activity?

6 A Yes. Increased goal directed activity.

7 Q Is it possible that writing the Court or writing  
8 opposing counsel would be an example of overactive, over goal  
9 activity?

10 A Well, it would have to be -- Anything is possible.  
11 Generally, when we see what we refer to as hypergraphia, in  
12 other words writing excessively, a person will generate many  
13 hundreds of pages, often times very difficult to follow. You  
14 know, kind of twisting ideas and a whole series of things that  
15 are very difficult to follow. So we do see hypergraphia in  
16 mania. And I saw reference to a 32 page document that  
17 Mr. Vanisi at one point produced. I didn't see that document.  
18 I don't know if I would characterize it. People that are in  
19 the midst of a legal case often do produce long documents. I  
20 don't know if that is indicative of him having written it  
21 during mania.

22 Q When you reviewed the records, you noted that the  
23 prison officials noted changes in Mr. Vanisi's mental status.  
24 Could you talk a little bit more about that?

1           A     Are you referring to the end of July?

2           Q     Yes?

3           A     Yes, there was indications that Mr. Vanisi was  
4     becoming more difficult to redirect. Some of it was barely  
5     legible, but I think they were talking about him having  
6     trouble processing words and believing that the phone was his  
7     phone. That he was becoming more difficult during that period  
8     of time.

9           Q     Do you recall if there was also a reference to  
10    increased paranoia?

11          A     There was.

12          Q     You also talked to Mr. Vanisi about how he would  
13    feel about his waiver if the State of Nevada started to  
14    execute individuals again?

15          A     Yes.

16          Q     Did you talk about the fact his waiver would be  
17    effectively permanent, that he could not undo his waiver?

18          A     I don't think we talked specifically about that,  
19    although I think it was implied in our conversation that he  
20    realized this could be his last shot of getting off death row  
21    and getting his death penalty reversed. So in that sense, yes,  
22    we did discuss that this is it. This could be it. This could  
23    be your last chance, and that if the State starts executing  
24    people again, then it may be too late. Now we didn't

1 specifically have that conversation around that topic. We had  
2 it in other ways where he was pretty clear he knew this could  
3 be his only shot.

4 Q Did you talk about whether Vanisi wanted to die?

5 A We did.

6 MR. FIEDLER: No further questions, Your Honor.

7 THE COURT: Okay. Thank you. Counsel for the State.  
8 Is that you, Mr. Plater?

9 MR. PLATER: Yeah. Thank you, Your Honor.

10

11 CROSS-EXAMINATION

12 BY MR. PLATER:

13 Q Doctor Zuchowski, I understand you graduated in  
14 1999?

15 A Yes, from residency.

16 Q What medical school did you graduate from?

17 A From the Medical College of Ohio now called the  
18 University of Toledo College of Medicine.

19 Q What year was that?

20 A 1994.

21 Q 1994 you graduated from med school, University of  
22 Ohio?

23 A Yes.

24 Q You finished your residency in 1999?

1           A     That's correct.

2           Q     Then you went on and did another two year specialty?

3           A     It was one year additional training. I delayed a  
4     year before started that training.

5           Q     All right. In 2001 you had further special  
6     training?

7           A     That's correct.

8           Q     What did it involve again?

9           A     Well, it was forensic psychiatry, so it was, we took  
10    a couple of law classes with Case Western Reserve students.  
11    We went through landmark cases in mental health law. We saw  
12    patients, defendants for competency to stand trial for not  
13    guilty by reason of insanity, violence Risk Assessment. We  
14    had time in the juvenile system. Just basically a very broad  
15    overview of mental health and the law.

16          Q     So this additional one credit or training was  
17    completed at Case Western University?

18          A     Yes.

19          Q     I believe it is in Cleveland?

20          A     That's correct.

21          Q     In Ohio?

22          A     Yes.

23          Q     Okay. After that, you became an associate professor  
24    at UNR?

1           A     First I became an assistant professor at Case  
2     Western and spent about three years as an assistant professor  
3     at Case Western. Then I moved to the University of Nevada to  
4     become their adult psychiatry training director. That was  
5     kind of the reason for the move primarily was to take the job  
6     of Training Director. I did that for several years and all  
7     the while practicing at Lake's Crossing Center.

8           Q     Okay. Then you became an associate professor at UNR  
9     five years ago?

10          A     Approximately five years ago.

11          Q     2013, '14?

12          A     Yes.

13          Q     Since 2004 you have been at Lake's Crossing?

14          A     Yes.

15          Q     Practicing as a psychiatrist?

16          A     Yes.

17          Q     You have seen a number of patients since that time I  
18     take it?

19          A     Yes.

20          Q     Do you have any idea how many?

21          A     I would have to say it is in the thousands.

22          Q     Of those thousands, have you evaluated any of those  
23     for competency purposes?

24          A     Most of them for competency purposes.

1           Q     How many would you say you have done in the last 14  
2     years?

3           A     I would just guess around a thousand competency  
4     evaluations.

5           Q     That is normally for competency to stand trial as I  
6     understand it?

7           A     That's correct.

8           Q     Have you testified before as an expert?

9           A     Yes.

10          Q     Where have you done that?

11          A     Washoe County. Clark county. Federal court in Reno.  
12     Various rural counties. I can't remember all of them. Out in  
13     Ely, Elko.

14          Q     How many times do you recall that you testified as  
15     an expert?

16          A     One hundred or more.

17          Q     Hundred or more? Have you testified in front of  
18     Judge Steinheimer before?

19          A     Yes, I believe I have.

20          Q     Have you always been accepted as an expert when you  
21     give your testimony?

22          A     Yes.

23          Q     Have you ever been denied as an expert?

24          A     No.



1           Q     Okay. So in this case, you were asked to resolve a  
2 particular question regarding Mr. Vanisi's competency,  
3 correct?

4           A     Yes.

5           Q     I think you broke that question down into three  
6 parts; is that correct?

7           A     Yes.

8           Q     So you were asked to decide whether Mr. Vanisi had  
9 the capacity to appreciate his position, right?

10          A     Yes.

11          Q     And to make rational choice and whether he had the  
12 capacity to make a rational choice with respect to waiving his  
13 penalty hearing or post conviction Habeas hearing, right?

14          A     Yes.

15          Q     Okay. You were also asked to decide whether he had  
16 any mental disease, defect, disorder that would affect that  
17 capacity to make that decision; is that correct?

18          A     Yes.

19          Q     What was your ultimate opinion?

20          A     My ultimate opinion was that Mr. Vanisi at the time  
21 I saw him on September 10th of this year, that he was able to  
22 appreciate his position. That he was able to make a rational  
23 choice with respect to waiving the hearing. And that his  
24 mental illness was in remission, and that it did not affect

1 his ability to engage in this process and make a rational  
2 choice.

3 Q Just to make sure I understand, the three things you  
4 looked at were whether he had capacity, number one, and two,  
5 whether he made a rational choice, and three, whether any type  
6 of mental disease or disorder affected that capacity?

7 A Yes, in a nutshell.

8 Q You acknowledge he has been diagnosed with some type  
9 of mental illness, disease, disorder or defect, right?

10 A Yes.

11 Q What are those mental health disorders that he has  
12 been diagnosed with?

13 A Well, he's been diagnosed with a variety of  
14 different things. I think the most relevant is the  
15 schizoaffective disorder bipolar type. From review of the  
16 records and history he provided, I agreed with.

17 Q Now do any of those things such as schizoaffective  
18 disorder bipolar type, did any of those affect his ability for  
19 capacity to appreciate his position and rationally make a  
20 decision with regard to waiving his post conviction hearings  
21 in this case?

22 A No.

23 Q Was that opinion -- Well, that opinion was based on  
24 a number of things, right?

1           A     Yes.

2           Q     Your interview with Mr. Vanisi?

3           A     Yes.

4           Q     You reviewed all the medical records; is that

5     correct?

6           A     Yes.

7           Q     There were a number of other evaluations by other

8     doctors as well you reviewed, right?

9           A     I did.

10          Q     In fact, there were like, well, you listed them in

11     your report, right?

12          A     Yes.   Hundreds of pages.

13          Q     You looked at all of those?

14          A     I did.

15          Q     You read them?

16          A     Yes.

17          Q     You considered them when you made your final

18     conclusion in this case?

19          A     Yes.

20          Q     You looked at the Declarations of Mr. Fiedler?

21          A     Yes.

22          Q     I think his name is misspelled in your report, but

23     no matter.  You looked at a transcript from one of the

24     hearings in this case?

1           A     Yes.

2           Q     You looked at some correspondence from Mr. Vanisi?

3           A     Yes.

4           Q     Those were dated you say in your report July 20th  
5           and August 13th of this year. Were those, do you recall,  
6           correspondence Mr. Vanisi sent to the Court?

7           A     Yes, I believe that is correct.

8           Q     You reviewed also prison kites and all the mental  
9           and medical records?

10          A     Yes.

11          Q     When you say you reviewed those things, you read the  
12          entirety of all those things you listed?

13          A     That's correct.

14          Q     You took them into consideration in forming your  
15          opinion today?

16          A     Yes.

17          Q     When you went down to talk to Mr. Vanisi, you  
18          indicated you went into a medical room type of facility?

19          A     It was an examining room.

20          Q     Okay. Initially, he was only handcuffed to a belly  
21          chain; is that correct?

22          A     That is my recollection. I couldn't say that  
23          absolutely for certain, but I believe that was the case.

24          Q     Did he have one of his hands free or were both hands

1 handcuffed, do you recall?

2 A I don't believe he had either of his hands free.

3 Q Were both cuffed to the belly chain as you recall?

4 A As far as I know.

5 Q That went on the first 20 minutes of the interview?

6 A Yes.

7 Q Then it changed. He was given an additional set of  
8 restraints?

9 A I believe they added leg restraints.

10 Q Did Mr. Vanisi object at that time?

11 A No, he didn't.

12 Q Did he appear more uncomfortable after the second  
13 set of restraints than before?

14 A No. I think I mentioned it was his suggestion to  
15 the correctional officer, "Do you want to put those on me  
16 now," because he saw him standing there.

17 Q You're testifying as though he expected to get a  
18 second set of restraints on his legs?

19 A We didn't discuss it. My feeling was, my sense was  
20 he knew the policy, knew that was coming. And that he had been  
21 walked over from another, from a bit away, another area of the  
22 prison, and I am assuming the policy was once he was seated,  
23 he was supposed to get back into the leg irons.

24 Q Did the restraints Mr. Vanisi was put under, did

1       that, in your opinion -- Let me ask it like this: Did his  
2       restraints affect the way you would interpret the results of  
3       your interview with him?

4           A       They did not seem to in the slightest.

5           Q       Didn't affect, in your perception, didn't affect the  
6       way he was speaking, responding or answering your questions?

7           A       That's correct.

8           Q       I would assume you would have noted that or made  
9       some objection to the prison guard if that had been the case?

10          A       Yes. If we noticed a change at that point, we would  
11       have noted it and asked for some kind of accommodation so we  
12       could be more comfortable.

13          Q       How long did the interview take?

14          A       Two hours.

15          Q       And you said that you didn't necessarily ask all the  
16       questions that you normally ask during a competency  
17       examination, right?

18          A       That's correct.

19          Q       But you used a number of the same questions, right?

20          A       Yes.

21          Q       Tell us what some of those questions were?

22          A       Well, I started off, it was just a simple why do you  
23       want to do this? Why do you want to waive this evidentiary  
24       hearing? I think the follow-up to that was -- He answered the

1 question, and the follow-up to that was why not just go  
2 forward? Why not take a shot? What's there to lose? He was  
3 able to explain himself in a way I thought was not based on  
4 mental illness. There may be, I outlined in my report, there  
5 may be an element of optimism, perhaps overly optimistic.  
6 There may be some hopeful thinking if you want to put it that  
7 way. But it did not flow from any delusion that I could  
8 detect.

9 Q Were the questions you asked Mr. Vanisi the sort or  
10 variety that a psychiatrist in your position would normally  
11 ask in his profession in determining competency regarding the  
12 question that was presented to you?

13 A Yes. Essentially, what we are trying to do is  
14 understand his ability to weigh the pros and cons for his  
15 decision, to see that the consequences may be severe. Is he  
16 able to accept that and discuss it in a reality based way.

17 Also, on the other hand, advantages, what does he  
18 see as the advantages of his decision, and is he able to  
19 describe those in a non-delusional reality based way.

20 Q In fact, one of the first things he told you during  
21 the interview was his decision to forego this evidentiary  
22 hearing was "tactical"?

23 A Yes.

24 Q How did you interpret that term?

1           A     Well, I took it to mean strategic. That was his  
2 preferred strategy to move his case, his appeals into Federal  
3 court as quickly as possible and not be tied up in State court  
4 any longer.

5           Q     The reason he wanted to move to Federal court, he  
6 wants to challenge the underlying conviction as well as the  
7 death sentence; is that true?

8           A     That's true.

9           Q     He can't get that in the State court system as the  
10 case is presently situated?

11          A     That was my understanding, and I believe his  
12 understanding as well.

13          Q     Did you feel his explanation was accurate?

14          A     Yes. As much as -- I am obviously limited in  
15 knowledge of the death penalty appeals process, but he seemed  
16 to be articulating himself well and seemed to be not basing  
17 his decisions upon any delusional ideas or delusional  
18 optimism. Choosing perhaps to focus on the more hopeful  
19 aspects of his chances versus the more pessimistic viewpoint.

20          Q     And because he felt it would be more beneficial for  
21 his case to move in the Federal court system, of course you  
22 wanted to explore what the basis for that belief was, right,  
23 because there could be a completely irrational delusional  
24 belief?



1           A     Yes.

2           Q     So you asked him why he thought his case would be  
3 more beneficial to be in the Federal court system, right?

4           A     Yes.

5           Q     And he told you that several Federal Public  
6 Defenders told him he had a good shot at getting the old  
7 conviction reversed, right?

8           A     That's correct.

9           Q     Because you took notes, handwritten notes during the  
10 interview, right?

11          A     Yes.

12          Q     Would you say they were contemporaneous or maybe you  
13 did it afterwards?

14          A     No, they were contemporaneous.

15          Q     You attached those notes to your report?

16          A     Yes.

17          Q     You make mention Mr. Bruschetta or the Federal  
18 Public Defender's Office had told Mr. Vanisi, according to  
19 Mr. Vanisi, his case had reversible error. Do you recall  
20 that?

21          A     I don't believe I mentioned any specific name, but I  
22 did say he said that one of his Federal Public Defender's had  
23 told him they thought there was reversible error.

24          Q     I want to see if I can refresh your recollection.

1 Would you take your report again?

2 A Uh-huh.

3 Q And go to your handwritten notes?

4 A I don't have a copy of my handwritten notes. Sorry  
5 about that.

6 Q Oh, okay. Do you recall saying in your handwritten  
7 notes Mr. Fiedler, one of his current lawyers said that  
8 Mr. Vanisi had a good chance?

9 A I don't recall saying it with a specific Public  
10 Defender he was referring to.

11 Q Okay.

12 MR. PLATER: Your Honor, may I approach?

13 THE COURT: You may. Show counsel.

14 BY MR. PLATER:

15 Q So, Dr. Zuchowski, I have handed you one page of  
16 your handwritten notes. Would you look at the bottom of the  
17 particular page I gave you?

18 A Yes. I see where I did mention in my notes a  
19 specific name of a Federal Public Defender.

20 Q Does one of those names look like the name  
21 Bruschetta?

22 A Yes.

23 Q The one below is Mr. Fiedler's name?

24 A Randy.

1           Q     Can you tell us what you wrote in your notes,  
2     according to Mr. Vanisi, those lawyers told him?

3           A     Yes. Mr. Bruschetta, if I am saying that correctly,  
4     said reversible error, and Randy said pretty good.

5           Q     How did you interpret Mr. Vanisi's remarks to you  
6     about what those lawyers had said to him?

7           A     They had instilled some hope in him.

8           Q     Regarding what?

9           A     Chances in Federal court.

10          Q     In terms of getting his conviction reversed?

11          A     Yes.

12          Q     Not just the penalty, itself?

13          A     Yes.

14          Q     So did you find, assuming what Mr. Vanisi told you  
15     was true, did you find that a reasonable explanation why he  
16     might not go for State proceedings and want to proceed in  
17     Federal court?

18          A     Yes.

19          Q     You found that wasn't necessarily the result of the  
20     a delusion or some type of mental disorder, mental health  
21     problem or defect?

22          A     No. That is correct. I mean we often find people  
23     that may make decisions that we don't fully understand or  
24     agree with, but in their shoes it seems to be the best choice

1       for them. If that is not flowing from a delusion or mental  
2       illness, then, generally speaking, we see that as a competent  
3       choice.

4           Q       Mr. Vanisi expressed awareness or knowledge that he  
5       could lose his case both in the State system and the Federal  
6       system and be subject to being executed some day, right?

7           A       That's correct.

8           Q       And he could lose everything and he might face  
9       execution?

10          A       That's correct. That is what distinguishes his  
11       decision making and reasoning from someone who is delusional.  
12       As a rule, people that are delusional don't have that  
13       flexibility to be able to entertain the chance they are wrong  
14       and the chance this is not going to turn out the way they  
15       hoped. So he's able to be flexible and acknowledge that this  
16       may not go the way he thinks it is going to go or hopes it is  
17       going to go.

18          Q       The way I read your report is that, when he  
19       acknowledged that awareness he could be executed, he decided  
20       that that was a chance he was willing to take, right?

21          A       That's correct.

22          Q       And part of the reason was that even if he lost all  
23       of his cases in the State and Federal system, he didn't think  
24       the State of Nevada would necessarily execute him right away?

1           A     That's correct or ever.

2           Q     Could be years from now?

3           A     Yes.

4           Q     Did you find that to be a rational benefit that  
5     Mr. Vanisi saw in waiving his State post conviction  
6     proceedings and go to Federal court?

7           A     I found it to be he was being consistent with his  
8     value system and his experience of prison for the last 20  
9     years. I found it to be consistent internally within him and  
10    not flowing from any delusional idea.

11          Q     You don't have any evidence that defendants on death  
12    row are necessarily executed swiftly? I mean within a year or  
13    two of their conviction, do you?

14          A     Correct.

15          Q     What he told you seems to be kind of accurate?

16          A     It does.

17          Q     According to at least your public awareness and  
18    knowledge of capital litigation, would that be correct?

19          A     Yes.

20          Q     Really, that is another additional rational reason  
21    he had, it doesn't stem from some kind of mental defect or  
22    delusion?

23          A     Correct.

24          Q     He did tell you that he is kind of comfortable on

1 death row, right?

2 A Yes.

3 Q He's learned to adjust, and he did acknowledge if he  
4 had a life sentence as opposed to a death sentence, he would  
5 return to general population and there might be some benefits  
6 to that, right?

7 A Yes.

8 Q But he was willing to forego those benefits because  
9 he was comfortable with the situation?

10 A My impression was that was also internally  
11 consistent with his value system and what his experience has  
12 been in prison to date. We talked about some of the  
13 advantages that could be afforded him if he were in general  
14 population, and he acknowledged them and even said he would do  
15 okay if that were the case in general population, but he  
16 didn't value those so much he was willing to change his  
17 decision.

18 Q When he said a lot of times these capital cases are  
19 tied up for years and that's one of the reasons why he didn't  
20 think he would be executed in the near future, he did admit he  
21 didn't know how long that delay could be; is that true?

22 A That's correct. I think we were actually referring  
23 to the delay if he were to be granted a new penalty phase at  
24 State court and then the potential for appeals of that

1 decision, and that he didn't know how long that delay would  
2 be.

3 Q In other words, what you are saying is he told you  
4 that regardless of the outcome in State court regarding his  
5 penalty hearing, whether he won or lost, one of the parties in  
6 the litigation would appeal, so his case would still be tied  
7 up in the State court system for years even if this Court  
8 granted him a new penalty hearing?

9 A That was his concern.

10 Q All the additional years are part of his decision  
11 wanting to go to the Federal system right now?

12 A Yes.

13 Q You told him at that point he was being maybe overly  
14 "pessimistic"?

15 A My impression was he was, if I can review my report,  
16 he was given numbers like ten to fifteen years, and my  
17 layman's view of that sounded like he was overly pessimistic  
18 it would actually take ten to fifteen years to sort out the  
19 State court Habeas.

20 Q When he told you that he had a number of Federal  
21 decisions that he was relying on in forming his decision,  
22 first he told he thought he had an excellent chance of the  
23 Federal court system overturning his conviction, right?

24 A Yes.

1           Q     But he modified that later and said it was only  
2 hopeful he would prevail in Federal court, right?

3           A     Correct.

4           Q     And you then responded back to him and said, well,  
5 look, anything is possible in the Federal court system. In  
6 other words, implying he might lose straight across on every  
7 issue, right?

8           A     Yes.

9           Q     Then he said "Anything is possible." Right?

10          A     Yes.

11          Q     Wouldn't that indicate to you he was fully aware of  
12 all the particulars, all the different options that might  
13 occur in his case in Federal court?

14          A     Yes.

15          Q     Would you agree he didn't necessarily think he was  
16 guaranteed to win in the Federal court?

17          A     No. He made that very clear he knew he was not  
18 guaranteed.

19          Q     Did he tell you he didn't see much difference from  
20 life on death row and life imprisonment without possibility of  
21 parole?

22          A     Yes, he did.

23          Q     Did he explain why?

24          A     Well, he sees them both as being in prison and



1       that's not his preference. He also at that point referenced  
2       that he feels fairly comfortable on death row, and he feels  
3       safe. It is not that bad. And it is not what he prefers,  
4       obviously, but the idea of going into the general population  
5       just was a bit of sort of limited value to him.

6           Q       Do you remember this quote when he said: "But I  
7       really don't want to linger in prison for the rest of my  
8       life?"

9           A       Yes.

10          Q       Did he explain to you what he meant by that?

11          A       Well, that to him -- that to him, a life sentence  
12       without possibility of parole wouldn't -- wouldn't bring him  
13       any advantage, that he would still linger in prison for the  
14       rest of his life.

15          Q       Did you think that that comment was the result of  
16       suicidal ideation?

17          A       No.

18          Q       Did you think it was the result of some type of  
19       delusional tool, defect or mental illness?

20          A       No.

21          Q       It was just an expression of what he felt his  
22       present circumstances were like in prison; is that correct?

23          A       Yes.

24          Q       He did express, I believe, a belief in an afterlife?

1           A     Yes, he did.

2           Q     You noted that in your report. He thought he would  
3 go to some type of spirit world then be resurrected at some  
4 point?

5           A     Yes.

6           Q     And you didn't feel that was necessarily a result of  
7 delusional thinking or mental illness, right?

8           A     No, I didn't think it was at all. I thought it was  
9 very consistent with his beliefs and apparently his  
10 long-standing beliefs.

11          Q     A lot of Christian faiths believe that type of  
12 doctrinational tenant?

13          A     Yes.

14          Q     You didn't see -- All right. You asked him whether  
15 he thought he had any special influence or power over the  
16 Federal court if this case ended up in the Federal system,  
17 right?

18          A     Yes.

19          Q     What did he say about that?

20          A     Well, he laughed and he answered with a strong no,  
21 and then he proceeded to say he wouldn't be in the situation  
22 he's in now if he had any special influence with the courts.

23          Q     I assume you asked that question, because you wanted  
24 to find out if his desire to get into Federal court was the

1 result of some type of delusional thinking he had on his part?

2 A Correct.

3 Q So you found his answer completely consistent with  
4 somebody who is competent to waive his evidentiary hearing in  
5 this case?

6 A Yes.

7 Q You asked him why he thought a new trial would have  
8 a different outcome, right?

9 A Yes.

10 Q I think what he told you was he wanted to testify  
11 and explain to a jury of his peers what happened on the date  
12 of the murder, right?

13 A That's correct.

14 Q Then when you asked him for more specific detail, he  
15 said, " I don't want to tell you that on advice of my  
16 counsel?"

17 A Yes.

18 Q Do you find that to be a rational response on his  
19 part?

20 A I find that rational and self-protective.

21 Q You found Mr. Vanisi was alert, cooperative and  
22 easily engaged in conversation with you?

23 A Yes.

24 Q He was attentive?

1           A     Yes.

2           Q     You didn't find his attention wavered, or I should  
3 say wavered or modulated?

4           A     That's correct.

5           Q     Your interview was completed without any breaks?

6           A     Yes.

7           Q     Was that consistent with somebody who had the  
8 ability or capacity to waive an evidentiary hearing with full  
9 understanding of his consequences?

10          A     It is consistent with somebody who is able to attend  
11 a two hour meeting that could be considered stressful  
12 circumstances, and us trying to challenge his thinking. He was  
13 able to maintain his composure, not appear particularly  
14 anxious or distressed in any way.

15          Q     Did Dr. Mouton's presence and participation in the  
16 interview affect any of the questions that you asked or your  
17 conclusions that you derived from the interview?

18          A     Well, the answer to your first part of the question  
19 is that I think, yes. I mean there is, we sort of play off  
20 each other as interviewers. So in other words, I ask a line of  
21 questions. Then Dr. Moulton gets curious about some answer,  
22 and he asks follow-up questions and back and forth. So there  
23 is that interplay where maybe I wouldn't have thought to ask  
24 every question he asked and vice versa. I don't think it had

1 any affect on the conclusion of my report.

2 Q We should get more to the point. Did you and  
3 Dr. Moulton compare notes afterwards and decide to arrive at  
4 your conclusion in your report based on a conversation with  
5 him afterwards? Maybe that is not a good question.

6 A Well, we did not collaborate on our opinions in any  
7 way. We didn't come to any kind of agreement we were finding  
8 any certain direction.

9 Q So you arrived at the conclusion of your report  
10 independent of what Dr. Moulton did in his report and his  
11 conclusions?

12 A Yes.

13 Q Mr. Vanisi's grooming and hygiene appeared normal to  
14 you?

15 A Yes.

16 Q He looked clean, right?

17 A Yes.

18 Q No body odor; is that correct?

19 A Correct.

20 Q Not tearful? Tell us what this means "His affect is  
21 a full range and appropriate to content?"

22 A Well, one of the characteristics of untreated  
23 schizophrenia or schizoaffective disorder is that the person's  
24 affect, which is the range of emotional expression, usually

1     you can see it in a person's face, is first of all consistent  
2     with what they are talking about. They are appropriately  
3     serious when the topic is serious. Are they able to then make  
4     use of sense of humor and laugh when something is funny.  
5     Mr. Vanisi demonstrated all of those things. He was able to  
6     have a variety of different emotional expressions, mostly  
7     serious given the serious nature of the conversation. But  
8     then we had several moments of humor, and he demonstrated his  
9     ability to laugh appropriately and find humor in things.

10         Q     In fact, you noted that in your report he  
11     demonstrated a sense of humor?

12         A     Yes.

13         Q     You say his mood appeared euthymic?

14         A     Euthymic.

15         Q     I don't know the word. Neutral?

16         A     Yeah. Basically it means like normal mood. Kind of  
17     not euphoric, not despondent, just somewhere in the middle.

18         Q     The way a mentally healthy individual should be?

19         A     Yes.

20         Q     You said his thought processes were linear and goal  
21     directed?

22         A     Yes.

23         Q     You were asked whether being goal directed can be a  
24     symptom of being manic I think, because that is true, right?

1           A     Well just to specify, excessively goal directed. So  
2     in other words, doing many things to an excessive level.  
3     Hopefully, goal directed is generally speaking normal. But  
4     excessively goal directed, engaged in multiple goal directed  
5     activities like starting multiple businesses in a day,  
6     something like that.

7           Q     You didn't find his answers as being goal directed  
8     were excessive?

9           A     No.

10          Q     What do you mean by his thought processes were  
11     linear?

12          A     Well, they were easy to follow. Basically, when he  
13     would answer a question, he wouldn't drift off on a tangent.  
14     He wouldn't take a long time to get around to the answer. He  
15     would, in a fairly linear way, answer the question.

16          Q     So is that related to the comment that his thought  
17     processes did not have tangential thinking?

18          A     Yes.

19          Q     In other words, they logically flowed?

20          A     That's correct. The way we judge it is how easy is  
21     it to follow the person. If we can follow them fairly easily  
22     most of the time, we consider that to be linear goal directed  
23     and organized. Everyone has trouble occasionally maybe  
24     following somebody's line of thought, but a person that has

1 untreated mental illness like schizophrenia or schizoaffective  
2 disorder can have a thought disorder where it is impossible to  
3 follow their line of thinking.

4 Q There were loose associations?

5 A That's correct.

6 Q That is why I think you say he answered questions  
7 appropriately and succinctly?

8 A Yes.

9 Q His speech was normal in rate, volume, articulation?

10 A Yes.

11 Q Was not slurred. What did you mean by that?

12 A Slurred is a characteristic of manic speech. It is  
13 very difficult to interrupt someone. They have a constant  
14 flow of words, and even with talking and raising your hand and  
15 saying stop, the person will continue talking. He didn't have  
16 that.

17 Q Okay. He denied hallucinations, right?

18 A Correct.

19 Q You said there was no evidence of internal  
20 stimulation. What do you mean by that?

21 A That usually refers to listening behavior. In other  
22 words, if a person is hearing a voice, they may at some point  
23 during the interview look up at the corner of the room, act as  
24 if they are hearing an intercom or something. And you can



1       see that behavior in a person. Likewise with visual  
2       hallucinations you may see them glance at something they are  
3       perceiving or misperceiving in the room. There was none of  
4       that with Mr. Vanisi.

5           Q       No delusions?

6           A       I didn't detect any delusions.

7           Q       There was no evidence of delusions. When you  
8       reviewed the medical records, did you see any -- Did you see  
9       any notation in the medical records he currently has  
10       hallucinations, any type or evidence of delusions?

11          A       No. The most recent concern was the end of July  
12       2018 when he had what seemed to be a brief period of what was  
13       described as increased paranoia. Exactly what that means is  
14       unclear. It is a fairly brief notation, but it is there from  
15       late July of 2018.

16          Q       You don't know what the symptoms were then?

17          A       Only what was described in the notes.

18          Q       Which was what, do you recall?

19          A       More difficult to redirect. More paranoid. Trouble  
20       with processing words is what I was able to interpret from the  
21       handwritten notes. And this notation that he believed the  
22       phone was his alone or something like that.

23          Q       The phone?

24          A       The telephone.

1           Q     You didn't find any of those symptoms evidenced when  
2     you interviewed him, did you?

3           A     No.

4           Q     In fact, you found him pretty engaging, easy to talk  
5     to?

6           A     Yes.

7           Q     You didn't find him resistant in any of your  
8     questions?

9           A     No. The only point of resistance was when we asked  
10    him to get into the details of the offense and he declined.

11          Q     Because of what his lawyer had advised him to do?

12          A     That's correct.

13          Q     You didn't find it difficult to direct him to  
14    certain subject areas?

15          A     No.

16          Q     So there was a notation -- What you are saying,  
17    there is a notation in the medical records at the end of July  
18    he was experiencing paranoia. It was difficult to direct him  
19    and his words were, I forget the word you used?

20          A     He was having trouble processing words is how I  
21    interpreted the notes.

22          Q     Are there any medical records from August or  
23    September?

24          A     I don't believe we got any from August or September.

1           Q     There was -- You testified he was -- There was an  
2 interruption in the regimen of Haldol?

3           A     Haldol. Well, it is unclear. Mr. Vanisi says he  
4 got his injection. The records may be incomplete or  
5 inaccurate. It is not documented in the records I reviewed  
6 that he received his June injection.

7           Q     But he did receive an injection in July, July 3rd  
8 right?

9           A     That is correct.

10          Q     Don't the records indicate that he is no longer  
11 resisting medication?

12          A     Well --

13          Q     He's cooperating with receiving the Haldol?

14          A     As far as I know, yes. As far as he told me, he's  
15 willing to continue on the regimen. And I don't know the  
16 medical records reflected that. I don't know if they are  
17 recent enough to reflect his most recent attitude towards his  
18 medicine.

19          Q     Well, I mean because there is notation in the  
20 medical records this Haldol, at least at some point, is  
21 forced, it is forced medication?

22          A     Well, yes. I believe in Mr. Vanisi's case he knows  
23 he has a forced medication protocol in place, so he takes it  
24 voluntarily in a sense. I mean he takes it. They don't have

1 to hold him down and inject him against his will, but he knows  
2 if he refused it, there would be that potential.

3 Q Yeah. I want to tie this into what you wrote on top  
4 of page 6 of your report.

5 MR. PLATER: Your Honor, these reports are part of  
6 the Court record, correct?

7 THE COURT: Yes. They were filed in.

8 MR. PLATER: Can we assume they are admitted for  
9 purposes of evidence in this hearing?

10 THE COURT: They are the basis for this hearing,  
11 yes. They are admitted for the Court's consideration.

12 MR. PLATER: All right.

13 THE COURT: Including the notes.

14 MR. PLATER: Right.

15 BY MR. PLATER:

16 Q Doctor, on the top of page 6, you said Vanisi had  
17 some pain at the injection site where he receives his long  
18 acting antipsychotic injection. That refers to the injection  
19 of Haldol, right?

20 A That's correct.

21 Q Then you said he denied resisting or attempting to  
22 refuse the injection, right?

23 A Yes.

24 Q On top of that paragraph, you said he acknowledged

1 the need for medication, and that they have been very helpful  
2 to him, correct?

3 A Yes.

4 Q Okay. So when we say he's under forced medication,  
5 is it accurate to say he's under a court order or he's under  
6 an order to receive this type of drug, but he doesn't  
7 necessarily physically -- he doesn't necessarily physically  
8 resist receiving the drug?

9 A That's correct.

10 Q Okay.

11 THE COURT: Counsel, we are about at our two hour  
12 mark, so we can take a recess and keep going. Doctor, I know  
13 you had some place you needed to be later.

14 THE WITNESS: Yes, at 1:00 o'clock.

15 THE COURT: Let's take a 15 minute recess and we'll  
16 be back on the record in 15 minutes.

17 MR. PLATER: My understanding is when we finish with  
18 Dr. Zuchowski, we are going to take a lunch break?

19 THE COURT: Yes.

20 MR. PLATER: So we can release Mr. Moulton?

21 THE COURT: Until after lunch.

22 MR. PLATER: I think that is what he prefers.

23 THE COURT: We are going to switch court reporters,  
24 and I said I believe we would be finished with this doctor no

1 later than 1:00 o'clock but perhaps 12:30 was my hope so we  
2 could take lunch from 12:30 to 1:30. That was my hope. The  
3 Court Reporter will be back at 1:30 knowing she may have to  
4 wait a half hour if we don't break until 1:00 o'clock  
5 approximately. Does that help doctor?

6 DR. MOULTON: Very helpful. Thank you.

7 THE COURT: Thank you.

8 (Short recess taken.)

9 BY MR. PLATER:

10 Q Am I saying your name correctly, Zuchowski?

11 A Yes.

12 Q Doctor, on page 6 of your report you noted that  
13 Mr. Vanisi was a low risk of harm to himself and in this  
14 setting at that time he's a low risk of harm to others. Why  
15 did you put that in your report?

16 A Well, it is something we always do as a psychiatrist  
17 to assess whether someone is at increased risk of suicide or  
18 violence, and I found no evidence that he was, in the setting  
19 he was in, that he was at risk, increased risk of suicide or  
20 violence.

21 Q That would be relevant to his mental health about  
22 whether he's incapable of rationally making the decision to  
23 forego his State Habeas proceedings, right?

24 A Yes.

1           Q     You did look for evidence of feigning or concealing  
2     symptoms; is that correct?

3           A     Yes.

4           Q     There was no evidence of that?

5           A     That's correct.

6           Q     Okay. Did he know -- Well, did he know what he had  
7     been initially charged with?

8           A     I am sorry, would you repeat that?

9           Q     Did he know he had been charged and convicted of  
10    murder?

11          A     Yes.

12          Q     Did he know what the sentence was?

13          A     Yes.

14          Q     He knew he was under a sentence of death?

15          A     Yes.

16          Q     He knew he was on death row?

17          A     Yes.

18          Q     Knew what death meant?

19          A     Yes.

20          Q     What was that?

21          A     Cessation of bodily functions and end of  
22    consciousness as we know it.

23          Q     And he knew if he pursued the State Habeas  
24    proceedings, this might be his only chance he would have to

1 vacate his death penalty; is that correct?

2 A That's correct.

3 Q He's willing to take that risk?

4 A Yes.

5 Q Okay. I won't go through your analysis as to  
6 subsection two about whether he had the ability to make a  
7 rational choice, because I think we covered that except for  
8 number four on top of page 7 you noted that he was able to  
9 acknowledge getting his sentence changed to life imprisonment  
10 would preclude him from receiving the death penalty; is that  
11 correct?

12 A Yes.

13 Q Even though he acknowledged that he was willing to  
14 take that risk, he didn't think the State of Nevada would  
15 carry out the death penalty on him?

16 A That's correct.

17 Q We had talked about the fact Mr. Vanisi had told you  
18 that some of his Federal Public Defenders told him he had a  
19 good chance in Federal court to have his conviction reversed.  
20 Do you remember that?

21 A Yes.

22 Q If he had -- If he had been wrong about his  
23 interpretation of what his lawyer told him, would that affect  
24 your analysis of whether he made a rational choice to pursue



1 State proceedings and go to Federal court?

2 A Well, in short I think not. That it wouldn't impact  
3 his rationality. I think there may be -- We all are prone to  
4 selectively remembering certain things that are -- that bring  
5 us hope and bring us a feeling of positivity and optimism, so  
6 it is possible that he remembers that particular positive  
7 comment. But not all the tempering evidence or tempering  
8 advise that would say, well, you have a chance, but it is not  
9 that great, so I don't think it means it is irrational. I just  
10 think it is a very human tendency to remember certain things  
11 with more emphasis than others.

12 Q He was oriented to time, place?

13 A Yes, he was.

14 Q What is the other one?

15 A Person.

16 Q While you were speaking to him?

17 A Yes.

18 Q Do you know what his educational level was?

19 A I believe he's 12th grade. High school graduate.

20 Q Do you know what his ability to read and write is?

21 A As far as I can tell, he has no trouble writing. I  
22 didn't test his ability to read. I am assuming he can read.

23 Q You read some of his kites --

24 A Yes.

1           Q     -- while he was in prison?  Would you agree with me  
2 they seem coherent?

3           A     Yes.

4           Q     Well written?  He's articulate.  All the spelling is  
5 correct as far as you recall?

6           A     I don't recall the spelling one way or the other,  
7 but I recall that he did write a number of kites.

8           Q     He didn't report hearing any voices?

9           A     Correct.

10          Q     That is part of the possible symptoms of  
11 schizophrenia; is that correct?

12          A     Yes.

13          Q     You noted that he was sleeping well.  At least he  
14 told you that, I believe?

15          A     Yes.

16          Q     He told you, is it correct, he was sleeping eight  
17 hours a night?

18          A     I would have to refer back to my report to know the  
19 number of hours, but I don't see where I specifically said  
20 that, but he denied issues with sleeping, trouble with  
21 sleeping.

22          Q     Do you remember a statement in your written notes  
23 that Mr. Vanisi noted that the Federal Public Defender had  
24 accused him of being delusional, and the reason, according to

1 Mr. Vanisi, that they wanted him to pursue his State post  
2 conviction remedies is their office is all about getting  
3 people off death row?

4 A Yes.

5 Q What can you tell us about that type of statement?  
6 What significance does it have?

7 A Well, Mr. Vanisi felt like the Federal Public  
8 Defender had one goal in mind, that was to get the death  
9 penalty reversed, and that they weren't necessarily taking  
10 into consideration other factors that are important to him.

11 Q Such as we have discussed, getting his conviction  
12 reversed?

13 A That's correct. And the idea of lingering in prison  
14 doesn't sound like any kind of a reward to him.

15 Q Did he talk to you or did he mention that he didn't  
16 think he would get a sentence of life with the possibility of  
17 parole?

18 A Yes. He didn't think that was possible.

19 Q In other words, the note was in your notes: "They  
20 won't give me parole." Do you remember that?

21 A That's correct.

22 Q Did he use that as a justification as well for  
23 getting out of the State system and wanting to go into the  
24 Federal system?

1           A     Yes. He didn't think parole was a possibility.

2           Q     In other words, his thinking is, even if he gets a  
3 new penalty hearing with new mitigating evidence, he's never  
4 going to get a better sentence than life without possibility  
5 of parole?

6           A     That was his perception.

7           Q     He didn't see that as any particular benefit?

8           A     No.

9           Q     The two other officers that were in the interview  
10 room with you, they didn't participate, did they, in the  
11 interview?

12          A     I wouldn't say they participated in the interview,  
13 but at one point when we were talking about the advantages of  
14 being in the general population, they did chime in with some  
15 ideas. They talked about vocational training, educational  
16 training and other things that they have available to the  
17 general population. So at that point, they did chime in with  
18 that information I found helpful, because I don't personally  
19 know all the possibilities.

20          Q     You referred to some of those programs in your  
21 report?

22          A     Yes.

23          Q     Mr. Vanisi was aware he could take advantage of some  
24 of those things if he went into general population?

1           A     Yes.

2           Q     He still wasn't interested necessarily in going into  
3     general population?

4           A     That's correct.

5           Q     Did that participation influence the way you  
6     perceived Mr. Vanisi's answers to you or the conclusion you  
7     derived from the interview?

8           A     No, not at all. They provided some information we  
9     didn't have, what sort of programs that are available to  
10    inmates that could enhance the quality of their life.

11          Q     Did you ask Mr. Vanisi everything you wanted to go  
12    over meaning you had Dr. Moulton there, too, and he was asking  
13    questions. Did that preclude you from going over any area you  
14    saw you wanted to with Mr. Vanisi?

15          A     No, not at all.

16          Q     You talked about all these different drugs  
17    Mr. Vanisi is taking or has taken. Did you consider all the  
18    drugs that he was taking or he's taken in terms of arriving at  
19    your conclusion regarding his mental status in this case?

20          A     I am not sure I understand the question.

21          Q     So we talked about some of the different drugs he's  
22    taking like Abilify, Cogentin, Trazodone, Haldol, Vistaril?

23          A     Yes.

24          Q     I take it it is not unusual for somebody in his

1 position, Mr. Vanisi's position, to be taking all of these  
2 things at different times or all at the same time?

3 A Yes, it is not unusual.

4 Q I mean as a psychiatrist, tell me if I am wrong,  
5 when you diagnose a person with mental illness, sometimes you  
6 are prescribing a medication, then you come back and you see  
7 how that medication is interacting with your patient in terms  
8 of whether it is working or not, right?

9 A Correct.

10 Q And sometimes you will modify the regimen of  
11 prescriptions you are giving to a patient, right?

12 A I would say that is the majority of the time we  
13 modify things along the way.

14 Q Even if you are giving an antidepressant to a  
15 patient like Haldol, like you explained, you will modify that  
16 at times, the regimen, and give him perhaps in addition to  
17 Haldol other prescriptions to either boost the affect of  
18 Haldol or maybe to counteract some of the symptoms that the  
19 patient is experiencing?

20 A Yes.

21 Q So, my word, sometimes they are receiving a cocktail  
22 of prescriptions, right?

23 A Yes.

24 Q Assuming he was receiving all these things, does

1       that affect any of your determinations in this case?

2           A       No. In fact, I think the medicines have him in a  
3       good place in remission.

4           Q       Does Mr. Vanisi understand this particular  
5       proceeding in this State court situation is his best chance  
6       for relief of the death penalty?

7           A       I would say no, he doesn't think it is his best  
8       chance. He realizes it might be his only chance, but I think  
9       he thinks his case is going to be seen more favorably in the  
10      Federal court, and he may in fact be granted a new trial. So I  
11      would say he doesn't necessarily think it is his best chance,  
12      but he rationally understands that it could be his only  
13      chance.

14                  MR. PLATER: That is all I have. Thank you.

15                  THE COURT: Okay.

16                  MR. FIEDLER: I WILL be quick, Your Honor.

17

18                               REDIRECT EXAMINATION

19       BY MR. FIEDLER:

20           Q       Doctor Zuchowski, will you say a little more about  
21       the guards when they chimed in and tell us what was going on  
22       during the interview at that time?

23           A       Well, I was asking Mr. Vanisi about the advantages,  
24       potential advantages of being in the general population versus

1 on death row, and I must have sounded a little puzzled,  
2 because I wasn't sure exactly what was available to inmates in  
3 terms of training programs, educational programs. And one of  
4 the correctional officers basically chimed in and said here's  
5 what we have in the institution and talked about vocational,  
6 laundry and also educational opportunities.

7 Q So can you describe where everyone is in the room?

8 A Yes. Mr. Vanisi was sitting right in front of the  
9 examining table. There was an officer to his right within  
10 about arms length sitting at a desk kind of turned around  
11 towards Mr. Vanisi. I was directly across from Vanisi. Dr.  
12 Moulton was to my left, and then a second correctional officer  
13 was basically in the doorway of the examining room.

14 Q And so the one correctional officer at the desk is  
15 seated?

16 A Yes.

17 Q The one over by the door was?

18 A He was also seated as I recall.

19 Q Did someone ask the question or did they just  
20 spontaneously chime in?

21 A I can't remember if they just offered that  
22 spontaneously or if perhaps I glanced in their direction and  
23 they took that as a question. I can't remember how that  
24 exactly happened.



1           Q     You were asked some questions about Mr. Vanisi's  
2     indication that he has reversible error in his case. Did you  
3     take any steps to verify Mr. Bruschetta or one of his  
4     attorneys said that?

5           A     No, I did not.

6           Q     You were also asked some questions, this is on the  
7     second page of your report, Mr. Vanisi had indicated his  
8     decision was tactical?

9           A     Yes.

10          Q     You asked him to elaborate. Can you repeat again  
11     what exactly did he say when he elaborated?

12          A     Well, more or less I summarized it in my report in  
13     that he, his main focus is getting a new trial, new guilt  
14     phase trial, a whole new trial, and that he didn't think that  
15     this -- the time cost of this next step in getting a new  
16     penalty phase was worth it. That the delay was too potentially  
17     long, and meanwhile he would be lingering in prison, and he  
18     wouldn't have his day in Federal court for a long time to  
19     come.

20          Q     So you also write that, I will quote: "It was clear  
21     he understood the difference between the guilt phase of the  
22     trial and penalty phase of the trial." Can you explain how it  
23     was clear he understood that?

24          A     Well, he used the terms accurately as far as I know.

1 He was able to describe that his guilt was not -- the guilt  
2 phase of his trial was not currently being considered in the  
3 State appeals. In other words, it had already been disposed of  
4 unfavorably to him, and that what he was looking for-- looking  
5 for in this potential hearing was a new penalty phase which  
6 would -- could get his death sentence overturned.

7 MR. FIEDLER: No further questions, Your Honor.

8 THE COURT: Anything further?

9 MR. PLATER: No. Oh, wait, wait, wait.

10

11 RECROSS-EXAMINATION

12 BY MR. PLATER:

13 Q I take it this information that the guards gave  
14 either you or to Mr. Vanisi was actually helpful to you in  
15 terms of helping you decide whether Mr. Vanisi really  
16 understands all the consequences of waiving this State  
17 proceeding?

18 A That's correct. Their input made our conversation  
19 less abstract and more concrete. In other words, we were able  
20 to actually hear from them what is available to people in  
21 general population as opposed to just speculating and throwing  
22 ideas out.

23 Q Some of those things the officers told you were some  
24 of the specific programs available to Mr. Vanisi?

1           A     Correct.

2                 MR. PLATER: Thank you.

3                 THE COURT: Did you have anything else?

4                 MR. FIEDLER: Nothing else.

5                 THE COURT: May the doctor be excused? Thank you,

6     sir, you may step down. You are excused.

7                         (Witness excused.)

8                 THE COURT: Okay, counsel, we will be in recess

9     until 1:45. That will give you a little bit of time to get

10    something to eat, Mr. Vanisi.

11                 Court's in recess.

12                 MR. WISNIEWSKI: Your Honor, will the courtroom be

13    open?

14                 THE COURT: No. We usually lock the courtroom.

15                 MR. WISNIEWSKI: So we can leave our stuff here?

16                 THE COURT: Yes.

17                 (Whereupon, the proceedings were concluded.)

18                         --o0o--

19

20

21

22

23

24

1 State OF NEVADA, )  
2 ) ss.  
3 COUNTY OF WASHOE. )

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

7 That as such reporter I was present in Department  
8 No. 4 of the above-entitled court on Monday, September 24,  
9 2018 at the hour of 10:00 a.m. of said day and that I then and  
10 there took verbatim stenotype notes of the proceedings had in  
11 the matter of THE STATE OF NEVADA vs. SIAOSI VANISI, Case  
12 Number CR98-0516.

13 That the foregoing transcript, consisting of pages  
14 numbered 1-95 inclusive, is a full, true and correct  
15 transcription of my said stenotypy notes, so taken as  
16 aforesaid, and is a full, true and correct statement of the  
17 proceedings had and testimony given upon the trial of the  
18 above-entitled action to the best of my knowledge, skill and  
19 ability.

20 DATED: At Reno, Nevada this 24th day of September, 2018.

21

22

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

1 4185

2  
3 IN THE SECOND JUDICIAL DISTRICT COURT

4 STATE OF NEVADA, COUNTY OF WASHOE

5 THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

6  
7 STATE OF NEVADA,

Dept. No. 4

8 Plaintiff,

Case CR98-0516

9 v.

10 SIAOSI VANISI,

11 Defendant.

12 \_\_\_\_\_/  
13 Pages 1 to 109, inclusive.

14 TRANSCRIPT OF PROCEEDINGS  
15 REPORT PSYCHIATRIC EVALUATION  
16 Monday, September 24, 2018

17 A P P E A R A N C E S:

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1 RENO, NEVADA -- MONDAY 9/24/18 -- 1:48 P.M.

2 -o0o-

3 THE COURT: Thank you. Please be seated.  
4 Counsel, call your next witness.

5 MR. WISNIEWSKI: Thank you, your Honor. We  
6 would call Dr. Moulton.

7 (Witness sworn.)

8 THE COURT: Go ahead.

9 DIRECT EXAMINATION

10 BY MR. WISNIEWSKI:

11 Q. Good afternoon, Doctor.

12 A. Hello.

13 Q. Would you please state and spell your name  
14 for the record.

15 A. John Moulton, M-o-u-l-t-o-n.

16 Q. Okay. And you are a psychologist?

17 A. That's correct.

18 Q. Can you briefly describe the differences  
19 between psychology and psychiatry?

20 A. Sure. Psychologists are trained in  
21 university and psychiatrists are physicians that go  
22 to medical school and they prescribe medication and  
23 we don't.

24 Q. How does your practice differ generally?

1       A. One person prescribes medicine. We --  
2 depends on what role we're talking about for  
3 psychologists. Psychologists do talk therapy or do  
4 evaluations. Psychologists also do testing when  
5 necessary.

6       Q. Okay. Sort of like data testing?

7       A. Yes.

8       Q. And that's not something that psychiatrists  
9 normally do?

10      A. Not usually.

11      Q. What is forensic psychology?

12      A. Well, it's the interface between this  
13 profession and the law. We are asked to do very  
14 specific evaluations to address legal questions for  
15 the court.

16      Q. Okay. And what's clinical psychology?

17      A. Well, it's all of that applied to  
18 treatment.

19      Q. Uh-huh.

20      A. Psychological science.

21      Q. Okay. "All of that" being?

22      A. Being psychopathology, treatment-driven  
23 research.

24      Q. Okay. What area do you practice in?



1           A. I'm a forensic psychologist.

2           Q. Oh, okay. Do you have any clinical work  
3 that you're currently --

4           A. Yes. I was trained as a clinical  
5 psychologist. So a forensic psychologist would  
6 first be trained as clinicians because you need that  
7 information, you need that background in order to do  
8 those evaluations, but this is a step beyond that.

9           Q. Okay. So you began your career as a  
10 clinical psychologist, and now is it fair to say  
11 that all of your work is forensic or do you still  
12 have some clinical practice?

13          A. No. All of my work is forensic.

14          Q. Okay. How long have you been doing  
15 forensic work?

16          A. Well, for the last three years at Lakes.

17          Q. Okay.

18          A. Well, August was my three-year anniversary.  
19 And then prior to that I worked in the prison system  
20 both in California and in Nevada, although that's  
21 not -- that's not what I would call typically  
22 forensic work. It's -- correctional psychology is a  
23 different branch of the discipline.

24          Q. Got you. So for the last three years,

1 then, you've been exclusively forensic?

2 A. That's correct.

3 Q. And did you obtain any kind of special  
4 training in order to do this forensic work or is it  
5 all experiential?

6 A. It's both. Every two years I go to the  
7 workshops, a series of workshops put on by the  
8 Academy of Forensic Psychology and then reading.

9 Q. And I don't know if this term really  
10 applies to a psychologist who is a Ph.D as opposed  
11 to an M.D., but is there any kind of residency in  
12 forensic psychology or is it mostly just gained  
13 through on-the-job learning?

14 A. I think that mostly depends on the examiner  
15 in question.

16 Q. Did you go through any kind of advanced  
17 formal training, like a residency?

18 A. No, I did not.

19 Q. Okay. So in your current work as a  
20 forensic psychologist you said, I believe earlier,  
21 that it's the interface between psychology and the  
22 law, correct?

23 A. That's correct.

24 Q. How much of that work involved determining

1 a criminal defendant's competency to stand trial?

2 A. Most of it.

3 Q. Most of it?

4 A. So in the -- I don't know if you're  
5 interested in this.

6 Q. I'm interested in everything.

7 A. Okay. Well, in the times I've worked at  
8 Lakes Crossing, we do a number of different  
9 evaluations. We do risk assessment evaluations when  
10 those are requested by public defenders. We do risk  
11 assessment evaluations to determine whether a person  
12 who's been found permanently incompetent needs to be  
13 housed in a forensic facility, but the lion's share  
14 of the work is evaluations of adjudicative  
15 competence --

16 Q. Okay.

17 A. -- and I've done 350 of those in the time  
18 I've been at Lakes.

19 Q. Okay. Have you ever conducted an  
20 evaluation like this one where you're being asked to  
21 determine someone's competency to waive a hearing?

22 A. This is the first one.

23 Q. Okay. When you're conducting those  
24 competency-to-stand trial evaluations, you're

1 looking for certain things. What are they?

2 A. Well, we're always looking first to see  
3 whether there is a threshold clinical condition. So  
4 what we mean by that is a serious mental illness, an  
5 intellectual disability or a dementia. It has to be  
6 something that has been empirically shown to  
7 negatively impact a person's adjudicative abilities.

8 It's not enough to have one of those  
9 conditions. You also have to be able to demonstrate  
10 a clear nexus between that condition and whatever it  
11 is that the person is expected to do.

12 Q. All right. And when you're engaged in that  
13 sort of testing, do you ever perform -- when you're  
14 making that type of determination, do you ever  
15 perform any testing using standardized testing  
16 instruments?

17 A. Only if it's necessary.

18 Q. Who determines when it's necessary?

19 A. I do.

20 Q. How do you make that determination?

21 A. Well, so, I would say that in a forensic  
22 arena there are only two times that I would ever do  
23 psychological testing. The first is if there is a  
24 genuine question about a person's clinical state,

1 their condition, the psychiatrist can't quite figure  
2 out what's going on and psychological testing might  
3 help shine a light on that.

4           The other time is when there's some concern  
5 about an examinee's response to us. So if they're  
6 malingering, then you would do objective testing in  
7 order to assess that.

8           Q. Uh-huh.

9           A. Now, the test doesn't answer that question.  
10 The test only tells you how the person's responding  
11 and whether there's any distortion. Whether they're  
12 malingering is a clinical determination based on  
13 consideration of other data.

14          Q. So in the ordinary course of your practice,  
15 then, you don't find it necessary to do standardized  
16 testing most of the time.

17          A. Actually, that's -- well, that depends. I  
18 do a fair amount of testing at Lakes, actually.

19          Q. In your criminal competency-to-stand trial  
20 evaluations?

21          A. Yes. But, again, only under those  
22 conditions that I mentioned.

23          Q. Okay. That's because you either are not  
24 certain what the threshold condition is or you

1 suspect malingerer?

2 A. That's correct.

3 Q. Oh, okay. And you didn't perform the  
4 testing here, correct?

5 A. No, I did not.

6 Q. Okay. So did neither of those issues  
7 present themselves to you?

8 A. I do not believe that Mr. Vanisi is  
9 malingerer and I don't question that Mr. Vanisi has  
10 a serious mental illness.

11 Q. Because in your report you do indicate that  
12 you're not certain which disease he has and that's  
13 not important to you.

14 A. No. Because the presence of that condition  
15 does not answer the question.

16 Q. Uh-huh. Does the character of the  
17 condition that someone may be suffering from ever  
18 determine what you're looking for in your forensic  
19 interviews?

20 A. Can you rephrase that, or is it -- I'm not  
21 really sure what you're getting at?

22 Q. Certainly. So, you know, when you say that  
23 the exact character of the underlying condition is  
24 not very relevant, I imagine -- well, first of all,

1 is that a universal statement or is that merely  
2 applying to the difference between schizo effective  
3 disorder with bipolar presentation or bipolar  
4 disorder?

5 A. Right. So when I say that, I'm  
6 specifically referring to when we're talking about  
7 those conditions that have been associated with  
8 incompetence, so that's the major psychoses,  
9 intellectual disability, dementia, bipolar illness.

10 Q. Okay. So in making your determination,  
11 were you -- are you assuming that Mr. Vanisi suffers  
12 from either schizo effective or bipolar disorder and  
13 it's immaterial to you which one it is?

14 A. Yes.

15 Q. Okay. Now, you also note that there are  
16 multiple past diagnoses of Mr. Vanisi, each of which  
17 is somewhat incomplete, correct?

18 A. Where are you getting that.

19 Q. From your report, page two.

20 A. Okay. Well, yes. I notice that over the  
21 years that he's been evaluated there has been this  
22 disagreement.

23 Q. But you note that each of these evaluations  
24 is somewhat incomplete.

1           What more would you have liked to see in  
2 prior evaluations?

3           A. Well, I don't know that I said they were  
4 incomplete as much as I said I thought there were  
5 issues with all of them.

6           If you look at the early reports, they  
7 claim that Mr. Vanisi was malingering, and I don't  
8 feel that what was documented in those evaluations  
9 said that at all.

10          Q. Okay.

11          A. Now, I can't say whether it wasn't true  
12 either, but you need a -- and there's no specific  
13 set of tests to determine that. But you need more  
14 than one data point and, similarly, in the later  
15 evaluations, they said he was not and never had  
16 been, I don't think you can say that these are  
17 present-state evaluations. Malingering is present  
18 state, competence is present state.

19          Q. Okay. Now, you said you need multiple data  
20 points. Can you expand on that a little bit.

21          A. Well, to be somewhat colloquial, we've all  
22 heard the saying, "One swallow doesn't make a  
23 summary." You don't generalize from a single  
24 instance. You need multiple data points.



1           So personally I like to have at least six  
2 that show a person's feigning before I entertain the  
3 idea that they're malingering. That's just -- but  
4 other examiners say no, I have three really strong  
5 data points and I'm convinced, so you will find  
6 variation among examiners.

7           Q. Okay. But, now, in making a determination  
8 of competence, do you also need those multiple data  
9 points?

10          A. Well, sure. It's not -- it's not based on  
11 any one answer to a question in an interview.

12          Q. Okay. So when you conducted the forensic  
13 interview here, do you consider each separate answer  
14 a different data point that you're relying upon?

15          A. Well, I don't look at it that concretely.

16          Q. Okay. So what are the multiple data points  
17 that you relied upon in coming to your conclusion  
18 that Mr. Vanisi is competent?

19          A. Well, his demonstrating his ability to  
20 appreciate his situation. And, again, I acknowledge  
21 that he has a mental illness but I don't see  
22 evidence that that mental illness is active to the  
23 degree that it would render him unfit. So, you  
24 know, on that basis alone I would say he's

1 competent.

2 Q. I see. So, you know, I still think I'm a  
3 little bit confused. What is a data point?

4 A. Well, when we're talking about testing, I'm  
5 talking about the results of that one test as one  
6 data point, but you could look at each item as a  
7 test as a data point. There are multiple ways to  
8 think about this.

9 Q. And as a psychologist are there any  
10 standards that govern what should be considered a  
11 data point in your area of practice?

12 A. I don't know that there's standards that  
13 govern what specifically should be a data point. I  
14 mean, I'm not really sure that I follow the  
15 question.

16 Q. Well, is it left up to the individual  
17 examiner to determine whether something is or is not  
18 a data point that they can rely upon in drafting  
19 their opinion?

20 A. Well, within reason. I mean, you know,  
21 some of the records that we received were about Mr.  
22 Vanisi's medical issues. That I don't consider a  
23 relevant data point for these evaluations, as an  
24 example.

1 Q. Sure. Why is that?

2 A. Because they don't speak to the mental  
3 illness.

4 Q. Okay. So back to, sort of, my original  
5 question, then, what data points did you rely upon  
6 that you found relevant for making your  
7 determination here?

8 A. His response to the interview -- responses.

9 Q. Okay. So was that one data point or  
10 multiple data points?

11 A. Well, it's multiple data points. It's the  
12 sum total of the interview. You can look at it that  
13 way.

14 Q. Okay. So the sum total of the interview  
15 constitutes a multiple points of data.

16 A. I would say so.

17 Q. Oh, okay. Separate from the forensic  
18 interview, was there any other data points you  
19 relied upon in coming to your conclusion?

20 A. Well, the NDOC records are more current.

21 Q. Uh-huh. How do they impact your conclusion  
22 that you reached?

23 A. Well, I should say this: Those records had  
24 not been provided by the time that we went to do the

1 interview so those were reviewed after the report  
2 was largely written, but they did not change my  
3 opinion. They, if anything, strengthened the  
4 opinion.

5 Q. Okay. Let's take this a little bit  
6 chronologically, then. So at the time that you were  
7 initially crafting your opinion, you had as your  
8 data points the forensic interview.

9 At the time that you came to your  
10 conclusion and began drafting this report, were  
11 there any other data points independent of the  
12 forensic interview that you relied upon in reaching  
13 your decision?

14 A. No.

15 Q. Okay. And you subsequently received Mr.  
16 Vanisi's Department of Corrections records, his  
17 medical records, and you said that they, if  
18 anything, strengthened your conclusion.

19 A. Yes.

20 Q. Okay. Which specific areas did you rely  
21 upon that strengthened your conclusion?

22 A. Well, there's a progress note that I  
23 referred to dated July 31<sup>st</sup>.

24 Q. And what page are you referring to in

1 your--

2 A. Page three.

3 Q. Okay.

4 A. But it was also clear that he was due for  
5 that injection on that day and, apparently, they  
6 didn't know that. It seemed, based on these  
7 records, that if he's not treated in a timely  
8 manner, he starts to become symptomatic.

9 Q. I see.

10 A. But the amount of symptoms that were  
11 documented in those records -- and, mind you, it's  
12 not a lot of detailed documentation in those records  
13 -- wouldn't suggest that he would be so impaired or  
14 symptomatic that he would be unfit.

15 Q. Okay. Let me ask you about this  
16 July 31<sup>st</sup> progress note, because what I have  
17 written here -- and you can correct me if I'm wrong  
18 -- from your report is a progress note dated  
19 July 31<sup>st</sup>, 2018, described him as paranoid with  
20 slightly pressured speech on his return to Ely State  
21 Prison. A followup progress note confirmed the last  
22 injection had been given on July 3<sup>rd</sup>, 2018.

23 Is that correct?

24 A. Yes.

1 Q. What about that strengthened your opinion  
2 that Mr. Vanisi was competent?

3 A. Well, it doesn't say that he was so  
4 impaired or so symptomatic that his decision-making  
5 capacity would be affected, in my opinion.

6 Q. Okay. So the fact that -- was this  
7 progress note -- do you know if it was written by a  
8 medical or non-medical professional?

9 A. I don't recall. I wanna say it was a nurse  
10 but I can't swear to that.

11 Q. Okay. So this progress note describing him  
12 as paranoid with slightly pressured speech, because  
13 it did not go on to say that he was actively  
14 psychotic to you, that is sufficient support to  
15 strengthen your conclusion?

16 A. Well, yes. There has to be -- look, there  
17 has to be obvious impairment due to a threshold  
18 condition. This is not enough, in my opinion.

19 Q. Okay.

20 A. And I would just say, again, getting back  
21 to it's a present-state evaluation, he was not in  
22 this state on the day that we saw him.

23 Q. Okay. Certainly. And that's what I'm  
24 getting back to again, but you'd previously

1 indicated that on the date of the examination you  
2 relied just on the forensic interview, right?

3 A. That's correct.

4 Q. Obviously, your observations as well.

5 A. That's correct.

6 Q. Okay. Now, when conducting this forensic  
7 interview, you conducted that with Dr. Zuchowski?

8 A. That's correct. Actually, Dr. Zuchowski  
9 asked the lion's share of the questions.

10 Q. Oh, okay. If you could estimate, how much  
11 was his questioning and how much was yours?

12 A. You know, I really don't know but I would  
13 say he asked more than three-fourths of the  
14 questions. Maybe more.

15 Q. Okay. Was there -- oh, sorry. Go ahead.

16 A. No. And there's a reason for that. If we  
17 see people in a panel, rather than have two  
18 different examiners pursuing two different trains of  
19 thought and derailing the whole process, we let one  
20 person take the lead. Sometimes I do it. When Dr.  
21 Zuchowski and I do an evaluation at the hospital,  
22 sometimes I do and sometimes he does it.

23 Q. Did you and he decide beforehand who would  
24 take the lead?

1           A.  No.

2           Q.  Okay.  You just went in there and whoever  
3 spoke first --

4           A.  Well, I mean, I don't know.  I think Dr.  
5 Zuchowski tends to be a little less formal than I do  
6 and he started asking the questions and ...

7           Q.  All right.

8           A.  There's no rhyme or reason to that.

9           Q.  Sure.  Now, with these type of panel  
10 interviews, I get the feeling that is something you  
11 do in the ordinary course of your practice.

12          A.  Well, we do it sometimes.  We don't do it  
13 -- I wouldn't say we do it a lot.  I can't give you  
14 an exact number.  It's always done for the  
15 convenience of the person being examined.  Some  
16 people just can't tolerate going through the same  
17 questions multiple times.

18                 In Mr. Vanisi's case, because we had to  
19 travel to Carson City to see him at the jail, it  
20 made sense that we would do a panel --

21          Q.  Okay.

22          A.  -- rather than make two trips.

23          Q.  Okay.  You said you can't give an exact  
24 number.  Can you give an estimate of how often you



1 conduct these type of panel interviews?

2 A. I really can't. I mean, I wanna say  
3 approximately 10 percent but I cannot swear to that  
4 with any kind of precision.

5 Q. I understand. And is that something that,  
6 you know, within your knowledge, obviously, only a  
7 certain number of Lakes Crossing doctors do or to  
8 your knowledge do all of you --

9 A. No. All of them do it --

10 Q. Okay.

11 A. -- from time to time.

12 Q. Are there any standards promulgated by  
13 Lakes Crossing to determine when it is and is not  
14 appropriate to conduct a panel interview that you  
15 know of?

16 A. Not that I know of. That's left up to the  
17 examiners.

18 Q. Okay. Have you ever been directed by -- is  
19 his name Mr. Durants -- whether to conduct or not  
20 conduct a panel interview?

21 A. He does not decide that.

22 Q. Oh, okay. That's up to the individual  
23 examiners.

24 A. It's up to the examiners.

1 Q. Okay. Now, when you conducted this panel  
2 interview, can you describe the setting?

3 A. Yes. It took place in the medical  
4 treatment room in the housing unit at in NNCC.

5 Q. All right.

6 A. Do you want me to say where people were  
7 sitting?

8 Q. Actually, I do. Thank you.

9 A. Okay. So, Dr. Zuchowski was sitting over  
10 here, I was sitting next to the desk, and then Mr.  
11 Vanisi was sitting on -- I don't know what they call  
12 that, the examination table where they have the  
13 paper come down and he was sitting up (indicating).

14 Q. Okay. Was anyone else in the room?

15 A. There were two correctional officers.

16 Q. Okay. When you interview an in-custody  
17 individual, is it common for correctional officers  
18 to be in the room?

19 A. I don't often interview people in prison.  
20 This is the first time I've interviewed somebody in  
21 the prison at -- since I've been at Lakes Crossing.

22 Q. In three years?

23 A. Yes.

24 Q. They're usually transported to Lakes

1 Crossing for an interview?

2 A. We don't usually see them coming from the  
3 prison. This is an unusual evaluation --

4 Q. Oh, I see, okay.

5 A. -- because most of the evaluations we do  
6 are pre=adjudication. This is well  
7 post-adjudication.

8 Q. I see. So this is the first time you've  
9 conducted an evaluation of a prisoner as opposed to  
10 someone who may be being held pretrial.

11 A. Well, I wouldn't say it's the first time  
12 I've conducted an evaluation of a prisoner because I  
13 did that all those years I worked in the prison  
14 system.

15 But in this -- since I've been at Lakes,  
16 this is the first time I've been to a prison to do  
17 an evaluation.

18 Q. Okay.

19 A. Although I'm going tomorrow.

20 Q. Oh. Well, as of today 100 percent of the  
21 time the COs sit in with you.

22 A. As of today, and my guess is it'll be the  
23 same.

24 Q. Okay. These two COs, did they participate

1 in the interview at all?

2 A. I wouldn't say they participated. One  
3 person asked a question and I can't remember his  
4 name.

5 Q. Okay. One of the correctional officers  
6 asked a question?

7 A. Uh-huh.

8 Q. Do you remember what the question was?

9 A. I don't.

10 Q. Okay.

11 A. Because I don't rely on that for my  
12 opinion.

13 Q. Sure. Do you remember what it pertained  
14 to?

15 A. Actually, I don't?

16 Q. Okay.

17 A. Again, I don't -- I don't give weight to  
18 that. I mean, I may seek information from custody  
19 staff about how a person's doing but -- no  
20 disrespect to custody.

21 Q. No, certainly. They've got a tough job to  
22 do.

23 So, do you remember whether this question  
24 was something that was prompted by yourself, Dr.

1 Zuchowski, or Mr. Vanisi, or was it something that  
2 was spontaneously uttered by the officer?

3 A. I really can't remember.

4 Q. Okay. But in any event, you said you  
5 didn't take it into account in formulating your  
6 opinion.

7 A. No.

8 Q. Based on your observations, did Mr. Vanisi  
9 react to this question.

10 A. Yeah. He engaged with the officer but I  
11 can't remember what he said.

12 Q. Okay. But they had a conversation?

13 A. Very briefly.

14 Q. Okay. All right. Now, you said sometimes  
15 you will -- and correct me if I'm paraphrasing  
16 wrong -- but sometimes you actually will have  
17 discussions with corrections staff to learn about an  
18 inmate?

19 A. Yeah. I wouldn't call it a discussion.  
20 That sort of implies that it's a two-way street. I  
21 get information from people in a facility about how  
22 a person's been doing.

23 Q. Okay. Did you do that here?

24 A. No.

1 Q. Why not?

2 A. Because Mr. Vanisi presented in such a  
3 remarkably -- I don't know -- competent manner. I  
4 mean, you know, if I have concerns or if it's what I  
5 would call a borderline case, then I'm more likely  
6 to seek that information, but in this case I didn't  
7 see any reason to do that.

8 Q. Okay. Have you ever had your opinion  
9 changed in any previous case by speaking with  
10 corrections staff?

11 A. No.

12 Q. Okay. Now, you do note that a competency  
13 determination is, to some extent, a snapshot in  
14 time.

15 A. Absolutely. Absolutely.

16 Q. Okay. And so if Mr. Vanisi, you know,  
17 according to your evaluation, he was competent on  
18 September 10<sup>th</sup>.

19 A. Yes.

20 Q. Okay. Do you have any basis, then, to say  
21 that he's competent right now?

22 A. No, I don't have any basis to say he is or  
23 he isn't.

24 Q. Right.